Supreme Court
New South Wales

Medium Neutral Citation:	**McFarland v Gertos [2018] NSWSC 1629**
Hearing dates:	8-9 October 2018
Date of orders:	30 October 2018
Decision date:	30 October 2018
Jurisdiction:	Equity
Before:	Darke J
Decision:	Amended Summons is dismissed with costs.
Catchwords:	LAND LAW – possessory title – registered proprietor of land died intestate in 1947 – no grant of administration – defendant takes possession of property in 1998 – defendant has since acted as landlord of the land – in 2017 defendant makes application to Registrar-General to become registered proprietor – descendants of registered proprietor seek declaration that defendant is not entitled to obtain possessory title to land – title of registered proprietor would be extinguished by the Limitation Act 1969 (NSW) if it applied to the land – defendant entitled to obtain possessory title
Legislation Cited:	Interpretation Act 1987 (NSW), s 21 Limitation Act 1969 (NSW), s 11, s 27, s 29, s 31, s 38, s 52, s 65 Probate and Administration Act 1898 (NSW), s 44 Real Property Act 1900 (NSW), s 45C, s 45D, s 45E, s 122, s 124
Cases Cited:	Abbatangelo v Whittlesea City Council [2007] VSC 529; (2008) V Conv R 54-750 Atsas v Gertsch [1998] NSWSC 522 Bartlett v Ryan [2000] NSWSC 807 Chetty v Chetty [1916] 1 AC 603 GEL Custodians Pty Ltd v The Estate of the late Geoffrey Francis Wells [2013] NSWSC 973 Guthrie v Spence (2009) 78 NSWLR 225; [2009] NSWCA 369 Hawkins v Clayton (1988) 164 CLR 539 Hewitt v Gardner [2009] NSWSC 705 J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419; [2002] UKHL 30 Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464 Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306 Powell v McFarlane (1979) 38 P&CR 452 Refina Pty Ltd v Binnie [2010] NSWCA 192 Roberts v Swangrove Estates Ltd [2007] EWHC 513 (Ch) South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd [2009] NSWSC 716
Category:	Principal judgment
Parties:	Lucy Joyce McFarland (First Plaintiff) Graeme Hugo (Second Plaintiff) Colin Charles Hugo (Third Plaintiff) Bill Gertos (First Defendant) Registrar-General of NSW (Second Defendant)
Representation:	Counsel: Mr C Stomo (Plaintiffs) Mr P C Tomasetti SC with Ms M Carpenter (First Defendant) Solicitors: Kedron Legal (Plaintiffs)

	Jordan Djundja Lawyers (First Defendant) Fiona Harris, Solicitor for the Registrar-General (Second Defendant – Submitting Appearance)
File Number(s):	2017/348059
Publication restriction:	None

JUDGMENT

Introduction

1 These proceedings concern a property at 6 Malleny Street, Ashbury. The property is land under the provisions of the *Real Property Act 1900* (NSW). The title reference is Folio Identifier 55A/316317. The registered proprietor of the fee simple is Henry Thompson Downie. Mr Downie died in 1947, apparently without leaving a will. No representative has since been appointed in respect of the deceased estate. That is, there has been no grant of administration.

2 At the time of Mr Downie's death the property was subject to a tenancy in favour of a Mrs Grimes. There is evidence that she was what is commonly referred to as a "protected tenant", who periodically paid the small amount of rent to a real estate agent in Canterbury, and later Hurlstone Park, known as Ford Real Estate. Mrs Grimes remained in occupation of the property until shortly prior to her death in April 1998. After her death the property remained vacant for a time.

3 Mr Bill Gertos, the first defendant, claims that he took possession of the property in about late 1998 and has maintained possession ever since. He contends that his possession has been adverse to the true owner throughout.

4 In 2017, Mr Gertos made an application under s 45D(1) of the *Real Property Act* to the Registrar-General (the second defendant) to be recorded in the Register as the proprietor of the fee simple in the land. An application under s 45D is a means whereby a person in adverse possession of land under the *Real Property Act* can in certain circumstances supplant a registered proprietor. In October 2017, the Registrar-General gave notice of its intention to grant the application made by Mr Gertos.

5 These proceedings were commenced on 17 November 2017. The plaintiffs are respectively a daughter and two grandchildren of Mr Downie. The third plaintiff was added as a party in March 2018. An interlocutory injunction was made by consent on 20 November 2017 restraining the Registrar-General until 13 December 2017 from registering Mr Gertos as the proprietor of the property. On 8 December 2017 the injunction was varied so that it henceforth operated until further order of the Court.

6 The Registrar-General entered a submitting appearance, and took no active part in the proceedings.

7 Amongst the final relief sought by the plaintiffs was a declaration to the effect that they were the beneficial owners of the property. An order for possession was also sought. By their Amended Summons filed on 22 March 2018, a declaration was sought to the effect that Mr Gertos is not entitled to be registered on the title to the property. This declaration was the only substantive claim pressed at the hearing. All other substantive prayers for relief were abandoned.

8 The plaintiffs accepted that they were not bringing their claim on behalf of the estate of Mr Downie. It was stated that the relief was sought on the basis that they were persons entitled to take on intestacy and thus had a chose in action to see that the estate was duly administered (see *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312-314). The Court was informed that the plaintiffs had made an application for a grant, but the application was "currently subject to requisitions". It was not suggested that a grant was imminent.

9 Mr Gertos submitted that the plaintiffs lacked standing to seek the declaration about his entitlement to be registered on the title. Mr Gertos submitted that in any event the evidence shows that he has been in adverse possession of the property since about late 1998 and any claim to recover the land from him would be barred pursuant to the relevant provisions of the *Limitation Act 1969* (NSW) ("the Act").

10 The plaintiffs take issue with those contentions. They submit that a claim on behalf of the estate to recover the land would not be barred, either because the cause of action does not relevantly accrue until a grant of administration is made, or because the deceased is a person under a disability such that the running of the limitation period is suspended (see ss 11(3) and 52 of the Act). The plaintiffs further submitted that in any

event it should be concluded on the evidence that Mr Gertos did not take possession of the property in the requisite sense, and did not form the necessary intention to possess the property either at all or until recent years.

Summary of relevant evidence

11 The plaintiffs read a total of 16 affidavits, from 11 deponents. These affidavits were read subject to a general objection as to relevance. It is true that a considerable amount of this evidence was of little or no relevance to the central issues in the case. None of these witnesses were required for cross-examination.

12 The first defendant read two affidavits. The first was made by Mr Gertos, and the second by an employee of his, Ms Alha. Again, the affidavits were read subject to a general objection as to relevance. Mr Gertos and Ms Alha were cross-examined.

13 Mr Downie acquired the property at 6 Malleny Street in 1927. One of his two children, the first plaintiff, gave evidence that Mr Downie and his wife lived in the property with the children until shortly prior to the Second World War. The first plaintiff deposed that at that time Mr Downie announced that the family had to leave the house because it was “full of white ants”. The family moved to a house in Queen Street, Ashfield, for a time, and to other houses thereafter. The first plaintiff deposed that the family never returned to 6 Malleny Street and neither did the family ever talk about it. The second plaintiff, a grandson of Mr Downie, gave evidence to similar effect, including that the property was “never discussed in terms of ownership”.

14 Mr Downie died in 1947. He was survived by his wife. There is no evidence that he left a will. As I have already mentioned, no grant of administration has been made in respect of Mr Downie’s intestate estate.

15 It appears to be undisputed that at the time of Mr Downie’s death the property was subject to a tenancy in favour of a Mrs Grimes that was likely a “protected tenancy”. The evidence is clear that Mrs Grimes continued to reside in the property, regularly paying a small rental to Ford Real Estate, until shortly prior to her death, which occurred on 19 April 1998.

16 Evidence was adduced by the plaintiffs from numerous persons who at one time or another were residents of, or frequent visitors to, Malleny Street. Some of those witnesses gave evidence that after Mrs Grimes died the property remained vacant for a period, the estimates ranging from “a short period” to “a number of months” to “approximately one year”, before new tenants moved in. Some of the witnesses gave evidence to the effect that over the course of the years that followed, various tenants occupied the property from time to time. Some of the witnesses gave evidence that they did not know Mr Gertos and had never met him.

17 Mr Gertos was formerly an accountant by profession. He gave evidence that he came to notice the property at 6 Malleny Street when he went to the street to visit clients for whom he prepared taxation returns. He stated that the property appeared to be unoccupied, and falling into disrepair. He said that he gained the impression that the building was empty and that no one was maintaining it, and further that this state of affairs continued for over a year. Mr Gertos says that his curiosity was sparked, and that he spoke to one of his clients about the property. He recalls being told that an elderly lady had lived in the house for many years but had moved out or died, and since then the property had been vacant. Mr Gertos says that in 1998 he concluded that the property was in fact vacant and unoccupied.

18 Mr Gertos deposed that many years earlier he was employed by a senior accountant who had spoken to him about his own experience of obtaining title to a property “by adverse possession”. Mr Gertos says that in 1998 he had it in the back of his mind “that this may be a case where it may be possible to obtain title to the property by possession of it over a sufficiently long period of time if nobody else was interested in it”.

19 Mr Gertos deposed that he instructed a solicitor (Mr Murphy) to ascertain the name of the owner, whether the owner was alive, and if not whether any grant of probate or administration had been made. He says that inquiries were made but did not yield any useful information. Mr Gertos recalls that Mr Murphy (who is now deceased and whose former firm was unable to locate any records of the retainer) gave some advice to the effect that Mr Gertos would need to occupy the property, pay the bills for the property, and look after it as if it was his own for at least 12 years, or perhaps 14 years. Mr Gertos also recalls Mr Murphy saying that if Mr Gertos could prove to the Registrar-

General that he had been in possession of the property to the exclusion of others for the necessary period, he could request the Registrar-General to register him as the owner of the property.

20 Mr Gertos' affidavit continued:

> 28. In 1998 I made the decision to actually go onto the property to see what the state of affairs was. I recall walking to the front door and knocking on it. There was no answer. I then recalled calling out for the occupier saying words to the effect "Is anybody home?". Again there was no answer.
>
> …
>
> 31. I found the rear door was off its hinges and placed to the side. The house was open.
>
> 32. I went inside the property. I found rubbish inside the property. I also found assorted old furniture as I walked from room to room. I recall an empty wardrobe, a bed, a dirty mattress, some broken chairs. I recall some of the floor coverings were linoleum.
>
> 33. There was evidence that the dwelling may have been occupied by squatters from time to time as there was empty food tins on the floor, papers and scraps, and the mattress that I referred to had been slept upon.
>
> 34. Most of the windows in the dwelling were closed. I recall seeing the two open windows and at least one broken.
>
> 35. The bathroom was dirty, fouled and disgusting.
>
> 36. Water was dripping from the roof into the bathroom and into the hallway. The whole place was dark and smelly. It was not occupied for a long time and I could not say how long it had been since someone had stayed there.
>
> 37. I recall walking along the hallway to the front door. The front door was locked and I tried to unlock it from inside but could not do that. There was no mail under the door or inside the premises. There was nothing to identify the last occupier.
>
> 38. I tried to see whether or not the electricity was turned on. I recall flicking switches on the walls as I moved from room to room to see if a light would come on but there was no power. I recall turning a tap on in the kitchen to see whether the water was running which it was.
>
> …
>
> 42. I left the house by the back door and walked around to the front door. I tried to open the front door but it would not open.
>
> 43. I then left the property. I was satisfied in my own mind that the property was not occupied and it was uninhabitable.
>
> 44. I left the property and then decided to take possession of it myself.
>
> 45. I returned the next day. I went up to the front door and tried to open it. I then applied my shoulder to the door and it opened. I had made contact with a licensed builder I knew named Steve Skintzis. He arrived shortly after I arrived. I instructed him to make the building watertight, secure it, to refit the rear door, and change the locks on the front door and give me the key.
>
> 46. Due to pressure of work Mr Skintzis was unable to do all the work that I asked him to do. In particular he was unable to quickly make the property watertight so I engaged a builder named Tom De Blase to do that.
>
> 47. We made the roof weatherproof on a temporary basis and made the property secure. It was then that I went to consult with Mr Murphy in the way that I have described above. I did not want to incur significant expenditure unless I was reasonably informed about my legal rights.
>
> 48. I then set about repairing the property and in doing so incurring significant expense.

21 Mr Gertos deposed that to the best of his recollection he "took possession" of the property in the second half of 1998.

22 Mr Gertos gave evidence that he spent approximately $35,000 on repair works shortly thereafter. He was unable to locate any records to substantiate this claim.

23 Mr Gertos deposed that after the repairs were completed, arrangements were made by a member of his staff to appoint a managing agent. Richardson & Wrench of Hurlstone Park were appointed. Mr Gertos says that within a few weeks he had signed a lease of the property as landlord. Mr Gertos also says that he commenced to pay all the outgoings for the property including Council rates, water levies and charges, and land tax.

24 There is no documentary evidence to support these claims in respect of the first few years from 1998. However, Mr Gertos produced statements issued by Richardson & Wrench which show that as early as 2003 Mr Gertos was receiving rent from tenants of the property, and paying water rates and Council rates out of the rent received. The statements show that in February 2004 an instalment of land tax was paid by Mr Gertos out of rent received. Other documents show that Mr Gertos has since continued to pay land tax on the property.

25 Mr Gertos produced various taxation records, including schedules of rental income and expenditure, which indicate that from at least 2004 Mr Gertos has declared net income earned on the property as part of his taxable income. These records show that amounts were occasionally paid for items such as insurance and minor repairs.

26

Mr Gertos deposes that by 2014 the property was in need of further substantial repairs, and that he spent about $108,000 accordingly. This expenditure was evidenced to a large degree by invoices, and also the testimony of Ms Alha, who has worked for Mr Gertos since about 2006, and whose responsibilities include management of the property.

27 Mr Gertos gave evidence that in the course of certain Family Court proceedings in about 2015, he disclosed that he had been in possession of the 6 Malleny Street property for a long period and was probably able to become registered as its owner.

28 Those proceedings concluded in 2016. In early 2017, Mr Gertos made his application under s 45D of the *Real Property Act*. The Registrar-General made various enquiries, and issued a number of requisitions to Mr Gertos for further information, before giving notice in October 2017 of an intention to grant the application.

29 In cross-examination, Mr Gertos was asked about a statutory declaration he had made in which it was stated that he had taken possession of the property in 1992. Mr Gertos said that this was a mistake and that he was able to recall the time of taking possession by reference to the time when he acquired a certain property in Camperdown. Mr Gertos said that he purchased the Camperdown property at a public auction in April 1999. The transfer of the title to that property, to a company associated with Mr Gertos, did not take place until May 2000.

30 Mr Gertos was questioned about the absence of records going back to 1998. Mr Gertos agreed that the senior accountant had earlier told him that it was important to keep records in order to prove a claim for adverse possession. Mr Gertos stated that attempts were made "to find the receipts for that period, but the records were just not available". He was asked numerous questions about aspects of the invoices he produced in relation to the works carried out in 2014. There was a suggestion that the works, or at least some of them, were not carried out in relation to the 6 Malleny Street property, but in my opinion Mr Gertos adequately explained how most of the invoices related to that property. I note further that there was no challenge made to the testimony of Ms Alha concerning the works undertaken at that time.

31 Mr Gertos was asked to explain why the money expended on the works was not reflected in the expenses shown in his taxation return for the year ended 30 June 2015. Mr Gertos explained that the works involved a lot of replacement, not merely repairs, and so were treated as being of a capital nature.

32 Mr Gertos was also asked about whether the income from the property had been declared in his taxation returns. Mr Gertos explained that prior to the 2015 year the income from the property was included in the returns under the "Business Income" item rather than as a separate item. Mr Gertos said that there had been "a change of format" in 2015, and it was decided to henceforth include the income from the property under the "Rent" item. In re-examination, Mr Gertos referred to a rental profit and loss schedule for the 2014 year, that he said supported the 2014 tax return. I note that the evidence includes other schedules of that character in respect of earlier years.

33 It was put to Mr Gertos that he formed the intention "to have the possession and own" the property when he instructed his solicitor to proceed with the s 45D application. Mr Gertos replied:

> I was already in possession of that property.

When asked why he did not make the application in 2010 or 2012, Mr Gertos said that he had other things going on in his life at the time, and making the application was not a priority. Mr Gertos did not accept the proposition that until 2014 "all he saw from the property" was an opportunity to obtain rental income.

34 Ms Alha deposed:

> 6. I have been looking after the property for Mr Gertos since I began work for him. I have been appointing real estate agents to manage the property and receive rents from the letting of the premises. I have been the point of contact for real estate agents managing the property to organise repairs or address enquiries or requests of tenants and I have from time to time been going to the premises to inspect it.
>
> 7. For many years the property has been managed by Richardson and Wrench, Newtown. That agency has been responsible for advertising and recommending tenants to Mr Gertos, collecting rentals from tenants, paying out for maintenance and other day-to-day expenses from rental receipts, re-leasing of the premises when the term of any lease expires, organising repairs and maintenance of an essential nature to the premises if and when those repairs or maintenance became necessary and liaising with me as Mr Gertos' representative to obtain Mr Gertos' instructions.
>
> …
>
> 9. In the first five years or so after I began work for Mr Gertos I would visit the property once or twice a year. It could have been a little more often. I would make a point of calling in at the property on a random basis to check the state of the premises either by driving past looking from the outside or actually walking up to the front door to speak to

> the tenant. I would more likely speak to the tenant in response to specific requests from the tenant for repairs or maintenance of a particular kind so as to get an understanding of whether or not the work requested was reasonable and justified.
>
> 10. After the first five years or so I began to call at the property a little more often. For example, as I became more experienced I thought it important to visit each tenant at the commencement of their lease. I would introduce myself to the tenant and leave my business card. I would typically introduce myself and then say words to the effect:
>
> > "Here is my business card. If you have any need for urgent repairs feel free to call me. I am responsible for looking after the property for the owner and don't hesitate to call me."

35 Ms Alha also gave evidence concerning her involvement in relation to the carrying out of repairs at the property in late 2014 and early 2015.

36 In cross-examination, Ms Alha was asked about when she carried out certain searches for Mr Gertos in relation to the registered proprietor of the property. Ms Alha was unable to recall when the searches were made, but suggested it was "much later" than when she first started working for Mr Gertos. Later in her cross-examination she said that she assumed that the searches were carried out after 2011. She could not recall whether the searches were carried out before or after 2014.

37 No substantial challenge was made to the thrust of Ms Alha's evidence, including her evidence about the undertaking of works at the property in late 2014 to early 2015.

Determination

38 The terms of the declaration sought by the plaintiffs are directed to whether Mr Gertos is entitled to be registered as the proprietor of the land. In the course of the hearing I raised some misgivings about whether the Court ought to determine that matter. I did that because the application made by Mr Gertos to the Registrar-General under s 45D of the *Real Property Act* has not been finalised, and no final relief is sought against the Registrar-General, such as an injunction preventing the grant of the application. Further, no cross claim has been advanced by Mr Gertos. In light of the provisions of the *Real Property Act* which allow for review by this Court of decisions of the Registrar-General (s 122), and stating of cases by the Registrar-General for the opinion of this Court (s 124), I can see sound reasons for the Court not embarking upon a determination of whether to make a declaration of the type sought by the plaintiffs.

39 However, as both parties indicated that it was open to the Court to do so, and urged the Court to proceed accordingly, I will do so. I note that in this regard I was referred to the observations made by Hamilton J in *Bartlett v Ryan* [2000] NSWSC 807 at [11] and the cases there referred to.

40 A convenient starting point is s 45D itself, which relevantly provides:

> (1) Where, at any time after the commencement of this Part, a person is in possession of land under the provisions of this Act and:
>
> (a) the land is a whole parcel of land,
>
> (b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land, and
>
> (c) the land is comprised in an ordinary folio of the Register or is comprised in a qualified or limited folio of the Register and the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the creation of the qualified or limited folio of the Register,
>
> that person in possession may, subject to this section, apply to the Registrar-General to be recorded in the Register as the proprietor of that estate or interest in the land.
>
> …
>
> (5) A possessory application shall be in the approved form and shall be accompanied by such evidence and documents of title, and (in the case of an application under subsection (2A)) such evidence of concurrence on the part of the local council, as the Registrar-General may require.

41 Section 45E relevantly provides:

> (1) Subject to section 45F, the Registrar-General may grant a possessory application if the Registrar-General is satisfied that the application:
>
> (a) was authorised by section 45D (1), (2) or (2A),
>
> (b) was not made in breach of section 45D (3) or (4), and
>
> (c) complies with section 45D (5).
>
> (2) Where the Registrar-General intends to grant a possessory application and, pursuant to section 12 (1) (h) or 12 (1A), gives notice of that intention the Registrar-General shall, in the notice, specify a period (being not less than 1 month after the date of the notice) before the expiration of which the application will not be granted.
>
> …
>
> (6) The Registrar-General may make such recordings in the Register, and take such other action, as the Registrar-General considers necessary or proper as a consequence of the grant of a possessory application.

42

These provisions need to be considered alongside s 45C(1), which is in these terms:

> (1) Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.

43 In essence, Mr Gertos contends that he is entitled to become the registered proprietor of the land because the title of Mr Downie would have been extinguished in accordance with s 45D(1)(b). In *Refina Pty Ltd v Binnie* [2010] NSWCA 192 Young JA stated at [83]-[84] that:

> …the effect of s 45C is that under s 45D(1)(b) one looks to see whether, hypothetically, the title of the proprietor would have been extinguished by the statutes of limitation had those statutes applied to the land (ie had the land been Old System land). If that enquiry returns a positive result then one of the factors which may induce the Registrar-General to issue a title has been satisfied.
>
> To my mind the provisions of the *Limitation Act* with respect to extinguishment of title to land have no greater effect on Torrens land than as stated in the previous paragraph.

(See also the judgment of Allsop P at [16]).

44 The relevant enquiry is whether the title of the registered proprietor of the fee simple (Mr Downie) would have been extinguished by the operation of the provisions of the Act had those provisions applied to the land.

45 The salient provisions of the Act are those that concern the recovery of the land. They are largely contained within Division 3 of Part 2 of the Act (ss 27 to 39). Reference should be made in particular to the following:

> **27 General**
>
> (1) An action on a cause of action to recover land is not maintainable by the Crown if brought after the expiration of a limitation period of thirty years running from the date on which the cause of action first accrues to the Crown or to a person through whom the Crown claims.
>
> (2) Subject to subsection (3) an action on a cause of action to recover land is not maintainable by a person other than the Crown if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.
>
> (3) Subsection (2) does not apply to an action brought by a person claiming through the Crown and brought on a cause of action which accrues to the Crown.
>
> (4) Where a cause of action to recover land accrues to the Crown, an action on that cause of action is not maintainable by a person claiming through the Crown if brought after the expiration of the first to expire of:
>
> (a) the limitation period fixed by or under this Act for an action on that cause of action by the Crown, and
>
> (b) a limitation period of twelve years running from the date on which the cause of action first accrues (on or after the date of accrual to the Crown) to a person claiming through the Crown.
>
> ...
>
> **29 Accrual—deceased in possession**
>
> Where:
>
> (a) the estate or interest claimed in an action on a cause of action to recover land is an estate or interest:
>
> (i) assured as an estate or interest in possession by the will of a deceased person, or
>
> (ii) passing on intestacy,
>
> to the plaintiff or to a person through whom the plaintiff claims,
>
> (b) the deceased is, at the date of his or her death, in possession by virtue of the estate or interest claimed or by virtue of an estate or interest out of which the assurance is made, and
>
> (c) no person is, after the date of the death of the deceased and before the date on which the action is brought, in possession:
>
> (i) by virtue of the estate or interest claimed and under the assurance or intestacy, or
>
> (ii) as personal representative of the deceased,
>
> the cause of action accrues on the date of the death of the deceased.
>
> …
>
> **31 Accrual—future interests**
>
> Subject to section 67, where:
>
> (a) the estate or interest claimed in an action on a cause of action to recover land is at any time an estate or interest in reversion or remainder or any other future estate or interest, and
>
> (b) no person is, at any time after the date on which the estate or interest claimed becomes a present estate or interest and before the date on which the action is brought, in possession by virtue of the estate or interest claimed,
>
> the cause of action accrues on the date on which the estate or interest claimed becomes a present estate or interest.
>
> …
>
> **38 Adverse possession**

> (1) Where, on the date on which, under this Act, a cause of action would, but for this section, accrue, the land is not in adverse possession, the accrual is postponed so that the cause of action does not accrue until the date on which the land is first in adverse possession.
>
> (2) Subject to subsection (3), where a cause of action accrues to recover land from a person in adverse possession of the land, and the land is afterwards in the adverse possession of a second person, whether the second person claims through the first person or not, the cause of action to recover the land from the second person accrues on the date on which the cause of action to recover the land from the first person first accrues to the plaintiff or to a person through whom the plaintiff claims.
>
> (3) Where a cause of action to recover land accrues and afterwards, but before the cause of action is barred by this Act, the land ceases to be in adverse possession, for the purposes of this Act:
>
> (a) the former adverse possession has no effect, and
>
> (b) a fresh cause of action accrues on, but not before, the date when the land is first again in adverse possession.
>
> (4) For the purposes of this section:
>
> (a) adverse possession is possession by a person in whose favour the limitation period can run,
>
> (b) possession of land subject to a rentcharge by a person who does not pay the rent is possession by the person of the rentcharge, and
>
> (c) in a case to which section 33 applies, receipt of the rent by a person wrongfully claiming to be entitled to the land subject to the lease is, as against the landlord, adverse possession of the land.
>
> (5) Where land is held by joint tenants or tenants in common, possession by a tenant of more than his or her share, not for the benefit of the other tenant, is, as against the other tenant, adverse possession.

46 Reference should also be made to s 65 which relevantly provides:

> **65 Property**
>
> (1) Subject to subsection (2), on the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of Schedule 4, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of that Schedule is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.
>
> (2) Where, before the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of that Schedule, an action is brought on the cause of action, the expiration of the limitation period does not affect the right or title of the plaintiff to property specified in column 2 of that Schedule in respect of which the action is brought:
>
> (a) for the purposes of the action, or
>
> (b) so far as the right or title is established in the action.

47 In Schedule 4 the relevant item in column 1 is “To recover land” and the relevant item in column 2 is “The land”.

48 It should also be noted that by s 11(1), unless the context or subject matter otherwise indicates or requires, “Plaintiff” is defined to mean a person bringing an action. By s 11(2)(b), a reference to a cause of action to recover land includes a reference to a right to enter into possession of the land. Section 11(5) provides that the provisions of the Act as to the date of accrual of a cause of action have effect for the purposes of the Act but not for any other purpose.

49 Extinguishment of a title to land pursuant to s 65(1) occurs on the expiration of a limitation period fixed by or under the Act for a cause of action to recover land. In that situation the title of a person formerly having the cause of action to recover the land is extinguished as against the person against whom the cause of action formerly lay.

50 In the present case Mr Downie had title to the fee simple in the 6 Malleny Street property. However, prior to his death he had no right to possession of the land against Mrs Grimes, who was in possession under her tenancy. Mr Downie had no cause of action to recover the land against her.

51 Upon the death of Mr Downie in 1947, his interest in the property became part of his estate, and by the operation of s 61 of the *Wills Probate and Administration Act 1898* (NSW) was deemed to be vested in the Public Trustee. That state of affairs has continued as no grant of probate or administration has been made in respect of the estate. There has not been any passing and vesting of the estate to and in any legal personal representative of the estate (see *Probate and Administration Act 1898* (NSW), s 44).

52 Mrs Grimes' tenancy came to an end when she died in April 1998. Mr Gertos claims that he took possession later in 1998 and has maintained his possession without interruption, and adversely to the documentary owner, ever since. I will deal first with that claim.

53 There was no real dispute as to the principles applicable to a claim based on adverse possession. I was referred by the plaintiffs to the well-known statement of Bowen CJ in Eq in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 475. His Honour there

stated (in relation to the Imperial limitation statute that formerly applied in New South Wales):

> Possession which will cause time to run under the Act is possession which is open, not secret; peaceful, not by force; and adverse, not by consent of the true owner. Lord Shaw of Dunfermline, giving the opinion of the Privy Council in *Kirby v. Cowderoy*, discussed the nature and incidents of adverse possession. Adopting earlier judicial observations, he said: "Possession 'must be considered in every case with reference to the peculiar circumstances … the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession'."

54 Reference was also made by the plaintiffs to the judgment of Slade J in *Powell v McFarlane* (1979) 38 P&CR 452, especially at 470-472 as follows:

> It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
>
> (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.
>
> …
>
> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.
>
> The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.

55 Both parties referred to the decision of the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; [2002] UKHL 30. In that case, the judgment of Slade J in *Powell v McFarlane* (supra) was described by Lord Browne-Wilkinson as remarkable, and by Lord Hutton as a classic. Lord Browne-Wilkinson delivered the leading speech in *J A Pye (Oxford) Ltd v Graham* (supra). His Lordship stated (at [35]-[36]):

> From 1833 onwards, therefore, old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions. From 1833 onwards the only question was whether the squatter had been in possession in the ordinary sense of the word. That is still the law, as Slade J rightly said. After 1833 the phrase "adverse possession" did not appear in the statutes until, to my mind unfortunately, it was reintroduced by the Limitation Act 1939, section 10 of which is in virtually the same words as paragraph 8(1) of Schedule 1 to the 1980 Act. In my judgment the references to "adverse possession" in the 1939 and 1980 Acts did not reintroduce by a side wind after over 100 years the old notions of adverse possession in force before 1833. Para 8(1) of Schedule 1 to the 1980 Act defines what is meant by adverse possession in that paragraph as being the case where land is in the possession of a person in whose favour time "can run". It is directed not to the nature of the possession but to the capacity of the squatter. Thus a trustee who is unable to acquire a title by lapse of time against the trust estate (see section 21) is not in adverse possession for the purposes of para 8. Although it is convenient to refer to possession by a squatter without the consent of the true owner as being "adverse possession" the convenience of this must not be allowed to reintroduce by the back door that which for so long has not formed part of the law.
>
> Many of the difficulties with these sections which I will have to consider are due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to "oust" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with

> any present or future use by the true owner. In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.

56 At [41] Lord Browne-Wilkinson expressly agreed with what Slade J had said about "factual possession" in *Powell v McFarlane* (supra). In relation to the question of intention to possess, Lord Browne-Wilkinson said (at [42]):

> …Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title.

57 Lord Hope stated (at [69]):

> It is plainly of some importance, both now and for the future, to understand what the use of the word "adverse" in the context of section 15 of the Limitation Act 1980 was intended to convey. At first sight, it might be thought that the word "adverse" describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor. The context is that of a person bringing an action to recover land who has been in possession of land but has been dispossessed or has discontinued his possession: paragraph 8 of Schedule 1 to the 1980 Act. His right of action is treated as accruing as soon as the land is in the possession of some other person in whose favour the limitation period can run. In that sense, and for that purpose, the other person's possession is adverse to his. But the question whether that other person is in fact in possession of the land is a separate question on which the word "adverse" casts no light.

58 Lord Hutton stated (at [76]-[77]):

> …Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.
>
> The conclusion to be drawn from such acts by an occupier is recognised by Slade J in *Powell v Macfarlane*, at p 472:
>
>> "If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."
>
> And, at page 476:
>
>> "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite *animus possidendi* in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."
>
> In another passage of his judgment at pp 471-472 Slade J explains what is meant by "an intention on his part to … exclude the true owner":
>
>> "What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

59 The plaintiffs submitted that the evidence did not show that Mr Gertos was relevantly in adverse possession. It was submitted that Mr Gertos did not possess the property in an open manner. It was put that insofar as he occupied the property he did so only for the purpose of obtaining rental income from it, and this was not sufficient to amount to a taking of factual possession. The plaintiffs also submitted that in these circumstances clear evidence was required in order to show the requisite intention to possess, yet the evidence did not reach that standard. Alternatively, it was submitted that an intention to possess was only formed in recent years, possibly when Ms Alha was asked to carry out searches, or possibly as a result of advice received by Mr Gertos in the course of his Family Court proceedings.

60 The submissions made on behalf of Mr Gertos emphasised the following aspects of his evidence. First, that in 1998 he concluded that the property was not occupied, and after carrying out an inspection, decided to take possession of it himself. Secondly, that he thereafter took steps to secure the property, had the locks changed, and had some works carried out to make the property habitable. Thirdly, that he then set about renting the property to tenants through an agent appointed for that purpose. Fourthly, that over the years that followed the property was let by him, on a more or less continuous basis,

to a series of tenants. Fifthly, that he undertook the payment of the rates and charges, and land tax, in respect of the property, and further made payments for insurance and maintenance. Sixthly, that he expended more than $100,000 in 2014 in effecting substantial works at the property. Seventhly, that the income and expenses in relation to the property were included within his taxation returns throughout. And lastly, that his entitlement to assert a possessory title was disclosed in the course of his Family Court proceedings.

61 It was submitted by Mr Gertos that the evidence demonstrated both factual possession and an intention to possess from about late 1998. It was put that the actions of Mr Gertos in respect of the property were unequivocal in that it was made clear that he was using the land as an owner would, and in such a way as to exclude the world at large including the documentary title holder.

62 I will record at the outset that I generally accept the evidence given by Mr Gertos concerning his use and occupation of the 6 Malleny Street property. I have not overlooked that the statement contained in his initial statutory declaration, that he went into possession in 1992, was most inaccurate. The magnitude of this error, coupled with a lack of documentary records in respect of the period from 1998 to 2003, caused me to treat his testimony with some circumspection. However, I gained the impression that Mr Gertos essentially gave an honest account of events, to the extent that his imperfect memory allowed.

63 Most of Mr Gertos' account of his involvement with the property was not the subject of challenge in cross-examination. Further, it is noteworthy that his account is corroborated in a number of significant respects by evidence given by witnesses called by the plaintiffs. For example, there was evidence about new tenants moving into the property not too long after Mrs Grimes' death. There was also evidence given by Kathy Pritt, who lives next door to the property, that some minor works were carried out on the property after Mrs Grimes died, by a man associated with Richardson & Wrench Hurlstone Park. It is likely, having regard to the evidence about the agent's negative attitude to repairs whilst Mrs Grimes was alive, that the works referred to were the works Mr Gertos arranged at about that time. I accept the evidence of Mr Gertos to the effect that he retained Richardson & Wrench Hurlstone Park in about 1998. Another example is the evidence given by numerous witnesses about the succession of tenants who occupied the property over the course of the years that followed Mrs Grimes' death.

64 I accept the evidence of Mr Gertos about deciding to take possession of the property for himself, including his evidence to the effect that it was in his mind that if he possessed the property for long enough he may be able to become its owner. I further accept that Mr Gertos thereupon took steps to secure the property including by changing locks, and have works carried out in order to make the property habitable. I find that this occurred in about late 1998. I also find that within a short period Mr Gertos had, through an agent, found a tenant and entered into a lease of the property as landlord. I accept that since that time Mr Gertos has entered into a series of leases with different tenants, such that the property has been almost continuously let. There is evidence that one of these leases was entered into in October 2005, following a marketing campaign carried out by Richardson & Wrench Hurlstone Park. This campaign included a signboard at the property, and advertising on internet websites.

65 I am satisfied that from about late 1998 Mr Gertos made arrangements to pay outgoings in respect of the property. The documentary evidence shows that by no later than about 2003-2004, Mr Gertos was paying the Council rates and land tax for the property, and by 2005 was paying insurance premiums. In relation to Council rates, the evidence suggests that the notices were initially sent to Richardson & Wrench Hurlstone Park, but after they ceased to be agents in about December 2009 the rate notices were sent to Mr Gertos personally. (It seems that The Professionals of Newtown became the new managing agents. That firm subsequently became Richardson & Wrench Newtown.)

66 I am further satisfied that from about late 1998 various maintenance and repair works in respect of the property were undertaken on the instructions of Mr Gertos and paid for out of the rental income. Substantial repair works were carried out at the property for Mr Gertos in late 2014 and early 2015.

67 Having considered the totality of the evidence, viewed in the light of the character of the property being a single dwelling suburban block, I am comfortably satisfied that since about late 1998 Mr Gertos has been in factual possession of the land with the intention of possessing the land. In essence, Mr Gertos succeeded in taking and maintaining

physical custody of the land, to the exclusion of all others, and he has assumed the position of a landlord. I do not accept the submission that he did not actually take possession because he only occupied the property for the limited purpose of obtaining rental income. In my opinion, the actions taken by Mr Gertos (in particular his engagement of a managing agent to arrange leases, and entry into leases as the landlord) clearly signify an intention to possess the property to the exclusion of all others, including the registered title holder. His actions are not equivocal in that respect. Mr Gertos has plainly acted as the person who has the possession of the land, able to confer leasehold interests upon tenants. Mr Gertos accepted rent from the tenants (see *Roberts v Swangrove Estates Ltd* [2007] EWHC 513 (Ch) at [33]). He has made full use of the land in a way an owner would.

68 The actions of Mr Gertos in paying rates and taxes levied upon the land further reinforce the conclusion that he has taken possession with the intention of possessing the land to the exclusion of all others (see *South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd* [2009] NSWSC 716 at [19]). So, too, do his actions in having extensive repairs carried out. I do not accept the suggestion that Mr Gertos only formed an intention to possess the land in recent years. His actions show that he had the requisite intention from about late 1998. From that point, he intended to possess the property himself to the exclusion of all others including the registered title holder "so far as is reasonably practicable and so far as the processes of the law will allow" (see *Powell v McFarlane* (supra) at 472, cited by Lord Hutton in *J A Pye (Oxford) Ltd v Graham* (supra) at [77]).

69 I do not think that Mr Gertos' possession can be considered to be secret rather than open. Neighbours and other residents in Malleny Street may not have seen Mr Gertos personally, or had any dealings with him, but that is no different from what commonly occurs where a residential property is held by its owner as an investment and is made available for lease. Insofar as Mr Gertos acted (through his agent, and assisted by Ms Alha) as the landlord by entering into leases, maintaining and repairing the property, and paying outgoings in respect of it, he was not acting in secret. It was obvious to many of the residents who gave evidence that the property was being rented out by an "owner" even if they did not know the identity of the "owner". I have already referred to the marketing campaign carried out in 2005. In 2009, the Council was requested to send rate notices to Mr Gertos as the owner. I note further that Mr Gertos has included his income from the property in his taxation returns from at least 2004, and he disclosed his interest in the property in the course of his Family Court proceedings in 2015.

70 Mr Gertos' possession of the land since about late 1998 can be regarded as open, not secret; peaceful, not by force; and adverse, not by consent of the true owner. It has continued without interruption to the present day. In my opinion it is possession by a person in whose favour the limitation period under the Act can run (see s 38(4)(a)).

71 The plaintiffs submitted that even if Mr Gertos made out his adverse possession claim, the registered title to the fee simple (which remains in Mr Downie's name) would not have been extinguished under the Act. It was put, in support of that submission, that in the absence of a legal personal representative of the estate, the estate was unable to bring any action against a trespasser such as Mr Gertos, and time did not run against a legal personal representative (in this case an administrator) until a grant was made.

72 Reference was made to certain statements made by Hodgson CJ in Eq (as his Honour then was) in *Atsas v Gertsch* [1998] NSWSC 522, including the following:

> It is clear that a limitation period only starts when a cause of action accrues to a plaintiff or a person through whom the plaintiff claims; and decisions such as *Thomson v. Lord Clanmorris* indicate there must also be a party liable to be sued. It is convenient to look separately at actions on behalf of an estate, and actions against an estate. Generally, in both cases, if time has begun to run before death, it continues to run in the period between death and the appointment of a legal personal representative. The more doubtful question, which arises in this case, concerns the position where there is no cause of action before the death.
>
> Looking first at the position concerning actions in favour of an estate, it seems clear that, where there is no executor who obtains a grant, an action cannot be commenced by an administrator until the actual appointment of the administrator (see *Gertsch v. Roberts* (1993) 35 NSWLR 631 and cases cited at p.654); and it follows that, in relation to causes of action arising on or after death, time does not begin to run against the administrator until then. Where there is an executor appointed by the deceased's will, who obtains a grant, there are decisions to the effect that the same situation obtains: *Marshall v. D.G. Sundon & Co.* (1989) 16 NSWLR 463; *Darrington v. Caldbeck* (1990) 20 NSWLR 212. This matter was left open by Powell J. in *Gertsch v. Roberts*. However, the decision of the High Court in *Hawkins v. Clayton* was to the effect that time began to run against the executor in that case once the executor had taken control of the estate and was committed to taking probate: that would seem to suggest that proceedings commenced by an executor in those circumstances, where that executor subsequently obtains a grant, would be well commenced.

73 Reference was also made to the judgment of Brennan J (as his Honour then was) in *Hawkins v Clayton* (1988) 164 CLR 539 at 562 where his Honour said:

> Unlike the ordinary case, the last element to occur in a case of the present kind is the nominated executor's assumption of the office of executor. Until that occurs, the cause of action is not complete. For the purposes of s. 14(1)(b) of the *Limitation Act*, "time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be some one who can institute the action": *Meyappa Chetty v. Supramanian Chetty*; and see *Thomson v. Clanmorris (Lord)*. Until the nominated executor assumes the office of executor, the cause of action does not accrue and time does not begin to run. If a cause of action is itself an asset which devolves on the executor or arises from an infringement of the proprietary or possessory rights of an executor in respect of the estate, the executor's ignorance of his title would not prevent the time from running: cf. *Knox v. Gye*. But where no action can be brought by the nominated executor until he assumes office, time runs only from that event. Time commenced to run in this case only from Mr. Hawkins' assumption of the office in March 1981. The action was commenced within six years thereafter. The defence based on the *Limitation Act* fails.

74 Mr Gertos submitted that the situation was governed by ss 27 and 29 of the Act. He submitted that the latter section operated so that, subject only to the postponement effected by s 38, the relevant cause of action to recover land accrued on the date of the death of Mr Downie. It was submitted that s 38(1) operated to postpone that accrual until Mr Gertos first went into adverse possession in about late 1998, and that no action was brought to recover the land from Mr Gertos prior to the expiration of the 12 year limitation period set by s 27(2) of the Act. Accordingly, so it was submitted, the plaintiffs (even if they had standing to do so) could not succeed in an action to recover the land from Mr Gertos.

75 I do not think that s 29 of the Act operates in the circumstances of this case. This is because s 29(1)(b) is not satisfied. At the date of his death, Mr Downie was not in possession by virtue of his fee simple estate. The property was instead possessed by Mrs Grimes pursuant to her tenancy, and Mr Downie was not entitled to disturb her possession.

76 It seems to me that s 31 of the Act operates in this situation. Mr Downie's fee simple estate was an estate or interest in reversion for the purposes of s 31(a). That fee simple estate became a present estate or interest upon the termination of Mrs Grimes' tenancy, which occurred upon her death. As no person was thereafter in possession of the land by virtue of Mr Downie's fee simple estate, s 31(b) is satisfied. It follows that by reason of s 31 of the Act, the cause of action to recover the fee simple estate accrued on the date on which the estate became a present estate or interest, namely 19 April 1998. (Section 31 is expressed to be subject to s 67, but that section does not operate in the circumstances of the present case.)

77 However, the accrual of the cause of action is postponed by s 38(1) until the date on which the land is first in adverse possession. As Mr Gertos went into possession in about late 1998, and his possession was adverse possession for the purposes of s 38 (see s 38(4)(a)), the cause of action accrued at that time.

78 It then becomes necessary to consider the operation of s 27(2). Section 27(2) relevantly provides that an action on a cause of action to recover land is not maintainable if brought more than 12 years after the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.

79 The plaintiffs submitted that if a legal personal representative was now appointed for Mr Downie's estate, that person could bring and maintain the cause of action to recover the land from Mr Gertos because the cause of action first accrues to the legal personal representative when the grant of representation is made.

80 I do not think that is correct.

81 The cause of action is one to vindicate or assert the title of a deceased registered proprietor. It is the assertion of a proprietary right on behalf of a deceased estate, not merely a personal right held by the person bringing the action. The action must, of course, be brought by a person who has the requisite standing to bring an action on behalf of the estate. Standing is ordinarily obtained through a grant of probate or administration, although in rare cases standing might be derived from a representative order (see *Hewitt v Gardner* [2009] NSWSC 705 at [76]-[92]). It seems that the Public Trustee does not have the power to institute proceedings (see the extensive discussion of the cases by Davies J in *GEL Custodians Pty Ltd v The Estate of the late Geoffrey Francis Wells* [2013] NSWSC 973 at [20]-[54]).

82 If the interest of a deceased registered proprietor would pass on intestacy, s 29 of the Act would apply if the deceased died whilst in possession by virtue of the interest, and no one who is entitled to the land (including a legal personal representative) is subsequently in possession. In that situation a cause of action to recover the land

accrues on the date of death. That is so even though a legal personal representative will not then have been appointed, and indeed might never be appointed. Section 29 envisages that the cause of action will be brought by a beneficiary under the will or a person who would take on intestacy. Nevertheless, the cause of action remains one for the assertion of a right on behalf of a deceased estate, namely the title held in the name of the deceased registered proprietor. The section seems to provide, subject to the s 38 postponement, that from the date of death proceedings to recover the land can be commenced and time can begin to run for the purposes of a limitation period regardless of when (or whether) a legal personal representative is appointed. It would be incongruous if time commenced to run at a different time in respect of an action to recover the same land merely because it was commenced by a legal personal representative. The cause of action remains one for the assertion, on behalf of the estate, of the title held in the name of the deceased registered proprietor.

83 In the present case s 31 of the Act applies. That section provides, subject to the s 38 postponement, that from the date the estate or interest becomes a present estate or interest, proceedings to recover the land can be commenced and time can begin to run for the purposes of a limitation period. That is so, in a case where the relevant interest is part of a deceased estate, regardless of when (or whether) a legal personal representative is appointed. Again, it would be incongruous if time commenced to run at a different time in respect of an action to recover the same land merely because it was commenced by a legal personal representative.

84 There is in these circumstances but one cause of action to recover land by asserting the title of the deceased registered proprietor against a trespasser. The accrual of the cause of action is governed, not by the general law, but by ss 31 and 38 of the Act. It accrues, for the purposes of the Act, independently of the existence of a person with present standing to bring an action upon it (compare *Chetty v Chetty* [1916] 1 AC 603 at 610).

85 If, as I have found, Mr Gertos' claim of adverse possession is made out, the cause of action accrued when Mr Gertos took possession. Time then commenced to run for the purposes of a limitation period. Subject to obtaining the requisite standing, it was from that time open to a person, acting on behalf of the estate, to bring the cause of action to recover the land from Mr Gertos. In that sense the cause of action can be regarded as having accrued to such a person for the purposes of s 27(2) of the Act.

86 The action would not be maintainable if brought by such a person after the expiration of the 12 year limitation period provided for in s 27(2). In the present case, the twelve year limitation period would have expired in about late 2010. Moreover, by reason of s 65(1) of the Act, upon the expiration of the limitation period the title of any person formerly having the cause of action would be extinguished as against Mr Gertos. In my view, s 65(1) would operate so that there would be an extinguishment of the title held in the name of the deceased registered proprietor. That is because that title is the title that would be asserted by a person bringing the cause of action on behalf of the estate. It is the very basis of the cause of action to recover the land from Mr Gertos. It would follow that, in the circumstances of this case, the title of the registered proprietor would have been extinguished had the Act applied to the land. Section 45D(1)(b) of the *Real Property Act* is thus satisfied.

87 I have given careful consideration to the plaintiffs' submissions on this issue but am unable to accept them. The statements made by Hodgson CJ in Eq in *Atsas v Gertsch* (supra) were made in the context of an issue as to the accrual of a cause of action (in contract) at general law, as were the observations made by Brennan J in *Hawkins v Clayton* (supra). That case involved a cause of action in tort against a custodian of a will. Brennan J held (at 562) that the cause of action was only complete when the executor under the will assumed office. The statements in these cases that are relied upon by the plaintiffs essentially reflect the general law principle that no cause of action can accrue unless there is someone who can institute the action. However, as I have said, the question of accrual in this case is governed by ss 31 and 38 of the Act, and is independent of the existence of a person with present standing to bring an action upon it. In essence, those provisions operate so that a cause of action to recover land is deemed to accrue at a certain time, for the purposes of the Act (see s 11(5)).

88 Acceptance of the plaintiffs' submissions would create considerable uncertainty in the operation of the Act insofar as it concerns actions to recover land held by a deceased registered proprietor. If a registered proprietor was deceased but no legal personal representative had been appointed the potential would exist for a cause of action in favour of a legal personal representative to arise at an indefinite time in the future and

there would be no certainty that the cause of action would ever arise. This result would be contrary to one of the evident purposes of the provisions of the Act, namely, that where land remains in adverse possession for a defined period the title holder will be barred from seeking recovery of the land and the title will be extinguished. This purpose may be regarded as a reflection of the notion that there is a public interest in ensuring that a person in long-term and undisputed possession is able to deal with the land as owner (see *Abbatangelo v Whittlesea City Council* [2007] VSC 529; (2008) V Conv R 54-750 at [3]).

89 I am also unable to accept the plaintiffs' alternative submission that the running of the limitation period is suspended because the deceased registered proprietor, by reason of his death, is a person under a disability within the meaning of s 52 of the Act.

90 Section 11(3) of the Act sets out the circumstances in which a person is treated as "under a disability" for the purposes of the Act. It provides:

> (3) For the purposes of this Act a person is under a disability:
>
> (a) while the person is under the age of eighteen years, or
>
> (b) while the person is, for a continuous period of twenty-eight days or upwards, incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of:
>
> (i) any disease or any impairment of his or her physical or mental condition,
>
> (ii) restraint of his or her person, lawful or unlawful, including detention or custody under the Mental Health Act 1958,
>
> (iii) war or warlike operations, or
>
> (iv) circumstances arising out of war or warlike operations.

91 As I understood the submission, it was put that Mr Downie is a person incapable of managing his affairs by reason of an impairment of his physical condition. However, it seems to me that death is something more than an impairment of one's physical condition. In any event, it is my opinion that "person" for the purposes of ss 11(3) and 52 of the Act does not extend to a person who is no longer alive (see *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369 at [117]). The event of death brings about the end of the person. The ordinary meaning of "person" does not include those who are no longer alive. The inclusive definition of "person" contained in s 21 of the *Interpretation Act 1987* (NSW), which refers to an individual, does not in my view extend to someone who is no longer alive. The language of s 11(3) does not suggest that something different is intended. It makes no sense to speak of a person managing his or her affairs if they are no longer alive. The submission, which was barely developed, is in my view without substance.

92 For the above reasons, it is my opinion that had the Act applied in respect of the land at 6 Malleny Street, the title of Mr Downie would have been extinguished pursuant to s 65 of the Act. Accordingly, s 45D(1)(b) of the *Real Property Act* is satisfied. There is no doubt that ss 45D(1)(a) and 45D(1)(c) are also satisfied. In these circumstances, I can see no impediment standing in the way of the Registrar-General proceeding to grant Mr Gertos' application under s 45D.

93 The plaintiffs' application for a declaration that Mr Gertos is not entitled to be registered on the title to the property will be refused, and the Court will discharge the injunction that currently restrains the Registrar-General from registering Mr Gertos as the proprietor of the land. The Court will order that the Amended Summons be dismissed. The Court will also order that the plaintiffs pay Mr Gertos' costs of the proceedings.

94 I have not overlooked the submission made by Mr Gertos that the plaintiffs lacked standing to bring these proceedings. It is correct, in my view, that the plaintiffs, having neither a grant of administration nor a representative order, do not have standing to pursue an action on behalf of the estate to recover the land from Mr Gertos. However, the plaintiffs did not ultimately pursue an action of that character. The plaintiffs instead limited their claim to the declaration that Mr Gertos is not entitled to be registered on the title. In circumstances where there is no representative of Mr Downie's estate, and the plaintiffs as surviving relatives of Mr Downie might have a claim to be granted administration of the estate and might be persons who would take on intestacy, I tend to think that the plaintiffs do have standing to seek the declaration. However, as the matter was not the subject of detailed argument, and as I consider that the claimed declaration should not be made in any event, it is not necessary to express a concluded view on the question.

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Decision last updated: 30 October 2018