Possessory Title in the Context of Aboriginal Claimants

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To the present day, no court in Australia has decided a case of possessory title being claimed by Aboriginal claimants. In the landmark case of *Mabo v Queensland*[1], which awarded a group of indigenous people land rights to a small group of islands based on "native title", the only judge to even consider the issue of possessory title was Justice Toohey. However, as the following discussion will show, this lack of judicial consideration does not mean that possessory title may not be a useful and perhaps even favourable course of action for a group of Aboriginal claimants to follow. Possessory title is an old Common Law doctrine which states that the possession of land gives rights to a title which is good against the rest of the world except for a person with a better claim. The occupier of the land is feudally possessed or seised of the land and acquires a fee simple title. The common law presumes this interest in the land, and it will be effective against the world until it is rebutted by someone contending that they have better title. In light of this definition it can be seen that possessory title is based on two main elements. Firstly, the claimant must show that they have possession of the land in question. Secondly, there must not be a party present who can prove they have an existing and better title to the land.

1. What amounts to "possession"?

This is the most difficult aspect of possessory title and has been a source of much debate amongst commentators and in the courts themselves. There have been many attempts by writers, present and past, to identify an accurate definition of "possession" as a fundamental concept of the common law. One such writer, Tay,

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1 [1992] 175 CLR 1.

advocated that possession is the "present control of a thing, on one's own behalf and to the exclusion of all others."[2] In other words, she bases the concept of possession on "control". A relevant implication of such a definition is that just as control can be exercised from a distance — it is possible that possession may be exercised whilst not physically present. She considered the ideas of Rudolph von Ihering, who distinguished ownership from possession, stating that possession is the objective realisation of ownership[3]. By this he meant that possession is the factual evidence which indicates ownership. This may provide some guidance to the meaning of possession in a classical sense, but one must consider how this definition has been incorporated to identify "possession" as it relates to establishing title to land.

Reynolds[4] considered the concept of possession in this context and outlined the traditional view of possession as involving some kind of enclosure of the land or tilling of the soil. However, he went on to argue that such a view is not valid in light of circumstances in England where landowners could do what they liked with their land — "neglect did not open the way to forfeiture to the Crown"[5]. The concept was considered at length by McNeil[6] who outlined several types of common law conduct which are required to prove possession.

McNeil began by stating that the acts and related intention only needed to relate to the occupation. There was no requirement that the claimant have an intention to acquire a title in the land as the common law automatically gives the occupier title to the land as a result of the possession. This principle has the effect of conferring title on possessors who not only do not intend, but also do not even want to take title. Before specifying several individual acts which prove occupation, McNeil advocated the general principle which the courts consider in determining possession as "requiring acts on or in relation to the land that indicate an intention to hold or use it for one's own purposes"[7]. The acts referred to included those mentioned by Reynolds above and other less obvious acts such as cutting trees or grass; fishing in tracts of water; and perambulation.

Having referred to these specific acts, McNeil emphasised the point made by Lord O'Hagan in *Lord Advocate v Lord Lovat*[8] stating that the nature of the acts depends on the particular circumstances of the case. To illustrate this point the case of *Red House Farms Ltd*[9] was examined. In that situation neglected waste land was held to have been in occupation by the act of shooting over it, whereas if

2 AES Tay 'Possession in the Common Law: Foundations for a New Approach' (1964) 4 Melbourne University Law Review 476 at 490.
3 R von Ihering 'Ueber den Grund des Besitzschutzes' 179.
4 M Reynolds *The Law of the Land* (1992) at 19–29.
5 *Ibid* at 20.
6 McNeil *Common Law Aboriginal Title* (1989).
7 *Ibid* at 199.
8 (1880) 5 App. Cas. 273 at 288.
9 (1976) 244 EG 295.

the circumstances had have been different it is unlikely that such an act would have been considered evidence of possession.

a) Could Aboriginal Claimants Successfully Prove Possession?

At the outset it should be noted that the fact that the claim is being made by a *group* of Aboriginals is of little consequence. According to Aboriginal custom, no one person owns the land — they advocate that they are part of the land. The common law obviously requires that one person be the title-holder of the land. A simple solution to this inconsistency is suggested by McNeil[10] who stated that the groups should form unincorporated associations, and this is usually the procedure followed by Aboriginal claimants.

McNeil discussed whether a group of Aboriginals would be able to show possession by applying the criteria outlined above. Firstly he considered the case of a settled group of Aboriginals, who use a specific area of land not only for hunting and gathering food but also for dwelling purposes. In such a case he concluded that occupation was easily established as their acts clearly indicated an intention to use the land for their own purposes. Secondly he considered the case of a nomadic group which exclusively ranged over a certain area of land and used natural resources for their own benefit. Here, he once again concluded that such acts would be enough to evidence possession, especially in cases where others using the land would ask for permission to do so — indicating that the group exercised exclusive control.

McNeil's views were considered and applied by Justice Toohey in the decision of *Mabo*[11], the only judge to have considered a claim of possessory title by Aborigines in that judgement. In considering the criteria expounded by McNeil, Toohey J. concluded that the Meriam people would easily have established possession of the land in question. However, this was a very exceptional case, the Meriam people being on a very small island over which they had almost exclusive occupation since settlement of Australia by England. If a group of mainland Aboriginals were to bring a claim in possessory title they would need to establish the McNeil occupation criteria. The success or otherwise of proving this occupation would obviously depend on the facts of the particular case. A typical problem which could hamper the claim of many Aboriginal groups is that of loss of possession — an issue considered by Toohey J.

His Honour considered the issue in the context of the old Common Law action of "Ejectment", and concluded that whilst some commentators[12] would suggest that possession does not of itself give rise to a title which survives dispossession, the case authorities now indicate that the contrary is so. The result of this

10 *Supra* n.6 at 213.
11 *Supra* n.1.
12 Holdsworth, see [1992] 175 CLR 1 at 210.

conclusion is that an Aboriginal claimant would not be prevented from establishing possession of land merely because they have lost possession to another, so long as that intervening possessor does not have better title to the land. The issue of what constitutes better title to the land will be examined in detail later.

It follows then that, provided the Aboriginal group is able to prove on the facts that they satisfy the McNeil criteria for possession, they may successfully mount a possessory title claim and acquire a fee simple title to the land in question according to both McNeil and the subsequent judicial consideration by Justice Toohey. It should be noted though that the discussion by His Honour was by his own words not conclusive, as he had already made his decision on grounds of Native Title. Therefore, the courts are yet to consider the issue of possessory title in this context and whether it will be a useful action distinct from native title. However, there is some commentary which suggests that the above conclusions are correct. Pamela O'Conner[13] argued in her analysis of the *Mabo* decision that if Aboriginals could establish that they had possession of the land in question at the time of annexation, then they would have title better than anyone else — thus concurring with Toohey J's statements.

2. Could any Party Claim to have Better Title?

The first major issue when considering this element is whether the Crown acquired better title to the land on settlement of Australia. This was considered by McNeil who advocated that whilst the Crown in England was deemed to be the original owner of all lands, this was only a legal fiction which made up the "Doctrine of Tenure", conferring merely a right to the land as a feudal Lord. He concluded that " should the Crown wish to claim a right to the land itself, it must prove its present title just like anyone else"[14] with the result that upon settlement: title to all *vacant* land vested in the Crown by reason of occupation of the territory; title of lands occupied by Aboriginals vested in them; and, the "Doctrine of Tenure" gave the Crown paramount Lordship — making the Aboriginals tenants in fee simple of the Crown. Justice Toohey in *Mabo* discussed this issue and cited the findings of McNeil extensively, agreeing with them and further stating that the "Crown did not acquire a proprietary title or freehold possession to occupied land but rather it acquired a radical title only"[15]. As mentioned above, this view is not conclusive, but once again it has received support by commentators. O'Conner agreed on this point and stated that "whist the Crown acquired a radical title in all land, this bare radical title did not confer a better right to possession"[16].

13 P O'Conner 'Aboriginal Land Rights at Common Law: Mabo v Queensland' (1992) 18 Monash University Law Review at 264.
14 *Supra* n.6 at 218.
15 *Supra* n.1 at 211.
16 *Supra* n.13.

Another major issue to be considered here is whether people that presently have a free-hold title to the land will be deemed to have better title. As discussed above, loss of possession does not necessarily mean loss of title unless the person presently in possession has better title to the land than the claimants. Toohey J. does not deal with this issue of free-hold title — however, he does state two general situations in which better title will be acquired; namely, where another has an older claim to possession, or where another has shown adverse possession against the claimants for the duration of a limitation period. Obviously, no person in Australia could claim to have an older claim to possession than a group of Aboriginals — not even the Crown in light of the aforementioned. It may be, though, that holders of freehold title may be able to claim adverse title to the land, the elements of which include: possession of the land, adverse to the rights of the title-holder — that is the Aboriginal group holding fee-simple title; for a period of twelve years after the date of dispossessing[17]. Of course this will depend on the facts of the particular case, but there is little doubt that any claim to free-hold land would easily be defended by claiming adverse possession.

A related issue here is whether lease-holders of land could similarly defend their title. Once again this issue has not been directly considered, however, a brief examination of the formation of a lease may result in an indication of how the courts may decide. It can be seen that pastoral and mining leases are leased out by the Crown. Whilst it has been established that land held in fee simple by Aboriginals can not be argued to be possessed by the Crown by way of its radical title, the very act of leasing the land may indicate possession. The granting of a lease to a third party manifests an intention to control the land in a way which complies with the elements of possession as stated by McNeil. It follows from this that the Crown could easily establish adverse possession of the land, according to the elements stated above and thus defend a claim of possessory title to any leasehold land. The fact that such land is in the physical possession of the leaseholder is of no consequence as at all times the Crown is exercising control over the land by way of the lease agreement and at the time of expiry of the lease the Crown takes back physical possession of the land. Therefore, arguably, an Aboriginal claimant may not be able to successfully claim leasehold land by way of possessory title.

3. Can Possessory Title be Distinguished from Native Title?

As stated above, possessory title has not been considered judicially as a distinct action from native title either in *Mabo* or in any subsequent cases dealing with the issue of aboriginal land rights. In a recent case, Justice Drummond, whilst not considering possessory title in detail, advocated that possessory title would be

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17 Section 13 *Limitation of Actions Act 1901* (Cth).

proved on substantially the same facts as native title and could possibly be determined as part of the Native Title Act proceedings[18]. This suggests that possessory title does not provide a distinct course of action entailing different elements and consequences from that of native title. However, there has been commentary which suggests a contrary view. O'Conner, in her examination of the *Mabo* decision, concluded that possessory title has been wrongly dismissed as being a mere alternative method of obtaining the same position acquired under native title proceedings. She further stated that possessory title can be distinguished from native title in several ways. Firstly, possessory title does not depend on the existence of traditional aboriginal laws and customs, but rather it comes into existence upon reception of English Common Law into a colony. Secondly, possessory title results in a fee simple, which is a better title than native title as it is not subject to extinguishment and will not be lost as a result of alienation. Finally, native title requires it to be shown that the claimants are descended from the original group which occupied the land at annexation, whilst possessory title does not[19]. For these reasons it may be that an Aboriginal claimant may be advised to choose possessory title as a course of action in preference to native title.

4. Conclusion

The concept of possessory title states that a person in occupation of land is presumed to have possession with the result that they obtain a fee simple interest in the land. This proposes two elements which must be satisfied in order for a claimant to be successful. Firstly, the claimant must be in possession of the land. Secondly, there must not be another party present holding better title to the land. The potential for a successful claim by Aboriginal claimants for possessory title to land will depend on the facts of each particular case, but there is no reason why such a claim would be unsuccessful by its very nature. The main problems which may be faced by such a claimant would be where they have lost possession of the land in the past and the dispossessor has a free-hold or lease-hold title to the land. In both of these cases it is likely that the defendant could raise a successful defence to the claim on grounds of having better title to the land as a result of the concept of adverse possession. However, if circumstances such as these can be avoided, an Aboriginal claimant may find that possessory title is not only less difficult to establish than native title, but also, the consequences of a successful possessory title claim are more favourable than those resulting from a native title claim.

18 G Nettheim 'The Wik Peoples v Queensland and Others' (1994) 3 *Aboriginal Law Bulletin* 17.
19 *Supra* n.13.

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