



SOLICITORS

ADVERSE POSSESSION

GENERAL POSITION

In Queensland under the Torrens System of Registration of Interests in Land the general position is that registration provides complete security for the registered proprietor with respect to the registered proprietor's interest to the land in question.

This general position is subject to certain exceptions preserved within the Property Law Act and in particular section 6(c) whereby an interest in land can be acquired "by virtue of taking possession".

It has been said in a leading text on the subject, that this provision "strikes a balance between absolutely securing the title to a persons estate or interest and the competing principle that public interest demands that if a person chooses to abandon those rights for a long period of time there should be a method of clearing the Title to the land so that it can be utilised for public benefit".

REQUIREMENTS FOR OBTAINING TITLE BY ADVERSE POSSESSION

Section 46 Real Property Acts Amendment Act 1952 states that title by possession to any land cannot be obtained save and except in accordance with the provisions of the Real Property Acts Amendment Act (the "Act").

Section 50 of the Act provides that a person may apply to the Registrar of Titles for the issue to him of a Certificate of Title to the land which they are in possession of.

In practice what is required is proof to the Registrar of Titles that the person so applying was in adverse possession of the land for at least 30 years. If the period is less than 30 years then evidence can be produced to prove that the applicant should not lose its right due to the disability of any other party claiming rightful ownership of the land. The Act requires that any application be advertised and also provides that the registered proprietor may lodge a caveat over the property seeking to defeat the application. In this case, if the Registrar of Titles is satisfied that the caveator is the registered proprietor, then he shall refuse the application.

Note that the only requirement is that of advertising and not advising the registered proprietor directly. Given the number of 'legal' public notices which appear in Gazettes and newspapers there is of course the real likelihood that such an advertisement would go unnoticed.

If however there is no caveat lodged or if the caveator cannot substantiate its claim and the Registrar is happy that the requisite period of possession has been achieved then the Registrar will be in a position to cancel the Title and re-issue in favour of the applicant.

REQUIREMENTS TO PROVE ADVERSE POSSESSION

The most important point to keep in mind when considering a potential application for title to land through adverse possession, is that each and every case will depend on its own facts and circumstances.

What constitutes adverse possession is a question which requires consideration of the totality of the situation not merely a consideration of the time upon which the potential applicant may have been "on" the land.

Generally adverse possession can be stated as being actual possession of the land without licence from the true owner.

At common law the question of possession considers two elements:-

- (1) Factual Possession showing physical control; and
- (2) Animus Possendendi or in other words an intention to possess the land.

Re: (1)

With respect to factual possession the issues to be considered include the character or value of the property, what is suitable use of the particular property as well as consideration of the conduct of the

registered proprietor which one would reasonably expect that person to follow.

As an example of some of these considerations contrast the case whereby an application was successful where the applicant utilised otherwise worthless marsh lands for the purpose of shooting, to the case which was unsuccessful in that the tethering of ponies and utilising of land for a childrens play area was considered too trivial to indicate factual possession.

The concept of possession of the land imputes a requirement that possession be single and exclusive and if it is not so the registered proprietor will be successful in refuting any application. In conjunction with this concept is should be noted that the 30 year time period runs from the date of the acts which are inconsistent with the rights of the owner.

Re: (2)

With respect to the intention to possess the land it is noted that what is required is more than being simply, for example, a persistent trespasser.

Here again the facts of each case should be considered but it has been generally held by leading cases that the fencing or otherwise enclosing of land is the strongest way of disclosing an intention to deprive the registered proprietor of the land. Fencing however cannot be seen as evidencing the intention if to do so was merely for the purpose of the better enjoyment of the land.

Another factor which could be considered as evidencing the intention to possess the land is the payment of rates. Certainly this is the case or raises a strong presumption if the person paying the rates is in possession of the land but is not so if the person paying rates is not present on the land. Again however as each case depends on its own facts payment of rates could be construed as evidencing a strong intention if for example the land in question is rugged bush land which could not be reasonably physically possessed and therefore the payment of rates is the only real means of evidencing the intention to possess the land.

The 30 year period which is relevant to any potential application should also be an unbroken period. In this case therefore an adverse possessor cannot rely or accumulate time which has accrued by a previous adverse possessor. This position is varied only slightly and subject to a handful of exceptions such as where a adverse possessors endeavours to pass any interest that person may have onto a beneficiary in a Will.

TERMINATION OF A POTENTIAL ADVERSE POSSESSION APPLICATION

The relevant time for an application will stop if either:-

- A. The owner asserts its right; or
- B. If an adverse possessor admits to a superior right.

Re: A

What is required is an action or a peaceable entry which amounts to resumption of possession. In this case therefore "paper claims" is not sufficient to assert the right of ownership. What is meant by a "paper claim" is for is for example writing to the adverse possessor to state that they have no claim to the land, or alternatively advertising to the world at large that ownership is retained in the land.

Re: B

Where an adverse possessor acknowledges title to the registered proprietor such acknowledgment must be in writing and signed by the person in possession or an agent on their behalf. Such an acknowledgment will bind all following potential adverse possessors in the given limitation period.