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Protection for Owners under the Law on Adverse Possession: An Inconsistent Use Test or a Qualified Veto System?

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Abstract

This article will assess the case for reforming the Irish law on adverse possession to confer additional protection on the owner. Assuming such reform is warranted, it is possible that an existing judicial solution, known as the rule in Leigh v Jack, has already been devised. Ontario's experience with an equivalent rule, known as the inconsistent use test, is of interest in this context and certain academic literature is discussed which explains why the inconsistent use test was developed and argues in favour of its retention or resurrection. An alternative model of protection is then analyzed: the English Qualified Veto System of adverse possession introduced by the Land Registration Act 2002. I argue that a judicial or legislative reincarnation of the rule in Leigh v Jack would be an extremely flawed method of reforming the law in jurisdictions, such as Ireland, which are considering reform, as the Qualified Veto System more effectively responds to the difficulties which the inconsistent use test appears to be attempting to resolve. I conclude that such a Qualified Veto System, similar, although not identical to the one introduced in England, should be introduced in Ireland.

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THE INCONSISTENT USE TEST or, its English ancestor, the rule in *Leigh v Jack*,[1] has been the target of much judicial and academic criticism since its inception.[2] Although the English House of Lords has definitively rejected the rule in *Leigh v Jack*—Lord Browne-Wilkinson referring to it as "heretical and wrong"[3]—its status elsewhere remains less certain. For example, whether the rule still forms

1. (1879), 5 Ex D 264 [*Leigh v Jack*].
2. For criticism of the inconsistent use test, see *Teis v Ancaster (Town)*, 1997 ONCA 1688 at para 24 [*Teis*]; *Bradford Investments (1963) Ltd v Fama* (2005), 77 OR (3d) 127 at para 100 (Ont Sup Ct) [*Bradford*]; Brian Bucknall, "Two Roads Diverged: Recent Decisions on Possessory Title" (1984) 22 Osgoode Hall LJ 375. For criticism of the rule in *Leigh v Jack*, see *Seamus Durack Manufacturing Ltd v Considine*, [1987] IR 677 (Ir) [*Seamus Durack*]; *Buckinghamshire County Council v Moran*, [1989] EWCA Civ 11; *JA Pye (Oxford) Ltd v Graham*, [2002] UKHL 30 [*JA Pye 2002*]; Martin Dockray, "Adverse Possession and Intention-II" (1982) The Conveyancer 345 at 346-47; Adam Cloherty & David Fox, "Heresies and Human Rights" (2005) 64 Cambridge LJ 558. The Irish Law Reform Commission has twice recommended the introduction of statutory clarification that it does not apply. See Ireland, The Law Reform Commission, *Report on Land Law and Conveyancing Law: General Proposals*, LRC 30-1989 (The Law Reform Commission, 1989) at paras 52-53; Ireland, The Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law*, LRC CP 34-2004 (Law Reform Commission, 2004) at para 2.04.
3. JA Pye 2002, *supra* note 2.

part of Irish law is a matter of debate.[4] Moreover, the inconsistent use test has enjoyed an unparalleled revival in certain parts of Canada, particularly in Ontario, leading one commentator to describe it as a functional substitute for the civil law concept of interversion.[5]

The rule in *Leigh v Jack* is named after an English Court of Appeal decision delivered in 1879 and is attributed to Lord Justice Bramwell who declared:[6]

> in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes.

While the rule held sway in England and Wales,[7] it was applicable if the owner had a plan to use the land for some specific purpose in the future and, in the meantime, some other person took physical possession of it.[8] The rule prevented adverse possession from taking place if the adverse possessor's current use was not inconsistent with the owner's future plan for the property. In contrast, the inconsistent use test appears to play a more important role in adverse possession claims. The courts apply it in a more universal fashion, for example, if the owner has an existing, although limited purpose (as opposed to a future plan) for the land.[9] In such circumstances, its current use must be inconsistent with the owner's existing purpose for the land to qualify as adverse possession. It could be argued that this extension of the inconsistent use requirement is facilitated by a literal reading of Lord Justice Bramwell's original dictum in *Leigh v Jack* which

4. There are conflicting High Court decisions. See *Cork Corporation v Lynch*, [1995] 2 ILRM 598 (Ir); *Seamus Durack*, *supra* note 2. Buckley argues that the rule in *Leigh v Jack* continues to play a role in Irish law. See Niall Buckley, "Adverse Possession at the Crossroads" (2006) 11 Conveyancing & Prop LJ 3 at 59, 64. In contrast, Woods argues that it cannot be confidently asserted that the rule forms part of Irish law. See Una Woods, "The Position of the Owner under the Irish Law on Adverse Possession" (2008) 30 Dublin U LJ 298 at 317-22 [Woods 2008].
5. See Michael H Lubetsky, "Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law" (2009) 47 Osgoode Hall LJ 497 at 525-27.
6. *Leigh v Jack*, *supra* note 1 at 273.
7. For a description of the evolution of the rule in England and Wales, see Woods 2008, *supra* note 4 at 314-17.
8. See the explanation of the case law (following *Leigh v Jack* put forward by Sir John Pennycuick) in *Treloar v Nute*. See *Treloar v Nute*, [1976] 1 WLR 1295 at 1300-01 [*Treloar*].
9. Katz comments: "The inconsistent user test is typically applied in resolving a contest between a deliberate squatter and an owner-occupier." See Larissa Katz, "The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law" (2010) 55 McGill LJ 47 at 68.

requires, "acts to be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."[10] It is worth noting however that, in England, a similar interpretation of the rule, known as "the doctrine of necessary inconvenience," made only a brief appearance in the case law before it was rejected.[11]

A persistent, although sporadic theme which has emerged in law reform and judicial circles across the common law world in recent decades has been the fairness of the doctrine of adverse possession. A principal concern relates to the doctrine's failure to confer adequate protection on owners against the danger of inadvertently losing title by adverse possession. In addition, critics have emphasized the extent to which it permits squatters who know they do not own the land (*i.e.*, deliberate or "bad faith" squatters) to acquire title.[12] The Irish law on adverse possession has not escaped this controversy. The Law Reform Commission in a report published in 2005 noted, "it appears to exact a very severe penalty on a landowner (the loss of the land) through a mere oversight or

10. *Leigh v Jack*, *supra* note 1 at 273.
11. Dockray maintains that Justice Slade applied this approach in reaching his decision in *Powell v McFarlane*, (1977) 38 P & CR 452 [*Powell*]. See also Dockray, *supra* note 2 at 349-50. However, *Powell* can also be explained on the basis that the intruder's user was equivocal and did not amount to possession in the absence of an intention to dispossess the owner. See Stephen Jourdan & Oliver Radley-Gardner, *Adverse Possession*, 2nd ed (Bloomsbury Professional, 2012) at para 9.88. See also *Treloar*, *supra* note 8. In *Treloar v Nute*, the Appellate Court held it was not permissible to import into the definition of adverse possession a requirement that the owner had to be inconvenienced or otherwise affected by that possession. It was held that *Leigh v Jack*, and the cases that followed, could be distinguished as in those cases the owner had future plans for the property. In the absence of plans for such a special purpose, time began to run from such taking of possession irrespective of whether the plaintiff suffered inconvenience from the possession.
12. Media coverage of adverse possession cases tends to be negative. See *O'Hagan (Personal Representative of Alice Dolan, deceased) v Grogan*, [2012] IESC 8 (Ir). See also Tim Healy, "Squatter wins rights to widow's house 30 years after he broke in," *Irish Independent* (17 February 2012), online: <www.independent.ie/irish-news/squatter-wins-rights-to-widows-house-30-years-after-he-broke-in-26822629.html> [perma.cc/PSZ2-WY3Z]. Similarly, the English adverse possession case, *R (Best) v Chief Land Registrar*, [2015] EWCA Civ 17, attracted critical media commentary. See Paul Bracchi & Stephanie Condron, "How the Squatter Who 'Stole' a Pensioner's Three-Bedroom House with the Blessing of the Law Will Cost You £250,000," *The Daily Mail* (22 May 2016), online: <www.dailymail.co.uk/news/article-3601741/Squatter-stole-pensioner-s-three-bedroom-house-blessing-law-cost-250-000.html> [perma.cc/QK3Z-VM7L].

mistake."[13] Part I of this article examines the argument for the introduction of reform to Irish law on adverse possession designed specifically to confer additional protection on the owner against the danger of losing title through the operation of the doctrine. Certain empirical evidence is presented to demonstrate the need to safeguard the position of owners and hone the operation of the doctrine so that only "deserving" adverse possessors would be in a position to rely on the doctrine in Ireland.[14]

Assuming for the moment that the owner does require additional protection under the Irish law on adverse possession, it is possible that an existing, although ostensibly outmoded, judicial solution has already been devised. In 2006, Niall Buckley made a case for the retention of the rule in *Leigh v Jack* to ensure more robust protection for the property rights of the owner.[15] It is worth considering whether Ireland can learn from Ontario's experience with the inconsistent use test in this regard. Part II of this article critiques certain literature which explains why the inconsistent use test was developed and argues in favour of its retention or resurrection. Larissa Katz maintained that the adoption of an "inconsistent use" model of adverse possession permits the radical transformation of squatters into owners without collapsing into a moral paradox where the law appears to reward the theft of land.[16] Katz believes that this approach recognizes the authority of the owner to set an agenda for the land and remain the owner without maintaining possession, but also fills a vacancy in ownership where the owner is no longer exercising their authority and the land has become agenda-less. This article seeks to determine, from the Canadian experience, whether the application of the inconsistent use test represents a regressive, heretical step or an inspired judicial development.[17]

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13. Ireland, The Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law*, LRC 74-2005 (The Law Reform Commission, 2005) at para 2.06 [*Reform and Modernisation Report*]. It also recognized the unfair operation of the doctrine when it enables 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.
14. I discuss briefly this concept of the "deserving" and the "undeserving" adverse possessor in Part III of this article. For a more detailed discussion, see Una Woods, "The 'Undeserving' and the 'Deserving' Squatter under the Irish Law on Adverse Possession" in Bjorn Hoops & Ernst J Marais, eds, *New Perspectives on Acquisitive Prescription* (Eleven International, 2019) [Woods, "The Undeserving and Deserving Squatter"].
15. Buckley, *supra* note 4 at 64.
16. Katz, *supra* note 9.
17. Lord Browne-Wilkinson described the notion that sufficiency of possession can depend on the intention of the true owner as "heretical and wrong." See *JA Pye 2002*, *supra* note 2.

Part III of the article examines an alternative reform option and discusses the Qualified Veto System of adverse possession introduced in England and Wales by the *Land Registration Act 2002*.[18] Through the implementation of this reform, the Law Commission purported to address both of the ethical concerns mentioned earlier.[19] Additional protection is conferred on the registered owner who may veto an adverse possession application. However, the qualifications to the veto system preserve the operation of the doctrine for certain adverse possessors (*e.g.*, a good faith adverse possessor of boundary land) in the interest of fairness.[20] I argue that a similar, but not identical, system of adverse possession should be introduced in Ireland, although lessons can be learned from the English experience in implementing such reform. I conclude by arguing that a judicial or legislative reincarnation of the rule in *Leigh v Jack* would be an extremely flawed method of reforming the law in jurisdictions, such as Ireland, which are still considering reform, particularly given the pragmatic alternative of introducing a qualified veto system of adverse possession.

I. THE CASE FOR ADDITIONAL PROTECTION FOR VULNERABLE OWNERS UNDER IRISH LAW

A. SYMPATHY AND ANTIPATHY FOR THE OWNER

A number of views have been expressed by law reform bodies in Ireland, Northern Ireland, and England and Wales on whether there is an ethical justification for reforming the law on adverse possession to more effectively protect the owner. These views have, in turn, been critiqued by academic commentators who have discussed whether the "typical" owner deserves additional protection or whether the law can, or should, accommodate such ethical concerns. In its report published in 2005, the Irish Law Reform Commission commented, "it must be recognized that on occasion the doctrine may operate unfairly."[21] It made particular reference to the doubts expressed by English courts about the compatibility of the doctrine of adverse possession with the European Convention on Human Rights. It recommended that, in the future, a person claiming title by adverse possession

18. (UK), schedule 6 [*Land Registration Act 2002*].
19. United Kingdom, Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document*, Law Com No 254 (HM Land Registry, 1998) at para 10.19 [*Law Com No 254*].
20. The Law Commission also claimed that these reforms were essential to ensure the compatibility of the doctrine of adverse possession with title registration principles.
21. *Reform and Modernisation Report*, *supra* note 13 at para 2.06.

would have to obtain a court "vesting" order, which would only be available in specified circumstances. These law reform proposals were clearly intended to provide added protection for the owner and to streamline the operation of the doctrine. In doing so, it would continue to apply only where necessary to restore the marketability of abandoned land, and in certain other limited circumstances. However, these particular proposed reforms were jettisoned in response to critical submissions made to the government by the Law Society's Conveyancing Committee, mostly related to the workability of the proposed scheme.[22]

It could be argued that the tenor of the Irish Law Reform Commission's commentary, and its recommendations in this respect, represented a knee-jerk reaction to the *Pye* litigation, which was, at the time, gradually winding its way through the English courts. The *Pye* case originated from an action brought by J.A. Pye (Oxford) Ltd. to recover possession of 25 hectares of land in Berkshire from the personal representatives of Michael Graham, who had been a neighbouring farmer and claimed to have established adverse possession of the land. When the House of Lords ruled in favour of the Grahams, Pye Ltd. proceeded to bring an application against the UK government pursuant to article 34 of the *European Convention on Human Rights*. 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. On 30 August 2007, the Grand Chamber of the European Court of Human Rights delivered its judgment in *JA Pye (Oxford) Ltd v United Kingdom*.[23]

It 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.[24] This application represented a high point of disquiet in relation to the doctrine, and had implications for other contracting states. Indeed, the Irish government made a third party submission to the European

22. Consequently, the *Land and Conveyancing Law Reform Act 2009* (UK), emanating primarily from the recommendations made in the 2005 Report, was enacted without the inclusion of any reforms dealing with the law on adverse possession. For a discussion of these proposals, see Una Woods, *The Irish Law on Adverse Possession: The Case for a Qualified Veto System* (PhD Thesis, Queen's University Belfast, 2015), ch 5 [unpublished] [Woods]. The *Land and Conveyancing Law Reform Act 2009* was enacted on 1 July 2009 and all of its provisions, with the exception of section 132, came into operation on 1 December 2009. Section 132 came into force on 28 February 2010.
23. [2008] 1 EGLR 111 [*JA Pye 2008*].
24. The judgment reversed the Chamber decision delivered on 15 November 2005 which found by four votes to three that there was a violation of the property rights guarantee.

Court of Human Rights, which emphasised the important functions performed by the doctrine in Ireland.[25] The Grand Chamber decision in *JA Pye* eliminated doubts over the acceptability of the English law on adverse possession from a human rights perspective and crushed any possibility that the Convention would act as a catalyst for the reform of the Irish law on adverse possession. It could be argued that the Grand Chamber decision also renders any anxiety in relation to the position of the owner redundant. One could say that it nullifies the case for the introduction of reforms to the doctrine in Ireland designed to confer additional protection on the owner.[26]

In addition, it is interesting that a very different approach was taken in 2010 by the Northern Ireland Law Commission to the ethical issues which have emerged in this area of law. While the Commission noted this development, it ultimately recommended that the law on adverse possession should not be reformed to accommodate ethical concerns.[27] It also expressed the view that it was not appropriate "at this stage" to recommend a veto system of adverse possession of registered land for Northern Ireland.[28]

As mentioned, the Law Commission of England and Wales justified the reforms to the law on adverse possession introduced by the *Land Registration Act 2002* by explaining that the qualified veto system, in conferring additional protection on the registered owner and limiting the extent to which undeserving squatters can rely on the doctrine, strikes a fairer balance between the owner and the squatter.[29] "Fairness" can be a nebulous concept which, like beauty, lies

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25. *JA Pye 2008*, *supra* note 23 at paras 50-51.
26. It is worth bearing in mind that the Convention is designed to guarantee only a minimum standard of protection, particularly in areas, such as property law, where a broad margin of appreciation is afforded to Convention States. In addition, in a recent Irish Supreme Court decision, Justice Laffoy commented that the doctrine of adverse possession remains controversial and stated: "There would seem to be a need for a review of the recommendations made by the Law Reform Commission in 1989, 2002, and 2005 with a view to bringing clarity to the law in this area." See *Dunne v Iarnrd Éireann*, [2016] IESC 47 at para 23 (Ir).
27. Ireland, Northern Ireland Law Commission, *Supplementary Consultation Paper: Land Law, Adverse Possession, Ground Rents, Covenants after Redemption*, NILC 3 (Northern Ireland Law Commission, 2010) at para 2.45 [*Consultation Paper*]; Ireland, Northern Ireland Law Commission, *Report: Land Law*, NILC 8 (The Stationery Office, 2010) at paras 12.6-12.7 [*Report*].
28. *Ibid* at paras 12.10-12.11. *Consultation Paper*, *supra* note 27 at para 2.56. It is interesting to note that it did not definitively reject this as an option but noted that it would require a more in-depth analysis of the circumstances in which adverse possession takes place and whether such a system could be extended to unregistered land.
29. *Law Com No 254*, *supra* note 19 at para 10.19.

in the eye of the beholder, and it is unsurprising that the Commission's claim attracted some academic criticism. Fox and Cobb described the Commission's fairness rationale as predicated on the assumption that, under the old regime, the owner who lost title was blameless.[30] They strongly imply that the old adverse possession regime achieved a fairer result by punishing the (blameworthy) owner who neglected to monitor their property. 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*.[31] Their central focus is the matter of forgotten properties and they note as follows:[32]

> 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.

They also point out that the Law Commission's 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. According to Lorna Fox and Neil Cobb, "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."[33] They also note, "the challenges of effective supervision seem less acute for landowners of smaller tracts of land."[34] One of their main arguments 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

30. Neil Cobb & Lorna Fox, "Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002" (2007) 27 LS 236 at 236, 242.
31. *Ibid* at 256.
32. *Ibid* at 243-44, 257-59. Fox and Cobb also make an interesting point that as urban squatters (who are more concerned about the use value of the property than the acquisition of title) are 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.
33. *Ibid* at 255.
34. *Ibid*.

this duty of stewardship should include a fundamental obligation to engage in an appropriate degree of supervision over empty land.[35]

In a recent article, which examines the case for the introduction of various reforms to the Irish law on adverse possession, John Wylie reiterates the concerns expressed by the Northern Irish Law Commission in relation to the dangers of incorporating an ethical dimension into the doctrine, noting that it is necessary to examine the ethical position of the owner if one begins to consider reforms designed to prevent less ethical applications by squatters.[36] Wylie continues:[37]

> A proper ethical approach would involve weighing in the balance the respective merits of both the dispossessed owner and the squatter in each individual case. I have no hesitation in saying that devising a legislative scheme to achieve this which the courts would find satisfactory to operate would be extremely difficult, if not impossible.

The fact that Wylie's views coincide with those expressed by the Northern Ireland Law Commission in 2010 is unsurprising as Professor Wylie was a member of the legal team engaged for that particular law reform project.

It is axiomatic that owners who lose title through the operation of the doctrine may evoke sympathy or a sense of righteous indignation depending on whether they are perceived to be guilty of wrongdoing and their particular circumstances. On one end of this spectrum of blame/innocence, there is the owner who has completely abandoned their land and is guilty of wasting a valuable resource. On the other end, there is the epitome of the dutiful owner: someone who is unaware that adverse possession is taking place because the land in question can only be used for activities which are less obvious, even with regular monitoring.[38] Somewhere in between you have: (1) the owner who is unaware that they own the land or uncertain about the position of a boundary; (2) the owner who desires to retain the land but neglects to maintain or monitor it; and (3) the owner

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35. *Ibid*.
36. See John Wylie, "Adverse Possession—Still an Ailing Concept?" (2017) 58 Ir Jur 1 at 12. While Wylie argues in favour of the introduction of reforms to more technical elements of the doctrine (*e.g.*, the implementation of the parliamentary conveyance theory), he argues against the introduction of more fundamental structural reforms, for example, the abolition of the doctrine or the introduction of a qualified veto system.
37. *Ibid* at 14.
38. Although legal experts appear to be divided on whether adverse possession must be "obvious," I concur with the opinion of the Law Commission of England and Wales on this issue. In certain circumstances, adverse possession can take place without it being readily detectible, despite monitoring by the owner. See *Law Com No 254*, *supra* note 19 at paras 5.46, 10.4. For further discussion, see Woods, *supra* note 22, ch 3, part 3.

who is aware that someone is in possession but neglects to enter into a formal arrangement with the occupier or take legal action to evict them.

If the owner has no current use for the property but has future plans for it, an owner's failure to act may seem more understandable, although a sympathetic reaction is not a foregone conclusion as the *Pye* litigation aptly illustrates. The resigned reluctance of certain members of the judiciary at the domestic level to rule in favour of the adverse possessor, their sympathy for the owner, and their clear indications of dissatisfaction with the old adverse possession regime,[39] contrasts sharply with the references of the European Court of Human Rights to the culpability of the company in failing to regularize the Grahams' occupation of the land or issue proceedings within the twelve year limitation period. This culpability was viewed by the European Court as particularly pronounced, given that the company was engaged in specialized professional real estate development and should be assumed to have knowledge of the law on adverse possession.[40]

Conway and Stannard note that the public emotional response to the *Pye* litigation was fairly muted, despite the amount of land at stake and its value. They speculate that reactions were probably influenced by the fact that Pye Ltd. was a wealthy (and faceless) corporation with an abundance of land, and in some way responsible for what had happened by failing to remove the Grahams. Also, development land was at stake rather than a private residence.[41] However, when the background to the case is considered in a little more depth, the culpability of the company does not appear so clear cut. There was a history of grazing agreements between the company and the Grahams, 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 may well have noticed that they were continuing to do so. It is arguable that the company had monitored the land, and its representatives were aware and content that it was being exploited and maintained while they were seeking planning permission. The company's representatives were simply guilty of not acting in an antagonistic or litigious fashion towards a neighbouring farmer.

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39. See *JA Pye (Oxford) Holdings Ltd v Graham*, [2000] Ch 676 at 709-10, Neuberger J [*JA Pye 2000*].
40. *JA Pye 2008*, *supra* note 23. References to the culpability of the company appear in the Chamber judgment at 68, the opinion of the dissenting judges at 1-12 and the Grand Chamber judgment at 80.
41. See Heather Conway and John Stannard, "The emotional paradoxes of adverse possession" (2013) 64 N Ir Leg Q 75 at 82-84.

B. WHAT ARE THE CIRCUMSTANCES OF THE "TYPICAL" OWNER AFFECTED BY THE IRISH LAW?

Although adverse possession can occur in a myriad of different circumstances against owners of varying levels of culpability, it makes sense to take due consideration of the most common situations in assessing whether owners are blameworthy, and the case for additional protection. Is the argument made by Fox and Cobb relevant in the Irish context? Does the doctrine currently operate to punish "large landowners" who fail to comply with their duty of stewardship? Is it possible to make any generalizations about the position of the owner who loses title by adverse possession in response to Wylie's reticence to introduce any reforms to the Irish law in this area prompted by ethical concerns?

In Ireland, over one thousand adverse possession applications are made (pursuant to section 49 of the *Registration of Title Act*) to the Property Registration Authority in relation to registered land on an annual basis.[42] The majority of these "section 49 applications" are successful.[43] In addition, approximately five hundred applications for first registration of unregistered land based on possession, otherwise known as Form 5 applications,[44] are made on an annual basis.[45] It has been informally confirmed that adverse possession applications to the Property Registration Authority are rarely lodged against the State, local authorities, or companies. Applications which are made against local authorities or companies are generally uncontested and involve small plots of land.[46] For example, sometimes a small plot of land forming part of a housing estate is not disposed of and is instead incorporated into an adjacent garden.

In 2008, the Property Registration Authority conducted an analysis of section 49 applications received during a one-month period in respect of two

42. These applications are made by completing Form 6. See *Land Registration Rules 2012* (IR), SI No 483/2012. This level of applications appears to be quite consistent: 1,378 section 49 applications were received in 2007 and 1,081 applications were received in 2011.
43. Eight hundred and eighty-four applications were completed in 2007. Seven hundred and seventy-eight applications were completed in 2011. The rest were abandoned, withdrawn, refused, or transferred.
44. Form 5 is set out in the *Land Registration Rules 2012* (IR), SI No 483/2012.
45. Eight hundred and seventy-three applications were received in 2007; 767 applications were received in 2012; 386 applications were received in 2013.
46. It may be that when such cases arise, many of them are settled before an application is even made to the Property Registration Authority. For example, Kitty Holland discusses the financial settlements negotiated between Fingal County Council and certain traveller families living in Dunsink Lane. See Kitty Holland, "Whose Land Is It Anyway?," *Irish Times* (16 June 2007), online: <www.irishtimes.com/news/whose-land-is-it-anyway-1.1210808> [https://perma.cc/H37L-HCDW].

counties, Cork and Waterford.[47] The analysis revealed that over 56 per cent of these applications involved adverse possession between family members, typically in relation to property forming part of an unadministered estate. It was confirmed that objections are made in the majority of section 49 applications, and that 70 per cent of the objections reviewed in this survey were based on an entitlement to the land under the unadministered intestate or testate estate of the registered owner. Of course, once the limitation period has expired, such an objection has no legal basis and will not prevent registration in the absence of another valid ground for objection. For example, proof that the objector continued to engage in acts of possession, or that the applicant was not in possession or was in possession pursuant to a licence would all constitute valid grounds for objection.

Where only one or some of the members of a family with entitlements under an unadministered estate enter into, or remain in possession, of the property following the death of the deceased owner, those out of possession are clearly in a very precarious position as the Irish law currently stands.[48] It is easy to imagine a situation where absent members of the family were content to allow a sibling to continue to occupy a property but failed to appreciate that their interests were in danger of being extinguished by neglecting to formalize the arrangement. The fact that family members frequently object to section 49 applications reflects the counter-intuitive nature of the law on this issue. The potential for misunderstanding renders absent family members extremely vulnerable, an argument that has been made to justify the English position, which precludes adverse possession in such circumstances.[49]

The internal survey conducted by the Property Registration Authority revealed that the second most common situation, representing 25 per cent of section 49 applications, involved lost or informal transfers. Twelve per cent of applications involved strangers to title, frequently in relation to abandoned land. Finally, 6 per cent of applications involved boundary issues.[50] I have relied on this secondary data (*i.e.*, the Property Registration Authority's internal survey) to

47. Note that this survey was restricted to registered land and did not include applications for first registration based on possession. I am grateful to the Property Registration Authority for sharing this information with me, particularly CEO, Liz Pope, who patiently discussed it with me.
48. For a discussion of the law in this area, see Una Woods, "Adverse Possession and Unadministered Estates: An Unfair Solution to a Redundant Irish Problem" (2016) 67 N Ir Leg Q 137 [Woods 2016].
49. Gareth Miller, "The Administration of Estates and Adverse Possession" (2000) 150 New LJ 940 at 940, 946.
50. Note that 1% of applications involved a claim to commonage.

conduct my analysis of adverse possession applications for pragmatic reasons.[51] Although the organization's aim coincided with my own—identifying how the doctrine is relied on in practice—as the Authority was the primary data collector, it decided on the survey's scope and other aspects of how the survey was to be conducted. While the sample of section 49 applications surveyed was small (one month's applications in 2008 in respect of two counties, totalling eighty-eight cases), I was reassured that the results accurately reflected the experience of Examiners of Title who dealt with such applications on a daily basis. The decision to sample the counties of Cork and Waterford was justified on the basis that they contain a good mix of both urban and rural properties.

Although only a minority of adverse possession disputes reach the courts, an analysis of the reported Irish case law reveals that most of these disputes arise between family members or neighbouring landowners.[52] The number of cases involving family members is unsurprising and reflects the experience of the Property Registration Authority in dealing with section 49 applications. The disputes between neighbours typically arise because one party encroaches on land that is not being used by the owner. It seems fair to assume that the fact that these cases reach court indicates the contentious nature of the dispute, the entrenched position of the parties, and consequently, the discordant relationship that can be predicted for these neighbours into the future regardless of the outcome.[53] Therefore, in Ireland, owners rarely lose title through adverse possession to a stranger unless the land has been abandoned. Most owners lose title to members of their family and, when the dispute is litigated, a significant number of cases involve neighbours.

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51. For further discussion of this methodology, see Una Woods, "The Case for a Qualified Veto System of Adverse Possession in Ireland: A Doctrinal Approach with 'Bells and Whistles'" in Laura Cahilane & Jennifer Schweppe, eds, *Case Studies in Legal Research Methodologies: Reflections on Theory and Practice* (Clarus Press, 2019).
52. There are thirty-four cases listed in the Appendix. In sixteen of these cases there was a family relationship between the parties; fourteen cases involved neighbouring landowners; three cases involved a pre-existing contractual relationship between the parties; only one case involved strangers.
53. As Jeffrey Evans Stake points out, the doctrine "strains neighbourhood relations and could force us away from the most efficient use of the land." See Jeffrey Evans Stake, "The Uneasy Case for Adverse Possession" (2001) 89 Geo LJ 2419 at 2433. William G Ackerman & Shane T Johnson list the "Creation of Division and Animosity Between Neighbours" as a disadvantage or problem of adverse possession. See William G Ackerman & Shane T Johnson, "Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession" (1996) 31 Land & Water L Rev 79 at 94.

Although it is impossible to speculate on the circumstances that give rise to every claim, it seems reasonable to assume in this peculiarly familial or neighbourly context, that many such owners fail to take action out of a desire to avoid conflict or because they imagine and trust that the occupier recognizes that their presence is simply tolerated. Although such owners may be accused of naivety or, in some cases, perhaps a degree of laxity in failing to familiarize themselves with the law, it seems harsh to denigrate them as "blameworthy" for failing to formalize the arrangement or commence litigation. It is submitted that these owners are particularly vulnerable and would benefit from a system that would warn them if they are in danger of losing title through adverse possession.[54]

II. THE PROTECTION AFFORDED TO OWNERS BY THE INCONSISTENT USE TEST

The inconsistent use test features most prominently in Ontario case law; therefore, its status in that particular jurisdiction is the focus of this article. The test was incorporated into the law on adverse possession in Ontario by a trilogy of Court of Appeal decisions delivered in the 1970s and 1980s: *Keefer v Arillotta*,[55] *Fletcher v Storoschuk*,[56] and *Masidon Investments Ltd v Ham*.[57] As was the case with the rule in *Leigh v Jack*, it is not immediately obvious where the inconsistent use test fits in the proofs that make up an adverse possession claim, as identified in *Pflug and Pflug v Collins*:[58] actual possession for the statutory period, possession with the intention of excluding the owner, and the effective exclusion of the owner's possession for the statutory period.[59] In *Keefer* and *Fletcher*, Justice Wilson clearly regarded the test as relevant to the establishment of *animus possidendi*; that is, it was part of the second requirement set out in *Pflug*. She stated that the person claiming a possessory title must have an intention to exclude the owner from

54. In the case of applications in relation to land, which had been the subject of a lost or informal transfer or abandoned, it is clear that such owners have no need of additional protection. It is submitted that any reforms made to the law on adverse possession should not impede such applicants.
55. (1976), 72 DLR (3d) 182 (Ont CA) [*Keefer*].
56. (1981), 128 DLR (3d) 59 (Ont CA) [*Fletcher*].
57. (1984), 45 OR (2d) 563 (CA) [*Masidon*].
58. [1952] 3 DLR 681 (Ont HC) [*Pflug*].
59. See *ibid* at 689. This three-part test has been cited with approval in many subsequent decisions. See *e.g. Keefer*, *supra* note 55; *Teis*, *supra* note 2. In *Pflug*, the third requirement was referred to as the "discontinuance of possession" by the owner and all others, if any, entitled to possession. However, subsequent case law has clarified that effective exclusion must be proved.

such uses as the owner wants to make of their property. However, in *Masidon*, Justice Blair regarded the inconsistent use test as relevant in establishing whether the third requirement for adverse possession had been satisfied, *i.e.*, whether the owner had been effectively excluded from the land. As Michael Lubetsky points out, to confuse matters further, a third line of authority treats the inconsistent use test as part of both the animus and exclusion requirements.[60]

Brian Bucknall, in an article published just after the Court of Appeal for Ontario decision was delivered in *Masidon*, was critical of the adoption of the inconsistent use test which demands an inquiry into both the intention of the owner and the intention of the possessor.[61] He felt that when Justice Wilson's inconsistent use test gloss is put on the test for *animus possidendi*, it requires the person in possession of the land to: (1) know that they do not own the land, (2) know who does own the land, and (3) know the intentions that the owner has with regard to the use of the lands.[62] As Bucknall notes, proof of any intention is difficult and proving this degree of knowledge and intent over a ten-year period will obviously represent a considerable challenge. He noted that the formulation is almost impossible to apply in the most common adverse possession scenario, where both the owner and the possessor are mistaken about the nature and extent of their respective rights in relation to a boundary strip and, therefore, cannot establish an intention consistent with Justice Wilson's legal test.

It is interesting to note that in *Beaudoin v Aubin*,[63] an Ontario case that involved a mutual mistake in relation to the ownership of a boundary strip, Justice Anderson, in a decision delivered after *Keefer* and *Fletcher* but before *Masidon*, made no attempt to apply the inconsistent use test. He rejected the notion that sections 4 and 15 of the *Limitations Act 1970* required a claimant to demonstrate a subjective intention, with knowledge of the rights of the plaintiff present in his mind, to occupy in defiance or denial of those rights. He distinguished several cases where intention was found to be an important element by showing that they focused on factual situations in which the acts of possession were equivocal.[64] After conducting a historical review of the law on adverse possession, Justice Anderson concluded that since the abolition of "adverse possession" in its

60. See *Laurier Homes (27) Ltd v Brett* (2005), 42 RPR (4th) 86 (Ont Sup Ct). See also Lubetsky, *supra* note 5 at 513-14.
61. See Bucknall, *supra* note 2.
62. *Ibid* at 380.
63. (1981), 125 DLR (3d) 277 (Ont HC) [*Beaudoin*].
64. See *Re St Clair Beach Estates Ltd v MacDonald et al* (1974), 5 OR (2d) 482 (Div Ct); *Sherren v Pearson* (1886), 14 SCR 581; *Williams Bros Direct Supply Stores Ltd v Raferty*, [1957] 3 All ER 593.

technical sense,[65] where the acts of possession are certain and unequivocal, *animus possidendi* can be presumed.

Since the Court of Appeal for Ontario trilogy, the inconsistent use test has not been applied in a consistent fashion by Ontario courts. Lubetsky succinctly explains why:[66] The test produces counterintuitive and even outrageous results when applied in certain situations. As Lubetsky notes, in some cases delivered after the trilogy,[67] the courts simply followed *Beaudoin* and made no attempt to reconcile it with the case law that applies the test.[68] However, in other cases the judicial response was to imply an intention on the part of the owner or to graft exceptions to the test. According to Lubetsky, the "fantastic diversity of approaches read as a whole, represent a highly creative brainstorming exercise among the judiciary,"[69] but the different approaches have also made the law in this area increasingly unclear. His detailed overview of the case law reveals that the test tends not to be applied in cases of mutual or unilateral mistake in relation to the ownership of the land.[70] On occasion, the test also tends not to be applied where the owner has clearly lost interest in the land and sufficient evidence of their intentions cannot be submitted to the court.[71] This is dubbed the "apathetic titleholder" by Lubetsky.[72]

It is submitted that the difficulties encountered in cases of mutual or unilateral mistake or apathetic owners are undoubtedly a result of the treatment of the inconsistent use test as a standard element of the adverse possession proofs and not a special rule to govern a situation where the owner has future plans for the property. If an owner has no plans for the property and is not engaged in any activities as the user, because of a mistake in relation to its ownership or due to

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65. Under the old law some acts of possession were deemed to be acts on behalf of the owner. This approach was abolished by the enactment of *An Act to Amend the Law Respecting Real Property, and to Render the Proceedings for recovering possession thereof in certain cases, less difficult and expensive*, which adopted the language of the *Real Property Limitations Act*. See *An Act to Amend the Law Respecting Real Property, and to Render the Proceedings for Recovering Possession thereof in Certain Cases, Less Difficult and Expensive* (UK), 1834, 4 Will IV, c 1; *Real Property Limitations Act, 1833* (UK), 3 & 4 Will IV, c 27.
66. Lubetsky, *supra* note 5.
67. See *e.g. Keil v 762098 Ontario* (1992), 91 DLR (4th) 752 (Ont CA).
68. Lubetsky, *supra*, note 5 at 516.
69. *Ibid* at 537.
70. See *Teis*, *supra* note 2. Mutual mistake between the parties relates to who owns the land. See also *Bradford*, *supra* note 2. Unilateral mistake on the part of the squatter or a good faith belief in ownership is discussed in *Bradford*.
71. See *Galati v Tassone*, [1986] OJ No 698 (HC) [*Galati*].
72. Lubetsky, *supra* note 5 at 520-21.

apathy, then they should be treated as having discontinued possession.[73] which renders it unnecessary to prove that they have been dispossessed or excluded from possession. In such circumstances, the inconsistent use test is inapplicable, and the claimant should succeed once they prove possession and *animus possidendi*. However, as the remainder of this article demonstrates, there are other fundamental objections to the test that cannot be overcome by simply confining its application to a situation where the owner has future plans for the property.

A. JUDICIAL DISSATISFACTION WITH THE INCONSISTENT USE TEST

A striking feature of the case law that refers to the inconsistent use test is the hint of judicial dissatisfaction with the test that threads its way through the judgments, sometimes subtle but on other occasions more forceful. In *Teis*, Justice Laskin commented as follows:[74]

> The test of inconsistent use focuses on the intention of the owner or paper title holder, not on the intention of the claimant. It is a controversial element of an adverse possession claim even when the claimant knowingly trespasses on the owner's land. … Taken at face value its application could unduly limit successful adverse possession claims, especially when land is left vacant. [The] paper title holder could always claim an intention to develop or sell the land, or could maintain that a person in possession cannot hold adversely to someone who does not care what is happening on the land.

In *Bradford Investments Ltd v Fama*,[75] Justice Cullity was more vociferous in his condemnation of the rule. He noted that the rule in *Leigh v Jack* has been completely discredited in England. However, despite the persuasive force of the reasoning in *Pye*, he felt he was not entitled to follow recent English decisions as he was bound by the trilogy of Court of Appeal for Ontario decisions. He commented as follows:

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73. Statutes of limitation typically state that a right of action to recover land is deemed to have accrued once the person bringing the action has been dispossessed or discontinued his possession. The classic explanation of the distinction between the two terms was put forward by Lord Justice Fry who stated that dispossession involves some form of ouster of the paper owner by the squatter while in instances of discontinuance the owner is found to have given up possession before the squatter enters on the land. See *Rains v Buxton* (1879), 14 Ch D 537 at 539. As was explained by Chief Justice Blackburne the term "discontinuance" is used to mean an abandonment of possession. See *McDonnell v McKinty* (1847), 10 ILR 514 at 526 (Ir).
74. *Teis*, *supra* note 2 at para 24.
75. *Bradford*, *supra* note 2.

> The introduction and development of the requirement of inconsistent use, and its application in this jurisdiction has led the courts to draw a distinction between knowing trespassers and other trespassers. To relate this to the terms of section 4 [of the *Real Property Limitations Act 1990*] requires some intellectual effort. It means not only that the time that a true owner's right of re-entry will accrue will depend on the result of an enquiry into the purposes for which the property was held at different times within the statutory period, but also on the state of a claimant's knowledge. If the policy behind the statue is to provide certainty of land titles by protecting the settled expectations of those who have enjoyed undisturbed possession of land for what is considered to be a reasonable period, and to avoid litigation over titles that will require an inquiry into events—let alone subjective states of mind—in the distant past, the development could be considered regressive.[76]

Lubetsky is of the view that the inconsistent use test has reached a point of crisis. He speculates that the Court of Appeal for Ontario may well review it when an appropriate case comes before it.[77] It is interesting to note that Supreme Court of Canada recently obliquely referred to the possibility of such a review in *Nelson (City) v Mowatt*:[78]

> [T]he question properly before this Court is not whether the inconsistent use requirement is necessary or desirable; we have received no submissions, for example, on whether it should continue to apply to claims based on adverse possession in Ontario.

Therefore, it is important to clarify whether the inconsistent use test should be part of the law on adverse possession. The remainder of Part II of this article attempts to identify an underlying rationale for the inconsistent use test, and to critically assess its shortcomings and the case for its retention.

B. A "RAISON D'ÊTRE" FOR THE TEST

Lubetsky points out that the rise and fall of the inconsistent use test in the course of a single generation "begs the question of how it managed to catch on in the first place."[79] He speculates that Ontario's adverse possession law was apparently missing something important that this test seemed to address. He makes an interesting argument that the "something" was the civil law principle of interversion and the inconsistent use test acts as a functional equivalent to this civil law concept. Interversion deals with the dilemma of a detainer, that is someone who uses the land "with acknowledgement of a superior domain," who changes intention

76. *Ibid* at para 100.
77. Lubetsky, *supra* note 5 at 525.
78. *Nelson (City) v Mowatt*, 2017 SCC 8 at para 21.
79. Lubetsky, *supra* note 5 at 525.

vis-à-vis the property under detention and develops *animus domini* (an intention to be the owner), a crucial component of acquisitive prescription. As the owner has no way of knowing that the detainer has formed the requisite *animus* to start the clock running on acquisitive prescription, the civil law requires the detainer to manifest any change of intention with unequivocal facts and thereby give notice to the true owner that their legal relationship has changed.

Lubetsky's empirical analysis of the case law of Ontario leads him to the conclusion that the inconsistent use test was typically applied in interversion-type situations, and only those adverse possessors who demonstrated interversion through unequivocal facts succeeded when the inconsistent use test was applied. According to Lubetsky, most people who use the land "with acknowledgment of a superior domain" can be characterized as a grantee (of an easement), a tenant/licensee, or a co-owner.[80] Thus, according to his theory, the inconsistent use test will only be critical in resolving cases where the adverse possessor took possession in such circumstances. One difficulty with Lubetsky's analysis is that in a number of cases where he classifies the possessor as having taken possession "with acknowledgment of a superior domain,"[81] he finds no evidence of any of the scenarios he mentions.

The adverse possessor may have been aware that they were not the owners of the disputed plot but there was no evidence that they had commenced the use of the land by virtue of a grant, lease, or a licence. Further difficulties present themselves, even if one considers his classification unimpeachable in this respect. Lubetsky's central argument seems to be that the common law has not specifically catered for the complications that such situations give rise to. It is submitted that this is not the case. Regardless of whether or not one applies the inconsistent use test, a possessor who originally commenced the use of the land by virtue of a right of way, a lease, or a licence has always faced more difficulties in proving adverse possession. Where the claimant already had a right of way over the disputed land, unless the acts of possession are unequivocal, they will have to prove an intention to exclude the true owner which may be problematic in these circumstances.[82] Where the claimant took possession pursuant to a lease or a licence, time will only run against the owner when the permission or lease has expired.[83] This

80. *Ibid* at 527.
81. See *e.g. Fletcher*, *supra* note 56; *Elliot v Woodstock Agricultural Society*, [2007] OJ No 3064 (Sup Ct); *Marotta v Creative Investments Ltd*, [2008] OJ No 1399 (Sup Ct).
82. See *e.g. Littledale v Liverpool College*, [1900] 1 Ch 19 (CA); *George Wimpey & Co Ltd v Sohn*, [1967] Ch 487 (CA).
83. See *Bellew v Bellew*, [1982] IR 447 (Ir).

moment may be difficult to pinpoint and the legislature has, on occasion, found it necessary to clarify when a right of action is deemed to accrue.[84]

In England, adverse possession by a co-owner against his fellow co-owners is prohibited by legislation.[85] In the United States, the co-owner out of possession must have notice of a repudiation of the co-ownership agreement before time can run in favour of the co-owner in possession.[86] The common law is not missing a concept to deal with these scenarios. The judiciary and the legislature have taken pains to deal with the complications which they present. I would argue that the emergence of the inconsistent use test and its exceptions may be explained in a less complicated manner by looking at what the judiciary have said.

As this test makes it more difficult for a claimant to succeed, in formulating the exceptions to the rule and implying fictitious intentions, the judiciary has, on occasion, been forced into a discussion of who should benefit from the law on adverse possession and in what circumstances. This unusual feature of Ontario case law contrasts sharply with the case law in England and Ireland which, for the most part, demonstrates a concerted effort on the part of the judiciary to apply the law in an objective fashion regardless of the merits or demerits of the possessor or the owner. The application of the inconsistent use test is clearly motivated by a judicial desire to make it more difficult for deliberate (bad faith) squatters to succeed against a responsible owner. Therefore, as one would expect, it has evolved in a manner that denies its additional protection to certain owners: for example, those who have mistaken the position of their boundary,[87] or acquiesced in an enclosure by a neighbour who believed they were the owner.[88] Also, in some cases, the courts have refused to apply the test where the owner has effectively abandoned the land.[89] While a plausible rationale exists for the inconsistent use test, the judicial gymnastics apparent from Lubetsky's overview of the case law associated with it, reveal significant pitfalls with its

84. The *Statute of Limitations Act, 1957* provides that, in the case of a periodic tenancy with no written lease, the tenancy is determined on the expiration of the first period when no rent is paid. Additionally, the right of action accrues at that point. See *Statute of Limitations Act, 1957* (NI), s 17(2).
85. *Limitation Act 1980* (UK), schedule 1, para 9. In Ireland, it is easier for a co-owner to acquire title by adverse possession against another co-owner, but this position may have been necessary historically to allow the ownership of farms to be updated following a death on title. For discussion, see text accompanying footnote 134 below.
86. See Louis S Muldrow, "The Adverseness of Possession to Fractional Interests" (1957) 9 Baylor L Rev 168.
87. See *Beaudoin*, *supra* note 63; *Teis*, *supra* note 2.
88. See *Bradford*, *supra* note 2.
89. See *Galati*, *supra* note 71.

application. As mentioned earlier, certain difficulties could be resolved by simply confining the test's application to a situation where the owner has future plans for the property. It is worth considering, therefore, the case for embracing such a re-engineered test.

C. THE CASE BY KATZ FOR AN INCONSISTENT USE MODEL OF ADVERSE POSSESSION

In a 2010 article,[90] Katz claims that the inconsistent use test has been wrongly maligned. She argues that the inconsistent use model of adverse possession recognizes the authority of the owner to set an agenda for the land and to remain the owner without maintaining possession, but allows for a vacancy in ownership to be filled where the owner is no longer exercising their authority and the land has become agenda-less. Katz draws an analogy between the position of the successful adverse possessor and a government that has taken over as a result of a bloodless coup d'état. Katz maintains that this model of adverse possession solves the problems of agenda-less objects just as the recognition of the existing government (whatever its origins) solves the problem of stateless people. Katz also maintains that this model of adverse possession permits the radical transformation of squatters into owners without collapsing into a moral paradox where the law appears to reward the theft of land.[91] She notes that American commentators have become increasingly dubious of the role played by adverse possession in resolving certain utilitarian issues and concerned with the morality of the transformation of the deliberate squatter into a land owner. Consequently, she claims that judicial practices have been limiting the extent to which bad faith squatters can succeed under the doctrine. She states that English commentators have managed to sidestep the moral incoherence of the doctrine by relying on an overly procedural model of adverse possession. This approach relies heavily on the doctrine of relativity of title that recognizes the right to possess for both the owner and the possessor and emphasizes that once the owner's title is extinguished, the squatter's right to possession becomes unassailable. Katz criticizes this approach as relying on an unsatisfactorily weak conception of ownership.[92]Although Katz assumes ambivalence on the part of English jurists in relation to the morality of the doctrine, certain judges have been quite vociferous in their criticism of the

90. See Katz, *supra* note 9.
91. *Ibid* at 60-63.
92. *Ibid* at 52-60.

law that preceded the 2002 reforms.[93] It is also important to note that a very clear moral stance was adopted by the Law Commission of England and Wales in the proposals that formed the basis for these changes.[94] As mentioned, Fox and Cobb accused the Commission of "moral essentialism" in its views that the owner who lost title was blameless and that urban squatters were undeserving of the benefits conferred by the old regime.[95]

Katz's preferred model of adverse possession is as attractive as she presents it. However, as she herself acknowledges, the inconsistent use model of adverse possession has not been perfectly articulated in any jurisdiction.[96] The judicial quagmire of approaches that the test generated in Ontario is illustrative of the practical difficulties that it presents. Legislative or judicial clarification that the test shall only apply where the owner has a future agenda for the property would not eliminate these difficulties, as the presence or absence of such an agenda may not be easy to establish in practice. As has been pointed out by the judiciary, an owner could always claim an intention to develop or sell the property in the future.[97] Trying to establish subjective intention is always difficult and the test does not tell us how specific the owner's purpose or future plans have to be. For example, it is unclear how the test should be applied if the owner had a number of alternative purposes or plans for the land and the squatter's current use was compatible with one or some of them but not with others. Also, the test would not protect the owner who has yet to decide on what they will do with the land or where the original plans of the owner or their predecessor in title have been forgotten or are unclear.[98]

Also, assessing the inconsistency of the squatter's acts of possession may not be as straightforward as Katz suggests. For example, she states that an owner with development plans requires the land to remain vacant until they are ready to develop and, therefore, an adverse possessor who occupies the land interferes with such plans.[99] In reality, developer-owners do not require the land to remain vacant in the interim and Katz does not give a true sense of the difficulties

93. *JA Pye 2000*, *supra* note 39 at 709-10, Neuberger J; *JA Pye 2002*, *supra* note 2 at paras 2, 73, Lord Bingham and Lord Hope, respectively.
94. *Law Com No 254*, *supra* note 19 at para 10.19.
95. Cobb & Fox, *supra* note 30.
96. Katz, *supra* note 9 at 63.
97. See *Teis*, *supra* note 2 at para 24.
98. See *Tracey Enterprises MacAdam Limited v Drury*, [2006] IEHC 381 (Ir). Although evidence was given that the disputed plot may have been acquired with the intention of extending quarrying onto it, Justice Laffoy was not convinced of this.
99. Katz, *supra* note 9 at 69.

facing an adverse possessor who occupies the land in such circumstances. The judiciary has noted it may be impossible for an adverse possessor to succeed against such an owner.[100] At the very least, the case law indicates that the erection of some sort of permanent building would be required.[101] The speculator-owner with a plan to sell the land when the time was right (typically when it becomes rezoned for development purposes) is also in a strong position when the test is applied. Katz, however, seems to draw quite an arbitrary distinction between the speculator-owner and the owner who plans to develop the land themselves. She states that the speculator-owner should be treated as having discontinued possession by failing to exercise agenda-setting authority. A failure to set an agenda for the land renders the inconsistent user test inapplicable.[102] She seems to equate a plan to sell the land with an intention to abandon it which is surely an extremely harsh view to take of property speculation and again fails to reflect the case law where such owners benefited from the application of the inconsistent use test.[103]

According to Katz, the owner who does not realize they are the owner should also be taken to have discontinued possession which means that the inconsistent use test does not apply in cases of mutual mistake or unilateral mistake on the part of the owner.[104] However, she maintains that the test should still apply in cases of unilateral mistake on the part of the squatter where the true owner is aware of their rights and has an agenda for the property. She maintains that such a squatter will find it next to impossible to satisfy the test, presumably because only "knowing" squatters will be in a position to engage in acts which directly challenge the authority of the owner. Katz states that this situation is problematic only if we think that there ought to be some connection between the virtue of the squatter and the reward of adverse possession. Instead, she maintains that it is not on the merits of the use or the user that adverse possession is justified, but rather on the imperative in any property system to guard against vacancies in the position of the owner.[105] Although Katz does not comment on the situation, presumably an owner who has acquiesced in a mistaken enclosure by the squatter

100. See *Masidon*, *supra* note 57 at 573-74.
101. See *Skidmore v Parkin* (2002), 5 RPR (4th) 53 at para 33 (Ont Sup Ct).
102. Katz, *supra* note 9 at 69-70.
103. See *Masidon*, *supra* note 57; see also *Marotta v Creative Investments Ltd* (2008), 69 RPR (4th) 44 (Ont Sup Ct).
104. Katz, *supra* note 9 at 70-71.
105. *Ibid* at 71. As shall be demonstrated below, the introduction of a qualified veto system of adverse possession achieves both objectives: restricting the operation of the doctrine to appropriate and deserving cases and restoring abandoned land to the market.

should be treated as having discontinued possession, rendering the inconsistent use test inapplicable.

Katz makes a convincing case that the law on adverse possession should respect the authority of the owner to set an agenda for the property and remain the owner while not in possession. However, if more protection is needed for the owner, it is clear that the application of the inconsistent use test or the rule in *Leigh v Jack* is an inelegant and haphazard method of meeting such a need, which creates unnecessary complications in the law on adverse possession. A fundamental problem with Katz's argument for the adoption of an inconsistent use model of adverse possession is her implicit assumption that it is the best model for protecting the authority of the owner.

Lubetsky's article highlights that owners may sometimes need a clear warning that possession is adverse,[106] while Katz points to a desire to protect absent owners from inadvertently losing title without acts that demonstrate a direct challenge to their authority or agenda. Both seem to be concerned that an owner may not realize what is happening on the ground. It is worth exploring the merits of the qualified veto system of adverse possession, recently introduced in England and Wales, as a pragmatic alternative to the inconsistent use test. The remainder of this article explores the case for the introduction of such a system in Ireland, a jurisdiction that has yet (as is the case in Ontario with the inconsistent use test) to definitively reject the rule in *Leigh v Jack*.

III. THE QUALIFIED VETO SYSTEM OF ADVERSE POSSESSION

A. THE ENGLISH EXPERIENCE

Before the *Land Registration Act 2002*, the same rules governed adverse possession of unregistered land and land that had been registered in the Land Registry in England and Wales.[107] Any person claiming to have acquired title to a registered estate by adverse possession could apply to be registered as proprietor of that estate and the registrar, on being satisfied that adverse possession had been

106. Lubetsky, *supra* note 5.

107. The *Land Registration Act 1925* provided that the *Limitation Acts* shall apply to registered land in the same manner and to the same extent as those Acts applied to unregistered land. See *Land Registration Act 1925* (UK), 15 & 16 Geo V, c 12, s 75(1).

established, would register the applicant as the new owner.[108] The qualified veto system of adverse possession introduced by the 2002 Act only applies to land that has been registered in the Land Registry.[109]

Under the 2002 Act, an adverse possessor who has been in adverse possession of a registered estate in land for at least ten years[110] is entitled to apply to be registered as proprietor of that estate.[111] The Land Registry must serve the registered proprietor of the estate, any charge and any superior registered estate (if the estate is leasehold) with notice of the application[112] and any person who receives such a notice is entitled to veto the application.[113] However, the adverse possessor will be entitled to be registered as proprietor of the estate if there is no response to the notices served,[114] or if no action is taken to repossess the land within two years of the rejection of the adverse possessor's application.[115]

Therefore, the doctrine will continue to play an important role in restoring abandoned land to the market. Also, in three exceptional situations where the Commission felt that the balance of fairness lay with the adverse possessor,[116] the applicant will be registered in spite of an objection by a notice recipient.

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108. *Ibid*, s 75(2)-(3). Rights acquired or in the process of being acquired through adverse possession amounted to "overriding interests" which would bind a proprietor on first registration or following a disposition of registered land even though they did not appear on the register. See *Land Registration Act 1925* (UK), 15 & 16 Geo V, c 12, s 70(1)(f). Subsequent legislation reduces slightly the overriding status of the rights of an adverse possessor so that they will only bind a new owner if the adverse possessor was in actual occupation and his or her occupation was apparent or known to the new owner. See *Land Registration Act 2002*, *supra* note 18, s 11(4)(b)-(c); *Land Registration Act 2002*, *supra* note 18, schedule 3, para 2(c).
109. The *Act* introduces a divergence between the law governing adverse possession of registered and unregistered land which is discussed below. The Law Commission argued that extending the veto system to unregistered land could weaken the security of title to such land as the doctrine of adverse possession plays an essential role in the investigation of such titles by curing title defects and facilitating transactions in relation to such land. See UK, Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271) (The Stationery Office, 2001) at para 14.2 [*Law Com No 271*].
110. Note that the limitation period for actions to recover unregistered land continues to be twelve years. See *Limitation Act* 1980, s 15(1).
111. *Land Registration Act* 2002, *supra* note 18, schedule 6, para 1.
112. *Ibid* at para 2.
113. *Ibid* at para 3, 5. The veto is exercisable by requiring that the application be dealt with under para 5, which only allows the applicant to be registered if one of the three conditions set out therein is met.
114. *Ibid* at para 4.
115. *Ibid* at paras 6-7.
116. *Law Com No 271*, *supra* note 109 at para 14.36.

The first exception preserves the doctrine's operation where the applicant can prove an equity by estoppel and the circumstances are such that they ought to be registered as the owner.[117] In its discussion of this exception in the report that preceded the enactment of the 2002 Act, the Law Commission gave an example of a purchaser who went into possession of land pursuant to an oral contract for sale that was unenforceable as it was not "in writing" as required by section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989*.[118] The second exception permits reliance on the doctrine where the applicant is "for some other reason" entitled to be registered as the owner of the estate[119] (*e.g.*, if the adverse possessor had contracted to buy the land and paid the purchase price but the legal estate was never transferred to them).[120] The third exception facilitates the registration of an applicant who owns adjacent land and who reasonably believed for at least ten years ending on the date of the application that the land, which is the subject matter of the application, belonged to them.[121]

B. LESSONS FOR IRELAND

The reforms to the doctrine introduced in England and Wales by the 2002 Act "received widespread (if not universal) support."[122] While property lawyers have traditionally emphasized the justifications for the doctrine, a radical transformation in attitude towards it justifiability appears to have taken place in recent times.[123] As mentioned, members of the judiciary have been critical of

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117. *Land Registration Act 2002*, *supra* note 18, schedule 6, para 5(2).
118. See *Law Com No 271*, *supra* note 109 at para 14.42.
119. *Land Registration Act 2002*, *supra* note 18, schedule 6, para 5(3).
120. The Law Commission provided these examples in its report. See *Law Com No 271*, *supra* note 109 at para 14.43. For a discussion of the difficulties that arise in treating informal purchasers as adverse possessors and how these problems could be resolved, see Una Woods, "Adverse Possession and Informal Purchasers" (2009) 60 N Ir Leg Q 305 [Woods, "Informal Purchasers"].
121. *Land Registration Act 2002*, *supra* note 18, schedule 6, para 5(4). For a critical discussion of this qualification to the veto system, see Una Woods, "Adverse Possession and Boundary Disputes, Lessons for Ireland from Abroad" (2016) 8 Intl JL Built Env 56.
122. Roger J Smith, *Property Law*, 6th ed (Pearson, 2009) at 67. The reforms to the English law on adverse possession introduced by the *Land Registration Act 2002* have been described as effecting an "emasculation" of the doctrine insofar as it applies to registered land. See Martin Dixon, "The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment" [2003] Conveyancer & Property Law 136 at 150. Neil Cobb & Lorna Fox expressed reservations in relation to the reforms. See Cobb & Fox, *supra* note 30.
123. See Cobb & Fox, *supra* note 30 at 237-38. Cobb point out that a slight majority (60 per cent) of those who responded to the Law Commission's consultation supported the proposed reforms "in principle."

the doctrine, especially in its application to registered land. For example, in *Pye*, Lord Bingham of Cornhill declared the outcome of the adverse possession claim as "apparently unjust."[124] Gray and Gray note:[125]

> This view mirrored a growing public perception that it had become "too easy for squatters to acquire title." A criticism which attracted added force where difficulties in the effective policing of vacant premises by cash-strapped local authorities could easily lead to substantial losses for the public purse … . If property is indeed a relationship of socially approved control over a valued resource, it had become quite clear that in the Britain of the 21st century, adverse possession of land is a form of control which is no longer socially approved.

Thompson states that the reforms "will undoubtedly make the law substantively more satisfactory" and meet, to a considerable extent, the objections of those who viewed the traditional regime as distasteful.[126] It is interesting to note that in a report published by the Law Commission of England and Wales on 24 July 2018,[127] the Commission noted that responses to their consultation on how the adverse possession scheme is operating under the *Land Registration Act 2002* did not suggest that fundamental reform to the scheme was desirable. Instead, the Commission made some recommendations to deal with certain procedural or technical issues related to how the law operates.[128] Recently, the decision in *Best v Curtis*[129] illustrates an additional procedural issue which may require to be revisited. While certain commentary on this case focused on the fact that

124. *JA Pye 2002*, *supra* note 2.
125. Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford University Press, 2009) at para 9.1.15.
126. Mark P Thompson, "Adverse Possession: The Abolition of Heresies" [2002] Conveyancer & Prop Law 480 at 492. Thompson strongly welcomes the reforms. See also Mark P Thompson, *Modern Land Law*, 5th ed (Oxford University Press, 2012) at 271.
127. UK, Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380) (The Stationery Office, 2018) at para 17.4.
128. *Ibid*, ch 17.
129. *Best v Curtis* (*administrator of the estate of Curtis*), [2016] EWLandRA 2015-0130.

the current law permitted a "criminal"[130] to be registered pursuant to the 2002 Act, the decision in the Property Chamber hinged on the fact that Mr. Curtis, as a personal representative, would only be entitled to object to the registration of Mr. Best as proprietor if he had previously applied to the registrar to be registered as a person entitled to be notified of such applications. Robin Hickey notes that it is arguable that specific provisions ought to be made for personal representatives to be notified of adverse possession applications.[131] It is submitted, however, that a number of more substantive lessons can be learned from the English experience by legislators in Ireland (or any jurisdiction, including Ontario, Canada) considering the introduction of a similar system of adverse possession.

The article written by Fox and Cobb highlights the value of empirical research as a precursor to any law reform project. It is important to consider how the law on adverse possession currently operates in practice: Who is affected and who benefits from the law on adverse possession? The Northern Ireland Law Commission emphasized that it would be important to carry out "a much more detailed analysis of the different considerations applicable to the various scenarios involving adverse possession" before a qualified veto system could even be considered for Northern Ireland.[132]

This article demonstrates the prevalence of adverse possession between family members and neighbours in Ireland and discusses the reasons why owners may be vulnerable and in need of additional protection in such circumstances. Any empirical research should also engage with the possible impact of reform. Fox and

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130. In earlier judicial review proceedings, the Court of Appeal upheld an order that the Chief Land Registrar had to proceed with Mr. Best's application to be registered on the basis of adverse possession, notwithstanding the fact that for at least part of the relevant period he had been committing the offence of trespass in a residential building pursuant to the *Legal Aid Sentencing and Punishment of Offenders Act 2012*. See *Legal Aid Sentencing and Punishment of Offenders Act 2012* (UK), s 144; *R (on the application of Best) v Chief Land Registrar*, [2015] EWCA Civ 17. Robin Hickey, "The Best Outcome: The Application of Schedule 6 and the Reinforcement of Adverse Possession policy under the Land Registration Act 2002: Best v Curtis" [2017] Conveyancer & Prop Law 53 at 60. Hickey comments:

> For now, it seems at least strange for the law on the one hand to recognise the potential for adverse possessors to become registered proprietors and on the other to posit a criminal offence likely to catch anyone adversely possessing residential premises. … [W]e will need to address again the relationship between these provisions [of the *Land Registration Act 2002*] and the criminal offence in LASPOA 2012, s 144."

See also Mark West, "Adverse Possession, Illegality and Land Registration: The Balancing of Conflicting Public Policies" [2015] Conveyancer & Prop Law 432.

131. Hickey, *supra* note 130 at 59.

132. *Consultation Paper*, *supra* note 27 at para 2.51.

Cobb argued that the English reforms would negatively impact the urban squatter making use of a forgotten property. I have argued elsewhere that urban squatting is not commonplace in Ireland;[133] the predominant impact of the introduction of a qualified veto system of adverse possession would be to preclude claims by "sibling" adverse possessors who went into possession of property forming part of an unadministered estate of a deceased parent. The historical justification for the operation of the doctrine in favour of the child in possession in Ireland was to permit ownership of small farms to be updated at a time when will-making was uncommon, emigration was widespread, and grants of representation were rarely extracted when a farmer died intestate.[134] As pointed out elsewhere, this peculiarly agricultural justification is no longer relevant in modern Ireland[135] and it must be questioned whether it is fair to allow the occupying sibling to extinguish the rights of those out of possession.[136] Although it is difficult to make generalizations in this area, it could be argued that the moral entitlement of an applicant who has entered or remained in possession of the family home or a residential investment property following the death of a parent is not as strong as that of a child who had been raised to take over a farm, and perhaps forgone an education and adequate pay during the lifetime of the parent.

As I have already mentioned, it is also easy to imagine a situation where absent members of the family were content to allow a sibling to continue to occupy a property but failed to appreciate that their interests were in danger of being extinguished by neglecting to formalize the arrangement. Adverse possession is a crude mechanism to rely on to resolve the disputes that can arise between beneficiaries with an entitlement to land following a death on title. It results in the automatic transfer of ownership to the possessor without any consideration of the circumstances of the other beneficiaries or their vulnerability to a claim when a family member goes into possession. It is submitted that the beneficiaries

133. See Woods, *supra* note 22, ch 4, part 2. Wylie is sceptical about this justification for the doctrine based on the notion that it makes a contribution to social problems such as homelessness. He notes: "As has become all too clear in recent times, homelessness is one of the most complex and intractable problems facing modern society and it is surely naïve to think that adverse possession is a solution to it." See *supra* note 36 at 8.

134. See Andrew Lyall, *Land Law in Ireland*, 3rd ed (Round Hall, 2010) at 990; JCW Wylie, *Irish Land Law*, 5th ed (Bloomsbury Professional, 2013) at para 23.42; RA Pearce, "Adverse Possession by the Next-of-Kin of an Intestate" (1987) 5 Ir L Times 281; Ireland, Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (July 2005) at 331-32.

135. See Woods 2016, *supra* note 48.

136. *Ibid*.

out of possession are in need of additional protection, and adequate alternative remedies exist to protect a beneficiary in possession with a moral claim.

The doctrine of proprietary estoppel provides a much more stable basis for the grant of a remedy in such circumstances[137] and also allows the court more flexibility in its response.[138] If the child can prove an intention to create legal relations, consideration, and part performance, it may also be possible to prove that the deceased entered into a contract to leave a particular property to them by will.[139] It should be noted that a child also has the option of bringing an application pursuant to section 117 of the *Succession Act 1965*, although such an application must be brought within six months of the extraction of the grant and is unavailable if the parent dies intestate.[140] If the court is of the opinion that the testator has failed in their moral duty to make proper provisions for the child in accordance with their means, whether by will or otherwise, it may order that just provisions be made for the child out of the estate. In assessing the extent of that moral duty, the court will have regard to special circumstances, such as where "a child is induced to believe that by … working on a farm, he may ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly."[141]

C. THE ADVANTAGES OF A QUALIFIED VETO SYSTEM

The veto system of adverse possession is an effective—if not fool proof—method of enabling abandoned land to be brought back onto the market. It is submitted

137. See *Smyth v Halpin*, [1997] 2 ILRM 38 (Ir) (in response to his father's assurance that the family home would be his after his mother's death and at his father's suggestion, the son built an extension to the home at his own expense. When his father left the home to one of his daughters instead, the court ordered a conveyance of the house to the son pursuant to the doctrine of proprietary estoppel). See also *Thorner v Major*, [2009] UKHL 18 (the court ordered the transfer of a farm into the name of the claimant who had worked on the deceased's farm for 30 years without pay in reliance on oblique assurances made by the deceased that he would inherit it).
138. In some circumstances, conferring a right of residence or awarding compensation may be more appropriate than an outright transfer of ownership. See Hillary Biehler, *Equity and the Law of Trusts in Ireland*, 6th ed (Round Hall, 2016), ch 18.
139. See *McCarron v McCarron*, [1997] 2 ILRM 349 (Ir).
140. The Law Reform Commission has recently recommended that section 117 of the Succession Act 1965 should be extended to allow children to make an application where the parent died intestate. See Ireland, The Law Reform Commission, Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children (LRC 118-2017), para 3.54. See Succession Act, 1965 (IR), s 117.
141. See *McDonald v Norris*, [2000] 1 ILRM 382 (Ir); *C(X) v T(R)* [2003] IEHC 6 (Ir); *MH v NM*, [1983] ILRM 519 (Ir).

that an owner cannot be assumed to have permanently relinquished any claim to land just because they have failed to use the land or bring an action to recover it during the limitation period, particularly in Ireland in light of the familial/neighbourly context of the majority of adverse possession claims. Under a veto system of adverse possession, the owner is warned of the adverse possession application and the application will only proceed if the owner fails to exercise their veto within a specified period of time. Although this system will, in most cases, effectively identify owners who intend to abandon the land, it is not perfect in this respect. Obviously, if the owner cannot be located (because of a failure to update their contact details on the Land Register), they will have been denied the protection of the veto and, consequently, an assumption cannot be reached about whether there was an intention to abandon the land.

A qualified veto approach is a very flexible method of refining the doctrine of adverse possession as the qualifications to the veto can be fashioned to suit the valuable functions performed by the doctrine in any particular jurisdiction. Three categories of "deserving" squatters are particularly noteworthy in the Irish context on the basis of the merits of their claim and/or for utilitarian reasons: (1) informal purchasers; (2) those who hold under a defective paper title; and (3) good faith possessors of a boundary strip.[142] A squatter in possession under an informal or a defective title could be described as the "true" owner. The informal purchaser would, in any event, be entitled to regularize their position by seeking an order for specific performance of the contract for sale. A qualification to the veto system of adverse possession for such possessors would ensure that the doctrine is preserved as a pragmatic alternative remedy in certain circumstances.[143] Although other remedies may be available, adverse possession is also regularly relied on to cure defects in title. Not only does this adverse possessor "deserve" to rely on the doctrine to quiet their title, the preservation of the doctrine's function in this context is essential to the functioning of the unregistered conveyancing system.[144] Finally, it is arguable that an adverse possessor of a boundary strip who reasonably believed that they owned the land in question may be regarded as "deserving" on the basis of their strong psychological attachment to it. However, it is submitted that the more convincing case for this qualification is based on

142. See Woods, *supra* note 22, chs 4, 6, 8-9.

143. A purchaser in possession must be able to prove that the licence granted by the vendor has been terminated expressly or by implication (*e.g.* if the entire purchase price has been paid) and that the limitation period has expired. For further discussion, see Woods, "Informal Purchasers," *supra* note 120.

144. See discussion below on this point.

the extent to which it protects purchasers and facilitates conveyancing in an environment where boundaries are typically non-conclusive.[145] If Ireland is to introduce a qualified veto system of adverse possession, we should also, I submit, retain our current "light touch" criminal response to peaceable squatting by adverse possessors who care for the property.[146] An overview of the Irish criminal law in this area[147] reveals that no criminal sanctions can be brought against the adverse possessors who I have just identified as "deserving" and who should continue to benefit from the doctrine.

D. THE EXTENSION OF THE QUALIFIED VETO SYSTEM TO UNREGISTERED LAND

It is important to point out that I am not arguing that the reforms to the English law on adverse possession introduced by the *Land Registration Act 2002* should be directly transplanted into Irish law. For example, I submit that it would be preferable to extend the veto system beyond registered land to include unregistered land. The Law Commission of England and Wales argued in favour of retaining the existing law in relation to unregistered land on the basis that making it more difficult to acquire title by adverse possession of unregistered land could weaken the security of title to such land.[148] The Law Commission appears to have assumed that extending the veto system to unregistered land could damage the unregistered conveyancing system. The Law Commission acknowledged that the existing law can produce harsh results but maintained that they are counterbalanced, in the context of unregistered land, by the essential role played by the doctrine in facilitating conveyancing.[149] The divergence between adverse possession of registered and unregistered land introduced by the English *Land Registration Act 2002* is far from ideal and the reform of the doctrine need not necessarily lead to two different systems of adverse possession. The Northern Ireland Law Commission has also expressed reservations about creating a situation of having the doctrine of adverse possession operate differently depending on whether the land is registered or unregistered.[150]

I have argued that a qualified veto system of adverse possession could be extended to unregistered land in a manner that would not affect the functionality

145. See generally Woods, "The Undeserving and Deserving Squatter," *supra* note 14.
146. See Woods, *supra* note 22, ch 4, Part 1.
147. *Ibid*.
148. *Law Com No 271*, *supra* note 109 at para 14.2.
149. *Law Com No 254*, *supra* note 19.
150. *Consultation Paper*, *supra* note 27 at para 2.53.

of the unregistered conveyancing system and may even facilitate the extension of the registration of title system. In the case of unregistered land, it is proposed that the qualified veto system would be administered by the Property Registration Authority[151] on an application for first registration based on long possession or first registration of an unregistered title. Consequently, the reform would become relevant in the lead up to or following a transaction for value, which triggers the requirement for compulsory first registration of title. In practice, this reform would mean that a person claiming a title based on adverse possession of unregistered land would be deprived of the ability to engage in a valuable transaction in relation to such land unless efforts are made to identify and protect the owner by allowing them to veto the adverse possession application. However, a qualification to the veto system would operate in the context of an application for first registration of unregistered land based on an imperfect title (or "colour of title," a concept from the United States) coupled with twelve years adverse possession. The extension of the veto to unregistered land coupled with this exception to cater to defective titles would represent a fundamental distinction between the qualified veto system of adverse possession that I propose for Ireland, and the system introduced in England and Wales that applies only to registered land and preserves the old law of adverse possession in relation to unregistered land.[152] This approach would allow owners of unregistered land to benefit from the veto in the face of an adverse possession application,[153] but also ensures that the registration of title system can ultimately be extended to the most uncertain of titles.[154]

IV. CONCLUSION

Lubetsky has pointed out that the doctrine of adverse possession and, consequently, the inconsistent use test may die a natural death once the province completely

151. The Property Registration Authority was established by through legislation to manage the Land Registry and the Registry of Deeds. See *Registration of Deeds and Title Act 2006* (NI), ss 9-10.
152. For further discussion, see Una Woods, "Adverse Possession, Unregistered Land and Title Defects: A Fly in the Ointment of Irish Reform?" in Heather Conway & Robin Hickey, eds, *Modern Studies in Property Law*, vol 9 (Hart, 2017) at 61.
153. It may sometimes be difficult to identify the owner. In such circumstances, reasonable efforts would have to be made through the display of site notices and newspaper advertisements. For further discussion, see *ibid*.
154. For further discussion, see *ibid*.

implements the Torrens Registered Title System.[155] Section 51 of the *Land Titles Act* prohibits the acquisition of title by adverse possession in relation to land that has been registered.[156] Although 99.9 per cent of titles in Ontario are now registered under the land title system, many of these titles were automatically converted in recent years without a proper investigation of title.[157] Therefore, such titles were registered subject to qualifiers, which specifically preserve the rights of adverse possessors that had accrued prior to conversion. Before the title can be upgraded to absolute, the qualifier must be removed, and any adverse claims resolved. Alternatively, the adverse possessor may apply for registration on the basis of a pre-existing possessory title. As a result, I would submit that many years will pass before the doctrine of adverse possession is rendered redundant in Ontario.

Although a prohibition on adverse possession of registered land has been introduced by the 1990 Act, it is not beyond the bounds of possibility that Ontario could be forced to reintroduce adverse possession in the future. It would not be possible in an article of this length to consider in any detail whether adverse possession should be re-introduced in Ontario in the context of registered land or how a qualified veto system of adverse possession could be adapted to suit the needs of that particular jurisdiction. Ideally, this would require an investigation into how the doctrine operates in practice. It is possible, however, to draw certain tentative deductions based on the experience of other jurisdictions. Although it has, on occasion, been argued that adverse possession is inconsistent with a registered title system,[158] in reality, there is no uniform consensus on how the doctrine should operate within a registered title context.[159]

In addition, there is ample evidence to suggest that the approach taken by a particular jurisdiction may evolve as circumstances demand. New Zealand, and a number of Australian territories, which (like Ontario, Canada) operated a prohibition system of adverse possession were forced to re-introduce the doctrine to govern registered land to counteract marketability difficulties that arose due to a culture of informal transactions and a high incidence of abandoned

155. Lubetsky, *supra* note 5 at 508.
156. RSO 1990, c L5.
157. This took place as part of the POLARIS programme which involved the automation of all records in relation to land transactions and ownership.
158. See *Law Com No 254*, *supra* note 19 at para 10.11. For a critique of this argument, see Una Woods, "The English Law on Adverse Possession: A Tale of Two Systems" (2009) 38 Common L World Rev 27 at 31-38.
159. See generally Malcolm McKenzie Park, *The Effect of Adverse Possession on Part of Registered Title Land Parcel* (PhD Thesis, University of Melbourne, 2003) [unpublished].

land.[160] Wylie has emphasized that the doctrine of adverse possession is equally as important in resolving conveyancing problems (*e.g.*, informal transactions or boundary encroachments) in relation to registered land as it is in relation to unregistered land.[161] Where land has been abandoned, awarding title to a resourceful squatter can be justified as a pragmatic response to overarching societal concerns.[162] The squatter can be described as the most deserving recipient of the law's bounty on the same basis that title is awarded to the first possessor of unowned property or a finder who takes possession of a chattel found lying on the ground.[163] An alternative approach would be to award title to the State, as is the case with the estate of a deceased who dies without next of kin.[164] However, the squatter is more likely to be aware that the land is abandoned and hence more motivated than the State to bring the land back into use and ultimately back onto the market.[165]

The main purpose of this article is to highlight that a qualified veto system of adverse possession more effectively responds to the difficulties that the inconsistent use test appears to be attempting to resolve. The veto system ensures that the owner is warned about the danger of losing title, without reintroducing old notions of ouster or artificially straining concepts of possession and intention. By allowing the owner to veto an adverse possession application, the owner's authority to set an agenda for the land and to remain the owner without maintaining possession is respected. However, where the owner has abandoned the land and consequently fails to exercise their veto, this approach permits the vacancy in ownership to be filled.

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160. *Ibid*, ch 6.
161. See Wylie, *supra* note 36 at 10.
162. Recently, a number of US academics have justified the doctrine on the basis that it operates in cases of imputed or constructive abandonment. See Christopher Meredith, "Imputed Abandonment: A Fresh Perspective on Adverse Possession and a Defence of the Objective Standard" (2010) 29 Miss CL Rev 257; Scott Shepard, "Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests" (2011) 44 Mich JL Reform 557.
163. See *Armorie v Delamirie* (1722), 93 ER 664; *Parker v British Airways Board*, [1982] 1 All ER 834 (CA).
164. See *Succession Act 1965* (IR), s 73.
165. If no squatter takes possession, in certain jurisdictions which levy property taxes, the state may ultimately acquire the right to sell the property for non-payment of such taxes. In Ireland, it is currently more likely that the bank would acquire this right due to a failure to make repayments on an outstanding secured loan.

It is submitted that adverse possession is not a "relic" or "an ailing concept,"[166] but a valuable feature of the modern Irish property law landscape. However, reform is overdue to address the doctrine's inability to protect vulnerable owners from inadvertently losing title, particularly where a family member or a neighbour has taken possession. This article illustrates the positive impact that the introduction of a qualified veto system in Ireland could have. In addition to conferring additional protection on such owners, a qualified veto system allows the doctrine of adverse possession to continue to perform certain valuable functions. This is achieved through the formulation of exceptions or qualifications that facilitate applications by specified categories of claimant in spite of an objection by the owner. These qualifications may be adapted to meet the particular needs of any jurisdiction but, in Ireland, it is possible to envisage a continuing role for the doctrine in regularizing informal or defective titles and resolving certain types of boundary disputes.

166. See JCW Wylie, "Adverse Possession: An Ailing Concept?" (1965) 16 N Ir Leg Q 467 at 489; Wylie, *supra* note 36.

V. APPENDIX: IRISH CASE LAW

	Case Name	Was the claim successful?	Pre-existing relationship
1	*Martin v Kearney* [1902] 36 ILTR 117	Yes	Family
2	*Morteshed v Morteshed* [1902] 36 ILTR 142	Yes	Family
3	*Doyle v Foley* [1903] 2 IR 95	Yes	Family
4	*Smith v Savage* [1906] 1IR 469	Yes	Family
5	*Christie v Christie* (1917) 1 IR 17	Yes	Family
6	*Keelan v Garvey* [1925] 1 IR 1	No	Family
7	*In Re Loughlin* [1942] 1 IR 15	No	Family
8	*Murland and Smyth v Despard and Alton* [1956] IR 170	Yes	Family
9	*Vaughan v Cottingham* [1961] 1 IR 184	No	Family
10	*Ruddy v Gannon* [1965] IR 283	Yes	Family
11	*Browne v Fahy* (HC, 24 October 1975)	No	Neighbours
12	*Perry v Woodfarm Holmes* [1975] IR 104	Yes	Neighbours
13	*Murphy v Murphy* [1980] IR 183	Yes	Family
14	*Bellew v Bellew* [1982] IR 447	Yes	Family/ Contractual
15	*Drohan v Drohan* [1984] 1 IR 311	No	Family
16	*Dundalk Urban District Council v Conway* (HC, 15 December 1987)	No	Neighbours
17	*Seamus Durack Manufacturing Ltd v Considine* [1987] IR 677	Yes	Neighbours
18	*Cork Corporation v Lynch* [1995] 2 ILRM 598	No	Neighbours
19	*Doyle v O'Neill* (HC, 13 January 1995)	No (except for narrow strip)	Neighbours
20	*Fanning v Jenkinson* (HC, 2 July 1997)	No	Neighbours

	Case Name	Was the claim successful?	Pre-existing relationship
21	*Gleeson v Feehan and Purcell* [1997] 1 ILRM 522	Yes	Family
22	*Griffin v Bleithin* 1999] 2 ILRM 182	Yes	Contractual
23	*Feehan v Leamy* [2001] IEHC 23	No	Neighbours
24	*Bula Ltd (in receivership) v Crowley* [2003] 1 IR 396	No	Contractual
25	*Fahy v Dillon* [2005] 7 JIC 2913	No	Neighbours
26	*Keelgrove Properties Ltd v Shelbourne Development Ltd* [2005] IEHC 238	No	Neighbours
27	*Tracey v Drury* [2006] IEHC 381	No	Neighbours
28	*Dunne v Iarnrod Eireann* [2007] IEHC 314	No	Neighbours
29	*Moley v Fee* [2007] IEHC 143	No	Contractual
30	*Mahon v O'Reilly* [2010] IEHC 103	Yes	Neighbours
31	*Moore v Moore* [2010] IEHC 462	No	Family
32	*Scanlon v Larkin* [2011] IEHC 549	No	Neighbours
33	*Gunning v Sherry* [2012] IEHC 88	No	Family
34	*O'Hagan v Grogan* [2012] IESC 8	Yes	Strangers