

The Law Institute of Victoria

470 Bourke Street Melbourne VIC 3000
GPO Box 263, Melbourne VIC 3001, DX 350 Melbourne

T: 03 9607 9311 **F:** 03 9602 5270 **W:** www.liv.asn.au

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PROPERTY LAW PRACTICE UPDATE

What's Yours is Mine: Adverse Possession

Presenter: Matthew Townsend

This paper was first presented on Wednesday, 21 March 2018 at The Sofitel, 25 Collins St, Melbourne.

Executive Summary

The paper provides an overview of the law in relation to adverse possession and the process involved in making a claim. Reference is made to evidentiary issues that can arise in adverse possession litigation, including the failure of human memory over time, raising the issue of credit and the reliability of witnesses. Special mention is made of the value of aerial photography. The lessons of some recent cases are discussed, with a reminder about the importance of keeping the costs of litigation in proportion to the value of the land in dispute.

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WHAT'S YOURS IS MINE—

ADVERSE POSSESSION

The Law in relation to adverse possession is stable and readily understood

The law in relation to adverse possession is reasonably well settled in Victoria. The principal authority in Victoria remains [Whittlesea City Council v Abbatangelo \[2009\] VSCA 188](#); (2009) 259 ALR 56 that set out a comprehensive summary of the law:

- The presumption of ownership lies with the paper title holder:
 - “(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, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
- If that presumption is to be displaced, a person will need to show factual possession and the requisite intention to possess:
 - (2) *If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (animus possidendi).*
- What constitutes factual possession may change depending on the circumstances, but the alleged possessor must deal with the land as though he or she is the actual owner:
 - (3) *Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, ... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession 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.*

- The requisite intention to possess requires clear and affirmative evidence that the trespasser has not only had the intention but demonstrated this to the world—this might not be shown if those acts are open to more than one interpretation:

(4) *The animus possidendi, which is also necessary to constitute possession, ... involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow ... the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the [requisite] animus possidendi and consequently as not having dispossessed the owner."*

To these principles, the Court of Appeal added additional principles including the principles outlined by Ashley J (as he then was) in *Bayport Industries Pty Ltd v Watson*¹. In summary:

- (1) the intention to exercise exclusive control does not necessarily require a conscious intention to exclude the true owner. An intention to control the land, and a belief by the adverse possessor that he or she is the true owner, is sufficient;
- (2) enclosure by itself prima facie indicates the requisite animus possidendi;
- (3) an adverse possessor cannot rely on acts which are merely equivocal as regards the intention to exclude the true owner;
- (4) periods of possession may be aggregated, so long as there is no gap in possession.
- (5) acts of possession with respect to only part of land may in all the circumstances constitute acts of possession with respect to all the land;
- (6) where a claimant originally enters upon land as a trespasser, the claimant should be required to produce compelling evidence of intention to possess; and
- (7) 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.

¹ [2006] V Conv R 54-709; [2002] VSC 206

An alternative summary of the law was provided by Derham AsJ in the recent decision of [Nicholas Olandezos v Bhatha & Ors](#) [2017] VSC 234, that helpfully refers to the relevant statutory provisions in Victoria:

- you can't make a claim of adverse possession against the Crown:
 - (a) *section 7 of the Limitation of Actions Act 1958 (Vic) provides in substance, 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;*
- the relevant period for an adverse possession claim is 15 years:
 - (b) *section 8 of the Limitation of Actions Act 1958 provides that no action shall be brought by any person to recover any land after the expiration of 15 years from the date on which the right of action accrued to them or, if it first accrued, to some person through whom they claim, to that person;*
- at the end of that 15-year period, title is extinguished:
 - (c) *section 18 of the Limitation of Actions Act 1958 provides that at the expiration of that period, the person's title to the land shall be extinguished;*
- the key event is the date on which the paper title holder was dispossessed:
 - (d) *a number of provisions deal with when the cause of action accrues. Section 9(1) of the Limitation of Actions Act 1958 directs attention to the date upon which the person whose paper title is in issue was dispossessed or discontinued possession;*
- no right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run:
 - (e) *section 14 of the Limitation of Actions Act 1958 provides (in part) that that no right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run. The reference to 'adverse possession' in s 14 is to possession by a person in whose favour time can run and not to the nature of the possession;*
- the claimant must have both factual possession and the intention to possess:
 - (f) *the claimant for adverse possession must be shown to have both factual possession and the requisite intention to possess:*

- factual possession involves a single and exclusive possession—this may depend on the nature of the land and the manner in which it is commonly used:

(i) *factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession. What must be shown as constituting factual possession 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. What acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed;*

- an intention to possess requires clear and affirmative evidence:

(ii) *the intention to possess involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if they are not themselves the possessor, so far as is reasonably practicable and so far as the processes of the law will allow. This requires clear and affirmative evidence. If the claimant's acts are open to more than one interpretation, and they have not made it perfectly plain to the world at large by their actions or words that they intended to exclude the owner as best they can, the courts will treat them as not having requisite intention and consequently as not having dispossessed the owner; and*

- periods of possession and intention to possess may be aggregated with those of predecessors in title:

(g) *a claimant to adverse possession may rely upon possession and intention to possess on the part of predecessors in title. Periods of possession may be aggregated, so long as there is no gap in possession.*

In his decision last year, Garde J in *Spiteri v Fibreglass Industrial Products Pty Ltd* restated the principles in *Abbatangelo* and adopted this short summary by Dixon J in [Cervi v Letcher](#) [2011] VSC 156:

The question is simply whether the putative adverse possessor has dispossessed the paper owner by going into possession of the land, for the requisite period without the consent of the paper owner, with the word "possession" being given its ordinary meaning. Whether the paper owner realises that dispossession has taken place is irrelevant.

What constitutes clear and affirmative evidence?

It should be clear from this summary that each case turns on its facts.

As a consequence, adverse possession cases invariably turn on the quality and reliability of evidence.

Much evidence is routinely called from landowners, neighbours and predecessors in title, whose recollection may be hazy, particularly in relation to specific periods of time more a decade or longer ago.

As the Court somewhat benevolently explained in *Roy v Lagona* [2010] VSC 250:

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.*

The following exchange in cross examination recorded in *KY Enterprises Pty Ltd v Darby* [2013] VSC 484 is typical:

46 *The defendant’s oral evidence is that he first took up occupation in 1971. He said he dated occupation of the shop as being a few months before his daughter’s birth, and he had made a mistake in his earlier documents because he thought she was born in 1974. On discussion with “others in the family” he realised or was told that his daughter was born in 1971. When put to him that his first memory (mid 1970s) may be true he denied it, adding in this next question and answer :*

Q: It's very difficult to remember so far back isn't it?

A: Well, when you associate it with the birth of a child and others in the family, saying the birth of the child and when we moved from Corrigan Avenue into a smaller house and we couldn't - and we got the shop prior to that, it all fitted in place, but obviously when I first said, I said mid 70s. But if I've said that I said it, but I was wrong, OK?

Another example, also drawn from *KY Enterprises Pty Ltd v Darby* [2013] VSC 484, shows the weight the Court can give to even the most subtle pieces of evidence—and a reminder as practitioners, to trust our instincts when we assess how well clients will fare when giving evidence:

90 *Here the defendant's own evidence as to intention is that he always thought the disputed land was in fact his land. I accept this evidence. It was volunteered in the context of answering a question in chief as to what he did in relation to the disputed land, and in response to the characterisation of the land in question as "disputed". His exact evidence was:*

When you say disputed land, I always thought it was my land. I never ever thought we would be disputing anything.

91 *In the context, the statement did not appear to me to be gratuitous or deliberately self serving, but an honest statement of his position. It was not put squarely to the defendant in cross examination that this statement was incorrect. Indeed, in answer to another question using the phrase "disputed land", the defendant repeated his evidence that "I never ever thought it was disputed. It's only just become disputed..." and the plaintiff's counsel did not challenge this evidence by any question directed to it. In this cross examination, the defendant agreed that his intention in constructing the gate was to secure items he kept at the rear of his property. It was put to him that he only wanted to use the disputed land to drive over it, and the defendant agreed that "it's mainly a driveway".*

The one type of evidence that will often prove determinative is aerial photography. To the extent it may be helpful, investigations here should be done early in the litigation, preferably before it is even commenced.

An example is a case in which I recently involved, in which, despite a dozen or more statements of evidences by a variety of witnesses, at one point appeared to come down to whether the shadow cast from this laneway was produced by a door, or something else:



Yet aerial photographs at a satisfactory resolution in the critical period can be difficult and expensive to find. To that end, the following summary will hopefully be helpful.

Photomapping

Photomapping is a firm that 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. It appears to be the sub-contractor firm for a number of firms offering historical imagery, but you can deal with it directly:

- **Website:** <http://www.photomapping.com.au/historic-imagery>
- **Email address:** images@photomapping.com.au
- **Phone number:** (03) 9328 3444
- **Address:**
133 Abbotsford Street,
PO Box 369, North Melbourne,
VIC 3051
- **Cost:**
\$132 per date search (must specify a date rather than range or interval)
\$33 search and use fee in the office, in addition to the above fee should the full service be used (eg. can check resolution prior to purchase)
- **Format:** photos sent in a digital file over Dropbox and in multiple formats

Nearmap

Nearmap is an aerial photograph supplier that should be a standard subscription for every property or planning lawyer in Melbourne. It went from being a free service a few years ago to one that now costs ~\$150 per month for an individual practitioner—as one of my colleagues remarked nearly as expensive as his Lexis Nexis subscription.

The result of this uncompetitive pricing means that it is beyond the reach of many sole practitioners and town planners and even larger law firms that have substantial property and planning practices have elected to not subscribe to it.

The resolution of photography for current imagery is outstanding. In one instance I was able to ascertain the date that window frames were replaced despite the fact that they were under the eaves. However, for historical imagery, Nearmap faces the difficulty that a number of its Victorian maps only date back to 2009.

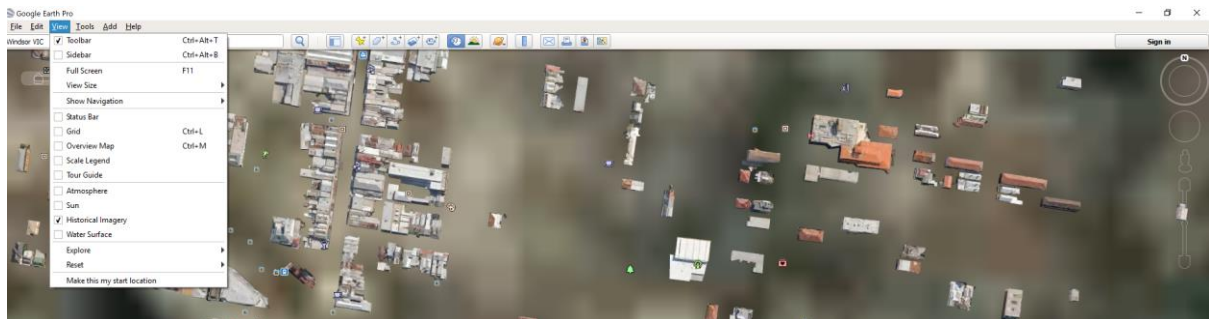
For subscribers this may allow a degree of use in an adverse possession claim, albeit in concert with other aerial photography suppliers:

- **Website:** <https://www.nearmap.com.au>

- **Email address:** Contact through online form.
- **Address:**
International Tower 1, Level 4
100 Barangaroo Avenue
Barangaroo NSW 2000
- **Phone number:** 1800 632 762
- **Cost of images:** Quotes available.

Google Earth historical imagery

For completeness, Google Earth also offers historical imagery available through the pull-down menu:



However, the resolution of images deteriorates rapidly once you start to access anything other than contemporary satellite imagery and imagery can be particularly poor once you venture past the inner suburbs.

For these reasons, Google Earth is useful for little more than site familiarisation.

The use of caveats in adverse possession cases

Another matter of interest to property lawyers that has featured in recent cases is the intersection of the law of caveats and adverse possession. This relationship was explored in a decision last year of Derham AsJ in [Olandezos v Bhatha & Ors \[2017\] VSC 234](#).

This was a case in which a plaintiff sought the removal of two caveats pursuant to s 90(3) of the *Transfer of Land Act 1958* (Vic). The caveats had been lodged by the caveators in relation to a strip of land near the Benjeroop-Tresco Road, Tresco.

The caveators claimed a freehold estate in ~7ha of land by adverse possession, claiming that they had exercised exclusive and continuous possession of the disputed land since 2010.

But it was said against them that they were not entitled to the disputed land by adverse possession because they would not be able to establish that they had exclusive possession of the disputed land, without interference, for a minimum of 15 years. Second, it was said that the claim was statute barred

because the Australian Securities and Investments Commission (**ASIC**) is an arm of the Commonwealth, and as we know claims in adverse possession cannot succeed against the Crown.

The Court considered an argument by the caveators that because they had lodged an application under s 60 of the *Transfer of Land Act 1958*, their rights and those of the plaintiff should be dealt with pursuant to the procedure under the TLA. The Court summed up this procedure thus:

48 *Section 60 of the TLA is in Division 5 of Part IV headed 'Acquisition by possession'. The procedure is, in summary, as follows:*

- the claimant writes to the Registrar on the appropriate form supported by survey evidence:
 - (a) *the claimant applies to the Registrar in writing in an appropriate approved form accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description, for an order vesting the land in them for an estate in fee simple or other the estate claimed;*
- the Registrar causes notice of the application to be advertised:
 - (b) *the Registrar causes notice of the application to be advertised once at least in a newspaper circulating in the city of Melbourne or in the neighbourhood of the land and to be given to any person he thinks proper including every person appearing by the Register to have any estate or interest in the land;*
- notice is placed on the land:
 - (c) *the applicant posts the notice in a conspicuous place on the land or at such place as the Registrar directs and it is so posted for not less than 30 days prior to the granting of the application, and that notice must be posted on the day on which the application is advertised;*
- after 30 days, if a caveat is not lodged the application may be granted in whole or in part:
 - (d) *the Registrar appoints a period of not less than 30 days from the publication of the advertisement or service of the notice after the expiration of which he may, unless a caveat is lodged, grant the application altogether or in part;*
 - (e) *a person claiming any estate or interest in the land in respect of which any such application is made may, before the granting of the application, lodge a caveat in an appropriate approved form with the Registrar forbidding the granting thereof. The caveat is subject to the same provisions, and have the same effect with respect to the application against which it is lodged, as a caveat under section 26R against the creation of a folio; and*

- (f) *subject to the TLA, after the expiration of the period appointed, the Registrar, if satisfied that the applicant has acquired a title by possession to the land, may make an order vesting the land in the applicant, or in such person as the applicant directs, for an estate in fee simple or the estate or interest acquired by the applicant free from all encumbrances which have been determined or extinguished by such possession.*

The court agreed that there was a factual dispute as to the caveators' entitlement to the freehold estate in the land by adverse possession, but suggested they would need to elect whether or not to proceed with their claim:

50 *... The evidence of the situation of the land, the totality of the fencing, the history of the occupation of the disputed land, the use to which the plaintiff and his predecessors may have put the land ... require more extensive evidence. If the Caveats remain without any condition requiring the commencement of proceedings, and if the plaintiff lodges a caveat under s 61 of the TLA claiming an interest in the land, for example a right of way by long user, the dispute will have to return to Court, but with the plaintiff having the burden of establishing a prima facie case and that the balance of convenience is in his favour.*

51 *This may be an advantage to the Caveators. But it is hardly in the interests of the due administration of justice and the overarching obligation under the Civil Procedure Act 2010 (Vic) to take a course that results in precisely the reverse of the position that now faces the parties.*

The Court ultimately ordered that unless within one month, the Caveators commence proceeding to establish their entitlement to the freehold estate in the disputed land by adverse possession, the Caveats shall be removed.

Conclusion

In closing, a word of caution is warranted about adverse possession cases. That is, they can often become a proxy for disputes between neighbours that may have their genesis in matters quite unrelated to property law.

An inference in *Cervi v Letcher* [2011] VSC 156 was that the underlying dispute was in fact a planning dispute and the case opened with the ominous words:

1 *This proceeding concerns a neighbour's dispute, of an extreme kind.*

They are often over parcels of land of relatively low value:

- 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 said to have been \$3,850.

Indeed, a number of adverse possession cases can simply be fencing disputes that take on a life of their own, although clearly land can have value to adjoining owners in excess of what it might sell for to a third party.

The underlying risk is that the value of the land in dispute is quickly dwarfed by the costs of litigation meaning that parties are compelled to run their disputes to a conclusion for fear of the cost consequences of losing.

We therefore need to be ever-mindful that our function as lawyers is not simply to be the mouthpiece of our clients, but to exercise independent forensic judgement, and that may mean that we lean firmly on our clients to compromise, irrespective of whether that advice is well received.²

Matthew Townsend

Owen Dixon Chambers

townsend@vicbar.com.au

² That responsibility is now manifest in section 24 of the *Civil Procedure Act* 2010:

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

- (a) *the complexity or importance of the issues in dispute; and*
- (b) *the amount in dispute.*