IS POSSESSION NINE TENTHS OF THE LAW? EASEMENT BY PRESCRIPTION; ADVERSE POSSESSION and COMPULSORY ACQUISITION

This theme has emerged from recent Supreme Court, Court of Appeal (VSCA) decisions. Just because you are the registered proprietor of land, doesn't mean that you are immune from part of it being "possessed" by another to your exclusion. In the case of easements and adverse possession, if you are aware that an adjoining owner has encroached onto your land and you do nothing about it, beware (see the Whittlesea City Council decision below). Compulsory acquisition of land for a public purpose by an Authority can also lead to dispossession, without a right to be heard.

EASEMENT BY PRESCRIPTION/DOCTRINE OF LOST MODERN GRANT:

Laming v Jennings [2018] VSCA 335: Jennings had claimed adverse possession over adjoining land (the disputed land) owned by Laming at Ferny Creek. If that claim was unsuccessful, then Jennings sought an easement over the disputed land. The matter was heard at first instance by the Victorian County Court[i] (VCC) which found that the claim for adverse possession was not made out. However, the Judge upheld a claim for an easement for recreation over the disputed land.

Laming appealed to the VSCA against the VCC decision to grant an easement over the disputed land. The legal fiction on which the principle of lost modern grant depends is that the paper owner (the title holder) has conferred a right by way of a grant of that right, but that the grant is lost.

The VSCA[ii] found that: "Essentially, an easement arising by a presumption of lost modern grant will be found where there is an open and uninterrupted enjoyment of land for at least 20 years that is not explained by an express grant of an easement or permission to use the land".

Back to basics

The requirements for a valid easement as set out in the VCC decision[iii] are:

a. There must be a dominant and servient tenement
b. The easement must accommodate the dominant tenement
c. The owners of the dominant and servient tenements must be different from each other; and
d. The right or claim must be capable of being the subject matter of a grant

and the matters necessary to create an easement by prescription were identified[iv]

- The doing of an act by a person(s) upon the land of another
- The absence of right to do that act in the person doing it
- The **knowledge** of the person affected by it that the act is done
- The power of the person affected by the act to prevent it; and
- That person's failure to do so.

The VSCA observed that in the case of both adverse possession and an easement by prescription, although the common law recognises long-established de facto enjoyment of property, it was as much the lapse of time which barred an owner from asserting ownership; or alternatively giving rise to a presumption that the owner had done something which conferred title in the person in de facto possession. [v]

Knowledge of the owner of the disputed land

The knowledge or lack thereof of the owner of the land the subject of a claim is a matter which must be given considerable weight in the decision making process. This could take the form of both actual knowledge and, in certain circumstances, some forms of constructive knowledge.

Actual knowledge may include the knowledge of agents of the principal. Constructive knowledge on the other hand is more difficult to establish and requires knowledge that a reasonably diligent owner would have obtained exercising reasonable care in protecting its own rights and interests. The acts of the claimant, and the response of the owner must both be considered. The assertion of a right must be evident; and it must not be by way of violence, stealth or by request.[vi]

It was found that Jennings was never in 'possession' of the disputed land; and had offered to buy the disputed land which of itself constituted acknowledgement that another person owned the land (it follows that Jennings occupation of it was not therefore "adverse" to that ownership).

Insofar as an "easement for recreation" over the subject land was concerned, such an easement had been found in Jennings favour by the VSC. The VSCA held however that, although such an easement is a recognised and permissible form of easement, the contexts in which easements for recreation had been upheld previously were very different to that in the present case. Easements in other cases were created over land which had a common or communal character. The disputed land in the case of Jennings could not be said to have been used in a communal manner; or dedicated for the purposes of communal recreation. [vii] In addition Jennings relied on evidence that Telstra (a prior owner of the disputed land) had knowledge of the use of the land by him and his predecessors. That evidence was not accepted. The decision of the VSC was therefore overturned.

ADVERSE POSSESSION:

Whittlesea City Council v Laurice Abbatangelo [2009] VSCA 188: Note that in this case, Council owned land was the subject of a claim in adverse possession. The Limitation of Actions Act (LAA Act) excludes claims against Water Authorities, Victorian Rail Track, PTC and common property in addition to Council land registered under the Transfer of Land Act.[viii]).

Section 8 of the Act is familiar to most people, and provides that:

> "No action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

In this case a claim for adverse possession was made with respect to Council owned vacant General Law land (the disputed land), a claim which is not excluded by the LAA Act. The Supreme Court [ix] at first instance had found that the Abbatangelos had acquired title to the land by adverse possession. The Whittlesea City Council appealed this decision. The decision was upheld by the VSCA. An abridged version of the basic principles applicable to adverse possession claims as set out by the VSCA ([9]) is:

- the owner of land with the paper title is deemed to be in possession of the land unless there is evidence to the contrary;

- A person claiming possession of land must have factual possession and an intention to possess (an intention to exercise exclusive control; enclosure of the land is the most cogent evidence of adverse possession;
- Factual possession may be evidenced by the possessor dealing with the land in question as though it were his own
- The intention to possess to the exclusion of others must be made clear to the world;
- Periods of possession may be aggregated, so long as there is no gap in possession;
- Acts of possession with respect to only part of land claimed by way of adverse possession may in all the circumstances constitute acts of possession with respect to all the land claimed;

The VSCA set out additional principles that were relevant to this case. It is clear that each case very much depends on its own facts and circumstances; and that a person seeking to establish the requisite possession must provide a thorough record of the elements on which they rely.

> "In considering whether the putative adverse possessor has factual possession, a court has regard to all the facts and circumstances of the case, including the nature, position and characteristics of the land… Each case must be decided on its own particular facts….. previous cases... should be treated with caution in terms of seeking factual analogies by reference to particular feature of a person's dealings with land. Acts that evidence factual possession in one case may be wholly inadequate to prove it in another. "[x]

With regard to an intention to possess land, it is helpful to consider the VSCA's findings[xi] that the use of the disputed land must amount to more than casual acts of trespass (for example occasional grazing of cattle, occasional sporting activities, and the like). But in the case of the Abbatangelos', they had used the land over a considerable amount of time for a variety of uses which together amounted to more than mere use, or mere casual acts of trespass. Those acts constituted the taking of exclusive possession and manifested an intention to do so.

This decision is essential reading if you have an adverse possession claim you need to consider.

COMPULSORY ACQUISITION:

Melbourne Water Corporation, & Yarra Valley Water Corporation v Caligiuri **[**2020] VSCA 16 Compulsory acquisition – the acquisition of land for a public purpose subject to payment of compensation – will divest a land owner of his or her land. The Caligiuri decision is a departure from the usual contest over the amount of compensation that should be paid. Novel arguments were raised with respect to the acquisition process and procedural fairness.

It is important to bear in mind in this case that the subject land had not been reserved for a public purpose. The Governor in Council had certified that reservation was 'unnecessary, undesirable or contrary to the public interest' as provided for by s 5 (3) of the Land Acquisition and Compensation Act 1986 (LAC Act). This reservation excluded Caligiuri from being heard prior to the acquisition being effected. The Victorian Supreme Court [xii] (VSC) considered whether this amounted to a failure to accord procedural fairness.

The VSC had held that a precondition of an order to effect a transfer of land pursuant to s. 19 (service of a Notice of Acquisition of the land - NOA) of the LAC Act was that the land owners should be afforded an opportunity to be heard. If that proposition was correct, it could have had far reaching consequences for all future acquisitions under the LAC Act. (The steps taken under ss 5 and 6 were not expressed to be conditional on such a right).[xiii]

Interestingly, the parties subsequently came to an agreement to overturn that decision and jointly asked the Court of Appeal to determine that the VSC was wrong; and that there was no right to be heard by the owner of the acquired land. The VSCA considered the process involved in a compulsory acquisition under the LAC Act commencing at s. 5 including requiring the reservation of the land for a public purpose by way of a planning scheme amendment. This process (under the Planning and Environment Act) raises a number of opportunities for people to make submissions, that is, be heard, about the proposed amendment. However, s. 5(3) enables a certification by the Governor in Council that reservation of the land for a public purpose is **not** required, which of itself removes any right to be heard.

The VSCA acknowledged that there was a right to be heard at the outset if the land was reserved for a public purpose by way of a planning scheme amendment (s.5(1) LAC Act). The VSCA observed[xiv] that:

> "The reservation of land for a public purpose creates what is referred to as 'planning blight'. It inhibits the use and development of the land. In recognition of this, Part 5 of the Planning and Environment Act provides for compensation to be paid where the owner or occupier of land suffers loss as a result of the land being reserved for a public purpose……The service of a notice of intention to acquire also has dramatic consequences for a land owner … "

Notwithstanding that a person whose land has been "certified" under s. 5(3) LAC Act has no right to be heard, the VSCA determined that s. 19 did not open the door to that opportunity. S. 19 it was said is "a machinery provision. It contains the mechanism to effect the transfer of the land to the Authority … it does not impliedly re-open the question as to whether the acquisition should take place …".[xv]

Adopting the wisdom of the High Court of Australia in Annetts v McCann[xvi] that

> "… when a statute confers power upon a public official to destroy, defeat or prejudice a person's right, interests or legitimate expectation, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment"

and Kioa v West[xvii]

> "To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require".

and upon careful consideration of s. 8 (containing provisions with respect to the form and content of a NOITA), the VSCA found that s. 8 was designed to elicit information relevant to the assessment of compensation prior to the publication of the NOA, and did not invite comment about whether the land should in fact be compulsorily acquired. That decision had already been made and the NOITA was the public expression of that intention.

The VSCA did not support the conclusion of the VSC. The VSCA found instead that the VSC had read into s. 8(1) words that were not there. That is, if the legislation had intended a right to be heard, then s. 8(1) would be expected to require the NOITA to inform the recipient of the right to make submissions and adduce evidence as to whether the acquisition should proceed. It did not do so.

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[i] Laming v Jennings [2017] VCC 1223
[ii] [81]
[iii] [37]
[iv] [41] Sunshine Retail Investments Pty Ltd v Wulff: [1999] VSC 415
[v] R v Oxfordshire County Council; Ex parte Sunningwell Parish Council[2000] 1 AC 335, 349
[vi] 83
[vii] [145]
[viii]Sections 7 – 7C Limitation of Actions Act 1958 – "LAA"
[ix] [2007] VSC 529
[x] S. 6(c)
[xi] [98]
[xii] Caligiuri & Anor v Attorney General on behalf of the State of Victoria & Ors (No. 2) [2019] VSC 365
[xiii] S.5 – Reservation or certification of the land required before acquisition; s. 6 – Service of a notice of intention to acquire the land
[xiv] [65]
[xv] [66]
[xvi] (1970) 170 CLR 596
[xvii] (1985) 159 CLR 550