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Thesis on Adverse Possession

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Abstract

Adverse possession has been described as a “debilitating”¹ experience and acts as a “blunt instrument”² of necessary legislation in modern society. It is a device that ends litigation. Legislation for abolition would lead to greater societal difficulties. Statistically land theft is rare and given that ownership of property carries a duty an owner should be vigilant. One sentence on the property folio could alert an owner of the danger of inadequate fencing. Although aspects of notification as in the *Land Registration Act 2002*³ may be more desirable.

The area of compensation payable to the title holder would be unworkable and could lead to acrimonious disputes. However the value of land does not at present enter into squatter activity although it appears central to the dissenting judgements in *Pye*⁴. *Pye* needs to be seen in isolation as a very unusual case. Adverse possession of company land in Ireland is not an issue according to the PRAI.

The Statute of Limitations 1957 operates fairly in protecting land ownership. Although land purchased from the public purse should carry the longer recovery period of thirty years, the timeframe of twelve years is adequate in relation to private property. The timing of activity on the ground can be assisted by photographs from the OSi.⁵ The Constitution adequately protects private property and better access to justice could be achieved if court costs were tax deductible for individuals as they are for companies.

In summary the survey analysis concluded that squatter behaviour is repetitive if left unaddressed. The lack of professionalism amongst those involved in land measurement needs resolution. Suggestions in relation to the use of GPS satellite maps in the *Green Paper Proposing Reform of Boundary Surveys* could lead to confusion and in the wrong hands further land theft. A better proposition would be to utilise the OSi mapping that dates back to the early 19th century combined with a moderate archaeological survey.

Overall the doctrine of adverse possession is an essential mechanism acting to stabilise title and has traditionally worked well although sometimes unfairly.

¹ Charleton Denise. Smithfield, Dublin, April 2007. RTE News Bulletin following settlement of the Charleton/Kenny case

² McDermott Paul Anthony quoted in *The Irish Times* Holland Kitty, Whose land is it anyway? 16th June 2007.

³ Land Registration Act 2002.

⁴ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.]

⁵ Ordnance Survey Ireland, Phoenix Park, Dublin.

Declaration Page

I certify that this thesis which I now submit for examination for the award of MA in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole or in part for an award in any other Institute or University.

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Introduction

Adverse Possession concerns rights acquired over land through exclusive use and possession adverse to the ownership rights of another person. Denise Charleton described the experience as debilitating following the settlement of the Charleton/Kenny land dispute in 2008. In contrast the Dunsink Lane settlement received little publicity, when travellers were paid in excess of twenty million pounds by the State to vacate property the size of Phoenix Park. Lord Haughey's claim on neighbouring land in Northern Ireland failed. However, many paper title holders are affected by squatters without ever realising their land is being seized. This happens through genuine error; misreading a will, confusing parcels of land, a fence in the wrong place or the owner remaining ignorant of the squatter's true intention. Issues around the *Pye*¹ decision and questions arising from the endorsement of the doctrine are explored.

Possessory title or adverse possession as it is commonly called is a painful and expensive issue to address and while law is not emotional the terminology used to describe squatter activity and wrongdoing are intrinsically linked to position the activity to the realms of unlawfulness.

This thesis questions:

- Where the value of adverse possession lies in modern society and has it outlived its necessity?
- Should it be allowed in very limited circumstances?
- Should there be an onus on the authorities to protect private property further given the high cost of land and housing?

¹ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.]

- How does the Statute of Limitations 1957² operate to protect the rights of the squatter and the paper title holder?
- Does the Constitution adequately protect private property?

Squatting is controversial, argumentative and at variance with a reciprocal approach to the ownership of land for value. Whatever the view on the doctrine, it remains on the Statute Books and submissions to the ECHR by the Irish Government during *Pye*³ urged retention in particular circumstances to settle and quieten title. It acts in a beneficial way to protect future owners from old extinguished and stale claims to land that could be made for illogical, cruel or unjust reasons. “The policy of limitation was stated by Streatfield J, in *R.B. Policies at Lloyd’s v Butler*⁴

“It is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and I think equal policy behind these Acts, is that there shall be an end of litigation””

This thesis attempts to discern the logic of some of the judgements made distinguishing areas of comparative law and how time, evidence based information and the Constitution and the Convention may act in Ireland to better protect the paper title holder. Appreciation is extended to all who participated in the survey part of this research, newspapers, their readers and litigants.

² Statute of Limitations 1957.

³ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.]

⁴ [1950] 1 KB at p. 81, [1949] 1 All ER, at p. 229; *A’Court v Cross* (1825) e Bing at p. 332, per Best CJ “It is an Act of peace. Long dormant claims have often more of cruelty than of justice in them” quoted in Maudsley R H and Burn E H Land Law: Cases and Materials (London, 1980) at 151

CHAPTER ONE

1.1 HISTORICAL BACKGROUND

*The Limitation Act, 1623*¹ set out time limits for simple contract debts and periods of limitation for recovery. It ran against the lord of a manor as well as against any other person. If a cottage was built upon waste in defiance of lord and quiet possession had been had for twenty years, it was within the *1623 Act*; but if built at first by the lord's permission or any acknowledgement, though it were 100 years since that statute would not run against the lord.² *The Prescription Act, 1832* is also concerned with time limited for establishing rights of common and other profits. Prior to the introduction of the *Real Property Limitation Act, 1833* once entry on the land by an owner could be established by whatever means, land could be recovered thus the older statutes "*barred only the remedy and not the right*"³

This had an unsettling and destabilising effect on title and was a worry to any future purchaser thus possessory action was "abolished in 1833 for regaining possession of land."⁴ Possession for twenty years was strong presumptive evidence of a fee if no other title appeared.⁵ By the time of the Grand Tour and the Victorian era it was necessary to introduce copious legislation to manage basic societal change; illiteracy, disease, early mortality rate, travel, urban population emigration and development. This contributed to the implementation of a law to make land freely alienable, in a world choked with Dickensian characters of mischief and theft lacking the speed of today's electronic communications.

¹ The Limitation Act, 1623.

² Carson. Thomas H. and Bompas, Harold B. *Carson's Real Property Statutes* (London, 1902) 126

³ *per Griffin J. Bellew v. Bellew* [1982] IR 447 [1983] 3 ILRM 128

⁴ Curzon. L.B. *A Dictionary of Law* (Suffolk 1979) 259

⁵ *ibid.*

England in the Victorian era acquired Superpower status through Empire, many were lost in wars and battles leaving some property holders without paper title or any written documentation exercising all rights of ownership unchallenged and unable to alienate land or locate true owners in a developing commercial economy.

Persons rightfully entitled “*to land or other property have by neglect on their part to assert their rights slept upon them so long as to render it inequitable that they should disturb an enjoyment to which they have been tacit parties (Adnam v. Sandwich, 2 Q.B.D. 489).*”⁶

The *1833 Act* settled a time limit of twenty years for the recovery of land in an effort to make land freely alienable. Sect. 2 of the *Real Property Limitation Act, 1833* was eventually repealed and the *R.P.Lim. Act, 1874* Sect 1 reduced the period to twelve years after the right of action accrued⁷ this remains the term in Ireland today under the *Statute of Limitations, 1957*.⁸

Other limitation periods exist, 30 years to recover land by a State authority⁹ and 60 years for the recovery of foreshore¹⁰ following the date on which the right of action accrued. State bodies within the *1957 Act* are: a Minister of State, the Commissioners of Public Works in Ireland, the Irish Land Commission, the Revenue Commissioners or the Attorney General.

“Historically, the length of title a vendor is required to show has always been closely linked to the limitation period.....a purchaser is probably willing to assume that any

⁶ Carson Thomas H and Bompas Harold B *Carson's Real Property Statutes* (reprint 1910 Oxford 1981) at 114

⁷ *ibid.* at 125

⁸ 1957 Act, s 13(2)(a).

⁹ 1957 Act, s 13 (1)(a).

¹⁰ 1957 Act, ss 27 and 28

claim to the land arising before the statutory period of title ...has been barred under the 12 year limitation period.¹¹

However this is not so where there has been an acknowledgement with the previous owners whether verbal or in writing although proving this acknowledgement may prove a difficult hurdle to overcome. Another requirement was believed to exist in the past i.e. that if an owner had a future purpose for the land, adverse possession could only be achieved if the squatter could successfully frustrate that purpose.

1.2 POSSESSION

Historically, going back to Roman law, possession was ownership of property, control, as in war and territory, goods and chattels. Roman law relies on *corpus* i.e. physical control and *animus*, i.e. the intention to exclude others.¹² The interpretation of possession today is closely associated with maintenance, access to and walking land combined with other ownership duties of “use and enjoyment of land”.¹³ As Lord St Leonards said, “*It is perfectly settled that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely*”¹⁴ However, intention attitude and behaviour are paramount in establishing a possessory title pursuant to the Statute¹⁵ and it must be shown that an *animus possidendi* existed for the duration of the period of limitation and “no right of action to recover land shall be deemed to accrue

¹¹ MacKenzie Judith-Anne and Phillips Mary *Textbook on Land Law* (Oxford, 9th ed., 2002) 135

¹² Keenan, Denis *Smith and Keenan's English Law* (London, 9th ed., 1989) 426

¹³ DeLondras, Fiona. *Principles of Irish Property Law* (Dublin, 2007) [14-22] 380

¹⁴ *Dean of Ely v Bliss* (1852) 2 De GM & G 459 at 476-7 quoted in Wylie, J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.05] at 1080.

¹⁵ Statute of Limitations, 1957

unless the land is in the possession of some person in whose favour the period of limitation can run”¹⁶

The presence or absence of this constituent primary element is crucial to disputing parties claiming ownership. “Where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce this (*Magdalen Hospital v. Knotts* 8 CH. Civ 727).”¹⁷ Following the 1833 Act the change in the law as “thus described by Lord *St. Leonards*:

although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed” (*Ely v. Bliss*, 2 D.M. & G. 476, 477; see *Nepean v. Doe* 2 M & W. 911; *Culley v. Doe*, 11 Ad. & Ell. 1008; *Doe v. Barton*, 3 P & Dav 198; *Jack v. Walsh*, 4Ir. L. R. 254).¹⁸

Where a squatter has knowledge of the owner’s future plans for the land, “when this factor is present it is easier to hold an absence of *animus possidendi*”¹⁹ “the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alerted to his rights that occupation adverse to his title was taking place”²⁰ therefore the role of these factors is considerable in asserting lawful rights for either party. However “acts of the paper owner tend to rely on a relatively low bar for retention of ownership and from the point of view of the adverse possessor tend

¹⁶ 1957 Act, s18(1)

¹⁷ Carson Thomas H and Bompas Harold B. *Carson’s Real Property Statutes* (reprint 1910, Oxford, 2nd ed., 1981) at 126

¹⁸ *ibid* at 130.

¹⁹ *per* Kenny J. *Murphy v. Murphy* [1980] I.R. 183,

²⁰ *per* O’Hanlon J. *Doyle v. O’Neill* High Court, unreported, 13 January 1995.

to require the exercise of high levels of possession therefore implicitly favouring the paper owner.²¹

In theory a “squatter, from the first moment of dispossession, has a fee simple relative to every one except the dispossessed title holder, or anyone with a better title than the dispossessed title holder”²² The “right stemming from possession, is known as the *jus possidendi*”²³. Possessory title can be transferred by will or *inter vivos* and will operate in the same way and have the same material value on the open market that the extinguished title of the dispossessed owner once had.

1.3 PARLIAMENTARY CONVEYANCE THEORY

Following the introduction of the *1833 Act*, Parke B stated “*The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years [as it then was] has elapsed*”²⁴ This view was accepted in *Rankin v. McMurtry*²⁵ “where Holmes J stated:

Whatever the mode of transfer, I am of opinion that the estate and interest the right to which is extinguished, so far as the original owner is concerned, became vested in the person whose possession has caused such extinction.”²⁶

²¹ McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.5

²¹ Jourdan *Adverse Possession* 2003 paras 5.01 – 5.04 quoted in McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.2

²² Lyall Andrew *Land Law in Ireland* (Dublin, 2000) at 886.

²³ Cannon, Ruth. *Land Law* (Dublin 2001) 134

²⁴ Parke B *Doe d Jukes v. Sumner* (1845) 14 M & W 39 at 42, 153 ER 380 quoted in Lyall Andrew *Land Law in Ireland* (Dublin, 2000) at 884.

²⁵ (1889) 24 LR Ir 290 quoted in Wylie. J.C.W. *Irish Land Law* (Dublin, 1997).1082

²⁶ Wylie, J.C.W. *Irish Land Law* (Dublin, 1997). 1082

The court approved a passage from the leading treatise of the time which stated:

*“Though the title extinguished..... is not directly transferred by the statute to the wrongdoer who has been in possession, yet the title gained by such possession, being limited by rights yet remaining unextinguished, is clearly commensurate with the interest which the rightful owners have lost by operation of the statute, and must, therefore, it is apprehended, have the same legal character, and be freehold, leasehold or copyhold accordingly”.*²⁷

This statement “falls short of saying that there has been a parliamentary conveyance of the former owner’s title. It merely asserts that the dispossessor’s title is similar in nature to the former title: it does not say it is identical.”²⁸

However this view was rejected by the Court of Appeal in *Tichborne v. Weir*²⁹ a case on leaseholds. “Lord Esher MR and Bowen LJ both held that the previous title was *destroyed and not conveyed to the dispossessing tenant*”³⁰. However the “court in *Tichborne* accepted the parliamentary conveyance theory in relation to freehold”³¹ but not to leaseholds, appears to have been accepted “*obiter* by the Irish Court of Appeal in *O’Connor v. Foley*”³² However the problem with the parliamentary conveyance theory is that “it does not sit comfortably with the literal meaning of the words “the title of the owner is extinguished” Meredith³³ asked, “how can you reconcile extinguishment and

²⁷ Darby and Bosanquet. *Statutes of Limitations in England and Ireland* (1st ed. 1867) p 390. quoted in Wylie, J.C.W. *Irish Land Law* (Dublin, 1997). 1082

²⁸ Lyall, Andrew. *Land Law in Ireland* (Dublin, 2000) at 885.

²⁹ (1892) 67 LT 735, M & B 178, 709, followed in *Taylor v. Twinberrow* [1930] 2 KB 16 quoted in Lyall, Andrew. *Land Law in Ireland* (Dublin, 2000) at 885.

³⁰ *Ibid.*

³¹ *ibid.*

³² [1906] 1 IR 20. quoted in Lyall Andrew *Land Law in Ireland* (Dublin, 2000) at 885.

³³ “A Paradox of Sugden” (1918) 34 L.Q.R.253 quoted in Woods. Una, “Adverse Possession of unregistered Leasehold Land” (2001) 36 Irish Jurist 305

transfer? Extinguishment imports annihilation, transfer imports existence”³⁴ The word extinguished in S.24 of the Statute of Limitations particularly influenced the court in *Perry* to reject the notion of parliamentary conveyance.³⁵

The Supreme Court in *Perry v. Woodfarm Homes Ltd*³⁶ “did not accept the parliamentary conveyance theory applied to unregistered land.... and impliedly rejected the distinction in *Tichborne* and *O’Connor* between leasehold and freehold in this respect.....*Perry* however suggests that “the parliamentary conveyance theory may apply in registered title”³⁷ acting in favour of the squatter “where the terms of the *Registration of Title Act 1964* allow the dispossessed person’s interest in the land to be transferred to the squatter after 12 years’ adverse possession”³⁸ therefore “ a parliamentary conveyance may occur in relation to registered land.”³⁹ *Perry* “did not accept that the ousted lessee retained an estate in the land, as opposed to contractual rights in relation to the lessor” *Perry* agreed “that the parliamentary conveyance theory was no longer valid and that adverse possession only operated to extinguish the rights of the dispossessed owner.”⁴⁰ Griffin J. states:

*“though there is no transfer or statutory conveyance to the squatter, what the plaintiff as (squatter) has gained is the right to possession(as fee simple owners) for the unexpired portion of the term of the lease, subject to the risk and possibility of a forfeiture”*⁴¹

³⁴ *ibid.*

³⁵ See the discussion of *Perry v Woodfarm Homes Ltd.*, [1975] IR 104 at paragraphs 1.09 -1.11 quoted in Law Reform Commission *Report on Title By Adverse Possession of Land* (LRC 67 – 2002) 15

³⁶ [1975] IR 104, Supreme Court. quoted in Lyall Andrew *Land Law in Ireland* (Dublin, 2000) at 885.

³⁷ Lyall Andrew *Land Law in Ireland* (Dublin, 2000) at 885.

³⁸ Cannon Ruth *Land Law* (Dublin 2001) at 135

³⁹ *ibid.* at 140

⁴⁰ *ibid.* at 134

⁴¹ Per Griffin J. at 129, and 130 quoted in Lyall, Andrew. *Land Law in Ireland* (Dublin, 2000) at 909

Therefore an adverse possession of “leaseholds, the squatter can be removed by a forfeiture⁴² on the part of the landlord, even if he is prepared to pay the rent and observe the covenants in the lease. This turns the whole principle of adverse possession on its head.”⁴³

This is enunciated by Griffin J referring to *Fairweather*⁴⁴ he stated :

“.....a squatter on leasehold land can be ejected however long the lessee has been out of possession – be it 12 years, 120 years or 900 years. It seems to be that such a result would entirely defeat the object of the Statute of Limitations”⁴⁵

If the dispossessor’s title is subject to rights which have not been extinguished, rights which bound previous owners will bind the dispossessor. However in relation to contractual obligations Walsh J in *Perry* states:

“the ousted lessee remains bound contractually to the lessor to perform the covenants in the lease....a contract is a personal obligation not dependent upon the promissory having any estate in the land, unless the parties expressly say that it is.”⁴⁶

On leasehold land the squatter is bound by the terms of the lease and his interest in the land terminates when the lease comes to an end. If the squatter remains on the land for a further twelve years, then the lessor will be dispossessed as happened in *Pye*.⁴⁷

Although the Grahams made efforts to renew the lease without success however they remained on the land in possession without challenge for in excess of the twelve year

⁴² 1957 Act s16(1)

⁴³ Cannon, Ruth. *Land Law* (Dublin 2001 at 139

⁴⁴ *Fairweather v. St Marylebone Property Co Ltd.*, [1963]AC510 544 per Lord Denning.

⁴⁵ Per Griffin J at 129 quoted in Lyall, Andrew. *Land Law in Ireland* (Dublin 2000) at 909

⁴⁶ Per Walsh J at 119, Griffin J at 130 quoted in Lyall, Andrew. *Land Law in Ireland* (Dublin, 2000) at 909.

⁴⁷ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.]

period. On unregistered leasehold land adverse possession extinguishes the title of the dispossessed owner. However in *Gleeson v. Feehan*⁴⁸ the statement is unequivocal Keane J stated:

*It is clear from the decision of this Court in Perry v. Woodfarm Homes Ltd*⁴⁹ that, at the expiration of the limitation period, there is nothing in the nature of a 'parliamentary conveyance' to the person in adverse possession. Since, however, under s. 24 of the Statute of Limitations 1957,⁵⁰

at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.

The Law Reform Commission has recommended the re-introduction of the parliamentary conveyance in the context of the adverse possession of leasehold land.⁵¹

This would have the effect of alerting the squatter to his obligations under the terms of the lease.

1.4 ADVERSE POSSESSION - GENERAL

All court hearings relating to property must be first heard at the Circuit Court or at the High Court. There must be a title holder and a squatter or a person in whose favour the twelve year time limit has already run. "In order to be able to bring an action for the recovery of land one must first have a right to possession of that land"⁵² The Statute states "No right of action to recover land shall be deemed to accrue unless the land is in the possessionof some person in whose favour the period of limitation can run"⁵³ i.e. a trespasser without the owner's consent or permission and adverse possession has

⁴⁸ *Gleeson v. Feehan* [1997] 1 ILRM 522 SC

⁴⁹ *Perry v. Woodfarm Homes Ltd.*, [1975] I.R. 104

⁵⁰ S.24 Statute of Limitations 1957

⁵¹ LRC. *Report on the Acquisition of Title by Adverse Possession* (2002), p 10.

⁵² Cannon, Ruth. CLT Seminar "Adverse Possession" May, 2008

⁵³ 1957 Act s18(1)

been described as a “blunt instrument”⁵⁴ Tenants remaining on the property of the landlord without the payment of rent or permission are tenants at will and are in adverse possession after one year of unchallenged occupation⁵⁵ Four conditions must be “satisfied in order for adverse possession to occur throughout the period in question

1. The individual whose title is alleged to be extinguished must have had a right to possession of the land.
2. The individual whose title is alleged to be extinguished must not have been in possession of the land.
3. Another individual (a squatter) must have been in possession of the land.
4. The possession of the squatter must have been adverse to that of the true owner. In other words, the squatter must have had what is known as an *animus possidendi*”⁵⁶

Adverse possession is therefore about rights and acts of ownership performed continuously over another person’s land throughout the limitation period that may or may not result in the owner being dispossessed by the squatter or the squatter being put out of possession. Part-time use of the land will not suffice to confer ownership as is evident in the *Dunne v. Irish Rail*⁵⁷ decision. Time, access and behaviour are vital components to disputing parties.

Many aspects of cases need to be considered and all cases are different i.e. how old is the title, how difficult it is to prove entry or acknowledgement⁵⁸ if verbal and if in

⁵⁴ McDermott Paul Anthony quoted in *The Irish Times* Holland Kitty. Whose land is it anyway? 16th June 2007

⁵⁵ 1957 Act s 17(1)

⁵⁶ Cannon, Ruth. *Land Law* (Dublin 2001) at 133,134.

⁵⁷ *Dunne v. Irish Rail* [2007] IEHC 314.

⁵⁸ 1957 Act s51(1)

writing⁵⁹ how on the day of a court hearing a judge will interpret the evidence or the Statute, the behaviour or the intention of the parties. There is nothing in the Statute⁶⁰ however that refers to the intentions of the true owner.

The importance of intention relates mainly to the squatter i.e. excluding the owner. The intention of the owner may only have some relevant meaning if the squatter was affected by it in some meaningful way. A squatter therefore performing unchallenged acts of ownership and possession, i.e. fencing and locking the land off for his exclusive use, has after a twelve year period a possibility of dispossessing an owner provided strong and sustainable evidence based information can be brought before a court or the squatter remains on the land unchallenged for the limitation period.

However an action seeking a declaration of title deeds⁶¹ will stop the clock from the date proceedings are instituted. If the squatter has acquired adverse possession through fraudulent means or concealment of any type, time does not run against the owner until he is aware of the fraud.⁶²

Intermittent use of the land or payments to the owner by the squatter will never grant ownership, however any acts performed by the owner, however intermittent, minor or otherwise, will negative the squatter's claim. Possession is never adverse if granted in writing or with the permission of the owner by lease or licence. It can however be obtained by a tenancy at will⁶³ after one year of possession with the permission of the landlord. Without this permission a tenancy at sufferance will result.

⁵⁹ 1957 Act s58(1)

⁶⁰ Statute of Limitations, 1957.

⁶¹ 1957 Act s2(a)

⁶² 1957 Act s 71

⁶³ 1957 Act s17(1)(a)

If the owner is under a disability i.e. insanity or an infant, time does not run against the owner however when the squatter is in possession for the requisite 12 years. This is extended by a further 6 years after the recovery from the disability.⁶⁴

1.5 LOGIC FOR ITS INTRODUCTION AND NECESSITY

Adverse possession was introduced to quieten title thus making land freely alienable. It also provides protection to future purchasers against old and stale claims to property.

*“Many claims to title by adverse possession do not arise from a deliberate taking of another’s property, but rather through some kind of mistake.....[it] may assist an innocent party who has spent money and time on land which he believes to be his own....[it] helps to ensure that land abandoned by its owner is not left to become derelict, or taken out of the property market.....it is said that the system of adverse possession facilitates and cheapens the investigation of title to unregistered land.”*⁶⁵

There are particular cases where people have been in possession of property “but documentary title has been lost or destroyed, or where people remain in possession of the land of a deceased and no representation is taken out on the estate.”⁶⁶ Therefore the retention of the doctrine is paramount to stabilise land ownership.

It is difficult to win a case where mistake plays a part, as wilful squatter activity in relation to the land is absent and possession cannot be adverse. If knowledge of the mistake can be brought within the limitation period it is possible to oust the squatter. However considerations relating to the expending of money on improvements and permission would make it very difficult to see mistake as squatting.

⁶⁴ 1957 Act s10

⁶⁵ MacKenzie, Judith-Anne and Phillips, Mary. *Textbook on Land Law* (Oxford 9th ed 2002) 135

⁶⁶ DeLondras, Fiona. *Principles of Irish Property Law* (Dublin, 2007) [14-08] 366

This is evident in *Murphy v. Murphy*⁶⁷ where one son farmed his mother's land treating it as his own from 1946, paying rates and carrying out improvements. When mother died she left all her property to the plaintiff, her other son, the defendant claimed the mother's title was extinguished by adverse possession. The plaintiff claimed this could not be so as mother was unaware of her entitlements in relation to the land however the "law will not save one from ignorance of one's entitlement."⁶⁸ The Supreme Court held for the defendant. The Statute⁶⁹ provides for mistake however this "provision is directed towards mistake in title."⁷⁰

1.6 ADEQUACY OF LAW RE THE PROTECTION OF PRIVATE PROPERTY

The Constitution upholds man's right to private property. However equally it also delimits these rights for the common good.⁷¹ Therefore the Statute⁷² is more than adequate in reflecting these rights and in protecting ownership rights, provided the owner is fully aware that possession adverse to that ownership has taken/is taking place. This awareness may be one reason for "a question mark over the constitutionality of adverse possession"⁷³ However the twelve year time limit appears logical and adequate in relation to an owner's "use" of land although the interpretation of this "use" can be controversial and must be inconsistent with the enjoyment of the land⁷⁴ by the owner. Acts of "user" are sufficient to establish adverse possession although it should be noted that Ordinance Survey Ireland⁷⁵ can produce photographs of land that can

⁶⁷ *Murphy v. Murphy* [1980] I.R. 183.

⁶⁸ DeLondras, Fiona. *Principles of Irish Property Law* (Dublin, 2007) [14-15] 379

⁶⁹ 1957 Act, S72(1)

⁷⁰ DeLondras, Fiona. *Principles of Irish Property Law* (Dublin, 2007) [14-15] 379

⁷¹ Constitution of Ireland 1937, Article 43.1.1° and Article 43.2.2°

⁷² Statute of Limitations, 1957.

⁷³ McDermott Paul Anthony quoted in *The Irish Times* Holland Kitty. Whose land is it anyway? 16th June 2007

⁷⁴ 1957 Act, 14(1)

⁷⁵ Ordinance Survey Ireland, Phoenix Park, Dublin.

clearly denote buildings, extensions, gate and fence movement although these can be obscured by tall trees and shrubbery. These photographs are expensive and can accurately date activity on the ground from a source independent of the disputing parties. The estimated cost of these photographs ranges from 250 to 4,500 euros for a series over a period of years or they can be backdated for the duration of the dispute. In one court case the photographs were considered legal State documents.

The finality of extinguishment of legal and equitable title and rights over land is intrinsically and historically linked in the Irish psyche to Colonisation, the Penal times, the Great Famine and evictions. The word “squatter” is unhelpful, it conjures wrongdoing and anti-establishment behaviour. However because of legislation and social policy considerations relating to the common good it is quite clear that cases of this nature featuring any element of wrongful activity; interference with the land, particularly after Court Proceedings are issued, threatening behaviour or acts contrary to good neighbour principles will prove detrimental to the wrongdoer provided the limitation period has not run or has for some reason stopped.

The legislation enables the court to declare and uphold title deeds provided the judge has not been confused as to true ownership, “the person with the best title to the land is the owner”.⁷⁶ Confusion can easily occur through evidence, illustrated maps and proposed compromises that are instrumental to further confusion. Many cases, particularly those involving tiny strips of land, are extremely difficult to prove due to the evidence before the court and the manner in which evidence based information is elucidated and formulated.

⁷⁶ DeLondras, *Fiona. Principles of Irish Property Law* (Dublin 2007) 10

CHAPTER TWO

2.1 Comparative Law – Ireland and the U.K.

“In truth, English law has never worked on a completely logical and exhaustive definition of possession.”¹ While this statement relates to possession without the mental element in relation to crime it is also valid in the area of adverse possession and in the constituent elements of law that establish and award ownership of land. The Irish “legislature has consciously recognised the importance of the Land Registry reflecting the long-time occupant as owner in s.52 of the *Registration of Title Act, 1891*² and in s.49 of the *Registration of Title Act 1964*³the long survival of the doctrine without constitutional challenge leans towards legitimacy.⁴ However it may very well not stand up to Constitutional challenge in the future in relation to registered land.

The compatibility of adverse possession with the ECHR and the *Pye*⁵ decision was quoted by *The Sunday Times*⁶ in an interview with Mr Pat Kenny when he endorsed the doctrine of adverse possession in defending his claim to the Charleton’s land worth in excess of one million euro. Interestingly it failed to mention dissenting decisions in *Pye*⁷ or the unease caused by this case where registered land valued at thirty-one million pounds in 2005 became the property of the Grahams through adverse possession. The court noted “that “limitation periods if they are to fulfil their purpose.... must apply

¹ *USA v Dollfus Mieg et Cie SA* [1952] 1 All ER 58 quoted in L R Curzon *A Dictionary of Law* (Suffolk 1979) 259

² s.52 *Registration of Title Act 1891*

³ s.49 *Registration of Title Act, 1964*

⁴ Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p 2

⁵ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005]

⁶ *The Sunday Times* 30th March, 2008.

⁷ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005]

regardless of the size of the claim” and the value of the land could not therefore be of any consequence to the court’s deliberations”⁸

Article 43 of the Constitution⁹ guarantees rights to private property. A judge therefore must uphold the rights of a title holder, with respect to the limitation period, and judgments in Ireland tend to favour title holders sometimes in circumstances that are difficult to unravel and analyse. In *Shirley v. Graham & Ors*¹⁰ Peart J. “discerned the close analogy between Art 43 of the Constitution and Art.1 of the First Protocol:

“The wordingis different...but the principle that the exercise of property rights may be regulated to meet the exigencies of the common good is apparent...and must include meeting a social justice principle and the measures adopted by a State must be proportionate. For all practical purposes, there is no distinction...”¹¹

Article 40.3.2. “protects from unjust attackproperty rights of every citizen”¹² vindicating these rights is a long and protracted process. Gerry Charleton Snr hoped to have his case concerning Gorse Hill in Dalkey heard in the Commercial Court in order to speed up the process without result. It is unfortunate that the court system takes no notice of the disputing parties living in close proximity where intimidation and other difficulties relating to the peaceful enjoyment of home are detrimental to health and well being. Law is unemotional fact circumscribed by logical argument and “Irish law

⁸ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007 Buckley, Niall F. “Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder “ (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

⁹ Constitution of Ireland 1937, Article 43.1.1^o.i.

¹⁰ *Shirley v.Gorman & Ors* [2006] I.E.H.C. 27. quoted in Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p.4

¹¹ Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p.3.

¹² Article 40.2.3^o.i. of the Irish Constitution.

has tended to shift its focus from the acts of possession and intention of the paper owner, to those of the squatter and, perhaps, back again.”¹³

However all cases are different and the interpretation of fact and evidence cannot be understated. It may be acknowledged that the title holder has failed in the demarcation of the disputed lands and as property carries duty, there was a failure in duty or the limitation period lapses unchallenged by the title holder thus allowing squatter activity to continue to the registration process unabated.

“Generally speaking land [in Ireland] is a productive commodity which is in finite supply and so it is of social benefit to prefer a squatter who has made use of it for a substantial period of time over the true owner who has neglected it”¹⁴

Very often the value of the land may be the pivotal reason an owner remains silent, acquiescent, sleeping on and lacking all ownership assertiveness conscious of the cost of recovery.

The Constitution offers protection to landowners in Ireland that is unavailable in the U.K. “Irish law is believed to be arguably more favourable towards the paper owner and thus more proportionate in its effect than the English law¹⁵ although in the U.K. the law on adverse possession has changed regarding registered land since the introduction of the *Land Registration Act 2002*.¹⁶ The major change relates to the registered owner being notified that he is being dispossessed and this legislation could be followed in Ireland.

¹³ McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.6.

¹⁴ Coughlan, Paul. *Property Law* (Dublin, 1995) at 206.

¹⁵ Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p.3.

¹⁶ Land Registration Act 2002

It is difficult to seize Crown land and the Crown and the Duke of Cornwall hold special rights within the *Limitation Act 1939* with the longer period of thirty years applying instead of twelve and twelve years instead of six¹⁷.

“*Theoretically [going back to the Normans] all land belongs to the Crown and the only person who is capable of owning land is the monarch*”¹⁸ Subjects who purchase land have rights over their land and obtain an estate in the land. This is the same for squatters who obtain rights over another’s land thus giving them an estate in the land. A freehold owner is said to “*hold land of the Crown*”¹⁹ and is the logic behind the law where occasionally an estate with no heirs and no one entitled will vest in the Crown on intestacy and in Ireland a similar estate vests in the State.

It is not unreasonable to suggest gifting paper title of registered land to the Crown before any court decision extinguishes title and the twelve year limit has not expired. This is one way a title holder, aware of time extinguishing title could potentially exclude or frustrate the squatter’s intention from acquiring valuable registered land “held” under the Crown. However for a variety of reasons the Crown might prefer to reject the gift that could be used for charitable purposes with a notional tax free element built into the gift for the donor.

Something similar could be done in Ireland where the land could be transferred to a State Body with a tax incentive to the donor. This would be beneficial to local authorities where the wholly inadequate recovery period of twelve years exists and where vigilance on Council land appears inadequate. However all property purchased

¹⁷ Maudsley, R.H. & Burn, E.H. *Land Law: Cases and Materials* (London 3rd ed., 1975)152
¹⁸ MacKenzie, Judith-Ann and Phillips, Mary. *Textbook On Land Law* (Oxford, 2002). 4

¹⁹ *Ibid.* 5.

with taxpayers money should be better protected against squatters and carry the longer period of thirty years for recovery.

In *Feehan v. Leamy*²⁰ the issue was ownership of a field. Litigation was protracted and the rightful owner never entered on the land for some considerable time. However he gave evidence that he suffered an accident hence explaining his absence.²¹ He was it appears under a disability as provided for in s.48 and s.49²²

*“where a person with good title brings an action for the recovery of lands and the Statute of Limitations is pleaded as a defence, the defendant must prove that the title holder, the plaintiff has been dispossessed or has discontinued his possession of the lands in question for the statutory period. The onus here accordingly is on the Second named Defendant to establish his claim that he has acquired title by adverse possession”*²³

Finnegan P. held that ownership included the land running to the middle of the road and the owner standing looking into the field was standing on his own land and therefore had possession. This calls into question the whole area of doing something tangible to the land. This case identifies the respect which the owner held for the law while litigation was in progress and by being excluded by the squatter he was actually unable to access the field, this was both reasonable and fair, and he had not abandoned his land. No evidence was forthcoming that the plaintiff displayed any threatening behaviour. He viewed the activities taking place on his land, without his permission, standing on his own land and the judge upheld the registered title holder whose accident and disability

²⁰ *Feehan v. Leamy* [2000] IEHC 118 (29 May, 2000), available at: <http://www.bailii.org/ie/cases/IEHC/2000/118.html>.

²¹ *ibid.* No.8. 3.

²² s.48 s.49 Statute of Limitations 1957.

²³ *ibid.* at No.4. 2.

may have given him an extension of the limitation period thus disagreeing with this case as “an example of black letter law inapplicable in practice”²⁴ Woods and Jourdan refer to the idea of such entry being a formal or natural entry to the land.²⁵ However time ceases to run on the date proceedings issue.

It is important to note however that whenever the plaintiff or his agents went to the land they “were threatened by Christopher Leamy.”²⁶ The importance of behaviour and conduct in these cases must be emphasised and the fact that the plaintiff gave evidence that he never saw cattle on the land when he visited the land contradicted the evidence of the defendant and the lack of cattle was backed up by other witnesses rendering the “use” of the land questionable. It has been suggested that “it seems more likely that he [Finnegan J] was endorsing Barron J’s view [in *Considine*] that the rule in *Leigh v. Jack* had been too broadly stated”²⁷

Although it could be inferred that the “gaze” harboured “intention” to possess, to own, as is evident in the area of purchasing goods. With respect, there are difficulties in relation to this judgment, particularly as the owner had been excluded, but other issues involved in the judgement - time, title, conduct; challenging threatening behaviour, possible disability and presentation of material - were relevant particularly the fact that the squatter told the gardai the lands belonged to a man in America thereby defeating

²⁴ McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.4.

²⁵ *Ibid.*

²⁶ *Feehan v. Leamy* [2000] IEHC 118 (29 May, 2000), available at: <http://www.bailii.org/ie/cases/IEHC/2000/118.html>. at No.8. 3.

²⁷ [[Woods “The position of the procrastinating owner under the Irish law on adverse possession” (delivered at SLS Conference, Durham, September 13, 2007) at 19.]] quoted in McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.6

his own claim of possession and intention. This case is not without its critics. If adopted in future cases it could have the effect of barring all future unwelcome squatters.

The most minimal acts on the land executed by the paper owner will be acknowledged as acts of ownership and should defeat any claim to the land by a squatter who must prove continuous possession during the twelve year period. However it is a case that defines absolutely the individualistic traits that pertain to each case and identifies how difficult it is to assemble any cohesive analysis that relates to all cases in the area of intention, possession and the twelve year rule.

This was emphasised in *Murphy v. Murphy* and approved in *Brown v. Fahy* by Kenny J. and by Finnegan J. in *Feehan v. Leamy* quoting Lord O'Hagan in *Lord Advocate v Lord Lovat*²⁸

*“The question whether a defendant who relies on the Statute of Limitation was and is in adverse possession must be considered in every case with reference to the particular 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 due regard for his own interest..... all these things greatly bearing as they must under various conditions, are to be taken into account in determining the sufficiency of a possession”*²⁹

By comparison agents for *Pye*³⁰ “the dispossessed owner had attended at the lands, they had not entered on the lands and their presence in the vicinity or at the entranceway

²⁸ *Lord Advocate v. Lord Lovat* [1880] 2 App. Cas. 273 at 288.

²⁹ *Ibid.* quoted in Buckley, Niall F. “Adverse Possession at the Crossroads1”(2006)11(3) *Conveyancing and Property Law Journal* 59 5, 6.

³⁰ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.] www.echr.coe.int

did not amount to possession as far as the House of Lords was concerned³¹ “they ruled that *Pye* had lost its title to the land by virtue of the provisions of the *Land Registration Act 1925* and the *Limitation Act 1980*.”³² Lord Bingham of Cornhill stated

*“where title is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it”*³³

The law on adverse possession does not take any account of the value of the land or the area of the land involved and it is unusual for strangers in blood to acquire title to such extensive and valuable lands without challenge. *Pye* sued the UK government believing the Convention on Human Rights protected company property ownership rights. Article 1 of Protocol No 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

The *Pye* decision “characterised the Statute of Limitation’s operation as a “control of use” rather than a “deprivation of possessions”³⁴ However in view of the dissenting decisions in *Pye*, another challenge in the future may change this interpretation. The “Convention is a central part of Irish law it is essential that....subjects such as property

³¹ Cannon, Ruth. CLT Seminar “Adverse Possession” May 2008. 9

³² Buckley, Niall F. “Adverse Possession at the Crossroads1” (2006) (3) *Conveyancing and Property Law Journal* 59. 1

³³ *per* Lord Bingham of Cornhill *JA Pye (Oxford Ltd., v. Graham* (HL(E)) (2003)1 AC (p.426)

³⁴ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.] www.echr.coe.int p.4

law attempt to consider its potential impact.”³⁵ As in “*James V United Kingdom*, the Strasbourg court in adjudicating on property rights issues made allowance for the margin of appreciation enjoyed by each State as to how best to strike the balance between individual rights and the public interest.”³⁶

*The Judgement of the “European Court [was] disappointing in its failure adequately to address whether adverse possession served any useful purpose in relation to registered land, especially in the light of the Law Commission report and the action taken by Parliament for new cases. I do not think it is any answer to these points to rely on the margin of appreciation”*³⁷

The UK Government “stressed the wide margin of appreciation in regulating land use and ownership the antiquity of the doctrine and the familiarity of landowners with it and contended that it did not upset the balance of Art.1.”³⁸

In this case *Pye*, a property development company purchased land, twenty-three hectares for future use as a shopping centre in Berkshire. They leased the land to neighbouring farmers “The Grahams” who grazed cattle on the land till the expiration of the lease. They then tried to renew the lease without success and this point appears crucial in the judgement in relation to the behaviour of the squatter. *Pye* made no effort to oversee the removal of the Grahams, nor did *Pye* exercise any tangible acts on the land at any time during the period of occupation and possession by the Grahams from 1984 to 1999 without permission. The agents of *Pye* in utter dereliction of duty failed to

³⁵ de Londras, Fiona. *Principles of Irish Property Law* (Dublin, 2007). vii.

³⁶ Buckley, Niall F. “*Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder*” (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3

³⁷ Pannick, David Comments on *Pye v United Kingdom* email December 20, 2008 see Appendix Lord Lester of Herne Hill and David Pannick are general editors of *Human Rights Law and Practice* (1999) quoted in *Ofulue v. Bossert* [2008]HRLR 20 p.18

³⁸ Buckley, Niall F. “*Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder*” (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

ensure that their registered land was vacated following the termination of the lease, acting to their detriment in relation to acquiescence and silence. The Grahams were in occupation and in absolute control of the land performing day to day functions on the land as owners should

*“they enjoyed the full use of the land without payment for 12 years. As if that were not gain enough, they are then rewarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in anyway at all”*³⁹

While this appears unjust; there are aspects of *Pye* that sit uncomfortably with the establishment, nevertheless pivotal to the decision is that every aspect of the law on adverse possession upheld the Grahams unchallenged possession and ownership. They appear to have enjoyed the land peacefully at all times. It appears it was only when the Grahams lodged cautions in 1996 to protect their unregistered interests in the land that Pye became aware of the Grahams adverse possession. The agents of Pye who stood outside the lands neither displayed nor asserted any attributable rights of ownership or possession nor did they challenge the Grahams.

This is at variance with the activities of the plaintiff in *Feehan v. Leamy*⁴⁰ who according to Finnegan J.

*“enforced his entitlement to possession by seeking and obtaining interlocutory relief against the then Defendant in this action, Christopher Leamy. Therefore he was involved in litigation in which his title was ultimately vindicated”*⁴¹

³⁹ *per* Lord Bingham of Cornhill *JA Pye (Oxford Ltd., v. Graham* (HL(E)) (2003)1 AC (p.426)

⁴⁰ *Feehan v. Leamy* [2000] IEHC 118

⁴¹ *ibid.* No 12.

The extraordinary fact in *Pye* is that they were land developers who would have been expected to be aware of the law, of limitation periods and their obligations to their shareholders. They appear to have relied heavily on the offer of money from the Grahams as a means to defeat their claim and while money was offered this was to renew the lease. “Lord Brown-Wilkinson considered that there was “*no inconsistency between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession*” for the purposes of the limitation period.⁴² An offer of money to buy the disputed land would have defeated the Grahams claim.

The court of first instance in Ireland regarding land decisions is the Circuit or the High Court or the High Court on Appeal. In Ireland in the wake of the Great Famine, Parnell and Davitt founder of The Land League, promulgated the fencing of common land or land in the ownership of absentee landlords with a view to acquiring rights.

This grew in popularity and remaining on the land often in dire circumstances had the affect of defeating the paper title holder and with the development of the Registration of Title system “*large sums of money were being advanced by the Government for the purchase of lands by tenant purchasers [thus giving] security of title.*”⁴³ This security was further enhanced by fencing with related problems immortalised in the words of Whitman “*bad fences make bad neighbours*”⁴⁴

Fencing land therefore was seen as a function of ownership and this was performed by the defendant in *Feehan v. Leamy* per Finnegan J. “*in the late 1980’s or early 1990’s he*

⁴² [[2003]1 A.C. 419 at 438 per Lord Browne-Wilkinson] quoted in Buckley, Niall F. “Adverse Possession at the Crossroads I” (2006) 11 (3) *Conveyancing and Property Law Journal* 59. 1

⁴³ Murphy, John. “The Historical Development of Registration of Title in Ireland” (Land Registry Centenary 1892 – 1992) 4.12. quoted in Draft Land and Conveyancing Bill 2005 – Submission from Conveyancing Committee of the Law Society re Adverse Possession. 7

⁴⁴ Whitman, Walt. “Leaves of Grass” published 1897.

provided a water system on the lands and erected an electric fence”⁴⁵ This falls within the parameters of doing something tangible to the land. However both are connected to the welfare of animals rather than land. Kenny J. stated:

*“the creation of fences on the boundary with the public road was to keep the cattle in so that they would not stray while the creation of a fence between the lands and the avenue was intended to prevent the cattle from getting on to the avenue and from there on to the road”*⁴⁶

Kenny J. held that there was no adverse possession because the acts relied upon were not inconsistent with the enjoyment of the land in question by the owners⁴⁷

In England the “primary consideration in each case is the establishment of factual possession by the squatter coupled with an intention to exclude all others.”⁴⁸ The law in Ireland and in England is reasonably compatible in relation to squatters, possession and title. However England has the new *2002 Act*⁴⁹ regarding the 10 year rule and Ireland has the Constitution upholding the right to private property. However the limitation period is substantial and any owner of land should be aware of when or if he is being dispossessed. In the past law was State centred. This has changed since Ireland signed binding International Treaties and Human Rights Law.

The ECtHR was unable to overturn the law on adverse possession in relation to *Pye* nor was it capable of resurrecting an already extinguished title although the majority held

⁴⁵ *Feehan v. Leamy* [2000] IEHC 118 No 5.

⁴⁶ *Browne v. Fahy* (Unreported, High Court, Kenny J., 25 October 1975).

⁴⁷ Wylie, J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.21] at 1088.

⁴⁸ *ibid.* at 1089.

⁴⁹ Land Registration Act 2002.

that “extinguishing title, as distinct from barring an action, constituted an interference with *Pye*’s rights under Art 1 of Protocol No 1.⁵⁰

The morality of squatting and squatters will always be controversial. However adverse possession is a valuable mechanism, it settles and quietens title and there is redress for a paper holder although the costs involved may prove a limiting factor apart from the limitation period. Rights of property owners in England are now protected by the *Land Registration Act 2002*. The court in *Pye* recognised,

*“the consequence of extinguishing their title without any compensation or procedural protection by way of notice imposed an excessive burden and upset the fair balance between the public interest and the rights of individual property owners”*⁵¹

This protection should exist in Ireland for the paper holder, despite the guarantees laid down in both the Constitution and the Convention, especially in relation to registered land bearing in mind registered title denotes an index of property and does not denote boundaries. The UK position is not without complication due to the difference in the treatment of registered and unregistered land. The Irish “position is more favourable to the paper owner than the traditional English position, under *Pye*, as applicable now only to unregistered land but is certainly not more favourable than the new English position, as applicable only to registered land”⁵²

⁵⁰ Buckley, Niall F. “Adverse Possession at the Crossroads1” (2006) 11 (3) *Conveyancing and Property Law Journal* 59. 1

⁵¹ *ibid.* 2

⁵² McInerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.7

2.2 Property Registration Authority

There are two main systems of registration in relation to land in Ireland. These are the registration of deeds system which was introduced in 1707 and the registration of title system which was introduced by the *Record of Title (Ireland) Act 1865* and established by the *Local Registration of Title (Ireland) Act 1891*. The Registry of Deeds provided for the registration of documents dealing with the land and the Land Registry [or the Property Registration Authority as it now is] provided for the registration of the ownership of land.⁵³

Within the 1891 system “acquisition of title to registered land by mere “adverse possession” was abolished. However the squatter could have the title registered after the limitation period had run, through a court order for rectification of the title, as declared by the court⁵⁴ This does not mean that adverse possession was ever abolished *per se*: it means that the system desired and promoted registration for the benefit of the owner and for future owners and the squatter was obliged to observe the limitation periods and have a court rectify title.

The *1891 Act* was defective in a number of ways and the Land Commission whose function was to buy and divide land under the various Land Purchase Acts did so without an investigation of the tenant’s title,⁵⁵ and this proved problematic. When land is vested by the Land Commission after 1 January 1967, it is registered by them with a possessory title.⁵⁶ When this has been registered “for thirty years it may be converted to absolute on registration of any disposition or transmission on death, the Registry does

⁵³ Wylie, J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [21.01] at 1039

⁵⁴ *ibid.* 1891 Act, s.52 [21.04] at 1041

⁵⁵ *ibid.* [21.07] at 1042.

⁵⁶ *ibid.* S.26. [21.30] at 1052.

this without application.”⁵⁷ Where possessory title “has been registered for fifteen years, it may be converted to absolute, if freehold, or good leasehold, if leasehold”⁵⁸ This in effect settles land, quietens title and allows land to become marketable. Possessory title can be sold or can pass on intestacy, the value depends on the interest of the dispossessed owner.

The new 1964 and 1970 systems gave greater powers to the Registrar in dealing with matters that had hitherto been dealt with by the court under the *1891 Act* e.g. discharge of restrictive covenants and rectification of registers in cases of adverse possession. There is no statutory requirement to register (deeds) but failure to do so may result in loss of priority.⁵⁹

While adverse possession has always been a controversial feature of land law, registered land has Constitutional and legal protection and the most minimal tasks in relation to the land, before the limitation period has run, will be seen as asserting acts of proprietorship.

In view of *Pye* the Registrar of Titles ordered a temporary stay on processing of adverse possession-based applications on December 7, 2005. On advice from the office of the Attorney General this stay was lifted on January 5, 2006. However the court in *Pye* accepted that “where an action for recovery of land is statute barred, termination of the title of the paper owner does little more than regularise the respective positions” and that the aim of the land registration legislation was “to replicate the pre-registration law

⁵⁷ *ibid.* S.50(3)(a) [21.30] at 1052.

⁵⁸ *Ibid.* S.50(2)(c) [21.30] at 1052.

⁵⁹ Brennan, Gabriel “A new Registry of Deeds” (2008) 13(2) *Conveyancing and Property Law Journal* 30

so far as practicable”⁶⁰ Land registry recognises Irish law to be materially different to the UK regime and the Irish doctrine may withstand ECHR scrutiny. If there are queries or any uncertainties raised in any application to Land Registry they will consider referral for determination by the court under s.19(2) *Registration of Title Act, 1964*⁶¹

Procedures to register and perfect title acquired by possession are provided for under s.49 of the *Registration of Title Act 1964*.⁶²

The practice of the Land Registry, which was, and remains, that where a person has barred the right to possession of the registered owner, he will be registered with absolute title to the existing leasehold interest, thereby effect giving such a squatter the advantage of parliamentary conveyance.

*The practice of the Land Registry is based on the interpretation of the word “title” in section 49 as referring to the particular ownership or claim of the registered owner rather than an “estate” or “interest,” and this practice had been in place since the enactment of the Registration of Title Act 1891*⁶³

This is not a simple process and is thoroughly, extensively and exhaustively researched before any title is transferred and this is reflected in the high number of aborted applications although there are a number of these applications that later develop and settle through other mediation processes, through the courts or for value.

⁶⁰ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.at para. 76] quoted in Buckley, Niall F. “Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder “ (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

⁶¹ Buckley, Niall F. “Adverse Possession at the Crossroads1 (2006) 11 (3) *Conveyancing and Property Law Journal* 59. 3.

⁶² Registration of Title Act 1964 s.49

⁶³ Law Reform Commission, *Report on Title by Adverse Possession of Land*, LRC 67 – 2002 (Dublin, 2002). [1.18] 12 see also the judgment of Walsh J *Perry v. Woodfarm Homes Ltd.*, [1975] IR 104, 119 where he states: “the effect of the Statute is to destroy the title of the person dispossessed to the estate from which he has been dispossessed, but it does not destroy the estate itself.”

Judges have adopted the practice of directing that the squatter's title be registered in the same folio as the dispossessed owner's title i.e. as if in effect there had been a conveyance or transfer of title⁶⁴ The logic of this appears to be to confine the squatter to the dimensions of land owned within the dispossessed owner's extinguished title while contemporaneously the land is vested in the squatter. While this appears contradictory it is logical to state that the rights of the paper holder have been extinguished, his title to "hold" has been extinguished. However the folio lists all previous registered owners and all burdens that pertain to that particular land and registering the squatter within the folio may not *per se* be a conveyance or a transfer.

There should be some mechanism whereby the squatter becomes liable for any mortgage due on the land or if the land has been used for security against any loan registered within the title that this burden automatically transfers to the squatter. It is appreciated that the contract is between the original paper holder and the mortgage or loan company. However it appears unjust that any loan made to purchase the land should remain payable by the dispossessed title holder.

It is acknowledged that "adverse possession of leasehold land is extremely rare in Ireland almost to the point of non existence."⁶⁵ However the introduction of s.50 of the *Registration of Deeds and Title Act 2006* may alter this in the future for interests acquired by long user. S3(1) of the *Registration of Title Act 1964* "the right or interest of a person who has barred, under the *Statute of Limitations 1957*, the right of action of a person entitled to such leasehold interest."

The new act is mainly concerned with changes of an administrative nature including setting up a new Property Registration Authority to manage the two registration systems

⁶⁴ Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.43] at 1099.

⁶⁵ Treacy Frank, Property Registration Authority Item 2 Situations in which Adverse Possession arises 2

in Ireland.⁶⁶ S.36(1) has the most significant immediate impact for practitioners however the effect of registration is unchanged⁶⁷

The following data was been made available by Land Registry⁶⁸ regarding adverse possession for 2007:

| | | |
|---------------------------|--------------|------|
| Registered Land: | Applications | 1378 |
| | Completed | 884 |
| | Abandoned | 210 |
| | Withdrawn | 96 |
| | Refused | 43 |
| | Transferred | 8 |
| Unregistered Land: | Applications | 873 |
| | Completed | 348 |
| | Abandoned | 72 |
| | Withdrawn | 69 |
| | Refused | 13 |
| | Transferred | 6 |

The completed applications take account of applications from the previous year although the figure of approximately 2000 applications between registered and

⁶⁶ Mee John "The Land and Conveyancing law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions Part 1" (2006) 11(3) *Conveyancing and Property Law Journal* 67 1

⁶⁷ Brennan, Gabriel "A new Registry of Deeds" (2008) 13(2) *Conveyancing and Property Law Journal* 30

⁶⁸ Mee John "The Land and Conveyancing law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions Part 1" (2006) 11(3) *Conveyancing and Property Law Journal* 67 1

unregistered land would be representative of the number of applications annually. Abandoned applications would consist of cases where the PRAI sought clarification and the applicant neglected to reply. The PRAI's standards for an adverse possession application to succeed are very high and any contested application will be refused.⁶⁹

As can be seen from these figures the registration process is not easily achieved and takes considerable time and interrogation in order to procure paper title and establish lawful ownership. Possessory title will eventually yield an ownership as good as the original exchanged for value title however the controversial aspect is that the doctrine operates to sanction the activities of squatters deliberately setting out to dispossess the true owner of the land.⁷⁰

Taking account of the fact that some of the completed applications are from the previous year it appears that there is relatively little of this activity occurring in Ireland although Mr Charles Morrissey of the Law Reform Commission in 2003 stated they had room loads of post received from people who were encountering moving fences, boundary difficulties and other activity concerned with the taking of strips of land and other land disputes.

This is borne out by the volume of post received by Mr Gerry Charleton Snr and who in 2007 confirmed he received hundreds of letters from all over the country. Letters received in the course of this research including letters relating to settlements in advance of court hearings have left some parties unhappy and confused as they agreed settlements they failed to comprehend, under duress, while stressed and with the advice of solicitors conscious of escalating costs sometimes unrecoverable.

⁶⁹ *ibid.* Item 1 p.1 and p.2

⁷⁰ Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.03] at 1079.

This volume is at variance with the following figures received from the PRAI:

| | |
|---|--------------------|
| Between family members, on intestacy or other situations | 50 to 60% |
| Encroachment on neighbouring land/boundary disputes | less than 10% |
| Defective paper title | 40% |
| Squatter assuming possession of effectively abandoned land | much less than 10% |

It appears from the figures available from the PRAI that few follow the legal route for redress through the courts or through alternative dispute resolution in relation to encroachment as the overall figures to resolution are very low at less than ten per cent. These figures are an endorsement of the decisions made by the Registrar and this is reflected in the low number of appeals and is borne out in an article by the late Justice Mella Carroll who wrote:

“The most remarkable aspect of being the Land Judge is that there are so few applications to the High Court. In the six years that have elapsed since I was nominated, there have been less than a dozen cases....the most common form of application was under S.19 being an appeal against an order of the Registrar. But even these were few in number which is an indication of the parties’ general satisfaction with Registrars’ decisions”⁷¹

Taking account of the figures for 2007 from Land Registry as a whole they indicate the need for the doctrine overall to be retained. This is endorsed by the Irish government submissions in *Pye*. These “identified five areas of public interest served by the

⁷¹ Carroll J “The Land Registry and the High Court” in “Land Registry Centenary 1892 – 1992” quoted in Draft Land and Conveyancing Bill 2005 (LRC74-2005) Sections 129 and 130 – Submission from Conveyancing Committee of The Law Society re Adverse Possession.

doctrine of adverse possession: “*quieting titles, the desirability of clarifying title where land... had remained abandoned and was occupied by another person, in cases of failure to administer estates on intestacy, in pursuance of a policy of using land to advance economic development; in perfecting title in cases of unregistered title, and in dealing with boundary disputes*”⁷²

Possessory Title “will usually be registered where the applicant cannot produce documentary evidence of title e.g. a squatter”⁷³ and can only show actual occupation of the land or receipt of rents and profits.”⁷⁴ This often relates to agricultural land and to the farming community and is instrumental in regulating title.

*“Moreover, a significant benefit for them is the availability of the procedure under Section 49 of the Registration of Title Act, 1964 based on the Statute of Limitations, which is an easy and cheap method of establishing title by possession and which has a particular relevance in the context of emigration from agricultural land”*⁷⁵

Lack of formal information must account for the high number of abandoned, aborted, withdrawn or refused applications. In Ireland “the doctrine has played a vital role in regularising informal transfers of ownership”⁷⁶ Overall the general opinion is that retention of the doctrine is essential to settle title despite the unfairness that may result on occasion through its use by the unscrupulous.

⁷² [[2007] ECHR 44302/02 at para.40.] quoted in Buckley, Niall F. “Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder “ (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

⁷³ *Re Richardson* (1935) 69 *ILTR* 252 quoted in Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [21.26] at 1050.

⁷⁴ Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [21.26] at 1050.

⁷⁵ Moylan, Tom. “An Overview of the Land Registry” in “Land Registry Centenary 1892 – 1992” 27 quoted in Draft Land and Conveyancing Bill 2005 (LRC74-2005) Sections 129 and 130 – Submission from Conveyancing Committee of The Law Society re Adverse Possession 5.

⁷⁶ Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.03] at 1079.

2.3 The Land and Conveyancing Law Reform Bill and other Law Reform Commission Reports related to land law and adverse possession.

The Land and Conveyancing Law Reform Bill⁷⁷ provides an evidence based document on the need for reform and on the urgency of change. This Bill “closely resembles the Draft Bill appended to the LRC Report and the exclusion of radical proposals that had been contained in the Report in relation to the restriction of adverse possession is significant.”⁷⁸

The doctrine of adverse possession came under close scrutiny because of the *Pye* case and the compatibility of the doctrine with the European Convention on Human Rights. The ECtHR decided that the English system of adverse possession in relation to registered land, prior to the introduction of the 2002 Act, violated Art 1 to Protocol 1 of the Convention⁷⁹ as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.....The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”

However there is a material difference in the law on adverse possession in Ireland compared to England. Dubious title sterilises land held by the squatter and the LRC

⁷⁷ The Land and Conveyancing Law Reform Bill 2006. [No.31b of 2006]

⁷⁸ Mee, Prof. John “The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part 1” (2006) 11(3) *Conveyancing and Property Law Journal* 67. 2

⁷⁹ *ibid.*

recommend the introduction by statute of a parliamentary conveyance.⁸⁰ This way the *Registration of Title Act, 1964* should mirror the Statute of Limitations 1957⁸¹ and judges have in some cases requested that the squatter's title be registered in the same folio as the dispossessed owner's title.⁸² A high number of adverse possession applications are family related (50 to 60%) and on intestacy utilising the same folio number is both understandable and sensible. England does not have a Constitution as Ireland has regarding property protection and provisions in the *2002 Act*⁸³ in England and Wales altered the law in relation to registered land.

The main emphasis of the LRC Report⁸⁴ is focused on the nature of the title acquired by the squatter at the termination of the limitation period. It is also concerned with squatting on leasehold land that is now dealt with under s.50 of the *Registration of Deeds and Title Act 2006*.

The Commission notes that sections 41 to 45 of the *Bill 2006*⁸⁵ provide for a process in the District Court for carrying out work between adjoining properties.⁸⁶ While this is not about adverse possession it is about access to other people's land. Arguably this is a proposal that could lead to very acrimonious or contentious relationships between parties and could easily be resolved by the appointment of an independent works

⁸⁰ Law Reform Commission, *Report on Title by Adverse Possession of Land*, LRC 67 – 2002 (Dublin, 2002). [1.15] p.10

⁸¹ Law Reform Commission, *Report on Title by Adverse Possession of Land*, LRC 67 – 2002 (Dublin, 2002), p.13

⁸² Wylie, J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.43] at 1099.

⁸³ Land Registration Act, 2002

⁸⁴ Law Reform Commission, *Report on Title by Adverse Possession of Land*, LRC 67 – 2002 (Dublin, 2002).

⁸⁵ Land and Conveyancing Law Reform Bill 2006 (derives from the *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005)

⁸⁶ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008 (Dublin 2008) [9.11] p.291

person, a registered builder or a maintenance company, acceptable to both sides who would carry out the work deemed necessary for access within an agreed timescale.

This independent person would not represent any threat to either property. The issue of insurance does not arise in the Report or in the Bill: however damage to property does.

Discussion has in the past recognised the difficulties in relation to maintenance on buildings where there is no access. However if these sections of the Bill become law they could develop into a means of encroachment depending on the parties involved and on how frequent this access becomes a necessity or is requested as such.

Rather there should be a timeframe when access is desirable e.g. every ten years, five years, in the case of inclement weather or unforeseen damage to property (fire etc.,) Curtailing access would be desirable particularly if the parties involved were ever in dispute.

It is proposed in the Bill⁸⁷ to abolish the rule in *Wheeldon v. Burrows*. However adverse possession or possessory title is not mentioned in the Bill. The Draft Bill had included proposed changes⁸⁸ in the law on adverse possession as it currently operates as a result of the *Pye* decision. These proposals included:

Payment of compensation

Applications relating to adverse possession decided in Court.

These recommendations are “under review at departmental level and may even be reconsidered by the Law Reform Commission⁸⁹ although unnecessary court applications do not appear a logical formula.

⁸⁷ s.38(1) of the Bill

⁸⁸ Law Reform Commission *Report on Reform and Modernisation of Land Law and Conveyancing Law* LRC 74 – 2005 (Dublin 2005) s.129 s.130

⁸⁹ Hutchinson, G. Brian “Squatting in the field of human rights...” CLP (2008) 15(1) *Commercial Law Practitioner* 2: Editorial p.2

The Report states:

*“the operation of the doctrine has become the subject of increasing controversy. Much of this relates to the extent to which it appears to sanction a person who has no claim whatever to the land becoming the owner of it without having to pay any compensation at all to the “paper” owner or even to obtain the sanction of a court order”*⁹⁰

There was no tangible evidence of “any concern having been expressed in relation to the manner in which S.49⁹¹ has operated in the past...the majority of claims for adverse possession would arise in relation to agricultural land, through land being neglected or abandoned and being taken over either by relations of the owner or by owners of neighbouring land.....most cases relate to the acquisition of disused laneways or other small portions of ground [they] have not been the subject of a great number of applications to the court”⁹² This is evidential from the figures obtained from Land Registry.

The Irish Farmers Association and the Irish Landowners Association made submissions to the Ninth Progress Report of the All-Party Oireachtas Committee on the Constitution (April 2004) regarding Private Property. 140 submissions were made in relation to “Private property and the common good” and none made any reference to adverse possession or to limitation periods.⁹³

The current law on adverse possession appears to work well in Ireland in relation to agricultural land and particularly in relation to estates that remain un-administered, sometimes for generations. There are however difficulties in relation to small strips of

⁹⁰ Law Reform Commission *Report on Reform and Modernisation of Land Law and Conveyancing Law* LRC 74 – 2005 (Dublin 2005) s.129 s.130 [2.04] p.7

⁹¹ s.49 Registration of Title Act, 1964

⁹² Draft Land and Conveyancing Bill 2005 (LRC 74 – 2005) sections 129 – 130 – Submission from Conveyancing Committee of the Law Society re Adverse Possession 2, 3.

⁹³ *Ibid.* 3.

land that have been sold or given away to neighbouring farmers but not scaled off the seller's title, in most cases because of legal and surveying costs involved. This works very well until the land changes hands and mayhem breaks out between neighbours sometimes lasting through generations of both families through simple misunderstanding.

The Report states:

*“However it must be recognised that on occasion the doctrine may operate unfairly especially where it appears to enable a person, who deliberately sets out to take advantage of it, to use it as a means of obtaining ownership of someone else's land without paying any compensation. The same applies where it appears to exact a very severe penalty on a landowner (the loss of the land) through a mere oversight or mistake”*⁹⁴

The submission states the abandonment of property for 12 years cannot be described as “a mere oversight or mistake” and states there has not been a demand for compensation nor would the paper title holder always be deserving of same. “Any change in the current legislation is, it is submitted, unnecessary and inappropriate.”⁹⁵ The area of compensation appears fraught with danger. Arguably the majority of cases dealt with by the Registrar are family related at 50% to 60% and justifiable on intestacy. The lines could become blurred in relation to succession law and the sharing of the compensation, paid for by the squatter, perhaps to a parent or to other siblings. The logistics of a compensation payment appear inappropriate and unworkable. It could destabilise a mechanism that works well in its traditional form.

⁹⁴ *Ibid.* [2.06] 8.

⁹⁵ Draft Land and Conveyancing Bill 2005 (LRC 74 – 2005) sections 129 – 130 – Submission from Conveyancing Committee of the Law Society re Adverse Possession 8.

Perhaps in unfair situations of non relatives where inappropriate activity - neighbours moving fences and seizing land, normally a rare occurrence, through bitter and violent costly dispute, and where a case is determined by a Court - an appropriate amount of damages could be paid by the squatter provided the limitation period had not expired against the title holder. This is actually in existing legislation i.e damages, however, judges usually take the view that both parties believe they own the disputed land and bear their own costs.

The Report states:

*“In England considerable doubts have been expressed by some judges as to whether the doctrine is consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms.”*⁹⁶ *“Not only has the European Convention been given effect in Irish law by the European Convention on Human Rights Act, 2003, but there is also the protection of private property rights enshrined in Articles 40 and 43 of the Constitution”*⁹⁷

Article 43 of the Constitution protects private property subject to “the principles of social justice” and “the exigencies of the common good” and this is consistent with the requirements of the European Convention (Article 1 of the First Protocol)⁹⁸ this was outlined by Peart J. in *Shirley v. Graham & Ors*⁹⁹ *“the principle...may be regulated to meet the exigencies of the common good.... meeting a social justice principle and the measures adopted by a State must be proportionate.”*¹⁰⁰

⁹⁶ *Ibid.* [2.04] 3.

⁹⁷ Draft Land and Conveyancing Bill 2005 (LRC 74 – 2005) sections 129 – 130 – Submission from Conveyancing Committee of the Law Society re Adverse Possession [2.05] 3.

⁹⁸ *Ibid.* 3.

⁹⁹ *Shirley v. Gorman & Ors* [2006] I.E.H.C. 27. quoted in Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p.4

¹⁰⁰ Buckley, Niall F. Article “Adverse Possession at the Crossroads1” (2006) 11(3) *Conveyancing and Property Law Journal* 59: p.3.

One case that had the potential to challenge the Constitutional position and the Convention was the Charleton/Kenny dispute. This would have proved helpful to a better understanding of the lawful effect of the guarantees to private property and particularly with regard to the overlap of these guarantees as laid down by the Constitution and the Convention.

Reference in regard to “Proportionality” on which point the ECHR held against the UK in *Pye* is made to the Report of the Constitution Review Group referred to in Appendix Six of the Ninth Progress Report of The All Part Oireachtas Committee on the Constitution.

The view of the Review Group is set out as follows:

“Following a review of the case law on the provisions of both Article 40.3.2. and Article 43 on the one hand and Article 1 of the First Protocol on the other, the Review Group is of the view that there is a great deal of overlap as far as the substance of the respective guarantees is concerned. While a detailed review of the respective case law would be unnecessary in the present context, an examination of the two leading cases arising respectively under the Constitution (Blake v. Attorney General) and the Convention (Sporrong v. Sweden (1983) 5 EHRR 325) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights. Applying, therefore, the first two principles already mentioned, there is little of substance to choose between the Constitution and the Convention, as both rights can be restricted, qualified, etc., in the public interest,

*provided any such interference in the right is proportionate and required on objective grounds.”*¹⁰¹

Adverse possession is protection to future purchasers of land. For this reason it is to be welcomed as a device that enables the free alienability of a marketable product. In the context of the Constitution it has remained without challenge despite the controversy of the doctrine. The Law Reform Commission accepts submissions on changes to the law and had acted swiftly in preparing proposed changes to legislation in relation to the doctrine as fitting to take account of the fallout from the *Pye* decision. However on examination these changes were not necessary as the retention of the doctrine in its current form, combined with the limitation periods, provides adequate protection to private property.

The mechanism of the doctrine provides stability in land law often in circumstances that honour a deceased paper owner’s expressed wishes or in the settling of defective title and in other circumstances that are not always fair and reasonable. Law operates for the common good and overall the doctrine, although controversial, achieves the aim of social justice in many cases.

2.4 *Pye*¹⁰² decision and fallout.

“In England it was suggested some years ago that there could be no adverse possession despite the fact that the owner was making no present use of the land entered by the squatter, if the owner had some future plans to use the land.”¹⁰³ If this had been interpreted as the law in *Pye* then the result would have been different. However the

¹⁰¹ Draft Land and Conveyancing Bill 2005 (LRC 74 – 2005) sections 129 – 130 – Submission from Conveyancing Committee of the Law Society re Adverse Possession 4. Appendix Six at p.307.

¹⁰² *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.]

¹⁰³ *Wallis’s Cayton Bay Holiday Camp Ltd., v Shell-Mex and BP Ltd.*, [1975] QB 94 quoted in Wylie. J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.21] at 1089.

English Court of Appeal later reverted to the view of factual possession and the intention to exclude all others¹⁰⁴ as the main component of the law. *Pye* is an unusual and rare case and this accounts for the overwhelming public and legal interest into the nature of the doctrine combined with an examination into the probity of the doctrine's functionalism. The requirements were honourably fulfilled and the limitation periods "must apply regardless of the size of the claim. Therefore the value of the land was of no consequence"¹⁰⁵ Expectations of many were not realised in the decision.

The "initial decision of the Chamber of the ECHR has recently been overturned by the Grand Chamber holding that the English law on adverse possession prior to the entry into force of the *LRA 2002* did not violate Art.1 of the First Protocol to the European Convention on Human Rights"¹⁰⁶ This arguably had a bearing on the Law Reform Commission excluding many of the proposed recommendations regarding adverse possession from the *Bill of 2006*. The fact that the paper owner "had greater protection under the *Land Registration Act 2002* did not mean that the pre-existing law was not Convention-compliant."¹⁰⁷ This allows for the deduction; that even without the Constitution, Ireland would be Convention-compliant. The court observed the taking of property without compensation under Art 1 as a disproportionate interference.¹⁰⁸ States accordingly "enjoy a wide margin of appreciation" this extends both to the choice of means of enforcement and whether the consequences of enforcement are justified in the

¹⁰⁴ *Buckinghamshire County council v. Moran* [1990] Ch 623 quoted in Wylie, J.C.W. *Irish Land Law* (Dublin 3rd ed., 1997) [23.21] at 1089.

¹⁰⁵ McNicholas, Nicholas "Recent developments in Adverse Possession" (2007) *Bar Review December 2007* p.246.

¹⁰⁶ McInerney, Patrick A. "The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis" (2008) 13(2) *Conveyancing and Property Law Journal* 33 3.

¹⁰⁷ *Ofilue v. Bossert* [2008]HRLR 20 p.21

¹⁰⁸ [[*Papachelas v Greece* [1999] ECHR 31423/96] quoted in Buckley, Niall F. "Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder " (2007) 12(4) *Conveyancing and Property Law Journal* 109.

public interest¹⁰⁹ The pivotal point of the judgement was the distinction between “deprivation” and “control of use” and the fact that the lawful limitation period had expired. Crucial too was intention to acquire the property when it was possessed.

The majority held that adverse possession should be construed as regulation of title rather than deprivation of ownership.¹¹⁰ The law on “adverse possession was designed to regulate questions of title and limitation periods in the context of ownership and use of land as between individuals....and therefore constituted a control of use of land within the meaning of the *para.2 of Art 1 of Protocol No. 1.*”¹¹¹

The provisions of the 1925 and 1980 Acts “were part of the general law, and were concerned to regulate, amongst other things limitation periods in the context of the use and ownership of land”¹¹² The judgement went on to state “It was open to a State to attach more weight to lengthy, unchallenged possession than to the formal fact of registration”¹¹³ The 2002 Act was enacted as a result of the *Pye* decision. However the act is not retrospective and was not beneficial to *Pye*.. The Irish government also submitted in defence of retention “that ownership of land brings duties as well as rights and the duty to take some action to maintain possession was not unreasonable”¹¹⁴

¹⁰⁹ [[AGNOSI v. United Kingdom (1987) 9 E.H.R.R.1.] quoted in Buckley, Niall F. “*Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder* “ (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

¹¹⁰ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.] Buckley, Niall F. “*Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder* “ (2007) 12(4) *Conveyancing and Property Law Journal* 109.

¹¹¹ *Ofilue v. Bossert* [2008]HRLR 20 p.20

¹¹² *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007. at para.. 66]

¹¹³ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.at para.74]

¹¹⁴ Irish Government submission in *Pye* McNicholas, Nicholas “Recent developments in Adverse Possession” (2007) Bar Review *December 2007* p. 246

2.4.1 Review of dissenting decisions in *Pye*

In the minority judgements, Rosakis, Bratza, Tsatsa Nikolovska, Gyulumyan and Sikuta JJ “saw little justification for extinguishing title in the context of registered land and considered a sharp disparity to exist between the “gravity of the interference with the owners’ property rights and the justification provided” and that the applicants were “required to bear an individual and excessive burden”

Dissenting decisions did not feel the general interest was served in “depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation.”¹¹⁵ They did not agree that compensation was a practical solution as this “did not sit well with the operation of limitation periods.”¹¹⁶

Loucaides and Kovler JJ considered the measure “completely disproportionate”¹¹⁷ and stated “I do not see how illegal possession can prevail over legitimate ownership.”¹¹⁸

They also stated it “encouraged illegal possession of property and the growth of squatting.”¹¹⁹ The limitation period had run and the title extinguished. However the dissenting judgments arguably expressed dismay at what exactly the legal registration of property within the Land Registry system represents in a modern world of technological communications, far removed from the implementation of the original 1833 Act. The positive aspect of *Pye* is the introduction of the *2002 Act* and the possibility that there cannot be a repeat of *Pye* in the UK.

¹¹⁵ Five Judge dissenting judgement quoted in McNicholas p. 246

¹¹⁶ *ibid.*

¹¹⁷ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007 quoted in Buckley, Niall F. “Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder “ (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

¹¹⁸ Russo-Cypriot opinion quoted in McNicholas, Nicholas “Recent developments in Adverse Possession” (2007) *Bar Review December 2007* p.246.

¹¹⁹ Cases and Comment: *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007 -(2007) 12 (4) *Conveyancing and Property Law Journal* 113a p.3

However one aspect that could be interrogated in a future test case is that during the limitation period of twelve years and before the extinguishment of title the fruits of the land, the benefit and income, and profits derived from the land could vest in the dispossessed title holder on extinguishment.

Due to the dissenting decisions and the expressed disquiet, it is likely that should another case similar to *Pye* come before the ECHR in the future, in relation to registered land, the decision could favour the title holder.

2.4.2 Changes in the law in the UK since *Pye*

The law in relation to registered land changed in England since the enactment of the *Land Registration Act 2002*. As a result it will be difficult to obtain title to registered land through adverse possession. This is due to the new requirement of the adverse possessor to apply to Land Registry after a ten year period of pending registration. Land Registry will then notify the registered owner to the application thus giving the owner time to reassert ownership of the land.¹²⁰ This gives the title holder a two year time frame within the notification period to act. There however will be exceptions that allow registration to take place; mistaken boundaries and in the interest of fairness. This will have the effect of “the near abolition of adverse possession in the context of registered land”¹²¹ and “the emasculation of adverse possession in relation to registered land”¹²²

¹²⁰ [Fox Lorna “*Living Outside the System? The (im)morality of urban squatting after the Land Registration Act, 2002*” (2007) 27(2)Legal Studies 236 at 238] quoted in McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 3.

¹²¹ *Ibid.* 3.

¹²² [Dixon, *The reform of property law and the Land Registration Act, 2002: a risk assessment*” (2003) Conv. 136 at 150] McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 3.

However the law remains unchanged with regard to unregistered land “which has led to an anomaly in the law”¹²³ The *Limitations Act 1980* and the *Land Registration Act 1925* had two factors to be considered; dispossession by the owner and possession by someone in whose favour the limitation period can run. However “Jourdan states....all that is necessary....namely somebody in possession (adverse possession), in whose favour the limitation period can begin to run”¹²⁴ In *Ofulue v. Bossert* the Respondents acquired property by adverse possession and “established the requisite intention to possess was perverse in the light of the continued acknowledgements of title and offers to purchase they made.”¹²⁵

However the offers made were under the without prejudice rule and arguably the respondents expended £60,000 on renovations of a derelict basement. The Applicants had initiated proceedings for possession which they did not pursue and slept on their rights. The case was whether the court should follow the judgment of the ECHR in *Pye*. The *2002 Act* sets down procedures to enable Land Registry to give better protection to registered land thus extending some protection to landowners that in England did not exist prior to the introduction of the act. This could be interpreted too as a means of promoting registration. It would be wrong to suggest adverse possession of registered land cannot succeed. Land Registry may experience difficulties in locating the title holder or there could be justifiable reasons that would render this part of the act unworkable. The other interesting side of this legislation is how far Land Registry is, within reason, obliged to follow up the initial notice or advertisement in the local

¹²³ McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 2

¹²⁴ Jourdan *Adverse Possession* 2003 paras 5.01 – 5.04 quoted in McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33

¹²⁵ *Ofulue v. Bossert* [2008]HRLR 20 p.22

newspaper to chase, at the taxpayer's expense, a landowner in utter dereliction of duty. This could also be interpreted as "Nanny State" activity when compared to the submissions from the Conveyancing Committee of the Law Society.¹²⁶

The Irish Government "argued that it was not unreasonable that land ownership should also involve a duty to take some action to assert possession"¹²⁷ The Committee "argued that introducing change based on the decision in *Pye* would be a self defeating exercise as it could be construed as a tacit admission that our existing legislation offends the European Convention"¹²⁸ The "policymakers in England envisaged an incompatibility between the concept of adverse possession in the traditional sense and the aim toward "indefeasibility of title"¹²⁹ with respect to registered land."¹³⁰ The operation of *2002 Act* has generated a confidence in registered land that heretofore was non-existent in the UK.

2.5 *Dunne -v- Iarnroid Eireann - Irish Rail & Anor*¹³¹

The decision in *Dunne -v- Iarnroid Eireann - Irish Rail & Anor* is under Appeal to the Supreme Court. The fact that children played on the land to the late 1980s limited exclusive use by the plaintiff and the defendants were actively involved with the land between 1993 to 1995. Fencing was constructed by the defendants in 2001 and these

¹²⁶ Draft Land and Conveyancing Bill 2005 (LRC 74 – 2005) sections 129 – 130 – Submission from Conveyancing Committee of the Law Society re Adverse Possession

¹²⁷ Buckley, Niall F. "Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder" (2007) 12(4) *Conveyancing and Property Law Journal* 109. p.3.

¹²⁸ (See the December submission, note 16 at 8 – 9) quoted in Woods, Una "The Position of the Owner under the Irish Law on Adverse Possession (2008)15(1) *Dublin University Law Journal* 298 p2

¹²⁹ [Fox Lorna "Living Outside the System? The (im)morality of urban squatting after the Land Registration Act, 2002" (2007) 27(2) *Legal Studies* 236 at 241.] quoted in McInerney, Patrick A. "The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis" (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.6.

¹³⁰ McInerney, Patrick A. "The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis" (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.6

¹³¹ *Dunne -v- Iarnroid Eireann - Irish Rail & Anor* [2007] IEHC 314

acts were consistent with the finding in *Powell v. McFarlane*¹³² “the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession.” Clarke J. stated “*though minimal, the acts of possession by CIE must be taken to relate to all of the lands at the relevant times.*”¹³³ Therefore there was no exclusive use by the plaintiff.

Clarke J. “was not satisfied that the fact that the caretaker of CIE came onto the disputed lands on a few occasions in each year amounted to a material factor to be taken into account.”¹³⁴ Walking is not an act of ownership activity whereas doing something tangible to the land is i.e. fencing and the building of the platform. Although these were small incursions onto the land and appear to have been peripheral to the site, the acts have a superior element to ownership than walking the land despite other judgements to the contrary. This endorses the individuality that pertains to each separate case and the difficulties in discerning any common thread, although “one justification for the rule in *Leigh v. Jack* is the fact that the owner repaired a fence during the limitation period.”¹³⁵

Clarke J. stated:

“the small number of animals being present were at least as consistent with the exercise of grazing rights as with ownership and in particular there were no significant buildings have been constructed or were in use”.

This was consistent with *Egan v. Greene*¹³⁶ “occasional grazing of cattle on the land without objection by the landowner was not sufficient to establish adverse

¹³² *Powell v. McFarlane* [1979] 38 P & CR 452

¹³³ *Dunne v. Irish Rail* [2007] IEHC 314.

¹³⁴ *Dunne v. Irish Rail* [2007] IEHC at [6.3] quoted in Woods, Una “The Position of the Owner under the Irish Law on Adverse Possession (2008)15(1) *Dublin University Law Journal* 298 p 9

¹³⁵ Woods, Una “The Position of the Owner under the Irish Law on Adverse Possession (2008)15(1) *Dublin University Law Journal* 298 p 13

¹³⁶ *Egan v. Greene* Unreported, High court, 12 November 1999.

possession”¹³⁷ Grazing is not an all year round activity, cattle go to market and if fattening cattle is the husbandry element then intermittent use of the land is at the core of this activity as was the case in *Seamus Durack Manufacturing Ltd., v. Considine* where animals on the land for nine months did not negate possession as the normal practice of taking animals off the land was occasional use.

Clarke J. used the following two part test :

Is there a continuous period of twelve years during which Mr Dunne was in exclusive possession of the lands in question to an extent sufficient to establish an intention to possess the land itself, rather than to exercise grazing rights or the like over it.

*Is any contended period of possession broken by an act of possession by CIE. If so, time will only commence to run when that act of CIE terminates.*¹³⁸

In *Dunne* there was no exclusive use of the land for a continuous twelve year period. Although the plaintiff and his family had use of the land for a thirty year period continuously, although with others, on occasion, children and the defendants. The plaintiff was the predominant user however a small portion of the lands used by the plaintiff was taken by the defendants for the construction of a new platform. In this the squatter failed in his intention to take possession of the land to the exclusion of all others in that the defendants retained access and use. It may have proved helpful if the plaintiff had challenged the work by the defendants to the property or arguably developed a sustainable building project at substantial cost. Intention is central to the judgement. However fencing and a strip of land taken by the defendants were sufficient

¹³⁷ de Londras, Fiona. *Principles of Irish Property Law* (Dublin, 2007).at 383.

¹³⁸ Clarke J in *Dunne v. Irish Rail* [2007] IEHC 314. quoted in McNicholas, Nicholas “Recent developments in Adverse Possession” (2007) Bar Review *December 2007* p.245

to constitute acts of possession. There is the additional component in this judgement of the unacceptability of dispossessing a Semi State body where land is used for societal use and the common good.

CHAPTER THREE

3.1 *Other Cases*

It is accepted that the Statute of Limitations 1957 “takes away rights rather than conferring them”¹ Dixon J. stated “It is not so much a question of interests having been acquired as of rights having been lost. I do not wish to answer the question in a way which would suggest that the Limitation Act effected a transfer of property.”² Although for a squatter on leasehold land, a parliamentary conveyance of the lease would effect a reasonable resolution to marketability and other difficulties squatters experience in complying with the terms of the lease which currently remain undisclosed to squatters. There is justification for the introduction of legislation to enable squatters dispose of an acquired asset for value. This could be achieved after the twelve year limitation period when the adverse possession is established and the tenant’s rights extinguished. Knowledge should transfer to the squatter in relation to covenants and agreements. However for the duration of the limitation period the tenant should retain the right to:

- (a) disentangle himself from the terms of the lease, which may prove costly and
- (b) contact with the landlord re ousting the squatter should not be seen as collusion.

However tenant collusion with the squatter may be a way of ultimately acquiring freehold ownership of property and this appears to be an area open to abuse. It is therefore advantageous for the landlord to remain in a position to sue the tenant

¹ *re Ryan’s Estate* [1960] IR 174, 179-180 per Dixon J. quoted in Coughlan, Paul. *Property Law* (Dublin, 1995) at 217

² *re Ryan, Maher v. Harte Barry* ([1960] I.R. 174, 179) quoted in Wylie, J.C.W. *A Casebook on Irish Land Law* (Oxford, 1984) at 693.

regarding the terms and provisions of the lease even though the tenant has lost control and use of the property.

A lessee who encroaches and annexes adjacent property is considered to have done so for the benefit of the landlord and to hold the land, merging it under the lease. This presumption is logical and stems from “an owner” annexing land in the mistaken belief of ownership thus avoiding outright land theft. The landlord as a successor squatter will become the owner, although the duration of the lease may actually bar the landlord from ever exercising rights over the land.

The primary test in all cases is the presence or absence of *animus possidendi*, the component ingredient of possession combined with the intention to possess. However Nourse L.J. held “that an intention of the paper owner is not relevant in itself though it may alter the quality of the intention of the adverse possessor should such an intention on the part of the owner be known to the squatter.”³

The adverse possessor’s possession and intent is fundamental in all cases to the upholding of any claim although the “State (either through the legislative or judicial organ) tends to plump for the paper owner at least in the majority of instances.”⁴ *Feehan v. Leamy*⁵ remains with respect, a controversial decision. However it has arguable logic in relation to mapping and land and crucially the squatter was unhelpful to his own interests with his evidence.

³ *Buckinghamshire County Council v. Moran* [1990] Ch 623 quoted in McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.2

⁴ McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p1

⁵ *Feehan v. Leamy* [2000] IEHC 118

In *Mulhern v. Brady*⁶ the paper owner was active and vociferous in asserting possessory acts over the land on numerous occasions. However *Feehan v. Leamy* incorporates the dictum of the most minimal acts by the paper owner establishing and retaining ownership. Whether there is a dislike for squatters on moral grounds is irrelevant. The Acts of Limitation must operate fairly for all litigants in upholding law. How they are interpreted depends on each individual judge. Judgements usually reveal good legal and judicial reasoning on close examination.

The twelve year limitation period is not unreasonable and there should be “no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place.”⁷ In defeating any adverse possession claim, the most minimal acts of possession by the title holder will defeat the squatter. Possession is enunciated by Clarke J. in *Dunne*⁸ as “single and exclusive possession” which entailed a “sufficient degree of exclusive physical control” and he stated that the possession must be “objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to.”⁹

The squatter therefore must defeat the title holder’s possession by absolute exclusive physical control of the land by dispossession. The difference between dispossession and discontinuance of possession was stated by Fry J. in *Rains v. Buxton* – “the one is where a person comes in and drives out the others from possession, the other case is

⁶ *Mulhern v. Brady* [2001] 5 I.C.L.M.D.59 quoted in McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.4.

⁷ *Doyle v. O’Neill* [Unreported, High Court, January 13 1995 at p20 of the transcript.] quoted in McNerney, Patrick A. “The Irish Law on Adverse Possession: Pro Adverse Possessor or Paper Owner? A Moral or Public Policy Objective? - A Comparative Analysis” (2008) 13(2) *Conveyancing and Property Law Journal* 33 p.2

⁸ *Dunne v. Irish Rail* [2007] IEHC 314

⁹ *per* Clarke J. in *Dunne v. Irish Rail* [2007] IEHC 314 quoted in McNicholas, Nicholas “Recent developments in Adverse Possession” (2007) *Bar Review December 2007*. p242.

where the person in possession goes out and is followed into possession by the other persons.”¹⁰ It is, *per* Cockburn CJ “clearly established, that possession is good against all the world except the person who can shew a good title: and it would be mischievous to change this established doctrine.”¹¹

Possession must therefore remain a critical component in the law on adverse possession and squatters exercising exclusive rights on land are in the best possible position to have their possessory title claims upheld provided they fulfil all other crucial ingredients for adverse possession, or the paper title holder acquiesces and allows activities on the land without challenge. Each case merits a different approach. There is no obvious universal approach. However only time can operate to aid the paper owner who must at all times remain vigilant in relation to the stewardship of his lands and challenge before the limitation period expires.

3.2 Unacceptable behaviour in Land Disputes – Penalties

In the early 17th century Sir Edward Coke noted that —the house of every man is to him his Castle and Fortresse, as well for his defence against injury and violence, as for his repose.¹² It would be of benefit if law had a different approach to adverse possession involving non relative disputes. This would act to reign in on unacceptable encroachment and trespass, particularly in relation to threatening behaviour, bullying, and intimidation.

Where the gardai have been involved, access to a speedy resolution would be beneficial to all parties. This can be serious, frightening and bordering on criminal. As it takes

¹⁰ *Rains v. Buxton* (1880), 14 ChD.537, 539 quoted in Maudsley R.H. & Burn E.H. *Land Law: Cases and Materials* (London 3rd ed., 1975).

¹¹ *Asher v. Whitlock* (1865), L.R. 1 Q.B. 1 (Court. Exch. CH. Cockburn, C.J. and Mellor and Lush, JJ) quoted in Maudsley R.H. & Burn E.H. *Land Law: Cases and Materials* (London 3rd ed., 1975).

¹² *Semayne's Case* (1604) 77All ER 194. quoted in Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008.at 289

place on private property there are difficulties in relation to a garda presence despite public order offences and other minor infringements of law, being in defence of private property appears to endorse activity that would otherwise be criminal for any party trying to annex adjacent land while pretending to own same.

If placed within a workplace environment bullying activity would be a disciplinary matter and would transgress law together with other dignity at work policies. In a school environment if proven, it would be a matter for expulsion and/or criminal proceedings. It is unsatisfactory that in majority of these cases each side bears their own costs. It is very unusual for judges to award costs as the commonly held belief is that each side believe they own the disputed land and this is pivotal to all land disputes.

However where encroachment, moving fences and outright “land theft” takes place it is at variance with the reasoning and logic behind the introduction of the law in 1833 and the pleas for its retention in 2007 in the Grand Chamber submissions by the Irish Government. It was introduced in order to settle land. However because of the difficulties and costs in proving ownership many abandon the land to the squatter.

The introduction of hefty fines for any encroachment/trespass on land would be welcomed. The penalty for registered land should be significant, in the area perhaps of 20,000 or 50,000 euro, due to the fact that the property encroached upon no longer has title that matches maps lodged with Land Registry and this would be detrimental to the value apart from the history of living beside a squatter or difficult neighbour. This fine should also compensate for the stress involved with a maximum fine of 100,000 euro or the value of the encroaching party’s property. The penalty should be so great that it acts as a deterrent to squatting activity.

3.3 Paid expert witness

Experts are not paid for their testimony; they are paid for time. Experts are persons with special knowledge and/or education that goes beyond the experience of ordinary members of the public.¹³ Some mischievous activity exists although often their evidence is dismissed and dismantled by a court. Judges have a preference for hearing the evidence of the disputing parties and the “use” of the land involving physical control over time. However ethics and repercussions appear almost non-existent in relation to misleading statements and information by some professionals; architects, engineers, surveyors involved in land measurement, determined to frustrate law and the legal process.

In one boundary dispute a chartered engineer with access to the plaintiff’s drawings, gave these drawings, to the defendants, with no permission from the plaintiff. It was discovered after the case concluded that this engineer was paid by both parties. However he refused to go to court for the defendants. Another experienced chartered engineer arrived on site with a photocopy map to agree a compromise and refused to work from his client’s registered folio. Earlier a qualified architect who met with the plaintiffs surveyor, through a mediation process, to agree and mark the boundary at his clients request, agreed the boundary and refused to mark it saying it was too small to mark as it was covered in shrubbery. The time lapse between the mediation process and the meeting on site totalled fourteen months. This was beneficial in delaying proceedings.

Difficulties in professionalism exist in the current banking environment where statements were economical with the truth, and banker/accountants now distancing

¹³ <http://expertpages.com/news/new1.htm> “General Information about Expert Witnesses and Consultants”

themselves from reports they audaciously stood over a year ago. Reform in this area would be welcomed; the removal of professional qualifications, a fine of the total value of the property and/or a prison sentence for misleading a court.

The measures should ensure forfeiture at a level that would make it very difficult for any professional aware of the penalties for misconduct to act other than professionally and all professions need reform in this area and penalties should be severe. Paid expert witness has been controversial in the past. They are paid for evaluating matters, studying files or reviewing evidence, meeting with other professionals and coming to conclusions that are most beneficial to their own clients while frustrating the aims of the opposing side.

In the area of surveying fences and boundaries, they can place an old fence almost anywhere on a site or say in evidence, a fence existed or was located in that particular area but fail to mention that it was recently installed or installed at their instigation. Paid expert witness is an area fraught with peril, with some very unscrupulous professionals who are prepared to say and do anything that is beneficial to their clients while having no moral stand on their actions or behaviour.

3.4 Barrister immunity in civil cases and duty of solicitors to the administration of justice

Barrister immunity in civil and criminal cases has been abolished in the UK. The House of Lords, in “*Hall (Arthur JJ) & Co v Simons* abolished the advocates’ immunity (with some dissenting voices on the criminal aspect)¹⁴ This should be the case in Ireland particularly when barristers, aware of the sensitivity of a dispute with parties living in close proximity, are rude to witnesses. Where a judge asks a barrister to apologise,

¹⁴ [2003] 3 All ER 673 (HL) quoted in McMahon & Binchy *Law of Torts* (Dublin, 2001) at 379

there should be a consequence for the barrister beyond the apology. Civil court immunity should be abolished to take cognisance of law as it exists in most other European countries apart from a duty of care principle that is owed to both the plaintiff and defendant. McMahon and Binchy suggest the abolition of immunity as they state the current position would not withstand an *Osman* standard of scrutiny. They also suggest solicitors and barristers “have a broader duty to assist the administration of justice.”¹⁵

Solicitors who within an ethics and practice code, fail to honour their duty of care to a Ruling or any aspect of the findings of a learned judge, should face a disciplinary hearing that has the capacity to close the practice, or issue a substantial fine that is paid into the court to benefit the Law Library or the Law Society. The penalty should be so severe, that the act of continuing litigation after a final Ruling, when no other Appeal can be made should, because of knowledge of the parties, be beyond Contempt of Court.

Some time ago the President of the High Court the Honourable Mr Justice Richard Johnson voiced concern while handling of an investigation into errant solicitors about the honour of the profession and the lack of ethics that exist today in so many areas of professional life. An effective monitoring system that acts to highlight repetitive errant behaviour and any breach of ethics or behaviour that seeks to obstruct a Ruling should be a matter for a disciplinary hearing by an adjudicator of the Law Society or other monitoring body with the ultimate penalty being administered, a court case with a possible jail sentence.

¹⁵ McMahon & Binchy *Law of Torts* (Dublin, 2001) at 402.

3.5 Court Costs deductible for tax purposes

The subject of costs are a contributory factor to many cases being settled, dropped or discarded particularly when the value of the land bears little relationship to the overall legal costs involved. As court cases decide precedent and recommend changes in law, court costs should be tax free for the duration of the Hearing. This would be particularly beneficial to the PAYE taxpayer as businesses usually claim their costs as necessary expenses in their year end accounts. This would result in better access to justice particularly when a Hearing could run into days and would arguably be beneficial to all parties especially those caught up in disputes where no free legal aid is available. This mechanism would benefit all cases and would not be confined to land cases.

CHAPTER FOUR

4.1 *Charleton Kenny case, dispute, media, publicity, the Dunsink Lane Case.*

Denise Charleton described the experience as debilitating following the settlement of the *Charleton v. Kenny* land dispute in April, 2008¹. They made no other comment due to an agreed silence clause. Arguably Mr Kenny's comments on television and in later news bulletins were in contempt of the clause. The earlier discovery case,² before Clarke J. disclosed satellite dated photographs, obtained from the OSi. They illustrated clearly when gates, bird tables and other accoutrements were placed on the land. This case highlighted publicly the activity of squatters in respectable surroundings seizing land from elderly neighbours and one time close friends. Media publicity³ because of the personalities involved proved beneficial to public awareness and the case was followed closely on news reports in Ireland and abroad.

In contrast the Dunsink Lane settlement received relatively little publicity, when travellers were paid in excess of twenty million pounds by Fingal County Council to vacate property half the size of Phoenix Park. The property was once dominated by the most putrid dump in the State⁴ and the "travellers could show they had been on the neglected site for more than 20 years."⁵ The Evening Herald ran a headline "The Squatter Millionaires" saying that one of the families was set to become a millionaire thanks to taxpayers' money."⁶ Barrister Paul Anthony McDermott explained "If they have been living there and no one has complained or tried to put them off the land, they

¹ see Appendix 1

² *Charleton & Anor v. Kenny & Anor* [2007] IEHC 308

³ *The Sunday Times* 30th March, 2008.

⁴ Holland, Kitty "Whose Land is it anyway?" *The Irish Times* 16th June, 2007.

⁵ Maguire Siobhan "Property Law" p12 *The Sunday Times* 27th April 2008.

⁶ Holland, Kitty "Whose Land is it anyway?" *The Irish Times* 16th June, 2007.

are entitled, after 12 years, to conclude they have possession of it”⁷ he went on to explain “if the media doesn’t like them they are portrayed as having scammed”⁸ In contrast the publicity surrounding the Dalkey land was different, it gripped the imagination of the people with pages of photographs appearing daily as front page news with captions and comments on style, fashion and the respectability of the parties. A settlement was reached and “Kenny is reported to have paid between one million and two million to take ownership of the land.”⁹

4.2 Lord Haughey case in Northern Ireland

Lord Haughey claimed adverse possession of a derelict cottage adjoining Ballyedmond Castle in County Down¹⁰ “it was a classical case of the little man against the big industrialist and the attendant financial risks involved”¹¹ Campbell L.J. stated “Mr Haughey at one stage ordered the actual owner off the land at Rostrevor” in 1998 when the owner returned to the cottage. A small fence erected by a member of the owner’s family was removed by Mr Haughey. Campbell L.J. stated it was apparent that in recent years Lord Ballyedmond and his two companies had a firm intention to possess the disputed land and had been in factual possession of it. However they “failed to discharge the onus of proving that they had a sufficient degree of physical control or an intention to exercise such custody and control over it for the requisite period of 12 years” and accordingly the owner had not been dispossessed.

⁷ McDermott Paul Anthony quoted in Holland, Kitty “Whose Land is it anyway?” *The Irish Times* 16th June, 2007.

⁸ McDermott Paul Anthony quoted in Holland, Kitty “Whose Land is it anyway?” *The Irish Times* 16th June, 2007.

⁹ Maguire Siobhan “Property Law” p12 *The Sunday Times* 27th April 2008.

¹⁰ *BBC News Channel* 26th May 2005.

¹¹ Solicitor Tim Donnelly who appeared for Mr Scott Foxwell owner of the cottage quoted in *The Irish Times* 26th May, 2005.

Both the Haughey and Kenny cases produced years of highly publicised litigation brought about by unlawful attempts at confiscating land and housing. These claims proved unsustainable. However in Boulder Colorado, a couple lost their land to a former district court judge and former Boulder mayor when he used the legal concept of adverse possession to take control of thirty-four percent of his neighbours land.¹² Both the judge and his wife received a vitriolic response to their successful adverse possession lawsuit.

4.3 Boundary Disputes

Retention of the mechanism of adverse possession in relation to the settling of boundary disputes was urged in the Irish Government submissions in *Pye*¹³. The disputed land is usually awarded first through the deeds to the title holder and in order to sustain that award, the land is then also awarded through adverse possession. If there has been outright land theft this is the most sustainable form of judgement and therefore is necessary to law. In the case of a squatter being successful the land is awarded to the squatter by adverse possession. However boundary disputes by their very nature are difficult to reconcile and because of the proximity of the disputing parties can be problematic to resolution and beyond. Other difficulties often arise into future generations of the same families have their origins in the original difficulty of the boundary dispute and so in a way the boundary dispute remains with the parties forever. The marking of the line establishing the boundary after a High Court Ruling, often with a garda presence is traumatising. One builder who specialises in constructing barriers on agreed boundaries stated the difficulties have involved physical violence,

¹² Urie Heath *Boulder Daily Camera*, November 17th 2007 available at <http://www.dailycamera.com/news/2007/nov/17/stevens-loser-disgruntled/>

¹³ *JA Pye(Oxford) Ltd v. United Kingdom* [ECtHR no.44302/2, Grand Chamber August 30, 2007.]

abusive language and threatening behaviour combined with garda activity regularly on site.¹⁴

In some cases, according to Colm Condon¹⁵ even with a High Court Order it is not possible to succeed in marking a legal boundary. This is contradictory to the truth of the statement “the boundaries of each piece of land are marked out -mistaken belief in ownership of a piece of land can be simply fixed by consulting the Land Registry.”¹⁶ This is possible with honest surveyors.

However it is often the case that one of two surveyors using the same maps can assert the boundary to be other than the correct location. Considering a line on a map is two metres wide and boundary disputes are about tiny strips of land any surveyor wishing to frustrate a boundary marking can achieve some level of success. Considering “rectifications of boundaries on PRA maps requires either the owners consent, or be carried out on foot of a judge’s order according to the *Registration of Title Act 1964*.”¹⁷ Land Registry in its website *Frequently Asked Questions* point out they have no responsibility in the area of boundaries. Rather the registration process is an index of land ownership and the title folio states clearly that the mapping is not conclusive with regard to boundaries. Problems arise where one neighbour moves a fence from the legal boundary often with the co-operation of the neighbour. This is done usually to facilitate an extension or an access problem regarding maintenance. Usually an acknowledgement exists, between the neighbours, as to the location of the legal

¹⁴ Finian O’Reilly, Project Manager and Builder, Gibbstown, Co Meath.

¹⁵ Colm Condon, 2003.

¹⁶ Fitzgerald, Ciara. “The Beginning of the End for Adverse Possession?” (2007) 3(1) *Independent Law Review* 15

¹⁷ Prendergast, Patrick. “Green Paper Proposing Reform of Boundary Surveys” (2008) 13(3) *Conveyancing and Property Law Journal* 65

boundary and no problems arise until one of the properties changes hands, perhaps years later.

By that time a conclusive fence has been constructed as a physical boundary, for in excess of the twelve year limitation period and the legal owner faces great expense in recovering his land to his legal boundary. If he is successful, he may not be in a position to remove a conclusive fence as the topographical feature on the ground will not have allowed him access to his boundary. The registered owner has in effect lost physical control over his land because of the fence which is limiting his access and use of the land. He has successfully fenced himself out and while he may consider he owns to the legal boundary without the consent of the new owner and an agreement as to the location of the boundary it is unlikely this strip of land can be recovered.

If successful in court, the judge will uphold the acknowledged legal boundary consistent with registration: however this does not mean it can be re-fenced. It merely means that the acknowledged land is recorded in the title of the squatter as being in the ownership of the paper holder. Judges have a habit of finding favour with the topographical features on the ground. This appears to avoid any one-upmanship between neighbours especially if both have been law abiding during the dispute. However judges do not like any interference with the land by the placing of accoutrements, fencing, wire, or other manifestations. If this is done after Proceedings are served it is serious. The disturbance caused to a title holder enduring this activity borders on criminality and totally obstructs the use, peace and enjoyment of home. The placing of barbed wire, posts, pallets and other rubbish on land by a squatter is deemed “making a claim” to the land. This is done with the intention that the paper holder will abandon the land to the squatter. The best advice appears to be:

Not to throw anything back onto the neighbour's land.

Issue Proceedings, report and record with the gardai all incidences of interference.

Diary all problems.

While the Law Reform Commission acknowledges land theft to be a rare occurrence the squatter hopes the title holder will abandon the land.

Apart from expense, these disputes take a considerable number of years to resolve through court and would appear to be more amenable to Alternative Dispute Resolution through a mediation or a constructive arbitration process and can usually be resolved quickly by compromise. This is done by each neighbour instructing an architect or surveyor to establish the boundary line most favourable to them. The parties would have to compromise, by "splitting the difference" The problem is that there must be a willingness to compromise in the first place for this to work.¹⁸

The area of compromise is fraught with danger for the title holder, where an errant surveyor will offer a compromise that favours his client, agree the accuracy of the compromised offer and then state the compromise agreed by both surveyors was unacceptable to the title holder. Technically an agreement was reached, however the compromise was in itself not agreed by the landowners. Solicitors for the parties will take steps to have an attempt at reducing costs by agreeing the legal boundary and ending litigation. However, the errant surveyor may offer a compromise saying it is agreed and seek the signature of the opposing surveyor for the agreement without providing any mapping of what has been agreed. A squatter will sometimes ask if his architect or surveyor can agree and mark the legal boundary, the title holder agrees and the errant professional will agree the legal boundary, refuse to mark it, saying it is too

¹⁸ McGowan Conor *The Sunday Times* Ask the Experts, April 2004.

small a boundary to mark or the shrubbery is in the way and therefore the boundary is not “available” to be marked. These activities act as delay tactics. The compromise can take up to six months to arrange and the agreed boundary offer anything from six to fourteen months. Letter writing by solicitors will not address the issue of a determined squatter who is knowledgeable regarding squatting procedures, time and delay and quick thinking procedures under duress.

One squatter having fenced off the access of the title holder told the gardai that the County Council told him he owned the land and later following a successful court hearing told the gardai the name of the surveyor was not on the High Court Order in order to have the marking aborted. The gardai were unwilling to oversee the Ruling of the High Court and the marking came to a standstill. Squatters have an excellent chance of successfully registering abandoned land.

There are however exceptions. If the disputed land is covered in shrubbery beyond a fence with an access and the land is maintained by the title holder by pruning, planting or cutting with no physical control functions performed, it would be impossible for the squatter to succeed in a claim.

A better chance of success exists for the squatter by the removal of shrubbery, planting grass and maintaining a lawn and closing the access. Thereafter excluding all others and remaining unchallenged for twelve years the squatter should be in a position to register his claim to the land. Only the person showing better title than the squatter can oust the squatter.

Other issues in boundary disputes to be considered are, the amount of land involved, often a tiny strip, the expense of recovery, the difficulty of proving ownership, and the

possible health consequences in embarking on expensive litigation that leaves the parties in adjoining houses without the ethos of good neighbourly relations.

This point was raised by Ward L.J. in the English case “of *Alan Wibberley Building Ltd v Insley* to hear those words, 'a boundary dispute', is to fill a judge even of the most stalwart and amiable disposition with deep foreboding since disputes between neighbours tend always to compel...some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers. This case proceeded to the House of Lords, the highest Court in the United Kingdom judicial system, where Lord Hoffman noted that .boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army.¹⁹

If the squatter neighbour has challenging behaviour the dispute enters an entirely different realm. This concerns outright land theft, the moving of fences, the taking of walls and land, fencing off perhaps two to three metres of a neighbours land. The land of a site must be accessed from inside the gate as only adjoining land can be annexed.

Boundary disputes are by their nature painful and protracted. The OSi mapping department confirmed the problem of cobble locking in an adjoining driveway where the owner of the cobble locking rather than cutting the block installs the block beyond the boundary line by between six and eight inches.

One of the difficulties with boundaries is the non conclusive boundary system as operated in Ireland. This requires surveyors to map the topographic features that bound properties rather than the title boundary, which define the legal extent of properties.

This gives rise to a situation where the following three principles are applicable :

¹⁹ [1998] 2 All ER 82 quoted in Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008. 9.05 and 9.06 at 290

The location of the title boundary within the topographic feature is not determined.

The ownership of the topographic feature is not determined.

The type of topographic feature is not specified.

Therefore a corridor of unspecified width exists between properties where the ownership is not determined.²⁰ These difficulties combined with the problem of the line on the map being equal to two metres of land, leave the mapping of properties with difficult reference points, often in chaos with the potential for argumentative dispute. OSi have not published a statement of positional accuracy for their mapping and the results of tests conducted during the last twenty-five years indicate that OSi mapping does not meet internationally accepted standards of positional accuracy.²¹ Because of these difficulties the potential for surveyors to continue argument after a court ruling exists. Surveyors and engineers can be economical with the truth, advise their clients to manufacture their site to resemble their folio, hide and fence off land with overgrown shrubbery and tall trees making it impossible for the fencing and site to be reflected accurately by OSi mapping. Shrubbery forms a major role in obscuring land markings i.e. fences, walls and other topographical features.

Another tactic used by surveyors is the placing of other markers on the ground after the legal boundary has been marked by the appointed surveyor *per* a Court Order. These markers are placed with the intention of misleading a builder and obstructing the Order.

The area of surveyors and their activities needs to be addressed by their professional bodies in order to establish a recognised code of practice that remains ethically sound.

Any recorded behaviour of malpractice should invoke a penalty that ranges from

²⁰ Prendergast Patrick "Title Boundary" IIS News Spring 2005.

²¹ *ibid.*

removal of qualifications at the top end of the scale to fines. The most bizarre situation occurs where an engineer confirms the boundary to be the fence in court, having agreed the boundary with his opposite number to be two metres beyond the fence on site. This can happen by using a diverse method of locating a reference point, taking a bearing from an incorrect source or using a photocopy doctored map. However the fact can be truly stated that the boundary is indeed the fence while the same person can be accused of agreeing the boundary at another location on the site by the opposing surveyor. The goal appears to be to cause the judge confusion as to where the boundary lies. One judge in Trim Circuit Court refused to hear a boundary dispute stating that the parties must work to locate an agreed boundary. If they were not able to agree as to where it lay how on earth was he to know where the boundary was.

Interestingly the “Irish surveyors now have the technology to survey features to centimetres in a national context using GPS, so they can now identify discrepancies in less accurate OSi and PRA maps”²² this gives rise to the question of what is or is not a less accurate map. A line on a GPS system map was dismissed by Smyth J. in the Court of Appeal²³ when this line translated into six metres of land on the ground taking account of mature trees, a fence, a shrubbery and a wall. A GPS system map is unacceptable to Land Registry as a document suitable for the registration of land and this gives rise to the validity of some of the proposals in the Green Paper even taking into account less accurate OSi and PRA maps. Worryingly this technology in the hands of errant surveyors, if acceptable to disputing parties could be used beneficially to further land theft. While the Green Paper may have in its proposals some areas of

²² Prendergast, Patrick. “Green Paper Proposing Reform of Boundary Surveys” (2008) 13(3) *Conveyancing and Property Law Journal* 65 p2

²³ *O’Dwyer v. Kerrigan* [2007] 311 CA High Court 6th December 2007.

worthwhile debate it does not give any new solutions to very old contentious or long running disputes. The report requires many amendments and it is unlikely to become a report to government as a White paper. It may stimulate debate amongst stakeholders, solicitors, engineers, surveyors and architects. However for the moment some of its suggestions are unworkable and could operate to the detriment of a landowner and could give rise to further dispute.

In boundary disputes surveyors are only interested in where they find the line on the ground that best suits their client's needs. The court hearing becomes a technical experiment relating to maps and mapping procedures. However the court is always interested in the use of the land, the law in relation to the limitation period and the harassment the parties have endured. Surveyors take no account of the use of the land nor of behaviours, their interests and loyalty is solely to their own respective clients for remuneration.

A change of solicitor or the sending of the first solicitor's letter to a neighbour or acts that are contrary to good neighbourly and community practices i.e. interference with private property and outright land theft, are significant indicators to a court and are not taken into account by surveyors who lack the information and knowledge base available to a judge who can administer law. The Irish land registration system can be viewed as two separate systems of folios and PRA maps though directly related. Information in the PRA folios is considered reliable so a State guarantee is provided for the title. In contrast information in the PRA mapping is considered as unreliable and

has no State guarantee regarding boundaries, thus the system is perceived as less secure.²⁴

There is no ideal resolution to boundary disputes and two honest surveyors may resolve with compromise within a week. However the era of the original marking of the boundary and the techniques employed by the professional at that particular time historically is one way a dispute can be settled. The qualifications of the parties who performed the original marking can become important issues even if the parties are deceased. Modern technology can find a boundary to within a millimetre however it may not be the correct boundary and the acceptable boundary to both parties. Rather this can have a two to four metre discrepancy leading to further complications. Tolerances in mapping have the potential for large movements of the recorded positions of PRA legal boundaries. Consequently old title documents are unlikely to correlate exactly with the new PRA digital maps any longer.²⁵ This acts to further complicate the issue where buildings and reference points differ on similar maps issued by the OSi in different years. A willingness to compromise through ADR or some other recognised mediation process appears therefore the most logical solution although a court remains the only forum to better explore and examine the use of the land and the behaviour and intention of the parties.

4.4 Irish Government submission to the ECHR in Pye for the retention of the doctrine

When the *Pye* case was referred to the Grand Chamber the Irish Government applied to be a notice party to the appeal. Here five areas of public interest served by adverse

²⁴ Prendergast, Patrick. "Green Paper Proposing Reform of Boundary Surveys" (2008) 13(3) *Conveyancing and Property Law Journal* 65 p2

²⁵ Prendergast, Patrick. "Green Paper Proposing Reform of Boundary Surveys" (2008) 13(3) *Conveyancing and Property Law Journal* 65 p2

possession were identified - quieting titles, the desirability of clarifying title where land had remained abandoned and occupied by another person, cases where estates remained un-administered on intestacy, in pursuance of a policy of the use of land to advance economic development, to perfect title in cases of unregistered title and in dealing with boundary disputes.²⁶

This Irish Government argued that it was not unreasonable that land ownership should involve a duty to take some action to assert possession. The Government highlighted the wide margin of appreciation in regulating land use and ownership, the antiquity of the doctrine and the familiarity of landowners with it and contended that it did not upset the balance of Art.1.²⁷ It was open to a State “to attach more weight to lengthy unchallenged possession than to the formal fact of registration.”²⁸ The Government therefore argued for the retention of the mechanism of adverse possession as a necessary component to Irish law. Historically in Ireland many farming estates remain un-administered for years, often due to a distrust in professionals or a desire to save money. The doctrine of adverse possession is essential to law to settle land keeping it marketable and an economical and viable entity. Mr Hennessy of the Property Registration Authority considered that the doctrine of adverse possession works extremely well in achieving its goal of regularising titles and stated that the vast majority of applications do not appear to be what one typically considers “adverse possession” i.e. assumption of ignored or abandoned land by a squatter. In fact, the vast majority of applications are legitimate instances of regularising title and illustrate that

²⁶ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, at para.50 quoted in Buckley, Niall F. Pye (Oxford) Ltd v United Kingdom : Human Rights Violations in the Eye of the Beholder “ (2007) 12(4) *Conveyancing and Property Law Journal* 109.

²⁷ *ibid*,

²⁸ *ibid*.

adverse possession is a highly valuable mechanism which is clearly needed. It was surprising to learn that the many problems outlined by commentators in relation to adverse possession hardly affect the PRAI's work in any way, if at all.²⁹ The *Pye* decision should be seen in isolation.

4.5 Protection offered to future purchasers

Adverse possession is necessary to settle land for future purchasers. Once the limitation period has expired, the paper title extinguished, the land registered by affidavit or by other means of registration, the land becomes freely marketable and viable. A new purchaser obtains title to the land that is superior to all others. As the extinguished title holder cannot challenge ownership and the only way the purchaser can be dispossessed is by another squatter or a succession of squatters. As the limitation periods consist of 12 years for private property 30 years for State property and 60 years for foreshore it is unlikely that any vigilant person can be dispossessed without being aware of squatter activity. Purchasers can be assured that once the limitation period has expired and all necessary steps have been concluded with regard to registration that no further challenge can be made.

4.6 Cully tragedy in Co Westmeath

The tragic shooting of Vincent and Mary Cully, a couple in their sixties, the parents of seven children, in Turin, Delvin, Co Westmeath, by a neighbour occurred on 8th November, 1997.³⁰ This followed six years of acrimony, initially about a boundary connected to the planting of tall trees bordering their respective properties. Other

²⁹ Treacy Frank, Property Registration Authority "Item 3 Other conclusions" at 3 see Appendix.

³⁰ *Sunday Independent* 24th October 1999 p.17

<http://www.irishnewsarchive.com/Respository/getFiles.asp?style=OliveXLib:LowLev...22/12/2008>

difficulties arose relating to planning permission for renovations and there had been garda activity earlier in the day, at the site of the shooting.³¹

On 18th October 1999, Mr Justice O’Sullivan described the circumstances of the case as “extraordinarily tragic” and imposed two mandatory life sentences on Seamus Dunne who pleaded guilty to murdering his neighbours.³² This case is mentioned in order to highlight the high emotions that surround disputes of this nature. The proximity of disputing parties needs to be addressed by easier court access. The difficulties that arise in relation to mediation are the implementation of an agreement between the parties that is binding and the acceptance of an adjudicator acceptable to all participants. If bad behaviour, threatening or bullying is involved then it is impossible to reach any meaningful and binding settlement.

4.7 Alternative Dispute Resolution

Alternative Dispute Resolution holds the key to many disputes where valuable court time can be dispensed with and a viable working solution can be obtained by all parties involved. The *Charleton/Kenny* and the pleadings of Clarke J.³³ is the ideal example of how mediation works well in this area. However ADR addresses many disputes other than those concerning land or adverse possession. It may offer the best possible solution before the parties become entrenched in expensive litigation. However this calls for a reasoned approach where compensation or compromise may be the best solution.

³¹ see Appendix 2

³² Wilson. Mary Legal Affairs Correspondent, reports on the murders from the Central Criminal Court on Monday 18 October 1999. 9.00 News, printable version..

³³ Ms Justice Clarke quoted in Black and Healy “Judge Makes Plea for Peace in Kenny Land War” 12th April 2008, *The Irish Independent*. Available at <http://www.independent.ie/national-news/judge-makes-a-plea-for-peace-in-kenny-land-war-1345782.html>. quoted in Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008 9.14 at 293.

A dispute has been compared to an iceberg with various layers covering up another difficulty, that may never be resolved. Often the major dispute is not the issue. The iceberg lists, issues, personalities, emotions, interests, needs and desires, self perceptions and self esteem, hidden expectations, unresolved issues from the past.³⁴

While some of these headings may be at odds with a land dispute and look more amenable to a separation or a divorce there is logic in some of the headings.

However the issues and personalities may be a fundamental component in early resolution. ADR is not a panacea for all disputes, it has its limitations and it is not always ideal. In some cases power imbalances may exist. allowing one party to place undue pressure on the other.³⁵ Land disputes by their nature are ideal for ADR and this is recommended by barristers. There is also the underlying issue of who exactly owns the land and some litigants mislead members of the legal profession, barristers and solicitors. This is the case in boundary disputes where proof of ownership of tiny strips of land are particularly difficult hence the logic of the Balance of Probabilities. While the courts retain a central place in the civil justice system, it is recognised throughout the world that in many instances there may be alternative and perhaps better ways of resolving civil disputes.³⁶ Provided the parties adopt an approach of compromise or mediation, ADR offers resolution that may save costs apart from offering a permanent solution to parties embarking on litigation and where one party only can be happy with the outcome. As with all disputes compromise holds the best solution.

4.8 Survey analysis

³⁴ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008 1.07 at 35

³⁵ *ibid.* 1.23 at 17

³⁶ *ibid.* 1.27 at 18

As part of the survey a letter was written to Graham Rowles-Nicholson, of the Limestone Farming Company Limited in the U.K, landowner in Ireland, England, South America and South Africa with reference to land bank protection prior to and since *Pye*³⁷. He was chosen mainly because his company and other affiliated companies control land in excess of 43,000 acres. He states they drive or walk boundaries that are most under threat on a regular basis and act suitably if anything appears out of line. An abstract of his letter details the approach his company adopts is included in the *appendix*.³⁸

As the acreage is high the analysis leans toward the credibility of *personalities* playing a much larger role in disputes.

As the companies have not experienced difficulties re adverse possession the autonomy of the company and its lack of an emotional sphere combined with many personalities leads the analysis to the *emotional state* playing a pivotal role in disputes.

The combined features of *emotions and personalities* form the background structure of all of the disputes analysed.

However the Limestone Group of companies have staff living on the land mainly due to livestock issues hence staff vigilance may operate to the companies advantage in a way that was not possible in the Pye group. Pye were originally electrical distributors. They diversified because of cheap imports. The developmental element of land gave good return to shareholders particularly in rural areas and small towns where shopping centre development escalated since 1972/1982. However much of their land development was based on new housing developments taking place and Pye differ considerably in the treatment of their land as a transient asset compared to the

³⁷ *JA Pye (Oxford) Ltd v. United Kingdom* [ECtHR Application 44302/02, November 15, 2005.]

³⁸ see Appendix 3

Limestone group whose use of the land varies from studs and horse training to livestock and food production: hence their staff input is considerable in working the land.

The court was told that an agent for *Pye* visited the land but did not enter onto the land whereas this is not a scenario that can occur with Limestone. Another conclusion that could be drawn from the experience of Limestone is that well staffed farming land cannot be under threat of adverse possession although the power of the company against any individual attempting this activity would be addressed. Another aspect of Limestone is their recruitment of native employees who are knowledgeable and vigilant at local level.

Letter to Dr Paul Anthony McDermott re *Dunsink*.³⁹

Letter to Mary O'Malley County Registrar and response.⁴⁰ This indicates that while Justice is administered in public accessing court documents is difficult therefore providing analysis on this particular case was reliant on access to the plaintiffs and respondents documentation

Letter to Catherine Tracey, Registrar at PRAI⁴¹ both Ms Tracey and Mr Frank Treacy, Deputy Registrar, responded and provided the information that is available in *Chapter 2*.⁴² While publicity since *Pye* was negative towards adverse possession it remains a valuable mechanism for the Property Registration Authority in settling land. Therefore the Government submissions in *Pye* become logical and necessary when viewed in the overall context of intestacy.

It is vital that the doctrine remains law. However there could be a role for the PRAI in having on a property folio a one liner in relation to fencing similar to the warning that

³⁹ see Appendix 4

⁴⁰ see Appendix 5

⁴¹ see Appendix 6

⁴² Chapter 2

exists re the non conclusive aspect of boundaries. This could be as simple as “*Bad Fencing Makes Bad Neighbours*.”⁴³ If your land is not correctly fenced this could lead to difficulties for you or a future owner and you should discuss this with your legal advisor”

It would be wrong to conclude the general public are knowledgeable about adverse possession. There may be an awareness of squatters; however many caught up in disputes particularly about boundaries are unaware of the consequences of having a fence incorrectly located. While the website of the PRAI offers great advice unfortunately in the majority of cases the website will only be accessed after the outbreak of a dispute. While the non-conclusive aspect of boundaries arises as one of the most frequently asked questions the analysis must lead to a conclusion that the problem is frequent and therefore perpetual. A small step with a one liner on the folio that may or may not be read when the folio is newly acquired could mean the difference between a neighbour for life living amicably beside another or a legal advisor being asked why fencing is important.

email sent to David Pannick QC re *Pye* and response.⁴⁴ Overall his response was that the European Court failed to adequately address whether adverse possession served any useful purpose in relation to registered land. While the Irish Government submitted reasoned argument for the retention of the doctrine, an analysis of the doctrine from different perspective may arise in the future if valuable land worth millions was encroached upon and seized by squatters. While this analysis does not relate to the value of the land it formed a pivotal part of the dissenting judgement in *Pye*. The

⁴³ Whitman Walt *Leaves of Grass* First Published 1897

⁴⁴ see Appendix 7

implementation of a new Act similar to the 2002 Act in the U.K would be beneficial to registered land particularly the warning that exists to registered owners.

The information age allows technology to locate owners and the warning system contact numbers could be made available to the PRAI at the point of registration. The owner of the folio would have an obligation to alert the PRAI regarding changes to the contact numbers. This could be self financing with a charge of one to two hundred euro for each change.

Letter to newspapers.⁴⁵ Some of these were successful with regard to publication. However, the Longford Leader elicited the greatest response. This gives the analysis that Longford is a county where squatters are active. Overall editors were kind, with advice.

A blank three page survey document⁴⁶ provides the questions necessary to gain an understanding of how the activity occurred. Not all the forms sent were returned and there are several reasons for this; privacy, failure to understand the questions although time was spent in assessing the legibility of the document and its meaning on individuals who had/had not an understanding of squatting. Overall the response was slow although many failed to return the forms preferring instead a telephone call and in some cases believing free legal advice was available. From the analysis of the conversations by phone there is a grave misunderstanding that members of the legal profession can and will move fences and sort out land ownership with letter writing. Another aspect of solicitors writing letters to neighbours causes even more strain and further break up of relationships. If the threat is made, proceedings must be issued and followed through.

⁴⁵ see Appendix 8

⁴⁶ see Appendix 9-31-34

Survey papers sent, received and void.⁴⁷

Letter received from SG⁴⁸ Swords, Co Dublin. This lady inherited a share of her aunt's land that had been rented to two men, the aunt lived on the rent. These men claimed squatter's rights on the aunt's land following her death. There was no evidence that rent had been paid and on the day the case was to be heard in court a settlement was reached giving the squatters 40% and the relatives 60% of the land. This case indicates wrongdoing by both parties. Had the aunt declared the rent for tax purposes there would have been evidence of payments. However the fact the woman received cash left the source untraceable. Unfortunately her lack of compliance with law left her estate vulnerable after her death to a claim. No survey document completed in this case.

Letter received from GC⁴⁹ Cork. This man bought a farm in 1971 that included a field 300 yards x 15 yards that had been acquired by adverse possession by the previous title owner for in excess of thirty years. An affidavit was made by the previous owner whose family had lived on the property with no paper title for generations. GC lived on the farm in possession for approximately ten years before neighbour who had bought his farm a few years prior to 1971 understood he had paper title.

GC's relationship with his neighbour became violent, argumentative, hostile, inappropriate, and he was bullied by the neighbour who was also "ignorant and stubborn". This dispute lasted for years. GC had no legal costs. He sought ADR to no avail and suffered "terrible hassle" and "all hell broke loose". GC stated "the whole saga has given rise to much acrimony but I am completely innocent of any wrongdoing and still occupy this strip of land"

⁴⁷ see Appendix 9-1-30

⁴⁸ Appendix 9-1

⁴⁹ Appendix 9-2

This case was never a case to court although both parties engaged solicitors and received solicitors letters. GC was anxious that anyone purchasing land that had an affidavit accompanying the title would have their ownership endorsed in some way without the expense of court. There are obvious difficulties in the proposal by GC. Affidavits could be made and be meaningless. However the fact that so much time had passed before his neighbour believed he had “pulled a fast one” makes his neighbour’s claim less plausible considering his physical impact on the land was nil, he was totally fenced out and his intention to own and possess only became established ten years after he took control of his farm without the field being included in the sale although it was in the title document. GC hoped that something could be done to better establish the validity of the affidavit as this would have been beneficial to end the dispute. As the land had been in the possession of the previous owner for in excess of thirty years and of GC for ten years, this dispute proves the necessity for the re-introduction of the parliamentary conveyance theory to become part of established law. There is no benefit for anyone receiving paper title to land they cannot access. It offers no beneficial use to the new purchaser whose paper title is extinguished.

email received through Irish Farmer’s Journal from PF⁵⁰ Kerry. PF and family returned from England. They inherited a relative’s farm and bought additional land adjoining the farm. There had been hassle with squatters who succeeded in building a house on land they took by adverse possession from a semi-state body. They then decided to obstruct PF and his family from the use of a laneway that was vital for access to a milking parlour. The laneway was a shared access. The squatters had plenty of room around their house to park their vehicles. However they wanted to possess exclusively the

⁵⁰ see Appendix 9-7

laneway and parked their cars blocking the lane. It was still possible to herd the cows: however this proved a three hour instead of a thirty minute job and tensions and other hostilities erupted.

Political representatives were active for the squatters and other difficulties arose in relation to PF's children attending school and his wife being hassled. PF defended himself in both the Circuit and High Court and was happy with the outcome although unhappy with costs. Unfortunately PF and his family had grave difficulties with criminal and other behaviours.

He took his neighbours into the District Court on several occasions re public order offences and he and his wife experienced minor interference from public representatives. Some of this revolved around PF and his family being returned immigrants and his children not having local accents. Parochialism and other less acceptable social and racial behaviours were evident in small matters.

The locals took sides and became involved in a sinister way that he would not have experienced abroad. One neighbour while befriending him and accompanying him to court talked at length to the opposing legal team. He said in conversation the hassle lasted sixteen years and ended overnight following the end of the last court case with the squatters selling their property. Now they have a lovely neighbour who parks at her house.

This case has one interesting feature that appears unique to squatters. If squatters succeed in adverse possession once, the behaviour appears repetitive. This has proved to be the case in families who have succeeded in taking small strips of land from their neighbours who do not assert their rights and promotes the activity amongst others. The kernel of the problem appears to be knowledge by the squatter that only a judge can

move a fence or can restore land to the title holder or decide boundaries. This case also confirms the analysis that exists that the issue itself is often cloaked in other issues and other disputes that will break out in other generations of the same families as the dispute about a right of way closed for 40 years confirmed in Tralee Circuit Criminal Court.⁵¹ Interest-based dispute resolution processes expand the discussion beyond the parties' legal rights to look at underlying interests; they address parties' emotions, and seek solutions to the resolution of the dispute. The focus of these processes is on clarifying the parties' real motivations or underlying interests, with the aim of reaching a mutually acceptable compromise which meets the interests of both parties.⁵²

JC⁵³ saw the letter in the Meath Chronicle and responded. His father died in 1988 and father's widow took her share in 1996 and settled, brother took his land and settled. JC and his sister remained on the land. The will remains un-administered. In 1996 the sister became mentally ill she inherited land with brother and land remains unregistered today. Sister is now confined in mental institution and has been made Ward of Court. The court now wants her share of farm invested for her to provide her with an income. Her brother has farmed the land from the late 1980s to the present time. Both sister and brother are in their 50's. Land is worth two to three million euro. He has refused to come to any settlement and she is in an institution paid for by the taxpayer. She is entitled under the will, and her mental state and her Ward of Court status will guarantee her lawful entitlement. She cannot be disinherited and her brother wrongly believes he has the land through adverse possession due to the twelve year time lapse. This is not so as his sister fulfils the criteria under s.48 (b) as a person under a disability and under

⁵¹ *The Irish Times* 27th March 2009.

⁵² Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* LRC CP 50 2008 at 1.08

⁵³ see Appendix 9-8

s.48 (2) as a person conclusively presumed to be of unsound mind while he is detained.⁵⁴ JC represented himself in the High Court and believes he is “fighting” to keep his land.

SOF⁵⁵ responded to letter in The Longford Leader. This three page letter detailed how the Longford Courthouse basement had been taken by adverse possession. Facts relating to the case were published at various times in the Longford Leader newspaper. As the

“two premises adjoin...In 1979, the Longford Arms Hotel got quite legally a “licence” to occupy part of the basement of the Courthouse, for a ten year period. Sometime in 1989 and again in 1991 or 92, the Co. Council requested the hotel to vacate the basement. At that time the courthouse was in the care of the Co. Council – not the Courts Service. It appears that they ceased paying rent in 1989 but continued to occupy the space – it was and still is used as the main public toilets of the hotel.

During the late 90’s various stories persisted that no rent was being paid by the hotel for the basement. Later in the 1990’s the courthouse was declared a fire hazard and the court was transferred to other premises.

An article on the basement was written by Sheila O’Reilly and a letter sent to her as , Editor, The Longford Leader⁵⁶ At one point the entire courthouse was under threat of adverse possession. However the claim was eventually confined to the basement.

The courthouse was built and paid for by taxpayers money. The shorter period of 12 years should be increased to 30 years where any public money has been expended to provide a building used by the public and to protect public money. The County Council

⁵⁴ Statute of Limitations 1957 s.48 (1) (a) and (2)

⁵⁵ see Appendix 9-9

⁵⁶ see Appendix 8

as a body with the control of housing and land should have been aware of the danger of a claim where they were in receipt of no rent. Accountability should be at the heart of all public bodies and a forfeiture of some kind from central funds that acts to form a checks and balances on the expenditure of all public money by local authorities should be in existence. Perhaps an increase in power of the Auditor General in respect of these losses would in part address the issue. The value of the courthouse would be an adequate fine on the council.

The analysis of this case is the silence that surrounds the taking of a large basement of an old stone building that forms part of the heritage of the town and the lack of accountability by Longford County Council.

BM responded to letter in the Meath Chronicle⁵⁷. BM was widowed twenty-seven years ago. When her husband was buried her neighbour moved in with diggers into her seven acre field. Three years ago the same neighbour moved in again taking more land. She has suffered abusive language “so again I don’t have any choice but to let them go with it. I have lived a very intimidated life because of that field and my children now are living the same life.”

This letter involves land theft, it endorses the repetitive behaviour of squatters, bad language, bad behaviour, intimidation and the consequences for future generations of the same families suffering in silence, helpless due to formidable costs.

LH responded to letter in the Longford Leader⁵⁸ with regard to a boundary dispute that has now settled although not to his satisfaction. In 2000 LH had 64 sq metres of a farmland ditch taken “by a neighbour with the help of four other people. I went to a solicitor and was assured that my land would be returned to me. I was put under severe

⁵⁷ see Appendix 9-13

⁵⁸ see Appendix 9-15

pressure by my legal team to settle and also that I had to seek medical help due to the stress and annoyance” LH signed on the day agreeing to a settlement that he says was not properly explained to him, he did not comprehend he was “selling” his land for 10,000 euro and he later appeared in court when he failed to sign subsequent documents he received to finalise the settlement. He is due to pay 5,000 in fees relating to this court appearance and while on the stand he became confused. LH was told on the morning of the settlement the amount of land that had been taken from him by his neighbour’s surveyor. It appears from his description of events he was badly prepared for court and was not in a position to bear the cost of a case. At this point in time he would like his land returned to him. He is unable to accept the loss of his land and that the dispute lasting sixteen years ended with the settlement.

This case highlights the vulnerability of a rural farmer, living alone, unable to comprehend law, the behaviour of his neighbour and the finality of his signing a binding agreement.

AD responded to letter in the Kilkenny People.⁵⁹ He believed his farm was affected by adverse possession when his sister made a s.117⁶⁰ claim on his father’s estate. Response void.

MM responded to letter in the Longford Leader. MM gave folio details of her land. The “hotel took this small piece of land away from me. They changed this folio no. of mine with a new no. about four or five years ago...this acre is planted by forestry this eight years” MM did not complete a survey document and failed to respond to further correspondence.

⁵⁹ see Appendix 9-22

⁶⁰ Succession Act, 1965..

Brendan T. Muldowney solicitors responded to letter in the Longford Leader.⁶¹ He very kindly offered to assist with information on current cases and research. However following discussion his research articles were already to hand.

⁶¹ see Appendix 9-28

Conclusion

Adverse possession has been described as a “debilitating”¹ experience and acts as a “blunt instrument”² of necessary legislation. In modern society it is necessary for both the title holder and the squatter. It is a device that settles land and ends litigation. Legislation for abolition would lead to greater societal difficulties than currently arise under retention in its traditional form. Statistically land theft is rare in Ireland and placing an onus on the authorities to protect private property would be ludicrous given that the ownership of property brings responsibility and duty as well as rights. One sentence on the property folio could be the solution to alerting an owner of the danger of inadequate fencing or lack of access. Although aspects of notification as in the *Land Registration Act 2002*³ may be more desirable.

The area of compensation payable to the title holder would be unworkable given the high proportion of familial cases on intestacy. This may lead to acrimonious disputes. However the value of land and housing does not at present enter into squatter activity nor should a monetary value have any part in the process although it appears pivotal in *Pye* in the dissenting judgements. *Pye* needs to be seen in isolation as a very unusual case where an electronics company faced with cheap imports from Asia and the Middle East diversified into the development of shopping centres for profit, without, it appears, any focus on land-bank protection or on the economic viability of the land in advance of development. Adverse possession of company land in Ireland is not an issue according to the PRAI.

¹ Charleton Denise. Smithfield, Dublin, April 2007. RTE News Bulletin following settlement of the Charleton/Kenny case

² McDermott Paul Anthony quoted in *The Irish Times* Holland Kitty, Whose land is it anyway? 16th June 2007.

³ Land Registration Act 2002.

The Statute of Limitations 1957 operates fairly as necessary legislation in protecting the rights equally of the squatter and the paper owner although any land purchased from the public purse should carry the longer recovery period of thirty years i.e. County Council land. The timeframe of twelve years appears adequate in relation to private property. The timing of activity on the ground can be assisted by photographs from the OSi⁴ that accurately date developments.

The Constitution adequately protects private property from unjust attack although a challenge to the law on the constitutionality of adverse possession, may arise in the future. However the Constitution and the Convention combined, act in Ireland to protect the rights of paper title holders and better access to justice could be achieved if court costs were tax deductible for individuals as they are for companies.

In summary the survey analysis concluded that squatter behaviour is repetitive and sustained. While some of the participants expressed unhappiness with settlements a reasoned approach and compromise were the most inexpensive and amenable solutions. The lack of professionalism and ethics amongst those involved in land measurement needs resolution. Suggestions in relation to the use of a GPS satellite maps in the *Green Paper Proposing Reform of Boundary Surveys* could lead to confusion and in the wrong hands further land theft. A better proposition would be to utilise the OSi mapping that dates back to the early 19th century combined with a moderate archaeological survey. While squatting can be controversial, overall the doctrine of adverse possession is an essential mechanism acting to stabilise title. It has traditionally worked well although sometimes unfairly.

⁴ Ordnance Survey Ireland, Phoenix Park, Dublin.

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