The position of the procrastinating owner under the Irish law on adverse possession

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On the 30th of August 2007 the Grand Chamber judgment in *JA Pye (Oxford) Ltd v United Kingdom*[1] was delivered in which it was held by ten votes to seven that the English law on adverse possession, as set out in the Land Registration Act 1925 and the Limitation Act 1980, did not violate article 1 of the First Protocol to the European Convention on Human Rights, which protects property rights. The judgment reversed the Chamber decision delivered on the 15th of November 2005 which found by four votes to three that there was a violation of the property rights guarantee. This scrutiny of the doctrine of adverse possession by the European Court of Human Rights may not have raised too many eyebrows in English legal circles. It was preceded by a general awareness that the enactment of the Human Rights Act 1998 might have implications for property law.[2] Also, the criticism of the doctrine's application to registered land,[3] which led to the reforms introduced by the Land Registration Act 2002, must have been fresh in many minds. In contrast, the *Pye* litigation caught many Irish legal academics and practitioners by surprise. The peaceful co-existence of the doctrine of adverse possession with the Constitutional protection of property rights[4] since 1937 explains the complacency to some degree. Also, perhaps because urban squatting was never as widespread in Ireland, the doctrine had not spawned the levels of moral indignation amongst the general public that the English media coverage appears to indicate.[5]

The case heard by the European Court of Human Rights originated in an action brought by JA Pye (Oxford) Ltd to recover possession of 23 hectares of land in Berkshire from the personal representatives of Michael Graham, who had been a neighbouring farmer. JA Pye Ltd purchased the disputed land in 1977 with the intention of retaining it until planning permission could be obtained for development. The company entered into a series of grazing agreements with whoever owned the neighbouring farm at the time. On the 1st of February 1983 the company entered into a grazing agreement with Michael Graham's father, due to expire on the 31st of December 1983. On the 30th of December 1983 a surveyor acting for the company wrote to the Grahams requesting that they vacate the land, as the company intended

[1] Application no. 44302/02.
[2] See, eg, J Howell, 'Land and Human Rights' [1999] Conv 285; D Rook, *Property Law and Human* Rights (London: Blackstone Press, 2001).
[3] See Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century Law: A Consultative Document* Law Com no 254 (London: TSO,1998), part X; Law Commission, *Land Registration for the Twenty-First Century Law: A Conveyancing Revolution* Law Com no 271 (London: TSO, 2001), part xiv.
[4] See Article 40.3.2 and Article 43.
[5] See L Fox, 'Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002' (2007) 27(2) LS 236 at 237, n4. In contrast, 'Adverse possession did not have the same criminal connotation in this jurisdiction where the acquisition of possessory titles were commonplace, particularly in rural areas where will-making was not common' per J Brady and A Kerr in *The Limitation of Actions* (Dublin: Law Society of Ireland, 4th edn, 1994) at p 102.

applying for planning permission. It was feared that the continued grazing of the land could impact negatively on this application. The Grahams wrote to the company in early 1984 seeking a new grazing agreement and they received no reply. In the summer of 1984 an agreement was made that the Grahams could take a cut of hay from the land. The Grahams contended that from the 1st of September 1984 onwards they were in adverse possession of the land. Neuberger J ruled in favour of the Grahams[6] but his decision was reversed by the Court of Appeal.[7] The House of Lords was satisfied that adverse possession had been established[8] and Pye Ltd proceeded to bring an application against the UK government pursuant to article 34 of the Convention. The company alleged that the law on adverse possession, through which it had lost land with development potential, violated its right to property as guaranteed by the Convention.

The *Pye* litigation has drawn attention to the position of the owner who has no current use for the property but has future plans for it. The operation of the doctrine in these circumstances in favour of the squatter who is currently making use of the land pushes the boundaries of the law on adverse possession to its limits from a doctrinal and a human rights perspective. Whether the rule in *Leigh v Jack*[9] should be applied or rejected has provoked debate for many years although, to date, the courts have struggled to decide the issue as a matter of black letter law. Consequently, the development of the law has taken place without an open and honest evaluation of the relative merits of the different approaches from a human rights or a moral perspective. *Pye* represented an opportunity to undertake such an evaluation, although it is submitted that this opportunity was not fully exploited in the either the Chamber or the Grand Chamber proceedings.

The first part of this paper charts the Irish reaction to the Chamber judgment in *Pye*, which cast doubts over the compatibility of the Irish law on adverse possession with the European Convention of Human Rights. It examines the argument that the doctrine has developed in Ireland in a manner which affords more protection to the true owner, in particular the procrastinating owner with future plans for the property. The analysis of the caselaw presented indicates that this is not the case. The second part of the paper considers whether adverse possession against such an owner can be justified on social or economic grounds. Finally, the writer considers whether the introduction of a compensation requirement or an early warning system would render the doctrine fairer from the perspective of the procrastinating owner. This owner may, after all, have sound reasons to procrastinate in the current climate where the future development potential of land may dramatically exceed any current use value. Although some may argue that the Grand Chamber decision in Pye eliminates the need to reform this area of law, it should be remembered that the purpose of the Convention is to guarantee only a minimum standard of protection, particularly in those areas where a broad margin of appreciation is afforded to Convention States. Although the danger of an incompatibility ruling has been removed for the meantime, it is submitted that the opportunity should be taken to reflect on whether this jealously guarded doctrine has the potential to occasionally operate unfairly from the perspective of the true owner. Although the pressure from the European Court to

[6] *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676.
[7] *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804.
[8] *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.
[9] (1879) 5 Ex D 264.

introduce immediate reform has decreased, other factors point to the timeliness of a re-evaluation of how this doctrine operates in Ireland.

Part 1

The Irish Reaction To The Pye Litigation

Before the Chamber delivered its decision in *Pye* the Irish Law Reform Commission was engaged in an extensive joint project with the Irish Government to reform and modernise land law and conveyancing law. This reform was considered a necessary part of the preparation for the introduction of eConveyancing at some stage in the future. The Law Reform Commission Report published in July 2005[10] set out a draft Bill which implements, with some minor alterations, most of the recommendations made in a Consultation Paper published by the Commission in October 2004.[11] However the provisions of the draft Bill dealing with the reform of the law on adverse possession[12] involved quite substantial variations from the Consultation Paper recommendations.[13] The Commission noted that the doctrine of adverse possession had become the subject of increasing controversy. It referred to the doubts expressed by English courts at different levels[14] about the compatibility of the doctrine of adverse possession, as applied to registered land, with the European Convention of Human Rights. Although the Chamber had yet to rule in the *Pye* case, the Commission argued that:

> '…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.'[15]

The Commission included a number of provisions in the draft Bill which were intended to allow the doctrine to continue to fulfil its role in settling doubtful titles[16] but would exclude its operation where it operated unfairly.

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[10] *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).
[11] *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004).
[12] See, in particular, sections 129-130, set out in the Report, above n 10, at pp 327-332.
[13] Above n 11, ch 12. The Consultation Paper recommendations were based on recommendations made in earlier reports eg, the recommendation, made in the *Report on Title by Adverse Possession of Land* (LRC 67-2002), to remedy and clarify the law in relation to adverse possession of leasehold land and the proposal, originally made in the *Report on Land Law and Conveyancing Law: General Proposals* (LRC 30-1989), to provide statutory clarification that the intentions of the true owner are irrelevant in determining if adverse possession has taken place.
[14] *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2002] E All ER 865; *Beaulane Properties Ltd v Palmer* [2006] Ch 79.
[15] Above n 10 at para 2.06.
[16] The Commission was of the opinion that the role played by the doctrine in quieting titles and thereby facilitating land transactions 'arguably comes within the "exceptional" circumstances based on "public interest" or "social justice" and "common good" recognised by the Convention and the Constitution.' Ibid.

Section 129 of the draft Bill requires a person who wishes to claim title by adverse possession to apply for a court order. It also provides that legal title will not vest in the applicant until the court order is registered in the Land Registry. The court application would, according to the Commission, provide added protection for the owner by ensuring the claim was validated and providing the owner with an opportunity to retrieve the situation. An analogy was drawn with the law governing the acquisition of easements by prescription, which has always required a court order. The registration requirement reflects the deeper respect for registration principles that seems have developed in anticipation of the eventual introduction of eConveyancing.[17] Section 130(1) lists a number of procedural requirements which the court may impose on an applicant, as it thinks fit: notices to be displayed or served; enquiries and searches to be made; advertisements to be placed; and statutory declarations or other evidence to be furnished as to the ownership or possession of the land. The notices, enquiries, searches and advertisements are designed to ensure that the owner is warned of the application, so that he can make representations to the court that the substantive requirements have not been met.[18] Section 130(2) sets out the substantive requirements that must be satisfied before the court can make a vesting order. The court must be satisfied that the applicant (including a predecessor) has been in adverse possession throughout the limitation period.[19] In addition, the court can only make a vesting order if one of the following conditions is satisfied:

1. from the lack of response to notices, inquiries, searches, advertisements or from statutory declarations or other evidence furnished it is reasonable to assume that the owner has abandoned the land or is unlikely to be found;
2. owing to a mistaken assumption as to the position of the boundary between the applicant's land and the owner's land, the applicant has throughout the period encroached upon part of the owner's land reasonably believing it to be part of the applicant's land;
3. where the application relates to land comprised in a deceased person's estate, it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes; or
4. in any other case, in the interest of settling the title to land in the fairest manner, it is appropriate to make the order.

The court is empowered to make this vesting order subject to the payment of a sum of money to the owner by way of compensation.

Although the implementation of these provisions would bring about a fundamental change in the law on adverse possession, reactions to them were muted until the Chamber judgment in *Pye* was delivered. At that point, the Law Society of Ireland may have recognised that the implementation of the proposals was becoming a

[17] Requiring the vesting order to be registered in the Land Registry nullifies the overriding status of rights acquired through adverse possession and, in the case of unregistered land, ties in with the goal of extending the registered title system. Court orders declaring the existence of an easement by prescription must also be registered in the Land Registry or the Registry of Deeds, as appropriate, pursuant to s 36(1) the draft Bill (now s 33(1) of the Land and Conveyancing Law Reform Bill 2006).
[18] Above n 10 at p 331.
[19] 'Adverse possession' is defined in s 126 as the exercise of physical control of land for that person's own benefit and in a way which is inconsistent with the right to possession of the owner of the land. This reflects the common law, except to the extent that it clarifies that the intention of the paper owner to use the land in the future is in no way relevant to establishing a claim.

realistic possibility. The draft Bill, set out in the Law Reform Commission Report, was expected to be published by the government in 2006. The Law Society's Conveyancing Committee made a submission to the government in December 2005[20] and a supplemental submission in January 2006.[21] 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.[22] It also pointed out that it would be premature to amend the legislation until the decision of the Grand Chamber had been delivered. At that stage, it would be possible to establish greater certainty the reservations which the European Court has in relation to the application of the doctrine in England and what conclusions can be drawn from that in relation to Irish legislation.[23] In addition, the Committee maintained that requiring a court application would impose disproportionate and unnecessary costs on claimants.[24] Pursuant to section 49 of the Registration of Title Act 1964, the Property Registration Authority may currently determine an application for registration based on adverse possession.[25] The applicant may appeal this decision to court or if the Authority entertains any doubts as to the law or any fact arising, it may refer the question to court.[26] The Committee pointed out how successfully this procedure has operated to date.[27] The Committee also argued against the introduction of compensation provisions. It noted that the payment of compensation would be completely inappropriate where the doctrine was used to update the register when one family member stayed on in the family farm without a grant of administration being extracted in the registered owner's estate. Neither would it be appropriate where the doctrine was relied on to rectify boundary errors created by faulty scheme maps for housing developments. The prospect of obtaining compensation could clog up the courts and create problems within families or undesirable tensions between neighbours.[28] The Committee recommended the removal of sections 129 and 130 from the Bill.[29] The government appeared to take on board the Committee's concerns as the section of the Bill dealing with the law on adverse possession was conspicuously absent from the Land and Conveyancing Law Reform Bill presented to the Seanad on the 16th of June, 2006. The government also availed of the opportunity to make a third party submission to the Grand Chamber in the Pye case highlighting the various public interests served by the doctrine and arguing that the doctrine did not upset the fair balance between the public interest and the right to peaceful enjoyment of possessions. In the aftermath of the Grand Chamber decision it remains to be seen whether the government will consider bolstering the position of the true owner under the doctrine in the absence of pressure from the European Court of Human Rights. Buckley has written two articles calling for the

[20] *Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (December 2005) available to members of the Law Society of Ireland at www.lawsociety.ie.
[21] *Supplemental Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (January 2006) available to members of the Law Society of Ireland at www.lawsociety.ie.
[22] See the December submission, above n 20 at pp 8-9.
[23] See the January submission, above n 21 at p 1.
[24] See December submission, above n 20 at p 10.
[25] The Committee pointed out that the previous procedure, set out in s 52 of the Registration of Title Act 1891, required a court application. The current procedure was introduced due to the relatively few contested claims. See the December submission, above n 20 at p2.
[26] The Registration of Title Act 1964, s 19.
[27] See the December submission, above n 20 at p 2.
[28] See the January submission, above n 21at pp 7-8.
[29] Ibid at p 8.

retention of the status quo in relation to the doctrine in Ireland.[30] He argues that the Irish law on adverse possession in Ireland affords more protection to the true owner than the law as stated by the House of Lords in *Pye*.[31]

Does The Irish Law On Adverse Possession Afford More Protection To The Owner?

On the 7th of December 2005 the Registrar of Titles ordered a temporary stay on the processing of adverse possession applications. This stay was lifted on the 5th of January 2006, following the receipt of advice from the Office of the Attorney General on the implications of the Chamber decision in *Pye* for Ireland. Buckley assumes that the lifting of the stay was based on a belief that the Irish law is materially different to the UK law that was found by the Chamber to violate the European Convention on Human Rights.[32] The summary of the law contained in the Practice Direction on *Title by Adverse Possession to Registered Land*,[33] which was updated shortly afterwards on the 15th of February 2006, lends support to such an assumption. It contrasts the conservative approach adopted by the Irish High Court in *Feehan v Leamy*[34] as to whether the owner has been dispossessed with the approach taken by the House of Lords in *Pye*.[35] It is also asserted that the rule in *Leigh v Jack* still applies in Ireland.[36] This rule prevents time running against an owner who has a specific future plan for the property where the squatter's use of the property is not inconsistent that future use. Buckley has conducted an assessment of recent Irish case law and concludes that although the courts may in certain circumstances rule in favour of a squatter whose acts of possession have been equivocal and intermittent,[37] a low bar to prevent dispossession and a continuing role for the future purpose doctrine circumscribes this generous approach.[38] Although there appears to be a reluctance to say so outright, in certain circles the conclusion seems to have been reached that the Grahams would not have succeeded if *Pye* had been heard in Ireland.

Although the wording of the Irish and the English versions of the statutory provisions limiting actions for the recovery of land are remarkably similar, [39]the caselaw has, on occasion, developed in quite a different manner.[40] The remainder of this part of the

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[30] N Buckley, 'Adverse Possession at the Crossroads' (2006) 11(3) CPLJ 59; N Buckley, 'Calling Time on Adverse Possession?' (2006) Bar Review 32.
[31] See N Buckley, 'Adverse Possession at the Crossroads' (2006) 11(3) CPLJ 59 at 61-64.
[32] Ibid at 60.
[33] Practice Direction (2005) No 15, updated on the 15th of February 2006 available at www.landregistry.ie. Note that the website specifies that Practice Directions are published for guidance only and should not be regarded as legal interpretations. Although reasonable care is exercised in their compilation no representation is made as to their accuracy.
[34] [2001] IEHC 23.
[35] See para 2.1 of Practice Direction, above n 33.
[36] Ibid at para 2.5. Although the Property Registration Authority will refuse registration if the owner has done something which indicates that he has not been dispossessed or if the rule in *Leigh v Jack* applies, an applicant may appeal this decision to the court under s 19 of the Registration of Title Act 1964. The Practice Direction emphasises that these are properly matters for the court to decide.
[37] See *Griffin v Bleithin* [1999] 2 ILRM 182.
[38] Above n 31 at 64.
[39] See the Irish Statute of Limitations Act 1957 and the English Limitation Act 1980.
[40] Contrast the decision of the Irish Supreme Court in *Perry v Woodfarm Homes Ltd* [1975] IR 104 with the decision of the House of Lords in *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510.

paper examines the Irish caselaw in an attempt to ascertain whether we can comfortably assert that the owner is less easily dispossessed under Irish Law. It examines the relevance of the owner's current actions and his future plans in relation to the land in proving whether he has been dispossessed. The aim is to place the decision in *Feehan v Leamy* in context and clarify the current status of the rule in *Leigh v Jack*. It is necessary to preface this analysis by highlighting the artificiality of examining any of the various elements that make up adverse possession in isolation. Many of the elements are not distinct and will overlap when applied by the court. For example, unequivocal acts of possession by the squatter, such as enclosing the property, usually implies the dispossession of the true owner and provides objective proof of *animus possidendi*. Each case must be decided on its own facts[41] and because previous decisions will typically have been reached due to a number of reasons, some of which may be related, the application of precedent can become a pick and mix exercise, with authorities cited and dicta extracted, occasionally out of context, to support very different arguments. As shall shortly be illustrated, this is especially true of the decisions in *Leigh v Jack* and *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*,[42] which are referred to on a regular basis in Irish caselaw.

Discontinuance of possession or dispossession of the true owner – An unnecessary requirement?

A number of Irish cases have emphasized that adverse possession cannot take place unless the true owner has discontinued his possession or been dispossessed of the property.[43] This requirement appears to be derived from section 14 of the Irish Statute of Limitations 1957 which provides:

> Where the person bringing an action to recover land … has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance. [44]

Jourdan, describes the equivalent English provision as one of the 'deeming provisions' which were originally included in the Real Property Limitation Act 1833.[45] Prior to the enactment of the 1833 Act, time would not run against the true owner unless there had been an 'ouster' of the true owner. Jourdan states that the purpose of the deeming provisions 'was to make it clear that time runs against a true owner who has a right of action even if the circumstances in which his right of action arises are such that he has not been ousted from possession.'[46] He comments, however, that a literal reading would suggest that time runs against a paper owner who discontinues possession, even if there was no one in possession who he could sue, or if the person in possession was there with his permission.[47] The courts refused to interpret the provision in this way and instead held that the limitation period would

[41] See Kenny J in *Murphy v Murphy [*1980] IR 183 at
[42] [1974] 3 All ER 575.
[43] See, eg, *Browne v Fahy* unreported, High Court, 24 October 1975; *Dundalk Urban District Council v Conway* unreported, High Court, 15 December 1987; *Feehan v Leamy* [2001] IEHC 23;
[44] See *Brown v Fahy*, ibid at p 8 of transcript.
[45] S Jourdan, *Adverse Possession* (London: Butterworths LexisNexis, 2003) at para 5.01-5.04.
[46] Ibid at para 5.04.
[47] Ibid at para 5.09.

only run against the true owner if the discontinuance of possession or the dispossession of the true owner was followed by possession by someone in whose favour the clock could run.[48] This approach was given statutory effect in the English legislation[49] and is replicated by section 18 of the Irish Statute of Limitations 1957 which provides:

> No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.
> Where *a*) under the foregoing provisions of this Act a right of action to recover land is deemed to accrue on a certain date, and (*b*) no person is in adverse possession of the land on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

Jourdan argues, therefore, that the English equivalent of section 14 is unnecessary and confusing. It gives the misleading impression that time will run on the discontinuance of possession or the dispossession of the true owner and that one of these conditions must be proved.[50] He seems critical of the two-step approach adopted in some of the caselaw, where the court requires proof of both the discontinuance of possession or the dispossession of the true owner and adverse possession by the squatter for the limitation period.[51] He argues that the first requirement is unnecessary. Time will only run if the squatter is in adverse possession and therefore this is the only proof required. It is submitted that whether the courts approach the case by a preliminary examination of whether the owner has discontinued possession or been dispossessed or by focusing exclusively on whether the squatter's actions amount to adverse possession is an academic point. In certain circumstances it may prove helpful to examine whether the owner has been dispossessed, particularly if both the owner and the squatter have engaged in acts of user. Such an approach draws attention to the fact that possession is single and exclusive[52] and for the squatter to be in possession, the owner must be out of possession. It is clear however, that regardless of the approach adopted, the conclusion will ultimately rest on whether the squatter's acts of possession were sufficient, in light of the character of the land and the use that the owner might reasonably be expected to make of it, and whether the squatter had the requisite intention.

Actions by the owner which prevent a discontinuance of possession or dispossession

The discontinuance of possession is usually understood as meaning the abandonment of the property by the owner.[53] It has been argued that the smallest acts by the owner would be sufficient to prove that there was no intention to discontinue possession.[54] Although this issue has been considered in a number of Irish cases, a discontinuance of possession by the owner was not proved on the facts. As shall shortly be

[48] See *McDonnell v McKinty* (1847) 10 ILR 514 at 526; *Smith v Lloyd* (1854) 9 Exch 562 at 571.
[49] The Limitation Act 1939,s 10(1) and (2) now re-enacted in the Limitation Act 1980 sch 1, para 8.
[50] Above n 45 at para 5.23.
[51] See *Buckinghamshire County Council v Moran* [1990] Ch 623 (per Nourse LJ at 644E)
[52] See *Buckinghamshire County Council v Moran* ibid at 641A per Slade LJ; *JA Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221 at para 70.
[53] See *McDonnell v McKinty* (1847) 10 ILR 514 per Blackburne CJ at 526.
[54] *Leigh v Jack* above n 9 per Bramwell LJ at 272; *Buckinghamshire County Council v Moran* above n 51 per Nourse LJ at 644E-645C.

illustrated, some of the acts which the court referred to as demonstrating that there had been no discontinuance of possession, could equally have been relied on to prevent a finding of dispossession. Nourse LJ commented in *Buckinghamshire County Council v Moran*[55] that if discontinuance is not proved, the question then becomes whether the true owner was dispossessed and this can only be proved if the squatter performs sufficient acts and has a sufficient intention to constitute adverse possession.

Where both the owner and the squatter are engaged in acts of user in relation to the property, the court will have to decide whether the owner or the squatter is in possession as they cannot be in concurrent possession. Although the Irish courts have occasionally identified actions by the owner which demonstrate that he had not been dispossessed, in the majority of cases the owner's actions are viewed more holistically, as one of a number of issues relevant in determining the sufficiency of the squatter's acts of possession.

The decision in *Doyle v O'Neill*[56] concerned a derelict site which the plaintiff owned. The defendant stored machinery on it while he was engaged in draining and excavation work for the plaintiff. When the defendant stopped working for the plaintiff, he started to use it to store scrap pipes and he occasionally used it to store vehicles. When the plaintiff wanted to clear up the site and incorporate it into nearby fields, the defendant claimed he owned it. It was accepted by the court that workmen employed by the plaintiff had occasionally removed slates from the derelict cottages on the disputed site. Although this activity could have been viewed by the court as an act of possession, precluding a finding that the owner had been dispossessed, the court instead decided the case by examining whether the acts of possession by the squatter were sufficient in light of the owner's uses for the site. O'Hanlon J comments have since been referred to in numerous decisions:

> 'The acts of use and enjoyment relied on by the defendant were merely of dumping and temporary storage on waste ground on his own door step and it would have appeared very unneighbourly if they had made an issue of it during a period when they had no use themselves for the disputed plot… In order to defeat the title of the original landowner the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place. This is particularly the case when the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner.'[57]

Mulhern v Brady[58] concerned a site which had been sold to the defendant in 1979 by the plaintiff's predecessor in title. It was surrounded on three sides by the plaintiff's farm. The plaintiff claimed he had exclusive use and possession of the plot for the limitation period either by using it himself or by receiving rent for it. The defendant originally purchased the site to build a house but did not do so as he inherited another house. Carroll J held that there was no abandonment by the defendant, pointing out that he had visited the plot four or five times a year; he only once saw cattle on the

[55] Ibid.
[56] Unreported, High Court, 13 January 1995.
[57] Ibid at p 20 of transcript.
[58] [2001] IEHC 23.

plot and told the farmer, who was renting from the plaintiff at the time, that he was trespassing; he advertised for planning permission in 1986 in local newspapers; and his auctioneer erected a 'For Sale' sign on the plot, which remained there for between six months to a year. It is arguable that some of the owner's actions, in particular making sure that the tenant farmer removed his trespassing cattle and arranging for a 'For Sale' sign to be erected on the property, were acts of possession sufficient to demonstrate that the owner had not been dispossessed. Carroll J instead chose to decide the case on the basis that the acts of the squatter and his tenants were insufficient to amount to adverse possession and they were not carried out with the requisite intention.[59] *Dundalk Urban District Council v Conway*[60] concerned a small plot of land, next to a bridge, owned by the local authority. The defendant claimed that a predecessor in title had acquired title by adverse possession between 1930 and 1960[61] and extinguished the title of Dundalk UDC. The main evidence on which the defendant relied was that over the statutory period, cattle belonging to the predecessor in title, had access to the disputed plot and could graze on it at will. Blayney J described the disputed plot as wasteland which was not capable of use and enjoyment. The value of the plot to the plaintiff was that it adjoined the bridge which carried the road over the river and so might be required in the event of repairs to the bridge becoming necessary. He stated that it was never the intention of the plaintiff to discontinue possession, noting that in 1938 the fee simple was bought; in 1956 a new manhole was built on the sewer running through the plot; ornamental trees were planted in the early 1960s; temporary permission was given to the Dalys in 1972 to cross part of the plot; and in 1978 the Assistant Town Engineer, in the company of the defendant, marked the boundary between the disputed plot and the neighbouring land. The court could have viewed the plaintiff's action in placing a new manhole cover on a sewer during the limitation period as an act of possession by the owner, preventing a finding of dispossession, but the court decided instead to focus on the actions and intention of the squatter.[62]

In *Browne v Fahy*[63] the owner's actions played a more important role in the reasoning of the court. It was argued that the Fahys had grazed cattle on the land for the last 30 years and that no one else had used the land. They had also put down a belt of trees, fenced the land, manured and drained the land and collected money from campers. They originally commenced grazing their cattle on the land with the permission of previous owners. Once the property was sold, the owners made complaints about the cattle trespass but were reluctant to institute proceedings due to a desire to maintain friendly relations. Kenny J found that the acts of the Fahys were not inconsistent with the enjoyment of the land by the owners. The cattle were on the lands because permission had been given by the previous owners and because the current owners had no cattle. The property was of little value and the only way that the owners could

[59] The squatter's tenants merely allowed their cattle to trespass on the owner's land from time to time with no intention of ousting him. One tenant had removed his cattle when asked to do so by the owner.
[60] Unreported, High Court, 15 December 1987.
[61] It is unclear why the defendant did not seek to prove the normal limitation period. Although a state authority benefits from a 30 year limitation period in relation to the recovery of land, the definition of a 'statue authority' does not include a local authority. See the Statute of Limitations Act 1957, s 2.
[62] See also Laffoy J's recent decisions in *Tracey Enterprises MacAdam Limited v Drury* [2006] IEHC 381 and *Moley v Fee* [2007] IEHC 143. Although the owner in both cases had engaged in acts of possession, Laffoy J chose instead to focus on the acts and intention of the squatter in ruling that adverse possession had not been established.
[63] Unreported, High Court, 24 October 1975.

use it was by walking on it and he accepted the evidence that the owners did walk over the land on a number of occasions. He held that it followed that the Fahys were never in adverse possession of the land and the owners were in possession of the lands.[64] Although the acts of user by the Fahys were quite strong, they were insufficient to prove adverse possession, as the owners' use amounted to possession in the circumstances. As in *Doyle v O'Neill*,[65] the court took a practical approach to neighbourly relations, which recognizes that trespasses will often be tolerated if the owner can currently make very little use of the property.

The decision in *Feehan v Leamy*[66] has caused the most controversy in relation to the acts by an owner which will prevent dispossession. These proceedings originated in 1978, shortly after the plaintiff purchased the land, when the plaintiff sought an injunction against the defendant's father and damages for trespass. The title of the plaintiff was called into issue and the proceedings lay dormant until the title issue was resolved,[67] at which point, the proceedings were re-constituted. The defendant claimed title by adverse possession. He claimed that although his father vacated the lands in 1978 he went back into occupation in 1981 and, from 1985 onwards, he grazed cattle there throughout the year. Finnegan J stated that it could not be said that the plaintiff had discontinued his possession. Having acquired the lands, he enforced his entitlement to possession by seeking and obtaining interlocutory relief against the defendant's father. Thereafter, he was involved in litigation in which his title was ultimately vindicated in 1996. Finnegan J explained that the plaintiff thought that he could not prosecute his claim against the defendants until the title action was resolved. In considering whether the owner had been dispossessed, Finnegan J noted that the plaintiff had no cattle or other animals on the land and did not require it for grazing. The only use to which he put the land, was to visit it on a number of occasions each year. On these occasions he would park his car and, standing on the road or in the gateway, look over the hedge or the gate into the property. He was never prevented from doing this by the defendant. He commented that as the plaintiff's title extends to the centre of the road, the plaintiff would have in fact been standing on his own lands when he was standing at the gate. Finnegan J was satisfied that the plaintiff did this several times a year throughout the period in which the defendant claimed to have been in adverse possession. He found that the plaintiff had not been dispossessed as he was exercising all the rights of ownership which he wished to exercise in respect of the lands, pending the determination of litigation. Buckley, although satisfied that the decision was correct on its facts, was critical of Finnegan J's approach, which permits adverse possession to be defeated by peering over the hedge. He states that it tilts the scales too heavily in favour of the paper owner. He would prefer an approach which permitted the more forthright assertion of ownership evident in *Mulhern v Brady* to defeat adverse possession.[68] When Buckley wrote the article there was a question mark over the compatibility of the doctrine with the European Convention on Human Rights and he did acknowledge that Finnegan J's approach, which confers added protection on the owner, may render our law more compatible with the Convention.[69] As has already been mentioned, the Property Registration Authority Practice Note

[64] Ibid at p 9-10 of transcript.
[65] Above n 56.
[66] [2001] IEHC 23.
[67] *Gleeson v Feehan and Purcell* [1997] 1 ILRM 522.
[68] See above n 31at 62.
[69] Ibid at 64.

contrasts the approach in *Feehan* with the House of Lords decision in *Pye*.[70] In *Pye* the agents of the company had attended in the vicinity or at the entranceway to the lands but this was not treated as an act of possession by the owner. The implication seems to be that if *Pye* had been decided by an Irish court, the owner would not have been treated as dispossessed.

In *Feehan v Leamy* Finnegan J made no reference to section 20 of the Statute of Limitations 1957 which provides that:

> For the purposes of this Act –
>
> (a) no person shall be deemed to have been in possession of land by reason only of having made a formal entry thereon,
> (b) no continual or other claim on or near any land shall preserve any right of action to recover the land.

This section replicates sections 10 and 11 of the Real Property Limitation Act 1833. Jourdan explains that these provisions were included to repeal the common law rules which allowed the owner to keep his right of entry alive beyond the limitation period by making a continual claim to the land or by making a notional entry onto the land.[71] These rules originally developed in the context of the old law on disseisin. The term seisin is used to refer to the possession of land under a freehold estate and the old real actions were only available to those who had been seised of the land, were disseised and who retained a right of entry. This right of entry could be cancelled if, for example, the disseisor died and his heir succeeded him. However the right of entry could be kept alive by a notional entry on even part of the land or by continual claim. Also, if the person was afraid to enter on the land 'for fere of beating, or maiming, or death' he might preserve his right of entry by going as near to the land as he dared and making his claim. However, such a claim had to be made every year.[72]

Jordan is emphatic that entry onto the disputed land by the true owner will not suffice to prevent a squatter who is in effective control of the land from being in possession, unless the owner takes back actual possession.[73] He refers to *Doe d Baker v Coombes*[74] where before the expiry of the limitation period, the lord of the manor went to a hut, which the defendant had built without his permission, and told the defendant's family that he took possession. He also directed that a stone be taken out of the wall of the hut and that a portion of the fence should be removed. This was done without objection and the defendant and his family remained in occupation for a number of years before the lord of the manor claimed possession. In considering whether the actions of the lord amounted to taking possession Wilde CJ noted that they:

> '…clearly amounted to no more than an entry, which since the late statute is not enough to bar the tenant's right unless accompanied by circumstance

[70] See above n 35.
[71] See above n 45 at paras 7.49-7.50.
[72] See the discussion by S Jourdan in *Adverse Possession* ibid at paras 2.06-2.09.
[73] Ibid at para 7.48.
[74] (1850) 9 CB 714.

> which would restore the possession of the land to the lord. The tenant was not removed, nor was anything done to disturb him in his possession.'[75]

Jourdan contrasts such a situation with cases where the true owner did take back possession.[76] In *Randall v Stevens*,[77] just before the expiry of the limitation period, the owners entered and turned out the plaintiff and his family and removed nearly all of his furniture and goods. The plaintiff returned that same day and held possession for another number of years, until the owners entered and destroyed the cottage. The court was satisfied that the owners had resumed possession when they had removed the family and so the Statute ran afresh. Campbell CJ noted that this was not a situation of a mere entry, as referred to in section 10 of the 1833 Act.[78] Similarly, in *Worssam v Vandenbrande*[79] the owners broke down a fence enclosing the disputed land, which the squatter had erected, and erected a notice offering to let the land. These actions were held to amount to taking possession and not a mere entry. Jourdan also refers to the repair of the fence carried out by the owner in *Leigh v Jack* as being an action sufficient to prevent adverse possession.[80]

If the squatter is in possession, the acts of the owner must clearly amount to a retaking of possession. The actions of the owner in *Mulhern v Brady* clearly satisfy this test but the owner in *Feehan v Leamy*, who visited the land and viewed it from the road, cannot seriously be regarded as having retaken possession. He made no attempt to remove the defendant and was not enjoying the land in a way which would indicate that he was still in possession, such as the owner in *Brown v Fahy*. It is submitted that his actions were more akin to the notional entry envisaged in section 20 of the 1957 Act which does not amount to possession. Jourdan acknowledges that a certain amount of confusion exists and explains that it may be due to the different requirements in relation to possession which exist between actions in trespass and actions to recover land.[81]

Although the ruling in *Feehan v Leamy* on the acts by an owner which can prevent dispossession must, therefore, be regarded as questionable, Finnigan J also based his decision on the fact that the squatter did not have animus possidendi. As shall shortly be illustrated, this reason remains a valid one for the decision reached.

Preventing dispossession – The relevance of future plans

The notion that the future plans of the owner may prevent him from being dispossessed where the current use by the squatter is not inconsistent with that future use is known as the rule in *Leigh v Jack*.[82] It was promulgated by Bramwell LJ and named after an English Court of Appeal decision delivered in 1879. The case concerned a piece of wasteland, known as Grundy Street, which belonging to the plaintiff and which he intended dedicating to the public a road. The plaintiff conveyed land adjacent to the disputed plot to the defendant and the defendant was aware of the

[75] Ibid at 717.
[76] Above n 45 at paras 7.56-7.62.
[77] (1853) 2 E & B 641.
[78] Ibid at 652.
[79] (1868) 17 WR 53.
[80] Above n 45 at para 7.60.
[81] Ibid at para 7.46.
[82] Above n 9.

plaintiff's future plans for the plot from the terms of this conveyance. Throughout the limitation period the defendant placed waste on the disputed plot, rendering it impassable for horses and carts. The plaintiff had repaired the fence at one end of the piece of land during the limitation period. The Court of Appeal held that time had not run against the true owner. As has already been mentioned, references to *Leigh v Jack* appear in many Irish adverse possession cases. It is submitted however that many of these references cannot be taken as a direct endorsement of the controversial rule in *Leigh v Jack* as it is frequently cited to support other arguments eg that temporary acts of user, such as for storage, are not sufficient acts of possession; that a squatter who intends to make such a temporary use of the property does not have animus possidendi; and that an owner's action in repairing a fence on the land will prevent dispossession. Before we examine the Irish caselaw on this issue a brief history of the rule in England should be given.

The Court of Appeal decision *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*[83] represented an important development in the story of the rule in *Leigh v Jack*. The disputed land was originally part of a farm. When the county council purchased a neighbouring strip of land with the intention of building a road, a nearby garage thought it would be a good idea to purchase the disputed plot with a view to extending the garage when the road was built. The plaintiff purchased the farm and the disputed plot was farmed for 10 years of the limitation period. For the last two years, it was used by the plaintiff as a visual frontage amenity for its holiday camp. Stamp LJ delivered a dissenting judgment in favour of the squatter. He was of the opinion that the acts of possession, carried out by the plaintiff, could be distinguished from the more trivial acts carried out by the squatter in *Leigh v Jack*. He referred, in particular, to the fact that the disputed plot was enclosed and could not be described as waste land. Omrod LJ decided in favour of the true owner, on the basis of the rule in *Leigh v Jack*. He was of the opinion that the plaintiff's actions in relation to the land in no way prejudiced the defendant's future development of the plot. He noted that the opposite conclusion might have been reached if the plaintiff had built chalets or other structures upon the land.

Denning LJ, who also found for the true owner, went one step further by explaining *Leigh v Jack*, and the cases which followed it,[84] on the basis of an implied licence:

> 'When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more… *The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner*.'

[83] Above n 42.
[84] See *Williams Brothers Direct Supply Ltd. v. Raftery* [1958] 1 Q.B. 159; *Tecbild Ltd. v. Chamberlain* (1969) 20 P. & C.R. 633.

The Law Commission of England and Wales recommended the abolition of the doctrine of implied licence in 1977 and this recommendation was implemented by the Limitation Act 1980, Sch 1 para 8(4), which provides:

> For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

Although this statutory provision eradicated Lord Denning's 'implied licence' spin on the rule in *Leigh v Jack*, represented by the part of the quote in italics, it remained unclear whether a traditional application of the rule was permissible. The rule in *Leigh v Jack* was finally rejected by the Court of Appeal decision in *Buckinghamshire County Council v Moran*.[85] In that case, the plot of land had been acquired by the council in order to construct a new road at some time in the future. The enclosure and annexation of the plot to the squatter's garden and, in particular, his actions in purchasing a new lock and chain and fastening the gate leading from the plot to the road, were held to be sufficient acts of possession. In addition, although the squatter was aware of the Council's future plans, he was held to have animus possidendi in the circumstances. Nourse LJ held that normally in adverse possession cases the intention of the true owner is not relevant although he continued:

> 'If an intention on the part of the true owner to use the land for a particular purpose at some future date is known to the squatter, then his knowledge may affect the quality of his intention, reducing it below that which is required to constitute adverse possession.'[86]

He rejected the rule in *Leigh v Jack*, as stated by Bramwell LJ, and pointed out that the decision could be satisfactorily explained on other grounds. This approach was approved by the House of Lords in *JA Pye (Oxford) Ltd v Graham*.[87] Lord Browne Wilkinson also referred to the other reasons for the decision in *Leigh v Jack* and described the notion that sufficiency of possession can depend on the intention of the true owner as 'heretical and wrong.'[88] He reiterating Nourse LJ's views that if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land, this may provide some evidence that the squatter only intended to occupy the land until needed by the paper owner. He thought, however, that there would be few occasions in which such an inference could be properly drawn in cases where the true owner has been physically excluded from the land.[89]

The judgment of Nicholas Strauss QC in *Beaulane Properties Ltd v Palmer*[90] added another twist to the tale of the rule in *Leigh v Jack*. The plot of land, which was part of the green belt, had been purchased as a speculative investment in the hopes that

[85] Above n 51.
[86] Ibid at 644B-645A.
[87] Above n 8.
[88] Ibid.
[89] Ibid.
[90] [2006] Ch 79.

there would be a change in planning policy in the future. The squatter had used the land by grazing cattle, repairing fences and securing access. Due to a concealment on his part the limitation period only commenced in 1991, with the result that it expired in 2003, before the Land Registration Act 2002 came into operation but after the enactment of the Human Rights Act 1998. Nicholas Strauss QC was satisfied that the law in relation to registered land, as it applied before the 2002 Act, infringed the right to property of the true owner protected by the European Convention on Human Rights. He referred to section 3 of the Human Rights Act 1998, which provides that legislation must be read and given effect in a way which is compatible with Convention rights. He held that this required him to interpret section 75 of the Land Registration Act 1925 so that it only applies to those cases in which the squatter establishes possession in accordance with the case law in existence at the time of its enactment. This meant that it was necessary to apply the rule in *Leigh v Jack*. As the squatter's actions were not inconsistent with any use or intended use of the land by Beaulane Properties Ltd, his possession was not adverse. Some have questioned this court's authority to effectively over-rule a House of Lords decision[91] and this type of judicial intervention seems unlikely to happen in the future in light of the Grand Chamber ruling that the law is compatible with the Convention.

There are only two Irish High Court decisions, both delivered in the mid 1980s, which directly consider the rule in *Leigh v Jack*. The decision in *Cork Corporation v Lynch*[92] was delivered on the 26th of July 1985. The disputed plot had been acquired by the plaintiff in 1965 with the intention of eventually incorporating it as part of a road widening scheme. In the mid 1950s the defendant had purchased the adjoining garage premises and forecourt and, shortly afterwards, he began using the northern portion of the disputed plot for dumping crashed cars. In 1960 or 1961 he began to use the remainder of the disputed plot for the purpose of parking cars (as many as 40 or 50 cars). In the mid 1960s the surface was improved by chippings and half of it was subsequently covered by tarmac. In 1973 or 1974 a chain link fence was built along the western and southern boundary walls and along the natural northern boundary. The only access to the plot was through two gates along the wire fence, which he also erected along the internal boundary between the garage and the disputed plot. Egan J acknowledged that the defendant was in exclusive physical occupation of the disputed plot for longer than the requisite 12 year statutory period. He referred to the rule in *Leigh v Jack* as formulated by Bramwell LJ. He also referred to Lord Denning's comment in *Wallis's Cayton Bay Holiday Camp Ltd* that when the owner intends to use the land for a particular purpose in the future, he does not lose his title to it simply because some other person makes a temporary use of it. He commented on the dearth of modern Irish authority on the matter but noted that the wording of relevant English statutes was close enough to the wording of the 1957 Act to make the English authorities strong persuasive precedents in this country. He concluded that 'adverse possession' within the meaning of the 1957 Act had not been established by the defendant. It is submitted that the re-surfacing carried out in *Lynch* was a strong act of possession compared to the user for temporary storage in *Leigh v Jack*. Also, although a full 12 years may not have passed since the defendant had carried out the fencing, the situation can be distinguished from *Leigh v Jack* as the parking lot in *Lynch* was already enclosed by natural boundaries. On the whole, the decision seems quite harsh and Mee comments that a desire to protect property owned by the local

[91] See M Dixon, 'Adverse Possession and Human Rights' [2005] Conv 345.
[92] [1995] 2 ILRM 598.

authority, which was ultimately going to be developed for the common good, may have influenced the court in reaching its decision.[93]

The decision in *Seamus Durack Manufacturing Ltd v Considine*[94] was delivered two years after the Egan J's decision in *Lynch* although it was reported in 1987, well before the *Lynch* case which was not reported until 1995. This may have caused some confusion as to which is the more recent authority. The disputed field contained two sheds and was adjacent to the defendant's farm. The field was originally owned by the defendant's sister and she leased it to him until 1971, when it was sold, together with a larger field, to the plaintiff. The sister reserved a right to use the sheds for herself for life on behalf of the defendant. The plaintiff purchased the fields with the intention of building two factories on them. A factory was built in the larger field but nothing was ever built in the disputed field. The defendant continued to use the field as before and in 1972 he put up a fence to prevent his cattle straying onto the factory premises. Barron J was satisfied that, as and from the time he erected the fence, the field was used exclusively by him for the purpose of grazing his cattle. Counsel for the plaintiff sought to rely on the rule in *Leigh v Jack*, recently followed by Egan J in the *Lynch* case, and argued that grazing of cattle for the past 14 years was no bar to the plaintiff's plans to build a factory. Barron J noted that in the *Lynch case* Egan J had referred to both *Leigh v Jack* and *Wallis's Cayton Bay Holiday Camp Ltd* in reaching his decision. Barron J felt that it was a significant feature of *Leigh v Jack* that the squatter was aware from the express words of his deeds of conveyance about the future plans of the owner in relation to the disputed plot. He set out the facts of *Wallis's Cayton Bay Holiday Camp Ltd* and stated that 'here also there was a special purpose for which the land was required and which was known to the parties.' However, it is not clear from the evidence discussed in *Wallis's Cayton Bay Holiday Camp Ltd* that this was the case. In fact, the court seemed satisfied that although the plan attached to the conveyance to the plaintiff excluded the disputed plot, the plaintiff believed that they owned it for most of the limitation period. Barron J also commented that, although the decision in *Wallis's Cayton Bay Holiday Camp Ltd* had been considered by Kenny J in the Supreme Court case of *Murphy v Murphy*,[95] there was no support to be found in the latter case for the rule in *Leigh v Jack*. However, in *Murphy v Murph*y there was no question of the true owner having future plans for the land; the true owner was not even aware that she owned the land. It is submitted, therefore, that Barron J may have attached undue importance to the absence of support for the rule in *Leigh v Jack* in that decision.

The most convincing reason for Barron J's decision was that he felt that the rule in *Leigh v Jack*, as applied in the *Lynch* case, was too broad. If accepted, it would mean that if the land had been used for the statutory period, the squatter's right would be dependent, not upon the statute, but upon whether or not the failure to use the land was occasioned by the desire of the owner to hold it for a particular time or purpose or until a particular hope could be realised. He stated:

> 'Adverse possession depends upon the existence of animus possedendi and it is the presence or absence of this state of mind which must be determined. Where no use is being made of the land and the claimant knows that the owner

[93] J Mee and P Pearse, *Land Law* (Dublin: Round Hall Sweet and Maxwell, 2000) at p .
[94] [1987] IR 677.
[95] [1980] IR 183.

> intends to use it for a specific purpose in the future, this is a factor to be taken into account. The principle has relevance only insofar as that when this factor is present it is easier to hold an absence of animus possidendi.'

He was satisfied that there was nothing in the facts to show that the defendant intended to use the land upon a temporary basis or merely to prevent it lying idle until the owner was in a position to use it for a purpose of which he was aware. He made full use of the land to graze his cattle and was therefore in adverse possession. Barron J's reasoning seems very similar to the reasoning adopted in the subsequent English decisions of *Buckinghamshire County Council v Moran* [96] and *JA Pye (Oxford) Ltd v Graham*.[97]

The High Court decision in *Dundalk Urban District Council v John Conway*[98] was delivered in December 1987 and is frequently referred to as supporting the rule in *Leigh v Jack*. Blayney J, in considering whether the plaintiff had been dispossessed, referred to the rule in *Leigh v Jack* and Denning MR's comment in *Wallis's Cayton Bay Holiday Camp Ltd* that a temporary user will not defeat an owner's title if he has future plans for the property. He also referred to Stamp LJ's dissenting decision in *Wallis's Cayton Bay Holiday Camp Ltd* , quoting his interpretation of the judgment in *Leigh v. Jack* that:

> '… to determine whether the acts of user do or do not amount to dispossession of the owner the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is waste land and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the waste land do not amount to dispossession of the owner.'

It should be pointed out that Stamp LJ found in favour of the squatter on the facts. Blayney J also referred to Black J's statement in *Convey v Regan*:[99]

> 'The main consideration operating in my mind is the principle that the party relying on acts of user over a long period to establish title against the owner must show that the acts were done with animus possidendi.'

Blayney J then applied these principles of law to the facts of the case and concluded that adverse possession had not taken place. He gave two reasons for this conclusion. First of all, there was no evidence of what intention the plaintiff's predecessor in title had in allowing his cattle to graze the disputed plot. In fact, the evidence indicated that he did not have animus possidendi as if he had, one would have expected that when the land was sold, the disputed plot would have been included in the sale. Secondly, Blayney J held that the user by the plaintiff's predecessor in title was not in any way inconsistent with the purpose for which the plaintiff required the plot: to run a sewer through it and to have it available in case repairs should be required to the bridge.

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[96] Above n 51.
[97] Above n 8.
[98] Above n 60.
[99] [1952] IR 56 at 58.

It is submitted that *Conway* should not be viewed as a strong endorsement of the rule in *Leigh v Jack.* In deciding whether the owner was dispossessed, Blayney J seemed very influenced by the absence of animus possidendi on the part of the squatter. Although the second reason advanced echoes the rule in *Leigh v Jack*, the circumstances were very similar to those in *Leigh v Jack*, which is frequently explained on different grounds. One justification which is given for the decision in *Leigh v Jack* is the fact that the owner repaired a fence during the limitation period. This was an act of possession, indicating that the owner had not been dispossesssed. Although Blayney J only mentioned it in the context of proving that there had been no discontinuance of possession, Dundalk Urban District Council's action in replacing the manhole cover on the sewer during the statutory period could also be regarded as proving that the owner had not been dispossessed. *Leigh v Jack* is also explained on the basis that the acts of possession were not sufficient and in *Conway*, the main act relied on was that cattle were permitted to wander onto the disputed plot. Grazing waste land that is of limited use to the owner is not considered a strong act of possession when unaccompanied by acts of enclosure or improvement to the land. The decision in *Conway* could, therefore, be equally explained on the basis that sufficiency of possession must be determined in light of the character of the land, the natural mode of using it and the use which the owner could reasonably be expected to make of it. The case is clearly different to the *Lynch* case where the acts of possession were much stronger and the owner's position could only be saved by relying on the rule in *Leigh v Jack.* The importance of *Conway* as an authority on the rule in *Leigh v Jack* must also be reduced by the fact that Blayney J expressed no views on whether the decision in *Lynch* was correct or whether he preferred the views of Barron J in *Considine*.

There seems to be a degree of disagreement over whether the decision in *Feehan v Leamy*[100] endorses the rule in *Leigh v Jack* or supports the approach taken by Barron J in *Considine*. The Property Registration Authority Practice Direction asserts that the rule was followed in *Feehan v Leamy*.[101] One commentator has stated that the decision rejected the rule in *Leigh v Jack* and finally put *Lynch* to bed.[102] Buckley appears less confident and expresses the view that the ruling, in fact, gives some sustenance to the future purpose line of cases.[103] The confusion stems from the ambiguity of Finnegan J's statement in relation to *Leigh v Jack*:

> 'As to dispossession, the comments in *Leigh v Jack* have been misunderstood: see *Murphy v Murphy* [1980] IR and *Seamus Durack Manufacturing v Considine* [1987] IR 677. As properly understood they indicate what is required for dispossession.'

Although it could be argued that Finnegan J was referring to the *Considine* case as an example of how the decision in *Leigh v Jack* was misunderstood, it seems more likely that he was endorsing Barron J's view that the rule in *Leigh v Jack* had been too broadly stated. Such sentiments would be more compatible with Finnegan J's earlier positive endorsement of Barron J's statement in *Considine* that:

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[100] Above n 34.
[101] Above n 33 at para 2.5.
[102] (2001) 6(1) CPLJ 2.
[103] See above n 31 at 64.

> 'Adverse possession depends upon the existence of animus possidendi and it is the presence or absence of this state of mind which must be determined.'

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It would also be more compatible with his endorsement of Slade J's ruling in *Buckinghamshire County Council v Moran*. *Buckinghamshire County Council v Moran* and *Considine* adopted the same approach to the rule in *Leigh v Jack* – the intention of the true owner was only relevant in so far as it may have impacted on the intention of the squatter.[104]

Finnegan J concluded that, on the balance of probability, the squatter's state of mind was that litigation was pending and dragging on in relation to the lands which were lying idle and ungrazed. The squatter had been a witness in that litigation and to some extent must have been aware of the progress of the proceedings. Finnegan J stated that the squatter's comment to the gardai, when someone came to fence the land on behalf of the plaintiff, that 'the lands belonged to a man in America' indicated an absence of the necessary animus possidendi. He had not demonstrated an intention to exclude the true owner and all other persons from the land. Finnegan J was clearly of the opinion that this was one of those cases where the squatter's awareness of the owner's intentions impacted on the quality of his own intention. This was a situation where the squatter only intended to occupy the land on a temporary basis, until the litigation was resolved.

It is submitted that although the Supreme Court has yet to rule on the issue, the High Court has, for the most part, leaned against the adoption of the rule in *Leigh v Jack*. However, before the Grand Chamber decision was delivered, Buckley argued that the retention of the rule may afford a bulwark against an ECHR incompatibility ruling for the Irish doctrine of adverse possession.[105] The notion of resurrecting the rule in *Leigh v Jack* to provide more protection for the owner seems surprising given that it has been consistently criticised by the judiciary[106] and the Irish Law Reform Commission has twice recommended statutory clarification that it does not apply.[107] If more protection is needed for the true owner of the land who currently has no use for the property, imposing procedural protection such as a warning system would be much easier to apply than trying to establish if the owner had future plans for the property and the compatibility of the current use with those future plans. Trying to establish subjective intention is always difficult and the rule in *Leigh v Jack* does not tell us how specific the owner's future plans have to be. It is, for example, unclear if the rule would be applied if the owner had a number of alternative plans and the squatter's current use was compatible with some of the plans but not with others. Also, the rule does not protect the owner who has yet to decide on what he will do

[104] Finnegan J also referred to Cockburn CJ's ruling in *Leigh v Jack* that the squatter in that case only intended to use the land until the time should come for carrying out the objective originally contemplated by the owner.
[105] Above n 31 at 64.
[106] See *Seamus Durack Manufacturing Ltd v Considine* above n 94; *Buckinghamshire County Council v Moran* above n 51; *JA Pye (Oxford) Ltd v Graham* above n 8.
[107] *Report on Land Law and Conveyancing Law: General Proposals* (LRC 30-1989) para 52-53; *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) at para 12.04.

with the land in the future or where the original plans of the owner have been forgotten or are unclear.[108]

Part 2

Justifying adverse possession in relation to the procrastinating owner:

Article 1 of the first Protocol to the European Convention on Human Rights provides that:

> 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."

In *Pye* the Grand Chamber referred to the well established analysis of this article as comprising three rules. The first rule contained in the first sentence enunciates the general principle of the right to peaceful enjoyment of possessions. The second rule contained in the second sentence of the first paragraph covers deprivations of possessions and the third rule contained in the second paragraph concerns controls which are place on the use of property. The rules are connected in that the second and third rules are specific instances of interference with the peaceful enjoyment of property and must be construed in light of the general principle set out in the first rule. The Grand Chamber noted that in order to be compatible with the general principle set out in the first rule an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Where the interference constitutes a deprivation of possessions under the second rule, it will normally constitute a disproportionate interference unless the individual is compensated by an amount reasonably related to its value. The Chamber in its judgment ruled that the operation of the English law on adverse possession constituted a deprivation of possessions, which although it pursued a legitimate aim in the public interest was disproportionate and imposed an excessively harsh burden on the applicant. It was particularly impressed by the absence of compensation and the absence of procedural protection for the true owner. The Grand Chamber in contrast chose to treat the nature of the interference as a control of the use of land. Such interferences must also involve a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, in the cases in

[108] See *Tracey Enterprises MacAdam Limited v Drury* [2006] IEHC. Although evidence was given that the disputed plot may have been acquired with the intention of extending quarrying onto it, Laffoy J was not convinced of this. She cited, with approval, Barron J's statement in *Considine* that the owner's future plans are only relevant in so far as they may impact on the animus possidendi of the squatter. However, her views must be considered obiter as the case was ultimately decided on the basis that the defendant's acts of possession were insufficient and he did not have the requisite animus possidendi.

which a situation was analysed as a control of use, even though the applicant had lost possessions, the Grand Chamber noted that no mention was made of a right to compensation. The Grand Chamber was of the view that the law was proportionate and struck a fair balance. It noted that it had been in force for many years and it was not open to the applicant companies to argue that they were not aware of it or that its application came as a surprise to them. It reiterated the comments made by the Chamber that the limitation period was relatively long and that very little action on the part of the applicant companies would have stopped time running. If they had failed to agree rental terms with the Grahams it was open to them to bring a court action for re-possession of the land. It noted that the Land Registration Act 2002 has introduced stronger procedural protection for the owner but pointed out that legislative changes in complex areas such as land law take time to bring about, and judicial criticism of legislation cannot of itself affect the conformity of earlier provisions with the Convention.

Once the Chamber and the Grand Chamber found that there was an interference with the right to property it became necessary for the government to justify that interference. The legitimate aim of limitation periods had been recognised by the Court on previous occasions[109] but the provisions also brought about a deprivation of the applicants' title to land. Such a result required justification by factors over and above those which explain the law on limitation.[110] In its observations to the Chamber the government attempted to justify the provisions by pointing out that they prevent uncertainty and injustice arising from stale claims and they also ensure that the reality of unopposed occupation and its legal ownership coincide. This attempt to justify the operation of the doctrine of adverse possession in the particular circumstances presented by *Pye* can only be described as half hearted. The stale claims argument, was never, on its own, going to be sufficient to justify a deprivation of possessions. The other justification reflects one of the reasons advanced by the Law Commission in the Consultative Document[111] published in the lead up to the Land Registration Act 2002. The Commission noted that if land ownership and the reality of possession are completely out of kilter, the land in question is rendered unmarketable if there is no mechanism by which the squatter can acquire title. The Commission noted that this could happen where the true owner had disappeared or there had been dealings off the register. [112] These situations clearly justify the operation of the doctrine of adverse possession, even if the land is registered, but unfortunately neither situation arose in *Pye*. In its observations to the Grand Chamber the government added a third more relevant objective of the legislation. As land was a limited resource it was in the public interest that it should be used, maintained and improved; the legislation encouraged landowners to make use of their land. The Grand Chamber noted that the margin of appreciation available to the legislature in implementing social and economic policies should be a wade one and that the court will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation. This is particularly true in cases such as the present one where what is at stage is a longstanding and complex area of law which regulates private law matters between individuals. It noted from the comparative material submitted by the parties that many member states possessed

[109] See, eg, *Stubbings v United Kingdom* 23 EHRR 213.
[110] Above n 1at paras 63-64.
[111] Above n 3.
[112] Ibid at para 10.7.

laws which were similar to the legislation in question and that they did not require the payment of compensation to the original owner. The 2002 Act did not abolish adverse possession thus confirming that the traditional general interest remained relevant. The Grand Chamber noted that different countries regulated the use and transfer of property in a variety of ways and these rules reflect social policies against the background of the local conception of the importance and role of property. Even where title to real property is registered it must be open to the legislature to attach more weight to lengthy unchallenged possession than to the formal act of registration. jurisdictions with systems of title registration had either abolished the doctrine completely or substantially restricted its effects. The strong emphasis placed by the Grand Chamber on the margin of appreciation to be allowed to member states in determining whether a public interest was served by this land law measure clearly also influenced its determinations on whether the measure struck a fair balance between the public interest and the individual's property rights.

Although the European Court has decided to leave adverse possession in the hands of the governments of the member states on this issue it is submitted that we need to look in more detail at the justification for the operation of the doctrine in the circumstances presented by Pye.
When exploring the implications of *Pye* for the operation of the doctrine in Ireland, the Law Society's Conveyancing Committee also digressed slightly into a discussion of the many functions which the doctrine performs in Ireland that are very justifiable. Of course, it is interesting to speculate on what the result would have been if a different type of adverse possession claim had found its way to the European Court of Human Rights. What if a squatter had sought to rely on the doctrine to remedy a defective conveyance in relation to unregistered land or to deal with a situation of mistaken boundaries? Although the person who could prove technical ownership may have been deprived of their possessions, it would be comparatively easy to justify the operation of the doctrine in the public interest in such circumstances. It allows errors in conveyancing and mapping to be rectified, thereby facilitating the sale of land, in a situation where the moral claim of the occupier is usually clear. Given the strong public interest function performed by the doctrine in such situations, it may satisfy the fair balance test without the introduction of improved procedural protections or provision for compensation. It is not, after all, necessary to prove that the objectives achieved by the doctrine in these circumstances could not be attained more efficiently by other rules. The European Court of Human Rights has stated on a number of occasions that it will not investigate whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way.[113]

In re-evaluating how the doctrine operates in Ireland it makes sense to begin by examining the merits of a system which allows the doctrine of adverse possession to operate, in its current form, against an owner who has no immediate use for the land but has future plans for it. Although the operation of the doctrine and its proportionality must also be explored in the other situations where it is commonly relied on, it is submitted that this task may be easier as these situations do not evoke the same sympathy for the owner. The operation of the doctrine against the procrastinating or speculating owner rewards the squatter for possessing and

[113] See, eg, *James v United Kingdom* (1986) 8 EHRR 123.

exploiting land that would otherwise be left vacant and neglected until the owner is ready to implement his plans. Time will not run against a squatter who is in possession with the owner's consent[114] and the doctrine consequently encourages an owner to enter into an arrangement with someone who will use the land in the meantime. Such an arrangement is not always feasible or desired[115] but an owner can also prevent time running by carrying out acts of possession such as maintaining or repairing fences.[116] As a last resort, he will prevent time running by monitoring the land and ensuring that trespassers vacate it.[117] The current approach of the House of Lords,[118] which the Irish courts are likely to follow, can therefore be justified in the public interest as encouraging the efficient and economic use of land or ensuring that the land does not become derelict, unsightly or even dangerous through neglect. Dockray notes that the objective of encouraging the use, maintenance and improvement of land has only rarely influenced judicial opinion in adverse possession cases[119] and has not been an important influence on Parliament or on any of the commissions or committees which have examined the law of limitations.[120] However, the Conveyancing Committee in its submission to the Irish Government quoted[121] from Paul Coughlan's text on *Property Law*[122] which specifically refers to this justification for the doctrine of adverse possession. He states:

> 'Generally speaking land 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.'[123]

In a similar vein, Lyall comments:

> 'The doctrine of adverse possession favours the person who uses the land at the expense of one who does not. The doctrine thus furthers the economic development of society. It favours the productive use of land as a social goal. This approach looks at the effects on society as a whole and implies that the law has a direct responsibility to further economic development. It can therefore be seen as a socialist or social democratic approach in the sense that it ascribes to the law a role in allocating resources or furthering economic development.'[124]

Gardiner notes that as land has become more scarce in the United States, the law of adverse possession has moved toward shorter periods of limitations, which has helped adverse possessors and increased the duties of land owners to monitor land.[125] He argues that a more liberal application of adverse possession laws should be

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[114] See *Bellew v Bellew* [1982] IR 447.
[115] See *JA Pye (Oxford) Ltd v Graham* above n 6.
[116] See *Leigh v Jack* above n 9.
[117] See *Mulhern v Brady* above n 58.
[118] As set out in *JA Pye (Oxford) Ltd v Graham* above n 8.
[119] Note Strauss QC's rejection of the relevance of this objective where a speculating owner was involved in *Beaulane Properties Ltd v Palmer* above n 90 at para 187.
[120] M Dockray, 'Why do we need adverse possession?' [1985] Conv 272 at 276-277.
[121] See December submission, above n 20 at pp 5-6.
[122] (Dublin: Gill & Macmillan, 2nd edn, 1998).
[123] Ibid at p 206.
[124] A Lyall, *Land Law in Ireland* (Dublin: Roundhall Sweet & Maxwell, 2nd edn, 2000) at p 882.
[125] B Gardiner, 'Squatters' rights and adverse possession: A search for equitable application of property laws' (1997-1998) 8 Ind Int'l & Comp L Rev 119 at 129.

encouraged to achieve the goal of more efficient and ultimately more beneficial use of land, even if such actions are contrary to the interests of governments, municipalities or private land holders.[126]

Encouraging the use of land is a valuable objective in both an urban and a rural context, regardless of whether the title is registered or unregistered and privately owned or owned by the State. It has been an important policy for governments across the globe since civilisation began[127] and is even more important today as a growing world population gives rise to increased levels of homelessness. The danger of land lying idle is more likely where large areas of land are in the ownership of a few wealthy individuals or corporations. In England and in Ireland, in recent times there has been a critical awareness of the number of empty homes in private and public ownership.[128] The negative consequences of hoarding land which has been zoned for development were recently discussed by the All-Party Oireachtas Committee on the Constitution in its Report on *Private Property*.[129] The Irish planning system, at the moment, is not tailored to ensure the timely release of land zoned for development onto the market. It was acknowledged that the hoarding of development land or land which may be zoned for development in the future by speculators results in the land being left unexploited and distortions in the housing market. Although it was unclear how extensive this practice was, the Committee pointed out that resourceful entrepreneurs will take a system as they find it and work it to their advantage. A landowner using zoned land for agricultural purposes cannot be criticised for wasting it, but his decision not to bring zoned land to the market can have a disproportionate effect in the market. A deficiency in the supply of zoned land to the market will very probably result in a substantial increase in the value of the land that does come to the market. Values may have to lift substantially in order to tempt some reluctant landowners to sell and this can give rise to a perception of shortage. Speculators will buy land that may be zoned for development in the future with the intention of cashing in on anticipated price rises. Having bought it, they are likely to have an incentive to maintain the shortage and keep values up by not developing or selling the land for development until it suits their interests. This is unlikely to accord with either the needs of the market or the timeframe of the development plan. The Committee recommended that the government should devise a scheme comprising a structure of progressive charges, whereby planning authorities can secure the release of development land if development is not being actively pursued by the owners or they are not prepared to release the land onto the market. The Committee noted that the base rate could be set having regard to the priority attributed in the plan to the urgency of developing particular lands. This would increase to a point after six years where the charge would amount to the difference between development land value and agricultural land value. At that point, the owner may be presumed to have chosen to forgo the benefit of having land zoned for development. The local authority

[126] Gardiner, ibid, at 132.
[127] See Gardiner, ibid at 124-125, n24-30 and associated text.
[128] For English statistics see www.emptyhomes.com/resources/stats/statistics.html. See also Office of the Deputy Prime Minister, *Empty Homes: Temporary Management, Lasting Solutions: A Consultation Paper* (London: TSO, May 2003); Office of the Deputy Prime Minister, *Empty Property: Unlocking the Potential – A Case for Action* (London: TSO, February 2003). For Ireland, see K Doyle, 'One in six homes in State empty – CSO' breaking news on 16 August 2007 on www.ireland.com.
[129] The All-Party Oireachtas Committee on the Constitution, *Ninth Progress Report: Private Property* (Dublin: Stationary Office, 2004) pp 82-87.

concerned could then acquire the lands by compulsory purchase in the interests of the common good.[130]

In an urban context a policy to encourage the development and maintenance of vacant lots and buildings was clearly the basis for the Derelict Sites Act 1990. This imposes a duty on every owner and occupier of land, including statutory bodies and State authorities, to take reasonable steps to ensure that the land does not become or does not continue to be a derelict site.[131] The Minister for the Environment is empowered to direct a local authority to take steps to prevent any land owned or occupied by it from becoming or continuing to be a derelict site or to dispose of its interest in the land if it is unlikely to be required by the authority for the performance of its functions.[132] It empowers the local authority to serve notices on any person who appears to be an owner or occupier of the land requiring them to take measures within a certain period to prevent the land from becoming or continuing to be a derelict site.[133] If such notices are not complied with the local authority may carry out those measures and recover any expense from the owner or occupier as a simple contract debt.[134] In addition, where a derelict site has been entered on the derelict sites register, which each local authority is obliged to maintain, the owner is obliged to pay an annual levy based on the market value of the land. This levy remains a charge on the land until paid but if the local authority is satisfied that the owner plans to develop the land and permission has been granted or applied for, it may consent to the owner entering into a bond in lieu of paying the derelict site levy.[135] The local authority is also empowered to acquire, by agreement or compulsorily, any derelict site situated within their functional area.[136]

When it comes to the procrastinating or speculating owner, the doctrine of adverse possession, the All-Party Oireachtas Committee proposals in relation to development land and the Derelict Sites Act 1990 have overlapping legitimate aims. The All-Party Oireachtas Committee proposals and the 1990 Act impose controls on the use of possessions and also permit a deprivation of possessions, through compulsory purchase orders, in certain circumstances. Although it was not discussed in much detail, the European Court of Human Rights did accept that the operation of doctrine of adverse possession in the circumstances presented by *Pye* served the public interest.[137] The Court's objection to the doctrine was that it was not proportionate response. The Court conceded that the 12 years afforded to the owner to bring proceedings was a long time and that the applicants had to do very little to stop time running but stated that even having regard to the lack of care and inadvertence of the applicants, it must still consider whether the deprivation struck a fair balance with any legitimate public interest served.[138] The Court stated that the taking of property in the public interest without compensation reasonably related to its value is justified only in exceptional circumstances. This was not an exceptional case and the lack of compensation also had to be viewed in light of the lack of adequate procedural

[130] Ibid at p 87.
[131] Derelict Sites Act 1990, s 9.
[132] Ibid, ss12-13.
[133] Ibid, s 11(1-2).
[134] Ibid, s 11(5).
[135] Ibid, ss21-26.
[136] Ibid, ss 14-20.
[137] See above n 1at para 67.
[138] Ibid at paras 69-70.

protection for the owner. No form of notification was required to be given to the owner, which might have alerted him to the risk of losing his title.[139] The Court explained that although a change in the law does not necessarily mean that the previous system must have been inconsistent with the Convention, it was relevant in assessing the proportionality of the pre-existing law. By including the early warning mechanism in the 2002 Act, the Parliament, Law Commission and Land Registry were recognising the lack of cogent reasons to justify the system of adverse possession in relation to registered land and the deficiencies in the procedural protection of registered landowners.[140] The Court concluded that the legislation imposed an individual and excessive burden on the applicants and upset the fair balance between the demands of the public interest on the one hand and the applicants' right to peaceful enjoyment of their possessions on the other.[141] The dissenting judges were of the opinion that the applicant companies did not bear an excessive or individual burden. They lost their land as a result of the foreseeable operation of legislation on limitation of actions and they could have stopped time running against them by taking minimal steps to look after their interests. They emphasised that possession and ownership carries not only rights but also duties and the purpose of the legislation was to behove a landowner to be vigilant to protect possession and not to sleep on his rights. They criticised the majority for having undue regard to legislative developments after the facts of the case. They explained that the Convention is intended to guarantee a minimum standard of protection although it was open to domestic authorities to provide a higher standard of protection. It pointed out the wide margin of appreciation afforded to States to determine how to implement the minimum standard of protection afforded by article 1. The fact that more procedural protection was introduced for negligent owners did not mean the previous position was in violation of the Convention.[142]

Relative to the doctrine of adverse possession, the provisions of the Derelict Sites Act 1990 confer more protection on the owner of the land. If the local authority requires measures to be taken in relation to the land or its registration as a derelict site, notices must be served on the owner. If the name or address of the owner cannot be ascertained, a notice may be served by affixing it in a conspicuous position on or near the land. The local authority must consider any written representations made by the owner in response to the notice.[143] The compulsory acquisition provisions require the publication of notices in local newspapers and the service of a notice on the owner who is given the opportunity to make objections to the compulsory acquisition. Where the site is compulsorily acquired, any person with an estate, interest or right in respect of the derelict site may apply for compensation equal to the value of that interest. However, if any derelict site levy or sum for measures carried out by the local authority is outstanding, it must be deducted from the compensation payable.[144] Any provisions enacted to implement the All-Party Oireachtas Committee's proposals in relation to development land would also presumably include requirements for the service of notices on the owner and, in the event that the property was compulsorily acquired, the payment of compensation would naturally be required. However, as has

[139] Ibid at paras 72-73.
[140] Ibid at para 74.
[141] Ibid at paras 75-76.
[142] Ibid at paras 1-4 of Joint Dissenting Opinion.
[143] The Derelict Sites Act 1990, ss6, 8(1)(d), 11(1-3)
[144] Ibid ss15,16 and 19.

already been mentioned, the compensation paid would incorporate a penalty for not selling or developing the land in a timely fashion. The remainder of this paper is devoted to exploring the implications of reforming the law on adverse possession in order to improve the position of the procrastinating owner. The primary focus is on the repercussions of introducing a compensation requirement or different notice procedures.

A Compensation Requirement

The introduction of a compensation requirement would clearly disadvantage the squatter but it could be argued that the squatter has already benefited from the free use of the property throughout the limitation period and this is its own reward. Such a reform would effectively result in the squatter acquiring a right of pre-emption in relation to the property on the expiry of the limitation period.[145] Such an approach recognises the physical relationship which the squatter may have developed over time in relation to the land[146] but it also recognises that the absent owner may be deeply attached to its financial value.[147] Stake notes that in many cases a squatter will not be able to afford to compensate the true owner [148]and such a requirement would be perceived as unjust where the squatter was morally entitled to the land, if for example there had been transactions off the register. He concludes that the compensation requirement should be limited to cases of bad faith adverse possession and declares that justice demands compensation in such circumstances, as the adverse possessor knows he is in the wrong. He maintains that the increase in the fairness of the doctrine would be worth its costs in terms of the judicial time required to listen to evidence on the issue of bad faith.[149] If 'good faith' is interpreted as a belief by the squatter that he is the owner, it is most likely to be present where the property in question is on or near the boundary with a neighbour's property. An overview of the caselaw involving adverse possession against an owner with future plans seems to indicate an absence of good faith on the part of the squatter in most cases,[150] although the courts are not required to examine this issue under the current law.[151] In the circumstances presented by *Pye* it is unlikely that the Grahams would have acquired ownership if it was conditional on paying the owner the full market value.

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[145] N Elfant, 'Compensation for the involuntary transfer of property between private parties: Application of a liability rule to the law of adverse possession' (1984-1985) 79 Nw U L Rev 758 at 761-762.

[146] 'The true explanation of title by prescription seems to me to be that man like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.' As per OW Holmes in a letter from Oliver Wendell Homes to William James (April 1, 1907) in *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* (Max Lerner ed, 1943) at pp 417-418.

[147] See Elfant, above n 153 at 761; JE Stake, 'The uneasy case for adverse possession' (2001) 89 Geo LJ 2419 at 2468.

[148] See Stake, ibid, at 2466.

[149] Ibid at 2472-2473.

[150] *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* above n 51 may be exceptional in this regard.

[151] Note, however, the introduction of a good faith requirement in relation to adverse possession on land adjacent to a boundary in the Land Registration Act 2002, sch. 6 para 5(4). See also RH Helmholz, 'Adverse possession and subjective intent' (1983-1984) 61 Wash U L Q 331 where it is argued that a survey of American caselaw indicates that the trespasser who lacks good faith stands lower in the eyes of the law and is less likely to acquire title by adverse possession.

In certain circumstances the introduction of a compensation requirement may result in the owner being compensated by the squatter for the value of improvements that the squatter carried out. In addition, it fails to recognise the aesthetic benefit to the community of the squatter's actions in maintaining and improving the property. If the procrastinating owner is compensated by receiving the full value of the property, it could be argued that the main objectives performed by the doctrine in such circumstances are defeated. The owner suffers no penalty for failing to make arrangements to ensure that the land is used or failing to maintain or monitor the land. A neglectful owner can relax in the knowledge that even if someone goes into occupation and he loses his title through the operation of the limitation period, he will, in any event, be entitled to the market value of the property. However, the culpability of the company in *Pye* in this regard is difficult to pinpoint. A history of grazing agreements existed in relation to the land and it would clearly have benefited the company financially to enter into another grazing agreement with the Grahams. The reasons for not doing so were strategic; it was feared that it would prejudice a planning application. The company was also aware that the Grahams wished to use the land and the Company representative who visited the land must have noticed that the Grahams were in possession. It could easily be argued, on behalf of the company, that it had monitored the land, and was aware and content that it was being exploited and maintained while it was seeking planning permission. The company was simply guilty of not acting in an antagonistic or litigious fashion towards a neighbouring farmer. Even if the company was under the impression that the land was currently vacant, it seems a little harsh to criticise it for its decision to retain the land for future development or to sell in the future. It could be argued that the retention of land as an asset to be liquidated once it has increased in value is in fact a 'use' of the property. It may not even be necessary to explain such a viewpoint as a recent phenomenon, which has developed in response to the proliferation of speculating development companies. John Locke's theory of property[152] permits the appropriation through labour of 'as much property as any one can make use of to any advantage in life before it spoils.' Waldron has argued that the spoilation provision must be interpreted generously as Locke's concept of 'use' is very broad. He states:

> 'It is use "to *any* advantage of life"and therefore not confined to consumption or production for consumption, but also includes, for example, aesthetic uses[153] and the use of the object as a commodity in exchange(II 46).'[154]

Stake notes that sometimes delaying bringing the land into production may in fact be more beneficial for society in general and, by prodding the owner into premature exploitation of the land, the doctrine of adverse possession might be doing more harm that good.[155] He comments:

> 'It is possible that an owner's non-use will generate substantial negative externalities or that his use will generate important benefits that the owner cannot capture for himself. In either case, a nudge toward production may be appropriate. Productive use of land could generate labour or consumer surplus

[152] Presented in *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960).
[153] Although, the companies in Pye cannot be credited with an environmental motive for not exploiting the land, it should also be mentioned that in some circumstances no use might be the best use.
[154] Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at p 207.
[155] Above n 155 at 2436.

> that would qualify as a positive externality. If the owner expects the returns from the land to be higher if its development were delayed, however, then we should also expect the consumer and labour surplus to be larger in the future…the owner's self interested decision will also serve society's interest. Even assuming that it is a good policy to prod owners toward production, the statute of limitations is a poor stick for doing so because the RO *(recorded owner)* can avoid loss of title by monitoring. Of course, slightly raising the cost of leaving land idle will nudge a few owners into production. But, because the costs of monitoring are so low, that number will be very small. The incentive to use the land thus withers into an incentive to inspect for possessors every few years.'[156]

Stake describes the incentive imposed on owners to monitor their vacant properties as a waste of resources.[157] The complete eradication of the operation of the doctrine against a procrastinating owner would fail to take into account the positive role played by the doctrine in such circumstances and may give rise to difficulties of proof. Making it conditional on the payment of compensation permits Stake's views to be accommodated and may achieve a fairer balance between the squatter and the procrastinating owner. It lessens the burden on the owner to inspect for trespassers; it allows development to be postponed until it will yield the best return; it permits a tolerated squatter to use the land in the meantime; and gives the squatter the opportunity to purchase the property on the expiry of the limitation period. The introduction of such a reform may render the operation of the doctrine in the circumstances presented by *Pye* more compatible with the European Convention on Human Rights. It is submitted, however, that the implications of imposing a compensation requirement on adverse possessors must also be viewed in a broader context. Even if the requirement was limited to cases of bad faith adverse possession and the Property Registration Authority was vested with the power to determine such claims, it would dramatically increase the costs and delays in processing adverse possession applications.[158] It would also result in many more appeals being made to court. It seems to be accepted that in many circumstances compensation may not be appropriate[159] and so it could be argued that the introduction of such a reform would be a case of using a sledgehammer to crack a nut. It is interesting to note that the Law Commission of England and Wales, in the discussions which preceded the publication of the Land Registration Act 2002, appear to have abandoned the notion of including provisions allowing for the possibility of compensation at some stage after their Consultation Paper was published.[160] Also, the European Court of Human Rights was keen to emphasize in *Pye* that the absence of compensation for the true owner had to be viewed in the context of the absence of adequate procedural protections.[161] It is submitted that it would be preferable to mitigate the unfairness of the operation of the doctrine against the procrastinating owner by other means.

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[156] Ibid.
[157] Ibid at p 2433.
[158] See the January submission to government of the Law Society's Conveyancing Committee above n 21 at pp 7-8.
[159] Ibid. See also Stake above no 155 at 2472-2473.
[160] See Law Com no 254 above n 3 at paras 10.55-10.57.
[161] Above n 1 at para 73.

The Irish Law Reform Commission proposals require the squatter to apply for a court order and permit the court to order the service of notices or the placing of advertisements. Although justified on the basis of the increased level of protection this reform will confer on the true owner, it is difficult to see how it would improve on the current Property Registration Authority procedures. The Practice Direction published by the Property Registration Authority clearly states that enquiries must be made to establish the names and addresses of the owner (or his or her successors) to ensure that they are warned of the application and given the opportunity to contest it, if desired.[162] If the identity or whereabouts of the owner or his successor is unknown, notices are to be directed in a newspaper circulating in the area where the property is situate,[163] or, in certain circumstances, notices will be directed to be displayed on the property.[164] The arguments advanced by the Law Society's Conveyancing Committee in favour of permitting the Property Registration Authority to retain its current role in processing adverse possession applications are very convincing.[165]

The Law Reform Commission also recommended a radical change in the substantive law on adverse possession. The operation of the doctrine would be limited to specific situations which have already been set out.[166] It cannot be denied that these situations represent the majority of cases where adverse possession is claimed. However, the introduction of such reform may reverse or cast doubts over some court decisions which, to this writer's knowledge, have not been criticised on the basis that they were unfair to the true owner. In *Murphy v Murphy*[167] the son succeeded in claiming adverse possession of 40 acres of land, which was left to his mother in his father's will. The evidence indicates that they both may have misunderstood the will and believed that the son owned the land in question. After his mother's death, his brother became entitled to her estate and claimed the land in question. It could hardly be argued that this was a case of mistaken boundaries and the circumstances do not easily correspond with any of the other situations outlined by the Law Reform Commission. Much of the academic commentary on the decision in *Perry v Woodfarm Homes Ltd*[168] expressed sympathy for the squatter on unregistered leasehold land and argued for the improvement of his position by the implementation of a statutory conveyance on the expiry of the limitation period.[169] The squatter in the *Perry* case was aware that he did not own the plot of land near his house and would therefore fail to satisfy the good faith requirement set out by the provision on mistaken boundaries. Perhaps the residual category, which permits the operation of the doctrine in the interests of settling the title in the fairest manner, could be developed by the court to permit adverse possession in such circumstances. It is also unclear whether a squatter would succeed against the procrastinating owner under these proposals. Although, the definition of adverse possession was amended to clarify that it could take place against an owner with future plans,[170] the squatter

[162] See above n 33 at paras 22.1-22.2.
[163] Ibid at para 22.3.
[164] Ibid at para 22.2.
[165] See the text accompanying n 24-27 above.
[166] See the text following n 19 above.
[167] See above n 95.
[168] See above n 40.
[169] See, eg, U Woods, 'Adverse Possession of Unregistered Leasehold Land' (2001) 36 Ir. Jur. (n.s.) 304. Note the reform introduced in this respect by the Registration of Deeds and Title Act 2006, s 50(d).
[170] See above n 19.

would presumably have to prove that the property had been abandoned or else bring himself within the residual category. The Commission may have envisaged the making of an order subject to the payment of compensation in such circumstances. It is submitted that reforming the substantive law in this way could have unforeseen implications; it may introduce uncertainty into when the doctrine operates and could reduce the role of the Property Registration Authority in determining such claims.

In England, the early warning system introduced by the Land Registration Act 2002 seems to have been primarily motivated by respect for registration principles. Previously, rights acquired or in the process of being acquired under the doctrine had overriding status and bound a purchaser of the land even though they were not apparent from the register.[171] As O'Connor points out 'the "overriding rule" undermines registration principles by allowing the off-register acquisition of a title and off-register extinguishments of a registered title.'[172] She also notes that some jurisdictions which introduced a 'prohibition rule,' eradicating the doctrine in so far as it applies to registered land, have since been forced to relax their approach to deal with problems of abandonment and informal conveyancing.[173] A number of jurisdictions operate a 'refresh rule,' which permits purchasers to rely on the register notwithstanding the extinguishment of the registered title by giving them the benefit of a fresh limitation period. O'Connor criticises this rule however on the basis that it fails to adequately protect existing registered owners.[174] She seems to prefer the 'veto rule,' which allows registered title to be extinguished only by an alteration of the register and gives the registered owner a right to object to the application. Although some veto systems are absolute she notes that the English system qualifies the grounds for objection and has only a temporary effect.[175]

Once an application is made for registration by the adverse possessor[176] under Schedule 6 of the Land Registration Act 2002, notice of the application must be served on the registered owner.[177] The registered owner may then object to the application[178] and, in such circumstances, the applicant will only be registered as proprietor if one of the following conditions is met:

1. it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as the proprietor;
2. the applicant is for some other reason entitled to registered as the proprietor of the estate;
3. the land in question is adjacent to land belonging to the applicant and for at least ten years of the period of adverse possession ending on the date of the

[171] Land Registration Act 1925, s 70(1)(f).
[172] P O'Connor, 'Possessory Claims to Registered Land: The International Experience' Sixth Biennial Conference in Property Law, University of Reading, UK, 21-23 March 2006 at p 28.
[173] Ibid at pp 8-9.
[174] Ibid at p 28.
[175] Ibid at pp 11-14 and p 29.
[176] Note that only 10 years adverse possession is required.
[177] Sch 6, para2 (1)(a).
[178] Sch 6, para 3.

application the applicant or any predecessor in title reasonably believed that the land belonged to him.[179]

If the registered owner fails to bring proceedings to eject the adverse possessor within two years of the date of the applicant's rejection or fails to enforce a judgment for possession which was given against the adverse possessor in the last two years, the applicant may make a further application to be registered, in which case the applicant shall be registered, provided that he has remained in adverse possession.[180]

The early warning system clearly guards against the loss of title through inadvertence and may well have been motivated by recent cases involving adverse possession against local authorities.[181] The English provisions are to be praised in that they will prevent an owner with future plans in relation to the property from losing his title. If such an owner was prepared to contest the adverse possession proceedings it must be presumed that he will respond to the notice and object. If he does not object, or if he fails to follow through on the objection by removing the squatter or regularising the position, his apparent lack of interest in the land or its financial value provide adequate justification for extinguishing his property rights. The provisions also respect the reality that in some cases the moral advantage rests with the applicant and an objection by the owner should not be taken into account. A qualified veto rule, similar to the English one but incorporating any modifications necessary to accommodate Irish land law peculiarities, could quite easily be introduced. The added protection afforded to registered owners by these provisions may encourage owners to voluntarily apply for first registration and therefore also helps to deliver on the goal of completing the Title Register. However, it is difficult to ignore the fact that they leave the owner of unregistered land at a distinct disadvantage in circumstances that are not always justifiable. On an application for first registration based on possession the Property Registration Authority, will in any case be concerned with identifying the owner to give him the opportunity to contest the application.[182] Frequently, the owner of unregistered land can be easily identified and where this not possible the Property Registration Authority could continue its procedure of directing the display of site notices or advertisements in newspapers. It could be argued that extending the qualified veto to applications for first registration based on possession could negatively impact on the unregistered conveyancing process. It could make conveyancers reluctant to rely on the passage of time alone, as a means of quieting title in circumstances where there is some defect in the title. It is true that the introduction of such a reform may increase the pressure on a person, relying on the Statute of Limitations to remedy such a defect, to apply for first registration if he wishes to sell the property. However, such an application may shortly become necessary in any event, when compulsory registration is extended to the entire country.[183] Currently, the Property Registration Authority may seek evidence of possession for the limitation period on an application for first registration if such a

[179] Sch 6, para 5.
[180] Sch 6, para 6.
[181] See, eg, *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596; *Lambeth London Borough Council v Archangel* [2002] 1 P&CR 18; *Lambeth London Borough Council v Bigden* (2001) 33 HLR 43; *Lambeth London Borough Council v Blackburn* (2001) 82 P&CR 494. See also Fox, above n 5 at pp 242-244 and 253-256.
[182] See Land Registration Rules 1972, rule 17 and Sch of Forms, Form 5.
[183] See below n 196 and accompanying text.

defect exists.[184] If appropriate, notice would be served on any person who retains a technical interest due to the defect. If an early warning procedure was introduced, it could be clarified that an objection by a person who claims an interest by virtue of some technical defect in an earlier conveyance is ineffective. It should be noted that a person with a title that is less than perfect also has the option of applying for first registration with a qualified title,[185] which can be converted into an absolute title in due course.[186] Although the English reforms pivoted around the demands of registration principles, it is submitted that failing to take the opportunity to also explore the operation of the doctrine in the context of unregistered land would be short-sighted and lead to inconsistencies in the law. The decision in *Pye* does not preclude a finding that the doctrine's application to unregistered land is also incompatible with the Convention. Tackling this issue through legislation would obviate the danger of judicial intervention requiring the re-interpretation of the common law in accordance with the Rule in *Leigh v Jack*.

It is not submitted that the early warning system is flawless. The protection afforded to the owner is obviously dependant on him keeping the register up to date and, if the system is extended to applications for first registration, the dangers of the owner not receiving the warning would be even higher. However, it is still the simplest way of increasing the protection afforded to the owner. Fox argues that the introduction of the early warning mechanism in England may render 'forgotten' properties, currently owned by local authorities, unmarketable. Many squatters, she argues, will choose not to apply for registration and they will simply remain in occupation of the properties.[187] This argument may not carry as much weight in Ireland as urban squatting does not appear to be as endemic.

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A re-evaluation of the Irish law on adverse possession was put on the back burner, pending a decision by the Grand Chamber in *Pye*. Although some may argue that a reversal of the decision of the European Court of Human Rights by the Grand Chamber would eliminate the need to reform this area of law, it should be remembered that the purpose of the Convention is to guarantee only a minimum standard of protection, particularly in those areas where a broad margin of appreciation is afforded to Convention States. Although decision by the Grand Chamber would decrease the pressure to introduce reforms, other factors also point to the timeliness of a re-evaluation of how this doctrine operates in Ireland. The Registration of Deeds and Title Act 2006 has conferred a mandate on the Property Registration Authority to extend compulsory registration to the entire country.[188] Although many jurisdictions have amended the doctrine so that it sits more comfortably within a registration of title system, to date in Ireland the doctrine has been applied in a uniform fashion to both registered and unregistered land. Rights acquired or in the process of being acquired under the Statute of Limitations are

[184] Note that Rule 17 of the Land Registration Rules 1972 permits an application for first registration based on possession or where the applicant has no documents of title. Such an application is made by completing Form 5, which requires the applicant to set out details of the occupation of the property, details of the owner and details of the title which is alleged to have been acquired through the expiry of the limitation period.

[185] See s 33 of the Registration of Title Act 1964, as substituted by s 56 of the Registration of Deeds and Title Act 2006.

[186] See s 50 of the Registration of Title Act 1964.

[187] Fox, above no 5 at pp 256-260.

[188] See s 10(1)(b).

treated as overriding interests.[189] A deeper respect for the 'mirror principle' seems to have developed recently in preparation for the introduction of eConveyancing.[190] It has, for example, prompted revisions to earlier recommendations made by the Law Reform Commisssion in relation to the acquisition of easements by prescription.[191] Its most dramatic influence, however, can be seen in section 21 of the Land and Conveyancing Law Reform Bill 2006 which eliminates the overriding status of the equitable interests of those in occupation of the land. Such a development provides an ideal backdrop against which to question the overriding status of other rights, such as those acquired or in the process of being acquired under the doctrine of adverse possession. Registration principles aside, a re-evaluation of the doctrine is also timely in the current law reform climate where many less popular features of Irish land law, such as the rule against perpetuities,[192] have been deemed unnecessary in modern times and will be phased out under the new Bill. Our fondness for the doctrine of adverse possession should not preclude an examination of whether it may operate unfairly in certain circumstances.

[189] Registration of Title Act 1964, s 72(1)(p)
[190] See above n 17.
[191] See ss31-37 of the Land and Conveyancing Law Reform Bill 2006, which reflect changes which were made to the recommendations made by the Law Reform Commission in its *Report on the Acquisition of Easements and Profits A Prendre by Prescription* (LRC 66-2002). The changes are likely to have been prompted by John Mee's article 'Reform of the Law on the Acquisition of Easements and Profits à Prendre by Prescription' (2005) 27 DULJ 86.
[192] See s 16(d) of the Land and Conveyancing Law Reform Bill 2006.