

# **PRESCRIPTIVE TITLE FOR CO-OWNER IN POSSESSION**

report of the  
Property Law  
and Equity Reform  
Committee

**NEW ZEALAND**

REPORT OF THE  
PROPERTY LAW AND EQUITY REFORM COMMITTEE

Presented to the Minister of Justice  
July 1986

PRESCRIPTIVE TITLE FOR A CO-OWNER IN POSSESSION

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TO : The Rt Hon G.W.R. Palmer  
Minister of Justice

Reference

Your predecessor referred to us the inquiry of the New Zealand Law Society as to the changes in the law necessary to allow a co-owner to obtain as against his fellow co-owner a prescriptive title under the Land Transfer Amendment Act 1963. There is an apparent impediment to this at present because (at least in part) of the omission of Parliament to re-enact in the Limitation Act 1950 the substance of s.12 of the Real Property Limitation Act 1833.

A. Background : Adverse Possession and Prescription

1. Adverse possession of land for a sufficient period has long been a source of good title to it, at common law and in later centuries under statute. In New Zealand, subject to the protection of the registered proprietor under the Land Transfer Act 1952, the period of adverse possession which sufficed to extinguish previous interests was (except as against the Crown) generally 20 years under the Real Property Limitation Act 1833 ("the 1833 Act") and 12 under

s.7 of the Limitation Act 1950 ("the 1950 Act"). (Special statutory provisions relating to the Crown and to certain exceptions need not be dealt with here).

2. The estate or interest of a registered proprietor is generally protected from the adverse possessor by s.64 of the Land Transfer Act 1952 which until it was amended by the Land Transfer Amendment Act 1963, so far as relevant provided that -

After land has become subject to this Act, no title thereto ... shall be acquired by possession ... adversely to ... the title of the registered proprietor.

This protection was reinforced by s.6(2) of the 1950 Act under which that Act was made subject to the Land Transfer Act.

Unregistered interests in land have generally remained subject to the limitation period and hence vulnerable to the adverse possessor.

3. The Torrens System's somewhat inflexible protection of the registered proprietor (even of one who might have long abandoned the land) against an adverse possessor persisted unmodified until the passing of the Land Transfer Amendment Act 1963, to which s.64 of the principal Act became subject. Under Part I of the 1963 Amendment Act it is

possible for an adverse possessor of Torrens land to apply to the District Land Registrar for a prescriptive title to it, which will replace that of the registered proprietor. Under s.3(1):

3(a) Where -

(a) Any person has been in possession of any land which is subject to the principal Act, being land for which a certificate of title has been issued or a Crown grant has been registered under that Act, for a continuous period of not less than 20 years, and continues in possession of the land; and

(b) That possession was such that he would have been entitled to apply for a title to the land on the ground of possession if the land had not been subject to the principal Act, -

he may, in accordance with the provisions of this Part of this Act, apply to the Registrar in Form U in the Second Schedule to the principal Act for the issue to him of a certificate of title for an estate in fee simple in the land.

4. The effect of later provisions in the 1963 Amendment Act (so far as here relevant) is that the application must be publicly notified, and specifically notified to the registered proprietor (if he can be found); and that the

registered proprietor may by caveat automatically put an end to the application, thus ensuring that his registered title continues to enjoy the protection of s.64 of the principal Act. See ss.7, 8 and 9.

5. The reforms made by the Land Transfer Amendment Act 1963 have no doubt largely solved the problem of abandoned Torrens land, in a manner consistent so far as possible with maintaining proper protection for the registered proprietor.

B. The Problem : Adverse Possession as Between Co-Owners

6. Where however the land has been apparently abandoned by one or more of a number of co-owners (whether joint tenants or tenants in common) there is the difficulty now raised by the New Zealand Law Society: the co-owner who has remained in possession of the land may not be able to invoke Part 1 of the 1963 Amendment Act.

7. The reason for this difficulty lies to a large extent in the nature of co-ownership and the omission from the 1950 Act of a provision which appeared in the 1833 Act. To be specific:

- 7.1 Co-owners of a piece of land share with each other a unity of possession. Thus for one co-owner to exercise possession of land is for all to do so. Hence one co-owner was unable to extinguish the title of another by possession adverse to that title unless there had been actual or

presumed ouster of the other co-owner. (Ouster might be presumed from a long period of exclusive possession going well beyond the statutory period: Doe d Fishar v. Prosser (1774) 1 Cowp 217; 98 ER 1052).

7.2 This difficulty was removed by s.12 of the 1833 Act which provided as follows:

"And be it further enacted, That when any One or more of several Persons entitled to any Land or Rent as Coparceners, Joint Tenants, or Tenants in Common, shall have been in Possession or Receipt of the Entirety, or more than his or their undivided Share or Shares of such Land or of the Profits thereof, or of such Rent, for his or their own Benefit, or for the Benefit of any Person or Persons other than the Person or Persons entitled to the other Share or Shares of the same Land or Rent, such Possession or Receipt shall not be deemed to have been the Possession or Receipt of or by such last-mentioned Person or Persons or any of them."

The effect of this provision was to give rise to "separate possessions" in the circumstances under consideration, in place of the unity of possession normally enjoyed: Paradise Beach Co. Ltd v. Price-Robinson [1962] AC 1072. Time then could run, without ouster as between co-owners "as soon as he enjoyed more than his share of the land or of the rents and profits, to the exclusion of the other": Megarry



& Wade, Real Property (4th ed. 1975) 1022.

- 7.3 No provision corresponding to s.12 of the 1833 Act was included in the 1950 Act. In this the New Zealand legislature followed the English example, there being a similar omission in the Limitation Act 1939 (UK).
- 7.4 The effect of not re-enacting the substance of s.12 of the 1833 Act is at the best uncertain. In England the matter has been complicated (perhaps inadvertently) by the introduction of statutory trusts into the law of co-ownership by the Law of Property Act 1925; the effect of which (even while the 1833 Act was still in force) was to prevent one co-owner from pleading the Limitation Act against another: Re Landi [1939] Ch 828. In New Zealand the matter must of course be considered apart from any such complication. It may be argued that, even without the re-enactment of the substance of s.12, it is still possible for time to run against a co-owner in favour of another, because, despite the unity of possession, the former may bring an action for declaration of title or for partition and that either of these is an "action for recovery of land" for the purpose of s.7 of the Limitation Act 1950 and may become statute barred so that an adverse possessory title may after all be obtained by the other co-owner. This argument has been put forward in the English context by M. Goodman in (1965) 29 Conv (NS) 356 and, commenting on the Paradise Beach case, in (1968) 31 MLR 571. But the

orthodox view is that, apart from the exception as to ouster, "limitation between co-owners was a creature of section 12 of the Act of 1833": R.E.M. commenting in 57 LQR 26, 29 on Re Landi cited above. It must follow from the orthodox view that the omission to re-enact the substance of s.12 has brought back the difficulties of the pre-1833 law. (See also G Battersby, (1971) 35 Conv (NS) 6).

8. That of course is to come to the difficulty which is the subject of this Report. A person registered as the proprietor of land under the Land Transfer Act cannot obtain a prescriptive title under the 1963 Amendment Act as against a co-registered proprietor who has abandoned the land, if an adverse possessory title could not have been obtained under the general law. The claimant must rely either on Goodman's somewhat uncertain argument or else show ouster in accordance with the pre-1833 law.
  
9. The substance of s.12 of the 1833 Act has been retained in a number of other ex-colonial jurisdictions. See e.g. s.38(5) of the Limitation Act 1969 (N.S.W.) which provides:

"Where land is held by joint tenants or tenants in common, possession by a tenant of more than his share, not for the benefit of the other tenant is, as against the other tenant, adverse possession".

See also s.14(4) of the Limitation of Actions Act 1958 (Victoria) and s.20 of the Limitation of Actions Act 1936 - 1975 (South Australia).

10. But in any case, whatever the law in England and in other jurisdictions, the present problem is a New Zealand one. There does indeed appear to have been no reason for omitting to re-enact the substance of s.12 of the 1833 Act in the 1950 Act. The omission would not have been of much practical importance had not the Land Transfer Amendment Act 1963 to some extent re-instated limitative and prescriptive principles to modify the paramount protection given by the Land Transfer Act to the registered proprietor. Especially since experience has confirmed the desirability of the reform, it is now important to remove the doubt about its scope, to which the New Zealand Law Society has drawn attention. Prima facie, there appears no good reason for generally excluding a co-registered proprietor in relation to another such, from the benefit of the 1963 Amendment Act. There is certainly none for leaving the position doubtful, as at best, it is at present.

- 10.1 It is necessary, however, to consider specifically the effect of now remedying the omission by restoring the substance of s.12 to the general law and making any necessary amendments to the Land Transfer Amendment Act 1963. The effect would be that, where there are co-owners of unregistered interests in land, the share of one who

abandons or otherwise loses possession of the land will be extinguished in favour of the other or others, after the elapse of 12 years from abandonment or from the time when the other co-owners began to enjoy the land or its profits to the exclusion of the one who had gone. Should the estates be registered under the Land Transfer Act, there will of course be no automatic extinguishment but the co-owner or co-owners in exclusive possession may apply for a prescriptive title under the 1963 Amendment Act. The co-owner out of possession may, like any other registered proprietor in like case, block the application by lodging a caveat under s.9 of that Act.

10.2 The only objection that might be suggested, to thus assimilating (a) the case of a co-owner in possession of land to the exclusion of another co-owner to (b) that of a person in adverse possession where such a complication of co-ownership is not present, is that in (a) there is a greater likelihood than in (b) of a trust, as a further complication. To pursue this suggestion and state it more fully, the relationship between co-owners of land may be such that one purporting to assume possession to the exclusion of the other may be prevented by a trust (likely to be implied rather than express) from extinguishing the title of the absent co-owner (under s.21 of the Limitation Act 1950). That is (even if the reforms recommended in this Report are put into effect), in such a case time would not run under the general law against an absent co-owner to

extinguish his estate. Nor, where the estate is registered, could a prescriptive title be obtained against him under the 1963 Amendment Act, unless the co-owner applying under that Act incorrectly declared (for the purpose of s.3(b)) that his possession had been such as would have extinguished the co-owner's interest were the matter governed by the general law. Even if a prescriptive title were then to issue, it would remain subject to the trust initially (of Tataurangi Tairuakena v. Mua Carr [1927] NZLR 688); but (and here is the danger) the equitable interest of the co-owner in the land would of course be extinguished in favour of a bona fide registered transferee of the land for value.

10.3 We do not however think the matters just discussed constitute a serious objection to reforming the law so that (in particular) a co-registered proprietor of land under the Land Transfer Act may take advantage of the 1963 Amendment Act as against a fellow co-registered proprietor. For the objection to be serious, the trust to be implied would seemingly have to be to the same effect as the English statutory trust for sale (referred to in paragraph 7.4 above). An implied trust of that sort must be rare indeed. Where it does exist the absent co-owner would have in any case not only the opportunity to lodge a caveat to block the application under s.9 of the 1963 Amendment Act but also (if the prescriptive title is issued) might protect the trust by caveat. These protections appear adequate for

the very rare cases in which they would be needed. (Of course where the trust is express the parties would be particularly on guard to protect themselves).

- 10.4 How general should the reform be? An exception as to Maori land is noted below (paragraphs 11.2 and 12.1). We think too that, in view of the intention of Parliament that the Matrimonial Property Act 1976 (see s.4(3)) should override all other legislation except where provision is expressly made otherwise, it should accordingly be made clear that the jurisdiction of the court to make orders under that Act is not affected. But limitative and prescriptive principles, as affected by the reform, would apply otherwise where land (not being Maori land) is held by persons as co-owners, whatever the personal or business nature of their inter-relationship.

- 11 It will follow from what has been said above that the appropriate change should be made, primarily to the general law as to adverse possession contained in the Limitation Act 1950. The change should be retroactive, to the effect, for example, that a co-owner who for say 6 years has been in receipt for his own benefit of all the rents of a piece of land, would (where the law otherwise permits) after a further 6 years be able to invoke the change as against the other co-owners. This retroactive operation is justified because the original omission from the 1950 Act must be taken to have been inadvertent, and the change (in the light

of Goodman's arguments referred to in paragraph 7.4 above) is clarificatory only. Further s.12 of the 1833 Act was itself held to operate retroactively: Culley v. Doe d Taylersen (1840) 11 Ad and El 1008; 113 ER 697.

11.1 Our basic purpose is therefore to restore the law to its former position before the removal of s.12 of the 1833 Act (which was Imperial legislation) from New Zealand law in 1950. This purpose has involved some drafting difficulties, despite the assistance of the Australian precedents which are referred to in paragraph 9, supra. In our draft Bill which is attached, the new provision is fitted in as part of the existing s.13 of the Limitation Act, and adopts the legal presuppositions and drafting style of that section. We think this is preferable to the attempt to restate the general principle as a separate section of the Limitation Act (or even of the Property Law Act 1952). It is certainly our intention to re-state a rule applicable only to limitation problems, and not to affect the relationship between two or more co-owners of land in any more general way.

11.2 It is noted that a co-owner of Maori land would not be prejudiced by such a change to the law. This is ensured by s.453 of the Maori Affairs Act 1953 which prevails over the Limitation Act 1950 by virtue of s.6(2) of the latter Act.

12. As the main purpose of the change is to ensure that a co-registered proprietor in possession of Land Transfer land may invoke the 1963 Amendment Act as against a co-registered proprietor who has abandoned it, it is necessary to consider whether the 1963 Amendment Act itself requires amendment to achieve this end. There may in fact be some doubt here, as s.3 at least of that Act does not seem to contemplate the situation to which s.12 of the 1833 Act was directed. (Compare in this respect, for example, the wording of the corresponding New South Wales provision, s.45D(1) Real Property Act 1900 (NSW), which is more apt to that purpose). To remove the doubt s.3 will require redrafting, explicit reference being made to possession by a co-owner. This amendment also should be retroactive.

12.1 It is noted that Maori land within the meaning of the Maori Affairs Act 1953 would remain unaffected by such changes. See s.21(b) of the 1963 Amendment Act (and cf paragraph 11.1 above).

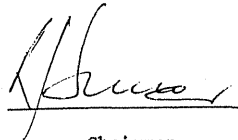
C. Recommendations

13. The Committee accordingly recommends the insertion in the Limitation Act 1950 of a new s.13(4) which will restore the substance of s.12 of the Real Property Limitation Act 1833 to the law of limitation of actions for the recovery of land. It should be made clear that the new provision operates retroactively.



14.

14. The Committee also recommends that s.3 of the Land Transfer Amendment Act 1963 should be amended so that it clearly includes the case of one co-owner in possession to the exclusion of another.

A handwritten signature in black ink, appearing to read 'R J Sutton', is written over a horizontal line.

Chairman

Committee

Professor R J Sutton (Chairman)

Professor F M Brookfield

Mr RGF Barker

Mr W B Greig

Mr A J Forbes

Mr B J Blacktop

Mr P Blanchard

Mr B J Cameron

Miss J M Finnigan (Secretary)

APPENDIX

LIMITATION AMENDMENT

Analysis

A BILL INTITULED

An Act to amend the Limitation Act 1950 and the Land Transfer Amendment Act 1963 relating to prescriptive titles

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows :

1. Short Title and commencement - (1) This Act may be cited as the Limitation Amendment Act 1986, and shall be read together with and deemed part of the Limitation Act 1950\* (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 28th day after the date on which it receives the Governor-General's assent.

\*R.S. Vol. 6, p. 845

2. Application of principal Act to matrimonial property -  
Section 6 (2) of the principal Act is hereby amended by inserting,

after the words "the Public Works Amendment Act 1935," the words "and the Matrimonial Property Act 1976,".

3. Adverse possession by one owner as against another -  
Section 13 of the principal Act is hereby amended by adding the following subsection :

"(4) Where land is held by joint tenants or tenants in common, possession by a tenant of more than that tenant's share (otherwise than for the benefit of the other tenant) shall be deemed for the purposes of this section -

"(a) Not to be possession by the other tenant; and

"(b) To be, as against the other tenant, adverse possession."

4. Land Transfer Amendment Act 1963 amended - Section 3 of the Land Transfer Amendment Act 1963 is hereby amended by adding the following subsection :

"(3) Where any land is held by joint tenants or tenants in common and one of the tenants has been and continues in possession of more than that tenant's share (otherwise than for the benefit of the other tenant), that possession shall be deemed for the purposes of subsection (1)(b) of this section to be such that the tenant would have been entitled, as against the other tenant, to apply for a title to the land on the ground of possession if the land had not been subject to the principal Act."

5. Application of this Act - This Act shall apply in respect of any period of adverse possession whether commencing before or after the date of the commencement of this Act.

V. R. WARD, GOVERNMENT PRINTER,  
WELLINGTON, NEW ZEALAND—1986