

PROPERTY

ANSWER GUIDES

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ADVERSE POSSESSION

STEP ONE:

- Determine whether or not the claimant has been in possession for the requisite statutory period (15 years): [LLA, s 8](#)
- The 15 years must be continuous occupation comprised of a single period of possession **OR** multiple continuous possessions (transitional, ouster)
- **REMEMBER** limitation period may be suspended if paper title holder under disability or affected by fraud ([LLA, s 27\(1\)](#)) **AND** in Victoria adverse possession can only be raised 6 years from cessation of the disability: [LLA, s 23\(1\)](#) **OR** 30 Years: [LLA, s 23\(1\)\(c\)](#)
- Adverse possession can only be raised over corporeal land interests that carry possessory rights

STEP TWO:

- Determine whether or not the claimant has the requisite degree of **FACTUAL POSSESSION**
- This requires an examination of the facts and a determination that physical control of land was **OPEN AND PEACEFUL** and taken **WITHOUT CONSENT**
- **Physical acquisition** involves a reasonable degree of control over the area of land claimed
- 'Nec vi, nec clam nec precario': *Mulcahy v Curramore*
- 'Nec vi (not by force), 'nec clam' (not secret, open), 'nec precario' (not by consent)

[Power v McFarlane \(1977\) 38 P&CR 452](#)

- Adverse possessor always ensured he was not around when the titleholder visited the land = no factual possession

[JA Pye \(Oxford\) Ltd v Graham \[2003\] 1 AC 149](#)

- Grahams used the land as their own for relevant period (through grazing, maintaining ploughing) while the title owner did nothing = met requirements of factual possession
- [Whittlesea City Council v Abbatangelo \[2009\] VSCA 188](#)

STEP THREE:

- Determine whether the possessor has satisfied the requisite **INTENTION TEST** (*animus possidendi*)
- Discuss whether the possessor has occupied the land without the consent of the paper title owner and is acting as if they were the title owner by carrying out acts which reveal an intention to exercise **EXCLUSIVE CONTROL**

[Whittlesea City Council v Abbatangelo \[2009\] VSCA 188](#)

- Relevant factors:
- Has possessor taken full and complete control of the property
- Can third parties walk on the property or is it enclosed
- Has possessor constructed, maintained or repaired fencing around claimed area
- Has the possessor paid rates over the claimed area
- Has the possessor managed the claimed area and used it in a manner akin to that of the paper title owner
- **NOTE:** Possessor need to know they are adversely possessing land as long as their acts evince intention to control

[JA Pye \(Oxford\) Ltd v Graham \[2003\] 1 AC 149](#)

- Grahams carried out acts they would have right to do under their previous grazing licence – demonstrated intention to use land as own in manner of paper title owner
- It is not nature of acts which one does but the intention with which he does which determines whether or not he is in possession

[KY Enterprises Pty Ltd v Darby \[2013\] VSC 484](#)

- Fencing significant act to suggest intention to adversely possess

NOTE: Has there been **ABANDONMENT**?

[KY Enterprises Pty Ltd v Darby \[2013\] VSC 484](#)

- Question of fact and circumstances

STEP FOUR:

- Investigate the effect of adverse possession
- **DOES** defence operate against a registered titleholder?
- **OR** future interest holders: [LLA, s 10\(2\)](#)
- Consider **REGISTRATION FRAMEWORKS:** -
- Adverse possession is protected under the [Transfer of Land Act 1958 \(Vic\), s 42\(2\)\(e\)](#) and will constitute an exception to any subsequent registration
- Adverse possessor can obtain registration of title: [Transfer of Land Act 1958 \(Vic\), ss 60-62, 99](#)

STEP FIVE:

- **TO AVOID AP**, titleholder can put adverse possessor on notice with a letter, grant consent **OR** eject

MORTGAGES

STEP ONE: What is a **MORTGAGE**?

- A mortgage is a **security interest (a charge)** that confers upon a lender a proprietary title over land or goods for the purpose of securing repayment of a debt
- **MORTGAGOR**: The debtor who grants a mortgage
- **MORTGAGEE**: The creditor who receives mortgage

STEP TWO: What type of **MORTGAGE** is it?

- **OLD TITLE MORTGAGE** (Fiducia): Creditors becomes owner of the property promising to reconvey it upon repayment of the debt. Equity of redemption is **right to reconvey title**
- **TORRENS LAND MORTGAGE** (Hypothecation): A charge. Creditor mere has rights over the property, principally to sell, exercisable upon default. **Equity of redemption to discharge the mortgage**
- **EQUITABLE MORTGAGE**: Equity will validate a mortgage where mortgage transaction was intended, despite non-compliance with formalities: no writing, failure to register

STEP THREE: Have the **FORMALTIES** been complied with?

- (1) Execute an agreement in **WRITING** for mortgage/mortgage documents: **Section 53 Property Law Act 1958 (Vic); s 126 Instruments Act 1958 (Vic)**
- (2) **REGISTER** the mortgage and upon registration a legal mortgage is created: **s 40(1) Transfer of Land Act 1958 (Vic)** (a registered instrument shall have the same effect as if the instrument was duly executed deed)
- (3) A registered mortgage is a **SECURITY INTEREST: s 74(2) Transfer of Land Act 1958 (Vic)**
- If **NO** – see **EQUITABLE MORTGAGE**

STEP FOUR: Can the **EQUITABLE** jurisdiction validate the mortgage?

- Equity will validate a mortgage where transaction was **intended**, despite non compliance with formalities
- Where the mortgage is enforceable under the doctrine of **part performance: Russel v Russel (1783) 28 ER 1121**

GENERAL RULE: The deposit of title deeds to secure monies advanced, will give rise to an equitable mortgage.

Re Wallis and Simmonds [1974] 1 WLR 391

- Mortgagor and third party – deposit of certificate of title without execution of deed
- Depositor/ Owner securing a debt owed by third party
- The doctrine as a general rule, a deposit of title deeds to secure a debt creates charge on the land, it does not make any difference whether the debt owed by the debtor or whether it is owed by somebody else

NOTE: This case has been overruled in the **UK** but not in **AUS**

Theodore v Mistford [2005] HCA 45

- Actual intent supported by deposit of certificate of title
- Depositor not the owner, but with authority securing a debt owed by the depositor
- Equitable mortgage arose from the deposit of the title documents which was based upon the **actual intention** of Mrs Theodore
- It is sufficient for there to be enforceable agreement to deposit a certificate of title, with or without signed transfer with the lender by way of security

CNG Co (Aust) Pty Ltd v ANZ Banking Group (1992) 6 BPR 13

- Depositor not the owner, without authority, securing a debt owed by the depositor
- A presumption mortgage should only arise where there is **INTENTION** to create security interest in absence of **EXPRESS** authorisation.
- Any **SUSPICION** or **DOUBT** concerning purpose of deposit should prevent presumption being raised
- There should be an **EXAMINATION** of **ALL** the circumstances, **EXAMPLE:** nature of relationship between third party and mortgagor and motivation underlying the deposit

STEP FIVE: What are the **RIGHT OF THE PARTIES**?

MORTGAGOR: Equity of Redemption

- Mortgagors equitable **beneficial ownership** of the land and equitable **right to redeem the land** when mortgage discharged or the property sold

Campbell v Holyland (1878) 7 Ch D 166

- Where a **FORECLOSURE** order has been issued, equity will allow the mortgagor to redeem
- The right to redeem in the equitable jurisdiction is founded upon the need to give effect to the intention of the parties and ensure that property transferred, which was intended as security for the repayment of the debt, retains its 'security' in character
- Any stipulation by the mortgagee for a further collateral advantage came to be spoken of as a **clog or fetter** on this equity
- **ALSO** applies to Torrens land for **DISCHARGE OF MORTGAGE**
- **FURTHER** has there been any **CLOGGING** of equity of redemption?
- Collateral advantages, **EXAMPLES:** Obligation to buy beer supplied from lender even after mortgage discharged, business advantages or options to purchase, clauses attempting to extinguish the equity of redemption

Lift Partners Pty Ltd v Merrill Lynch International (2009) 253 ALR 482

- **TWO** Requirements for **CLOGS** to **IMPEDE** right of redemption
- (1) There has been a **FETTERING** of the mortgagor's right to **REDEEM**; and