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WHAT'S YOURS IS MINE

ADVERSE POSSESSION IN VICTORIA

Abbatangelo is one of the leading authorities on adverse possession law but even it leaves many questions unanswered. **By Jonathan Tisher and Phillip Leaman**

Adverse possession occurs when another person's land is intentionally used and all other parties are excluded from its use for more than 15 years.

Section 8 of the *Limitation of Actions Act* 1958 (the Act) provides that no action shall be brought by any person to recover land after the expiration of 15 years from the date on which the right of action accrued. Section 18 of the Act provides that at the end of that period, the person's title to the land shall be extinguished.

Claims for adverse possession can no longer be made for land owned by the Crown, the Public Transport Corporation, Victorian Rail Track, water authorities and, since January 2005, council-owned Torrens land.

ABBATANGELO V WHITTLESEA CITY COUNCIL

There are a number of well-established principles of adverse possession in recent authorities. However, the most recent is the David and Goliath case of *Abbatangelo v Whittlesea City Council*¹ (*Abbatangelo*), which was initially heard by Justice J of the Supreme Court of

Victoria in 2007 and upheld in August 2009 by the Court of Appeal. *Abbatangelo* confirms and expands the principles relevant to this area of law.

THE FACTS

Abbatangelo involved vacant General Law Land which was approximately half an acre in size in Mernda ("the disputed land"). The Whittlesea City Council obtained the land in 1908 as a gift for the construction of a shire hall. Shortly after, the council moved from Mernda to Epping and the shire hall was never built. The council retained the land for municipal purposes. Before 1950, the council planted trees along the southern (street) boundary of the land and throughout the block. There was no driveway or vehicle access to the land from the southern boundary.

In 1958, Mrs Abbatangelo and her husband purchased the property abutting the western, northern and eastern boundaries of the disputed land. Mrs Abbatangelo (together with her family) treated the disputed land as their own and in September 2004, Mrs Abbatangelo, through her solicitors, wrote to

the council and advised them of her adverse possession claim of the disputed land.

The council disputed the claim and requested that the Abbatangelos' horse, that was grazing on the disputed land, be removed. The council also entered the land and erected a fence on the eastern boundary of the disputed land (which at the time had no fence) and installed a chain and padlock on the gate in the northern boundary fence.

At trial, Mrs Abbatangelo relied on numerous acts of adverse possession. These included the installation of a gate so that the land could only be accessed through the surrounding Abbatangelo land, the maintenance of fences on the boundary of the disputed land, and the use of the land for grazing, shade, shelter, general maintenance as well as sporting, social and recreational activities.

The council primarily sought to rely on a written document provided by the council in response to a 1979 application for a planning permit for the subdivision by the Abbatangelos (of their property). The council noted that it owned the disputed land adjoining the proposed allotment and that this land had been set aside for "proposed municipal purposes".



The Court found that Mrs Abbatangelo had demonstrated both sufficient acts of factual possession and a manifest intention to exclusively possess the disputed land for the necessary period.

The council also relied on its employee's visit to the Abbatangelos' land in 1992 to address issues of a flooding spoon drain which ran along the boundary of the disputed land. The council employee asked Mrs Abbatangelo if she knew who owned the disputed land and Mrs Abbatangelo allegedly told the council employee that the council was the owner. The council submitted that this was a contraindication that the Abbatangelos had taken possession of the land with the requisite intent and constituted a resumption of possession by the council.

INITIAL FINDINGS IN THE SUPREME COURT

It was found that the disputed land came to be treated as an integral part of the one composite land and the Abbatangelos' use of the land was more than an act of mere grazing or for mere enjoyment or special use.

The Court found that the Abbatangelos' construction of a gate in 1959 provided access to the disputed land solely for the Abbatangelo family, but the gate was not sufficient alone to prove an intention to possess the occupied land to the exclusion of others. The constant restoration and construction of fences throughout the property (without seeking compensation), including the sides of the disputed land, was integral to the Abbatangelos' case. The work performed by the Abbatangelos was found to be thorough, systematic and constant.²

The fence abutting the road was considered a signal to all that the disputed land behind it had been enclosed by someone and had excluded everyone else. The placing of a water trough on the land was found to be "a relatively permanent item placed on the disputed land as a visible demonstration of use by the Abbatangelo family of the disputed land and, to that extent, an assertion of entitlement".³

The council submitted that it permitted private grazing on council land, however, evidence led by the council was insufficient to prove a connection between the land where grazing was permitted (i.e. on unused roads in the back blocks) and the land in dispute.

The Court found that Mrs Abbatangelo had demonstrated both sufficient acts of factual possession and a manifest intention to exclusively possess the disputed land for the necessary period.

COURT OF APPEAL

The council appealed and the matter was heard before Ashley JA, Redlich JA and Kyrou AJA in the Court of Appeal.⁴ The council's appeal was dismissed in August 2009.

The Court of Appeal, in confirming Pagone J's judgment, set out a number of principles necessary to establish adverse possession, namely:

1. In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land

and the person with the prima facie right to possession.

2. An alleged possessor must show both factual possession and the requisite intention to possess (*animus possidendi*) with an appropriate degree of physical custody and control for the possessor's own benefit. Both elements must be satisfied by a possessor, although the intention to possess may be deduced from the objective acts of physical possession.⁵
3. While each case turns on its own facts, the alleged possessor must show that it has dealt with the land as an occupying owner might have been expected to deal with it and that no-one else has done so.
4. It must be clear that the intention to possess is to the exclusion of all others.
5. There does not need to be a conscious intention to exclude the true owner, but rather an intention to exercise exclusive control of the land. A person need not believe that they are the true owner of the land to establish possession.
6. Possession of the land cannot be with the consent of the true owner.
7. Whether or not the paper title owner realises that dispossession has taken place is irrelevant.
8. Acts of possession with respect to only part of the land claimed may, in all the circumstances, constitute acts of possession with respect to all the land claimed.
9. A person's use of the land may amount to enjoyment of a special benefit from the land by casual acts of trespass rather than factual possession. A mere use of the land or a special benefit will not be enough to constitute factual possession nor to demonstrate the requisite intention to possess.⁶

The Court of Appeal found that regard must be had to all the facts and circumstances of the particular case. This should include the nature, position and characteristics of the

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land, the uses that are available on that land, together with the course of conduct that an owner might be expected to follow.

The Court of Appeal noted that while previous cases can provide guidance about the relevant principles to be applied, they should be treated with caution in terms of seeking factual analogies by reference to particular features of a person's dealings with land. Acts that evidence factual possession in one case may be wholly inadequate to prove it in another.⁷ Further, the acts that may be sufficient evidence of taking possession for an adjoining land owner may be insufficient for a person who lives some distance from the land.

The Court of Appeal upheld Pagone J's view that "a number of acts which, considered separately, might appear equivocal may, considered collectively, unequivocally evidence the requisite intention".⁸ The Court found that some of the acts of possession individually may not have constituted sufficient evidence of possession, but when they are combined with the overall factual matrix, sufficient evidence of possession can be, and in this case was, proven.

LESSONS TO BE LEARNED

(a) The party making the claim

Before making an adverse possession claim, make sure that you have satisfied the requisite elements for a claim and that you have the appropriate statutory declarations and evidence to support the claim before lodging at Land Victoria. Meet each individual who can provide evidence to support the claim and test the strength of their evidence. Once a claim is made, the true owner may attempt to retake control of the property. If possession is interrupted within 15 years, the claim may be defeated. Before lodging the claim, prepare for the fight.

Consider obtaining aerial photographic evidence dating back over 15 years. Victoria has archives of aerial photographs of the state. However, be aware that the reliability of these photographs varies depending on the location of the land. For example, inner city areas have photographs with greater detail as they cover smaller areas, whereas country and regional area photographs cover much larger areas and are often not as detailed. In addition, trees and other structures can

create shadows over particular areas of the land. This may mean that an important feature is difficult to see, for example, a disputed fence line. However, a series of photographs can provide strong evidence of, say, the existence of a fence (to support a claim). Also be aware that the seasons can impact on what can be viewed in a photograph (because of shadows). Photogrammetrists can provide compelling evidence.

Survey reports are a reliable record of the position of structures and fence lines and are also useful in mounting a case for adverse possession. Surveyors can provide evidence of the age of a fence and whether it was constructed on the same fence line as the previous fence. Photographs of the land (and its changing landscape) and oral evidence from disinterested witnesses can be crucial to your success. In the *Abbatangelo* case, oral evidence was preferred to evidence from photogrammetrists, particularly as the photographs were unclear and ambiguous. Photographs with people on the land can be supportive because they help identify time periods and may evidence use or acts on the land.

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(b) The paper title owner

If a claim is made against your client's land without prior notice, the client will receive a notice from Land Victoria advising them of the claim. If the claim has no merit or is arguable, a caveat should be filed strictly within 21 days with Land Victoria forbidding the granting of an application pursuant to s61(1) of the *Transfer of Land Act 1958 (TLA)* in respect to Torrens land or pursuant to s26R of the *TLA* in respect to General Law Land.

Proceedings must then be issued within 30 days, failing which Land Victoria may process the claim and register the title in the alleged possessor's name if the requisite matters have been complied with.

If you act for the paper title owner, do not act hastily and be wary of your client's potential defence.

If, on the evidence, it seems that the 15-year period has not elapsed, your client should act quickly to regain possession of the land. However, you must be careful

to ensure that 15 years has not passed, as your client may be deemed a trespasser and liable to damages from any attempt to regain possession if the adverse possession claim is subsequently upheld.

CONCLUSION

Abbatangelo is one of the leading authorities in Victoria on adverse possession law. While it provides guidance as to the likely circumstances that may combine to provide factual possession and the requisite intention to possess, each case will have different circumstances and facts. What may be considered sufficient to evidence an unequivocal act or an intention to possess in one situation may not be sufficient in another. The courts will look at the combined conduct and acts of the alleged possessor to establish whether the necessary principles can be established.

Although the court in *Abbatangelo* did not rely greatly on photographic evidence, this evidence should be obtained to assist or discredit potential witness evidence, particularly if possession is being alleged for a significant period of time over a 15-year period where the recollection or availability of witnesses

may be diminished. It is essential to ensure that the period of possession is continuous and there has been no break in possession. Carefully review all evidence, including all acts by the possessor, even if those acts alone seem insignificant. As in *Abbatangelo*, an act of placing a bath tub as a water trough may be one of the keys to successfully obtaining an order for adverse possession! •

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- [2007] VSC 529
- Note 1 above, at [15] (Pagone J).
- Note 1 above, at [32] (Pagone J).
- Abbatangelo v Whittlesea City Council* [2009] VSCA 188.
- JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 AC 419, 435 [40] (Lord Browne-Wilkinson).
- Murnane v Findlay* [1976] VLR 80, 87 (Cussen J).
- Murnane v Findlay*, note 5 above; *Riley v Penttila* [1994] VR 547, 561 (Gillard J); *Sunny Corporation Pty Ltd v Eikayess Nominees Pty Ltd* [2006] V ConvR 54 724; [2006] VSC 314, [46] (Bongiorno J).
- [2009] VSCA 188, [61c] (Ashley JA, Redlich JA, Kyrou JA).

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