

Adverse Possession

How to defend a claim

Institution of Surveyors Victoria
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What is adverse possession?

- Adverse Possession is a legal principle enabling the occupier of a piece of land to obtain ownership
- To obtain ownership, the occupier of the land must prove the 3 main requirements:
 - They have had **actual** possession of the land; and
 - They had an **intention** to possess the land; and
 - Their possession has continued for at least **15 years**
- Adverse possession will, as a general rule, extinguish the title of the true owner to everything above and below the surface, but be subject to existing easements unless they can be removed as part of the application.

1. Actual Possession

- The applicant needs to prove actual possession. Actual possession must be open and peaceful and not secret or by force.
- It must not be with the consent of the owner. However, the rightful owner's knowledge of the adverse possession is irrelevant.
- This means a visible and effectual dominion or control by a person who intends to act as an owner.
- Possession must be **uninterrupted** and **exclusive**.
- Various acts which alone may not be sufficient, when combined, can be sufficient to establish possession.

2. Intention to Possess

- There must be an intention to possess the land
- What constitutes intention?
 - Mere personal convenience will not constitute intention
 - Fencing of land and payment of rates suggests intention to possess
 - 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
 - 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

2. Intention to Possess. Cont.

- Enclosure is, absent other evidence, the best evidence of intention to possess. Enclosure is usually demonstrated by fencing, walls or building over land. However, enclosure may not be enough to show actual possession.
- Almost all cases of established adverse possession involve enclosure.
- It is almost impossible to establish a claim without enclosure.

3. Time Limitation

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

Examples of Adverse possession

Examples of adverse possession may include:

- a fence not in alignment with the title boundary;
- a building or structure placed over another person's title boundary;
- the blocking off of an old road or lane;
- the deliberate enclosure or use of another person's land without that owner's permission.

How does a claim start?

Usually when a survey is obtained for the purpose of:

- replacing a fence;
- undertaking a development/subdivision/renovation.

Other issues which affect claims

- 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.
 - Council will also need to confirm that the road is not a road for the purpose of the Road Management Act and is not on the public register of roads.
- If there is an easement (sewer, carriageway etc), the applicant will need to prove that the easement has not been used for 30 years, in order to secure its removal. Council's consent may also be required.

Ways to claim adverse possession?

There are 3 ways to obtain title to property which has been adversely possessed:

- Make an application to Land Victoria under s60 of the Transfer of Land Act 1958 (Vic);
- Seek orders from the County Court of Victoria or Supreme Court of Victoria pursuant to the Limitation of Actions Act 1958 (Vic);
- Make a claim to the Magistrates' Court of Victoria. This option is only available when a Fences Act 1968 (Vic) compliant has been filed and the land the person is claiming title by possession to is land on which fencing works that are subject to the complaint are to be carried out

Abbatangelo v Whittlesea City Council

The Abbatangelo case is the leading Victorian authority in adverse possession and provides a useful summary of how a claim can be made. The case was upheld in the Supreme Court of Victoria Court of Appeal.

Abbatangelo v Whittlesea City Council

The Court of Appeal 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.

Abbatangelo v Whittlesea City Council

The Court of Appeal set out a number of principles necessary to establish adverse possession, namely:

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.

Abbatangelo v Whittlesea City Council

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.

Abbatangelo v Whittlesea City Council

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.

What happens if a claim is made against you/your client?

Some things to look for:

- Has there been common ownership in the last 15 years?
- Are there gates or breaks in the boundary fence?
- Are there old surveys which show different positions of fences?
- Was there agreements in place between owners?

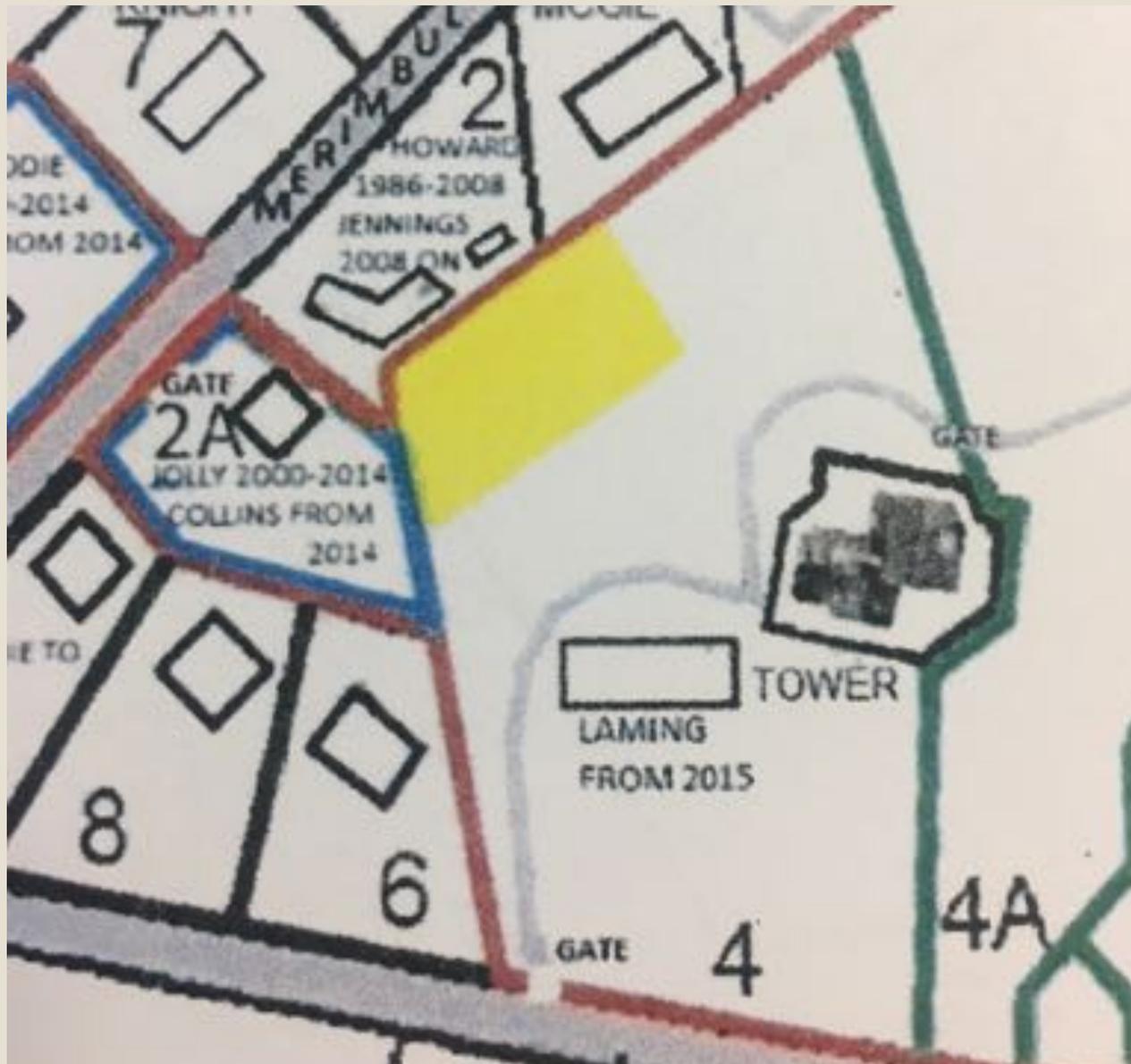
How to defend an adverse possession claim

Case Law Update:

Laming v Jennings, County Court of Victoria
2017 VCC 1223

What was the case about?

- The case concerned a claim by the defendant (“Jennings”), the registered proprietor of the property at 2 Merimbula Road Ferny Creek, over part of the land owned by the plaintiff (“Laming”) at 4 One Tree Hill Road Ferny Creek.
- Jennings alleged that he had an interest in a part of the land falling within the title boundaries of Laming’s property and contended that he had acquired legal title to the disputed land, or part of it, due to adverse possession.
- Alternatively, if his adverse possession claim failed, he claimed an easement in respect of the disputed land, due to the doctrine of the lost modern grant.
- Laming denied that Jennings had any rights in relation to the disputed land or his property generally and said that Jennings had trespassed on his land.



Laming v Jennings

2 claims were made by Jennings against Laming's land (land in yellow):

- Adverse possession
- Easement by prescription

11 day County Court of Victoria hearing.

- Laming successfully defended the claim for adverse possession
- Jennings successfully obtained an easement over part of the land

The Court has delivered judgment but has not delivered formal court orders. Once orders are made either party (or both) may appeal the decision. The following is based on the judgment delivered which may be affected by any formal orders or appeal.

I will only deal with the adverse possession claim here given the time.

What was claimed by the alleged adverse possessor?

- Laming had only recently purchased the property and the property for a period on and off since 1953 the Government/Telstra and its various incarnations owned the Lamings land until 2012.
- Jennings land and the Laming land was at one point in time delineated by a concrete post and wire fence.
- The land was also separated by some trees and vegetation.
- The initial alleged possessor, Howards, claimed they removed the fencing wire on the boundary, removed some trees and vegetation and started using the yellow land as a 'backyard' and undertook mowing of some sections.

What was claimed by the alleged adverse possessor?

- It was also alleged that the Howards:
 - Stored firewood on the disputed land and undertook burning off in two locations;
 - Used the land for a variety of recreational activities such as playing with their family dog, playing various ball games such as cricket, football and golf, kite flying, Easter egg hunts and for social occasions such as picnics or dinners;
- It was alleged that similar uses of the land continued when Jennings took ownership of the land in 2008.
- The land claimed was not enclosed by a fence. Apart from some planting of trees and the installation of a clothes line late in the timeframe, no permanent fixture was installed on the land.

What were the issues in dispute?

- Did Howards and/or Jennings actually possess the land;
- Did Telstra retake possession of the land at any time;
- Did Howard or Jennings make any acknowledgements of Telstra's title;
- Did Howard and/or Jennings have the necessary intention to possess the land;
- Was there a continuous 15 year period;
- Does a title issue free of un-matured or accruing rights of adverse possession under Section 42 (2) (b) of the Transfer of Land Act 1958;

Possession

- Factual possession signifies an appropriate degree of physical control.
- To determine what constitutes a sufficient degree of exclusive physical control depends on the circumstances of each case including the nature of the land and the manner in which it was commonly used
- The alleged adverse possessor must show that they were 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

Possession- Not Sufficient Acts

- Whilst the Court was satisfied that the Howards and the Jennings both made extensive use of the land over many years such use when combined was not sufficient to amount to possession of the land.
- There was not a sufficient degree of exclusive physical control;
- There was no effort to stop Telstra from entering the claimed land;
- There was no attempt to enclose the land or erect signs to keep people off the land;
- The Howards knew that Telstra could sell off the land and use would need to stop if Telstra took control of the land.

No Animus Possidendi

- In order to make a successful claim you need factual possession and the requisite intention to possess (**animus possidendi**).
- It was found the attempts by Howard and the Jennings to purchase part of the land being claimed meant that they each lacked the requisite intention to possess needed.

Acknowledgements of Title

- Howards and Jennings made written offers to Telstra to buy part of the claimed land.
- Some of these offers were in writing and signed by the relevant people making the offer.
- Section 24 and 25 of the Limitation of Actions Act provides that if a written acknowledgement of title is made then any adverse possession prior to that offer is discounted and time can only start afresh from after the offer is made.
- An offer to purchase land on a without prejudice basis in an attempt to settle an adverse possession claim may not be an offer which attracts the operation of the above sections.

Surveys undertaken by paper title owner

- Telstra performed surveys of the boundaries of the property in 1995 and in 1997 and 2008.
- During one survey, the surveyor marked concrete boundary posts and in another placed survey pegs.
- The purposes of the surveys were for Telstra to consider the subdivision of the land and to determine what land to sell and what to retain.

Surveys undertaken by paper title owner

- There is authority to provide:
- The act of a surveyor going on to land, lifting old pegs, marking boundaries and undertaking a survey within a 15 year period is an assertion by the owner of a right to ownership of the land and is, according to the High Court case of *Clement v Jones*, about “as strong a piece of evidence of possession as could be imagined.”

Surveys undertaken by paper title owner

- The Court found that a survey for the purpose of clarifying the title dimensions of properties with a view to sale was sufficient assertion of the Owners right to amount to possession and therefor is a retaking of possession for the purpose of adverse possession.
- Therefore, the actions of a surveyor can stop time running and restart the clock on an adverse possession claim (if within the 15 year period).

What to do if facing an adverse possession claim?

- See if there can be an attack on the evidence. It is important that when faced with claims of adverse possession that the client does their own research as to what has happened in respect to the claimed land to see if evidence can be contradicted. Most evidence is reliant on peoples own recollections and own positive bias towards the applicant.
- Did the owner or previous owner enter the land for any reason? Was there a potential retaking of possession?
- Who maintained fences?

What to do if facing an adverse possession claim?

- If the property has been sold in the last 15 years, check to see if the neighbour ever made an offer to buy the land.
- If it is a lane or road on a subdivision, it might also benefit a lot owner of the subdivision who may be able to make a defence to the claim.
- Check to see if there has been an abandonment or break in possession by the alleged possessor.
- Consider issuing a Notice to Fence to bring the matter to a head.

What if there is possession but not 15 years?

- Consider physical entry upon the land (noting that you need to do something more than just a mere re-entry);
- Consider fencing and changing locks on gates;
- Consider issuing legal proceedings to seek a declaration;
- A mere letter protesting the claim will not suffice as a retaking of possession.

Case Law Update- Olandezos v Bhatha- Supreme Court of Victoria

2017 VSC 234

Case Law Update- Olandezos v Bhatha- Supreme Court of Victoria

Bhatha lodged a caveat over property claiming a freehold estate in that land by adverse possession.

The claimed land was owned by Australian Farms Pty Ltd, a company which was deregistered in 1927. Under the Australian Securities Commission Act all land in deregistered companies vest in the name of ASIC.

The Plaintiff, Olandezos, wanted to purchase the claimed land from ASIC and brought the proceedings. Olandezos also claimed that it might have a right of way over the land.

The land had a fence separating the claimed land and the balance of the deregistered company's land so that the claimed land was enclosed within the Bhatha's land. The claimed land was not fenced on the other ends.

Case Law Update- Olandezos v Bhatha- Supreme Court of Victoria

There were two main questions dealt with:

- Was there a potential adverse possession claim so as to allow the caveat to stay; and
- Did the vesting of the land in ASIC mean that Section 7 of the Limitation of Actions Act was invoked and therefore a claim against the Crown was prohibited.

Case Law Update- Olandezos v Bhatha- Supreme Court of Victoria

The Court found that there was an arguable claim for adverse possession and that the caveat should remain for 30 days pending Bhatha issuing proceedings in Court seeking orders that they have acquired the land by adverse possession.

In respect to the Section 7 Crown argument, the Court found as a preliminary but not binding view on the case that the capacity in which ASIC holds land is limited as that ASIC only takes the same property rights that the company itself held. The company did not hold as one of its property rights the crown's immunity from adverse possession under Section 7. In addition, ASIC does not have the benefit of any exemptions that ASIC or the commonwealth may be entitled to have.

Case Law Update- Olandezos v Bhatha- Supreme Court of Victoria

Therefore it is likely that a Court would not prevent an adverse possession claim against land owned by a deregistered company which is consistent with how Land Victoria currently deals with applications for adverse possession when the company is deregistered.

So how do you make a successful claim?

Clients seeking to claim adverse possession should:

- Ensure they get clear evidence of possession from a variety of sources
- See if aerial photographs can assist;
- Talk to previous owners and get neighbours to verify the possession being claimed;
- Search for previous survey records;
- Try and locate historical photos which might have the claimed land in them or which can show use of the claimed land;

So how do you make a successful claim?

Clients seeking to claim adverse possession should:

- Be careful if relying on possession of a previous owner to ensure that the evidence stands up to scrutiny;
- Obtain a Deed of Assignment of Possessory Rights even if there is a sliver;
- Obtain more than just one disinterested witness statutory declaration.

Lessons for surveyors

- Just because someone makes a claim for adverse possession does not mean that a claim will be successful;
- Check whether previous surveys have been undertaken;
- Make sure that you survey all parts of the land and if you don't that you notify the client of the risk of not doing so;

Lessons for surveyors

- Be careful when making statements in your report. Only make a statement if you are aware with first hand knowledge or confirm the statement with a qualification;
- Check if a lane or a road;
- If undertaking a survey for planning purposes note any title/occupation discrepancies to the client to investigate further and to obtain advice.

Lessons for surveyors

- If you put in place survey pegs or mark boundaries take photographic evidence.
- Keep notes of what you did and make sure that you walk the boundary of the site and enter upon each part of the land you need to survey.
- Consider dealing with all boundary issues at once.
- Consider the value of the claimed land and the potential for dispute.

Adverse Possession- Land Use Victoria updates

- Processing times are now at 9 months from date of lodgement to review
- All applications going via Land Use Victoria Legal then to Application and Survey branch
- Any issues with application then Applicant has 30 days to rectify, otherwise application refused and fees forfeited.
- Extension sometimes possible but Registrar being tough on extensions to deal with any deficiencies.
- Stamp duty payable if application successful (depending on circumstances).

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Some services we provide surveyors and their clients in the property area are:

Adverse possession claims

Dealing with Councils in Road Discontinuances

Easements and their removal

Restrictive covenants

Developments and registration of subdivisions

Compulsory acquisitions

Owners Corporation structuring

Greenfield land subdivisions

Development structuring and joint ventures

Conveyancing- one offs, off the plans

Development master contracts

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Questions?

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