

Adverse Possession

1 WHAT IS ADVERSE POSSESSION?

Adverse possession is the process whereby title to another person's real property is acquired without compensation by holding the property in a manner that conflicts with the true owner's rights for a specified period of time¹.

If the adverse possessor acquires title, the rights of the true owner are extinguished. Adverse possession will, as a general rule, extinguish the title of the true owner to everything above and below the surface².

2 WHAT ARE THE REQUIREMENTS?

There are three main requirements which are as follows:

2.1 Time limitation

In Victoria, in order to adversely possess another party's land, possession of the land must be for a minimum of 15 years.

Section 8 of the Limitation of Actions Act 1958 provides no action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him.

Roads and reserves - Where the area claimed includes a road, reserve or easement, evidence of 30 years of non-use will need to be supplied, if the title is to issue free from the encumbrance.

If the encumbrance is an easement, the applicant will need to prove that the easement has not been used for 30 years, in order to allow its removal.

2.2 Actual Possession

An applicant will need to prove actual possession which must be open and peaceful and not secret or by force. It must not be with the consent of the owner. It means a visible and effectual dominion or control by a person who intends to act as an owner³. The rightful owner's knowledge of the adverse possession is irrelevant.

An adverse possessor who abandons possession prior to the expiry of the limitation period loses his entitlement to make a claim for adverse possession. However, if adverse possession is abandoned after the expiry of the limitation period, the true owner's title has been extinguished.

2.3 Intention

The onus of proof of possession lies with the party seeking to possess the land. What constitutes intention?

- a. Mere personal convenience will not constitute intention.
- b. Fencing of land and payment of rates suggests intention to possess.
- c. If the objective intention of the possessor is clear, there is no need for inquiry into the possessor's subjective purpose. If the objective acts of the possessor are unclear or ambiguous, the subjective purpose may become a crucial determinant.
- d. Possession cannot be pursuant to a licence, lease or other grant from the true owner. A claimant's willingness to accept a licence or lease from the true owner is inconsistent with the intention to possess the land.

If an adverse possessor mistakenly believes they have a lease from someone other than the legal owner, this may be sufficient. In *Sunny Corporation*, the adverse possessor believed that he was in possession of the property under a lease from the local water authority (which was not the legal owner of the disputed land), and thus excluded the actual owner on that basis. The requisite intention to possess was nevertheless found to exist⁴.

3 **WHAT ACTS AMOUNT TO ADVERSE POSSESSION?**

There are a range of acts which may evidence possession either singularly or cumulatively. These acts include (but are not limited to) the following:

- Enclosure / Fencing - Enclosure is cogent evidence of adverse possession and of dispossession of the true owner⁵. Enclosure is the strongest possible evidence of adverse possession⁶. It is noted that "enclosure of an area of land by fencing is

clearly a method by which a person can demonstrate that he or she intends to dispossess and has taken possession of the land."⁷ However, it should also be noted that even when a section of land is enclosed, there may still be insufficient use made of it to show exclusive possession⁸.

- Occupation by residence / building on the property - This would usually involve constructing a house on the property or moving into an existing property.
- Leasing the property to other parties;
- Use of the property by planting trees, crops or running livestock - This may include allowing agistment of cattle, maintenance of trees, plants and garden and the employment of a person to maintain, cut or mow lawns.
- The payment of rates and taxes;

The absence of one or more of these items does not necessarily prove lack of possession. Each case is to be judged according to its circumstances and the nature and characteristics of the land are to be taken into account⁹. Further, the circumstances of the owner are also to be considered¹⁰. Although permanent structures and maintaining the disputed land in a similar manner to the rest of the adverse possessor's land may be expected, sometimes this will not be the case.

Certain acts which prima facie indicate possession may in fact be no more than special benefits and amount to occasional trespass¹¹. For example, using land by occasionally tethering ponies and allowing them to graze on it as well children playing on the disputed land was seen in *Tecbild Ltd v Chamberlain*¹² merely as the enjoyment of a special benefit. A special benefit may constitute part of the adverse possessor's case, although a special benefit alone will not be sufficient to amount to exclusive possession¹³.

4 WHAT DOCUMENTS ARE REQUIRED TO SUBMIT A CLAIM?

4.1 Application for a vesting order together with payment of the required fee

This is an approved form which is submitted with the documentation below. The fees vary depending on whether a survey is required.

4.2 Statutory Declaration attesting to occupation of the land.

The applicant's statutory declaration should contain the following information¹⁴:

- a. The postal address of the land claimed;
- b. The value of the land being claimed (with an attached valuation);
- c. The name and address of the municipality where the land is located;
- d. The circumstances in which possession commenced.
- e. Description of the use of the land;
- f. State who occupied or used it and whether their occupation or use was exclusive, continuous and without interruption;
- g. Show that the land was completely enclosed by itself or with other land;
- h. Identify the means of access to the land;
- i. Describe improvements to the land and their related circumstances;
- j. Advise who pays/paid the rates;
- k. State that no acknowledgement of ownership in respect of the claimed land (or any part thereof) has been given;
- l. Identify the land claimed by reference to the plan of survey or aerial photograph as an exhibit;
- m. If the period of possession is less than 30 years and the registered owner is a natural person, the statutory declaration should:
 - State that the applicant has no knowledge of any circumstances on the part of the owner which might have extended the limitation period for doing so beyond 15 years; and
 - Give details of any dispute with the registered owner or any other party that is claiming an interest in the land.

4.3 Disinterested Witness Statutory Declarations

A disinterested witness is a person that can provide a statutory declaration in respect to the land claimed, but who does not have an interest in the property.

The disinterested witness declarations should state the witnesses means of knowledge that fences which surround and mark the boundaries of the land as shown on the plan of survey, have continuously stood in their present position for the past fifteen years and upwards.

The disinterested statutory declaration should:

- Identify the land claimed by reference to the plan of survey as an exhibit;
- Note how the witness has known the land for at least 15 years;
- Explain how the witness acquired the knowledge;
- Deal with those parts of the evidence pertaining to occupation, use, enclosure, access and improvements required of the applicant.

4.4 Statutory Declarations from previous owner / Assignment of possessory rights

If the applicant has not been in possession of the land for the full 15 year period, but when combined with previous owners can show that he satisfies the limitation period, an adverse possession claim can proceed. Periods of possession may be aggregated as long as there is no gap in possession (or time begins again)¹⁵. The Deed of Assignment of Possessory Rights will need to be stamped at the State Revenue Office.

4.5 Rating evidence

Letter from the Council regarding the payment of rates. The letter should identify the land claimed and give particulars of the person who, during the last 15 years has been recorded in the municipal records as the rated owner.

4.6 Plan of survey, abstract of field records and original surveyors report or aerial photograph.

A survey plan or aerial photographs will usually be required. The survey should be attached to each Statutory Declaration and Deed of Assignment of Possessory Rights.

A survey is not required when the land which is being claimed is wholly enclosed¹⁶:

- by land to which the applicant has title;
- by Government roads or Crown land;
- a combination of the above.

4.7 Evidence by applicant's solicitor

If the period of possession is less than 30 years, and the true owner is a natural person, a statutory declaration by the applicant's solicitor is required that in summary provides that he:

- has made thorough enquiries;
- is satisfied that the applicant has been in adverse possession of the land for at least the last 15 years;
- has no knowledge of any circumstances on the part of the registered proprietor which might have extended the period of limitation beyond 15 years; and
- has given details of any dispute with the registered owner.

5 TORRENS LAND

Section 62 of the Transfer of Land Act 1958 provides that the Registrar may make an order vesting land in an applicant. The Registrar will usually be satisfied if the documentation covers the issues set out above, however, requisitions can be given by the Registrar which may involve further statutory declarations being prepared by the applicant.

6 GENERAL LAW LAND

General Law Land claims are made under Section 15 of the Transfer of Land Act 1958 (depending on whether there is a survey). The application must be supported by:

- a survey plan, with an abstract of field records certified by a licensed surveyor (if required);
- search of title;
- Legal Practitioner's Certificate; and
- Evidence of Possession. This would usually be in the form of Statutory Declarations from the person in possession of the land and Deeds of Assignment of Possession where other parties have been in possession.

7 EXEMPTIONS & QUALIFICATIONS TO ADVERSE POSSESSION CLAIMS

7.1 Crown Land

No adverse possession against the Crown.

Section 7 of the Limitation of Actions Act 1958 essentially provides that the right title or interest of the Crown to or in any land shall not be in any way affected by reason of any possession of such land adverse to the Crown, whether such possession has exceeded sixty years or not.

7.2 Rail Track

No adverse possession against PTC or Victorian Rail Track.

Section 7A of the Limitations of Actions Act 1958 provides that land prescribed by the Rail Corporation Act 1996 shall not be affected by any adverse possession claims irrespective of the period of adverse possession.

7.3 Water Authorities

No adverse possession against water authorities.

Section 7AB provides that adverse possession of any length does not affect water authorities.

7.4 Council Land

No adverse possession against a Council.

Section 7B of the Limitation of Actions Act 1958 exempts council land from claims of adverse possession. This refers to Torrens Land.

7.5 Common Property

No adverse possession of common property under an Owners Corporation.

Section 7C of the Limitations of Actions Act 1958 provides that common property under an Owners Corporation is not affected by any adverse possession irrespective of the length of time.

8 DISRUPTING AN ADVERSE POSSESSION CLAIM

The true owner may stop time running by:

- Ejecting the possessor and re-entering the land;
- Rejecting the possessor's acts of possession, i.e. by the removal or erection of a fence;
- Instituting proceedings to recover the land.

9 WHAT TO DO IF A CLAIM IS MADE AGAINST YOUR LAND

If a claim is made against your land, you should receive notice from Land Victoria advising of the adverse possession claim. Advice should be sought from a solicitor

before any action is taken. If the claim does not have merit or the claim is arguable, it may be appropriate to file a caveat with Land Victoria which:

- forbids the granting of an application for vesting order, pursuant to section 61(1) of the Transfer of Land Act 1958 (for Torrens Land); or
- forbids the creation of the folio pursuant to section 26R of the Transfer of Land Act 1958) (for General Law Land).

You have 21 days from the date that Land Victoria gives you notice to lodge a caveat. Once lodged, the caveat will remain valid for 30 days. Prior to the 30 day period lapsing, advice should be sought about whether proceedings should be issued. A copy of the proceedings should be served on Land Victoria.

After the 30 day period, if proceedings are not issued, the Registrar is free to process the adverse possession claim.

10 RECENT CASES

Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd [2006] VSC 314

The Kelly family owned land adjacent to the disputed land. The disputed land was legally owned by Kelly's neighbours. The neighbor had a fence separating the disputed land from the remainder of their land and a gate to the disputed land but the gate was locked and never used.

In 1972, Mr Kelly acquired a license from the water authority (DVA, later renamed Melbourne Water) to use the disputed land (despite the fact that the water authority was not the legal owner of this land). In addition to this mistake, Mr Kelly thought that the license was a lease and he used the property in various ways including running cattle on the land. It was found that the Kelly family had sufficient intention to possess and factual possession through various acts – this was notwithstanding that Mr Kelly thought that the exclusive possession of the land was due to a lease.

JNM Pty Ltd v Adelaide Banner Pty Ltd [2009] VSC 327

The disputed land was a narrow strip of which the northern part was unfenced and not really useable. The southern and middle sections were fenced. However, only the southern section was used by the adverse possessor for parking cars (they had a car sales business).

Adverse possession was proven for the southern part of the strip only. The middle section was fenced, but as it was unused, exclusive possession was not shown. The claim for the northern section had less merit because it was unfenced and unused.

This case demonstrates that a court may find only part of the disputed land qualifies for adverse possession. It also highlights the fact that although fencing often features as a major factor in adverse possession claims, it is *use* which can make or break the claim.

Whittlesea City Council v Abbatangelo [2009] VSCA 188

In this case, the Abbatangelo family made varied use of land which was surrounded by their land on three sides but legally belonged to the Council. Various acts were relied upon to show intention:

- installation of a gate and maintenance of fences on the boundaries of the land, without seeking financial contribution from the Council;
- use of the land for grazing, shade, shelter and at times enclosure of the variety of animals kept by the Abbatangelos from approximately 1960;
- installation of a bathtub;
- maintenance of trees and vegetation, including mowing of grass, and removal of noxious weeds and pests - foxes, snakes and rabbits;
- the construction of a cubbyhouse on the land; and
- use of the land for sporting and recreational activities such as horse riding, archery, football, horse training, rabbit shooting, bike riding, 'paddock bomb' driving and cricket.

The court found that all of these acts taken separately may be inadequate, but, together they were sufficient to make out a claim of adverse possession. The court pointed out that the adverse possessor's special circumstances had to be taken into account in addition to the nature of the land itself. The Abbatangelo family used the land in a way which suited their needs and circumstances, and so for them, all of the acts together were sufficient to show the requisite intention to exclusively possess. This was notwithstanding that to a 'farmer's eye' the land looked uncultivated and barely used.

Disclaimer

The material contained in this publication is for the purpose of legal training and is only meant to be a guide and is not to be construed as legal advice. The views expressed are not necessarily endorsed by the Television Education Network and recipients should take steps to inform themselves before acting on any information provided in the material. Jonathan Tisher and the firm Tisher Liner & Co will not be held liable or responsible for any claim which is made as a result of any person relying upon the information contained in this paper.

Copyright

© 2010 Jonathan Tisher, Tisher Liner & Co

A licence to reproduce this material has been given to Television Education Network. These materials are copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

¹ http://en.wikipedia.org/wiki/Adverse_possession

² Wikrama - Nayake, Voumard, *The Sale of Land*, LBC, 10-87.

³ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

⁴ *Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd* [2006] VSC 314, at 15.

⁵ *George Wimpey & Co Ltd v Sohn* [1967] CH 487, 511A.

⁶ *Seddon v Smith* (1877) 36 L.T. 168, 1609.

⁷ *Seddon v Smith* (1877) 36 L.T. 168.

⁸ *JNM Pty Ltd v Adelaide Banner* [2009] VSC 317 at 30.

⁹ *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215, at 126.

¹⁰ *Whittlesea City Council v Abbatangelo* [2009] VSCA 188 (*Whittlesea*), at 79.

¹¹ *Riley v Penttila* [1974] VR 547, 562.

¹² (1969) 20 P & CR 633.

¹³ *Whittlesea* at 6.

¹⁴ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

¹⁵ Shelmerdine & Anor v Ringen Pty Ltd & Anor [1993] 1 VR 315 at 341.

¹⁶ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.