

LAWS4104: Property

Question 1A or B: 26 minutes (*15 marks*)

Question 2A: 14 minutes (*8 marks*)

Question 2B: 12 minutes (*7 marks*)

Question 3: 26 minutes (*15 marks*)

Question 4: 43 minutes (*25 marks*)

Total: 120 minutes (70 marks)

A. Importance of Possession

Elements of possession

1. Factual possession

- Tangible things and physical control – ***Tubantia (UK)***
- Actually possessing – ***Young v Hitchens (UK)***
- Modification by contract – ***Re Jigrose (Qld)***

2. Intention to possess (*animus possidendi*)

- For the time being only (i.e. present time)
- Depends on acts of control

Tubantia (UK):

- T was sunk and lay in the seabed
- P began salvage operations: they moored buoys to the ship, cut a hole in its side and spent about 40,000 pounds
- Over 15 months they spent 25 days trying to recover the ship's cargo, however the divers could only spend 8 minutes inside the ship each day
- Held: Given the ship's location and position, 8 minutes per day was sufficient to constitute legal possession

Young v Hitchens (UK):

- P was in the process of enclosing fish in a net, though enclosure had not been completed
- D rowed his boat between the ends of P's net and netted the fish inside
- P claimed wrongful interference with his right to possession
- Held: P would have had possession of the fish but for the act of D however P did not have possession
- i.e. almost having possession isn't the same thing as actually having possession – more physical control was necessary

Re Jigrose (Qld):

- Vendor sold farmland to purchaser
- Contract contained standard conditions of sale including a provision that required the vendor to remove from the land items not sold prior to delivery of possession to the purchaser
- Items not removed by the vendor would be deemed abandoned and the purchaser may appropriate, remove or otherwise dispose of such property as they see fit
- Bales of hay worth \$20,000 were not removed by the vendor. They had remained in position in a paddock but the gate in the fence had been padlocked by the purchasers
- Held: normally physical possession would have been required, this case required a modification of contact -> lock on gate = appropriation

Adverse possession

Elements:

1. Person entitled to possession has been 'dispossessed or has discontinued possession' - s66

What is the difference between the two? – see **Buckinghamshire CC v Moran (UK)**

- **Dispossession** = the person comes in and drives out the others from possession
- **Discontinued possession** = the person in possession goes out and is followed into possession by other persons

2. Actual possession by some other person not entitled to possession – s3(6), s65

(a) Factual possession?

• **Mulcahy v Curramore (NSW)**

- “Open, not secret; peaceful, not by force; and adverse, not by the consent of the true owner”
-
- **Petkov v Lucerne (WA)** applying **Powell v McFarlane (UK)**
 - “Single and conclusive possession” – confirmed by **Clement v Jones (HCA)**
 - “An appropriate degree of physical control” – look to the nature of the land, the manner in which the land is commonly used and enjoyed, the behaviour of the possessor
 - “Dealing with the land as an occupying owner”

(b) Intention to possess?

• **Petkov v Lucerne (WA)** applying **Powell v McFarlane (UK)**

- Intention to exclude the world at large (including the true owner)
- Needs to be clear and affirmative evidence of this intention, which must be made clear to the world – i.e. openness of possession
- Does not require a conscious intention to exclude the true owner, but an intention to exercise exclusive control

• **Buckinghamshire CC v Moran (UK)**

- There must only be an intention to possess FOR THE TIME BEING – it is not necessary to intend to own it or possess it permanently
- Enclosure is strong evidence of an intention to exclusively possess – i.e. putting up fences, locking gates

• **J A Pye v Graham (UK)**

- D initially had possession with consent of the true owner through a license
- Once the license ended, time started to run

- D continued to occupy and maintain the land, expressed hope to obtain a new licence
- Held: this expression amounted to factual possession, but not an intention to possess
- **Whittlesea CC v Abbatangelo (Vic)**
 - After altering fences, the council's land was enclosed with Mrs A's land
 - Mrs A used council's land to keep animals, maintain trees, mowed grass, removed weeds/timber, held social functions, placed water trough/swings/cubbyhouse
 - Mrs A acknowledged the land was "not in title" in a planning application
 - Held: this acknowledgement did not hinder her claim – she had exclusivity and an intention to possess the land

3. Actual possession by the adverse possessor continues for 12 years – s19

(a) Adverse possessor abandons possession

- Abandonment resets the clock
- Mere non-use of land is not evidence of abandonment – **Nicholas v Andrews**
- If the adverse possessor abandons, the true owner's title is restored to 'pristine force'

(b) Series of adverse possessors

- Respective periods of possession can be added if there's NO GAP
 - (i) *Where adverse possessors "claim through" one another:*
 - Person with possessory title (trespasser) can devise title by will – **Asher v Whitlock**
 - **Asher v Whitlock:**
 - Possessory title can be enforced against the entire world except the person who has superior right
 - Possessory title can be devised (by will)
 - Defendant can not set up a *jus tertii* to get better title
 - (ii) *Where adverse possessors are "independent trespassers":*
 - i.e. when the adverse possessor is claiming against the first AP and the true owner (NOT one person giving up title to the next possessor)
 - Is there a gap? – there can't be, issues on what constitutes a gap
 - Who has superior title at the end of the limitation period?
 - The first person in adverse possession has the best case
 - However the latest person to take claim can make the position better by staying in possession for 12 years – i.e. they become the AP

Extension of time:

(a) Minors

- **s32(1)** - the time during which a person under the age of 18 is without a guardian does not count in the reckoning of the limitation period
- i.e. the clock only runs when a person under the age of 18 has a guardian
- (b) Mental disability
 - **s35(1)** – the time during which a person suffers from a mental disability and is without a guardian does not count in the reckoning of the limitation period
 - **s35(2)** – maximum period of 12 years
 - i.e. once 12 years has passed, protection (i.e. extension of time) no longer occurs
 - Not helpful in an adverse possession cause of action because the limitation period because the limitation period is 12 years
- (c) Fraud or improper conduct
 - **s38(1)** – the limitation period has expired (i.e. 12 years has passed)
 - **s38(2)** – the court can give an extra 3 years leeway if this failure to commence an action is attributable to fraudulent or other improper conduct

Methods to stop time from running:

- *i.e. what can the true owner do to restore his/her title?*
 - Physical entry onto the land, written request is not enough – **s84 Limitation Act**
 - By court proceedings – time stops running when the documentary owner issues and serves a summons for possession – **Symes v Pitt (Vic)**
 - Acknowledge of the true owner's title by the adverse possessor – **s46 Limitation Act**
-

Finders Keepers

1. True owner's rights

- Superior rights to all the world unless abandonment or the limitation period bars a claim
 - Need physical abandonment and an intention to abandon – **Re Jigrose**
 - Difficult in finding claims – i.e. who will the time be running against?

2. Finder's rights – the finder has five rights and obligations – **Parker v British Airways (UK)**

- (a) Finder acquires no rights over the chattel unless (a) it has been abandoned or lost and (b) he takes it into his care and control
- (b) Finder acquires **very limited rights** over the chattel if he takes it into his care and control with dishonest intent or **in the course of trespassing**
- (c) Finder does not acquire absolute ownership of the chattel but acquires a right to keep it against all but the true owner or someone with a prior right