

Trespassers and Squatters Rights

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What is Trespass?

If you are the owner or lawful tenant of land, you are entitled to occupation of the land. If without your permission, someone else comes onto the land they have committed a wrong against you.

Such a wrongful entry onto land is called trespass. The entry may be by driving a car over the land or by walking across it. It may be by allowing animals or even vegetation onto another's land.

What can I do about trespass?

A trespass is a wrong against the citizen and the State.

An owner or occupier may require a suspected trespasser to give his name and address.

If the trespass is onto buildings there may be a crime such as burglary or breaking and entering. There are separate offences of defacing a wall or damage to property. Even if only land is crossed, there may be an offence under the Police Offences Act. The Police may take court action if appropriate. The police can arrest and thus forcibly remove a trespasser but must give the trespasser the chance to leave voluntarily. The Police are usually reluctant to be drawn into disputes between neighbours if the facts are unclear.

The victim of a trespass can take direct action himself through the courts to prevent further trespass in the future. Sometimes a restraint order through the Magistrates Court is appropriate. The restraint order will order the offender not to cause further breaches of the peace. It may contain specifics about not approaching the victim or coming within a defined area of the victim or the victim's land. With such an order in place, any breach allows the Police to intervene immediately and constitutes a serious offence. If there is a significant issue requiring determination of land rights, the Magistrates Court may not be able to resolve it and may need to be dealt with through the Civil Courts.

If the trespasser has caused any damage, the victim may claim the loss from the trespasser. If the trespasser refuses to pay the victim can pursue court action to order the trespasser to pay the damages.

Can I evict a trespasser myself?

If the trespass is by vegetation you are entitled to trim back the vegetation so that it does not cross your boundaries and kept off your property. If there is a significant cost in you doing so, you may be entitled to recover that from your neighbour.

If animals trespass onto your property you have the right to have them removed and impounded by Council.

There are limited rights to destroy dogs trespassing on land, particularly where they

are attacking stock. Great care needs to be taken before exercising any of these rights because if the necessary factual preconditions don't exist, the exercise of right becomes wrongful and the victim becomes the wrong doer.

If someone wrongfully comes on your land, you are entitled to use reasonable force from prevent them from entering and to evict them if they have entered. It can be difficult to know what is wrong in the circumstances. Great care needs to be used before evicting or resisting a trespasser by force.

If excessive force is used to evict the trespasser it is the land owner or occupier that becomes the wrong doer. A land owner using excessive force could themselves be responsible for criminal or civil penalty.

Usually for this reason, it is better to leave force to the Police and officials of the court.

Can a trespasser claim for injury on land?

Owners and occupier have a general duty to take care with their property to avoid injury to visitors. The test is what is reasonable. That duty can extend to trespassers. It may be reasonable for council to fence a sewerage pond next to a kindergarten but unreasonable for a farmer to fence a dam in the middle of his 500 acre property. What is reasonable for a trespasser may be different for what is reasonable for other visitors. The farmer may need to fence if he is charging families to come fishing on his property.

Is there a limited time to complain to the Courts?

In most cases where complaint is made of wrong doing to the courts, the courts require that the complaint be brought before the courts within a reasonable time. If an issue is left outstanding for too long, the courts take the view the victim has failed to pursue his claim and has lost his right to claim against the wrong doer. The courts say it is difficult to investigate matters many years passed and not fair for a victim to call up long forgotten injuries.

For example: if you had punched me in the face at the Grand Hotel at Huonville in 1980 and I left it until 1998 to complain to the courts, the courts would quite sensibly say that I had been too slow in pursuing my rights. The courts would say that in leaving the matter for 18 years, it was too difficult for the courts to go back and review matters. The courts would say that the matters were so long passed that I was no longer able to pursue my claim. This is the rule of the limitation of actions. Parties have a limited time to complain about wrongs done to them.

These same rules of limited time for complaints apply to trespassers of land.

The times vary according to the circumstances. The basic period to take court action for trespass is 12 years for private land. If a private owner or occupier fails to make complaint to the courts within 12 years, they are no longer able to seek the courts assistance to evict the trespasser.

Longer periods apply if the victim is subject to some disability such as a mental incapacity or for a number of other possible reasons is unable to respond.

The period for Government land is 20 years.

What happens to a trespasser not evicted after the limitation period?

A trespasser of sufficiently longstanding may then be in possession of the land and the otherwise rightful owner may because of the delay be unable to evict them.

The trespasser then is entitled to remain on the land.

This right of a trespasser is known colloquially as a squatter's right. The law refers to this sort of occupation of land as adverse possession.

Can a squatter become an owner?

Because the original owner has lost his rights to eject the person who has adverse possession of the block, that person effectively ends up as the owner of the property.

The person with adverse possession can make application to the Land Registry and prove the circumstances of the long use adverse to the original owner and have title transferred to them.

Can I lose my land by giving others permission to use it?

The trespasser's rights start with a wrongful action. The fault of the rightful owner is to fail to defend his rights against that wrongful action for a long time. If the owner has given permission, the possession is not wrongful or not adverse. If the occupation is not wrongful, no squatter's rights can arise.

A lease no matter how long, will not give rise to squatter's rights because the occupation is under the rights of the true owner and by the true owner's consent. An occupation under a lease is thus not adverse.

It is not essential that you have the block surveyed but it would be a wise precaution. Not only to be certain about which block to use, but it is some evidence of your occupation.

What is the Critical Criteria for title by possession?

Any period during which the owner has paid the Council rates is to be disregarded for the purposes of an application to acquire title to land by possession.

Who has paid the rates is a critical criteria to acquire title to occupied land by adverse possession as it is more than likely that an applicant will only be able to pay rates in a "whole of land" assessment situation.

What are the other Requirements for title by possession?

In determining an application for title based on possession, the Recorder must consider all the circumstances of the claim and the conduct of the parties including:

- whether the applicant has enjoyed possession as of right;
- whether the enjoyment was by force or secret, or whether any written or oral agreements had been made;
- the nature and period of possession;
- the improvements on the land including when and by whom they were made;
- whether the land has been enclosed; and
- whether the applicant has acknowledged ownership, paid rent or made other payment in respect to the land.

At least one other person must produce evidence in support of the application.

An application is to be supported by a plan of survey, unless the Recorder directs otherwise.

Before making an application the applicant must:

- give notice in a locally published newspaper;
- give notice to any person with an interest in the Register;
- give notice to any person with an unregistered interest lodged with the Recorder;
and
- post a notice on the land.

How do you go about squatting?

Paying the rates is critical but merely paying the rates is not likely to be enough.

If you base a claim of ownership on adverse possession you will be wise to not only set-up incontrovertible assertions of a right of possession of property but also have evidence of a documentary nature of your acts of possession. You need to set and implement what will be a long-term strategy.

You need to be sure you are in possession of the blocks which are the subject of the title you are claiming. Don't do a lot of work to find the land you are claiming is not the land you think it is or that you are occupying other land. In some ways you need to be going through some of the initial inspections and precautions of someone buying a block of land. You may need to establish the correct boundary alignment by survey.

If you are to pursue a claim for adverse possession, I would suggest you begin to put in place clear open assertions of your occupation of the property incontrovertible treating it as an owner would. Be careful if there is a possibility of another person claiming to be owner being able to claim you are trespassing and claim damages. Remember you are starting out in the wrong and will be in the wrong against an earlier owner until the time expires.

One of the best ways to establish your occupation of the land as owner is to fence it off.

Signs asserting ownership are one of many ways of claiming an exercise of possession of land. I suggest that the sign says “No Entry Allowed, by order of Your Name (owner)”.

Keep some independent record made of your use of the land. Make-up a diary and begin with all of the acts you have done to exercise possession of the block. Once you have brought that up-to-date and have the photos of the fencing, the details of the survey, and the photo of the sign. Consider preparing a statutory declaration to record all that you have done so far. A picture paints a thousand words and a video even more.

Documenting the acts that you have done with documentary evidence will be important if you want to sell your interest before the squatting period is up or if you are not available when the application is ultimately made.

How do you avoid a claim for adverse possession?

Keeping your rates paid is the first step to avoiding a squatter’s claim.

If you allow occupation by permission, you need to be able to prove the basis of possession is the permission you have given. You need to be able to prove the possession is not adverse.

The best proof is an acknowledgment in writing from the person in possession that they are occupying by permission.

Many of the unhappy disputes in this area arise from misunderstandings and disputed facts that could have been resolved by the parties maintaining businesslike written records and agreements.

At the end of this paper is a sample short agreement for the use of property that illustrates the sort of simple way in which the basis of use can be recorded.

Are Squatters subject to the subdivision rules?

The Recorder may require an applicant for a squatters title to produce a certificate from the relevant Council that the block is not in breach of the subdivision rules, or if

it is, that the Council consents to the application.

How do I claim part of a title or a changed boundary?

The options to resolve a discrepancy between occupancy and title boundaries include:

1. Section 142 boundary rectification;
2. Local government subdivision, by agreement of the parties; or
3. moving the occupation to comply with the boundaries in the plan of title to the land.

Section 142 of the Land Titles Act 1980 provides:

The Recorder may act as provided in sub-section (2) where it appears to him that-

(a) the boundaries, area, or position of the land described in a folio of the Register differ from the boundaries, area, or position of the land actually and bona fide occupied by the registered proprietor as being included in that folio;

(b) the description of land in that folio is based on erroneous or imperfect information;

There are notice, inquiry and appeal provisions in section 142. An application should be accompanied by surveyor's notes and report that should set out in detail the full circumstances of the mis-description and rectification being sought for the Recorder's consideration and final order.

Can squatter's rights arise from some partial use of a property?

Ownership of a block must not only be without the owner's permission, but must be in a way which is exercising the sort of rights over land that are used by an owner in such a way as would indicate to the true owner that his rights were being infringed. A secret or trivial use would not be a sufficient ground to claim rights of adverse possession.

If the land is used for only some specific purpose, slightly different rules apply and a longer period.

If the land were used in conjunction with other land for some partial use, such as a right of way or right of drainage for a period in excess of 15 years, rights to continue that partial use may arise in favour of what would otherwise be a trespass.

This is known as the Law of Prescription.

A person who has used or enjoyed rights over a 15 year period (or 30 years in the case

where an owner is under a disability) and wishing to acquire an easement by possession may apply to the Recorder of Titles under Part IXB of the Land Titles Act 1980.

An application must show that:

- the easement has been enjoyed as of right;
- the easement has not been enjoyed by force or secretly;
- no written or oral agreements as to use have been made;
- there has been no common ownership between the benefited and burdened land;
- the owner knew, or ought to have known, of the enjoyment of the easement;
- the right of easement is of a continuous nature rather than temporary; and
- the applicant owns the land benefitted by the easement.

An easement cannot be acquired in a case where there is no land capable of benefitting from the easement.

At least one other person must produce evidence in support of the easement being claimed.

An application is to be supported by a plan of survey, unless the Recorder directs otherwise.

Before lodging an application with the Recorder, a person must give written notice of the claim to the owner of the servient land.

If the owner does not object the Recorder must consider the application.

If the owner lodges an objection then the Recorder may not consider the application unless she is satisfied that the applicant would suffer “serious hardship” if the application is not granted.

The easement claimed must be of the nature of an easement is supported by the Common Law or Act of Parliament.

The easement must be of the same character extent and degree of use throughout the relevant period of acquisition but extra right can be separately acquired if the conditions are fulfilled.

No claim may be made for a profit a prendre, a right to take material from land.

The owner of the burdened piece of land may lodge a caveat claiming that a person exercising easement rights is doing so by permission of that owner.

The effect of the caveat is to stop time running against the caveator, prevents time

running in favour of the owner of the benefited piece of land and the period of use of the easement prior to lodgement of the caveat is glossed over - section 138S. Any person claiming an estate or interest in the land in an application may lodge a caveat with the Recorder forbidding the granting of the application.

An owner of land may lodge a caveat with the Recorder giving notice that a person exercising rights that may amount to an easement is doing so with the permission of the owner. A caveat stops time from both accruing and running in favour of a person exercising rights that may amount to an easement. The caveat is recorded on the owner's own folio in the Register. The Recorder must give notice of the caveat to the person named in the caveat as exercising rights that may amount to an easement.

If I don't use a right to make some partial use of a neighbour's property, can I lose it?

The Land Registry and the Supreme Court have power to remove expired, redundant or abandoned right to make some partial use of a neighbour's property, (what is called an easement) or some other overriding interest in your neighbour's property. If the right has not been used for 20 years, this is evidence it has been abandoned.

What happens if there are a series of owners or a series of squatters?

The period of adverse possession can be made up of a number of squatters each occupying the land in turn under the previous squatter. If one person occupies the land for 7 years and sells his right to that date to another squatter who occupies for a further, say 7 years the second squatter can take account of the period of occupation of the first.

Changes in the registered owner during the period of squatting do not break up a period. The registered ownership of property could change hands a number of times during the period of squatting, but provided the minimum squatting period is served squatters rights would still prevent the final registered owner from suing in trespass.

Are squatter's rights fair?

More often than not squatter's rights operate to tidy up mistakes and long overlooked land where the original owner is long dead and gone. Usually there is no dispute.

Where there are competing claims the operation of squatter's rights can be difficult.

If there is a dispute, often both the squatter and the true owner are at fault. The matters are often difficult because the facts are hard to establish. Although it may be unfair for the original owner to lose his rights, the new occupier may have acted in reliance on his long-standing use of the land. It is unfair for the careless true owner to take the benefit of whatever that use has been.

Usually the laws of adverse possession are used where land has literally been

abandoned. In many cases, blocks that are subject to some difficulty are left untended by the owner. Without the laws of adverse possession blocks such as this would be left orphaned and unused. Usually the laws of adverse possession operate to tidy up title holdings to bring them into accord with longstanding use. Usually the true owner is long dead and gone or has chosen to abandon his property.

Ownership of land carries with it, according to the theory of the laws of adverse possession, an obligation to use, maintain and defend land. If the land is neglected for long periods, the law says the original owner loses his right to keep it.

The law of adverse possession obliges an owner to maintain and defend his land. If the land is neglected for long periods the law says the original owner loses his right to keep it.

Sample Agistment agreement

THIS AGREEMENT for lease is made the day of 2000

BETWEEN

(called in this agreement "the Landlord") of the first part

AND

(called in this agreement "the Tenant") of the second part

AND

THE PARTIES AGREE:

- I. The Landlord agrees to let and the Tenant agrees to take: All that the premises at together with the Landlords fixtures and fittings (called in this agreement "the premises")

- II. The Tenant to hold the premises:
 - A. from the date of this agreement;
 - B. until determined by 14 written days notice of one party to the other; and
 - C. rent free.

- III. TENANT OBLIGATIONS:
 - A. The Tenant must maintain the pasture and fences in a good and husband like fashion.

 - B. The Tenant will not cut down or remove any growing timber on the premises without first obtaining the consent of the Landlord;

 - C. The Tenant will not commit or permit spoil or waste any of the premises;

- D. The Tenant will use all proper means for keeping down and exterminating on the premises all rabbits and other vermin and noxious animals and all insects, thistles, weeds and other noxious plants and will comply with all laws and regulations governing such matters;
- E. The Tenant will in cultivation and farming employ good, clean and husband like practices in accordance with the current standards of the district and shall keep and leave the premises in a clean and good hearted condition;
- F. The Tenant must keep all waste properly stored and regularly remove any garbage.
- G. The Tenant must not carry on or allow on the premises any trade or business other than that of grazing sheep and livestock without the prior written consent of the Landlord.
- H. The Tenant warrants to the Landlord that the Tenant has not entered into this lease upon any promise, representation, warranty or undertaking given on behalf of the Landlord as to the suitability of the provided premises for any use including those expressly permitted.
- I. The Tenant must not do or permit anything on the premises which may be or become a nuisance annoyance or damage to the Landlord or the occupiers of other property in the neighbourhood.
- J. The Tenant must comply with all the requirements of all Statutes, Regulations and By-laws in relation to the Tenants' use of the premises provided that the Tenant shall not be required by this clause to carry out any works of a structural nature.
- K. The Tenant must not to do any act matter or thing which may become a

breach of any Statute Regulation or By-law and will indemnify the Landlord in respect of all costs claims and demands that may arise by reason of any breach of this condition.

- L. The Tenant must not assign underlet or part with the possession of the premises or any part of the premises.
- M. The Tenant indemnifies the Landlord from all liability and expenses arising from the Tenants use of the premises.

IV. LANDLORD OBLIGATIONS:

- A. While the Tenant observe his covenants under the lease the Tenant shall peaceably hold and enjoy the premises during the term created by this lease without any lawful interruption or disturbance by the Landlord or any person rightfully claiming to act on behalf of the Landlord.
- B. The Landlord must pay all land tax payable in respect of the premises.
- C. The Landlord must pay all Council rates and charges payable in respect of the premises.

V. NOTICES

- A. Any notice to be given under this agreement shall be sufficiently given to the Tenant if signed by the Landlord or his solicitor and left addressed to the Tenant on the premises or posted to the Tenant at the premises and shall be sufficiently given to the Landlord if signed by the Tenant or his solicitor if addressed to be Landlord and left or forwarded by post to the Landlord's last known place of abode in Tasmania. A notice sent by post shall be deemed to be given at the time when in due course of post it would be delivered at the address to which it is sent.

SIGNED by the Landlord in the

presence of:

SIGNED by the Tenant in the

presence of:

This is an abridged version of the Judgement of Mr Justice Underwood in the Tasmanian Supreme Court Case GEORGE VINCENT WILSON v ROBERT WEIR CAMPBELL. This case dealt with Prescriptive rights to a right of way.

This decision illustrates the operation of Prescriptive Rights but predates the reform of the law of Prescription. Now the owner could object to the application for easement and the application would not proceed unless "the applicant would suffer serious hardship if the application is not granted"

The judgment is a document available to the public. The text has been abridged. The words are those of his Honour.

The parties to this action are neighbouring farmers at Sassafras. The plaintiff is aged 64 years. His farm has been in the family for three generations. The defendant is aged 63. He bought his property in March 1959 and farms it with his son, Mr Peter Campbell. Both properties are used for cropping, grazing and general mixed farming. In this action the plaintiff claims that since about 1945, he and his predecessor in title have gained access to Churchill's Road from the bush block by crossing over the defendant's land for a distance of about thirteen to fifteen metres in a straight line from the gate in the east/west fence to a gate in the defendant's fence along Churchill's Road. This strip of land between the two gates was referred to at the trial as "the back access".

The plaintiff claims he has acquired a right of way by prescription over the back access and seeks a declaration or other relief pursuant to the provisions of the *Prescription Act 1934*, s3 which provides:

"3 -- No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of the Crown, or being the property of any person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of 40 years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Although there was a great deal of dispute about the extent to which the plaintiff has used the back access over the years, the defendant did not dispute that the plaintiff had used it from time to time since at least 1959, the date on which the defendant bought his property. The defendant's case is that the plaintiff's use has always been permissive. The defendant claimed that in 1959, shortly after he moved onto the farm, the plaintiff's father sought and was given permission to use the back access and that thereafter, on many occasions until March 1995, the plaintiff requested and was given permission to use the back access. The plaintiff denied that he had ever asked for or had been given permission to use the back access. His case was that he had always

used it as of right.

I reject the defendant's claim that he gave the plaintiff and his father permission to use the back access in 1959. I am unable to make a precise finding as to the extent of the use of the back access other than to conclude that it was in the order of an average of six to eight times a year between 1959 and March 1995.

The question is whether that use was permissive as is claimed by the defendant or as of right as claimed by the plaintiff. I am satisfied that the defendant's claim that he "sealed" the gates to bar access by third parties is an invention. This reflects on his credit generally.

I reject the defendant's evidence that permission was sought and obtained on any of these other occasions.

The foregoing are some illustrations of the generally unsatisfactory nature of the defendant's evidence. There are many more examples in the cross-examination. However, the transcript of the defendant's cross-examination does not fully reflect the unsatisfactory nature of his evidence. At times, there were long pauses before answers were given to difficult questions which, coupled with the defendant's demeanour at the time, gave a clear impression that he was calling in aid his reasoning capacity rather than his memory to produce an answer that he considered would be satisfactory for his case.

I am satisfied that the evidence of the defendant with respect to the seeking and granting of permission for the use of the back access after 1959, should be rejected. The evidence was demonstrably unreliable and much of it the product of invention and rationalisation. I accept the evidence of the plaintiff and his son that permission to use the back access was never mentioned between either of them and the defendant over all the years that they have been using the back access.

I also reject the defendant's claim that between 1963 and 1970, the back access was sealed off and a panel was put in the north/south boundary fence.

However, the rejection of the defendant's claim that use of the back access was permissive is based, not on that impression, but on the inconsistencies, improbabilities and uncertainties in the defendant's evidence as was principally revealed by the cross-examination and his demeanour during that cross-examination. The evidence given by the plaintiff and his son did not suffer from any of these failings, and with respect to the central issue in this case, is to be preferred over that of the defendant.

Why this dispute arose was not explained by the evidence. There is no apparent reason for it. It is to be regretted that two neighbours, who have apparently been on good terms for nearly four decades, have fallen out over this matter and have since been unable to resolve their differences without resort to litigation in this Court.

There was no dispute about the law in the event of findings of fact being made as above. *The Prescription Act 1934*, s3 is quite clear. The plaintiff is entitled to the

declaration sought if he can establish that he has used the back access as an easement as of right for twenty or more years prior to the commencement of this litigation. Whether or not there has been user as of right is a question of fact. For those who relish legal Latin maxims, the use must be *nec vi, nec clam, nec precario* (not by violence, not secret, not precarious).

Application of those legal principles to the facts as I have found them entitles the plaintiff to a declaration that the defendant's land is subject to a right of way over the back access.

This is an extract from the judgment of The Supreme Court Of Tasmania of Mr justice Underwood in the matter of Keith George Woodward V. Wesley Hazell Pty Ltd.

The judgment is a document available to the public. Sections of the text have been deleted for brevity but the words are those of his Honour.

The issue for determination in this case is whether the plaintiff or the defendant Wesley Hazell Pty Ltd, is entitled to possession of a piece of land near Judbury that I shall refer to as "the disputed land".

2. The plaintiff's family were farmers at Judbury. In 1958 the plaintiff's father bought an adjoining farm. It comprised a house and 658 acres of land. The title was taken in the name of the plaintiff (then aged 19 or 20 years) and his father as tenants in common. The plaintiff lived in the newly acquired farm house and farmed the property. Over the next few years he cleared the bush from some of the land. In about 1961, the plaintiff left the farm to go fishing, but continued to work it and his father's farm when not at sea. Every apple season he returned home to help with the harvest.

3. In 1969, the plaintiff and his father sold approximately twenty-three acres of the farm to a Mr Cordwell. This acreage is now owned by an American couple, Mr and Mrs Webster, and for convenience I shall call it "the Webster land".

4. In 1975 the plaintiff's father transferred all his interest in the balance of the 658 acres to the plaintiff

6. At the end of 1990, a purchaser came along and offered to buy the disputed land from the plaintiff. The plaintiff spoke to Mr Wesley Hazell, a member of the Hazell family, for whose benefit the defendant holds its assets, about the offer he had received. Mr Hazell claimed that the disputed land belonged to him and so this dispute arose.....

Looking at a plan of the whole property, it appears as if a rectangular block of land, comprising approximately thirty-six acres has been "stuck onto" the western edge of the main property about halfway down that side. A private road runs roughly north/south through this rectangle of land. The land lying between the eastern side of this road and the creek, approximately twenty-three acres of bush, is the Webster land. The sale of that land had the effect of cutting the fourteen acres of land on the western side of the road off from the balance of the 658 acres. This fourteen acres is the disputed land. The principal access to the farm was and is from a point quite some distance from the disputed land. The private road on the disputed land joins with a public road at its southern boundary and access to it is reached via that public road and through a gate in the boundary fence.

8. The defendant is the owner of the farm adjoining the western boundary of the disputed land and claims that it, and its predecessors in title, have been in possession of the disputed land for more than twelve years.

9. There was little contentious evidence. I am well satisfied that all those

who gave evidence did so honestly and to the best of their recollections. What follows are my findings of fact unless I indicate to the contrary.

10. When the plaintiff and his father bought the 658 acre farm in 1958, the disputed land was uncleared bush. At that time the defendant's property, "Forest Home", was owned by Mr Tony Calvert. Mr Calvert was then clearing bush from his property and it was agreed between him and the plaintiff's father that as the plaintiff's father then had no present or immediate use for the disputed land, Mr Calvert could clear it and use it for grazing purposes until the plaintiff's father required it. This was done. Mr Calvert erected the fences that are there today. These fences do not follow the boundaries shown on the relevant titles. The western boundary of the disputed land is in the middle of an open paddock. A visitor to the area who stopped at the end of the public road on the southern boundary of the disputed land and looked over the gate, would see the private road continue on in a general northerly direction. Driving through the gate and up the private road, the visitor would see on his immediate right, to the east, a fence marking the boundary between the Webster bush land and the disputed land, and on the other side, stretching away to the west, an open grass paddock that continued without interruption over the title boundary of the plaintiff's land, giving the appearance that the disputed land was part of the "Forest Home" property.

.....

12. The plaintiff conceded that neither he nor his father had used the disputed land as farm land. The plaintiff said that in 1975 he was content for the new owners of "Forest Home" to continue using the disputed land as Mr Calvert had done until he had a use for it, but there were no discussions between the plaintiff and any member of the Hazell family about this. The plaintiff said that he knew nothing about the law of adverse possession and assumed that his rights to the disputed land as shown on the certificate of title would persist until he disposed of them. He explained that he regarded the disputed land as an asset he could realise if he needed to, and in the meantime:

"At least with Hazell's using it, it was reasonably tidy, the cattle ate the rubbish down, and it had some good grass, and we don't carry a lot of insurance but I thought it would be something to handle when I get older if necessary. But it was only the high interest rate that caught us a couple of years ago that I started looking for something I could sell."

13. On occasions after 1975, the plaintiff visited the disputed land, usually by driving up the road to gain access to a high vantage point from which he could look over other parts of his farm and check on stock. In addition the plaintiff made an occasional visit to the disputed land in the course of a shooting expedition or to speak to one of the employees of "Forest Home" who happened to be on it. Apart from those occasions however, the plaintiff neither used the disputed land nor set foot on it after "Forest Home" passed into the hands of the Hazell family.

14. Although, as counsel for the plaintiff, Mr Morris, submitted, there was little detailed evidence with respect to the use to which the disputed land had been put by the Hazell family over the years since 1975, the overwhelming inference to be drawn from the whole of the evidence is that during that period the Hazell family treated the disputed land as if it was part of the property to which they had the fee simple title. Mr Don Hazell drove up the private road at the time of the purchase in the belief that the boundary of the Webster land was also the boundary of "Forest Home".

15. I find that since the disputed land was cleared by Mr Tony Calvert, it has been continuously in use, principally for grazing cattle upon, by the owners of "Forest Home" as if it was part of that property. I also find that the servants and agents of the defendant and its trustee predecessors in title believed that the disputed land formed part of the title to "Forest Home" and consequently their possession and use was intended to be to the exclusion of all others.

16. On 2 January 1991 the defendant's predecessor in title lodged a caveat with the Recorder of Titles. The caveat claimed "an estate in fee simple in possession by virtue of exclusive uninterrupted possession by the caveator through its servants and agents for a period in excess of twelve (12) years." Notwithstanding the provisions of the Lands Titles Act 1980, s40 which confers indefeasibility of title in the case of land that has been brought under the Act, s117 provides that the provisions of the Limitation Act 1974 apply to the title of a registered proprietor of registered land in the same manner as it applies to the title of a proprietor of unregistered land. Subsection (2) saves the title from being extinguished by adverse possession and enacts where, in the case of unregistered land the title would have been so extinguished, in the case of registered land, the registered proprietor holds the land in trust for the person who has acquired the title by adverse possession. Subsection (3) enables such a person to apply to the Recorder for a vesting order. This, the defendant's predecessor did in June 1991. If the plaintiff is able to maintain proceedings to recover the disputed land, the Recorder will not grant the vesting application.

17. On receiving the notice of application the plaintiff acted as is provided by s118(1) and lodged a caveat forbidding the granting of the application. By virtue of the provisions of the Lands Titles Act 1980, ss118(2) and 14, the plaintiff was then put in the position of having to commence proceedings to establish his right to recover the land described in his title or his caveat would lapse and the vesting application would be granted. These proceedings were commenced on 5 March 1992.

18. The plaintiff seeks (inter alia) a declaration that the defendant has not acquired any beneficial interest in the land. In closing submissions, it became common ground that the real issue in these proceedings was whether a declaration should be made that the plaintiff, as registered proprietor of the disputed land, was entitled to possession thereof.

19. The effect of the Limitation Act 1974, ss10(2) and 11(1) is that if the plaintiff was either dispossessed or discontinued his possession twelve years or more prior to 5 March 1992, he is not entitled to maintain an action to recover the disputed land and the declaration he seeks in this proceedings will not be made.

20. It was accepted by Mr MacKay, counsel for the defendant, that Mr Calvert's possession of the disputed land was by way of licence and thus time did not begin to run until he sold it in 1975.....

21. It is well established by authority that to dispossess the owner of the fee simple there must be actual possession of the land without licence. That possession must consist of:

1. an appropriate degree of exclusive physical control of the land in question; and
2. an intention to possess that land to the exclusion of all others including the true owner.

22. Whether there has been a sufficient degree of exclusive control will depend upon the character of the property, its nature and location, and the ordinary use to which a registered proprietor might be expected to put the land.

23. In the present case the land is primarily rural land and the likely use to which the registered proprietor would put it is the very use to which it has been put by the defendant and its predecessor in title since acquisition in 1975. With respect to the second element, there must be an intention to possess the land to the exclusion of all others, especially if the acts relied upon to establish possession are equivocal

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The evidence of Messrs Don and Wesley Hazell satisfies me that this element is well established. Until 1990 when the plaintiff raised the question of title with them, the possibility that the plaintiff had the right to sell the disputed land had not occurred to them as they believed that the land belonged to them.

24. One cannot escape some feeling of sympathy for the plaintiff in the position in which he found himself. Ignorant of the law of adverse possession, he believed that the land was his in accordance with the certificate of title and available for him to sell when the time was ripe. I think it fair to observe that Messrs D and W Hazell may also have experienced some sympathy for the plaintiff for prior to proceedings being commenced they offered the plaintiff some money for the land "as we need to get on well together" but that offer, considerably less than the offer the plaintiff had been made by another, was not accepted.....

27. I find that the plaintiff has been dispossessed of the disputed land by the defendant and its predecessors in title for a period in excess of twelve years prior to the commencement of these proceedings. Accordingly, the Limitation Act operates to prevent the plaintiff bringing any action to recover the disputed land and the declarations and other reliefs sought in the application will not be made or granted. The application is dismissed.