

Adverse Possession – Does the owner get his just deserts?

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The doctrine of adverse possession, as most people know, operates to extinguish the owner's title to land once a squatter has been in adverse possession of it for 12 years, and allows the adverse possessor or squatter to become the owner of that land. The doctrine still operates in this manner in Ireland and in relation to unregistered land in England. However, the English Land Registration Act 2002 dramatically reformed the doctrine in relation to registered land conferring the registered owner with the power to veto most adverse possession claims.

This paper does two things. First, it examines how sympathy or antipathy for the owner emerges as a theme in the academic literature which discusses the law on adverse possession. The second aim of this paper is to discuss whether sympathy for the plight of the owner has already, or could be used in the future, influence whether the courts apply the rule in *Leigh v Jack*.²

The blameworthiness of the owner as portrayed by the literature

Two caricatures of the landowner occasionally emerge from adverse possession literature: One portrays him as the innocent victim of an unjust law which fails to adequately protect his interests; in the other he presents as the villain of the piece, guilty of neglecting the care or oversight of the land, a character who gets his just deserts in losing title to the land.

The idea that the owner is blameworthy is based on a traditional rationale which has been advanced for the doctrine of adverse possession known as the 'sleeping theory'. It is argued that the doctrine of adverse possession is justified on the basis that it prevents a plaintiff from sleeping on his rights. Stake sums it up by saying 'you snooze, you lose'.³ At the extreme end of the spectrum of sleeping plaintiffs, is the owner who fails to act as he has abandoned the land. Closer to the other end of the spectrum is the sleeping plaintiff who fails to detect the adverse possession due to a failure to monitor the land; it has been suggested that this owner could be described as a 'bad land steward'.

A very closely related rationale for the doctrine of adverse possession is the 'earner' theory, which justifies it on the basis that it punishes the owner who fails to use the land or develop it and rewards the squatter for doing so and also for bringing it back onto the market once he has acquired title. As we shall see, the moral and economic dimensions to these justifications tend to be linked. There is no shortage of American academic articles which critique the sleeping and earner theories and many of the authors reach a broadly similar conclusion that they do not, on their own, adequately justify the doctrine.⁴

¹ Please note that this conference paper is a work in progress.

² (1879) 5 Ex D 264.

³ Stake, 'The Uneasy Case for Adverse Possession' 89 (2000-1) Geo. L.J. 2419 at 2434.

⁴ See in particular, Stake, 'The Uneasy Case for Adverse Possession' 89 (2000-1) Geo. L.J. 2419; Merrill, 'Property Rules, Liability Rules and Adverse Possession' 79 (1984-85) Nw UL Rev 1122; Fennell, 'Efficient Trespass: The Case for "Bad Faith" Adverse Possession' 100(2006) Nw UL Rev 1037.

Merrill, Fennell and Stake view this social policy of punishing a 'sleeping owner' and rewarding a 'working possessor' as 'dubious' or a 'straw man argument worthy of ridicule.' The rationale ignores the prerogative of a property owner to do whatever he wants with his property, so long as he does not injure others. They also point out that a passive use may be the best use. Stake notes that productive use may be undesirable from an environmental perspective and refers to the critical literature on this issue. Merrill argues that even land speculation may be the best use. The authors also point out that these rationales overstate what is required of the owner to avoid losing the land through adverse possession: he does not have to develop his land or even occupy it; all he has to do periodically is assert his right to exclude others. As Stake notes, the owner 'can avoid loss of title merely by monitoring... The incentive to use the land thus withers into an incentive to inspect for possessor every few years.'

The authors point out that this requirement for absentee owners to monitor their lands may 'flush out offers to purchase' which reduces the sleeping theory to a rationale designed to facilitate land transactions. Stake, qualifies this benefit by noting that very few buyers will want to camp out on the land in hopes of meeting the owner. He concludes, 'the slightly greater chances for buyers to find sellers of land is not enough to dislodge the conclusion that increased monitoring is a cost rather than a benefit of adverse possession.'

The English literature on the sleeping theory was, until recently, less extensive. Dockray in his seminal article⁵ devotes a paragraph to it pointing out that it fails to provide a comprehensive explanation of the policy of the Limitation Act as it can only encourage an owner to protect himself if that owner knows or possibly if he ought to know that time has begun to run against him. But actual or constructive knowledge of the accrual of a cause of action is not a precondition for the operation of the Statute. Bogusz in her legislative note on the 2002 Act⁶ comments that adverse possession may have had a role to play in feudal times when there was a need for some form of land redistribution as feudal landowners could no longer manage the estates they owned.

This point inadvertently touches on the vital role which the doctrine of adverse possession continues to play in underdeveloped countries. The importance of the doctrine in this context seems to be due to a combination of factors – inadequate land titling systems, vast areas of under-utilised land, and a shortage of housing. Gardiner, in his article,⁷ encourages the more liberal application of adverse possession laws in less developed countries to counteract their inefficient property allocation systems.

England, like many countries, suffers from a social housing shortage, an injustice which is compounded by the number of empty, unused and forgotten properties owned by local authorities. Two recent articles by Fox-O'Mahony and Cobb⁸ are extremely critical of large

⁵ 'Why do we need adverse possession?' [1985] Conv 272, 274.

⁶ Bringing Land Registration into the Twenty-First Century – The Land Registration Act 2002' 65 (2002) Mod L Rev 556 at 563.

⁷ 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.

⁸ 'Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002' 27(2)(2007) LS 236; 'Taxonomies of Squatting: Unlawful Occupation in a New Legal Order' 71(6)(2008) Mod L Rev 878.

landowners in England, particularly local authorities, who fail to monitor their properties. In their first article they accuse the Law Commission of ‘moral essentialism’ in its treatment of owners in formulating the proposals for the reforms which were introduced by the Land Registration Act 2002. The central focus of this first article by Fox and Cobb is the matter of forgotten properties. Fox and Cobb note:

For the Law Commission, the problem of forgotten properties was one for which landowners were regarded as blameless... The clear (and contentious) moral implication here – that landowners cannot rather than simply do not supervise their properties effectively – reinforces the view that they should not be punished for inadequate supervision by losing title to their land. The LRA 2002 was specifically designed to protect registered proprietors from the possibility of such oversight or inadvertence.⁹

Fox and Cobb note that the Law Commission focus is on large landowners and assumes that all examples of oversight were not the fault of landowners, but rather an unavoidable consequence of the ownership of huge volumes of land spread across large areas. They state, ‘it is arguable that many large landowners are in a better position financially to manage their property effectively and should therefore be expected to take much greater responsibility for surveillance.’ They also note, ‘...the challenges of effective supervision seem less acute for landowners of smaller tracts of land. One of their main arguments¹⁰ is that landowners who fail to monitor their land are in breach of their duty of stewardship and therefore have a morally weaker claim to the property than an urban squatter who occupies it as a home. They state that this duty of stewardship should include a fundamental obligation to engage in an appropriate degree of supervision over empty land.

In their second article, Fox-O’Mahony and Cobb discuss the Human Rights litigation in the Pye case, in which the Grand Chamber ruled that the old law on adverse possession did not infringe the right to property of the owner of the land. Much of their critique of the Grand Chamber’s decision is utterly convincing. However, they conclude with a claim, which builds on the point they made in their earlier article, that the interference with the right to property which took place under the old regime of adverse possession could be justified by the public interest it serves in promoting owners to act as good land stewards.

It is true that a stewardship model of land ownership has replaced the more traditional liberal conception of ownership.¹¹ This model generally restricts the owner’s rights of use and exclusion to comply with his community orientated responsibilities and forms a solid basis for regulation designed to protect the environment or heritage or to confer public rights of access to the countryside.¹² I find it difficult to use this ideology to justify the complete extinguishment of title which takes place under the old regime of adverse possession, especially when a duty to monitor the land does not impose an obligation to care for it. In my

⁹ See ‘Living Outside the System’ *ibid.*, 244-245.

¹⁰ Fox and Cobb also make an interesting point that as the urban squatter (who is more concerned about the use value of the property than the acquisition of title) is now unlikely to make an adverse possession application to the land registry, the registered owners will not be notified about such properties and they are likely to remain forgotten, possibly becoming dilapidated, with no possibility of being brought back onto the market.

¹¹ See Gray and Gray, *Elements of Land Law* 5th ed (2009) pp111-114; Gray, ‘Equitable Property’ (1994) 47(2) *Current Legal Problems* 157, 189.

¹² See, generally, McKenzie Skene, ‘Stewardship: from rhetoric to reality’ (1999) *Edin. L.R.* 151; Howe, ‘Copyright limitations and the stewardship model of property’ (2011) *IPQ* 183.

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view, the doctrine does not represent a proportionate response in this regard. Even when the law does intervene to promote the maintenance of land or buildings in the public interest, for example under the Irish Derelict Sites Act 1990, warning notices and fines are generally relied on. The compulsory acquisition of title is seen as the last resort when all other attempts to encourage the landowner to comply with his obligations have failed. This gentler or more nuanced approach to promoting the oversight of land in fact mirrors the early warning system of adverse possession introduced by the 2002.

Although the Law Commission may have been guided by intuition rather than an analysis of the literature in making its proposals, much of this literature in fact rejects the sleeping theory or the need to monitor land as an adequate justification for the doctrine. Perhaps the Law Commission was overly influenced by the problems faced by local authorities in dealing with adverse possessors and it is also true that they could have made a better attempt to view the moral quandaries presented by the situation of the urban squatter more holistically. Fox and Cobb do an excellent job of re-balancing the case for reform by presenting the benefits of the old law from a moral perspective which highlights the difficulties faced by urban squatters and the blameworthiness of local authorities in failing to keep track of their properties. I would argue however, that these authors may also be guilty of a degree of moral essentialism in their analysis of the blameworthiness of the owner. However, it is difficult to see how subjective biases can be avoided in assessing whether a law is unfair especially when you examine how it operates in specific situations. In reality most landowners lose title through adverse possession to their neighbours or members of their family. Such landowners often wish to avoid conflict and assume that the occupier recognises that their presence is simply tolerated by the owner. Does this failure to formalise the arrangement or commence litigation due to a desire to avoid antagonising neighbours or family really make the owner a bad land steward? The failure to act becomes even more understandable if the owner has no current use for the property but has future plans for it. Fox-O'Mahony and Cobb make their argument in relation to the owner's duty of stewardship against the backdrop of the *Pye* litigation which draws particular attention to the position of this type of owner and yet they fail to really address the blameworthiness of *Pye*.

Leigh v Jack – Has it been applied out of sympathy for the owner?

Whether the doctrine should operate in these circumstances in favour of the squatter who is currently making use of the land has presented difficulties for the courts for many years, ever since Bramwell LJ set out the rule in *Leigh v Jack* in a Court of Appeal decision bearing that name. This rule states that time cannot run in favour of the squatter unless he is engaged in acts of user which are inconsistent with the future plans of the owner. The dilemma for subsequent courts was that there were a number of reasons for the decision in *Leigh v Jack* and therefore the case was often cited to support other fundamental elements of the doctrine. Whether the rule in *Leigh v Jack*¹³ should be applied has confounded the courts for many years although, to date, the judiciary has, for the most part, decided the issue as a matter of black letter law, or at least with no express references to the blameworthiness of the owner.

The judgment of Nicholas Strauss QC in *Beaulane Properties Ltd v Palmer*¹⁴ represents the only attempt by the judiciary to apply the rule in *Leigh v Jack* to ensure that the owner's rights were adequately protected. He was satisfied that the law in relation to registered land,

¹³ (1879) 5 Ex D 264.

¹⁴ [2006] Ch 79.

as it applied before the 2002 Act,¹⁵ 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 apply the rule in *Leigh v Jack* which meant that the owner did not lose title through adverse possession.¹⁶ This approach is now only of historic value given the Grand Chamber ruling in *Pye* that the law in question was compatible with the Convention.¹⁷

In Ireland, 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*.¹⁸ It is interesting to note that in the only Irish High Court case to rule in favour of the owner solely on the basis of the rule in *Leigh v Jack* (*Cork Corporation v Lynch*¹⁹), the court criticised the Corporation's delay in bringing proceedings and refused an order for costs. To sum up, sympathy for the owner does not seem to have overtly shaped the law in this area.

Was the owner in *Pye* blameworthy?

The European Court of Human Rights did refer to the culpability of the company in failing to regularise the Grahams' occupation of the land or issue proceedings within the 12-year limitation period, particularly given that it was engaged in specialised professional real-estate development and should be assumed to have knowledge of the law on adverse possession.

However, in my opinion, the culpability of the company was not so clear cut. There was a history of grazing agreements and it would clearly have been in the financial interests of the company to enter into another grazing agreement with the Grahams. The reasons for not doing so were strategic; they feared it would prejudice a planning application. The company was 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 is arguable that the company 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. Can the owner really be described as a bad land steward in such circumstances?

A potential role for *Leigh v Jack* to protect the owner

Before the Grand Chamber decision was delivered in *Pye*, Buckley argued that the application of the rule in *Leigh v Jack* could prevent a ruling that the Irish law on adverse

¹⁵ The law is set out in section 75 of the Land Registration Act 1925.

¹⁶ Some have questioned his authority to effectively over-rule the earlier House of Lords decision in *JA Pye (Oxford) Ltd v Graham* where Lord Browne Wilkinson emphatically rejected the rule in *Leigh v Jack*. See Martin Dixon, 'Adverse Possession and Human Rights' [2005] Conv 345 at 350.

¹⁷ Particularly since the Court of Appeal decision in *Ofulue v. Bossert* [2008] EWCA Civ 7.

¹⁸ See *Durack Manufacturing Ltd v Considine* [1987] IR 677. Recently, Barron J's approach in *Considine* was strongly endorsed in *obiter* comments by Mr Justice Frank Clarke in *Dunne v CIE* [2007] IEHC 314 at [4.6-4.7] and also by Ms Justice Maureen Clark in *Kelleher v Botany Weaving Mills Ltd* [2008] IEHC 417 at [16]. Pearce and Mee conclude that this approach represents the modern position in the Republic of Ireland, see *Land Law* (3rd ed, Roundhall, 2011) at p 214. Wylie notes that such an approach seems to be more consistent with the views of the Supreme Court expressed in *Murphy v Murphy* [1980] IR 183, see *Irish Land Law* (4th ed, Bloomsbury Professional, 2011), at [23.22].

¹⁹ [1995] 2 ILRM 598.

possession was incompatible with the European Convention on Human Rights.²⁰ 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 judiciary²¹ and the Irish Law Reform Commission has twice recommended statutory clarification that it does not apply.²² If more protection is needed for the owner, the application of this rule appears to be an inelegant and haphazard method of meeting such a need and I'll explain why in a minute.

More recently Katz in an article appearing in the McGill Law Journal made a strong plea for the reincarnation of the rule in *Leigh v Jack* which she refers to as an 'inconsistent use' model of adverse possession.²³ She feels that the majority of American jurisdictions view the transformation of a land thief into a land owner which takes place under the doctrine of adverse possession as morally paradoxical. She describes the English model of adverse possession as a procedural one which focuses on the extinction of the title of the owner on the expiry of the limitation period. It relies on the doctrine of relativity of title to avoid the radical transformation of land thief into land owner and so sidesteps the moral paradox faced by American jurists. She criticises this approach as relying on an unsatisfactorily weak conception of ownership.

She claims that the adoption of an 'inconsistent use' model of adverse possession would acknowledge the radical transformation of squatters into owners without collapsing into a moral paradox. She believes that this approach resolves a number of difficulties. It recognises the authority of the owner to set an agenda for the land and to remain the owner without maintaining possession. This model of the doctrine fills a vacancy in ownership where the owner is no longer exercising his authority and the land has become agenda-less. Where the owner has future plans for the land, the uses by the squatter must be inconsistent with that future use or agenda in order to challenge the authority of the owner. She draws an analogy between the position of the successful adverse possessor and a government which has taken over as a result of a bloodless coup d'état. She maintains that this model of adverse possession 'solves the moral problems of agenda-less objects just as the recognition of the existing government (whatever its origins) solves the moral problem of stateless people.'

Katz proposal would make it more difficult for an adverse possessor to succeed and afford more protection to certain owners. However, I have a number of difficulties with it. First, 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. Also, the inconsistent user test may not be as easy to apply as she suggests, particularly in the case of a procrastinating or speculating owner. 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 inconsistent with some of the plans but not with others. Also, in the case of a speculating owner, Katz assumes that such an owner has no plans or agenda. Surely, his agenda is to sell when the time is right? In such circumstances, it is difficult to see how building on the land could be deemed inconsistent with this agenda - he can still fulfil his plans to sell the land, by knocking the building or selling the property with the benefit of the building. This approach seems to overly skew the

²⁰ Buckley, note 7, at 64.

²¹ See *Seamus Durack Manufacturing Ltd v Considine* [1987] IR 677; *Buckinghamshire County Council v Moran* [1990] Ch 623; *JA Pye (Oxford) Ltd v Graham* [2002] All ER 865.

²² *Report on Land Law and Conveyancing Law: General Proposals* (LRC 30-1989) at [52-53]; *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) at [12.04].

²³ Katz, 'The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law' (2010) 55 McGill LJ 47.

law in favour of certain owners, while owners with no definite plan or agenda are left unprotected. Her article also pre-supposes ambivalence on the part of English jurists in relation to the morality of the doctrine. However, certain judges have been quite vociferous in their criticism of the law and, as was highlighted earlier, a very clear moral stance was adopted by the Law Commission of England and Wales in the proposals which formed the basis for the 2002 reforms. However, my most fundamental difficulty with her proposal is her assumption that the inconsistent user test is the best model for protecting the authority of the owner. She fails to discuss the merits of the veto or early warning system of adverse possession recently introduced in England.