
Conveyancing and property

Editor: Peter Butt

WHEN IS POSSESSION “ADVERSE”?

The decision in *Roy v Lagona* [2010] VSC 250 (Hansen J) raised several issues about possessory title, or title by “adverse possession” as it is also called. The property in dispute was a residential property in suburban Melbourne. The defendant had lived at a house for a number of years but was not the legal owner. Could she resist the plaintiffs’ demand for possession?

The plaintiffs were two of six grandchildren of the former legal owner of the property. The former legal owner had died intestate. His widow, Eileen, continued to occupy the property till her death in 1983, but the property was never registered in her name. When the widow Eileen died, her foster daughter Gloria, who grew up as if she were Eileen’s daughter but who had never been adopted, continued to occupy the property until her death in 1992. Thereafter a boarder who had lived with Eileen remained at the property for a short time, before squatters and then the defendant moved in and occupied the property. The plaintiffs obtained letters of administration of the estate, and became the legal owners in 2005. At that time the defendant was in possession of the property. The plaintiffs commenced proceedings to obtain possession in 2006.

There were two main issues for the court to decide. The first was whether, after Eileen died in 1983, foster daughter Gloria’s possession of the property after that time was adverse to the plaintiffs. The plaintiffs argued that her possession was not adverse – and if that was correct, then the defendant’s claim for adverse possession could not succeed.

Section 8 of the *Limitation of Actions Act 1958* (Vic) places a 15-year limitation period on claims to recover land. Specifically, it provides that no action may 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. Foster daughter Gloria had possession from 1983 until her death in 1992, and the proceedings were commenced 14 years later in 2006. Accordingly, if Gloria’s occupation was *not* adverse to the plaintiffs then the defendant could not rely on s 8 to extinguish the plaintiffs’ right of possession, because the requisite 15 years had not passed by the commencement of the action in 2006. The defendant’s adverse possession claim would fail.

In order to make out the point that Gloria’s occupation was not adverse, the plaintiffs argued that, given the close “family” relationship between Gloria and her foster mother Eileen, Gloria’s occupation of the property must have been more than pursuant simply to a bare licence. They argued that Gloria must have had the right to stay in the house for as long as she wanted, and that the law recognised circumstances within family arrangements where the court is not prepared to hold a person to be a trespasser. The plaintiffs relied on *Morris v Tarrant* [1971] 2 QB 143 in this regard.

However, Hansen J was not prepared to accept this submission. His Honour distinguished *Morris v Tarrant* on the facts (*Morris v Tarrant* involved a wife continuing in occupation after separating from her husband) and found that in the circumstances Gloria had no legal right, nor any right enforceable in equity, to continue to occupy the premises on the death of widow Eileen. Accordingly, Gloria’s occupation was adverse to the plaintiffs, and the nine years between 1983 and 1992 could be counted as being a period of occupation adverse to the plaintiffs.

Give the plaintiffs failed on this ground, their second ground of attack against the defendant’s claim for adverse possession was to rely on the operation of ss 14(1) and 14(2) of the *Limitation of Actions Act*. These sections provide, in effect, that time for the right of action for adverse possession does not continue to accrue unless there is *continuity* of adverse possession. That is, if person A is in adverse possession for five years, and then he or she abandons the property and it remains vacant for a period where no one is in possession, then “the true owner’s title ... is then restored to pristine force” (*Roy v Lagona* at [33], citing *Mulcahy v Curamore Pty Ltd* [1974] 2 NSWLR 464 at 476-477). In other words, in such a case the subsequent adverse possessor does not get the benefit of the first five years of adverse possession.

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Hanson J relied on the Court of Appeal's decision in *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56; [2009] VSCA 188, which approved of the principles summarised by Slade J in *Powell v McFarlane* (1997) 38 P&C R 452 at 470-472, in relation to the test to apply in determining whether a person has possession of property. The court relied (*Roy v Lagona* at [40]) on the following propositions:

[B]roadly, I think that 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 courts will ... 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.

The plaintiffs argued, in essence, that after 1992 there was a period of about a year (1993) where the premises were unoccupied, and that it was not until 1994 that squatters moved in, followed by the defendant in 1998. The defendant, on the other hand, argued that the boarder had continued in occupation during 1993 till the squatters moved in in 1994.

The court considered the evidence on this point and found as a fact that no one had been in possession of the property during 1993. Evidence was led and the court accepted that the boarder moved out in November 1992 (about a month after Eileen died) and did not possess the house thereafter, even if he did come to the house from time to time. On this basis, given that squatters took possession in 1994, followed by the defendant in 1998, in 2006 at the commencement of the action only 12 years, and not 15 years, of adverse possession had accrued. Accordingly, the defendant's claim for adverse possession failed and the plaintiffs obtained an order for possession of the property from the defendant.

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