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Adverse Possession and local government

By Leah Christie

Adverse possession, or "squatter's rights" as it is commonly referred to, is an issue that is of interest to many property owners who are both outraged and perplexed at the idea that a 'trespasser' could legally acquire title to land for nothing.

Whilst the principles of adverse possession may appear, on some level, to reward wrongdoing, the Courts have noted that there is a public interest in ensuring that a person in long-term and undisputed possession is able to deal with the land as owner. The law has long since accepted that it is "more important that an established and peaceable possession should be protected than to assist the agitation of old claims": ***Abbatangelo v Whittlesea City Council* [2007] VSC 529; (2008) V Conv R 54-750 at [3]** per Pagone J.

Unlike the Crown, local governments are not protected against claims for adverse possession as there is no statutory provision which excludes the operation of adverse possession principles against local governments in Western Australia.

What is adverse possession?

A claim in adverse possession arises where a person is in possession of land contrary to the interests of the rightful owner, and the statute of limitations runs in that person's favour.

In Western Australia, the *Limitations Act 2005* operates to extinguish the title of a person, who within 12 years of becoming entitled to bring an action, does not bring an action to recover possession from a person in adverse possession.

If the rightful owner does not intervene within the 12 year period, the person in adverse possession may obtain a good title against the entire world, including the rightful owner.

What is required to establish adverse possession?

For a person to claim title by adverse possession the relevant limitation period must have expired and the common law requirements of adverse possession must be satisfied. In assessing the common law requirements there are no formulated rules or definitions that can be applied; each case will be decided on its own facts.

A claim of adverse possession requires evidence of continuous possession of land in a manner that is 'open, not secret, peaceful, not by force, and adverse, not by consent of the owner': ***Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464** at 475 per Bowen CJ. Continuous possession of the land may be evidenced by acts such as fencing the land and the payment of rates.

For a possessor to succeed in a claim for adverse possession it must show, that for at least 12 years it had "both factual

possession, to the exclusion of others, and the requisite intention to possess the claimed land to the exclusion of others": ***Monash City Council v Melville* [2000] VSC 55**.

There are 2 facts which a possessor must establish for a claim to succeed:

- first, is continuous possession of the land for the requisite period; that is, the possessor must show continuous exclusive physical control of the land with the rightful owner being out of possession for at least 12 years; and
- second, an intention, held simultaneously with possession, to exclude the world at large (including the rightful owner), by exercising exclusive control and with such intention being made clear to the world. It is essential that the intention be one to exclude others, the possessor must show that the possession was held with an intention to assert the fundamental rights of ownership namely, possession and exclusion: ***Laurice Abbatangelo v Whittlesea City Council* [2007] VSC 529**.

No exceptions for local government

In Western Australia, s. 76 of the *Limitation Act 2005* prevents any person from acquiring Crown land by adverse possession. This exception will apply to Crown land vested in a local government, however there is no corresponding provision excluding the operation of adverse possession principles against land owned by a local government in fee simple. Meaning, land owned by a local government in fee simple could be the subject of a claim for adverse possession.

Adverse possession in the spotlight

The doctrine of adverse possession gained significant media attention in late 2018, when the New South Wales Supreme Court handed down its decision in ***McFarland v Gertos* [2018] NSWSC 1629**. The proceedings in that case related to a property at 6 Malleny Street, Ashbury, a suburb located approximately 10 kilometres south west of the Sydney CBD. The previous owner of the property, Mr Henry Thompson Downie, died in 1947 without any evidence of leaving a will. At the time Mr Downie died, the property was subject to a tenancy in favour of Mrs Grimes, who remained in the property until her death in 1998.

After the death of Mrs Grimes, Mr Gertos noticed that the property appeared vacant. His curiosity sparked, Mr Gertos investigated and concluded that the property was unoccupied and inhabitable. Mr Gertos took possession of the property, with a view that if he possessed it for long enough he may be able to become its owner. He hired a builder to secure the property and make it habitable, changed the locks and hired a managing agent to let out the property.

The property was then let out on a continual basis with Mr Gertos receiving rent from a series of tenants over the years. During that time, Mr Gertos also paid outgoings, including Council rates, water levies and charges and land tax and incurred significant expenditure when repair works were carried out at the property in late 2014 and early 2015.

Some 19 years after taking possession of the property, Mr Gertos sought to be registered as the owner of the property under the law of adverse possession. The gamble ultimately paid off for Mr Gertos, as the Court found that he had continual possession of the property well beyond the limitations period and his application was successful in becoming the registered owner of the property. The Court was satisfied that since 1998 Mr Gertos:

- had been in factual possession of the property with the intention of possessing of the property;
- succeeded in taking and maintaining physical custody of the property, to the exclusion of all others;
- assumed the position of a landlord; and
- made full use of the land in a way an owner would.

The Court held that Mr Gertos' possession of the property since 1998 was regarded as open, not secret; peaceful, not by force; and adverse, not by consent of the true owner and continued without interruption until the present day (per Darke J at 70).

In his findings, Justice Darke highlighted the actions taken by Mr Gertos that clearly signified an intention to take possession of the property with the intention of possessing the property to the exclusion of all others (including the registered title holder), in particular:

- the engagement of a managing agent to arrange leases of the property, and entry into leases as the landlord;
- the payment of all rates and taxes levied upon the property; and
- carrying out extensive repairs to the property.

Conclusion

It is important to note that it is rare for a whole house to be acquired by a possessor under the law of adverse possession like in the case of *McFarland v Gertos*. Claims for adverse possession most commonly arise in the context of boundary disputes and encroachments.

Local governments should be aware that they are not immune to claims for adverse possession as there is nothing to exclude the operation of adverse possession principles against local governments in Western Australia.

Local governments should take particular care to ensure that if there is any unauthorised use or encroachment on any part of its land, it takes prompt action to assert ownership to the land, either by taking court proceedings for possession, evicting the possessor or providing its consent to such use, to ensure that its title is not extinguished.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Leah Christie by email to lchristie@mcleods.com.au.