

THE BASIC PRINCIPLES OF ADVERSE POSSESSION IN VICTORIA

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Introduction

1. The following is an overview of the principles of adverse possession and concludes with some suggestions about how to manage disputes that can often take on a life of their own.
2. The opening words in *Cervi v Letcher* might fairly describe many adverse possession cases: “This proceeding concerns a neighbour’s dispute, of an extreme kind.”¹
3. The key to managing adverse possession disputes is to collect and circulate evidence early, and in an open and transparent way. A common mistake by litigants (and practitioners) is not gathering evidence early enough, or worse, wanting to hold evidence back for trial.

Basic principles

4. 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.
5. However, section 42(2)(b) of the *Transfer of Land Act 1958* (Vic) provides an exception to the principle of indefeasibility, stating that title is subject to rights subsisting under adverse possession:
 - 42 Estate of registered proprietor paramount**
 - (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to— ...
 - (b) any rights subsisting under any adverse possession of the land; ...
notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.
6. Adverse possession may be described as a shield to fight an action to recover land. Section 8 of the *Limitations of Actions Act 1958* provides:
 - 8 Action to recover land**
 - 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 or, if it first accrued to some person through whom he claims, to that person...
7. Section 9(1) states that a right of action accrues upon the date at which the person whose title stands to be extinguished ‘has... been dispossessed.’

¹ *Cervi v Letcher* [2011] VSC 156

8. To establish adverse possession, a trespasser must show factual possession and an intention to possess the land in question.²

Factual possession must be single and exclusive, but this is dependent on the circumstances

9. The degree to which acts constitute a sufficient degree of exclusive physical control depends on the circumstances, in particular the nature of the land, and the manner in which the land has been commonly used or enjoyed.
10. What must be shown is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.³

A trespasser must make it clear to the world that the land has been possessed

11. The courts will require clear and affirmative evidence that the trespasser, claiming possession, not only had the requisite intention to possess, but made such intention clear to the world.
12. This does not mean that there must be a conscious intention to exclude the paper title holder. What is required is an intention to exercise exclusive control.⁴
13. That the adverse possessor believes herself to be the true owner, might be quite sufficient to demonstrate an intention to possess.⁵

Enclosure by itself, prima facie, indicates the requisite intention

14. If the disputed property becomes separated from the land belonging to the paper title holder by a fence, hedge or wall, so that the paper title holder can only gain access to the disputed property with the trespasser's consent, and the trespasser makes more than minimal use of the disputed land, the courts will readily find that the trespasser has taken possession of the disputed property.⁶

A person asserting title may do so in reliance on predecessors in title

15. Periods of adverse possession by successive occupiers can be aggregated if there was no gap in the period of adverse possession, even though there has been no express assignment of the possessory rights to land.⁷

² *Whittlesea City Council v Abbatangelo* [2009] VSCA 188

³ *Whittlesea City Council v Abbatangelo* [2009] VSCA 188

⁴ *Ocean Estates v Pinder* [1969] 2 AC 19

⁵ *Bligh v Martin* [1968] 1 WLR 804

⁶ *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 33-12

⁷ *Shelmerdine and Another v. Ringen Pty. Ltd. and Another* [1993] 1 VR 315

Possession over part of the land may be sufficient to establish possession over the whole of the land

16. Acts of possession with respect to only part of land claimed by way of adverse possession may in all the circumstances constitute acts of possession with respect to all the land claimed.⁸

Once a limitation period has expired, the interest of the adverse possessor cannot be abandoned

17. At least probably, once the limitation period has expired the interest of the adverse possessor, or of a person claiming through him, cannot be abandoned.⁹

Each case must be decided on its facts

18. While previous cases can provide guidance as to the relevant principles which are to be applied, each case must be decided on its own facts. Acts that evidence factual possession in one case may be wholly inadequate to prove it in another.¹⁰
19. A court will decide what is the most probable inference to make on the evidence that is available.¹¹

Later conduct may throw light on earlier circumstances

20. In some case, the courts have been willing to look at acts by a trespasser after the commencement of the limitation period as shedding light on whether the trespasser was in possession throughout the whole period.¹²

Adverse possession must be continuous and uninterrupted

21. Adverse possession must be continuous and uninterrupted.¹³ If the trespasser's possession is interrupted by the paper title holder, or if the land ceases to be possessed by anyone, the 'clock' resets and the fifteen-year limitation period begins again.

Mere use of land may not be sufficient

22. In some circumstances, a person's use of land may amount to enjoyment of a special benefit from the land but casual acts of trespass will neither constitute factual possession nor demonstrate the requisite intention to possess.

⁸ *Whittlesea City Council v Abbatangelo* [2009] VSCA 188

⁹ *Whittlesea City Council v Abbatangelo* [2009] VSCA 188

¹⁰ *Whittlesea City Council v Abbatangelo* [2009] VSCA 188

¹¹ *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 9-105

¹² *Adverse Possession*, 2nd Edition, Jourdan QC, Stephen, & Radley-Gardner, Oliver, at 8-33

¹³ *Limitation of Actions Act* s 14(1).

Evidence should be collected early and with care

23. Evidence in adverse possession cases is often called from landowners, neighbours and predecessors in title, whose recollection may be hazy, particularly in relation to times a decade or longer ago.
24. As the Court explained in *Roy v Lagona* there is, with the passage of time a natural dimming of recollection and memory:¹⁴
 - 45 In assessing the credit and reliability of the witnesses for the purpose of fact finding I have regard to the difficulty in accurately recollecting statements and events that occurred years ago. There is, with “the passage of time ... a natural dimming of recollection and memory”. It is trite but true that human memory is fallible. It may fade with time, and may be affected by recollection partially true, or innocent but inaccurate reconstruction of what is thought to have been said or observed. Sometimes, also, understanding and recollection may be affected by the interest of the person giving evidence, even quite innocently. The judicial task in these circumstances is difficult, yet must be undertaken by the court in order to resolve the parties’ dispute. Steadily bearing in mind considerations of this nature, and having carefully read the transcript, and clearly recalling the witnesses, I have concluded as follows concerning the credit and reliability of the witnesses.
25. Aerial photography is therefore often useful, but the image quality at 15+ years for NearMap, MetroMap and Google Earth can be poor if images are available for the relevant period at all.
26. On the other hand, Photomapping has access to aerial photography and satellite imagery dating back as to the 1930s. Images are sourced from their own projects and the archives of State and Commonwealth Governments.¹⁵
27. Adverse possession disputes are often fought over parcels of land of low value and as with some planning disputes, can be a proxy for other issues. In *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 the land was 2.4m by 1.1m and in *Nicholas Olandezos v Bhatha & Ors* [2017] VSC 234 the value of the land was ~\$3,850.
28. To help ensure legal and other costs in proceedings are reasonable and proportionate to the amount in dispute,¹⁶ evidence in adverse possession cases should be collected early and made available to any party with an interest in the proceedings.
29. After all, a person whose name is on the title to land should not be expected to surrender those rights on anything other than the best of evidence.

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¹⁴ *Roy v Lagona* [2010] VSC 250

¹⁵ <http://www.photomapping.com.au/historic-imagery>; images@photomapping.com.au; (03) 9328 3444

¹⁶ Section 24 *Civil Procedure Act 2010*