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Editorial

Welcome to the second issue of the 2025 edition of the *Irish Judicial Studies Journal*. This is a special issue which is dedicated to exploring contemporary conflicts and challenges in Irish land law. It features the papers delivered at the Summit on *Irish Land Law – Conflicts and Challenges* which took place on 3 April, 2025 at Blackhall Place, Dublin. This Summit, which was subsidised by funding from Skillnet Ireland, was organized by Dr Gabriel Brennan (Law Society of Ireland) and Dr Una Woods (School of Law, University of Limerick) to respond to the neglect of this important area of law across the academy and practice when it comes to conferences. The Summit provided a forum for engagement and dialogue between legal experts, scholars, practitioners, educators and academics specialising in Irish land law. There were 138 attendees and the speakers, all distinguished legal experts, comprised a mix of academics and practitioners, bringing a 'nice balance of the academic and practical.' Feedback on this 'town and gown' approach to discussing key issues in land law was extremely positive. Gabriel and I hope to follow up with another Summit in the future and have tentative plans to make it a biennial event.

This issue of the *Irish Judicial Studies Journal* features seven papers delivered at the Summit which explore diverse areas of land law. The first article in this volume is written by Laura Farrell who examines how the landlord establishes their intention in relation to certain 'no fault' grounds for terminating residential tenancies – more specifically, when the landlord intends to sell or requires the property for occupation by a family member. She examines, in particular, the probative status of the statutory declaration which the landlord must serve on the tenant with the notice of termination in these circumstances.

We then have a piece from Professor John Mee who examines how the courts should decide on the appropriate remedy in a proprietary estoppel case, and whether the aim should be to fulfill the plaintiff's expectation or to remedy the detriment suffered by the plaintiff in reliance on the defendant's promise. This involves a close examination of the relevant English case law, including the recent UK Supreme Court decision in *Guest v Guest* [2022] UKSC 27 and the more limited case law dealing with the issue in the Irish context.

Next, we have an article written by Ruth Cannon BL which takes us through the provisions of the Landlord and Tenant (Amendment) Act 1980, the centrepiece of non-residential tenants' statutory rights in Ireland. This Act, although admirable in certain respects, dates from Edwardian times and could, Cannon argues, benefit from an update. Her recommended amendments include the removal of the restriction of its application to leases of 'tenements' and the inclusion of a facility to apply for damages when a landlord has unreasonably withheld consent to alienation or change of user.

We then have a piece from Dr Deirdre Ní Fhloinn BL who discusses two pernicious practical problems presented by multi-unit developments (the transfer of common areas and building defects) which continue to cause difficulty for apartment owners and owners' management companies despite the introduction of the Multi-Unit Development Act 2011. Drawing on developments elsewhere, she concludes with a number of suggestions for reform.

Next is an article from Dr Neil Maddox where we revert to the thorny issue of commercial tenancies, this time with an examination of the circumstances in which a landlord may effect a forfeiture of a lease through the self-help remedy of a peaceful re-entry. This article specifically addresses whether a landlord should be permitted to change the locks in effecting a re-entry of the premises.

Our penultimate piece in this volume is by Dr Gabriel Brennan and makes a strong case for a change in conveyancing practice to grant freehold title to apartment owners. Traditionally, long leasehold title has been granted to apartment owners due to the difficulties in enforcing freehold covenants (more specifically positive freehold covenants) against successors in title to the original owner. This difficulty was, however, removed by the Land and Conveyancing Law Reform Act 2009 which allows for the enforceability of freehold covenants. Despite this development, conveyancers have continued to use long leases for apartments. This article explores the historical difficulties and the current implications of granting freehold title to apartment owners.

In the final article in this volume, I explore the potential for unfair outcomes in the application of the law on adverse possession. Many adverse possession claims take place between family members or neighbours. Such relationships are frequently underpinned by trust and goodwill leading to a reluctance on the part of the owner to initiate litigation or to take steps to formalise a consensual occupation arrangement. This article makes a case for the introduction of a qualified veto system of adverse possession to address this unfairness by bolstering the protection afforded by the law to owners and limiting claims by undeserving squatters. Most importantly, however, this new system of adverse possession could be fashioned to preserve the valuable functions currently performed by the doctrine.

The *Irish Judicial Studies Journal* maintains its high standards of scholarship through the operation of a rigorous double anonymised peer review process. The work of reviewers is vital to the journal, and we are indebted to them for their careful and thoughtful approach to review. In the last issue, we began to formally recognise the work of peer reviewers by promoting transparency of the peer review process by publishing the gender breakdown of authors and peer reviewers.[1] In this edition, we have seven articles, and fourteen individuals completed the peer review process:

	Women	Men	Other, including Non-Binary people
Authors	5	2	0
Reviewers	11	3	0

As all authors to this volume will be aware, articles published in the *Irish Judicial Studies Journal* are subject to meticulous copyediting and proofing by a team of Judicial Assistants. This team was led by Carrie Anne O'Kelly who did an outstanding job of ensuring that the work was reviewed in a timely and consistent manner. This edition of the journal was proofed and copyedited by Majella Votta, Alessandra Grosariu, Adam Connolly, Eoin D. Ryan, John Blundell, Ryan Greaney and Adam O'Carroll.

I would also like to thank the Editor, Professor Jennifer Schweppe for her assistance in preparing this edition for publication, as well as Declan Calpin of the Courts Service for his assistance and endless patience in editing the journal website. Thanks as always go to our editorial board at the University of Limerick, our judicial editorial board, all of the authors who contributed to this edition, and all of the reviewers who supported it in giving so generously of their time.

Dr Una Woods
Editor of Special Issue on Land Law
Deputy Editor, IJSJ

[1] Gender will be assigned in line with fundamental principles of human rights and personal dignity, and the IJSJ will respect the principle of self-identification in this regard. Thus, "women" includes those who identify as women; "men" includes those who identify as men; and "other, including non-binary" includes those who identify outside the first two categories.

The Role of the Landlord's Intention in Terminating Residential Tenancies

Laura Farrell*

Abstract: On 10 June 2025, the government announced reforms to the rules governing security of tenure in residential tenancies. At the time of writing, a Bill has not been published. Under the existing rules on security of tenure, a Part 4 tenancy is of potentially unlimited duration, and whilst this seems like significant security of tenure, there are 'no fault' grounds on which a landlord may terminate which hinge on the landlord's intention in relation to the premises, e.g. they may intend to sell it. Therefore, this article argues that how a landlord is required to establish this intention becomes the measure of security of tenure. To assess this, this article discusses the evidential requirements including statutory declarations, and how the courts and the Residential Tenancies Board assess whether a landlord has established the requisite intention. It is expected that after the proposed reforms, a large landlord (to be defined in the legislation) will no longer be able to terminate on these grounds, whilst a small landlord will be able to terminate on these grounds at the end of a six-year tenancy. The proposed reforms make this article's review of the security of tenure offered by the current rules all the more important. Government discussions around the reforms have focused on largely banning 'no-fault evictions' to curb what they call 'economic evictions', or cases where landlords end tenancies in order to raise rents. However, looking closely at 'no fault' evictions, as this article does, we see that a 'no fault' eviction is not coterminous with an 'economic eviction' and these reforms represent a significant rebalancing of landlord and tenant rights, with stronger security of tenure for tenants. Less far-reaching reform to the rules of security of tenure could have prevented a landlord from terminating simply to re-let the residential dwelling at a higher (market) rent.

Keywords: residential tenancies; security of tenure; eviction; statutory declaration; law reform; landlord and tenant.

Introduction to Tenancy Termination

The Residential Tenancies Act 2004 ('the Act')[1] was commenced in September and December 2004.[2] In the preamble to the Act, the first stated purpose is to provide:

> In accordance with the exigencies of the common good, for a measure of security of tenure for tenants of certain dwellings.

Part Four of the Act contains the provisions on security of tenure.[3] Not all tenancies that fall within the ambit of the Act have the benefit of Part Four. For those tenancies that do, one of the main innovations of the Act was the so-called Part 4 Tenancy.[4] The statutory Part 4 Tenancy only arises once a person has been in occupation of a dwelling under a tenancy for a continuous period of 6 months, and no valid notice of termination has been served during that period.[5] Once a tenant has the benefit of a Part 4 Tenancy, that tenancy is of unlimited duration.[6]

A Part 4 Tenancy may be terminated by the landlord and/or the tenant. The grounds for terminating a Part 4 Tenancy are included in a table to section 34 of the Act. Certain faults by the tenant will allow a landlord to terminate.[7] In this article we are concerned with termination by a landlord where there has been no fault of the tenant. In outline, these reasons are:

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[1] References to the Act are references to the Residential Tenancies Act 2004-2024.
[2] Residential Tenancies Act 2004 (Commencement) Order 2004 (SI No 505 of 2004) and Residential Tenancies Act 2004 (Commencement) (No 2) Order (SI No 750 of 2004).
[3] The Act, s 25.
[4] "Part 4 Tenancy" is defined in the Act, s 29.
[5] ibid s 28(1).
[6] ibid s 28(1) as amended by the Residential Tenancies (Amendment) Act 2021, s 5(1)(a). See further, modification (not altering the Act's text) by the Residential Tenancies (Amendment) Act 2021, s 5(2)-(4).
[7] ibid s 34, table, grounds 1 and 1A.

- The dwelling is no longer suitable to the accommodation needs of the tenant;
- The landlord intends, within nine months after the termination of the tenancy under this section, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling and the notice of termination is accompanied by a statutory declaration (referred to herein with the shorthand of the ground of 'sale' or where the landlord 'intends to sell');[8]
- The landlord requires the dwelling for their own occupation or for the occupation of a family member;
- The landlord intends to substantially refurbish or renovate the dwelling or the property in a way that requires the property to be vacated for that purpose; and
- The landlord intends to change the use of the dwelling.[9]

To terminate for any of these reasons the landlord must serve a notice of termination in accordance with the requirements of the Act. The notice is served on the tenant, and on the same day a copy is required to be served on the Residential Tenancies Board ('the RTB').[10] The Act stipulates the information that must be contained in the notice,[11] and the period of notice that must be given.[12] There are other specific requirements for certain grounds of termination.[13] In this article we are concerned with those grounds that specifically refer to the landlord's intention and/or respond to the landlord's plans for the dwelling. For ease of reference those reasons (and their number in the table to the Act, section

[8] Since 17 January 2017 termination because of an intention to sell has a different application if the landlord is seeking to sell ten or more dwellings within a development but this so-called 'Tyrellstown amendment' is outside the scope of this paper.
[9] s 34 table, grounds 2-6.
[10] ibid s 39A.
[11] ibid s 62.
[12] ibid s 66.
[13] ibid s 34, table, grounds 2-6 and s 35.

34) are: sale (ground 3); own or family member's occupation (ground 4); refurbishment (ground 5); and change of use of the dwelling (ground 6).

Reasons for Termination that Respond to the Landlord's Intention

The specific requirements for each of those four reasons for termination are split, in a somewhat *ad hoc* manner, between the Act, sections 34 and 35. Each of those grounds require an offer to reoccupy to be made, and the rules regulating the offer to reoccupy are discussed for all grounds below. The other specific requirements for each ground are as follows:

- For the third ground in the table to the Act, section 34 (sale), the notice of termination must be accompanied with a statutory declaration, and that declaration must include:

  > a declaration that the landlord intends to enter into an enforceable agreement to transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling.[14]

- For the fourth ground in the table to the Act, section 34 (landlord's or family member's use), the notice of termination must be accompanied with a statutory declaration, and that declaration must specify the intended occupant's identity and (if not the landlord) the occupant's relationship with the landlord and the expected duration of that occupation.[15]

- For the fifth ground in the table to the Act, section 34 (refurbishment which requires the dwelling to be vacated for that purpose), if planning permission is required, that planning permission needs to be obtained *before* the notice of termination is served.[16] The notice of termination must be accompanied by a copy of any required planning permission. If planning permission is not required, the notice of termination must

[14] ibid s 35(8)(a).
[15] ibid s 34, table, ground 4(a)(i) and (ii). A member of the landlord's family is defined in the Act, s 35(4).
[16] ibid s 34, ground 5.

contain or be accompanied by a written statement which sets out: (i) the name of the contractor, if any, employed to carry out the intended works, and (ii) the dates on which the intended works are to be carried out and the proposed duration of the period in which those works are to be carried out.[17] Whether or not planning permission is required, the notice needs to contain or be accompanied with a statement specifying the nature of the intended works.[18]

- For the sixth ground in the table to the Act, section 34 (change of use), if planning permission is required, that permission needs to be obtained before the notice is served.[19] A copy of the planning permission should accompany the notice of termination.[20] Where works are required to be carried out in relation to the change of use, then the notice of termination needs to contain or be accompanied with a written statement specifying details of those works, the name of the contractor, if any, employed and the dates and expected duration of those works. Where no planning permission is required and/or no works will be required, there is no statutory requirement to state that fact explicitly. Any notice of termination served in reliance on the sixth ground needs to contain or be accompanied by a written statement specifying the nature of the intended use.

As noted above, each of these four grounds of termination contain a requirement that the landlord will offer the dwelling back to the tenant in certain circumstances. In respect of grounds 3 and 4, this statement needs to be contained in a statutory declaration. This obligation is considered in more detail below.

The Landlord's Intention as a Measure of Security of Tenure

As we have seen, the Act allows termination where there has been no fault on the part of the tenant. Four of those 'no fault grounds' of termination respond to the landlord's intention. This means that measuring the security of tenure in the Act depends on the role ascribed to the landlord's intention. In other words,

[17] ibid s 35(9)(b).
[18] ibid s 34, ground 5(a).
[19] ibid s 34, ground 6.
[20] ibid s 35(10).

measuring the security of tenure requires an assessment of how the landlord establishes and/or proves that intention, and the consequences when that intention changes or is revealed to never to have existed. To investigate these issues, this article considers:

- How the courts have approached the landlord's required intention;
- The importance of the requirement for a statutory declaration;
- Establishing the intention in evidence;
- Offer to reoccupy;
- Ulterior motive and penalisation; and
- Prohibited conduct and offences.

Exactly what intention must the landlord have?

The intention here is not to interrogate each of the grounds of termination that refer to the landlord's intention, but only ground 3 (sale) and 4 (landlord's or family member's use), which have received judicial attention.

The specifics of the required intention have received the most judicial attention. For example, must the landlord prove an intention 'to sell', or an intention 'to sell in nine months'? Baker J considered this issue in *Hennessy v PRTB*,[21] in 2016. The law at the time the notice of termination in *Hennessy* was served (11 June 2014) was different to the current rules in two respects: (i) the required intention was to sell in three months (subsequently extended to nine months)[22] and (ii) there was no requirement for a statutory declaration.[23] As was later repeated with approval by Simons J in *Gunn v RTB*,[24] Baker J said,

[21] [2016] IEHC 174.
[22] It was extended to nine months by the Residential Tenancies (Amendment) Act 2019, s 12(2)(a).
[23] The requirement for a statutory declaration was inserted by the Residential Tenancies (Amendment) Act 2015, s 28(c) and then amended by Planning and Development (Housing) and Residential Tenancies Act 2016, s 39.
[24] [2020] IEHC 635.

> the operative reason for termination on account of ground 3 in the table to s 34 is not that the landlord intends to sell the premises, but that he intends to bind himself to a contract for sale within three months of termination. There is a difference in emphasis and meaning between the two statements of intent, and that difference is relevant and central to the protection afforded by the legislation. An intention to sell simpliciter is not sufficient to terminate.

When the Act was amended by section 28(c) of the Residential Tenancies (Amendment) Act 2015 to include a requirement that the notice of termination be accompanied by a statutory declaration, the statutory declaration in question was required only to include a 'declaration that the landlord intends to enter into an enforceable agreement to transfer to another, for full consideration, of the whole of the landlord's interest in the dwelling'. Notably, the declaration does not include a declaration of an intention to sell in nine months. In *Residential Tenancies*,[25] I wrote that Baker J's decision in *Hennessy* now sat uneasily with the lack of a legislative requirement for the content of the statutory declaration to refer to 'nine months'.

Hennessy also considered when the landlord's intention is assessed, noting that before the notice of termination may be served, the landlord must intend to sell the dwelling. This was further extrapolated in *Gunn* such that regard *may* be had to steps taken by a landlord before *and* after the service of the notice of termination, but the probative value of acts taken after the service of a notice of termination cannot be a substitute for a lack of intention as of the date of service.

Turning to ground 4 (landlord's or family member's use), in *O'Sheehan v Residential Tenancies Board*[26] there was some disagreement between the parties as to whether the landlord must intend to occupy the property as a self-contained residential unit. The tenants submitted that the intended occupation must be occupation as a dwelling. By contrast, the RTB, at hearing, accepted that the landlord must intend the occupation as a dwelling, in the sense of a form of residential use, but that there is a certain 'elasticity' to the concept, which is

[25] Laura Farrell and JCW Wylie (eds), *Residential Tenancies* (Bloomsbury 2018) [6.80].
[26] [2024] IEHC 409.

ultimately a question of fact and degree. In *O'Sheehan*, the High Court explained the meaning of 'occupation' in ground 4 as follows for the 'accommodation needs' of the landlord or their family:

> Here, the object of Part 4 of the RTA 2004 is to confer security of tenure on certain classes of tenant. This is achieved by restricting a landlord's right to recover possession to specific circumstances. One of these is where the landlord requires the property for his or her own occupation or for occupation by a member of their family. A landlord is not entitled to exercise his property rights by terminating a tenancy for the purpose of letting it out, at a higher rent, to a third party. The legislature has, however, drawn a distinction where the intended occupation will be by the landlord or his or her family. *The legislature has ordained that a landlord retains the right to recover a tenanted property for his or her own accommodation needs or those of their family*. This right prevails over any right which a tenancy would otherwise enjoy to a secured tenancy of unlimited duration.[27]

In *O'Sheehan*, Simons J goes on to consider that ground 4 must refer 'to occupation of the property for its existing use, i.e., as a self-contained residential unit' because change of use of the property is addressed separately (ground 6). Simons J said that what will constitute occupation as a dwelling is a question of fact and degree:

> It is not necessary that the premises be occupied as the sole or principal residence of the landlord or family member … At the other end of the spectrum, occasional or intermittent occupation will not be sufficient. It must be doubtful, for example, whether a landlord would be entitled to rely on the landlord/family occupation ground where the proposed use of the tenanted property is a holiday home.[28]

In *O'Sheehan*, the time at which the landlord's intention must be assessed was also considered. The use to which the landlord/landlord's family members

[27] ibid [23] (emphasis added).
[28] ibid [26].

intended to put the property had changed through time, and Simons J said that the proper approach for the Tribunal was to

> identify which, if any, of the various proposed uses posited by the Landlords represented the operational use which could be relied upon to ground the notice of termination. Thereafter, the Tenancy Tribunal was required, secondly, to consider whether this identified proposed use, if *bona fide*, would constitute occupation as a dwelling, i.e., as a self-contained residential unit, for the purposes of section 34.[29]

The Requirement for a Statutory Declaration

In *Gunn v RTB,*[30] the RTB argued before the High Court that the statutory declaration that accompanies the landlord's notice of termination has a particular evidential status, specifically that the legislative intention was that the statutory declaration sworn by the landlord would *evidence* the intention stated therein. The RTB made the further argument that in the absence of cross-examination, it is not possible to go behind such a statutory declaration.[31] Whilst expressing his comments to be *obiter*, Simons J did consider these arguments:

> The legislative intent in prescribing a requirement for a statutory declaration is to ensure that this ground of termination is not invoked lightly. It would, however, be inconsistent with the overall scheme of the legislation to confer some sort of presumptive evidential status upon such a statutory declaration.[32]

If the statutory declaration was given a presumptive evidential status, then the effect would have been to diminish the tenant's rights (i.e., remove from the tenant the right to challenge the landlord's intention, once the landlord had sworn a statutory declaration).[33]

[29] ibid [74].
[30] *Gunn* (n 24).
[31] ibid [51].
[32] ibid [55].
[33] ibid [57].

Following *Gunn*, the High Court has further considered the evidential status of the statutory declaration in *Stulpinaite v The Residential Tenancies Board*[34] and in *O'Sheehan*.[35] The argument made in relation to the statutory declaration in *Stulpinaite* was not as strong as that made in *Gunn*: in *Stulpinaite* it was only urged that having regard to the fact that there were penal sanctions where a person made a false or misleading statutory declaration, the making of the statutory declaration was itself a significant piece of evidence that the Tribunal was entitled to take into consideration.[36] Barr J was satisfied that notwithstanding the *obiter* status of Simons J's comments on statutory declarations in *Gunn*, those comments represent an accurate statement of the law.[37] In answering the specific arguments made before him, Barr J said that a statutory declaration is some but not strong evidence of the intention stated therein:

> Given the informal nature of proceedings before the Tribunal, the better view is that a statutory declaration constitutes evidence of intention, due to the fact that there are penal consequences if the statement made therein is not true; however, given that the statutory declaration is essentially just a statement by the interested party confirming his own stated intention, it is not strong evidence of intention, but is nonetheless some evidence that can be taken into account by the Tribunal.[38]

In *Kelly v RTB*[39] the landlord, a commercial entity, served a notice of termination on the ground of intended sale, and the statutory declaration was sworn by a director of the landlord, who did not give evidence at the Tribunal hearing. The point of law on which the tenant appealed to the High Court was that the RTB had erred in finding that the statutory declaration was sufficient evidence of the truth of its contents. In *Kelly*, Bradley J noted that the comments in *Gunn* were expressly *obiter* and then made the following observation on those comments as follows: '[t]here is no suggestion, however, that a statutory declaration is

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[34] [2021] IEHC 178.
[35] Where it was affirmed that the statutory declaration does not have presumptive evidential status, *O'Sheehan* (n 26) [19].
[36] [2021] IEHC 178 [66].
[37] ibid [67].
[38] ibid [69].
[39] [2024] IEHC 730.

impermissible *per se* in a hearing.'[40] Just as in *Stulpinaite*, Bradley J characterised the statutory declaration served in *Kelly* as 'some (albeit not strong) evidence' that the landlord had the requisite intention.[41]

Establishing the Intention in Evidence

It is clear that the notice of termination/statutory declaration are intended to be interrogated/looked behind and this is evidenced by the Act's dispute resolution procedures.[42] Section 78(1)(g) of the Act[43] allows a tenant to bring a challenge to a notice of termination on the basis that a landlord did not have the requisite intention as stated in the notice. The legislation envisages that adjudications and then the Tribunal on appeal will proceed by oral hearing, with the Tribunal having statutory power to administer an oath or affirmation. How easy or difficult it is for the landlord to establish their intention before the Tribunal then becomes a further measure of the degree of security of tenure afforded by the Act.

In *Stulpinaite*, the tenant queried the landlord's intention to sell as set out in the notice of termination, and accompanying statutory declaration. The landlord did not attend at the Tribunal, and the tenant did not subpoena the landlord to attend before the Tribunal. Before the High Court, the tenant submitted that having regard to the dispute between the parties with regards to the *bona fides* of the landlord's intention, it was incumbent upon the Tribunal to exercise the power given to it under section 105(3) Act, to summon the landlord to appear before it and give evidence. Ultimately the High Court held that the tenant could not complain that the landlord did not give evidence as she did not call him as a witness. When analysing this decision, it should be noted that it was a particular feature of this case that the landlord had not attended at the adjudication, and so the tenant could have predicted he would not attend at the Tribunal. It should also be noted that the High Court expressed considerable sympathy for the tenant, noting that it seemed

[40] ibid [54]

[41] ibid [59].

[42] See for example the comments of Simons J in *Gunn* (n 24) [56].

[43] '(g) an allegation that the ground stated by the landlord for the purposes of terminating a tenancy was not valid or that the notice used to terminate a tenancy did not comply with this Act'.

> incongruous that where the sole issue is the intention which a landlord had at the date of service of the notice of termination … the landlord can elect to establish his state of mind, not by giving evidence himself of his intention, but by sending in his letting agent and by submitting a plethora of documents, to establish that fact.[44]

The High Court further noted that the letting agent could only give evidence of what he was told by the landlord, which was hearsay evidence, and that it is 'almost impossible to cross-examine a witness on the accuracy or veracity of their hearsay evidence.'[45]

In *Rathdrinagh Land Limited v Donfield*[46] there was a conflict of fact in the affidavit evidence on the determinative issue in the application, namely whether the tenant had received the notice of termination from the landlord. From that basis, the Tribunal went on to cross-examine the tenant but not to cross-examine the landlord. The High Court held that this was 'a manifest procedural unfairness',[47] and later 'this lack of procedural fairness leaps off the pages'[48] of the Tribunal transcript.

Stulpinaite was cited and distinguished in *Rathdrinagh* on the basis that in *Rathdrinagh*, the landlord 'did give evidence to the Tribunal by way of affidavit and his evidence was accepted.'[49] However, distinguishing the case in this way arguably overlooks the fact that, in *Stulpinaite,* the landlord's statutory declaration[50] was also before the Tribunal and constituted some evidence of intention, even though the landlord did not attend in person, or provide an affidavit. This raises the question of whether a statutory declaration, in the absence of oral or affidavit evidence, should be regarded as a lesser form of evidence, or whether the Tribunal ought to have required the landlord's attendance for cross-examination, particularly where intention is disputed.

[44] *Stulpinaite* (n 34) [87].
[45] ibid [88].
[46] [2024] IEHC 749.
[47] ibid [85].
[48] ibid [91].
[49] ibid [82].
[50] The landlord had sworn the statutory declaration, *Stulpinaite* (n 34) [13].

Appeal to the High Court

Having considered how the landlord establishes their intention in evidence, it is important to move on to consider the tenant's ability to appeal the Tribunal's findings in relation to the landlord's intention to the High Court. The scope of the statutory appeal brought under section 123 of the Act where the landlord's intention is in issue was considered in *Kelly* (above) where the tenant characterised the central issue in its appeal as a *legal question* concerning an error of law as to whether the Tribunal properly directed itself as to its approach to the *sufficiency* of the evidence before it. The tenant contended that as the appeal centred on the question of the landlord's intention, establishing intention as a matter of evidence is necessarily a matter of inference which can be reviewed by the High Court on a statutory appeal on a point of law. By contrast, the RTB said that the issue (i.e., whether the landlord held an intention to sell the dwelling within nine months of the termination date) was a *question of fact*. Bradley J described the jurisdiction of the High Court as follows:

> The following principles apply to the exercise of my statutory appellate jurisdiction in this appeal when considering whether the RTB erred as a matter of law: (a) in its determination; and/or (b) in its process of determination: (i) I may not interfere with first instance findings of fact unless I find that there is no evidence to support them; (ii) as to mixed questions of fact and law, I: (a) may reverse the RTB on its interpretation of documents; (b) can set aside the RTB determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by it on the primary facts before it could not reasonably be drawn; (c) must set aside the RTB determination, if its conclusions show that it was wrong in some view of the law adopted by it; (iii) even if there is no mistake in law, or misinterpretation of documents on the part of the RTB, I can, nonetheless, set aside its determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn.
>
> Accordingly the parameters of the remit of my statutory appellate jurisdiction in this case are as follows: (i) I cannot set aside findings of primary fact unless there is no evidence to support such findings; (ii) I ought not set aside inferences drawn from such facts unless such

> inferences were ones which no reasonable decision-making body could draw; (iii) I can and should, however, reverse such inferences, if the same were based on the interpretation of documents which was incorrect; and (iv) if the conclusion reached by the RTB shows that it has taken an erroneous view of the law, then that is also a ground for setting aside the resulting decision.[51]

Bradley J also quoted Ferriter J in *Web Summit Services v RTB*[52] where he observed that 'an appeal may not succeed unless, *inter alia*, there was no evidence to support a material finding of primary fact, or an inference or conclusion on the facts was one which no Tribunal could reasonably have reached.' Ultimately, Bradley J decided 'that, taken together … [there was] evidence to support the material findings of primary fact made by the RTB and that the inferences and conclusions drawn from those facts were ones which the RTB could reasonably have reached.'[53] In elaborating on what constituted 'sufficient evidence' that the landlord had the requisite intention, Bradley J explained that the Tribunal was entitled to rely on the statutory declaration (which he described as 'some (albeit not strong) evidence'), together with the oral evidence of a company director as to the landlord's intention at the relevant time, and the absence of any direct evidence to the contrary from the tenant. He noted that the Tribunal could consider the statutory declaration, oral testimony, and the surrounding circumstances in combination, and that this amounted to sufficient evidence to support the finding that the landlord intended to enter into an enforceable agreement for sale within the statutory period.[54] If we seek to rely on *Kelly* as a precedent to define the scope of a statutory appeal under section 123 of the Act, where the landlord's intention is in issue, we face a difficulty. While the judgment appears to describe the High Court's jurisdiction in terms that align more closely with the RTB's position (i.e., that the High Court cannot interfere with findings of fact unless there is no evidence to support them), its ultimate conclusion seems

[51] *Kelly* (n 39) [24]-[25].
[52] [2023] IEHC 634 [27].
[53] *Kelly* (n 39) [41].
[54] ibid [42] and [77].

to be framed in a way that reflects the tenant's test (i.e., that there was sufficient evidence).

Offer to Reoccupy

The fact that the intention has not materialised, e.g., the fact that the property has not been sold within nine months, is not a basis for negating the fact that the landlord ever had the requisite intention.[55] However, to deter landlords from terminating a tenancy based on a disingenuous intention, there are consequences if the stated intention does not materialise. Specifically, each of the four grounds of termination that rely on the landlord's intention require the landlord to offer the dwelling back to the tenant in certain circumstances. In respect of grounds 3 and 4, this statement needs to be contained in a statutory declaration.

- For the third ground (sale) it is triggered where the landlord does not enter into an enforceable agreement for the transfer to another for full consideration of the whole of their interest in the dwelling or the property containing the dwelling in nine months.[56]

- For the fourth ground (landlord's or family member's use) it is triggered where the landlord/family member occupant vacates within 12 months.

- For the fifth ground in the table to the Act, section 34 (refurbishment which requires the dwelling to be vacated for that purpose) it is triggered if the dwelling becomes available by reason of the completion of the works of refurbishment or renovation.[57] The Act does not stipulate a period of time.

- For the sixth ground in the table to the Act, section 34 (change of use) it is triggered if the dwelling becomes available for reletting within the period of 12 months.[58]

In each of these scenarios, where a period of time is stipulated, time runs from the expiry of the notice period, or if a dispute has been referred to the RTB, from the final determination of that dispute. Where the tenancy has been validly

[55] ibid [72].
[56] The Act, s 34, table, ground 3 and s 35(8)(aa).
[57] ibid s 34, table, ground 5.
[58] ibid s 34, table, ground 6.

terminated for an additional reason, the obligation to 'offer back' will not be triggered.[59]

If the offer is accepted within 7 days (or such lesser reasonable period as was included in the offer), the resulting agreement is enforceable by landlord and tenant.[60] If it is not accepted within that period, the tenant loses their right to reoccupy.[61]

Ulterior Motive – penalisation

Motive and intention are different. The landlord's motive in forming an intention to terminate is certainly relevant insofar as the Act prohibits a landlord from penalising a tenant. Penalisation is governed by section 14 of the Act. A tenant may be penalised if a landlord is motivated in serving a notice of termination by virtue of any acts of the tenant as described in section 14(1) of the Act (such tenant acts include referring a dispute to the RTB or making a complaint to a public authority). If a notice of termination is served in retaliation in a way prohibited by section 14 of the Act, then the consequence is that the notice will be invalid.[62]

The landlord's intention must be *bona fide*. One of the questions of law referred to the High Court in *O'Sheehan* was whether the Tribunal failed to carry out any enquiry or properly adjudicate upon whether the claimed requirement of possession of the subject property by the landlords was a *bona fide* requirement and not a requirement that in truth did not exist or one that was advanced to achieve an unlawful objective. The tenant further contended that relevant evidence in this regard had not been taken into consideration by the Tribunal. The High Court clarified that the Tribunal must consider both the subjective dimension (what the landlord claims their intention is) and the objective dimension (whether that stated intention is genuine and not advanced to achieve an unlawful objective). In *O'Sheehan*, the Court was satisfied that the Tribunal had

[59] The alternate basis for termination that mean the offer to reoccupy does not need to be made vary depending on which ground in any given scenario has given rise to the necessity of making an offer to reoccupy, see the Act, s 34 grounds 4-6, and s 35(8)(aa).
[60] ibid s 35(6).
[61] ibid s 35(6A).
[62] *O'Sheehan* (n 26) [33].

correctly addressed both aspects and reached a valid finding in accordance with the law.

Prohibited Conduct and Offences

The Residential Tenancies Amendment Act 2019 was signed by the President on 24 May 2019.[63] The Act introduced a significant enhancement to the powers of the RTB in regulating the conduct of landlords. The 2019 Act brought in new criminal offences for landlords, and extensive investigative powers of the RTB along with provision for sanctions for improper conduct by landlords. Schedule 2 of the Act sets out what constitutes improper conduct in respect of which investigations can be carried out. These grounds include giving a reason on a notice of termination that is known to be false or misleading and/or failure to offer a tenancy back to a tenant when certain conditions have been met. The decision-makers have a wide discretion in imposing sanctions for improper conduct. The maximum financial penalty is €15,000 for improper conduct.

The Act makes provision for several offences. A person who is guilty of an offence under the Principal Act is liable on summary conviction to a fine not exceeding €4,000[64] or imprisonment for a term not exceeding six months, or to both. Section 74 of the Act makes it an offence to act in reliance on an invalid notice of termination, which actions affects adversely, or are calculated to affect adversely, any interest of the person on whom the notice is served.

Conclusion and Reform

Following legislative reform in 2022, the Part 4 tenancy became of potentially unlimited duration. This sounds like significant security of tenure, but the tenants' rights are balanced by the landlord's ability to terminate a Part 4 tenancy for the reasons set out in section 34 of the Act. It is especially important for landlords that section 34 of the Act, allows termination for several reasons that do not

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[63] The Residential Tenancies Amendment Act 2019, <https://www.oireachtas.ie/en/bills/bill/2018/140/> accessed 08 January 2026.

[64] The fine of €3,000 provided for in s 9(1) of the Principal Act, translates into a class B fine, not greater than €4,000 as provided for by ss 3 and 5(2) of the Fines Act 2010 and table ref. no. 1, S.I. No. 662 of 2010.

correspond to the tenant's fault. These reasons respond to the landlord's intention/future use of the dwelling, and so, in a very real way, how a landlord is required to establish this intention is a measure of the security of tenure offered by the Act.

Since the talk on which this article is based was given in the Law Society, the government has announced significant reforms to the Act. At the time of writing, we do not yet have a Bill to consider. However, from a government press release, it appears that the rules on security of tenure will be subject to significant revision. There is to be a distinction between a large and a small landlord, with a large landlord having four or more residential properties for letting. A further new statutory construct will be introduced, being that of a tenancy of minimum duration, with the existing Part 4 tenancy being one of rolling six-year terms. Depending on the final text of the Bill, some existing grounds in section 34 of the Act, may be restricted to small landlords and/or engaged at the end of a minimum-duration term. During the six-year term, the small landlord will only be able to terminate on limited grounds, which we expect to be where the landlord requires the dwelling for its own use or that of an immediate family member, or where the termination is necessitated by the landlord's financial hardship. It seems that the large landlord will not have a right to terminate for sale, renovation, occupation or change of use at any time.

These security of tenure reforms are part of a package of reforms relating to rent some of which have already been commenced[65] while others have yet to be set out in a Bill. Insofar as rent is concerned, a major innovation of these reforms will perhaps be the landlord's power to reset to market rent between tenancies. The consequent incentive for landlords to terminate existing tenancies that are not at market rents is obvious. Accordingly, the government has been clear: economic terminations, i.e., terminations for the purpose of entering into another tenancy at a higher (market) rent, will not be allowed. It is in this context that the new security of tenure reforms have been proposed, but, is this what the new reforms achieve?

[65] Residential Tenancies (Amendment) Act 2025 (which made the whole country a rent pressure zone).

This article has been concerned with the existing 'no fault' grounds of termination, which depend on the landlord's intention/future use of the property. We have seen the methods which give teeth to the requirement that a landlord have a particular intention. It is submitted that these 'no fault' grounds of termination do not allow for an 'economic termination'. In other words, the existing no fault grounds of termination do not provide for a scenario where a landlord, motivated by increasing rent, may terminate, and let out at a higher rent, without more. It may be that the dwelling would be ultimately let at a higher rent, but first, something else would need to happen, for example the dwelling would need to be sold; and in respect of other grounds (for example where a family member moves in, or the use of the dwelling is changed), the dwelling would leave the residential rental market, at least for a time.

The subject matter of this paper is therefore important in understanding the proposed reforms. The proposed changes to the rules on security of tenure are more than simply a step to disincentivise economic evictions; it is submitted that the reforms go beyond what would be necessary to achieve this.

Choosing the Remedy for Proprietary Estoppel

John Mee*

Abstract: This article considers the appropriate method of determining the remedy in proprietary estoppel cases. The relevant doctrine has been invoked increasingly in recent years, particularly but not exclusively in the context of promises of testamentary benefit in the farming context. The question arises as to whether, in choosing a remedy for a successful plaintiff, the court should normally give effect to the expectation that has been reasonably created in the plaintiff by the defendant's promise. Or, on the other hand, is the underlying aim of the remedy to erase the detriment that the plaintiff would otherwise suffer as a result of having relied upon the defendant's promise? The article examines the English case law, leading up to the recent decision in Guest v Guest, where the UK Supreme Court rejected, by a narrow majority, the idea that the purpose of the remedy was to erase the plaintiff's detriment. The discussion then turns to the more limited case law from this jurisdiction, before seeking to identify the best way for our law to develop. It is concluded that, from a practical point of view, the most attractive approach would be one that identifies the underlying aim of the remedy as the elimination of the plaintiff's detriment but acknowledges that ensuring that this is achieved will frequently involve fulfilling the plaintiff's expectation.

Keywords: Proprietary Estoppel; Remedies; Law of Equity; Testamentary Promises; Judicial Discretion.

This article will consider, in light of developments in other jurisdictions, how the Irish courts should approach the question of determining the remedy in a proprietary estoppel claim based on a promise by the defendant (D) that the plaintiff (P) will obtain an interest in D's land or other property. Many of the recent cases in Ireland and in England and Wales have concerned testamentary promises to children in respect of the family farm[1] but the doctrine is also applicable in the business context, even if no family relationship is involved.[2] As was recently noted

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[1] See *Naylor v Maher* [2018] IECA 32; *K v K* [2018] IEHC 615.

[2] See *Ace Autobody Ltd v Motorpark Ltd* [2024] IECA 6. (Note that an appeal in this case has been heard by the Supreme Court but, at the time of writing, judgment is still awaited.) Of course, farming is also a business and some of the proprietary estoppel cases that have arisen in this context have involved either no family dimension (see *Finnegan v Hand* [2016] IEHC 255) or a fairly

by the UK Supreme Court in the leading case of *Guest v Guest*,[3] there has been a 'lively controversy' as to what the court should be trying to achieve in granting a remedy in such cases.[4]

Proprietary estoppel is not subject to the principle that it can operate as 'a shield but not a sword', a limitation associated with the neighbouring doctrine of promissory estoppel.[5] Therefore, it can be used as a cause of action and can generate positive remedies. Possible remedies include requiring D to transfer ownership of the land to P,[6] or to grant P an indefinite license to occupy the land (or not to revoke an existing licence)[7] or to grant a lease at a nominal rent,[8] or to pay P a monetary sum,[9] or to grant an easement to P.[10] Equity has traditionally described the process in terms of an 'equity' arising in favour of P, with the court having a discretion as to how best to satisfy that equity. In the leading Irish case, *Naylor v Maher*,[11] Peart J (speaking for the Court of Appeal) regarded the aim as

distant degree of kinship (see *Coyle v Finnegan* [2013] IEHC 463: claim by a second cousin once removed).

[3] [2022] UKSC 27.

[4] ibid [50], [52], [60] (Lord Briggs); [136], [137], [156], [158], [168] (Lord Leggatt); the phrase was originally used in *Davies v Davies* [2016] EWCA Civ 463 [39] (Lewison LJ).

[5] There has been an unfortunate lack of precision in the Irish cases in relation to terminology. For example, in *Naylor* (n 1), Peart J, with whom Ryan P and J agreed, described (at [4], [5], and [8]) the doctrine at issue as "promissory estoppel". However, it is clear that the Court of Appeal was considering the doctrine of proprietary estoppel. There was a lesser degree of confusion in the first instance judgment: see [2012] IEHC 408 [349]. Note also Costello J's reliance on promissory estoppel in *Re JR (A Ward of Court)* [1993] ILRM 657, discussed in John Mee, 'Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?' (1998) 33 Irish Jurist 187, 217-219. For a discussion of the differences between the two doctrines, see ibid 197-202.

[6] See *Smyth v Halpin* [1997] 2 ILRM 38 (involving the fee simple remainder). Sometimes a remedy of this nature is expressed by reference to the existence of a constructive trust: see *An Cumann Peile Boitheimeach Teorenta v Albion Properties Ltd* [2008] IEHC 447. Note also the suggestion in *Finnegan* (n 2) that a constructive remedial trust should be imposed in certain cases. This was based on the approach of Lord Scott in *Thorner v Major* [2009] UKHL 18, which was not supported by any of the other judges in that case. For criticism of Lord Scott's unorthodox approach, see John Mee 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 Child and Family Law Quarterly 367, 378-381.

[7] See *Cullen v Cullen* [1962] IR 268; *McMahon v Kerry County Council* (1976) [1981] ILRM 419.

[8] *Griffiths v Williams* (1977) 248 EG 947.

[9] See *Coyle* (n 2).

[10] See eg *Board of Management of All Saints Church of Ireland National School v Courts Service* [2011] IEHC 274.

[11] [2018] IECA 32.

being 'to achieve a just result for the plaintiff in accordance with equitable principles' and explained that 'the facts and circumstances of each case will determine how that ultimate objective is achieved.'[12] This states the court's task in the most abstract terms possible and so is not informative. Of course, it makes sense that the court would approach its task in a flexible manner, taking into account the peculiarities of the individual case. Nonetheless, it is necessary to know what the court is trying (in a pragmatic way) to achieve.

In thinking about this issue, two factors are of potential relevance: the detriment incurred by P and the expectation reasonably created in P by D's promise. Most of the difficult questions that arise in this area relate to these two concepts and their interaction. Does the extent of the detriment incurred by P have a role in the determination of the appropriate remedy? Does it matter if the value of the expectation-based remedy sought by P is greater, or much greater, than the value of P's detriment? How are the courts to deal with the fact that P's detriment may be difficult to quantify in monetary terms, as, for example, where a farmer has promised to leave his or her child the family farm, and that child has given up opportunities elsewhere to work for low pay for decades on the farm in reliance on this promise? Finally, what if P's detriment is linked to his or her expectation through an informal agreement, whereby one was the *quid pro quo* of the other? Should the courts seek to enforce such bargains, despite the fact that statutory formalities have not been complied with?[13]

This article will begin with a brief discussion of the relevant strand of proprietary estoppel. This will be followed by a review of the development of the case law in England and Wales, where the relevant issues have been given much more attention than in Ireland. This will include a detailed consideration of the positions established by the majority and the minority of the UK Supreme Court in the leading case of *Guest v Guest* in 2022.[14] Next, the relatively limited Irish case law will be discussed. Finally, the various possible theoretical approaches to the determination of proprietary estoppel remedies will be identified and evaluated.

[12] ibid [13].

[13] See section 51 of the Land and Conveyancing Law Reform Act 2009 (requirement of signed evidence in writing of a contract for sale of land).

[14] *Guest* (n 3).

It will be suggested that it is difficult to defend the approach of the majority in *Guest*, which insists that the remedy will normally reflect P's expectation but offers no convincing explanation as to why this is the case, nor any intelligible guidance as to the basis for choosing an alternative remedy when an expectation remedy is considered to be inappropriate. It will be submitted that, in theoretical terms, the most attractive approach is to base the remedy on the detriment incurred by P. However, this approach has proven unattractive to courts in practice, given the difficulty in quantifying non-monetary detriment incurred over a long period. Therefore, the conclusion offered by this article is that, in practical terms, the most realistic proposal may be an approach which identifies the aim of the remedial process as the elimination of P's detriment but which, at the same time, is willing to use the expectation as a proxy for the detriment in cases where the detriment is difficult to quantify, in order to ensure that P receives an adequate remedy.

The Doctrine of Proprietary Estoppel

It is often said that two 'limbs' of proprietary estoppel emerged from the decision of the House of Lords in *Ramsden v Dyson*[15] – the expectation (or promise) limb and the mistake (or acquiescence) limb.[16] The mistake limb requires P to have mistakenly believed himself or herself to be the owner of D's land and D to have allowed him or her to act to his or her detriment on the basis of this mistaken belief.[17] The Irish courts have considered the principle in a number of cases but the case law has been relatively sparse.[18] In practical terms, the expectation limb is the most important aspect of the doctrine of proprietary estoppel. It owes its origins to the speech of Lord Kingsdown in *Ramsden v Dyson,*[19] and was revived

[15] (1866) LR 1 HL 129.
[16] In the leading textbook on the doctrine, (Ben McFarlane, *The Law of Proprietary Estoppel* (2nd edn, Oxford University Press, 2020)), McFarlane – following John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in Susan Bright (ed), *Modern Studies in Property Law: Vol VI* (Bloomsbury Publishing, 2011) 175, 181-183 – analyses proprietary estoppel under three separate headings: acquiescence, promise, and representation. The third of these strands involves cases where D has represented that P currently holds an interest in D's land or other specific property. It is not necessary in the present context to address this third strand in detail. For an Irish example, see *McDonagh v Denton* [2005] IEHC 127.
[17] See the statement of this principle by Lord Cranworth in *Ramsden* (n 15), 140-141.
[18] Perhaps the leading case is the generous decision of Finlay P in *McMahon v Kerry County Council* [1981] ILRM 419, discussed in John Mee 'Lost in the Big House' (n 5) 208-211.
[19] *Ramsden* (n 15) 170.

by Lord Denning's Court of Appeal in *Inwards v Baker*,[20] before it was approved at House of Lords level in *Cobbe v Yeoman's Row Management Ltd*[21] and *Thorner v Major*.[22] It was some time before the expectation limb was accepted in Ireland, with the key case being *Smyth v Halpin*.[23] It has since featured relatively frequently in the Irish case law.[24] According to White J in *Finnegan v Hand*,[25] the doctrine 'is based on three main elements: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.'[26] In terms of the requirement of a representation, mentioned by White J, the better view is that, to trigger the doctrine, the representation must amount to a promise rather than a statement of present intention.[27]

Despite the fact that they can both be traced to the case of *Ramsden v Dyson*, it would probably be better to regard the mistake limb and the expectation limb as separate principles, rather than as two aspects of the same doctrine. The mistake limb turns on D's failure to act to prevent P's mistake,[28] whereas the expectation limb is founded on D's having led P to act to his or her detriment on the basis of a promise that P will obtain an interest in D's land. In what follows, the focus will be on the expectation limb.

The Development of the English Case Law

Prior to *Guest v Guest*

Equity has traditionally thought in terms of an 'equity' arising in favour of P when the requirements of the doctrine are satisfied, with the court having a broad

[20] [1965] 2 QB 29.
[21] [2008] UKHL 55.
[22] [2009] UKHL 18.
[23] [1997] 2 ILRM 38. See the discussion in John Mee 'Lost in the Big House' (n 5) 194-197.
[24] For textbook discussions of the doctrine, see Hilary Biehler and Philip Gavin, *Equity and the Law of Trusts in Ireland* (8th edn, Round Hall 2025) ch 18 and Ronan Keane, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017) [27.29]-[27.74].
[25] [2016] IEHC 255.
[26] ibid [37], referring to the formulation by Lord Walker in *Thorner* (n 22) [29].
[27] See McFarlane (n 16) [2.80]-[2.113]. It is arguable that it could also be sufficient if D is aware that P mistakenly believes that D has made a promise.
[28] This is an unusual example in private law of liability flowing from an omission. See generally, Kelvin Fatt Kin Low 'Non-feasance in Equity' (2012) 128 LQR 63.

discretion as to how best to satisfy that equity. One constraint was that the court must do justice to D as well as to P, so that the remedy is 'the minimum equity to do justice', as suggested by Scarman LJ in *Crabb v Arun District Council.*[29] Although this was not explicitly identified as the aim of the process, the almost invariable result of the exercise of the court's discretion was that the remedy took the form of giving effect to P's expectation (as reasonably created by D's promise). As Elizabeth Cooke suggested in 1997, 'the courts have consistently, with very few exceptions, protected the claimant's expectation interest when responding to estoppel'.[30] While the judicial assumption at this stage was 'that expectation is the main driver of the remedy',[31] a different outcome could be reached 'where practical considerations made [the fulfilment of P's expectation] impossible, impracticable or manifestly unjust.'[32]

In theoretical terms, a possible objection to this approach is that it fails to take adequate account of the role of detrimental reliance. Consider a hypothetical case 'in which the party claiming the benefit of an estoppel precluding a denial of his ownership of a million dollar block of land owned by the allegedly estopped party would sustain no detriment beyond the loss of one hundred dollars spent on the erection of a shed if a departure from the assumed state of affairs were allowed'.[33] In such circumstances, it would seem unjust to fulfil P's expectation and award him or her the very valuable land on the basis of limited detriment. Given that the foundation of P's claim is that he or she was induced to incur detriment on the basis of an expectation created by D, it seems logical to suggest that D should be able to satisfy the claim by erasing the detriment or, if this is more favourable to D, by satisfying the expectation. In either case, the foundation for P's appeal to justice is removed and D cannot be said to have acted unconscionably. On this approach, the expectation would serve as an upper limit on the remedy. This is because, even if the detriment exceeds the expectation, P has no grounds for

[29] [1976] Ch 179, 198.
[30] Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 Legal Studies 258, 258. As pointed out by Lord Briggs in *Guest* (n 3) [63], where there is a difficulty with fulfilling P's expectation *in specie*, the remedy may take the form of a monetary sum valued by reference to P's expectation.
[31] *Guest* (n 3) [22] (Lord Briggs).
[32] ibid [38].
[33] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 441 (Deane J).

complaint because D cannot be said to have acted unfairly if the expectation he or she has created is satisfied.[34]

The English courts responded to this concern, not by switching to a detriment-based approach, but by introducing a somewhat unsatisfactory compromise, represented by the concept of proportionality. This concept made its first appearance in English law in the case of *Sledmore v Dalby*.[35] In a concurring judgment,[36] Hobhouse LJ referred to the Australian case of *Commonwealth of Australia v Verwayen*,[37] where Mason CJ had stated that:

> A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.[38]

The next step was the emphasis placed on the concept of proportionality by the Court of Appeal in *Jennings v Rice*.[39] In discussing the appropriate approach to satisfying the equity that arises in favour of P, Aldous LJ described the question of proportionality as '[t]he most essential requirement'.[40] Also in *Jennings*, Robert Walker LJ agreed that 'the principle of proportionality (between remedy and detriment), emphasised by Mason CJ in *Verwayen*, is relevant in England also.'[41] He went on to state that '[t]he essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that.'[42] In the later case of *Ottey v Grundy*,[43] Arden LJ referred to 'the general proposition that the relationship between the promise and the remedy must be proportionate, and that the

[34] This paragraph draws on the explanation in John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in Martin Dixon (ed), *Modern Studies in Property Law, Vol V* (Hart Publishing 2009) 390.
[35] (1996) 72 P & CR 196.
[36] Both Hobhouse and Butler-Sloss LJJ agreed with the reasons of Roch LJ.
[37] *Verwayen* (n 33).
[38] ibid 413 (Mason CJ).
[39] [2002] EWCA Civ 159.
[40] ibid [36].
[41] ibid [56].
[42] ibid.
[43] [2003] EWCA Civ 1176.

promise, even if of a specific property, is only a starting point'.[44] The high-water mark in terms of enthusiasm for proportionality came in the Privy Council decision of *Henry v Henry*[45] where Sir Jonathan Parker stated that '[p]roportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.'[46]

The proportionality approach meant that the extent of P's detriment was recognised as a factor having relevance, at least in some situations, in the determination of the remedy. However, Robert Walker LJ commented in *Jennings v Rice* that a conclusion that an expectation remedy would be disproportionate 'does not mean that the court should … abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief.'[47] Instead, he felt, 'the court has to exercise a wide judgmental discretion'.[48] He went on to identify various factors which the court could take into account, such as

> misconduct of the claimant … or particularly oppressive conduct on the part of the defendant, … the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate.[49]

As Professor Simon Gardner has suggested, while it might be arguable that these factors could have an impact, in an appropriate case, on the mode of relief, it is more difficult to find a principled justification for the proposition that they should affect the quantum of relief.[50] For example, it is hard to see why the need for a

[44] ibid [58].
[45] [2010] UKPC 3.
[46] ibid [65].
[47] *Jennings* (n 39) [51].
[48] ibid.
[49] ibid [52].
[50] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 496, 500-504.

clean break between the parties should result in P being awarded a less valuable remedy than he or she would otherwise have obtained, even if it might sometimes make it appropriate to award P the monetary equivalent of his or her expectation rather than the land at issue. Furthermore, the factors listed by Robert Walker LJ – none of which might be in play in a particular case – are unhelpful in that they do not identify the aim that the court has in exercising its 'wide judgmental discretion'.[51]

In fact, there is a logical problem with an approach that generally determines the remedy on one basis but, when that would be disproportionate to the level of P's detriment, switches to another method. The use of different methods of determining the remedy will inevitably lead to indefensibly inconsistent results. The problem cannot be seen when looking at any one hypothetical case. Rather, as this author has argued in detail elsewhere, it only emerges when one compares the results that are generated in different hypothetical circumstances.[52] It is arguable that a potentially fatal defect in the expectation approach, i.e., that it unfairly benefits P at D's expense by affording a remedy that exceeds P's detriment, is being inadequately addressed by a decision to abandon that approach in only the most egregious instances of this unfairness.

The rejection of the detriment-based approach in *Guest v Guest*

In an article published in 1983,[53] Andrew Burrows (now a member of the UK Supreme Court) suggested that the question of whether estoppel remedies protect expectation or detriment was one that 'the courts must decide once and for all, and … they must not shirk from providing an answer by pretending that that answer will vary according to the facts of each particular case.'[54] Almost forty years later, this question was finally considered by the UK Supreme Court in *Guest v Guest*.[55] The Court was split 3-2, with Lord Briggs (with whom Lady Rose and

[51] ibid 499.
[52] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in Martin Dixon (ed), *Modern Studies in Property Law: Vol V* (Hart Publishing, 2009) 402-404. This argument was discussed by Lord Leggatt in *Guest* (n 3) [224].
[53] Andrew Burrows, 'Contract, Tort and Restitution – A Satisfactory Division or Not?"' (1983) 99 LQR 217.
[54] ibid, 243, quoted in Cooke (n 30) 258.
[55] *Guest* (n 3). Lord Burrows was not, in fact, part of the panel.

Lady Arden agreed) in the majority and Lord Leggatt (with whom Lord Stephens agreed) in the minority.

The facts of the case were not remarkable, although they had the distinguishing feature that the dispute arose before D's death.[56] Like many of the leading cases in the area, *Guest* involved a plaintiff who had worked on a family farm for low pay, foregoing other opportunities, on the basis of a promise of inheritance. The promise in *Guest* was that the plaintiff, Andrew Guest, would be left 'a sufficient (but undefined) part of [the family farm] to enable him to operate a viable farming business on it after the death of his parents.'[57] After he had worked on the farm for more than thirty years, more than twenty of which came after he had been led to expect an inheritance, the parties fell out and the parents changed their wills. The plaintiff was successful at first instance in his proprietary estoppel claim and was awarded, in addition to the 50% of the farming business to which he was already entitled under a partnership with his parents, a monetary sum representing 40% of the value of the farm land and buildings. The defendants were given permission to appeal on the question of the appropriate remedy but the Court of Appeal upheld the trial judge's decision. On a further appeal to the UK Supreme Court, the majority agreed that the remedy should be valued by reference to the plaintiff's expectation but held that the trial judge had erred by granting the plaintiff more than his expectation because he had failed to introduce a discount to reflect the element of acceleration which arose because the plaintiff was to receive the land immediately, rather than upon his parents' death as had been promised. Lord Briggs concluded that the defendants should be given a choice as to whether to give the plaintiff 40% of the farm upon their deaths, or a lesser monetary sum now (reduced to reflect the element of acceleration). While the remedy favoured by the majority reflected the plaintiff's expectation (albeit in monetary form), the minority favoured a remedy which would reflect the detriment he had incurred. Lord Leggatt's judgment included an appendix which worked through the necessary calculations, which would have

[56] Note also the facts of *Gillett v Holt* [2001] Ch 210; *Carter v Ross* (HC, 8 December 2000).
[57] *Guest* (n 3) [2].

led to an order requiring the defendants to pay the sum of £610,000 to the plaintiff.[58]

D's argument in *Guest* was that the remedy should have been limited to the extent of P's detriment. It was suggested that Scarman LJ's famous dictum concerning the 'minimum equity to do justice' represented 'the golden thread which explains the nature and purpose of the remedy'.[59] The suggestion, as Lord Briggs explained it, was that the meaning of this dictum was that 'the court separately values the expectation and the detriment and then chooses whichever is the cheaper for the promisor'[60] (which is another way of describing the approach whereby the remedy is based on the detriment subject to an upper limit represented by P's expectation). Lord Briggs regarded this as a distortion of the meaning of the relevant dictum,[61] and insisted that 'this court should firmly reject the theory that the aim of the remedy for proprietary estoppel is detriment-based forms any part of the law of England.'[62]

Lord Briggs' judgment, it is suggested, was somewhat disappointing in terms of the reasons he gave for this conclusion. One of his strongest points, in practical terms, was the suggestion that 'the detriment [is not] fairly capable of being monetarised, when it consists of decisions about education, training and career which (as here) have life-long consequences.'[63] It is certainly true that farming cases such as *Guest*, where P has often incurred decades of hard-to-quantify detriment, represent a challenging context for the detriment-based approach. However, as a matter of principle, it is difficult to see how the existence of a

[58] The award at first instance was worth around £1.3 million: ibid [131] (Lord Leggatt). The precise value of the reduced award favoured by the majority was not determined. Lord Briggs held that, if the defendants chose to pay a discounted monetary sum immediately and the parties could not agree on the figures, the matter would have to be remitted to the Chancery Division[105]. In passing, it may be noted that, from a tactical point of view, it may not have been advisable for Lord Leggatt to have included a detailed forty paragraph appendix which sought to implement his detriment-based approach. His judgment might have been more persuasive to his judicial colleagues if he had been more willing to paint with a broad brush, in the style with which judges applying equitable principles are more familiar.
[59] *Guest* (n 3) [7] (Lord Briggs).
[60] ibid [13].
[61] ibid [13], [25]-[26].
[62] ibid [71].
[63] ibid [12].

practical difficulty in respect of quantification justifies granting P the highest possible remedy, so as to avoid the challenge of calculating the extent of the lower remedy that justice seems to require. In practical terms, it must also be remembered that the expectation represents an upper limit on the remedy.[64] Therefore, cases involving very substantial detriment will often result in an expectation remedy, even on the detriment-based approach. On that approach, the problem of quantifying the detriment will arise only in cases where the level of expectation is so high that it might be seen to exceed the value of the detriment, if the detriment could be quantified. This article will return, at a later point, to the difficulty in quantifying detriment, where it will examine the argument that it could be appropriate to hold D responsible for the factual uncertainty created by their failure to keep their promise.[65]

Lord Briggs went on to emphasise the fact that authority to date had not favoured the detriment-based approach, suggesting that it was not appropriate to reverse 'over 150 years' careful development of the remedy upon a different foundation.'[66] The reference to 150 years ignores the period of over 80 years when the doctrine was moribund, between 1884 (*Plimmer v Wellington Corporation*)[67] and the revival of the doctrine in 1965 following *Inwards v Baker*.[68] It would perhaps be more accurate to suggest that it was not regarded as appropriate to take the level of detriment incurred by the plaintiff into account from 1965 up to the decision in *Jennings v Rice*[69] in 2002, a period four times shorter than that specified by Lord Briggs. Having given some role to detriment in *Jennings*, the courts were increasingly aware of the strong argument of principle in favour of the idea that the detriment should actually determine the extent of the remedy. It was, for example, suggested by Lewison LJ in *Davies v Davies*[70] that '[l]ogically, there is much to be said for' the detriment approach.[71] Admittedly, the authority in favour of that approach was slim prior to *Guest*, but

[64] See (n 34).
[65] See text following (n 117), below.
[66] [2022] UKSC 27 [71].
[67] (1884) 9 App Cas 699.
[68] [1965] 2 QB 29.
[69] *Jennings* (n 39)
[70] [2016] EWCA Civ 463.
[71] ibid [39].

one might have expected that the apex court would be free to consider the arguments of principle and not be constrained to follow the past decisions of the lower courts.

At the level of principle, Lord Briggs' judgment had little to offer. His one point of principle was focused on the concept of 'harm'. He assumed that, when one was trying to explain the nature of the doctrine, the task was to identify a wrong on the part of D and the harm that this caused to P. He took the view that the 'true purpose' of proprietary estoppel remedies 'is dealing with the unconscionability constituted by the promisor repudiating his promise.'[72] His view was that '[t]he wrong is the repudiation [of the promise] and the harm is the non-fulfilment of the promise thereafter'.[73] He stated:

> [T]he harm caused by the repudiation of the promise is not the same as the detriment. That lies entirely in the past. It cannot be undone and is in no sense caused by the repudiation, or by any wrong at all.... [74]

Thus, Lord Briggs' reasoning was that the detriment incurred by P cannot amount to the relevant harm because it comes at the wrong time in the chronological progression. It has happened before the triggering event, the unconscionable repudiation by D of his or her promise.[75]

In trying to identify the 'harm' to P, Lord Briggs focused only on the last event in the normatively relevant chain of events, the repudiation by D of his or her promise. However, this event can only be seen as causing harm in a relevant sense if it can be said that it was unconscionable of D to have acted in the relevant way. To determine whether it was unconscionable, we must look also at the earlier events in the chain: D's making of the promise and P's detrimental reliance on it. Lord Briggs' line of reasoning assumes that these earlier events make it unconscionable for D not to (later) keep his or her promise, meaning that the relevant harm is the non-fulfilment of the promise. However, it is equally possible to conclude that these earlier events make it unconscionable for D not to (later)

[72] *Guest* (n 3) [13].
[73] ibid [70].
[74] ibid [11].
[75] See also Lord Briggs' restatement of the point, ibid [70].

keep his or her promise without erasing P's detriment, meaning the relevant harm is to be valued by reference to P's detriment. On either view, previous events give shape to the constraint that equity's conception of unconscionability places on D's later conduct. Lord Briggs' reasoning, in fact, gains its plausibility by exploiting an ambiguity in the term 'detriment', which can be understood to refer either to P's conduct in reliance on D's representation or to the negative consequences of those actions (i.e., his or her reliance loss). Of course, as Lord Briggs emphasises, P's past conduct cannot represent the 'harm' caused by D's later unconscionable conduct. However, in the sense that is relevant here, the 'detriment' suffered by P is the extent to which he or she would be worse off, as a result of his or her prior conduct in reliance on the promise, if P were now to resile from his or her promise.[76] On the detriment approach, this is the harm that must be addressed by a proprietary estoppel remedy. Thus, once the relevant ambiguity is clarified, Lord Briggs' point based on chronology is disarmed.

Expectation and Proportionality in Lord Briggs' Judgment in *Guest*

When interpreting Lord Briggs' judgment, it is important to recognise the existence of a gap between the rhetoric he employed and the substance of his position. He referred to 'a fundamental divergence of view about which, as between satisfying the expectation and compensating for the detriment, is or rather should be the true underlying aim of the remedy'.[77] He described this as a 'supposed conundrum'[78] and suggested that 'neither expectation fulfilment nor detriment compensation is the aim of the remedy'.[79] Instead, he insisted, '[t]he aim remains what it has always been, namely the prevention or undoing of unconscionable conduct.'[80] Unfortunately, this statement is, with respect, essentially meaningless – or, in the words of Lord Leggatt in *Guest*, 'unexceptionable but … of little help.'[81] It provides 'no principled basis for

[76] Note the classic explanation of detriment by Dixon J in *Grundt v The Great Boulder Proprietary Mines Ltd* (1937) 59 CLR 641, 674: 'the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.'
[77] *Guest* (n 3) [7].
[78] ibid [8]
[79] ibid [94].
[80] ibid.
[81] ibid [160] (Lord Leggatt), referring to similar statements in other cases.

identifying the "equity" that arises when a claim is established or what the law regards as an unconscionable result.'[82] The question at issue relates to the demands of conscience and, therefore, a formulation involving that idea is not an answer but simply a reframing of the question. Whatever test equity settles upon will come to represent what equity deems to be necessary to prevent or undo unconscionable conduct. Thus, in defending the detriment-based approach in his judgment, Lord Leggatt made the point that

> what the law regards as unconscionable is not A's failure to keep a non-binding promise [but rather] is A's failure to accept responsibility for the consequences of B's reasonable reliance on the promise and for ensuring that B does not suffer detriment as a result of such reliance.[83]

If one more member of the panel had been persuaded of this position, this would have come to represent what, in English law, equity regards as necessary for 'the prevention or undoing of unconscionable conduct'. This demonstrates that it is not possible to read off any particular conclusion from the term 'unconscionability'. In equity, it represents a way of asking the essential question, or of describing the answer after it has been decided upon; it does not, in itself, constitute the answer.

In truth, despite his rhetoric, Lord Briggs came down strongly in favour of an approach centred around the fulfilment of P's expectation, albeit not in every conceivable case. There are repeated indications in his judgment that 'the specific enforcement of the promise or assurance is the primary remedy for the unconscionability threatened or occasioned by its breach.'[84] Thus, he stated that the court aims to remedy unconscionability 'mainly by satisfying expectation'[85] and 'with the effect, but not the aim, that it tend[s] to satisfy the expectations of the promisee'.[86] In the course of his review of the authorities, Lord Briggs commented approvingly on the assumption by the courts that 'expectation is the

[82] ibid.
[83] ibid [191].
[84] ibid [5].
[85] ibid [68].
[86] ibid [61].

main driver of the remedy'.[87] Thus, he referred: to the courts' 'almost single-minded ... pursuit of the enforcement of expectation';[88] to a 'discretionary approach to a remedy designed primarily to satisfy expectation',[89] and; to 'fine-tuning the fulfilment of the expectation of the promisee'.[90] It is only if one underestimates the subtlety of the so-called 'lively controversy' as to the nature of estoppel remedies that one could regard Lord Briggs' approach as taking a middle course between the two alternatives envisaged in that controversy. The choice was never between, on one side, a rigid or mechanical focus on the elimination of detriment, with no awareness of 'the practical problems' that arise in particular cases, and, on the other side, an invariable willingness to enforce the expectation, again ignoring the practical obstacles that can arise. The practicalities of the situation must, of course, be taken into account under either approach. In the end, Lord Briggs not only chose the 'expectation' side of the pre-existing debate, he favoured a more radical version of that approach than was regarded as orthodox prior to *Guest*.

In order to understand the extent to which Lord Briggs shifted the focus towards an expectation-based approach, it is instructive to consider his treatment of the role of proportionality – a concept which, after *Jennings v Rice*, appeared to reduce the centrality of expectation by affording a role to detriment in the determination of the remedy. Looking at the various remarks on the subject in his judgment in *Guest*, it is clear that Lord Briggs was determined to downplay its significance. His scepticism was foreshadowed by his remark, in the course of reviewing the English case law, that 'the introduction [in *Sledmore v Dalby*] of a supposed general requirement for proportionality between the remedy and the detriment was entirely new in English law'.[91] He felt that '[l]ike most tools or rules for the examination whether something produces justice, [the proportionality

[87] ibid [22].
[88] ibid [26].
[89] ibid [30].
[90] ibid [25].
[91] ibid [37]

test] is a good servant but a bad master'.[92] For Lord Briggs, it was 'no more nor less than a useful cross-check for potential injustice.'[93]

Lord Briggs' desire to restrict the role of proportionality is evidenced by multiple aspects of his judgment. For example, he interpreted the requirement to mean that the remedy had to be not merely 'disproportionate' but rather 'out of all proportion' to the detriment.[94] Different formulations had been used in earlier cases, so that it had been uncertain whether a high degree of disproportionality was required or not.[95] In fact, the two examples of disproportionality given by Lord Briggs were extreme. The first was a hypothetical case where

> a disabled 50 year old person … secures a commitment by her carer to look after her at very low wages for the rest of her life, on the assurance that she will inherit her large mansion [but] dies only three months later, without making a will to give effect to her promise.[96]

Lord Briggs mentioned that the hypothetical disabled person had 'no expectation of an early death'.[97] If one conservatively postulates that she was expected to live to the age of 75, then, in Lord Briggs' example, she has died one hundred times sooner than expected (i.e., after three months rather than after 25 years).

The second example was

> the full enforcement of a promise by an elderly lady to leave her carer a particular piece of jewellery if she stayed on at very low wages, which turned out on valuation by her executors to be a Faberge worth millions.[98]

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[92] ibid [72].
[93] ibid.
[94] ibid [68], [72], [73], [76], [79], [94].
[95] Contrast, for example, *Suggitt v Suggitt* [2012] EWCA Civ 1140 [44] (Arden LJ) ('out of all proportion') with *Jennings v Rice* (n 39) [36] (Aldous LJ) ('there must be proportionality between the expectation and the detriment.')
[96] *Guest* (n 3) [10]. Note that Lord Briggs repeats a version of this example when he returns to the question of disproportionality later in his judgment: ibid [76].
[97] ibid.
[98] *Guest* (n 3) [76].

The statement that the value of the jewellery 'turned out on valuation by her executors' to be extremely high introduces the possibility that D had been mistaken in her estimation of the value of the jewellery, thus suggesting a further possible reason to deny an expectation remedy. This seems to imply that even the apparently very high level of disparity between expectation and detriment in the example might not be enough on its own to justify the denial of an expectation remedy. The extreme nature of the examples selected by Lord Briggs[99] seems to suggest that he did not envisage that disproportionality would often play a role.

Lord Briggs placed the burden on D to establish disproportionality,[100] thus making it even less likely that it would be established in practice. He did not offer a justification in principle for changing the normal location of the burden of proof. He also required that the lack of any proportionality must be something that 'can easily be identified without recourse to minute mathematical calculation'.[101] A further restriction on the possible role of disproportionality is that Lord Briggs was of the view that the existence of an informal bargain between the parties could strengthen the case for giving effect to P's expectation.[102] He mentioned a hypothetical case where a daughter 'spends the whole of her working life on the family farm, working at low wages, in the promised expectation that she will inherit it.'[103] He went on to state that, even if the capital value of the farm was very high, an expectation remedy would 'be proportionate (or at least not out of all proportion) because the daughter has fulfilled her part of the family understanding, and it is only fair and proportionate that the parents should now perform theirs.'[104] Here, Lord Briggs has expanded the meaning of the word proportionality, so that it no longer simply refers to the relationship between the value of the detriment and the value of the expectation. It has come to mean

[99] Compare Kirsty Potts, 'An unwelcome Guest? Exploring the spare room of proprietary estoppel' (2023) Conv 78, 84 ("outlandish" examples).
[100] *Guest* (n 3) [76].
[101] ibid [94].
[102] ibid [77]. Note also Lord Briggs' mention of the idea of a 'spectrum' between bargain and non-bargain cases. For discussion, see Hilary Biehler, '*Guest v Guest*: a reconsideration of the role of the concepts of proportionality and unconscionability in formulating remedies in cases of proprietary estoppel' (2024) 71 Irish Jurist 133, 144-146.
[103] *Guest* (n 3) [73].
[104] ibid.

something more like 'appropriate in all the circumstances', notwithstanding the fact that (in the sense of the word he had previously favoured) the expectation remedy would be disproportionate to the detriment P has incurred.[105]

Thus, an examination of Lord Briggs' judgment suggests that he felt obliged to include the concept of proportionality in his scheme but that he sought to curtail its role to the greatest extent possible, thus giving increased prominence to the enforcement of expectations. However, as has been mentioned before, he simultaneously tried to insist that the enforcement of expectations was not the 'aim' of the remedy. This meant that, aside from unhelpful generalities about unconscionability, he failed to identify any underlying purpose that the court is trying to achieve when devising a remedy. This in turn resulted in his being unable to provide coherent guidance as to what the court should do in the (rare) case where the fulfilment of the expectation would be disproportionate. Lord Briggs did not refer to the factors that had been listed by Robert Walker LJ in *Jennings v Rice*. However, he shared Robert Walker LJ's unwillingness to revert to determining the remedy by reference to the detriment. Lord Briggs stated:

> I can see no principled justification for treating a perceived need to abandon full enforcement as a reason for moving straight (or at all) to compensation on the basis of an attempt to value the detriment. … I recognise that, in a case where there is perceived to be a large gap between the respective values of the promise and of the detriment this may leave the judge with a wide range of options with little in the way of rules as a guide. … [W]here the only objection to full enforcement is that it will be out of all proportion to the detriment then the court will … just have to do the best it can.[106]

This injunction to judges to 'do their best' is, with respect, far from convincing. In the absence of any identified remedial philosophy, in the words of Lord Leggatt, 'the law provides no yardstick for deciding when it is appropriate to award

[105] Compare *Naylor v Maher* (n 1) [16], where Peart J stated that the court 'must be guided by correct equitable principles, which necessarily includes a consideration of proportionality and fairness between the parties'. It seems clear that, here, 'proportionality' does not refer narrowly to proportionality between the remedy and P's detriment. Note also *K v K* (n 1) [124].
[106] *Guest* (n 3) [79].

something other than what was promised (or its value) or for deciding what that something else should be.'[107]

The Minority Position in *Guest*

The minority judgment in *Guest* was given by Lord Leggatt, with whom Lord Stephens agreed. Lord Leggatt took the view that the underlying purpose of the remedy is to erase P's detriment. However, he also accepted that it is necessary to ensure that P's remedy is adequate in this respect and that granting an expectation remedy is often necessary to achieve this. Therefore, despite important differences in emphasis between his judgment and that of Lord Briggs, the gap between their positions in terms of practical outcomes should not be overstated. Lord Leggatt's minority position, although notable for its attempt to ground the determination of proprietary estoppel remedies in a theoretical framework focusing on the elimination of detriment, would not have been particularly radical in its effect. Arguably, in practical terms, it could even be seen as representing less of a departure from the pre-existing English position, established in cases such as *Jennings v Rice*,[108] than Lord Briggs' majority approach (which sought to restrict the scope of the proportionality principle that had previously been recognised).

Summing up his position, Lord Leggatt stated in *Guest* that:

> a remedy designed to give effect to the promise is likely to be appropriate if (as eg in *Thorner v Major*): (1) … [P]'s reliance loss is of a kind which is very difficult to quantify in money terms; and (2) the value of the interest in property promised by … [D] is not clearly disproportionate to … [P]'s reliance loss.[109]

[107] ibid [181].
[108] *Jennings* (n 39).
[109] *Guest* (n 3) [258] (addressing the situation where the testator making the promise has died; Lord Leggatt suggested that somewhat different principles would apply where the dispute arose during the life of the promisor. See ibid [259]-[260]). Note that, in the quoted passage, Lord Leggatt refers to it being 'very difficult' to quantify the detriment, suggesting that he would be willing to quantify the detriment in cases where it would merely be difficult to do so. The frequency with which Lord Leggatt would have been willing to take on the quantification of non-monetary detriment is clearly crucial to assessing how significantly the results under his approach would differ in practice from those generated by Lord Briggs' majority approach. It may be significant,

Lord Leggatt had previously explained that:

> the principle that courts will not allow difficulty in quantifying loss to deprive the claimant of a remedy sits alongside, and sometimes in tension with, another principle. This is the principle that, where there is a choice between two possible remedies one of which is an award of money that would be difficult to quantify, such difficulty of quantification may be a good reason to prefer the other remedy.[110]

As an example, Lord Leggatt referred to the courts' willingness to grant an injunction or specific performance in a case where damages would not provide an adequate remedy, because *inter alia* damages 'would be hard to quantify … either because the loss is non-financial in nature or because the loss, although financial, would be uncertain in amount and difficult to estimate or prove'.[111] He felt that a similar approach was justified in proprietary estoppel cases where P's detriment is hard to quantify because

> [g]ranting the [promised] property right ensures that the claimant receives a remedy which is adequate and not one which is inadequate to prevent the claimant from suffering harm as a result of reasonably relying on the defendant's promise.[112]

It seems that the Australian courts also apply a version of this approach. They appear to accept that the object of the remedy is to erase P's detriment[113] but nonetheless see the expectation measure as the *prima facie* remedy.[114]

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in this regard, that Lord Leggatt saw *Thorner v Major* as a case where it was appropriate to grant an expectation remedy without attempting to quantify the detriment, despite the fact that the farm and associated assets awarded to P were worth over £2 million (as noted at the Court of Appeal stage in the case: [2008] EWCA Civ 732 [27]).

[110] ibid [200].

[111] ibid [201].

[112] ibid [202].

[113] See *Sidhu v Van Dyke* [2014] HCA 19 [82] (French CJ; Kiefel, Bell and Keane JJ) and Ying Khai Liew, 'The 'Prima Facie Expectation Relief' Approach in the Australian Law of Proprietary Estoppel' (2019) 39 OJLS 183, 184-193.

[114] See the leading case of *Giumelli v Giumelli* (1999) 196 CLR 101 [40]-[48] (Gleeson CJ; McHugh, Gummow and Callinan JJ) and *Sidhu v Van Dyke* [2019] HCA 19 [85] (French CJ; Kiefel, Bell and Keane JJ). Note that the relatively nuanced Australian approach is often misunderstood. It is not

One advantage of this approach is that it deals more comfortably than Lord Briggs' approach with cases where the detriment is easily quantifiable (such as where money has been spent on improvements to a house). In such cases, it seems natural to grant a monetary remedy reflecting the extent of P's expenditure. The idea that the underlying aim of the remedy is to erase detriment makes it obvious why such a remedy is appropriate.[115] The English courts have, in the past, taken this approach in the case of monetary expenditure on D's property,[116] but it is not clear how this apparently sensible result can be justified on the logic of the majority in *Guest*. That approach would seem to suggest that an expectation remedy should be granted in cases where the detriment – although easily quantifiable – is significant in comparison to the value of the land, so that the expectation remedy would not be 'out of all proportion' to the detriment. Furthermore, in cases where the expectation remedy would indeed be 'out of all proportion' to the detriment, Lord Briggs' opposition to the proposition that the court should ever be concerned with erasing P's detriment leads him to the unhelpful proposition that, in such cases, the court must simply 'do the best it can.'[117]

Although Lord Leggatt's approach has practical attractions, it remains to be demonstrated why it is appropriate to grant P the highest possible remedy (fulfilling his or her expectation) in cases where it is (very) difficult to quantify the detriment. Why is it assumed that the difficulty in quantification is D's problem? The normal position is that the burden of proof lies on P to prove all the elements of his or her case and it might seem natural to think that only loss which P can prove that he or she suffered should be compensated. A possible rationalisation, in terms of principle, for the approach under consideration is provided by Professor Andrew Robertson, who suggests that D – who has created the difficulty

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accurate to regard the Australian courts either as straightforwardly supporting the detriment-based approach (as suggested by Robert Walker LJ in *Jennings* (n 39) [54]; see also *Naylor v Maher* (n 1) [11], [13]) or as having 'comprehensively rejected' the elimination of detriment as 'the aim of a proprietary estoppel remedy' (*Guest* (n 3) [70] (Lord Briggs)).

[115] Compare Peart J's statement in the Irish case of *Naylor v Maher* (n 1)[16] that 'there will be other cases where the circumstances presented may indicate that it is just that the particular equity found to exist would be justly satisfied by a pecuniary award.' *Naylor v Maher* is discussed in detail later.

[116] See *Powell v Benney* [2007] EWCA Civ 1283. Note also *Sidhu v Van Dyke* (n 113) [84].

[117] *Guest* (n 3) [79].

by his or her inequitable conduct in making a promise and resiling from it – should be held 'responsible for the factual uncertainty brought about by his or her inconsistent conduct'.[118] He suggests that, in such cases, the expectation remedy may be chosen as a proxy for the detriment, as a means of ensuring that justice is done to P. As Robertson puts it 'expectation relief … provides complete protection of the unquantifiable reliance interest'.[119] Thus, there is 'a reliance-based rationale for protecting the expectation interest.'[120]

The plausibility of this rationalisation is open to debate.[121] It is arguable that, in a case like *Guest*, neither side could be said to be to blame for the breakdown in the parties' relationship which prevented the implementation of their intended arrangement. In principle, it may only be justifiable to apply the 'expectation as proxy for the detriment' approach in cases where D's unconscionable change of mind is actually the cause of the factual uncertainty in terms of the value of the detriment. This would, however, leave the courts with the difficult task of deciding whether D is to blame for the uncertainty in any given case.[122] As Lord Leggatt pointed out in *Guest*, 'courts have rightly been wary of investigating the parties' conduct and, in cases where their relationship has broken down, of making judgments about who was to blame.'[123] Furthermore, even if it were possible reliably to identify those cases where D was and was not at fault, in the latter category of case it would still be necessary to apply a pure detriment-based approach in cases where D is not at fault (with all the perceived practical difficulties that would entail). Finally, it should be pointed out that, as a matter of logic, a willingness to hold D responsible for the factual uncertainty created by his or her conduct does not inevitably lead to the expectation being used as a proxy for the value of the detriment. In an appropriate case it would, instead, justify pitching the remedy at a sufficiently high level, short of a full expectation remedy, that the court can feel confident that it is sufficient to erase P's detriment.

[118] Andrew Robertson 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] Conv 295, 317.
[119] ibid 296.
[120] ibid.
[121] For a critique of Robertson's position, see Mee (n 34) 408-411.
[122] Or, possibly, the appropriate question would instead be whether D was more to blame than P. Compare this with the approach of Clarke J, in a different context, in *Bracken v Byrne* [2006] 1 ILRM 91, 98.
[123] Guest (n 3) [236]. See also [182].

Thus, in a case with a similar fact pattern to *Suggitt v Suggitt*,[124] a court might decide that – even though the non-monetary detriment incurred by P is difficult to value in monetary terms – granting P some specified fraction of the promised farm, rather than the entire farm, would be sufficient to ensure that his or her detriment had been erased.

On the whole, it seems that Lord Leggatt's approach, which has similarities to that of the Australian courts, is relatively plausible even if questions remain over whether its willingness to avoid (severe) quantification difficulties by granting an expectation remedy can be fully justified in theoretical terms.

The Irish Case Law

Having reviewed the English case law, it is now necessary to turn to consider the more limited body of case law from this jurisdiction.

Preference for the Expectation Approach

While there has been very little explicit analysis, the Irish case law, like that of England and Wales up to *Jennings v Rice*, shows a straightforward preference for expectation remedies. Consider, for example, *Re JR, A Ward of Court*.[125] In this case, Costello J stated that P had established 'an equity which entitles her to stay in the house rent free for as long as she wishes to which the court must give effect'.[126] Thus, the equity which the court would have discretion to satisfy was treated as already having been shaped by P's expectation (since, on the facts of the case, P had been promised that she could remain rent-free in the house for as long as she wanted). The second step of giving effect to the equity involved discretion only in terms of deciding how best to give effect to P's expectation. On the facts, a difficulty arose with the obvious approach of preventing P's eviction (and refusing the request that had been made on behalf of D, a ward of court, that the house be sold). The house needed expensive repairs and was too large for P's needs. The solution implemented by Costello J was to allow it to be sold

[124] [2012] EWCA Civ 1140. For criticism of the remedy in that case, where P was awarded a very valuable farm despite an apparently modest level of detriment, see John Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough?' [2013] Conv 280, 281-286.
[125] [1993] ILRM 657.
[126] ibid 663.

on condition that a new, smaller house be purchased that would be suitable for P's needs, in which P would be allowed to live for as long as she wanted. While this remedy did not exactly reflect the expectation reasonably created in P by D's promise, it represented the closest practical equivalent (along the lines of ordering a monetary remedy quantified on the basis of the value of P's expectation in a case where the disputed property had already been sold by D and so it would not be possible to provide a simple expectation remedy).[127]

The case of *Smyth v Halpin*[128] provides another example of the Irish courts assuming that the aim of the remedy is to fulfil P's expectation. Geoghegan J stated:

> In this case the clear expectation on the part of Mr. Smyth was that he would have a fee simple in the entire house. The protection of the equity arising from the expenditure *therefore* requires in this case that an order be made by this Court directing a conveyance of that interest to him.[129]

Geoghegan J's use of the word 'therefore' suggests an assumption that the automatic remedy is the fulfilment of the expectation.

In *Carter v Ross*,[130] Murphy J stated the three standard requirements of the doctrine in terms of representation, reliance and detriment but went on to suggest that:

> I think it can be stated more quickly and effectively by saying that the courts *will hold a promisor to his promise* even if made without

[127] Note that, oddly, Costello J described the doctrine he was applying as promissory rather than proprietary estoppel: see (n 5). For other cases where, in the context of granting an expectation remedy, the court has made adjustments necessary to achieve justice, see *McDonagh v Denton* [2005] IEHC 127 (D, who was estopped from asserting his prior title, had spent money on the disputed land in the belief that he was the owner; he was held to be entitled to recoup this); *Naylor v Maher* [2012] IEHC 408; [2018] IECA 32 (P was entitled to the farm he had been promised but, on appeal to the Court of Appeal, was required to execute a disclaimer of a monetary bequest which he had been given 'in substitution for the lands which he was no longer to receive': [18] (Peart J)).
[128] *Smyth* (n 23).
[129] ibid 44 (emphasis supplied).
[130] (HC, 8 December 2000).

> consideration where it would be unconscionable to permit him to resile from the promise which he had made.[131]

This restatement of the doctrine indicates an assumption that it operates so as to hold D to his or her promise. Other Irish cases also show an assumption that the remedy will be to fulfil the expectation.[132]

Implementing the Expectation Approach on More Complex Facts

The determination of the remedy has not been simple in all the relevant Irish cases. Although at first sight some of the cases might seem to involve a choice by the court to give P a remedy falling short of the expectation, upon closer inspection it becomes clear that the complexities have related to the question of determining the precise nature of P's reasonable expectation, which it is assumed must be fulfilled. For example, in *Coyle v Finnegan*,[133] the deceased had told P that he needed help in working his farm and that he would leave P 'the place'.[134] After this, P helped with the farm for some nine years, at which point his contribution 'slowed down' to nothing.[135] His evidence was that the deceased 'did not mind'.[136] Later the deceased began to get assistance from the defendants (two brothers) and ultimately he changed his will to leave the land to them. P failed in his claim to the farm but was awarded €74,000 on a *quantum meruit* basis. Laffoy J concluded that the deceased had not made a simple promise to leave the farm to P. Rather, the commitment he had made was that he would leave him the farm or, if he changed his mind about doing so, would instead compensate him for his work. Thus, the remedy chosen by the Court ensured the fulfilment of the deceased's promise to P.

A second example is *Finnegan v Hand*,[137] where P worked for 38 years on the farm of D, his neighbour, from 1972 up to 2009 (the year that D died). P had been 'substantially underpaid and was seriously exploited by the deceased in that

[131] ibid (emphasis supplied).
[132] See, for example, *Owens v Duggan* (HC, 2 April 2004); *Prunty v Crowley* [2016] IEHC 293.
[133] *Coyle* (n 2).
[134] ibid [4].
[135] ibid [14].
[136] ibid.
[137] *Finnegan* (n 25).

regard'.[138] Perhaps being generous to P,[139] White J held that P should 'be awarded half that portion of the estate which includes the farmlands comprised in all the Folios, half the value of the stock and machinery and miscellaneous items sold', with D being given credit for the value of a site that he had provided to P.[140] What was the basis for the remedy granted in this case? It is significant that White J did not accept P's argument that D had promised him the farm. White J was willing to accept only that D had 'led the plaintiff to believe that he would, at least, name the plaintiff as a beneficiary in his will',[141] and emphasised the 'uncertain nature of the promises'.[142] On one interpretation of the facts, given that D had merely promised to mention P in his will, he would have fulfilled his promise if he had left P a non-trivial sum – say €10,000 – in his will. If this were the appropriate objective interpretation of D's words, then the remedy in the case could not exceed this amount (since, on any view, the expectation represents an upper limit on the extent of the remedy). It seems that the only way to justify the decision of White J on the remedial question is to assume instead that, on the facts, it would have been reasonable for P to understand a promise to be mentioned in the will as a promise that he would be given an amount commensurate with the extent of the work he had done on the deceased's farm. This would mean that the remedy given in the case would have to be categorised as an expectation remedy. Inevitably, the assessment of the remedy would involve a strong element of judgment in respect of assessing the amount that could be said to reflect P's work on the farm. However, the process would not involve a discretionary departure from the expectation measure, but rather the court doing its best to calculate the expectation remedy.[143]

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[138] ibid [60].

[139] P was said by White J to have 'some credibility problems', due to evidence that he had, on two separate occasions, made claims based on alleged promises of testamentary provision by people other than the defendant. See ibid [55]-[57].

[140] ibid [72].

[141] ibid [64].

[142] ibid [70].

[143] See also *Board of Management of All Saints Church of Ireland National School v Courts Service* [2011] IEHC 274, where the remedy took the form of a right of way shaped by the nature of the defendant's representations.

Proportionality and the Detriment-Based Approach in the Irish Case Law: *Naylor v Maher*

There has been little consideration in the Irish case law of the possibility of taking detriment into consideration in shaping the remedy for proprietary estoppel. However, it was discussed in the leading case of *Naylor v Maher*.[144] In reliance on promises of inheritance, P had worked for many years for low pay on a farm belonging to a man whom he believed to be his stepfather but who, it emerged in the course of the litigation, was in fact his natural father. At first instance, O'Keeffe J upheld P's proprietary estoppel claim and awarded him the farm.[145] On appeal, it was argued by D that this award was 'excessive and disproportionate to the detriment suffered'.[146] This argument was rejected.

Peart J stated that the defendant's submissions 'referred to two diverging strands of jurisprudence as to the appropriate method of satisfying an equity in circumstances such as here', suggesting that 'the topic has not thus far been the subject of authoritative determination in this jurisdiction.'[147] The divergence had been described by counsel by reference to a passage in *Snell's Equity*, where it was stated that '[o]n the first approach the starting point is that … [P]'s expectation will be protected, and a departure from this is permitted only if it is clear that such an order would impose a disproportionate burden on … [D].'[148] The textbook went on to explain that

> [o]n the second approach, there is no presumption in favour of making … [P]'s expectation good, and the extent of relief will be determined principally by the need for such relief to do no more than ensuring that … [P] suffers no detriment as a result of … [P]'s reasonable reliance on … [D].[149]

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[144] [2012] IEHC 408; [2018] IECA 32. A submission based on proportionality was mentioned by O'Hanlon J at first instance in *O'Rourke v O'Rourke* [2018] IEHC 791 [99]-[100], but the point was not subsequently addressed, given the failure of P's case. The Court of Appeal rejected P's appeal ([2022] IECA 59) and again the question of remedies was not discussed.
[145] [2012] IEHC 408. See also (n 127).
[146] *Naylor* (n 1) [11].
[147] ibid.
[148] John McGhee (ed), *Snell's Equity* (33rd edn, Sweet and Maxwell 2015) [12.48], as quoted in *Naylor* (n 1) [12] (Peart J).
[149] *Naylor* (n 1) [12].

Thus, the first approach represented the English position at the time, prior to *Guest*, and the second approach represented the detriment-based approach. Peart J stated that this 'binary choice' was not one which he considered 'necessary to make in order to achieve a just result for the plaintiff in accordance with equitable principles.'[150] According to Peart J:

> The facts and circumstances of each case will determine how that ultimate objective is achieved: it is not necessary, so to speak, to shoehorn the Court's overall disposition of the case into one or other approach.[151]

Thus, the Court of Appeal avoided making a choice between expectation and detriment on the basis of the argument, criticised many years ago by Andrew Burrows, that the 'answer will depend on the facts of each particular case'.[152]

Two main reasons were given by Peart J for rejecting D's argument, on the facts of the case, for a detriment-based remedy. The first was that P's detriment 'is not confined to a reduction of income or other purely monetary loss.'[153] Thus, the detriment also involved lost opportunities. Peart J pointed out that

> [t]he trial judge was impressed by the plaintiff and was satisfied that, despite his limited education, he was the sort of man who would in all probability have made a success of his life in Dublin or elsewhere, and away from farming.[154]

Peart J emphasised the fact that P had 'altered the course of his life'[155] and was of the view '[t]hat the altered life that he has led ever since ought not in good conscience be taken from him and replaced by mere money.'[156] In these remarks, Peart J anticipated the emphasis placed by Lord Briggs in *Guest* on the difficulty in fairly quantifying non-monetary detriment.[157] It should be remembered, though, that under a detriment-based approach it is appropriate to grant an

[150] ibid [13].
[151] ibid.
[152] See Burrows (n 53).
[153] *Naylor* (n 1) [16].
[154] ibid [14].
[155] ibid. Note the similar emphasis on the life-long nature of the detriment in *K v K* (n 1) [124].
[156] *Naylor* (n 1) [14].
[157] See text to n 58 above.

expectation remedy when the value of the detriment equals or exceeds the value of the expectation. Therefore, it is quite possible that the outcome in *Naylor* would have been the same under such an approach.

The second point made by Peart J was that 'the representations made to the plaintiff by the deceased that he would get these lands, and the reliance which the plaintiff placed upon them, in truth amount to a contract which ought to be fulfilled. The deceased should be kept to his contract – "*pacta sunt servanda*".'[158] The obvious difficulty with this line of reasoning is that D's representations did not 'in truth' amount to a contract. If they had, it would have been possible for D to obtain a remedy in the law of contract and so he would not have had to resort to the law of proprietary estoppel. As Lord Leggatt explained in *Guest v Guest*, there are a number of reasons why a promise that is capable of triggering a proprietary estoppel remedy may not be enforceable in the law of contract: (i) there may be an absence of consideration; (ii) the promise may lack the certainty required for contractual enforcement; (iii) there may be an absence of an intention to create contractual relations, and; (iv) the necessary evidence in writing in relation to contracts for the sale of land[159] may not have been complied with.[160] The maxim *pacta sunt servanda* does not ordinarily apply to non-contractual promises. Therefore, it seems that Peart J's point here must be understood to be that where there is an informal bargain between the parties, it is more reasonable to grant an expectation remedy. This view was taken by Lord Briggs in *Guest* as part of his expectation-focused approach,[161] but it could also be rationalised as part of a detriment-based approach on the basis that the existence of a bargain shows that the parties had regarded the detriment as equivalent in value to the expectation.[162]

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[158] [2018] IECA 32 [15] (emphasis in original).
[159] See s 51 of the Land and Conveyancing Law Reform Act 2009. Note also the more stringent rule created in England under s 2 of the Property (Miscellaneous Provisions) Act 1989.
[160] See *Guest* (n 3) [173]-[183].
[161] See above.
[162] See *Guest* (n 3) [220] (Lord Leggatt).

Possible Models

Having discussed the development of the law in England and Wales, as well considering the existing Irish authorities, it will now be useful to identify a number of possible theoretical models that could be adopted by the Irish courts at the remedial stage. Naturally, different variants of each approach may exist, but the aim here will simply be to indicate the broad range of possibilities. The question of which model the Irish courts should adopt will be considered in the conclusion.

The Non-Committal Approach

Under this model, the aim of the court in choosing a remedy is to give effect to 'correct equitable principles' (in the words of Peart J in *Naylor v Maher*).[163] Unfortunately, while it is understandable that the courts would resist being 'shoe-horned' into an inflexible position, invoking general principles of equity and good conscience provides no practical guidance for the court. In the end, the development of a satisfactory theoretical framework requires the court to take *some* position on the role of expectation and detriment in the process of determining the remedy.

The Pure Expectation Approach

Under this model, the purpose of the remedy is to fulfil P's expectation. As with all equitable doctrines, a pragmatic approach is taken in the individual circumstances of different cases, within the general framework of giving effect to expectations. It might seem to be a disadvantage of this approach that it does not give any role to the concept of proportionality. However, it is important to understand that the word 'proportionality' can have different meanings. The plausible proposition that all equitable remedies must avoid disproportionality involves a general sense of the word 'proportionate', conveying the idea of appropriateness in light of the circumstances and the logic of the equitable doctrine that is being applied. The concept of proportionality, as it has developed in the proprietary estoppel context, has a special meaning involving the relationship between the remedy and the detriment incurred by P. Assertions involving proportionality in that specialised sense have no inevitability to them.

[163] *Naylor* (n 1) [16].

Under the approach currently being discussed, a claim would either fail completely due to the fact that the detriment incurred was trivial and so could be dismissed as *de minimis*[164] (as could equally happen under any of the other theoretical models identified in this section),[165] or it would generally lead to the fulfilment of P's expectation. Thus, the approach under discussion would require the courts to give an expectation remedy even where there was a large disproportion between the detriment and that remedy, provided that the amount of the detriment was non-trivial. This may appear unpalatable but, in the end, this would be an intellectually honest approach – if one is unwilling to accept the detriment-based approach, one must face up to the logical consequence that limited detriment is sufficient to trigger a large expectation remedy.

The Expectation Approach Tempered by Proportionality

Under this model, the remedy would normally take the form of the fulfilment of P's expectation, subject to pragmatic considerations that might arise in individual cases. However, a lesser remedy would be chosen (on the somewhat unsatisfactory basis of the court 'doing its best' in the circumstances) if an expectation remedy would be disproportionate to P's detriment or – if one were to follow Lord Briggs in *Guest* – if it would be 'out of all proportion' to P's detriment. The existence of an informal bargain between the parties, which has been fulfilled by P, could also demonstrate the absence of disproportionality.

The Pure Detriment Approach

Under a detriment-based approach the purpose of the remedy is to erase P's detriment. This is subject to an upper limit of the expectation, so that an expectation remedy would be granted where this would be less onerous for D than a remedy based on the detriment. This approach has an obvious logic to it and has appealed strongly to academic commentators.[166] As Lord Leggatt put the

[164] As recently explained by Lord Briggs in *Brown v Ridley* [2025] UKSC 7 [30], the maxim *de minimis non curat lex* excludes 'matters which are trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible'.
[165] Note *Phoenix Rock Enterprises (Trading as Frank Pratt & Sons) v Hughes* [2025] IEHC 126 [121] (Kennedy J): P's engagement of a planning consultant for a few days 'involved de minimis … inconvenience or expense which must be deemed inconsequential'. See also *Bracken v Byrne* [2006] 1 ILRM 91.
[166] For one notable example, see McFarlane (n 16) [7.35]-[7.69].

central argument in *Guest*, 'both expectation loss and reliance loss are essential elements of the equity, and, once either the expectation is fulfilled or reliance loss is prevented, there is no further reason for the court to intervene'.[167]

It seems that courts in various jurisdictions have been discouraged from adopting this theoretically pure approach by the practical difficulty in quantifying non-monetary detriment.[168] Many leading cases have occurred in the farming context, and have tended to involve life-changing choices and non-monetary detriment which is incurred over a period of decades. Thus, the difficulties in quantifying detriment have been very much at the forefront of judicial minds. Although it has been suggested that '[t]he fact that a disadvantage may not be susceptible to quantification does not make it a trump card',[169] in practical terms it is not easy for a judge to depart from an expectation approach when P's detriment has a life-long quality, even if (because of inflation in farm values) the expectation remedy runs to millions of euros.

A Detriment-Based Approach Tempered by Proportionality and/or a Willingness to Use the Expectation as a Proxy for the Detriment

The minority approach of Lord Leggatt in *Guest*, and that of the Australian courts, can be placed under this broad heading. This type of approach identifies the elimination of P's detriment as the aim, in theoretical terms, of estoppel remedies. At the same time, it makes the concession that, where there are difficulties in quantifying the detriment, the award of an expectation remedy may be necessary to ensure that P receives an adequate remedy. This can be rationalised as using the expectation as a proxy for the detriment on the basis that D is to blame for the factual uncertainty created by his or her unconscionable conduct in making, and then resiling from, a promise upon which P has relied to his or her detriment.

[167] *Guest* (n 3) [195], citing Robertson (n 118) 303.
[168] It is arguable that these difficulties have been somewhat exaggerated: see Ben McFarlane and John Mee "Estoppel Remedies: Switching to Expectation When It Is Difficult to Quantify Detriment" <https://blogs.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/estoppel-remedies-switching-expectation-when> accessed 8 January 2026. See also *Guest* (n 3) [199] (Lord Leggatt).
[169] *Winter v Winter* [2024] EWCA Civ 699 [30] (Newey LJ).

Conclusion

What approach should the Irish courts adopt? Notwithstanding the fact that it was recently favoured by a majority of the UK Supreme Court, the 'expectation tempered by proportionality' approach (number (iii) above) is difficult to defend in principle. It fails to identify the underlying purpose that the doctrine of proprietary estoppel aims to achieve. We are told that the remedy will normally aim to fulfil P's expectation but if that is deemed inappropriate (on what principled basis?) then the court must do its best (to achieve what?). The pure expectation approach (number (ii) above), whereby the fulfilment of the expectation would be recognised as the aim of the remedy, is more coherent but has the disadvantage that the courts would sometimes have to grant a large expectation remedy on the basis of very limited detriment.

As a matter of principle, the detriment-based approach (number (v) above) is, it is submitted, the most attractive. The difficulty is that the enthusiasm of academic commentators for this approach has not been shared by the courts. Although it is this author's preferred approach, it may not advance matters much in practical terms to commend it to the Irish courts, given its recent rejection by the majority of the UK Supreme Court in *Guest*, and the absence of examples of its adoption in other cognate jurisdictions. It may be that, in pragmatic terms, the best hope is that the Irish courts will see the merits of approach number (iv) above, which is reflected in Lord Leggatt's minority approach in *Guest* and, in a somewhat different form, in the approach applied in Australia. These approaches acknowledge that the underlying aim of the remedy is to eliminate P's detriment, while at the same time emphasising that it will often be necessary in practice to grant an expectation remedy. Although this type of compromise may be open to question in theoretical terms, it is undeniable that the underlying questions are difficult and that no approach is without its drawbacks. To introduce a degree of predictability to this aspect of the law, it is important that the Irish courts settle on a specific understanding of the aim of estoppel remedies, rather than taking refuge in the unhelpful proposition that 'it all depends on the facts of the case'. In practical terms, the minority approach in *Guest*, or the broadly comparable approach favoured in Australian law, may represent the most plausible way forward for Irish law.

The Landlord and Tenant (Amendment) Act 1980 – Time for an Update?

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Abstract: The Landlord and Tenant (Amendment) Act 1980 is the centrepiece of (non-residential) tenants' statutory rights in this jurisdiction. However, its provisions date back to Edwardian times and some aspects would benefit from updating. This article considers the operation of the provisions of this Act in the 21st century landlord and tenant context, highlighting the main controversies which have arisen in relation to its interpretation and making the case for certain amendments.

Keywords: landlord and tenant; business tenancy.

Introduction

The stated year of enactment of the Landlord and Tenant Amendment Act 1980 ('the 1980 Act'), which gives important statutory rights to Irish tenants of non-residential property,[1] might indicate that this statutory protection is of recent origin. In fact, the 1980 Act, and its predecessor, the Landlord and Tenant Act 1931, find their genesis in a pre-First World War statute, the Town Tenants (Ireland) Act 1906. The legislation has changed so little since, that annotated versions of the 1906 Act remain an extremely useful guide to interpretation of the 1980 Act.

As its title suggests, the Town Tenants (Ireland) Act 1906 was intended to apply to urban property, something which continues to be reflected in a key limitation on the scope of the 1980 Act – the restriction of the operation of its provisions to tenements. For property to be a 'tenement', section 5 of the 1980 Act requires it to satisfy *inter alia* the following requirements: there must be a building on the property, and the entirety of any vacant land also included therein must be subsidiary and ancillary to the building.

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[1] Although the 1980 Act originally applied to residential property, such property is now excluded from the scope of the 1980 Act and falls under the statutory protection of the Residential Tenancies Act 2004.

One consequence of this has been to wholly exclude agricultural land from the statutory protections available to other tenants. At least one dramatic work has been premised on this exclusion. In John B Keane's play *The Field,* a farmer who had rented a field for many years was evicted when its owner wanted to sell, prompting a spiral of bitterness and vengeful events leading to tragedy and death.

Indeed, the tenement limitation also has the potential to deny statutory protection under the 1980 Act to urban property, where, for example, urban land is used for open-air activities or where urban land with a building on it includes even a small area of additional land not subsidiary and ancillary to the building. It has been held that if any unbuilt-on land forming part of a lease premises is not subsidiary and ancillary to the buildings, then there is no entitlement to the statutory protections under the 1980 Act in respect of any part of the premises.[2]

Definition of Tenement

The above restriction of the scope of the 1980 Act has resulted in an impressive amount of caselaw on the definition of 'tenement' as set out in section 5. The leading decision on the definition of 'building' for the purposes of this section remains that of the Supreme Court in *Mason v Leavy,*[3] which involved consideration of the following structures:

> - a mechanical hoist for raising motor cars off the ground with a base set into the concrete surface of the yard to a depth of about nine feet; and
>
> - a mass concrete well twelve inches thick designed for a petrol storage tank with capacity of 500 gallons.

In that case, Maguire CJ stated:

> Very little guidance is to be got from decided cases as to whether these structures or any of them can be held to be buildings within the meaning of the section. The cases cited dealt with the construction of the word, 'buildings', in particular statutes. The purpose of the Act, widely stated in the long title, is— 'To make provision for the further improvement and amelioration of the position of tenants … and for that purpose to

[2] *Lynch v Simmons* (1954) 88 ILTR 3.
[3] [1952] IR 40.

> amend the law relating to' (amongst other things) 'disturbance of such tenants…'. It is clear that the tenant's aim here was to provide a station for servicing motor cars and supplying oil and petrol. In the Case Stated the items of equipment installed are described as structures. They are, of course, artificial structures. They all have been built by the hand of man. A building which is the subject of a tenancy usually consists of walls and a roof. The concrete well for a petrol storage tank has walls. I do not think the fact that it is sunk beneath the level of the yard surface affects the question whether it is a building; nor does the fact that at present it is roofless prevent it from being regarded as a building. In my opinion, there is evidence which would support a finding that it is a building.
>
> On this view, an answer may be given to the question whether the land described as a yard is a tenement within the meaning of s 2 of the Landlord and Tenant Act, 1931, to the effect that this is a question of fact to be determined by the Circuit Court Judge and depends upon whether he holds that the concrete well is a building…
>
> I have, however, formed a clear opinion, which I think it well to express, that the mechanical hoist cannot be considered a building. In my view, this hoist is of the character of a machine fixed to the ground. It resembles a stationary engine used to provide power. The elaborate concrete foundations are merely provided for the purpose of holding it in position. Were the mechanism removed they would serve no purpose. The bed in which it is fixed and held in position could not be described as a building.[4]

Black J in *Mason* likewise took the view that the concrete well was a 'building' within the meaning of the Act, being a substantial artificial structure of permanent character incapable of being removed. He declined to dissent from the view of Maguire CJ regarding the hoist. The remaining judge, O'Byrne J, agreed with both judges.

In *Fitzgerald v Corcoran,*[5] Lardner J held that the word 'building' in the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 ('the 1978 Act') could not be

[4] ibid 45-46.
[5] [1991] ILRM 545.

construed as including a hard tennis court and car park. More recently, in *The Board of Management of St. Patrick's School v Eoghan O'Neachtain Limited,*[6] Hunt J held that a wheeled hut, fixed to the property by means of power cables, was capable of being a 'building', emphasising that buildings do not need to be permanent to come within section 5 of the 1980 Act.

The meaning of the term 'subsidiary and ancillary' has likewise been considered in several cases, commencing with *Killeen v Baron Talbot de Malahide*.[7] In that case a lessee had applied for a reversionary lease in respect of not only a house and grass plot (to the front of the house), but also a field which had been sublet for some time for agricultural purposes and was included in the lease but located beyond a wire fence dividing it clearly from the house and grass plot. HHJ Shannon held that while the grass plot was ancillary and subsidiary to the house, the field beyond was not, stating:

> On examination of the words, it seems to me that the word 'ancillary' is stronger against an applicant than the word 'subsidiary', but by reason of the draughtsmanship of the Act I need do no more than decide that either of the words is inapplicable to the particular facts … I think that 'ancillary' means ministering in an active way, whereas 'subsidiary' suggests a mere passive addition to the building … the words 'ancillary and subsidiary' require the giving or doing of something actively benefiting the house and are not satisfied by proof that the land is aesthetically advantageous to the building.[8]

The most detailed consideration of 'subsidiary and ancillary' is to be found in the judgment of Peart J in *A. O'Gorman & Co. Ltd v JES Holdings Ltd,*[9] in which he was called upon to consider whether a relatively small area of waste ground adjacent to a supermarket building and used for employee parking, the assembling of pallets and containers and incineration of rubbish relating to the supermarket was 'subsidiary and ancillary' to the building. Peart J stated:

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[6] [2018] IEHC 128.
[7] [1951] Ir Jur Rep 19.
[8] ibid 21.
[9] [2005] IEHC 168.

> Given the cardinal rule of statutory construction that words contained in a statute must be given their ordinary meaning, it is helpful to refer to the meaning of these words as set forth in The Concise Oxford Dictionary of Current English, [Clarendon Press Oxford 1990]. The word 'ancillary' when followed by the word 'to' is defined as 'subordinate, subservient'. The former in turn being defined as 'of inferior importance or rank; secondary, subservient', and the latter as 'subordinate'. Clearly there is considerable overlap in these dictionary definitions. The word 'subsidiary' is given the meaning 'serving to assist or supplement'. I find it helpful to regard 'ancillary' as meaning 'of lesser importance or subordinate.' and 'subsidiary' as 'serving to assist or supplement.' These meanings seem to me to accord with one's ordinary usage of the terms…
>
> Having regard to the fact that that the area has been used in connection with the business of the supermarket for the parking of cars, and also for the collecting and incineration of rubbish, it is an area which comes within the definition of 'ancillary and subsidiary'. It is clearly 'of lesser importance or subordinate' and it has also been an area 'serving to assist or supplement' the premises in the sense of being of assistance to the business run out of the premises. An important factor in my consideration of the point has been the certain fact that at all relevant times this small area has been within the boundary of the property, is not of sufficient size or character to be capable of any independent use, and that, accordingly it is of an entirely different character to the field beyond the grass plot in front of the house, which was the subject of the judgment of Judge Shannon in *Killeen v. Baron Talbot de Malahide*.[10]

Although a car park used by occupants of and visitors to a building may be subsidiary and ancillary to that building,[11] Hunt J in *O'Neachtain* found that an open-air car park could not be subsidiary and ancillary to a hut used for collecting fees for using it, stating:

> In this case, I am satisfied that the most likely conclusion will be that the business user of parking cars was carried out on the unbuilt yard area, and

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[10] ibid 16-17.

[11] *Fitzgerald v Corcoran* [1991] ILRM 545.

> that the wheeled hut was used as a convenience to the business of parking cars. Tickets could be issued and payment received for parking on the yard without the necessity of having the convenience of this hut. The situation would be quite different if a building had been erected to house the parked cars, as is the case with purpose-built multi-storey car parks. It is also different to the case of *Terry v. Stokes*, in that the business in question in that case was carried on inside the building, with the use of the yard for parking being ancillary to that business. In this case, parking was the sole business carried on under the contractual arrangement, not an activity carried on as an adjunct to some other activity involving motor vehicles.[12]

The above begs the question of whether important lessee statutory rights should really depend on such nice distinctions. The Law Reform Commission, in its Consultation Paper on Business Tenancies,[13] recommended removal of the requirement that premises be a tenement in order to benefit from the provisions of the 1980 Act. However, this recommendation, and the Paper's many other helpful recommendations in respect of the 1980 Act, have never been enacted by the legislature.

It should be noted that a lessee whose property fails to satisfy the definition of 'tenement' is not only excluded from the right to a new tenancy under Part II of the 1980 Act, but also from all other rights contained in the Act, including the modifications of lessee covenants effected by Part V. As a result, the landlord can unreasonably refuse consent to an assignment/a sublease of the property, or even improvements to the property without being called to account.

Entitlement to a New Tenancy under Part II

Not only the content, but also the general structure of the 1906 Act is replicated in the 1980 Act, which is divided into four substantive parts:

> Part II which deals with the right to a new tenancy;
>
> Part III which deals with the right to a reversionary lease;

[12] *O'Neachtain* (n 6) [30].
[13] LRC CP 21—2003.

Part IV which deals with the right to compensation for disturbance and improvements;

Part V which deals with the modification of tenant covenants.

The consequences of the failure to update non-residential landlord and tenant law can be seen throughout the 1980 Act, but in particular Part II, which deals with the right to a new tenancy. To qualify for this right, in addition to the land being a 'tenement', the tenant claiming the right must show the existence of one of three alternative equities.

The first of these equities arises under section 13(1)(a) of the 1980 Act where there has been continuous occupation of the premises for business purposes by the tenant and/or their predecessors in title[14] for five years prior to the determination of the lease or tenancy.[15] The term 'business' includes social, cultural, sporting activities, or the practice of a profession, and it is not necessarily confined to activities carried on for gain or reward.[16]

A non-residential tenant of a tenement can alternatively claim a new tenancy either under section 13(1)(b) where they and/or their predecessors in title have been in occupation of the tenement for 20 years prior to the determination of the lease or tenancy, or under section 13(1)(c) where at least half of the letting value of the tenement, at the date of determination of the lease or tenancy, is attributable to improvements carried out by the tenant and/or their predecessors.

Section 17 of the 1980 Act lists certain circumstances where the right to a new tenancy under Part II may legitimately be restricted even where one or more of the equities in Section 13 are satisfied. These include situations where the tenancy has been terminated for non-payment of rent or breach of covenant or where there is good and sufficient reason, attributable to the conduct of the tenant, for denying a new tenancy.

[14] Defined in the Landlord and Tenant (Amendment) Act 1980 s 3, as 'previous tenants under the same tenancy as the tenant or any tenancy of which that tenancy is or is deemed to be a continuation or renewal.'

[15] The qualifying period of three years applies if the lease or tenancy was entered into before August 10, 1994. The qualifying period was extended pursuant to the Landlord and Tenant (Amendment) Act 1994 s3 (1).

[16] Landlord and Tenant (Amendment) Act 1980 s 3.

Originally, there was no facility for tenants to contract out of the right to a new tenancy under Part II of the 1980 Act. However, section 4 of the Landlord and Tenant (Amendment) Act 1994 inserted a new restriction into section 17 (section 17(1)(a)(iiia)), applicable where a tenant of office premises has renounced their right to a new tenancy in writing following independent legal advice. Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 subsequently widened the scope of section 17(a)(iiia) to make it applicable to all cases where section 13(1)(a) applies.

In *Dublin Port Company v Automation Transport Limited*, McDonald J upheld the validity of a poorly drafted section 17(1)(a)(iiia) renunciation, stating:

> While there are a surprisingly large number of such errors and inconsistencies, it seems to me that these are very clearly mistakes in the document and it is equally clear what corrections ought to be made. Accordingly, the document should be read in the manner outlined in para 52 above. When read in that way, it seems to me that the document is clear on its face. There is no ambiguity in its terms such as to attract the application of the *contra proferentem* principle. Para. 4 of the renunciation contains a clear and unequivocal renunciation by the defendant of any right which it might acquire to a new tenancy under the Landlord and Tenant Act. [17]

McDonald J also refused to find the same renunciation invalid for lack of independent legal advice where it contained on its face an acknowledgement that the tenant had received such advice, stating:

> As noted above, no guidance is given in s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act) as to the nature of the legal advice that must be given to a tenant in relation to a renunciation. Nor was I referred to any authority which provides any assistance as to the nature of the legal advice to be given. However, it seems to me to be clear that the reason why the Oireachtas imposed a requirement that a tenant should receive independent legal advice, was to ensure that, before taking the very significant step of renouncing rights, the tenant should be aware of

[17] [2019] IEHC 499 [57].

the rights that exist under the 1980 Act to a new tenancy. By stipulating such a requirement, the Oireachtas has made sure that, before abandoning this valuable right, tenants will be apprised of the nature of the right they are asked to renounce. Such an approach is not peculiar to the 1980 Act. The importance attached to such a requirement can also be seen in other contexts. For example, in the case of the abandonment or waiver of a constitutional right, the courts have stressed the need for full knowledge. As Walsh J. observed in *G. v. An Bord Uchtála* [1980] I.R. 32 at p. 80, before anybody can be said to have surrendered or abandoned a constitutional right, it must be shown that he or she is aware of what the rights are and of what he or she is doing. While Walsh J. was concerned, in that case, with the potential waiver of a constitutional right, it seems to me that the basic concern is the same whether one is concerned with the abandonment or waiver of a constitutional right or of a legal right.

Furthermore, it seems to me that para. 3 of the renunciation in this case clearly records that advice was given to the defendant here that under existing landlord and tenant legislation, it would have an entitlement to a new tenancy in the premises should it continue to occupy the premises for a period of five years or more. On the face of the renunciation, it is therefore clear that the defendant was told of the right which it would have, absent the renunciation. That seems to me to encapsulate the nature of the advice which a tenant should be given so that the tenant will be aware of the effect of the renunciation.[18]

He also rejected the argument that the advice given to the tenant in relation to the renunciation was not 'independent', saying:

In my view, when the Oireachtas spoke of '*independent'* legal advice, it clearly had in mind advice which is independent of the landlord. In this context, s. 17 (1) (a) (iiia) must be seen in context. It is a provision that deals with the rights of a landlord and tenant *inter se*. It is situated within Part II of the 1980 Act. The entire of that part is concerned with the right to new tenancies as between landlord and tenant. Part II is not concerned with third parties at all. Thus, when s. 17 (1) (a) (iiia) refers to '*independent legal*

[18] ibid [63]-[64].

> *advice in relation to the renunciation*,' it seems to me to follow that what the Oireachtas had in mind was legal advice in relation to the renunciation which is independent of the other party to the landlord and tenant relationship — namely the landlord. It is crucial that the advice should be given by someone who is independent of the landlord so as to ensure that the tenant is not influenced to grant the renunciation as a consequence of advice that is given by a lawyer associated with the landlord. This is consistent with the approach which the courts take in a range of circumstances involving the validity of *inter partes* transactions. Thus, for example, in the case of improvident transactions, as the decision in *Carroll v Carroll* illustrates, the courts will frequently set such transactions aside where it is shown that the only advice available to the donor was advice from a solicitor who also acted for the donee.[19]

This decision of McDonald J, subsequently affirmed by the Court of Appeal,[20] shows a practical, purposive approach as regards the interpretation of section 17(1)(a)(iiia). However, as a subsequent decision, also by McDonald J in *KW Investment Funds v Stillorgan Leisure Ltd*[21] illustrates, there remain uncertainties regarding its scope. In that case, a lessor sought an interlocutory injunction to recover possession of premises from a lessee who was claiming a new tenancy under Part II of the 1980 Act. Although the lessee in this case fell within the scope of section 13(1)(a) and had executed a renunciation of Part II rights following independent legal advice, they also qualified for a new tenancy under the alternative 20-year occupation equity set out by section 13(1)(b). For this reason, McDonald J refused interlocutory relief, holding that there was an arguable case that the restriction in section 17(1)(a)(iiia) did not apply to such a tenant. The case was subsequently settled, meaning that no final decision was ever delivered on the point; however, in circumstances where, over time, more landlords will be seeking to rely on renunciations by tenants who have been in occupation for over

[19] ibid [74].
[20] *Dublin Port Company v Automation Transport Ltd* [2024] IECA 41.
[21] [2020] IEHC 132.

20 years, this is an aspect of section 17(1)(a)(iiia) which requires definitive statutory clarification.

In addition, section 17(2) of the 1980 Act also permits restrictions on a tenant's right to a new tenancy where the landlord is *inter alia* carrying out rebuilding or reconstruction, requires vacant possession for the purposes of incorporating the property into a scheme of development or simply requires possession of same on the basis of good estate management. However, in contrast to the restrictions in section 17(1), a landlord who relies on section 17(2) to deny a tenant a new tenancy will have to pay that tenant compensation for disturbance under Part IV of the 1980 Act.

Section 59 of the 1980 Act defines compensation for disturbance as 'the pecuniary loss, damage or expense which the tenant sustains or incurs or will sustain or incur by reason of his quitting the tenement and which is the direct consequence of that quitting.' This is the sole extent of the guidance given to facilitate the assessment of this head of compensation. Although claims under Parts II and IV of the 1980 Act fall within the exclusive first instance jurisdiction of the Circuit Court, the usual Circuit Court monetary limits do not apply to Part IV claims; instead a Circuit Court judge has, uncharacteristically, unlimited jurisdiction. Consequently, compensation for disturbance is assessed by judges unfamiliar in dealing with large sums, in circumstances where there is little or no statutory guidance as to the method of compensation. Valuation evidence is heavily relied on, and most cases settle. As Circuit Court cases have traditionally been unreported, where a written judgment is given on compensation for disturbance, it is not generally available. It is unsatisfactory that there is so little statutory or judicial guidance regarding the assessment of such potentially large claims.

Procedure for Claiming a New Tenancy under Part II of the 1980 Act

A further problem with Part II of the 1980 Act relates to the procedure for claiming the new tenancy.

Section 16 of the 1980 Act provides:

> Subject to the provisions of this Act, where this Part applies to a tenement, the tenant shall be entitled to a new tenancy in the tenement beginning on the termination of his previous tenancy, and the new tenancy shall be on such terms as may be agreed upon between the tenant and the person or persons granting or joining in the grant of the new tenancy or, in default of agreement, as shall be fixed by the Court.

Section 23 of the 1980 Act further provides:

> (1) This section applies where the Court fixes the terms of a new tenancy under this Part.
>
> (2) The Court shall fix the duration of the tenancy at thirty-five years or such less term as the tenant may nominate save, where the right to a new tenancy arises in respect of a tenement referred to in section 13 (1) (a) (as amended by section 3 of the Landlord and Tenant (Amendment) Act, 1994), the duration of the tenancy shall be fixed at twenty years or such less term as the tenant may nominate provided that it shall not be fixed for a term of less than five years without the landlord's agreement.

Section 28 of the 1980 Act further provides:

> Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination.

Therefore, if the tenant satisfies the criteria for the grant of a new tenancy and the parties cannot agree the terms, the court will fix the terms of the new tenancy. It should be 35 years or less in terms of duration, unless the tenancy arises pursuant to section 13(1)(a) (which confers a business equity), in which case it should be for between 5 and 20 years, at the election of the tenant. The rent fixed is the 'gross rent', namely that rent which a willing lessee would give, and a willing lessor would take based on vacant possession.[22]

Section 28 of the 1980 Act provides that a tenant who has claimed a new tenancy can remain in occupation until their claim is determined by the Circuit Court, paying rent at the rate applicable immediately prior to the determination of their earlier tenancy until they are granted a new tenancy, at which point any rent increase (or decrease) under the new tenancy will be backdated to such date of determination. However, Part II of the 1980 Act omits to expressly deal with the question of backdating the rent differential in the case of a tenant who remains in occupation under section 28 and then withdraws their application for a new tenancy, or a tenant who remains in occupation but is ultimately held not to be entitled to a new tenancy.

In *Harrisrange v Duncan,*[23] McKechnie J held that a tenant who had remained in occupation under section 28 and whose claim to a new tenancy proved unsuccessful could not be liable for mesne rates as they were not a trespasser, so that the landlord's claim against the former tenant was limited to rent payable under the former lease only. McKechnie J did state, 'of course if a tenant attempted to use section 28 solely as a device or pretence that would constitute an abuse of the process and could be dealt with accordingly.'[24]

In *Howard v Crown Paints*[25] a tenant remained in occupation of premises at Malahide Road, Coolock, following the determination of a lease which had expired in August 2018. Shortly before its expiration, the tenant had served on its landlord a Notice of Intention to Claim Relief claiming the right to a new tenancy of the premises under Part II of the 1980 Act. No agreement in relation to the market rent for the new tenancy was reached between landlord and tenant, and proceedings to have this matter determined by the Dublin Circuit Court were slow to progress due to *inter alia* postponement of court business due to COVID-19. In November 2022 the tenant notified the landlord that it was withdrawing its claim to a new tenancy and would be vacating the premises at the end of the

[22] 1980 Act, s 23(5).
[23] [2002] IEHC 14.
[24] ibid [26].
[25] [2024] IECC 10.

following month, which it did. Although the landlord had continued to receive rent from the tenant following the expiration of the lease at the rate payable immediately prior to its expiration, this rent fell far short of the August 2018 market rent which would have been payable by way of backdating had a new tenancy been granted.

The landlords in *Crown Paints* brought an application before the Circuit Court seeking the rental differential from the date of expiry of the lease to the date of the Defendant vacating the premises. In this regard they argued that where a tenant, entitled under Part II, stayed in occupation under section 28 for a period of 6 years following the expiration of their previous lease before withdrawing their claim, they should be deemed to have held under a Part II tenancy for that period. Secondly, they relied on the judgment of Charleton J in *Ulster Investment Bank Ltd v Rock Rohan Estate Limited*[26] to argue that there was an estoppel binding the tenant.

These arguments were rejected by HHJ O'Connor who held that, under section 28, a tenant who stayed in occupation and subsequently withdrew their claim was only liable to pay the rent payable prior to the expiry of the lease, stating:

> Section 28 of the 1980 Act cannot be used to create a new lease where it is not required by the tenant. The tenants can exercise their right to withdrawal, provided they have not used Section 28 of the 1980 Act to circumvent the Act. In other words, provided the tenant has not misbehaved. An example of misbehaviour is where the tenant has deliberately delayed the court process to frustrate the determination of a court decision to the tenant's advantage and the landlord disadvantage. I have not seen evidence that would justify this court taking the view that the tenant has misbehaved.[27]

He also found:

> In regards the argument of estoppel, it would appear to rely on the argument that the conduct of the tenant would give rise to an unconscionable situation whereby the tenant received a tenancy at

[26] [2015] IESC 17, [2015] 4 IR 37.
[27] *Howard* (n 25) [28].

> allegedly below market rent. In simple terms it states that it is unfair that the tenant does not pay an additional rent when it states it 'resiles' from taking a new tenancy. The term 'resiles' is not accepted by the Defendant. I accept the tenant remained in occupation of the premises. However, there is no provision in the 1980 Act which imposes an obligation for a tenant to take a retrospective expired lease for less than 5 years at a new market rent when the parties have both acknowledged that they failed to agree the terms of a new tenancy. There is no promise or conduct which in my view would give rise to estoppel by imposing an obligation on a tenant when there is so much uncertainty between the parties.[28]

HHJ O'Connor made clear that he regarded himself as bound by the judgment of McKechnie J in *Harrisrange*, who in turn felt himself limited by the wording of the 1980 Act. However, an outcome whereby a tenant claiming under a statutory provision entitling them to a new lease at market rent is allowed to enjoy the benefit of a period of post-lease occupation for a rent significantly less than this sum hardly seems fair to their landlord. It is suggested that this is another area where the 1980 Act would benefit from updating.

The Right to a Reversionary Lease under Part III of the 1980 Act

The rarely invoked Part III of the 1980 Act gives a tenant who satisfies the requirements set out by section 9 of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 the right to apply for a new 99-year lease at a below-market rent, usually the rent payable immediately prior to the determination of their previous lease or 1/8 market rent, whichever is the greater.

However, as satisfying the requirements to buy out under section 9 of the1978 Act also entitles a tenant to buy out the fee simple and any intermediate interests for a usually nominal price, there are only three situations in which Part III might fall to be invoked.

The first would be where the tenant's previous lease has expired. Since the generally accepted practice is that a Ground Rents application can only be made

[28] *Howard* (n 25) [32].

while a previous lease is ongoing, a tenant in this situation would usually apply for a reversionary lease before making their Ground Rents application.

The second situation where a tenant might wish to rely on Part III would be where one or more of the restrictions on the right to buy out the fee simple set out in section 16(2) of the 1978 Act applied. The most common applicable restriction is section 16(2)(a), which applies where the lease is a business lease, or a lease of premises divided into a certain number of flats and contains a rent review clause falling within the scope of that provision.

The third situation would be where the tenant cannot afford the purchase price which would be payable under the Ground Rents Acts. As this purchase price is, at a maximum, 1/8 of the market value of the property, this is unlikely to occur.

Given the limited function of Part III, and its close connection with the Ground Rents legislation, it might be best for the right to a reversionary lease in the above situations to be accommodated within the scope of the Ground Rents Acts rather than languishing in obscurity in an entirely different piece of legislation.

Tenant Covenants under Part V

Part V of the 1980 Act modifies tenant covenants in leases to prevent them being used harshly by a landlord.

Section 65(2) of the 1980 Act significantly modifies the tenant's liability to pay damages for breach of a repair covenant by providing that the maximum sum recoverable in respect of such damages is the loss caused to the landlord's reversion, so as to preclude the landlord from suing the tenant for the full cost of remedying the disrepair where the diminution in their reversion due to the disrepair is less than this sum. Surprisingly, section 65 only applies to limit the landlord's entitlement to damages. It does not preclude them from obtaining an injunction to compel the tenant to carry out repairs; nor does it preclude forfeiture of a lease for disrepair. As such, it is of primary relevance in circumstances where the lease has come to an end and the alternative landlord remedies of injunctive relief and forfeiture are no longer feasible.

Of more practical use in the case of an ongoing lease are the subsequent provisions of Part V. Section 66(1) provides:

> A covenant in a lease (whether made before or after the commencement of this Act) of a tenement absolutely prohibiting or restricting the alienation of the tenement, either generally or in any particular manner, shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the lessor… subject to a proviso that such licence or consent shall not be unreasonably withheld.

In *Perfect Pies Ltd v Chupn Ltd,*[29] a tenant succeeded in obtaining a declaration that their landlord was acting unreasonably in delaying or failing to agree to their request to assign the leasehold interest. Haughton J held it was unreasonable for a landlord to refuse consent to an assignment on grounds which had nothing whatever to do with the relationship of landlord and tenant. Such a refusal - being an attempt by a landlord to use the opportunity of a request for consent to assignment to secure a collateral advantage or benefit over and above what the existing lease offers – would be unreasonable. Here, the landlord had unreasonably withheld its consent to the assignment to the company based on an ulterior motive, namely the desire to obtain possession of the premises, and had relied on spurious reasons (non-repair and lack of consent to licensees) to decline the application for consent to the assignment.

Section 67(1) of the 1980 Act is framed in similar terms to section 66, the only difference being that it precludes a landlord from unreasonably refusing consent to a change of user. As with section 66(1), although the burden of proof is on the lessee to show unreasonableness, there are numerous cases in which this burden has been held to have been satisfied. One relatively recent example is provided by *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance PLC,*[30] which involved a claim by a tenant of a shopping centre that its landlord was acting unreasonably in refusing consent for the change of user of part of a fashion retail unit to that of a food hall. The basis of the landlord's refusal, as set out in correspondence, was that such a user would conflict with its vision for the shopping centre as a primary retail fashion area. However, the lease itself provided that in deciding whether to grant consent to a change of user, the landlord would have regard to the need for diversity within the centre. Clarke J held that the landlord had acted

[29] [2015] IEHC 692.
[30] [2008] IEHC 114, [2010] 4 IR 1.

unreasonably by failing to comply with its expressly assumed obligation under the lease to take account of the need for diversity; in addition, its refusal of consent was at least partly motivated by a desire on the part of the landlord to pressurise the tenant into surrendering the unit.

It appears that Irish judges have no hesitation in finding that a landlord has acted unreasonably in refusing consent to alienation or change of user. Unfortunately, it takes time for applications of this nature to be heard, during which time prospective assignees or sublessees may well withdraw or plans for a change of user may become redundant due to the delay.

Where this occurs, one would expect as a matter of fairness and common sense that, if the landlord’s refusal is ultimately found to be unreasonable, the lessees in question should be able to obtain compensation for the loss caused to them as a result. A claim for such compensation was, however, rejected by the Supreme Court in *Meagher v Luke J Healy Pharmacy Ltd*.[31]

The High Court in that case had found that the landlord had acted unreasonably and awarded damages to the lessee in respect of same.[32] The Supreme Court did not dispute the finding that the landlord had acted unreasonably but found that it had had no authority to award damages for the breach, as section 66 did not impose a statutory duty but rather regulated the construction of covenants freely entered between a lessor and a lessee. Although the common law in *Treloar v Bigge*[33] permitted an award of damages for breach of an express covenant not to unreasonably withhold consent, no such express covenant was present here, as the lease merely contained a covenant on the part of the lessee not to assign the said premises or any part thereof without obtaining the previous consent in writing of the lessor. The inability to award damages in such a case appears to be another obvious lacuna in the 1980 Act, which would benefit from reform.

Conclusion

As outlined above, the 1980 Act, despite its relatively recent date, is in fact merely a re-enactment of a statutory scheme of considerable antiquity. Like most

[31] [2010] IESC 40, [2010] 3 IR 743.
[32] *Meagher v Luke J. Healy Pharmacy Limited* [2005] IEHC 120.
[33] L.R. 9 Exch. 151.

legislation of the period, this scheme is beautifully drafted, and still, by and large, workable today.

However, the modern world is very different from that of 1906, and the 1980 Act could benefit from some updates, starting with the removal of the requirement that the lease premises be a 'tenement' as defined by section 5. Statutory clarification as to whether the renunciation facility in section 17(1)(a)(iiia) is operative as against a tenant holding under a tenancy which has been in existence for more than 20 years would also be of great benefit. In addition, there should be a provision for backdating of market rent as against a tenant who stays on under section 28 of the 1980 Act pursuant to a claim to a new tenancy, but does not ultimately accept or succeed in claiming such a tenancy.

It would also be of assistance if the provisions regarding the entitlement to a reversionary lease under Part III were removed from the 1980 Act and incorporated in a modified form into the more appropriate location of the Ground Rents Acts. Proper statutory guidance should be provided to Circuit Court judges engaged in the valuation of compensation for disturbance, and there should be a facility to award damages against a landlord who has unreasonably withheld consent under sections 66-67 of the 1980 Act, irrespective of the terms of the lease.

If effected, these changes should ensure that the 1980 Act remains functional well into the 21st century – a great testament to the enduring power of Edwardian statutory drafting.

Multi-Unit Developments – Problems in Practice and Proposals for Reform

Deirdre Ní Fhloinn*

Abstract: The Multi-Unit Developments Act 2011 established a regime for the management and governance of multi-unit developments. Fourteen years on, some of the problems in the apartment sector that prompted law reform persist, such as difficulties in securing the transfer of common areas of developments from developers. In addition, problems arising from construction defects are so widespread in Irish multi-unit developments that the Irish Government has established a national apartment defects remediation scheme which is currently the subject of draft legislation. This article considers these issues in the context of the relevant legislation and recent case law, and presents proposals for reform.

Keywords: Multi-Unit Developments; Common Areas; Apartment Defects.

Introduction

This article considers two areas that present particular problems for owners and management companies of multi-unit developments ('MUDs').

The first is the transfer of 'common areas' of multi-unit developments from landowners and developers to owners' management companies ('OMCs') in accordance with the statutory requirements established by the Multi-Unit Developments Act 2011 ('the 2011 Act').

The second is the remedies available in the event that construction defects are discovered in multi-unit developments; this issue is considered both from the point of view of apartment owners and of OMCs. The Working Group to Examine Defects in Housing established by the Department of Housing, Local Government and Heritage estimated in its 2022 Report that the prevalence of defects in apartments in Ireland was likely to be between 50% and 80%, equating to 62,500-

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100,000 of apartments or duplexes constructed between 1991 and 2013, and would likely cost between €1.56 to €2.5 billion to rectify.[1]

Throughout the discussion, there is reference to the dispute resolution and rehabilitation procedure available pursuant to section 24 of the 2011 Act by application to the Circuit Court. There is no detailed treatment of the procedure, however, as it is not possible to access any reported Circuit Court decisions via any publicly available database, and very little literature and commentary has been generated in relation to the process since its introduction.

The case is made for reform of the 2011 Act to facilitate the transfer of common areas and consequently the completion of the title to multi-unit developments. It is also submitted that a specialist tribunal ought to be established to deal with the various disputes that can arise in multi-unit developments.

Background and legal context

Ireland has gone from being a country with very few apartments at the beginning of the 1990s, to a situation where they have increased in number by 85 per cent since 2002, accounting for 12.0 per cent of all household types in 2016, compared with 11.1 per cent in 2011."[2] Despite a recent decrease in the number of apartments being built in Ireland, a long-term policy of successive governments has been to encourage increased density of housing, particularly around urban centres and transport hubs, which will require a significant proportion of housing stock to consist of apartments. Guidelines issued to planning authorities in 2024 by the Department of Housing, Planning and Local Government emphasised the necessity to increase the scale of new buildings in cities and towns, and to encourage higher densities and taller buildings.[3]

MUDs call for regulation because they are, in essence, single buildings, including groups of single buildings, containing numerous separate units each occupied separately and often owned separately. All developments (except for

[1] Working Group to Examine Defects in Housing, *Defects in Apartments Report of the Working Group to Examine Defects in Housing* (Department of Housing, Local Government and Heritage July 2022) viii-ix.
[2] Central Statistics Office, *Census 2016 Profile 1 Housing in Ireland* (Central Statistics Office 2017).
[3] Department of Housing, Planning and Local Government, *Sustainable Residential Development and Compact Settlements Guidelines for Planning Authorities* (2024) 5.

developments comprising between 2 and 5 units, exempted by section 2(1) of the 2011 Act) require management companies to be established to undertake the duties set out in the 2011 Act,[4] and to be managed in compliance with the 2011 Act. Section 17 of the 2011 Act imposes various obligations on OMCs with regard to the preparation and distribution of annual reports to members of the OMC, and the convening of a meeting at least once a year for purposes which include the consideration of the annual report.[5]

The 2011 Act was preceded by a Law Reform Commission ('the Commission') report published in 2008.[6] The report identified particular difficulties arising with regard to ownership of MUDs, title and conveyancing matters, the regulation of managing agents, consumer protection and service charges, and what was described in the report as the need for the '[r]escue and rehabilitation of multi-unit developments'.[7] The report recommended primary legislation to address a number of issues. The Commission recommended that developers of MUDs should be required to incorporate a management company before the conveyance of any unit in a MUD is completed,[8] and that the legal title to the development should vest in an OMC which would become compulsorily registrable with the Land Registry, with the developer retaining the beneficial interest in each unit.[9] As noted by the Commission, '[t]he effect of these recommendations is that unit purchasers will be guaranteed that there is a corporate management structure in place as soon as the conveyance of a unit is completed.'[10]

The Commission further recommended that the OMC should retain records of service contracts, warranties, guarantees, fire safety certificates, and certificates of compliance with planning permission and Building Regulations.[11] It also

[4] s 3(1)(a) of the 2011 Act provides: 'A person to whom this section applies shall not, after the coming into operation of this section, transfer his or her interest in a residential unit in a multi-unit development to which this section applies unless – (a) an owners' management company has been established at the expense of the developer of the multi-unit development concerned'.
[5] s 17(1)(a) and (b) of the 2011 Act.
[6] Law Reform Commission, *Multi-Unit Developments* (LRC 90—2008).
[7] ibid 10.
[8] ibid [2.15].
[9] ibid [2.22].
[10] ibid [2.23].
[11] ibid [2.28] and [8.09].

recommended that completion should be defined by law as requiring compliance with planning conditions and the statutory building code, as certified by a professional person in accordance with the building control legislation,[12] and that service charges should not be used to pay for snagging problems or other expenses incurred by the developer.[13]

The Commission considered that an OMC would be the preferred legal structure for large MUDs of five units or more and that co-ownership was the more appropriate legal structure for developments of five or fewer units.[14] With regard to the establishment and management of the proposed OMC, the Commission was of the view that the cost of incorporation of the OMC should be borne by the developer[15] and that the objects of the OMC after the development stage should be to ensure the management and maintenance of the common areas of the MUD and otherwise to comply with the obligations imposed on the company.[16] The Commission also recommended that the Memorandum and Articles of Association of an OMC should contain a number of specified provisions in relation to voting rights, service charges, and the holding of AGMs.[17]

The report went on to recommend that a directors' report should be prepared annually,[18] to include a list of the OMC's assets, its insurance details, and whether the development was fully compliant with fire and safety legislation; that a building investment fund be established as a mandatory statutory requirement for all larger MUDs; that all MUDs must maintain a scheme of annual service charges;[19] and that the Circuit Court should have jurisdiction to make a remedial order to enable the rescue and rehabilitation of existing or future MUDs (with the court to be given a wide discretion as to the remedial orders it could make).[20]

[12] ibid [2.28] and [8.09].
[13] ibid [2.39] and [8.11].
[14] ibid [3.18] and [8.14].
[15] ibid [3.39] and [8.17].
[16] ibid [3.46] and [8.20].
[17] ibid [3.50] and [8.21].
[18] ibid [3.69] and [8.28].
[19] ibid [3.107] and [8.32].
[20] ibid [7.37] and [8.66].

The report contained a Draft Multi-Unit Developments Bill[21] that was substantially adopted in the form of the 2011 Act.

A MUD is defined in section 1(1) of the 2011 Act as:

> a development being land on which there stands erected a building or buildings comprising a unit or units and that—
>
> (a) as respects such units it is intended that amenities, facilities and services are to be shared, and
>
> (b) subject to section 2(1), the development contains not less than 5 residential units.

Many apartment developments in Ireland constitute MUDs. Apartments within MUDs are typically sold subject to long leaseholds, essentially equivalent to ownership. In *Re Orlington Company Ltd by Guarantee and Re an Application by Ossory Road Enterprise Park Ltd*,[22] Stack J described the effect of section 1 of the 2011 Act as follows:

> While it does not apply to this Estate, it is notable that s. 1 of the Multi Unit Developments Act, 2011, defines 'unit owner' as the person, other than the Management Company, 'who holds the highest freehold or leasehold estate or interest in respect of a unit in a multi-unit development', thereby reflecting the general understanding of conveyancers and lending institutions, that a lengthy leasehold interest constitutes ownership.[23]

As will be seen, the established contractual models used in the arrangement of construction and ownership of apartments operate in conjunction with the statutory regime applicable to the ownership and management of apartment developments established by the 2011 Act.

[21] ibid 193-206.
[22] [2023] IEHC 34.
[23] ibid [37]. This case was upheld on appeal [2023] IECA 256.

Common Areas

Sections 4 and 5 of the 2011 Act require common areas in existing MUDs, as defined in section 1(1), to be transferred to OMCs within 6 months of the coming into operation of section 4.[24] Section 4(1) provides as follows:

> Where, before the coming into operation of this section, the ownership of a residential unit in a multi-unit development has been the subject of a transfer by or on behalf of a developer to a purchaser, and the ownership of the relevant parts of the common areas and in the reversion relating to the residential units has not been transferred to the relevant owners' management company, the developer shall, subject to subsection (2), arrange for the transfer of the ownership of the relevant parts of the common areas of the multi-unit development concerned together with the reversion to the relevant owners' management company within 6 months of the coming into operation of this section.

Section 5(1) of the 2011 Act imposes a similar obligation on developers in relation to MUDs substantially completed before the coming into operation of section 4(1).

The requirement to transfer common areas of MUDs constitutes a significant incursion into the property rights of developers and landowners. In effect, the 2011 Act renders it impermissible for common areas to be owned by any party other than the OMC established for the management of that MUD.

An OMC is defined in section 1(1) of the 2011 Act as 'a company established for the purposes of becoming the owner of the common areas of a multi-unit development and the management, maintenance and repair of such areas and which is a company registered under the Companies Acts'.

However, in the fourteen years since the coming into operation of the relevant sections of the 2011 Act, difficulties have arisen for apartment owners and OMCs where common areas have not been transferred in accordance with the

[24] Regulation 2 of the Multi-Unit Developments Act 2011 (Commencement) Order 2011, SI 2011/95 fixed 1 April 2011 as the day on which sections 1 to 13, 15 to 31, 33 and 34 of the 2011 Act came into operation.

requirements of sections 4 and 5 of the 2011 Act. Laffoy J in *Re Heidelstone Company Ltd* ('*Re Heidelstone*')[25] characterised the title to apartments in a MUD where the common areas had not been transferred as 'incomplete'. She pointed out:

> In such developments the full implementation of the scheme of disposal by the apartment or house owners assuming control of the management company and by the common areas being conveyed to the management company is an essential element in completing the title of each apartment owner and house owner. If this becomes impossible because of the dissolution of the vendor company or the management company, or both, the title of each apartment owner and house owner remains incomplete.[26]

A difficulty that arises in relation to the legal analysis of this field is that the dispute resolution mechanism provided by sections 24 and 25 of the 2011 Act requires that a party seeking to invoke that mechanism must make its application in the Circuit Court. Section 26(1) of the 2011 provides: 'The Circuit Court shall have exclusive jurisdiction to hear and determine applications under section 24 and such applications shall not be made to the High Court.' Conferring exclusive jurisdiction on the Circuit Court to deal with such applications means that there is no database of written judgments on section 24 applications. As Dowling and Martin in *Civil Procedure in the Circuit Court*[27] have commented, '[a]t the end of the trial of an action, the court will more often than not deliver an ex tempore judgment if it has made a final decision. However, in circumstances where the court requires time to deliberate on the matter, it will reserve its judgment to be delivered at a later date.'[28]

The land ownership model established in the 2011 Act envisages the original freehold owner of the development land transferring that freehold, together with title to the common areas of the development to the OMC on completion of the development, and that each of the individual apartments is held under a long lease.

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[25] [2007] 4 IR 175.
[26] ibid [4].
[27] Karl Dowling and Susan Martin, *Civil Procedure in the Circuit Court* (3rd edn, Round Hall 2018).
[28] ibid [17.02].

It is therefore a statutory requirement that the freehold in a MUD can only be owned by an OMC and should not be sold to any other party. The 2011 Act ensures this outcome by requiring the common areas to be transferred by developers on completion of the development and by requiring the transfer by the original developer[29] of the freehold of the development to the OMC.

An OMC, following completion of this process, should therefore own the entire freehold and become the landlord of the individual apartment owners as holder of the reversionary interest in each of those units. Typically, apartment units are sold on leases of 500 years or so.[30]

The situation can arise where the common areas have been transferred to a management company, but the management company is subsequently struck off. This can arise due to default on the part of the management company directors in complying with company law requirements following the transfer of control of the management company to the unit owners within the development. It can also occur where the original developer has retained control of the OMC and has failed to file appropriate returns with the Companies Registration Office so that the OMC has been struck off the Register of Companies.

Consequently, the common areas of the development may be vested in the State by virtue of section 28(2) of the State Property Act 1954, which provides as follows:

> (2) Where a body corporate is dissolved, either before, on or after the operative date, the following provisions shall apply and have effect and, in the case of a body corporate dissolved before the operative date, be deemed to have applied and to have had effect as from such dissolution, that is to say:—

[29] Or the landowner, in cases where the developer does not own the land.

[30] *Re Orlington Company Ltd. by Guarantee and Re an Application by Ossory Road Enterprise Park Ltd.* [2023] IEHC 34 [38], Stack J commented with regard to the practice: 'I also think those members of the public who have purchased apartments in this country would rightly regard as absurd any suggestion that the fact that they are nominally tenants of very long leases, such that they and their successors-in-title are entitled to remain in possession for periods of hundreds (or even thousands) of years, means they are not owners of them.'

(*a*) all land which was vested in or held in trust for such body corporate immediately before its dissolution (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State, subject however to any incumbrances or charges affecting the land immediately before such dissolution,

(*b*) all personal property (excluding chattels real but including choses-in-action) which is vested in or held in trust for such body corporate immediately before its dissolution (other than personal property held by such body corporate upon trust for another person) shall, immediately upon such dissolution become and be State property.

Therefore, the common areas may not be under the control of the apartment owners, even when they have been transferred to the OMC.

Another issue that can arise is that the common areas may continue to vest in the original developer or landowner, notwithstanding the fact that 14 years have now passed since the date on which the 2011 Act required all common areas to be transferred in all relevant developments to the OMCs for those developments. In those circumstances, if the original developer has itself been struck off the Register of Companies or cannot be found, an application may be necessary under the Trustee Act 1893 using the method adopted in *Re Heidelstone* by Laffoy J, which allows the OMC to be appointed as trustee for the purposes of taking ownership of the common areas.[31]

The Companies Act 2014 ('the 2014 Act') provides a method by which an application can be made to the High Court for the restoration of an OMC to the Register where it has been struck off. Section 738 of the 2014 Act provides that an application for restoration of a company to the Register may be made during the period of 20 years from the date of its dissolution. There is a similar provision in section 30 of the 2011 Act, but the application process under section 30 can only be made during the period of six years from dissolution of the company.

[31] *Re Heidelstone* (n 25).

The criteria to be satisfied before the company may be restored on an application are set out in section 738(1) as follows:

> (a) the striking off of the company has disadvantaged the applicant,
>
> (b) the application is made within the period of 20 years after the date of dissolution of the company; and
>
> (c) it is just and equitable to do so.

Pursuant to subsection 2, the application may be made by the company, a member or an officer or director of the company at the date of its dissolution, a creditor of the company, or by:

> (d) a person who, at the date of its dissolution, had an entitlement (disregarding any right of the directors to decline to register the person as such) to be registered as a member of the company by virtue of—
>
> > (i) the execution, in the person's favour, of an instrument of transfer of a share; or
> >
> > (ii) the transmission, by operation of law, to the person of a right to a share.

It is possible, therefore, that there may be a number of parties *prima facie* entitled to bring an application for restoration.

It is possible for the members of the company to seek the costs of the application against the former directors of the company on the basis of section 742(2) of the 2014 Act which entitles the court to:

> (c) if and to the extent that it thinks fit, order that the officers of the company, or any one or more of them as specified in the order, shall be liable for a debt or liability incurred by or on behalf of the company during the period when it stood struck off the register;

As a consequence of the strike-off, however, the property of the management company would have become vested in the Minister for Public Expenditure and Reform pursuant to section 28 of the State Property Act 1954.

Courtney explains the effect of the section as follows:

> Section 28 of the State Property Act 1954 provides that where a company is dissolved all of its property, both realty and personalty, including *choses in action*, automatically vests in the State and is held by the Minister of Finance on behalf of the State.[32]

Courtney further notes that property held in trust is not vested automatically in the Minister, as the company itself holds the property on trust for a third party:

> Property that is held in trust by the company is expressly stated not to vest in the State, because the company is not the beneficial owner of that property. An alternative to applying for restoration of a company that was the trustee of property before it was dissolved might be to apply for the appointment of a new trustee under s 25 or for a vesting order under s 26 of the Trustee Act 1893.[33]

Where the legal interest in a MUD vested in the OMC directly prior to its dissolution, upon its dissolution, the legal interest is vested in the Minister for Public Expenditure and Reform by operation of law.

The scheme of disposal for the development typically provides for a Management Company Agreement that in turn provides for completion of transfer of common areas on completion of the development. If the developer company itself is struck off the Register of Companies before the transfer of the common areas has been completed, an application to the High Court may be necessary pursuant to section 26 of the Trustee Act 1893. Section 26(ii) provides as follows:

> (ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—
>
> …
>
> (*c*) cannot be found;
>
> …

[32] Thomas B. Courtney, *The Law of Companies* (4th edn, Bloomsbury 2016) [27.035].
[33] ibid [27.039].

> the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.
>
> Provided that—
>
> (a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and
>
> (b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

In *Re Heidelstone*, Laffoy J considered the situation where the common areas of a development were vested in a company that had been struck off the Register of Companies for a failure to file annual returns. The original vendor of the common areas of a residential development, and the management company to which the vendor was to transfer the common areas pursuant to the scheme of disposal for the development, had both been struck off on this basis. An application was made by the majority of the owners of apartments and townhouses in the development for an order pursuant to section 26 of the Trustee Act 1893 vesting the common areas in a new management company which had been incorporated by the applicants.

A management agreement had been executed by the vendor company by which it covenanted to transfer the common areas to an OMC that had been established in order to maintain the estate in question. Laffoy J held that from the date of its dissolution, the vendor company held the relevant part of the estate in fee simple upon trust for the management company by virtue of the management company agreement, and that the management company, in turn, held its beneficial interest in the relevant part of the estate for the benefit of the unit owners.[34] Laffoy J held that it was an appropriate case for the exercise of the powers of the Court under the Trustee Act 1893 to vest the property in the new management

[34] *Re Heidelstone* (n 25) [19].

company established for that purpose, and commented that the original management company held the beneficial interest on trust for the members:

> at and immediately before the date of its dissolution, the second company held its beneficial interest in the varied estate for the benefit of the lessees of the apartments in No. 52 holding under the leases created by the first company in 1986 carved out of the fee simple. Those lessees or their successors, who are applicants on this application, are the ultimate beneficiaries of the varied estate.[35]

Laffoy J acknowledged that a company restoration of the original developer might also have been initiated but she was satisfied that the Trustee Act 1893 was the more expedient route in the circumstances of the case where the transfer of the common areas had not been completed, and the legal and beneficial interests were held in separate, dissolved companies, which might both have required restoration.[36]

Where, however, the transfer of the common areas to the OMC has been completed, it is arguable that no trust arises in favour of the unit owners that requires the intervention of the court for appointment of a trustee, but an application may nonetheless be required for restoration of the company if it has been struck off.

It is necessary in either scenario to seek a waiver from the Department of Public Expenditure and Reform by means of the procedure adopted by the Department for disclaiming property pursuant to the State Property Act, and to have the waiver available for the purposes of the court application, since the property may be vested in the State pursuant to section 28(2)(a) of the State Property Act 1954 as land that is vested in, or held in trust for the vendor company or OMC immediately prior to its dissolution.

Where the property owned by the OMC vests in the Minister for Public Expenditure and Reform by virtue of section 28 of the State Property Act 1954, and where the company was dissolved following the transfer of the common areas to the OMC, the Minister acquires the legal and beneficial interest in the

[35] ibid [19].
[36] ibid [21].

common areas. The procedure available pursuant to the Trustee Act 1893 for vesting of land held in trust would not, therefore, apply, as the Minister would not be holding the lands on trust.

It is to be noted that the decision in *Re Heidelstone* was followed in various authorities since, including in *Re Bárr na Farraige Owner's Management CLG*[37] and *Re Joe Miley and Partners.*[38]

Apartment defects

The land ownership model used for the development and sale of apartments presents considerable difficulties when defects emerge in apartments. An apartment block or development is a building or series of buildings, sometimes with commercial units (typically in ground floor units), often with underground car parks, and featuring common areas inside and surrounding the buildings. The 2011 Act defines a MUD as follows:

> a development being land on which there stands erected a building or buildings comprising a unit or units and that—
>
> > (*a*) as respects such units it is intended that amenities, facilities and services are to be shared, and
> >
> > (*b*) subject to *section 2 (1)*, the development contains not less than 5 residential units.[39]

The separation of legal title between the common areas and overall structure of the buildings (held by the original developer, landowners, and ultimately the OMC) and the individual apartments (held under leasehold by unit owners or institutional owners) presents complications in pursuing contractual and other legal remedies in respect of defects.

The sale of individual apartments will usually feature a long leasehold and a building contract, but the building contract will apply to the apartment and not to the entire building. The contract also cannot be relied upon by second and

[37] [2021] IEHC 71.
[38] [2025] IECA 25.
[39] s 1 (1) of the 2011 Act.

subsequent purchasers in an action against the original signatory to the building contract. That signatory may be a special purpose vehicle incorporated by the developer for the purpose of acting as the main contractor for the development, but which will likely have no assets and no insurance in respect of defects, and will thus not be a mark for litigation following completion. The OMC may seek to rely on the Management Company Agreement which should provide an indemnity in respect of defects, and/or on the provisions of the 2011 Act itself which oblige a developer to complete the development in accordance with planning legislation and Building Regulations.[40] However, the developer company may itself be a special purpose vehicle, dissolved or otherwise, not a mark for litigation when defects emerge.

The ownership structure means that the unit owners have no standing to bring actions in respect of the common parts or common areas of a development. Britton and Bell comment in this regard:

> Complications flow from the fact that the structure and 'common parts' are necessarily in different ownership (or at least management) from any individual flat. Residents' concerns about defects may therefore centre on part of the development which they have no right even to inspect, let alone repair or improve, even at their own expense.[41]

In the decision of *Re Lance Investments Ltd. (in liquidation)* ('*Re Lance Investments*'),[42] the OMC was held to be entitled to an order for the rectification of defects in a MUD, but such an order could not be enforced against the liquidator of the original developer, such that the order was essentially treated as an unsecured liability of the developer company. The remedial works orders that had been made by the Circuit Court in the case were overturned on appeal to the High Court on the basis that the Circuit Court had jurisdiction to award damages in lieu of the orders (as they were effectively mandatory injunctions) and that, as

[40] The Building Regulations are made pursuant to the Building Control Act 1990, as amended.
[41] Philip Britton and Matthew Bell, *Residential Construction Law* (2nd edn, Hart Publishing 2025) 591. The author of this paper was the specialist contributor to both the first and second editions of the work on the subject of Irish law.
[42] [2020] 1 IR 260.

such, the orders were to be regarded as unsecured debts in the liquidation of the developer.

There is a provision in section 24 of the 2011 Act whereby a 'developer' as defined in the Act may be required to complete a MUD (usually an apartment complex, with or without commercial units) in accordance with the planning and building control legislation. This is a potentially useful remedy which is available against developers by home owners and by OMCs, and could potentially be used to overcome the (usual) lack of a remedy in contract by an OMC against the original builder/developer. As the 2011 Act confers exclusive jurisdiction on the Circuit Court for the area in which the MUD is located in respect of such applications, there is little jurisprudence on how these orders work in practice.

As an OMC of an Irish apartment development will typically not be party to the original building contract for the development, it may be limited to an action in breach of contract against the original developer or to an application under section 24 of the 2011 Act.

An action for breach of contract will only be available where the developer has contracted with the OMC to complete the development (usually as part of an agreement for transfer of the common areas of the development to the OMC). Section 24 empowers the Circuit Court to direct the developer of a MUD to complete the development in accordance with the terms of any contract, the conditions of a planning permission, and/or the Building Control Acts 1990 and 2007.[43] The limitation of this remedy is apparent from the High Court decision in *Re Lance Investments*, in which the Court acknowledged the entitlement of an OMC to an order for the rectification of defects in a MUD, but held that such an order could not be enforced against the liquidator of the original developer, and that the order essentially ranked as an unsecured debt. Baker J commented in the decision:

> Section 24 of the 2011 Act permits the making of an order by the court for the enforcement of an obligation with a view to ensuring the effective enforcement of a right or the effective discharge of an obligation relating to a multi-unit development. I accept that, *prima facie* at least, the

[43] Multi-Unit Developments Act 2011, s 24(5)(l).

> Companies did have an obligation to complete the works to the common areas in accordance with the development agreement, and that the application before the Circuit Court was for the purposes of enforcing pre-existing rights. Counsel for Lee Towers makes the argument that the liquidator must comply with these statutory obligations and it is argued, therefore, that the liquidator can be compelled to perform a remedial order under the 2011 Act as part of the function of calling in and realising the assets of the Companies in the liquidation... The 2011 Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 of the 2011 Act has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which creates a proprietary interest which might give rise to an argument that the remedy lies *in rem*.[44]

Baker J made similar comments in relation to section 7 of the 2011 Act, which provides as follows:

> The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—
>
> > (a) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and
> >
> > (b) compliance with the Building Control Acts 1990 and 2007.

Baker J commented with regard to section 7: '[t]he section, in its plain language, suggests that a transfer of the common areas and reversions does not relieve a person from any existing obligations, but does not create new obligations.'[45] In

[44] *Re Lance Investments* (n 42) [68], [72].
[45] ibid [62].

Clarion Quay Management CLG v Dublin City Council & Ors ('*Clarion Quay*'),[46] Barniville J (as he then was) stated that Baker J was making clear in this regard that what was at issue with respect to the order that might be made pursuant to the 2011 Act was the enforcement of pre-existing obligations and rights in the relevant management company agreement. Barniville J agreed with Baker J that section 7 did not create any new obligations.[47]

Regulation and legal structures used in other jurisdictions

There are examples from other common law jurisdictions that offer models for mitigating the impact of conventional ownership structures on the availability of remedies for defects. One such example is the Domestic Building Contracts Act 1995 ('the 1995 Act'), which is the principal source of home buyer protection in the Australian State of Victoria. Section 8 of the 1995 Act implies a number of warranties into contracts for the construction of domestic buildings; section 9 provides that such warranties may be enforced by subsequent owners of the unit as if they had been a party to the original building contract. The warranties must be specifically included in any domestic building contract but apply whether or not they are so included and any attempted limit or waiver of those warranties is void save in limited circumstances.[48] The 1995 Act also provides that warnings must be given to domestic employers with regard to cost escalation clauses, and a copy of the building contract must be furnished to the employer.[49]

The 1995 Act applies to 'domestic building work', which includes most forms of building work concerning the construction, renovation or alteration of a home, including the preparation of plans or specifications for that work.[50]

The warranties in section 8 are a central part of the 1995 Act. Six warranties are set out, which are deemed by the section to be part of every domestic building contract. According to section 8, a builder engaged in domestic building work warrants that the work will be carried out in a 'proper and workmanlike manner' and in accordance with the contractual plans and specifications and all legal

[46] [2021] IEHC 811.
[47] ibid [317].
[48] Domestic Building Contracts Act 1995 s 10.
[49] ibid ss 15 and 25.
[50] ibid s 3.

requirements, that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used, and that (if a house) it will be suitable for occupation. Warranties extend to successors in title,[51] and cannot be excluded.[52]

Domestic building work is defective for the purposes of the 1995 Act where the work includes a breach of any of the section 8 warranties, and/or a failure to maintain a standard or quality of building work specified in the contract.[53]

The concept of 'fitness for occupation' is used in a number of the Australian states as part of the duty imposed (generally by means of implied warranties) on builders. In *Braham v Evans*,[54] the Supreme Court of Western Australia endorsed the finding of the State Administrative Tribunal that a house was not fit for occupation where the house lacked footings (foundations), a waterproof membrane, had inadequate roof framing and construction causing water ingress and ceiling deflection, inadequate joists under an upper floor and a defective balcony.[55]

Returning to the discussion of the position in Ireland, section 24 of the 2011 Act whereby a 'developer', as defined in the Act, may be required to complete a MUD (usually an apartment complex, with or without commercial units) in accordance with the planning and building control legislation is a potentially useful remedy which is available against developers by unit owners and OMCs, and could potentially be used to overcome the (usual) absence of a remedy in contract by an OMC against the original builder/developer. The fact that the common areas may have already been transferred at the point at which defects emerge does not relieve the developer of liability in this regard, by reason of section 7 of the 2011 Act, which provides as follows:

> The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person

[51] ibid s 9.
[52] ibid s 10.
[53] ibid s 3.
[54] [2008] WASC 274.
[55] ibid [33].

who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—

(*a*) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and

(*b*) compliance with the Building Control Acts 1990 and 2007.

The definition of 'developer' in the 2011 Act itself is not particularly helpful in terms of identifying the appropriate respondent to an application for an order pursuant to section 24, as it defines the 'developer' as 'the person who carries out or arranges for the development or construction of a multi-unit development'[56]

In effect, as is apparent from the *Re Lance Investments*[57] decision, an order made under section 24 creates a statutory form of specific performance, albeit one which ranks (in the event of developer insolvency) as unsecured debt, which is not enforceable against the liquidators of the developer.[58]

In the same vein, albeit with regard to a development that was not a MUD for the purposes of the 2011 Act, in *Grehan & Ors v Maynooth Business Campus Owners' Management CLG*[59] the Court of Appeal held that a management agreement that provided for the transfer of the common area after completion of the development had not been adopted by the receiver of the development, such that the receiver was not legally responsible for the cost of remedial works to the development's car park.

The Law Society of Ireland's practice note on precedent pre-contract enquiries in relation to units within MUDs seeks confirmation of whether 'the Vendor of the OMC [owners' management company] is aware of any proposal by the OMC to

[56] ibid s 1 (1).
[57] *Re Lance Investments* (n 42). The remedial works orders that had been made by the Circuit Court in the case were overturned on the basis that it the Circuit Court had jurisdiction to award damages in lieu of the orders (as they were effectively mandatory injunctions) and that, as such, the orders were to be regarded as unsecured debts in the liquidation of the developer.
[58] This suggests that the cost of compliance with remedial works orders should be treated as preferential debts in a liquidation of a developer.
[59] [2020] IECA 213.

carry out any repair work or incur other expenditure which would substantially affect the service charge payable at present', which would require the vendor/OMC to furnish information of any proposed repair works if there was a proposal to carry them out. However, if the OMC had commissioned a survey to determine the extent of known defects, but did not have a proposal to carry out repairs, this query would not require disclosure of such a survey.[60]

In *Clarion Quay*, Barniville J held that the plaintiff OMC was required to bring any application relating to a breach of the 2011 Act in the Circuit Court:

> Insofar as Clarion seeks to rely on the MUDs Act in respect of a claim against DCC it must make that case in the Circuit Court which, by virtue of s. 26, has exclusive jurisdiction. As I have already concluded, it is not open to Clarion to frame such a case by reference to a claim for a declaration as to the effects of the MUDs Act on the relevant contracts or as a claim for damages for breach of statutory duty. In my view, the Oireachtas clearly intended such claims to be brought in the Circuit Court.[61]

Canny comments that the holding in *Clarion Quay* may result in OMCs having to bring proceedings in the High Court in respect of any cause of action in tort or contract, and to bring separate proceedings in the Circuit Court in respect of any breach of the 2011 Act:

> While the MUDs Act 2011 may have been enacted with the laudable goal of limiting legal costs for all parties involved with MUDs Act litigation, regrettably it is likely to have the opposite effect given the lack of discretion in permitting parties to pursue a statutory claim in the High Court.[62]

[60] Law Society of Ireland Precedent Pre-Contract Enquiries, June 2015
[61] *Clarion Quay* (n 46) [279].
[62] Martin Canny, 'Claims against Developers by Owners' Management Companies at Common Law and under the Multi-Unit Developments Act 2011 after Clarion Quay Management CLG v Dublin City Council and I.E.G.P Management CLG v Cosgrave' (2022) 2 CPLJ 30, 31.

Proposals for reform

It is submitted that in light of the foregoing difficulties in the management and remediation of MUDs, a number of areas could be considered for reform.

First, the 2011 Act could be amended to provide for a transfer by statute of all common areas yet to be transferred, with a corresponding administrative procedure established by which Tailte Éireann could specify the proofs and mapping requirements applicable to such transfers. OMCs could be given the entitlement to apply for registration of the common areas in the name of the OMC subject to delivery of the requisite proofs and appropriate maps. An analogous scheme was used for the transfer of the entirety of the land and related property of London Underground to infrastructure companies established for the purpose of the upgrade and operation of the London Underground network by public-private partnership in 1999.[63]

Second, to take account of the difficulty in litigating disputes by means of the procedure established under section 24 of the 2011 Act, a specialist regulatory and administrative tribunal for MUDs could be established. An example of such a model is the Canadian Condominium Authority Tribunal established pursuant to Ontario Regulation 179/17 made under the Condominium Act 1998, which is Canada's first fully online tribunal.

The Condominium Act 1998 sets out various requirements in relation to the establishment, duties and governance of condominium corporations, which are analogous to OMCs under Irish law. The Condominium Authority Tribunal deals with a variety of disputes relating to nuisances, abandoned vehicles, pets, infestation, and failure to comply with settlement agreements arising pursuant to previous disputes. The tribunal operates a three-stage procedure consisting of negotiation, mediation by a tribunal member, which can be followed by adjudication and a tribunal decision if the dispute is not resolved at mediation, and the decision is binding subject to appeal. There is a fee of $25 for filing an application to the tribunal, a fee of $50 if the matter proceeds to mediation and $125 if adjudication is necessary, and it is designed to be user-friendly for self-represented parties.

[63] Greater London Authority Act 1999 s 165 and sch 12.

Another model can be found in New South Wales, where a public body, NSW Fair Trading, provides a free mediation service in relation to disputes relating to MUDs (known as 'strata disputes'), including disputes relating to repairs, maintenance, renovations to common property, owners' corporation governance, nuisance, and fire safety.

In the event that disputes are not resolved by mediation, parties have the option to apply to the New South Wales Civil and Administrative Tribunal (known as 'NCAT'), which is empowered by legislation to make a variety of orders in relation to both 'strata schemes' (analogous to MUDs in Irish law) and 'community schemes' (which can include mixed-use development lots such as recreational, commercial and residential lots).[64] NCAT has broad powers to make orders to settle a complaint or dispute about *inter alia* the operation, administration and management of a strata scheme and the exercise by an owners' corporation of its legal obligations.

Third, a statutory duty to construct and complete developments in accordance with all applicable laws could be enacted by primary legislation and be enforceable by OMCs and unit owners against developers, associated companies and builders. The Commission's 1982 Report on Defective Premises[65] included the scheme of a Defective Premises Bill, which was not introduced into Irish law following the Report. The Bill included a statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work was undertaken in a good and workmanlike manner with suitable and proper materials. The Bill provided that damages recoverable for breach of the duty should include an amount for economic loss (if any) suffered by the plaintiff. The author of this article was one of the authors of the Defective Dwellings Bill 2021, initiated as a Private Members' Bill in September 2021 and which reached the third stage of the legislative process during the lifetime of the previous Government.[66] It is to be hoped that it, or a future improved version of the proposal, may yet be introduced

[64] NCAT was established pursuant to the Civil and Administrative Tribunal Act 2013 which consolidated numerous tribunals into a single body.
[65] Law Reform Commission, *Report Defective Premises* (LRC 3–1982).
[66] Defective Dwellings Bill 2021, No. 121 of 2021.

by primary legislation to provide improved remedies in respect of construction defects.

Effecting Forfeiture by Peaceable Re-Entry: a critical analysis of recent developments and proposals for law reform

Neil Maddox*

Abstract: Once an act of forfeiture has been committed by a commercial tenant, a landlord may validly terminate a lease by effecting re-entry, by either issuing proceedings for ejectment or, alternatively, through self-help by physically re-entering the premises. Physical re-entry must be peaceable to be effective and there have been a series of recent High Court decisions where the limits of the permissible force allowed have been discussed. A judicial consensus is developing that a landlord effecting a re-entry may not break the lock on the premises to do so, even if this lock is immediately replaced. This article offers a critical analysis of these judgments in light of previous authority, as well as critiquing proposals from the Law Reform Commission to abolish the ability to terminate a lease without a court order. I suggest that judges and policymakers should be cautious in seeking to limit or abolish this self-help for both principled and practical reasons, that judges should be wary of applying landlord and tenant law mutatis mutandis to receiverships, as well as highlighting the fact that an aggrieved commercial tenant already has numerous post-factum remedies to vindicate their rights where an entry has been made unlawfully.

Keywords: Commercial landlord and tenant law, forfeiture, peaceable re-entry, receiverships.

Introduction

In contrast to the law relating to residential tenancies — which has been put on a modern footing by the Residential Tenancies Acts 2004-2025[1] — the procedure for terminating commercial tenancies for breach of covenant is still based on law that might justifiably be called arcane.[2] The Irish Law Reform Commission ("the

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[1] See Una Cassidy and Jennifer Ring, *Landlord and Tenant Law: The Residential Sector* (2nd edn, Round Hall 2020).
[2] Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28-2003), [14.01]. The best recent survey of the development of law in this area is provided by J.C. Wylie, *Irish Landlord and Tenant Law* (4th edn, Bloomsbury Professional 2022), ch. 24.

LRC"), in its 2003 Consultation Paper on General Law of Landlord and Tenant described the area as in need of radical reform, being 'fraught with complexity and uncertainty'.[3] To achieve this much needed reform, the LRC produced the heads of the Landlord and Tenant Law Reform Bill 2011,[4] although this measure remains unenacted and there is no indication at the time of writing that there are any plans to progress it to legislation.

Forfeiture was abolished as a remedy available to landlords for residential tenancies by the Residential Tenancies Act 2004, and replaced with a self-contained statutory procedure to terminate tenancies for breach of covenant.[5] Nonetheless, forfeiture is still very much part of the law in relation to commercial tenancies, and it is not controversial to state that, in Ireland, a landlord may effect physical re-entry of a tenancy as a means of forfeiting the lease, provided that entry is peaceable.[6]

In this regard, the degree of force which the landlord may use in effecting this physical re-entry, which by definition is without reference to any form of court procedure or court order, is often contested in cases that come before the courts. In this article, I first consider the law relating to forfeiture and re-entry in Ireland, before engaging in critical analyses of the recent judicial and academic debate on the issue of whether a landlord or receiver may break the locks when effecting peaceable re-entry. I also offer a brief critique of the proposal of the LRC to abolish the procedure.

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[3] ibid 165.

[4] Law Reform Commission, *Report: The Law of Landlord and Tenant* (LRC 85-2007), 9-227.

[5] Residential Tenancies Act 2004 (as amended) s 58(1). See consolidated statute prepared by the LRC, available at: <https://revisedacts.lawreform.ie/eli/2004/act/27/section/58/revised/en/html> accessed 28 June 2025. Although a tenant is, under the 2004 Act, entitled to be notified of the breach of covenant complained of, and given an opportunity to remedy it before a valid notice of terminations can issue (Residential Tenancies Act 2004, s 34) in a manner similar to the forfeiture procedure, there is understandably no provision to take possession otherwise than pursuant to a court order.

[6] *Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501; *Billson v Residential Apartments ltd* [1992] 1 All ER 141. For right of a mortgagee to enter peaceably: see *First National Building Society v Gale* [1985] IR 609.

The Law of Forfeiture and Re-Entry in Ireland[7]

Procedural Requirements

Tenants' obligations in a lease are normally in the form of covenants, but a breach of covenant *simpliciter* by a tenant does not effect a forfeiture or entitle a landlord to re-enter.[8] Modern commercial leases normally have a 'forfeiture clause' which expressly grants to the landlord a right to re-enter on the breach of a covenant contemplated by the clause. Nonetheless, the right to forfeit is subject to many restrictions.

The procedure adopted depends on whether the breach of covenant complained of is for the non-payment of rent as opposed to where it is a breach of any other covenant in the lease. For the latter, and subject to certain exceptions, a forfeiture notice must be served under section 14 of the Conveyancing Act 1881 ("the 1881 Act"), the contents of which must grant an opportunity to the tenant to remedy the breach before physical re-entry is permissible.[9] The policy of the requirement appears to be to allow the tenant an opportunity for relief in circumstances where the breach can be remedied, compensation awarded for any loss which the landlord has suffered from it and furthermore that an undertaking can be given that it will not recur in the future.[10] Failure to serve a notice may lead the tenant to believe that the breach has been waived, and would serve to deprive the tenant of her right to apply for relief.[11]

In the case of non-payment of rent, which is excluded from the requirements of section 14 of the 1881 Act, no notice need be served, but a demand for the rent must be made unless the lease specifically excludes this. Where it is excluded, the

[7] There has been lively academic discussion of this issue in recent years; see: Martin Canny, 'Forfeiture by Peaceable Re-Entry: Barely Legal Bullying or an Essential Remedy for Landlords?' (2007) 12(4) *Conveyancing and Property Law Journal* 94; Ruth Cannon, 'Forfeiture for Breach of Covenant by a Tenant—the Need for Reform' (2007) 12(1) *Conveyancing and Property Law Journal* 5; J.C. Wylie, *Irish Landlord and Tenant Law* (4th edn, Bloomsbury Professional 2022) [24.18]; Mema Byrne, *Landlord and Tenant Law: the Commercial Sector* (2nd edn, Round Hall 2024) ch. 28.
[8] The LRC has recommended making a right to re-enter automatic on a breach of covenant, removing the need for a forfeiture clause in a lease: Law Reform Commission, 'Landlord and Tenant Law Reform Bill 2011' s 68(1).
[9] Conveyancing Act 1881 s 14.
[10] See the comments of Andrews LJ in *Walsh v Wightman* [1927] NI 1, 9.
[11] ibid.

landlord may then effect re-entry in circumstances where no notice has been served and no demand for the rent made, effectively abrogating the tenant's opportunity to remedy the breach.

Relief Against Forfeiture

Once a valid re-entry has been effected either by peaceable physical re-entry or through the issuance of court proceedings, it is also of note that the tenant may seek relief against forfeiture whereby the tenant remedies the breach complained of and the court grants relief to prevent the termination of the lease.[12] Where the landlord has effected peaceable re-entry, the tenant can still apply for relief against forfeiture, and if successful, will be restored to the property.[13] The equitable jurisdiction to grant relief developed to avoid a situation where the tenant could lose a valuable asset (such as a long lease at low rent) through an inadvertent and trivial breach that was easily remedied.[14] Where the right to forfeit exists to secure the payment of money, equity will grant relief where payment is made with interest, and usually costs as well.[15]

Courts lean in favour of granting relief from forfeiture in cases where the breach can be remedied, and the breach of the landlord's rights was not wilful or continuous and the damage is trivial compared to the value of the property.[16] In cases where the landlord has effected peaceable re-entry, there is no time limit as to when the tenant can apply for relief, although *laches* has been an effective defence to a claim that was not made until five months after the landlord had re-entered the property.[17]

Re-Entry

By far the safest course of action for the landlord who wishes to effect re-entry is to bring ejectment proceedings on the title seeking possession on foot of an act

[12] Martin Canny, 'The Second Chance Saloon: The Unusual Jurisdiction to Grant Relief Against Forfeiture of Deposits and Forfeiture of Leases' (2008) 13(4) Conveyancing and Property Law Journal 89.
[13] *Billson v Residential Properties* [1992] 1 AC 494, 536-538 (Templeman L.J.).
[14] ibid.
[15] *Shiloh Spinners v Harding* [1973] AC 691, 722 (Lord Wilberforce LJ).
[16] ibid 723-725 (Lord Wilberforce LJ).
[17] *Keshwala v Bhalsod* [2021] EWCA Civ 492.

of forfeiture. Less risk-averse landlords may opt for the self-help remedy and seek to physically re-enter the property.

Venturing onto the property is not, of itself, sufficient to effect re-entry. In *Bank of Ireland v Lady Lisa Ireland Ltd,*[18] O'Hanlon J cited Collins MR in *Serjeant v Nash, Field and Company*[19] who noted that an act of re-entry occurs when 'there is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be retracted, treats a breach of covenant by the lessee as constituting a forfeiture'.[20] The issuance of possession proceedings on foot of an act of forfeiture is one such unequivocal act, as is physically re-entering and taking possession of the premises with the intention of determining the tenancy.

This latter point came to the fore in the recent case of *Verbenagrove Limited v Evans*[21] where the landlord had entered the building which was the subject of the lease in a manner that was found not to be peaceable, and tried to avoid this difficulty by claiming that entering the garden at the front of the building through an unlocked gate had effected the forfeiture after which the lease was terminated. By this logic, as the lease was no longer in existence, the landlord would then have been free to do any damage he wished to the property. O'Donnell J described the argument as 'weak', characterising it as:

> …an artificial and atomistic approach to the overall circumstances. Entry through an unlocked gate or garden – even where it forms part of the overall demise – is unlikely to demonstrate the requisite intention to forfeit the lease. This is particularly so where the main element in the demised premises is a building, and a landlord enters the building…[22]

In this case, the landlord argued that lawful entry over any part of the premises in the name of the whole is sufficient to constitute re-entry, if it demonstrates an intention to take possession of the whole,[23] but this is ultimately a factual

[18] [1992] 1 IR 404.
[19] [1903] 2 KB 304.
[20] (n 18) at 408.
[21] [2025] IEHC 151.
[22] [2025] IEHC 151 [39].
[23] ibid. See Thomas Harrison, *Ejectments in Ireland* (Dublin 1903; Reprint 1981), 385-390. A number of English cases are authority for the broader proposition that peaceable re-entry can include the use of reasonable force: *Jones v Foley* [1891] 1 QB 730; *Hemmings v Stokes Pages Golf Club* [1920]

question, and other textbook writers are of the view that entry over part of the premises is only sufficient if the lease so provides.[24] In any event, the entry into the unlocked garden that occurred in *Verbenagrove* could hardly be described as unequivocal evidence of an intention to re-enter the whole of the premises, as there are many possible explanations for this that postmen, charity-hawkers and electioneering politicians could testify to.

Judicial Attitudes Towards Physical Re-entry

The strongest modern argument in favour of the continued availability of the self-help remedy of physical re-entry is to prevent an impecunious tenant from taking advantage of the delays in bringing a case to court, in order to continue in the occupation of the premises without paying rent. This is particularly so in circumstances where the landlord will only stand a very small chance of recovering any arrears *post factum*. The *locus classicus* of this approach are the comments of Carroll J in *FG Sweeney Ltd v Powerscourt Shopping Centre Ltd*,[25] where the landlord effected re-entry by using a master key to the premises and re-entering on a Sunday, when there was nobody in occupation of the shop which was closed at the time. The Court upheld the validity of the re-entry and noted that no violence had been used in retaking possession. Carroll J observed that:

> At the present time the amount of rent payable for prime city locations is very high and the arrears owed here are very large. The commercial viability of a shopping centre may well depend on all the tenants paying their rents and service charges promptly … Why should a lessee have a free ride as far as rent and services charges are concerned for as long as it takes a lessor to bring an action in the Circuit Court and then wait for an appeal to the High Court? The undertaking concerning damages that has been given by the plaintiffs is meaningless as the damages will be the equivalent to the rent and service charges for which liability already exists.

1 KB 720.; *Billson* (n 13). This line of authority is, however, unlikely to be followed in Ireland: see the comments of Cannon (n 7) 7-8.

[24] John Furber and Joanne Moss (eds), *Hill and Redman's Law of Landlord and Tenant* (LexisNexis, 2025) [8989].

[25] *Sweeney v Powerscourt Shopping Centre* [1984] IR 501 (HC) 504.

The Court affirmed that a lessor is not obliged to go to court and may re-enter peaceably under a valid re-entry clause or after the service of a valid notice under section 14 of the 1881 Act, in cases where the default is otherwise than in the payment of rent. Carroll J also noted that 'the lessee's rights are fully protected by being able to apply for relief against forfeiture under section 14(2) of the Act of 1881'.[26]

It was of particular importance in this case, that the lessee had not applied for such relief. From this failure, the judge inferred that the tenant wished to avoid the court enquiring about when arrears of rent and service charges might be paid. When applying for relief against forfeiture, a tenant may seek an interlocutory injunction to have their possession restored pending the outcome of the proceedings, enabling possession to be resumed almost immediately and frustrating the landlord's attempts to quickly terminate the lease without recourse to the courts.[27]

There are further reliefs available to a tenant after a physical re-entry has been effected. A right to compensation (for instance by a trespass to goods claim if the tenant's property has been damaged) survives the re-entry and can be pursued as an independent damages claim in the Circuit Court or High Court depending on the amounts involved.[28] If a tenant is not allowed back into possession pending the determination of a relief against forfeiture claim that is ultimately successful, an account can be taken of the loss to the tenant from being dispossessed for this time, and that amount deducted from any sums owing to the landlord.[29]

Thus, it can be seen that a tenant is far from being deprived of effective remedies where the landlord has made physical re-entry, particularly in circumstances where the breach complained is remediable. *Sweeney v Powerscourt*, one of the leading modern Irish authorities on this issue, obscures this fact, as there the

[26] ibid.

[27] Although, a dispossessed tenant would be wise to seek such a remedy promptly; see *Pineport v Grangeglen* [2016] EWHC 1318 (Ch).

[28] *Rainey Brothers v Kearney* [1990] NI 18. See also Cannon (n 7) 8.

[29] *Monument Creameries v Carysfort Estates* [1967] IR 462 (HC) 464-465.

tenant took the unusual step of challenging the re-entry without seeking relief against forfeiture.

Indeed, *Sweeney v Powerscourt* represents the high watermark of the modern jurisprudence in favour of the self-help remedy. In contrast, the comments of McKechnie J in the High Court in *Harrisrange Ltd v Duncan*[30] which might be read as impliedly hostile to the self-help remedy, given the various court procedures available to a landlord in these circumstances. He noted:

> No re-entry is to take place unless it, and the method used, is lawful and in accordance with law. The procedures available are quite adequate to vindicate any person's rights and access to the courts for that purpose. Those who refuse to avail of such rights and such access can only intend to steal a march on the rule of law. This should not be allowed to happen.[31]

It is true that judges tend to scrutinise a purported peaceable re-entry closely, given that a landlord who has effected re-entry in this way has bypassed the courts system, and the procedural protections contained therein for a tenant. As such, choosing to proceed in this manner is attendant with risk and not just for a landlord themselves. As Canny notes "[i]t is with some trepidation that lawyers advise a client to invoke a self-help remedy".[32]

Physical re-entry is risky as it creates a possibility that it will lead to a physical altercation with an aggrieved tenant (which exposes the landlord to a trespass to the person claim or the risk of injury), or damage to the tenant's property (actionable as trespass to goods). It is also commonly stated that infringing forceable entry legislation runs the risk of both civil and criminal proceedings.[33] Nevertheless, the most recent forceable entry act — the Prohibition of Forcible

[30] [2003] 4 IR 1.

[31] ibid [35]. In *Harrisrange*, the conduct complained of (the claim by the tenant in respect of which was ultimately found to be statute-barred by McKechnie J) was a series of attempted re-entries by changing the locks, with the tenant each time regaining possession, and then claiming assault and battery against the landlord. Such unseemly back-and-forth is clearly to be disapproved of, but is of a materially different nature than taking possession of an empty building at a time when there is no one expected to be on the property, as occurred in *Sweeney v Powerscourt*.

[32] Canny (n 7) 94.

[33] Wylie, *Irish Land Law* (6th edn, Bloomsbury 2021) 973.

Entry and Occupation Act 1971 — only applies where the offender is not the owner of the land, and does not apply to landlords who have an interest in the property.[34] There is also a panoply of earlier measures, some very ancient, relating to forcible entry, but in an impressive review of these statutes Collins concludes that only an Act of 1381 is still in force and relevant.[35] This measure provides that:

> None from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in (peaceable) and easy manner.

While there would clearly be practical difficulties with seeking to invoke an Act from the 14th century, this statement has been influential on the law's subsequent development, and underlines the principle that the lawfulness of the re-entry is not a defence to entering too forcefully onto property. In relation to this statute, Archbold notes that '[a]n entry by breaking the doors or windows … especially if it is a dwelling house, is a forcible entry'.[36]

Force or a show of force calculated to prevent resistance is forbidden, but interestingly, Archbold further notes that entry through a 'trick or artifice', or an entry effected by threats, such as to property and that are not threats of personal violence, would not support an indictment. And, as occurred in *Sweeney v Powerscourt*, an entry with a key is acceptable.[37]

Physical Re-Entry and 'Minimal Damage'

Clearly, the antiquity of the 1381 Act presents interpretative difficulties for a commercial landlord in deciding whether or not a lock can be broken in effecting a lawful and peaceable re-entry.[38] In recent times, a number of academic writers have suggested that a re-entry in which "minimal damage" was caused would be

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[34] Owners of the land are excluded from the operation of the Act and the definition of owner encompasses *inter alia*: 'any person having an estate or interest in land' Prohibition of Forcible Entry and Occupation Act 1971 ss 1 and 2.
[35] Seamus Collins, 'To Break the Lock or Not?' (2021) 26(4) *Bar Review* 127, 129-130.
[36] Theobald Butler, *Archbold: Pleading, Evidence and Practise in Criminal Cases* (36th ed, W Gaunt & Sons 1966) 1306.
[37] ibid.
[38] Collins (n 35) 130.

an acceptable re-entry.[39] However, in the recent case of *ILG Ltd v Aprilane Ltd* [40] Allen J was doubtful of this position. He noted that the proposition for minimal damage being acceptable in effecting peaceable re-entry is derived from the first edition of Wylie's *Landlord and Tenant Law*,[41] and observed as follows:

> Without finally deciding the point, I am extremely sceptical of the argument that whether an entry is forcible might turn on the degree of force used, or the extent of damage done to the property – whether by drilling, forcing or cutting of locks or whatever.[42]

Allen J noted that the proposition that no more than minimal damage may occur in re-entry 'appears… to be unsupported by any judicial authority.'[43] To this point I will return below. Of interest here, is the seemingly inconsistent judgment of Keane J (delivered almost contemporaneously to *Aprilane*) in *Hafeez v CPM Consulting*,[44] where a lock was forced during re-entry. The Court noted that while the:

> …re-entry may have been forcible, but it is difficult to see how it was not peaceable… There is no evidence before me of anything more than minimal damage to the restaurant premises by, at most, breaking - and, presumably, immediately afterwards repairing - a lock.[45]

When one more closely examines these two seemingly contradictory authorities, the danger of making *obiter* statements, albeit in a qualified and provisional way, in the absence of a real factual dispute on the point that is before the court becomes apparent.

Aprilane was not directly concerned with the lawfulness of any physical re-entry that had been effected by the landlord. Rather, it was an attempt by the plaintiff to avoid the costs implications of issuing a notice of discontinuance, in circumstances where the main purpose of issuing the proceedings had been

[39] See Wylie, (n 7) 565-567; Cannon, (n 7) 7-8; Canny (n 7) 94-97; Byrne (n 7) 426-427.
[40] [2020] IEHC 420.
[41] John Wylie, *Irish Landlord and Tenant Law* (Butterworths 1990).
[42] [2020] IEHC 420 [26]-[27].
[43] ibid [26].
[44] [2020] IEHC 536.
[45] ibid [36].

achieved by it obtaining an interlocutory injunction restraining the defendant landlord from effecting physical re-entry of the property.[46]

In issue was the allegation that the landlord had threatened physical re-entry in circumstances where it would have been clearly unlawful, irrespective of whether locks would have been broken or not. First, re-entry was threatened in circumstances where the breach of covenant alleged was for reasons other than non-payment of rent (alienation of the interest without the landlord's consent), and no forfeiture notice had been served, as required by section 14 of the 1881 Act.[47] Secondly, the threat to re-enter was at a time when the premises (a gym) was open for business and the landlord was aware that a private security firm had been engaged to protect it, indicating a clear intention by the tenant to resist re-entry, which is not acceptable in Ireland.[48]

Contrast this with the facts in *Hafeez* where Keane J considered, in deciding whether to grant relief against forfeiture, the broader conduct of the tenant and refused relief due to the persistent failure of the tenant to pay the rent as it fell due.[49] The prospects of future commercial relations between the parties and the tenant's difficulties with both the Revenue Commissioners and the Director of Corporate Enforcement were further factors justifying the refusal of relief.[50] In declining to invalidate the re-entry because of the necessary inference that the lock had been forced (as the defendant did not have a key), the Court was able to avoid an outcome where a tenant, of opaque solvency and in persistent default in respect of his obligations under the lease, would be enabled to use litigation as a means of frustrating and delaying the landlord's right to forfeit the lease. This was in circumstances where there was also considerable doubt whether the tenant would be in a position to clear any arrears of rent owing, or to discharge any costs orders that may be made against him subsequently.

Were the requirement to avoid even 'minimal damage' in effecting re-entry, as espoused in *Aprilane* and the cases that follow it discussed below, applied strictly and in a manner removed from other contextual factors in the case, the result

[46] [2020] IEHC 420 [1], [7], [34].
[47] ibid [24].
[48] ibid at [24]. *Revok Properties v Dixon* (1973) 25 P & CR 1. Cannon (n 7).
[49] [2020] IEHC 536 [121].
[50] ibid [122].

would have been very different. This was precisely the evil warned against by Carroll J when she wondered why impecunious tenants should be allowed 'a free ride' as far as rent is concerned for as long as a case takes to conclude.

Indeed, Wylie in the most recent edition of his Landlord and Tenant Law text,[51] notes the comments of Allen J in *Aprilane* regarding 'minimal damage', but restates his view that physical re-entry is only unacceptable if the

> …tenant resists physical re-entry by the landlord, or if such a re-entry would cause more than minimal damage to the property the landlord should refrain as an attempt to use force is likely to be a criminal offence.[52]

In considering Allen J's criticism, Wylie further notes that there is no authority for the proposition that minimal damage is acceptable, referencing the above-cited article by Canny, of which he states that there is therein cited 'considerable authority supporting the proposition'.[53] Indeed, the English jurisprudence provides support for a much broader dictum that the use of force does not negate a forfeiture, and that peaceable re-entry using reasonable force such as the breaking into a locked premises, and even including the use of excess force, does not negate the forfeiture. The tenant who is affected would still be able to pursue remedies after the fact by civil or criminal means, but the forfeiture would be valid.[54]

There is authority to suggest that using reasonable force can include removing a roof,[55] and carrying the tenant's wife over the threshold of the premises while she was seated in her armchair.[56] Indeed, the English authorities go much further than this. Where re-entry is validly effected over part of the premises with the intention to re-enter the whole,[57]the lease is forfeited and the tenant is automatically a trespasser from that moment on. As such, in this line of thought, the landlord

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[51] Wylie, (n 7) 565-567.
[52] ibid 566.
[53] Wylie also cites the decision of Keane J *Hafeez* on this point with approval; ibid 566 fn 139. Canny (n 7) fn 133; The authorities referred to are as follows: Hill and Redman (n 24); Harrison (n 25), 385; *Hemmings v Stoke Pages Golf Club* [1920] 1 KB 720; *Kavanagh v Gudge* (1844) 7 Man. & G. 316; *Jones v Foley* [1891] 1 QB 730; *Billson* (n 13) [1992] 1 AC 494, 524-525 (Nicholls LJ).
[54] Hill and Redman (n 24) [9001].
[55] *Jones v Foley* [1891] 1 QB 730.
[56] *Hemmings v Stoke Pages Golf Club* [1920] 1 KB 720.
[57] See *Verbenagrove Limited v Evans* [2025] IEHC 151, [39]-[40].

would be justified in using reasonable force to turn the tenant out.[58] However, as Cannon notes, this statement of the law is unlikely to be applied in Ireland, and where a tenant offers resistance, physical re-entry would be an unacceptable means of securing possession, a position this author concurs with.[59]

Recent Jurisprudence: Receiverships

Notwithstanding the academic and judicial support for the position of Keane J in *Hafeez*, the comments of Allen J in *Aprilane* have had more influence on the subsequent jurisprudence in the High Court. Although this debate has commenced in the context of commercial landlord and tenant law, it has now been applied to the law relating to receivers obtaining possession of property pursuant to a debenture.

Receivers, of course, seek possession on a different legal basis to landlords, normally entering pursuant to the terms of a charge where a borrower has defaulted on the terms of the loan, and the right to possession has become exercisable. The receiver normally acts as the agent of the mortgagor on the basis of statute and, often, a provision to this effect in the mortgage.[60] For instance, section 108 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") indicates that a receiver appointed pursuant to this provision 'is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise.'[61] Invariably, commercial lenders insert terms to similar effect in deeds of mortgage and charge.

Furthermore, a receiver has a broader right to possession than a landlord who must effect a valid re-entry in order to bring the tenancy to an end. In contrast, a receiver's right to possession exists prior to the attempt to retake possession – once an event of default has occurred in respect of the mortgage that renders the power exercisable. Indeed, for mortgages by conveyance that may have been entered into prior to the commencement of the 2009 Act, the receiver may be the owner of the fee simple in the property, and thus entitled to possession only

[58] Hill and Redman (n 24) [9001].
[59] Cannon (n 7) 8.
[60] *McGuiness v AIB and Others* [2025] IEHC 180 [9] which set out the relevant portion of the debenture in that case that deemed the receiver to be the agent of the borrower.
[61] LCLRA 2009 s 108(2).

restricted by the terms of the mortgage so long as the borrower complies with its terms.[62]

This quite different legal basis for a receiver's right to possession has not been considered in any significant detail by a number of recent High Court decisions, where the law on re-entry for forfeiture of a commercial lease has been applied *mutatis mutandis* to receiverships. Additionally, these cases concern applications for interlocutory relief where no final factual determination has been made by the court, and their precedential value should be weighed accordingly.

In *Charleton v Hassett*,[63] the plaintiff had appointed a receiver as agent of the mortgagee (a rarer occurrence than the receiver being the agent of the mortgagor) over the mortgaged property pursuant to a charge, and sought injunctions restraining the defendant from interfering with the receiver exercising his powers so that the property could be sold.[64] What followed then was, as described by Allen J, a 'protracted game of cat and mouse' where the receiver initially changed the locks, and the defendant then retook possession by changing the new locks, and the process was repeated over the course of fourteen months.[65] Although there were many elements to the case, ultimately it was the bank's possession that was being interfered with, and while the plaintiff receiver had been appointed as agent of the bank with regard to securing the property and selling it, he had no authority to litigate on its behalf to vindicate its right to possession.[66]

There was some controversy as to whether the property was the defendant's family home, but it was unquestionably residential property. It was also clear that there was an express term in the Deed of Mortgage entitling the bank to take possession without notice, once default had been made by the borrower. In this regard, the Court noted Hogan J's comments in *Irish Life & Permanent plc v Duff*,[67] that the constitutional protection of the inviolability of the dwelling cast serious

[62] *Gale v First National Building Society* [1985] IR 609, Costello J; but cf the comments of Hogan J in *Irish Life & Permanent v Duff* [2013] 4 IR 96.
[63] [2021] IEHC 746.
[64] ibid [1]-[2].
[65] ibid[19], [22], [45].
[66] ibid [88].
[67] [2013] IEHC 43; cf *Gale v. First National Building Society* [1985] IR 609.

doubt on the entitlement of a bank to take possession of *residential* property in the absence of a court order.[68] Allen J restated his comments in *Aprilane* and doubted whether breaking locks could ever amount to peaceable re-entry,[69] but as noted above, *Aprilane* concerned re-entry pursuant to forfeiture of a commercial lease.

The subsequent case of *Wallace & O'Connor v Davey*[70] bears a superficial similarity to *Charleton v Hasset* in that the plaintiff receivers were seeking possession of the property, as well as related injunctions restraining interference with the joint receivers in the discharge of their functions, with a view to the plaintiffs selling the property. Stack J noted of the plaintiffs' assertion of a right of re-entry pursuant to the mortgage deed, and further that:

> …[the] right is a right to enter, and therefore must be either asserted on foot of a court order or exercised peaceably: see *Charleton v. Hasset* [2021] IEHC 746, where it was held the breaking of locks does not constitute peaceable re-entry.[71]

This perhaps overstates the finding of Allen J in *Charleton* where he merely recited his obiter comments in *Aprilane* that he 'doubted' if the breaking of locks could ever constitute peaceable re-entry. Such a distinction is not mere pedantry, as a general finding that locks in commercial receiverships may not be changed is fraught with difficulty, not least because it runs counter to commercial practice in this area of many years' standing.

Furthermore, there is a crucial distinction between the *Wallace* case and *Charleton* in that in the latter the receiver was an agent of the mortgagee, whereas in the former, the joint receivers were the agent of the borrower (the more common position).[72] As the agent of the mortgagor, the receiver would have been at law

[68] [2021] IEHC 746 [63].
[69] ibid [64].
[70] [2022] IEHC 120.
[71] ibid [96].
[72] This was because the implied statutory powers to appoint a receiver contained in ss 19 and 24 of the Conveyancing Act 1881 were implied into the mortgage deed, thus the receiver would have been the agent of the mortgagor pursuant to s 24(a). [2022] IEHC 120 [19]-[21].

deemed to be breaking the locks on behalf of the borrower, weakening the argument that this would not constitute peaceable entry.

In addition, the property the subject matter of the receivership in *Charleton* was residential (and there was a claim that it was a family home), whereas in *Wallace* it was a commercial premises. Hogan J's judgment in *Irish Life and Permanent v Duff*[73] was cited with approval by Allen J in the former case.[74] *Duff* was concerned with the inviolability of the dwelling and the Court noted in that case that:

> [t]he assurance of security and protection inherent in the guarantee of "inviolability" would be fundamentally compromised if peaceable possession could be taken at any time other than by means of a court order without express notice to the borrower … merely because the borrower was in default.[75]

The Court further held that the inviolability of the dwelling protected by Article 40.5 of the Constitution 'complements and re-enforces other constitutional guarantees and values, such as … dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42).'[76]

While this statement is certainly true for dwellings, it is of note that none of the rights mentioned are engaged with regard to entry onto commercial premises, which is usually a dispute about conflicting property rights. If a re-entry involves trespass to the person or goods (though not to land if a right to re-entry exists), there are established remedies available *post factum* to vindicate any infringement of these rights such as damages claims in torts, and the right to set-off any such damages against any arrears of rent claimed in the forfeiture

[73] [2013] IEHC 43.
[74] [2021] IEHC 746 [63].
[75] [2013] IEHC 43 [48]. In *Emerald Sky 2 DAC and Others v Victoria Homes Ltd and Others* [2023] IEHC 446, Egan J noted that *Charleton v. Hasset* concerned residential property, but nonetheless, indicated on an obiter basis that the removing and changing of locks did not represent obtaining peaceable possession in a partially completed and unoccupied block of apartments that did not yet constitute residential property.
[76] *DPP v. O'Brien* [2012] IECCA 68 [17] (Hardiman J); cited with approval in *Irish Life and Permanent v Duff* [2013] IEHC 43 [46] (Hogan J).

proceedings. This distinction is not only apparent from the constitution but also the differing statutory regimes pertaining to residential and commercial property.[77] Thus, applying the same procedural protections as are available for residential property to commercial property disputes cannot be justified on the basis of the same panoply of rights being engaged by both.

All of these authorities were considered by Nolan J in *Coulston and Others v Elliot & Elliot*,[78] a case involving the powers of a receiver to take possession on foot of a debenture. In this case, the relevant mortgage deed expressly indicated that the bank or its agent, being the receiver, could enter the premises any time after a demand was made and take possession of it. The receiver had entered the premises causing minor damage while changing the locks. Nolan J observed that the lock belonged to the defendants formed part of their property, and then expressly preferred the argument put forward originally by Allen J that any breaking of the lock constituted non-peaceable entry.[79]

Nonetheless, the effect of the finding that the entry was forcible was slight, going to the matter of costs, and the Court was influenced by the fact that the trespass took place in the middle of the night, lasting for a mere two hours with the premises being handed back at 6.00am. He noted as follows:

> …whilst I find that there has been a trespass, it seems to me that it could only be described as technical in nature and that it would be practically impossible to put a compensation value on that trespass and that justice will be done between the parties by an appropriate order for costs.[80]

It was also apparent in *Coulston and Others v Elliot & Elliot* that section 19 of the 1881 Act was implied into the deeds of charge and, as such, it would appear that the receivers, pursuant to that section, would have been acting as agents of the

[77] For example, s 96(3) of the Land and Conveyancing Law Reform Act 2009 indicates that the provisions affording procedural protections to defaulting borrowers on foot of a mortgage may not be contracted out of in regard to housing loan mortgages. Furthermore, the Residential Tenancies Act 2004, as amended, is a self-contained statutory regime for private residential tenancies that provides extensive procedural protection to tenants where the landlord wishes to terminate their tenancy.
[78] [2024] IEHC 697.
[79] ibid [103]-[105].
[80] ibid [106].

borrowers when changing the locks.[81] Although the point was not argued in the proceedings, the receiver was breaking locks that belonged to the borrowers on their behalf and with their authority as their agents.

In any event, this developing *ratio* that the breaking of locks will never be acceptable for a receiver retaking possession in a receivership has further embedded itself in this area of law by the recent decision of Dignam J in *McGuinness v AIB and Others*[82] where he found that the removal and changing of locks 'leads to the conclusion that there is a strong case that possession was not taken peaceably',[83] and this provisional finding (this was another interlocutory application) was one of the grounds on which injunctive relief was refused.

Reform

The LRC has produced a consultation paper,[84] and a subsequent report with a Draft Bill,[85] on the subject of commercial landlord and tenant law, of which, at the time of writing at least, there is no indication that its passage is imminent or a political priority for the Government. Nonetheless, the chapter concerned with forfeiture is sensitive to the need to simplify the procedure, as well as the potential injustice which may result from a defaulting tenant taking advantage of court delays when defending an indefensible claim.[86]

There is a further issue with property that has been abandoned by the tenant and the asset is at risk pending the retaking of possession by the former landlord. Of course, the current law which allows physical re-entry to complete a forfeiture avoids many of these problems and at one point the Law Commission of England and Wales had recommended retention of the self-help remedy as an 'effective

[81] ibid [85].
[82] [2025] IEHC 180.
[83] ibid [102].
[84] Law Reform Commission (n 2).
[85] Law Reform Commission (n 4).
[86] Law Reform Commission (n 4) 172-175.

management tool' for landlords with regard to commercial property,[87] although this appears to have been supplanted by more recent recommendations.[88]

The Draft Bill produced by the LRC contains a nuanced proposal for a statutory scheme to introduce a simplified and summary procedure in place of forfeiture, where entry without a court order is, for the most part, abolished.[89] This is subject to an *ex parte* procedure where the court can grant an order of possession if there are reasonable grounds for believing the property is to be abandoned.[90] In exceptional circumstances, possession can be retaken in an 'emergency action' application if the premises are at risk of 'substantial damage',[91] but this does not have the effect of terminating the tenancy, and the landlord has to apply to the court to retain possession, and bring an end to the tenancy.[92]

This is a well-drafted proposal, but one does have to wonder at the mischief it seeks to address. The reasons cited by the LRC itself (tenant had insufficient time to remedy the breach, trespass to goods or damage to tenant property, tenant subsequently applies for relief against forfeiture),[93] either have established remedies available after the fact, or raise the possibility that the tenant may claim a remedy after the fact (the reason why this creates a problem is questionable). The stated goal of 'simplification' of forfeiture hardly justifies abolishing the simplest remedy of all: self-help. Furthermore, there is nothing to suggest there is any difficulty with existing *post factum* remedies. In such circumstances, the legislature might be mindful of law reform that will lead to a notable increase in litigation in this area, unless clear policy reasons can be identified for this change.[94]

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87 Law Commission, *Termination of Tenancies by Physical Re-entry* (1998) [1.6]-[1.9]
88 Law Commission, *Termination of Tenancies for Tenant Default* (2006-Law Comm-303), <https://assets.publishing.service.gov.uk/media/5a7c30a4ed915d7d70d1d2ac/6946.pdf> accessed 24 July 2025.
89 Law Reform Commission (n 4) Landlord and Tenant Bill 2011, Ch 5 and 6.
90 ibid s 76.
91 ibid s 77.
92 ibid s 71.
93 Law Reform Commission (n 2) [14.16].
94 See the comments of Professor Mee regarding law reform creating incentives to litigate in relation to the reform of the law of prescription in: John Mee, 'Prescriptive Easements and Profits: Another Cliff Edge?' (2021) *Conveyancing and Property Law Journal* 11.

Conclusion

Although it is unquestionably the law that a commercial landlord may effect physical re-entry on foot of an act of forfeiture, judges are understandably wary of endorsing such a remedy given it bypasses the courts and the procedural protections they provide, and also because of the potential illegality that may result through an unseemly altercation with the tenant or damage to the tenant's property. Nonetheless, there are many established remedies that an aggrieved tenant may have recourse to after such a re-entry has occurred, including having possession restored and remedying the breach complained of so that relief against forfeiture can be sought.

Where a tenant is in persistent default of its obligations under a lease, or where property is abandoned by the tenant, such a right of re-entry enables a landlord to avoid an impecunious tenant exploiting the time involved court proceedings in bad faith in order to extend the tenancy and in circumstances where it is unlikely that any outstanding rent or service charges will be recoverable. Of course, re-entry must be peaceable but this is ultimately a factual question and courts should be wary of adopting rigid rules, such as that locks may *never* be broken, that may tie a judge's hands in examining all of the circumstances and contextual factors to determine the issue. I would contend that the decision of Keane J in *Hafeez* was correct in all of the circumstances of the case, and that an injustice would have resulted had he been compelled to find otherwise on the single fact of the locks having being changed when re-entering the property.

There is also an argument that the recent line of jurisprudence which rejects the proposition that a landlord may cause 'minimal damage' when entering the property has been decided *per incuriam*, as it fails to consider earlier authorities, and also in applying the requirement *mutatis mutandis* to the law of receiverships without a consideration of their differing legal basis. If earlier authority is to be departed from, it is better that it is done so consciously after considering the earlier law and distinguishing it or identifying a specific deficiency. One wonders if there is a certain conflation of the strict procedural requirements for taking possession of residential property with that pertaining to commercial property in the judicial mind, in circumstances where the latter does not engage the same range of personal rights of the former.

The Law Reform Commission's proposals to reform the area are a considered attempt to weigh the differing policy considerations at play in such commercial disputes, but in circumstances where there are established and powerful remedies already available to an aggrieved tenant, one wonders what evil they would seek to address.

The Granting of Freehold Title to Apartment Owners – Pros, Cons and Why Not?

Gabriel Brennan*

Abstract: Traditionally, long leasehold titles have been used for apartments to bind successors in title to the performance of both negative and positive covenants. Problems with the rules relating to the enforceability of freehold covenants meant that, in practical terms, it was generally not possible to use freehold titles for apartments. This difficulty was, however, removed by the Land and Conveyancing Law Reform Act 2009 which allows for the enforceability of freehold covenants. Despite this development, conveyancers have continued to use long leases for apartments. This article explores the historical difficulties and the current implications of granting freehold title to apartment owners.

Keywords: Freehold covenants, apartments, enforceability, freehold title, long leases, Tulk v Moxhay.

Introduction

Traditionally, long leasehold titles have been used for apartments primarily for one reason. That is to bind successors in title to the performance of both negative and positive covenants. Historically, 'the burden of restrictive covenants only runs in equity, and in the case of positive covenants, not at all.'[1]

Apartment schemes require mutually enforceable covenants. Problems with the rules relating to the enforceability of freehold covenants meant that, in practical terms, it was not possible to grant freehold title in relation to multi-occupational developments such as blocks of flats and apartment complexes.

However, the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act') removed this difficulty by allowing for the enforceability of freehold covenants. Despite this, conveyancers have continued to use long leases for apartments.

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[1] Andrew Lyall, 'Freehold Covenants and What To Do With Them' (1991) 9 ILT 157.

Such leases need to be carefully drafted so that the tenants do not have the right to buy out the freehold. The effect of this would be to remove some covenants and potentially defeat the communal nature of the scheme. But, given the provisions of the 2009 Act incorporating the enforceability of freehold covenants, why are freehold titles not being granted to apartment owners? What would be the benefit of this, if it became common practice? What difficulties (if any) might arise?

The benefit and burden

A covenant is taken to be 'a promise or undertaking contained in a deed.'[2] Previously it would have been under seal, but section 64(1) of the 2009 Act abolished '[a]ny rule of law which requires … a seal for the valid execution of a deed by an individual'. Section 3 of the 2009 Act defines a covenant as including 'an agreement, a condition, reservation and stipulation'.

In practical terms, it is a promise to do something or to refrain from doing some act in relation to land. Usually, a covenant is contained in a deed executed by the covenantee (the party given the promise who can sue if the covenant is not complied with (i.e., the person with the benefit) and the covenantor (the party who takes on the promise and is liable to be sued if he breaches the promise (i.e., the person with the burden). Traditionally, the enforcement of covenants was governed by the rules of contract law, however, the law of property has intervened to enforce covenants outside of the strict rules of contract law. A positive covenant is a promise to do something (i.e., to carry out a positive act), while a negative covenant is a promise not to do something (i.e., to refrain from a particular act). An example of a positive covenant would be a covenant to repair, while an example of a negative or restrictive covenant would be a covenant to refrain from demolishing or altering a property, or a covenant to restrict its use.

A lease will always contain leasehold covenants (e.g., to pay the rent, to build a house on the land, to maintain and repair, to use the land in a particular way etc.). There are also freehold covenants which arise most frequently when a parcel of land is being divided. The seller is selling part of the land and retaining another part which they wish to protect and hence they make the sale subject to

[2] Paul Coughlan, *Property Law* (2nd edn, Gill & Macmillan 1998) 261.

compliance with covenants which will protect the retained land after the sale is completed. Alternatively, the covenant may impose an obligation on the purchaser in relation to the sold land. Such covenants may restrict the purchaser's right to use the land purchased.

Covenants will always bind the covenantee and covenantor as these parties will be bound by the agreement they entered into under the principles of contract law. However, the question arises as to whether such covenants bind successors in title of the covenantee and covenantor. Do the benefit and burden of such covenants 'run with the land' so as to bind subsequent owners?

While leasehold covenants have long been enforceable against successors in title,[3] the law in relation to freehold covenants 'never developed properly and is subject to serious flaws.'[4] Freehold covenants were enforceable against successors in title only to a limited degree. This has been referred to as '[o]ne of the most striking anomalies' in the Irish land law and conveyancing system.[5] According to Lyall: 'The burden of positive covenants cannot run at law or in equity between independent freehold owners. The burden of restrictive covenants only runs in equity under *Tulk v Moxhay*.'[6]

According to McGrath in *Lyall on Land Law*:

> The old rules, particularly the common law rules, began by treating covenants as purely personal obligations, affecting only those parties who originally entered into them. Sometimes the common law, and more

[3] The Law Reform Commission noted that the law relating to leasehold covenants is relatively straightforward and effective; see Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34—2004) 92. The only reform recommended by the Commission is the replacement of the overlapping and slightly contradictory provisions contained in section 12 and section 13 of the Landlord and Tenant Law Amendment Act, Ireland 1860 (otherwise known as, and hereafter referred to as, Deasy's Act) and section 10 and section 11 of the Conveyancing Act 1881; see Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28—2003) 53-57. The suggested new provision is section 16 of the draft Landlord and Tenant Bill at Appendix B of the Law Reform Commission, *The Law of Landlord and Tenant* (LRC 85—2007). This recommendation remains to be implemented.

[4] Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34—2004) 92.

[5] Law Reform Commission, *Report on Land Law and Conveyancing Law: (7) Positive Covenants Over Freehold Land and Other Proposals* (LRC 70—2003) 3.

[6] Lyall (n 1).

> frequently equity, went beyond this and began to recognise covenants as property rights. As such they could bind successors to the original parties between whom there was no privity of contract.[7]

Complicated rules relating to the enforceability of covenants (and, in particular, positive freehold covenants) were developed by the common law and modified by equity. Numerous academics have articulated these rules, emphasising different nuances in their analysis. Some key elements of the historical position are summarised below.

The position at common law and in equity

Historically, only leasehold covenants (positive and negative) ran with the land and bound successors in title.[8] This was the reason why many leases were created particularly in relation to apartment schemes where all owners were required to comply with the same rules to ensure the efficient operation of the scheme (e.g., that no owner would put down wooden floors, that everyone would be required to pay the service charge or that no one could hang washing on their balcony).

The position in relation to freehold covenants was more complicated and common law rules laid down requirements to be met if the benefit or burden was to run with the land. The rules applied equally to both positive and negative freehold covenants.

Running of the benefit at common law

If a successor in title of the covenantee wanted to enforce a freehold covenant against the original covenantor, he could only do so if he complied with a number of common law rules:

a) The covenant touched and concerned the land of the covenantee i.e. it must not be personal;

b) The successor in title must have a proprietary interest in the land;

[7] Noel McGrath, *Lyall on Land Law* (5th edn, Round Hall 2023) 612.

[8] Sections 12 and 13 of Deasy's Act provide for the enforceability of leasehold covenants between successors in title to the landlord and tenant. See also ss 10 and 11 of the Conveyancing Act 1881.

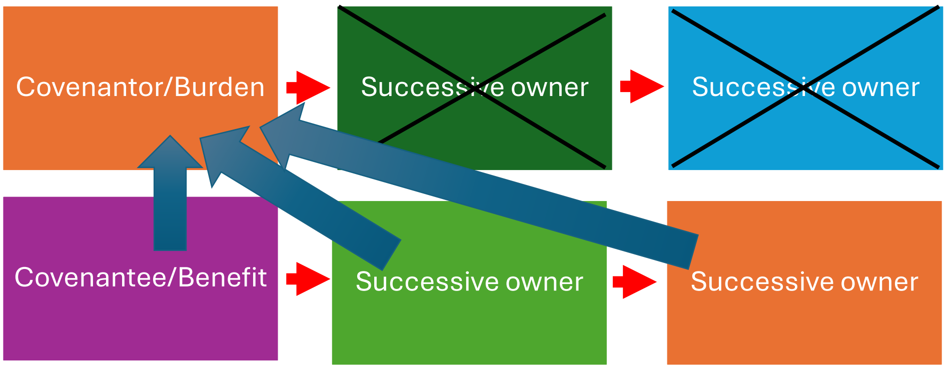
c) The successor in title must own the same type of estate as the original covenantee; and

d) The covenant must be intended to benefit successors in title.

In this way, the benefit of a freehold covenant could pass to successors in title of the covenantee.

Running of the burden at common law

Matters were more complicated in relation to binding successors in title of the covenantor. The common law position was that the burden of a freehold covenant cannot bind successors in title of the covenantor and does not run with the land.



However, as illustrated above, equity intervened to modify the common law position. Under the rule in *Tulk v Moxhay*,[9] the burden of a freehold covenant may run with the land in equity so that successors in title of the covenantor's land are bound by it. However, as noted by Mee and Murphy, 'the equitable rules surrounding the passing of the benefit and the burden of restrictive covenants are complicated and somewhat uncertain.'[10]

The rule in *Tulk v Moxhay*

In this 'iconic'[11] case, the plaintiff Mr. Tulk sold a garden and required the purchaser to enter into a covenant to the effect that the land would be kept as a garden and would not be built on. The garden was sold on a number of times until it was purchased by the defendant, Mr. Moxhay, who purchased it with

[9] (1848) 2 Ph 774.

[10] John Mee and Alan Murphy, 'Reform of the Law of Covenants' (2007) 12(4) CPLJ 100.

[11] David Cowan, Lorna Fox O'Mahony and Neil Cobb, *Great Debates in Land Law* (3rd edn, Hart 2023) 159.

notice of the covenant. Although he was aware of the covenant, Mr. Moxhay attempted to build on the land and Mr. Tulk brought an action to stop him on the basis that he was acting in breach of the covenant. Mr. Moxhay argued that he was not bound by the covenant and that under the common law rules, the burden of a freehold covenant does not pass to successors in title of the covenantor.

The court held that an injunction could be granted in equity preventing Mr. Moxhay from breaching the restrictive covenant and that the burden of such a covenant runs with the land in equity. It should be noted that Mr. Tulk retained land nearby and this land was benefited by the covenant.

Running of the burden in equity

Under the rules applied in this case equity will bind successors in title of the covenantor if the following conditions are satisfied:

a) The covenant must be negative or restrictive (and not positive). In *Tulk v Moxhay*[12] although the covenant was expressed in positive language as a duty to maintain the square as a garden, the court looked behind the wording to the substance of the obligation involved. This examination revealed that the covenant was actually a restrictive covenant prohibiting building on the land.

b) The land to which the benefit of the covenant is attached must be in the vicinity of the burdened land and must be benefited by the covenant.

c) The right to sue a successor in title of the covenantor is an equitable proprietary interest.

d) The rule in *Tulk v Moxhay*[13] may only be invoked by the original covenantee if he retains land for the benefit of which the covenant was entered into.

[12] *Tulk* (n 9).
[13] ibid.

e) The rule in *Tulk v Moxhay*[14] may only be invoked by successors in title of the original covenantee if they can show that the benefit of the covenant passed to them in equity.

In *Rhone v Stephens,*[15] the owner of a house had a covenant with his neighbour to keep the roof common to both properties tiled and watertight. The covenantor sold his property and the House of Lords refused to enforce the covenant against the new owner (the covenantor's successor in title) because it was a positive covenant and thus the rule in *Tulk v Moxhay*[16] did not apply.

The Irish courts recognised and applied the rule in *Tulk v Moxhay*[17] in cases such as *Craig v Greer*,[18] *Williams & Co Ltd v LSD Ltd,*[19]*Power Supermarkets Ltd v Crumlin Investments Ltd*[20] and *Whelan v Cork Corporation.*[21]

As the right to sue a successor in title of the covenantor is an equitable proprietary interest, the courts must decide if the new owner should be bound by applying the general rules in relation to binding transferees of land to third party interests. As the burden in *Tulk v Moxhay*[22] is equitable, the rule will be applied differently depending on whether title to the land is registered or unregistered.

If the burden exists over unregistered land, it can be extinguished by a sale of the legal estate to a *bona fide* purchaser for value who has no actual or constructive notice of the covenant. If the burdened land is registered, then a purchaser will not be bound unless the covenant is noted on the title register. However, a volunteer who takes the land as a gift will not be protected and will be bound by the covenant.

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[14] ibid.
[15] [1994] 2 All ER 65. See also its application in the Irish case of *Cardiff Meats Ltd v McGrath and Ors* [2007] IEHC 219.
[16] *Tulk* (n 9).
[17] ibid.
[18] [1899] 1 IR 258 (CoA).
[19] (HC, 19 June 1970).
[20] (HC, 22 June 1981).
[21] [1991] ILRM 19 (HC); [1994] 3 IR 367 (SC). For a detailed analysis of this case, see Lyall (n 1).
[22] *Tulk* (n 9).

Running of the benefit in equity

To show that the benefit of the covenant had passed in equity, a number of additional conditions had to be satisfied:

a) The covenant must touch and concern the land of the covenantee;

b) The land owned by the covenantee is owned by the person enforcing the covenant; and

c) One of the following conditions is to be met:

i. The benefit of the covenant was annexed to the land; or

ii. The benefit of the covenant was assigned with the land; or

iii. The land benefited and the land burdened were part of a scheme of development.

For the benefit of the covenant to be annexed to the land, both the covenantee and covenantor must have intended the benefit to run with the land so as to bind successors in title of the covenantor and thus be enforced by successors in title of the covenantee. This intention is clear where it is stated that the covenant is intended to benefit the land. In *Rogers v Hosegood,*[23] a restrictive covenant was held to be annexed to the land of the covenantee as it was stated to be in favour of the vendors of certain land, their assigns and others claiming under them for the benefit of adjoining land.

Lack of clarity may mean that the claim of annexation will fail. In *Renals v Cowlishaw,*[24] a claim that the benefit of the covenant was annexed to the land failed because the extent of the property to which the covenant was to be annexed was not clearly defined. In *Re Ballard's Conveyance,*[25] the benefit of the covenant was annexed to a large estate. Only a small part of the land was capable of being benefited by the covenant, so it was held that the covenant was not enforceable by the purchasers of the estate. In this particular case the covenant

[23] [1900] 2 Ch 388.
[24] (1878) 9 Ch D 125 (HC); (1879) 11 Ch D 866 (CoA).
[25] [1937] 1 Ch 473.

was said to be for the benefit of 'the land' as opposed to a covenant for 'the whole, part or any parts of the land'.

Section 58 of the Conveyancing Act 1881 provided that a freehold covenant shall be deemed to be made with the covenantee, his heirs and assigns. Hence, it is questionable as to whether this provided a method of statutory annexation of all covenants of freehold land so that their benefit would automatically run with the land in equity.

The alternative to automatic annexation (based on the intention of the original covenantee and covenantor) is that the benefit passes with the land if stated expressly in every deed selling the land. The benefit must be passed expressly and contemporaneous with the sale and cannot be done subsequently.[26]

If the land is part of a scheme of development, then equity will determine that each owner will be bound by the covenants put in place for the mutual benefit and burden of each owner within the scheme even where different houses are sold at different times. The rationale is that each house in the scheme is subject to similar restrictive covenants and that the mutual right to enforce these covenants, but also to be bound by them, ensures the proper maintenance of the scheme. Thus, equity will recognise that all owners are bound without looking for annexation or assignment of the benefit of the covenants.

A purchaser of each house only needs to covenant with the seller and does not need to enter into a deed of mutual covenant with all of the owners of the other houses. All the house owners will be able to enforce covenants against the other owners in the scheme. The case of *Elliston v Reacher*[27] set down the criteria relating to such schemes of development.

There are a number of conditions to be met:

a) The same vendor must have owned all the land in the scheme originally.

[26] See *Re Union of London and Smith's Bank Ltd's Conveyance* [1933] 1 Ch 611.
[27] [1908] 2 Ch 374.

b) Before selling, the vendor must have divided the land into lots subject to common restrictions (although this requirement is not applied strictly).[28]

c) The restrictions must benefit all the lots.

d) The nature and terms of the scheme must be disclosed to the individual purchasers, as they must be aware of the nature of the rights and obligations and they must also be aware that the rights and obligations are reciprocal.

e) The area of the scheme must be definite and known to the individual purchasers so that the scope of the rights and obligations are determined.

Thus, to comply with *Tulk v Moxhay*,[29] allowing a successor in title of a covenantee to sue a successor in title of a covenantor, the first conditions must be satisfied, and the successor must also show that the benefit has passed to him in equity, either by annexation, assignment, or under a scheme of development.

Practical problems

The Law Reform Commission has pointed out:

> These defects and limitations in the law governing enforceability of freehold covenants are sufficiently serious in themselves to justify legislative reform, but the practical problems to which they give rise in conveyancing transactions make the case for reform overwhelming … the most serious problem lies in the fact that the obligations contained in a positive covenant, such as a covenant to pay money or to carry out works or to do repairs, generally cannot be made to pass to a successor in title.[30]

As a result of the difficulty with the enforceability of freehold covenants, and by contrast the lack of difficulty in enforcing leasehold covenants, legal advisers and

[28] See *Baxter v Four Oaks Properties Ltd* [1965] Ch 816 *and Re Dolphin's Conveyance* [1970] Ch 654.
[29] *Tulk* (n 9).
[30] Law Reform Commission (n 5) 8.

their clients sought comfort by creating the relationship of landlord and tenant even where it was not strictly necessary. According to Mee and Murphy:

> Prior to the prohibition (subject to exceptions) of the creation of new long leases by the Landlord and Tenant (Ground Rents) (No.2) Act 1978, it was common in Ireland for vendors to grant long leases of land subject to nominal rents, instead of conveying the freehold. Amongst other things, this gave the landowner more flexibility in the imposition of covenants on the purchaser because such covenants, even if positive, would continue to be enforceable against future assignees of the leasehold interest.[31]

A landowner who wished to part with some land and to create rights in favour of the land retained was often advised not to convey the freehold, but instead to create a lease to protect their and their successors' right to enforce covenants which benefited the retained land. Even if the landowner did not want to retain a reversion and instead might have preferred to part with the freehold and their entire interest in the property, they may have been advised not to do so. This led to the creation of additional interests in land and increasing pyramids of title.

Another option was the creation of a fee farm grant[32] described as achieving 'the best of both worlds'.[33] This passed the freehold but created the relationship of landlord and tenant to avail of the law on the enforceability of leasehold covenants. This became more common for a period.[34] However, it was a retrograde step to move from unencumbered freehold titles to creating freehold interests subject to a rent (that is not sought for itself and is merely a legal technicality) to get around a difficulty in the law. In more modern fee farm grants created for this purpose the fee farm rent was never sought or paid. While these fee farm grants subsist, the creation of a fee farm grant at law or in equity is now

[31] Mee and Murphy (n 10).
[32] Section 3 of Deasy's Act provides that a reversion shall not be necessary to the relation of landlord and tenant thus allowing for the creation of fee farm grants.
[33] John CW. Wylie, *Irish Conveyancing Law* (2nd edn, Bloomsbury Professional 1996) 701.
[34] Lyall (n 1) examines the use of this and other legislation as devices to enforce and discharge freehold covenants.

prohibited by section 12(1) of the 2009 Act.[35] For pre-existing fee farm grants the obligation to pay such rent can be bought out under the ground rents legislation.[36] There would then be no rent payable and the relationship of landlord and tenant would come to an end with the estate of the grantee becoming an unencumbered fee simple. It is worth noting that certain covenants would no longer be enforceable due to the impact of section 28 of the Landlord and Tenant (Ground Rents) (No. 2) Act, 1978, as amended ('the No. 2 Act of 1978') (this is explained later).

Where the freehold interest (not being the creation of a fee farm grant) was passed, legal advisers drafted additional documentation, such as a lease of easements or a deed of covenant[37] and used this as a means of binding the purchaser and their successors in title to the enforcement of covenants, particularly positive covenants.

Thus, the limitations of the law governing the enforceability of freehold covenants had a considerable impact on conveyancing transactions and the legal formalities for vendors and purchasers. This has become acute in more recent years with the proliferation of mixed developments: not just mixed residential and commercial developments but also mixed residential developments containing apartments and houses and perhaps also townhouses or duplexes.

In relation to apartments, the difficulty was compounded after the enactment of the ground rents legislation. To preserve the reciprocal nature of neighbourliness and equality in burden sharing in apartment schemes, it is important that no one apartment owner, as tenant, can buy out the freehold. This would have the potential to unravel the scheme as it would impact the enforceability of covenants. Not all covenants would remain in force after acquisition of the freehold. It was also important that, if apartment owners were being granted

[35] Members of the public do not expect a freehold owner to have to pay rent and the confusion of the position of a freehold owner and a leasehold tenant is 'out of keeping with the drive to get rid of ground rents' Law Reform Commission (n 4) 44.
[36] The definition of lease in s 3 of the Landlord and Tenant (Ground Rents) (No 2) Act, 1978 includes a fee farm grant.
[37] For a more detailed explanation see Gabriel Brennan and Nuala Casey, '*Complex Conveyancing*' (Tottel 2007) 209 – 212. A typical Lease of Easements is included at Appendix 17.2.

leases, that such leases were not void under the Landlord and Tenant (Ground Rents) Act, 1978 ('the No. 1 Act of 1978').

Restriction on creation of leases

The No. 1 Act of 1978 is titled '*An Act to prevent the creation of new leases reserving ground rents on dwellings and to provide for related matters*'. This Act came into force on 16 May 1978. Section 2 of the No. 1 Act of 1978 provides that a lease of land made after 16 May 1978 shall be void if the lessee would, apart from this section, have the right to enlarge their interest into a fee simple and the permanent buildings are constructed for use wholly or principally as a dwelling.[38]

Section 2(4) of the No. 1 Act of 1978 provides that a person who has given consideration for a lease that is void has the right to acquire the fee simple in the land and any intermediate interests at the expense, as to both purchase money and costs, of the person who purported to grant the lease. The freehold owners or the owners of an intermediate interest who inadvertently grant such a lease are required to buy out the freehold for the lessee at their own expense. Thus, section 2(4) protects the position of a purchaser of a leasehold interest deemed void under the No. 1 Act of 1978.

A 'dwelling' under section 2 does 'not include a separate and self-contained flat in premises divided into two or more such flats'.[39] 'Flat' is not defined. Hence, multi-unit developments such as apartment complexes were excluded from the prohibition and continued to be 'developed on a leasehold basis.'[40]

In practical terms, the restriction applies to dwellinghouses. Any party selling a dwelling must pass their own interest in the property. Thus, a vendor who owns the freehold in a dwellinghouse must sell the freehold. A vendor who owns a leasehold interest must assign that interest to the purchaser. The vendor cannot create a new interest, e.g. a lease or sub-lease that would entitle the purchaser to buy out the freehold. If they did so, then the lease would be void and the vendor

[38] Landlord and Tenant (Ground Rents) Act 1978 s 2(1).
[39] ibid s 1.
[40] John C. W. Wylie, *Wylie on Irish Land Law* (6th edn, Bloomsbury Professional 2020) 1020.

would have to acquire the freehold and any intermediate interests for the purchaser.

In the case of dwellinghouses in mixed schemes, the difficulty with the enforceability of covenants pre the 2009 Act was overcome by granting freehold title to the houses and by creating a lease of easements. That lease of easements allowed for use of the common areas, right of access, support and so on with the required mutually enforceable covenants. Post the 2009 Act those covenants can now be included in a conveyance[41] or transfer[42] of freehold title.

Right to buy out the freehold

While the No. 1 Act of 1978 did not directly impact the granting of leases of apartments (flats in the legislation) the same cannot be said of the No. 2 Act of 1978. This legislation introduced the current test to be met by a tenant wishing to buy out the freehold and all intermediate interests.[43] It also provided for various restrictions on the right to buy out the freehold as listed in section 16. If any of these restrictions apply, then the lease will not be void under the No. 1 Act of 1978 as the lessee is not entitled to buy out the freehold.

Section 16(2) provides:

> A person shall not be entitled to acquire the fee simple … if the lease on which such right is based is—
>
> (a) a lease of land which is used for the purposes of business or includes a building divided into not less than four separate and self-contained flats being a lease which contains provisions enabling the amount of the rent reserved by the lease to be altered within twenty-six years from the commencement of the lease (not being provisions enabling such rent to be altered once only and within five years from such commencement or upon the erection after such commencement of any buildings upon the land or upon the breach of a covenant in the lease), or

[41] For unregistered land.
[42] For registered land.
[43] Landlord and Tenant (Ground Rents) (No. 2) Act 1978 ss 9, 10 and 15 for yearly tenants.

(b) a lease granted before the commencement of the Act of 1967 of land which is used for the purposes of business, being a lease which contains provisions requiring the lessee to carry on business on the land which is restricted in whole or in part to dealing in commodities produced or supplied by the lessor, or

(c) a lease of land containing a covenant by the lessee to erect a building or buildings or carry out development on the land if and so long as the covenant has not been substantially complied with, or

(d) a lease made by the Commissioners of Irish Lights, or

(e) a lease made by a harbour authority, within the meaning of the Harbours Act, 1946, whether before or after the passing of that Act.

A new subsection (f) was added by the section 76 of the Registration of Deeds and Title Act 2006 ('the 2006 Act') as follows:

or

(f) subject to subsection (3), a sublease of land granted by a lessee who is not a person to whom this Part applies-

(i) on or after 27 February 2006, or

(ii) before that date, unless before that date-

(I) a notice of intention to acquire the fee simple in the land was served by the sublessee in accordance with section 4 of the Act of 1967, or

(II) an application was made by the sublessee to the Registrar of Titles under Part III of this Act.

In addition to introducing section 16(2)(f) above, the 2006 Act also introduced a new section 16(3).[44] This provides that section 16(2)(f) will not apply if, at the date of the sublease, the sole reason why the lessee is not entitled to buy out is because the covenant to erect permanent buildings on the land has not been substantially complied with and, after that date, the covenant is substantially

[44] Registration of Deeds and Title Act 2006 s 76.

complied with by the sublessee. Thus, a sublessee who complies with this covenant is protected and can subsequently buy out the freehold. This is different to the remainder of section 16(2) which provides that a lessee (as opposed to a sublessee) can buy out the freehold if he is in contravention of a covenant in the lease, except where he is in breach of a covenant to build.[45]

In all other cases, a sublessee, unless an application had already been made or notice served before 27 February 2006, cannot buy out the freehold if the sublease was granted by a lessee who was not themselves entitled to buy out the freehold.

Thus, a sublessee cannot buy out the freehold unless:

(a) an application had already been made or notice served before 27 February 2006; or

(b) the lessee was entitled to buy out the freehold; or

(c) the covenant to erect permanent buildings on the land was not substantially complied with at the date of the sublease and after that date the covenant is substantially complied with by the sublessee.

This prevents 'unqualifying' lessees from creating a sublease which would qualify and thus allow the sublessee to have an advantage which the lessee itself did not have under the legislation. Prior to this change '[o]ne mechanism used to get around section 16(2)(a) was for the lessee to grant a sublease to themselves in which no rent-review clause was contained.'[46]

Section 4 of the No. 2 Act of 1978 provides that the Act does not bind a Minister of the Government, the Commissioners of Public Works in Ireland, or the Irish Land Commission. Section 4 has been amended by the Landlord and Tenant (Ground Rents) Act 2005,[47] which removed the reference to the Irish Land Commission, which no longer exists. It added three other agencies to the list of bodies not bound by the No 2. Act of 1978 Act. These are the Industrial

[45] See the No. 2 Act of 1978 s 16(2)(c) above.
[46] Ruth Cannon, 'Buying out the Fee Simple under the Landlord and Tenant (Ground Rents) Acts in Commercial Property —Some Issues' (2019) 4 Conveyancing and Property Law Journal 58, 65.
[47] Landlord and Tenant (Ground Rents) Act 2005 s 2.

Development Agency (Ireland), Shannon Free Airport Development Company and Udarás na Gaeltachta. The Central Bank of Ireland was added by section 85 of the Central Bank (Supervision and Enforcement) Act 2013. Harbour authorities were added by section 55 of the Maritime Safety Act 2005. Under the British-Irish Agreement (Amendment) Act 2005 certain other bodies can restrict acquisition of the fee simple by certifying that such acquisition would not be in the public interest.[48] These are North-South bodies.

Section 4 was examined in *Digital Hub Development Agency v Keane & Ors*.[49] The initial lease was found to be a building lease under the Landlord and Tenant Act 1931, and a subsequent lease was found to be a reversionary lease. That being so, section 10 of the No. 2 Act of 1978 was satisfied, and the lessee was entitled to acquire the freehold.

Since 1980, the right to acquire the freehold from state authorities such as a Minister of the Government, and other state authorities listed above, including the Commissioners of Irish Lights and the harbour authorities, is no longer automatically excluded due to section 70 of the Landlord and Tenant (Amendment) Act 1980 ('the 1980 Act'). Section 70 provides, in relation to dwelling-houses, that a lessee is entitled to acquire the fee simple save where the appropriate state authority or the Minister for Transport[50] is satisfied that such acquisition would not be in the public interest and certifies this.

In *Metropolitan Properties Ltd v John O'Brien and the Commissioners of Public Works in Ireland*,[51] it was held by the Supreme Court that as the lessee was not entitled to buy out the freehold held by the Commissioners, the lessee had no right to acquire the intermediate interests even though the lessee satisfied section 9 of the No. 2 Act of 1978. O'Flaherty J stated 'the existence of such interest in the Commissioners precludes not merely the acquisition of the fee simple but also of any intermediate interests in the property.' Thus, the right to purchase the intermediate interests exists only for the purpose of enlarging the interest held

[48] British-Irish Agreement (Amendment) Act 2005 s 2.
[49] [2008] IEHC 22.
[50] In the case of the Commissioners of Irish Lights and harbour authorities.
[51] [1995] 1 IR 467.

by the lessee into a fee simple interest. It is a case of all or nothing; either the applicant is entitled to buy out all interests or none.

To summarise, pursuant to section 16(2) of the No. 2 Act of 1978, the lessee cannot buy out the freehold where there is a lease of land used for business or a building divided into not less than four separate and self-contained flats which contains provisions enabling the amount of the rent reserved by the lease to be altered within 26 years from the commencement of the lease (not being provisions enabling such rent to be altered only once and within five years from such commencement or upon the erection after such commencement of any buildings upon the land or upon the breach of a covenant in the lease).[52]

Thus, a lease of an apartment block containing four or more flats or a business premises where there are rent reviews in the first 26 years may be granted provided:

(a) there is more than one rent review within the first five years;

(b) the rent review is not due on the erection of a building; and

(c) the rent review is not due to a breach of a covenant in the lease.

Hence, it is common to come across long leases of apartments with a rent review every year for several years. The rent may be nominal, for example €1 for the first year, €2 for the second year and €3 thereafter. This rent may never be demanded or paid. However, its purpose is to ensure that the lease comes within the restriction in section 16 of the No. 2 Act of 1978. Hence the lessee is not entitled to purchase the freehold and there is no possibility of the lease being void under the No. 1 Act of 1978. This requires careful drafting.

Those drafting such leases are naturally anxious to ensure that there is no possibility of the lease being void under the No. 1 Act of 1978 and that such leases fall within the restrictions in section 16 of the No. 2 Act of 1978 thus avoiding the possibility of enlargement rights arising. As is apparent from the discussion of the No. 1 Act of 1978, there is an element of overcaution in this practice as a 'dwelling'

[52] McCann notes that this was inserted to help the IDA grant business leases which would prevent the lessees from purchasing the freehold although they had paid for the building of the factory. And that it helped 'to provide communal covenants to protect the communal apartment dwellers.' See Angela McCann 'Landlord and Tenant Acts 1967 to 1987' (Dublin Solicitors Bar Association Seminar 1 June 2022).

in section 2 of the No. 1 Act of 1978 does not include 'a separate and self-contained flat in premises divided into *two* or more such flats [emphasis added]'. Interestingly, section 16 of the No. 2 Act of 1978 has a higher threshold; it is 'a building divided into not less than *four* separate and self-contained flats'.[53] The fact that 'flat' is not defined in either act may have engendered an overly cautious approach being taken in leases of apartments and this may be compounded by a lack of coherence and complexity in the legislative provisions.

Impact on covenants

One of the primary reasons legal advisers are keen to ensure that a lessee in an apartment cannot buy out the freehold is that it would adversely impact the mutuality of covenants. Such covenants include the requirement to pay the service charge and the nominal rent (which, as noted, may never be demanded or paid) and other covenants which ensure the smooth running of the scheme. Mutual enforceability of such covenants is key for the successful operation of apartment schemes. These may include negative covenants prohibiting the keeping of pets, putting down wooden floors or causing a disturbance to neighbours, and positive covenants such as ensuring windows are cleaned and rubbish is put in appropriate receptacles.

Not all covenants cease after acquisition of the freehold under the legislative provisions. Section 28(2) of the No. 2 Act of 1978 provides for certain covenants to continue in full force and effect after acquisition. A covenant—

(a) which protects or enhances the amenity of any land occupied by the immediate lessor of the grantee, or

(b) which relates to the performance of a duty imposed by statute on any such person, or

(c) which relates to a right of way over the acquired land or a right of drainage or other right necessary to secure or assist the development of other land,

[53] Section 3 of the No. 2 Act of 1978 provides that dwelling 'does not include a separate and self-contained flat in premises divided into two or more such flats'. However, section 16(2)(a) relates to 'a building divided into not less than four separate and self-contained flats'. (emphasis added).

continues in full force and effect. They are also burdens which affect the lands without registration under section 72 of the Registration of Title Act 1964 ('the 1964 Act').[54]

Section 28(2)(a) refers to covenants for the benefit of the lessor and section 28(2)(b) refers to the performance of a duty imposed by statute. Only section 28(2)(c) preserves covenants in favour of third parties. These are restricted to those which relate to 'a right of way over the acquired land or a right of drainage or other right necessary to secure or assist the development of other land' as per section 28(2)(c). In an analysis of *Whelan v Cork Corporation*[55] Lyall states:

> [i]t would seem that the only effect of *subsection 2* is to preserve those covenants the burden of which ran with the land before the enlargement and this can only refer, as far as third parties are concerned, to restrictive, i.e., negative, covenants. The burden of positive covenants cannot run either at law or in equity, outside privity of estate.[56]

Initially, all other covenants ceased to have effect, and no new covenants could be created in conveying the fee simple. This position was changed by section 77 of the Registration of Deeds and Title Act 2006, which substituted a new section 28(1) into the No. 2 Act of 1978. This provides that where a lessee buys out the freehold under the legislative provisions only covenants affecting the land in the lease under which the person held the land cease to have effect, and no new covenants can be created except with the person's agreement. Thus, only the covenants in the lease cease to have effect[57] and new covenants can be created with the lessee's consent.[58] The new subsection applies where the fee simple is acquired on or after 27 February 2006 unless the application was made or notice served before that date. After that date only covenants in the lease cease to have effect but the amenity and other covenants referred to above will survive.

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[54] See Registration of Title Act 1964, s 28(4).
[55] *Whelan* (n 21).
[56] Lyall (n 1).
[57] Cannon notes that after this change 'it was no longer possible to extinguish freehold covenants by creating a lease in favour of a third party nominee and transferring the fee simple to that third party nominee' or that third party then buying out the fee simple. See Ruth Cannon, 'Leasehold and Freehold Covenants affecting building' (2009) 14(3) CPLJ 66, 71.
[58] McGrath explores the difficulties that could arise with using this provision to attach covenants to the freehold. McGrath (n 7) 617.

Examples include a covenant restricting development, a covenant requiring land to be dedicated to common use and those which relate to a right of way or a right of drainage.

This is a change from the previous position. The previous version of section 28(1) did not refer to persons acquiring the fee simple under the legislative provisions and thus it could be argued that it applied to all cases where the lessee acquired the fee simple regardless of the method of acquisition. It potentially covered a situation where the lessor and lessee agreed terms among themselves and executed a deed of conveyance. However, it could also be argued that where acquisition of the freehold occurs outside the ground rents legislation no covenants survive the merger of the interests.

2009 Act reform

The 2009 Act radically altered the law in this area and replaced the old rules of common law and equity with a new statutory regime that makes no distinction between positive and negative covenants. The changes were introduced to address the two most serious flaws the Law Reform Commission had identified with positive covenants over freehold land. [59] First, that the burden of a positive covenant did not bind a successor in title to the original covenantor and secondly, that the burden of negative covenants ran in equity only under the rule in *Tulk v Moxhay*. [60]

The 2009 Act introduced new provisions in relation to 'freehold covenants' which are defined in section 48 as 'a covenant attaching to dominant land and servient land[61] which has been entered into after the commencement of this Chapter'.[62] The new provisions only apply to freehold covenants as 'servient land' is defined

[59] Law Reform Commission (n 4) 92. See also Law Reform Commission (n 5) for a more detailed examination. It was acknowledged by many commentators that this was an area of the law that was in need of much reform. See also Andrew Lyall, *Land Law in Ireland* (2nd edn, Round Hall 2000) 707 and John CW Wylie, *Irish Land Law* (3rd edn, Tottel 2005) 1013.

[60] *Tulk* (n 9).

[61] As noted by Wylie this language is similar to the language of the law of easements. See Wylie (n 33) 1038.

[62] McGrath articulates potential difficulties with the new statutory regime for the enforcement of covenants among successors including that any covenants entered into prior to the 1st of December 2009 are still subject to the pre-existing rules of law and equity. McGrath (n 7) 632-634.

in section 48 as 'freehold land which is subject to a covenant benefiting other freehold land'. No distinction is made between positive or negative covenants. The main effect of the 2009 Act is to provide for the enforceability of freehold covenants, thus transforming them into legal interests in land on a par with other legal interests such as easements and *profits*.[63]

Section 49 of the 2009 Act changed the position in relation to freehold covenants and provided that the benefit of such a covenant, whether positive or negative, will run with the land intended to be benefited and the burden will run with the land subject to the covenant. A prior owner may enforce breaches of covenant which occurred before he ceased to be owner, and a prior owner is also liable for breaches which occurred during their period of ownership.

However, section 49(6)(b) provides that section 49 takes effect subject to the terms of the covenant or the instrument containing it. Thus, it is possible to contract out of these provisions by providing that the particular covenant is personal to the parties and does not bind their successors in title. Section 49 does not affect the enforceability of a covenant under the doctrine of privity of contract or a section 80 covenant for title.[64]

The new statutory regime includes provision for the enforceability of covenants in the context of a scheme of development. Where such a scheme exists, section 49(3) ensures the enforceability of covenants which are capable of reciprocally benefiting and burdening the land within the scheme. Covenants are enforceable by and against owners and former owners for breaches occurring during their period of ownership. No privity of contract is required.

A 'scheme of development' is defined in section 48 by reference to an intention to create reciprocity of covenants as they relate to the parts and the proximity of the relationship between their owners as expressed in each conveyance to the

[63] John C. W. Wylie, *The Land and Conveyancing Law Reform Acts Annotations and Commentary* (3rd edn, Bloomsbury Professional 2023) 149. A freehold covenant is included in the list of legal interests in land in section 11(4) of the 2009 Act. Section 129 of the 2009 Act amends section 69 of the 1964 Act relating to burdens which may be registered as affecting registered land to include a freehold covenant. Mee and Murphy make some interesting points about priority and registration of title in respect of the draft Bill. See Mee and Murphy (n 10).
[64] Land and Conveyancing Law Reform Act 2009, s 49(6).

owners or implied from the covenants in question. This would usually be evident from the title documents or implied from the covenants as they relate to the parts and relationship between the owners.

In practical effect, this preserves and extends[65] the rule known as the rule in *Elliston v Reacher* [66] which provides that the covenants entered into by one resident on the estate with their vendor are enforceable by any other resident on the same estate. This applies even if the parties are not strictly successors in title. Section 49(4) provides that where the servient land has been subdivided any obligations are apportioned to the appropriate parts and enforceable by or against the persons in whom the parts are vested. Thus, subsequent transfers of title do not need to specifically identify how the obligations are to be apportioned. However, if such obligations are not specifically identified and apportioned it may become difficult to determine who has the benefit or burden of the covenants particularly in the future when schemes of development may be broken up for sale and redevelopment. Any dispute about apportionment can be referred to the court for determination.[67]

Subject to the terms of the contract between the parties, freehold covenants created after 1 December 2009 are now governed by the 2009 Act and the pre 2009 Act rules of common law and equity no longer apply. This is put beyond doubt by section 49 which confirms that the rules of common law and equity (including the rule known as the rule in *Tulk v Moxhay*[68]) are abolished to the extent that they relate to the enforceability of a freehold covenant.

McGrath notes that these provisions of the 2009 Act:

> [H]eralded a significant transformation in the established principles for the enforcement of covenants between successors to the original covenanting parties. The effect of the relevant provisions of the LCLRA 2009 goes a long way towards removing the traditionally recognised distinction between easements, as incorporeal interests affecting land, and covenants, which

[65] Wylie (n 63) 150.
[66] *Elliston* (n 27).
[67] Land and Conveyancing Law Reform Act 2009, s 49(5).
[68] *Tulk (*n 9).

> have tended to be regarded as a vestige of contract law to which the intervention of equity has ascribed certain proprietorial characteristics.[69]

Discharge and modification

Prior to the 2009 Act covenants could be modified or discharged but only in limited circumstances. Covenants could be discharged or there was the possibility of 'suspending the operation of the burden of them as to certain parties'[70] through enlargement.

Under section 69(3) of the 1964 Act the court has the power to modify or discharge any section 69 covenant or condition where the covenant or condition does not run with the land or is not capable of being enforced against the owner of the land, or where the modification or discharge will be beneficial to the persons principally interested in the enforcement thereof. The Registrar[71] may also discharge or modify with the consent of all persons interested in the enforcement thereof without a court order.

No similar provision exists for unregistered land and this was a considerable restriction,[72] particularly as problems often arise in relation to urban land which is more likely to be unregistered.[73] Even with a corresponding provision for unregistered land, the benefit of such a provision is limited in that it does not give the Registrar power to discharge or modify where the dominant owner refuses to co-operate. In that instance the only way to discharge or modify was to apply to court if the requirements of the section were met or to buy out or buy off the recalcitrant neighbour.

Section 50 of the 2009 Act has changed the position in that a person subject to a freehold covenant can apply to court for an order discharging it in whole or in part or modifying it on the grounds that continued compliance would constitute

[69] McGrath (n 7) 608.
[70] Lyall (n 1).
[71] Now Tailte Éireann.
[72] Wylie (n 59) 1015.
[73] Coughlan notes that as most urban land is unregistered section 69(3) of the 1964 Act is generally of no application in the areas where restrictive covenants cause the most difficulty. Coughlan (n 2) 290.

an unreasonable interference with the use and enjoyment of the land that is subject to the covenant i.e. the servient land. This section applies to new covenants and covenants that were put in place prior to the coming into force of the 2009 Act. In making its determination 'the court shall have regard as appropriate to the following matters—

a) the circumstances in which, and the purposes for which, the covenant was originally entered into and the time which has elapsed since then,

b) any change in the character of the dominant land and servient land or their neighbourhood,

c) the development plan for the area under the Act of 2000,

d) planning permissions granted under that Act in respect of land in the vicinity of the dominant land and servient land or refusals to grant such permissions,

e) whether the covenant secures any practical benefit to the dominant owner and, if so, the nature and extent of that benefit,

f) where the covenant creates an obligation on the servient owner to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous compared with the benefit derived from such compliance,

g) whether the dominant owner has agreed, expressly or impliedly, to the covenant being discharged or varied,

h) any representations made by any person interested in the performance of the covenant,

i) any other matter which the court considers relevant.

As noted by Wylie, '[a] "modification" should be distinguished from a "discharge' and means an amendment or change which falls short of a discharge. Thus, it might involve relaxing a restrictive covenant to allow some uses it prohibits but retaining others. The covenant will continue to operate, but as amended or changed.'[74]

The court can order that compensation be paid to cover any quantifiable loss resulting from the order to discharge or modify the covenant. It should be noted that section 50[75] does not extend to leasehold covenants. With a leasehold title, buying out the freehold may remove the covenant. However, if it is a covenant that remains in force after enlargement the only option is to seek the agreement of the lessor to vary the terms of the lease.

Section 50 provides a mechanism for freehold covenants that are obsolete or an unreasonable interference with the use and enjoyment of land to be removed from the title. In the past these have been an impediment to the development of land. They could only be discharged or modified by agreement between the parties and this often proved difficult and expensive to negotiate, particularly where several people enjoyed the benefit of the covenant. According to Cannon, section 50 is

> one of the most useful provisions in the Act and opens a light at the end of the tunnel for freeholders whose property is burdened by onerous freehold covenants … [However] [s]ection 50 of the 2009 Act does not provide for any right as such to have such covenants discharged, merely a right to apply to have them discharged if the court at its discretion so decides.[76]

McGrath notes that section 50

> introduces a welcome new facility for the removal of an otiose or over-burdensome covenant, without giving a right to demand extortionate payment for its discharge to a party entitled to enforce the covenant, which is a clear latent weakness in s.69(3) of the Registration of Title Act, 1964. Allowing the court to attach payment of compensation as a condition of the granting of an order of discharge or modification provides appropriate

[74] Wylie (n 63) 171.
[75] Cannon explores the parallels between section 50 and the comparable Northern Ireland, Welsh and English legislation. See Cannon (n 57) 71.
[76] ibid 74.

> protection to a party who would otherwise be at risk of gratuitous denial of his or her property rights. On the other hand, the necessity of making an application to court may provide a disincentive to the use of the section.[77]

This can be evidenced by the fact there has only been one written judgment on the use of this facility. *Jackson Way Properties Ltd v Smith & Ors*[78] concerned a freehold covenant not to erect any buildings on lands. The Court in examining the covenant found that there were no persons entitled to the benefit of the covenant and the benefit was not annexed to any land, either expressly or by implication. The High Court found in favour of Jackson Way Properties Ltd holding that the restrictive covenant was not valid and enforceable. However, the Court of Appeal set aside the order of the High Court and allowed the appeal.[79] It is disappointing that the section was not extended to include leasehold covenants.[80] Why should leaseholders equally not be able to apply to the courts to be released from burdensome covenants that are obsolete or an unreasonable interference with the use and enjoyment of land?

Lessees who do seek to discharge or modify leasehold covenants can avail of other statutory provisions, but these are limited in various respects. Section 29 of the Landlord and Tenant (Ground Rents) Act 1967 provides that a covenant, condition or agreement in a lease prohibiting alteration of user or the making of

[77] McGrath (n 7) 635.
[78] [2018] IEHC 115.
[79] [2023] IECA 185.
[80] Mee and Murphy argue, in examining the draft legislation, that a major defect of the legislation is 'that it does not apply to covenants which affect leasehold land but which are not governed by the landlord and tenant rules because they are not made between landlord and tenant (e.g. covenants imposed at the time of the subdivision of a property held on a long leasehold title subject to a ground rent).' They note the consequence 'that the enforceability of a positive covenant created on the sale of a subdivided piece of land will depend on whether the land is freehold or leasehold. If it is the former, it will be enforceable against all successors in title of the original covenantor. If it is the latter, it will not.' They explain that this is 'because the common law and statutory rules allowing the benefit and burden of covenants in a lease to run only apply to covenants entered in to between the landlord and the tenant. They do not apply to covenants entered into later between a tenant and her assignee, or between an assignee and subsequent assignees, as there will be no privity of estate between them.' They question if the equitable rules under *Tulk v Moxhay* would still apply. See Mee and Murphy (n 10). Note that this analysis related to the draft bill and not the legislation as subsequently enacted, but some interesting points arise in this article.

an improvement shall not apply provided planning permission has been obtained, or other conditions are met.[81] Effectively, the tenant is deemed not to have breached the terms of the lease by changing the user or making the improvement. However, the scope of this section is 'extremely limited'[82] and does not extend to covenants which would survive the acquisition of the fee simple.

Sections 66[83], 67[84] and 68[85] of the 1980 Act can be availed of where the landlord seeks to strictly enforce covenants in relation to alienation, user and improvements. The landlord can also grant a waiver of the covenant.[86] Other means of discharging leasehold covenants only arise where the lessee is entitled to buy out the freehold.[87] McGrath notes 'there is no effective method of removing a moribund or excessively burdensome leasehold covenant short of seeking to utilise (with their marked inherent limitations) the enfranchisement statutes'.[88] It is also possible to seek the consent of the landlord.

Arguments on granting freehold title

If apartment owners are granted freehold title, then they, and their successors in title, can avail of the enforceability of positive and negative covenants. The benefit and burden will run with the land. Freehold covenants created after 1 December

[81] The change of user or making of the improvement must have planning permission, be an exempted development or a planning consultation must have taken place. This provision is further restricted in that it only applies to lessees holding under a building lease or proprietary lease. These have the meanings assigned to them by section 4 and section 7 respectively of the Landlord and Tenant (Reversionary Leases) Act 1958. The provision is also limited in other respects. See Cannon (n 57).
[82] Cannon (n 57) 69.
[83] A covenant in a lease of a tenement absolutely prohibiting or restricting the alienation of the tenement shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the lessor.
[84] A covenant in a lease of a tenement absolutely prohibiting the alteration of the user of the tenement shall have effect as if it were a covenant prohibiting such alteration without the licence or consent of the lessor.
[85] A covenant in a lease of a tenement absolutely prohibiting the making of any improvement within the meaning of section 67(3) on the tenement shall have effect as if it were a covenant prohibiting the making of the improvement without the licence or consent of the lessor.
[86] This is required to be in writing by virtue of section 43 of Deasy's Act 1860.
[87] Landlord and Tenant (Ground Rents) (No. 2) Act 1978, s 28 as amended by section 77 of the Registration of Deeds and Title Act 2006. Under this provision certain covenants continue in full force and effect and thus it does not have the wide application of section 50 of the 2009 Act.
[88] McGrath (n 7) 636.

2009 are now legal interests that bind the whole world. Wylie points out that they are not like equitable interests, vulnerable to losing priority to a bona fide purchaser of a legal interest.[89] Similar to easements and *profits* created by express grant, if affecting registered land, they may be registered as burdens on the folio relating to the servient land[90] in order to preserve their enforceability against that land and the benefit can also be noted on the folio relating to the dominant land.[91]

Freehold title avoids the limited nature of a leasehold title which at some point in the future will expire and there is no risk of a lessee not having good marketable title[92] and being restricted to selling to a cash purchaser, if at all, when the lease has less than 70 years to run. Anecdotal evidence suggests that there are already some apartment owners who have this difficulty with management companies having to go to the effort and expense of granting reversionary leases.

In this situation, difficulties may arise if the management company does not hold the freehold. Legal title may remain with the developer, or the beneficial interest may not have been transferred, or the management company may have been struck off. [93] The owners may have to apply to court to remedy the position.[94]

Leases expire by effluxion of time. Will new ground rents legislation be required covering apartments when all these leases start to expire? How will the title be remediated? If a new lease is not granted but rent is paid and accepted, then they

[89] Wylie (n 63) 149.
[90] Under section 69(1)(kk) of the 1964 Act as inserted by section 129 of the 2009 Act.
[91] Registration of Title Act 1964, s 82.
[92] As agreed between the Law Society and lending institutions under the Certificate of Title system for residential mortgage lending. The title must be freehold, or leasehold with an unexpired term of at least 70 years, unless the solicitor is satisfied that the lessee has a statutory right to purchase the fee simple under the ground rents legislation. If Land Registry title, it must be either absolute or good leasehold.
[93] Under section 28 of the State Property Act 1954, where a body corporate is dissolved all land which was held (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State. Hence consent to any action would be required from the Minister of Finance or a waiver of the State's right to such property would need to be obtained.
[94] *Re Heidelstone Co Ltd* [2007] 4 IR 175 the original development company had been dissolved before transferring the common areas. Laffoy J found that the company constituted a 'trustee "who cannot be found"' and that the unit owners holding under long leases were the beneficiaries of the trust. The court made an order vesting the common areas in the new owner management company under section 26 of the Trustee Act 1893.

will become periodic tenancies which can be terminated by notice to quit. These issues will be avoided for apartments owners holding freehold title.

If disputes break out over, for example, unpaid service charges and the management company is not functioning effectively, is there a danger that some apartment owners will hinder the granting of reversionary leases to other apartment owners? Given the general length of such leases, apartment owners would not be entitled to the protection of the Residential Tenancies Act 2004, as amended.[95] Furthermore, they may not be entitled to rights of renewal under the 1980 Act. They would not have the required business user for a business equity.[96] Similarly, they would not have carried out improvements sufficient to gain an improvement equity.[97] While there remains the possibility of a long possession equity,[98] it is unclear how the courts would respond to such an application. Moreover, if successful, the tenant would only gain a 35-year lease.[99]

If granted a freehold title apartment, owners could avail of section 50 of the 2009 Act. However, this could equally be seen as a reason not to grant such title (particularly from the perspective of the management company). Nevertheless, in the case of an apartment block it is likely that an individual application by one apartment owner may have a low chance of success as it would impact all apartment owners.

The question arises as to whether a leasehold title provides more security and stronger remedies for the management company. A lease will have provisions in relation to breach and termination. Theoretically, a management company could forfeit the lease in the event of a breach. The courts are disinclined to forfeit commercial leases, with landlords often having to apply to court several times

[95] The Act does not apply to tenancies of more than 35 years. See the Housing (Miscellaneous Provisions) Act 2009, s 100.
[96] Landlord and Tenant (Amendment) Act 1980, ss 3 and 13(1)(a).
[97] ibid ss 13(1)(c) and 45.
[98] The long possession or long occupation equity under section 13(1)(b) is no longer available to dwellings to which the Residential Tenancies Act 2004, as amended applies. However, these tenancies tend to be considerably longer e.g. 500 years, 999 years. See section 192(2) of the Residential Tenancies Act 2004 which also captures the improvements equity. Hence, the possibility of an application under section 13(1)(b) remains.
[99] See Landlord and Tenant (Amendment) Act 1980, s 23.

before being successful. Hence, it is difficult to see how a court would grant an order to forfeit a lease of an apartment which is a residential property.

Conclusion

Apartment schemes first appeared in Ireland in the 1970s and became more prevalent from the 1990s. They are now a fixed part of our built environment. Initially there was no set structure for such schemes and conveyancers developed their own methods of addressing the complexity of communal living and ensuring this was reflected in the legal paperwork. Over time, difficulties emerged *inter alia* with the transfer of common areas to the management company, developers retaining control and a lack of transparency in the running and financing of apartment developments. Many of these practical difficulties were, to a greater or lesser degree, addressed by the Multi-Unit Developments Act 2011. However, this legislation did not address the difficulties arising when apartment leases expire.

The ground rents legislation and the 2009 Act have, in different ways, restricted the further creation and expansion of complex pyramid titles.[100] The 2009 Act also removed the difficulties with the enforcement of freehold covenants so that leases are no longer required to be created, and apartment owners have the possibility of a freehold title. All covenants can be included in a conveyance or transfer of the freehold. The concept of flying freeholds has been recognised in law for centuries. It is submitted that the time has come for practitioners to embrace the freehold apartment scheme.

[100] In relation to dwelling houses and the creation of fee farm grants.

Adverse Possession and Unfair Outcomes: The case for a qualified veto system

Una Woods*

Abstract: This article examines the extent to which the current Irish law on Adverse Possession has the potential to produce unfair outcomes. It explores the circumstances surrounding the most typical of adverse possession claims. There is evidence which suggests that many conflicts involving an adverse possession claim arise between siblings or neighbours. Such relationships are frequently underpinned by trust and goodwill leading to a reluctance on the part of the owner to initiate litigation or to take steps to formalise a consensual occupation arrangement. This article makes a case for the introduction of a qualified veto system of adverse possession to address this unfairness by bolstering the protection afforded by the law to owners and limiting claims by undeserving squatters. Most importantly, however, this new system of adverse possession could be fashioned to preserve the valuable functions currently performed by the doctrine.

Keywords: Adverse possession; law reform; unfairness; roles performed by the doctrine of adverse possession.

Introduction

The doctrine of adverse possession has been described as an 'extraordinary law'[1] which 'appears to sanction illegal activity … and to reward the perpetrators'[2] by extinguishing the true owner's title where adverse possession can be demonstrated for the duration of the limitation period.[3] The controversies generated by the doctrine of adverse possession have been described as giving rise to two branches of literature:

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[1] Northern Ireland Law Commission, *Supplementary Consultation Paper Land Law* (NILC 3, 2010) [2.12].
[2] ibid.
[3] In Ireland, an action to recover land must typically be brought by the owner within 12 years (although if a state authority is seeking to recover land or part of the foreshore is involved, a limitation period of thirty or sixty years is applicable). See Statute of Limitations 1957, s 13.

> One branch deals with what might be referred to as ‘fundamental features’ of the doctrine. The other deals with more ‘technical rules’ relating to particular applications of the doctrine.[4]

This article does not focus on the more technical aspects of the doctrine e.g., the parliamentary conveyance theory.[5] Instead, it could be described as falling within the remit of literature dealing with more fundamental features of the doctrine.[6] It engages with a moral/ethical dilemma which has stirred up controversy in Ireland, but also elsewhere, particularly in the last 20 to 30 years. In a nutshell, it seeks to explore two questions: (1) does the current Irish law on adverse possession produce unfair outcomes,? and (2) could the introduction of a qualified veto system address this unfairness but also hone the doctrine’s operation to facilitate deserving claims?.

In relation to the first question, it could be argued that ‘fairness’ is a nebulous concept which, like beauty, lies in the eye of the beholder. Therefore, I will attempt to be more specific. One aim of this article is to examine if the law on adverse possession confers insufficient protection on certain ‘vulnerable’ owners who lose title to their land and, also, if it occasionally allows ‘undeserving’ squatters to acquire title to land. I argue that the doctrine currently produces unfair outcomes for family members or neighbours who lose title due to a reluctance to initiate legal proceedings or to formalise a consensual occupation agreement.

In relation to the second question, there appears to be a clear-cut divergence of views in relation to whether there is a need to introduce reforms to the law on adverse possession designed to produce fairer outcomes. While members of the

[4] Northern Ireland Law Commission (n 1) para 2.3.
[5] Una Woods, ‘Adverse Possession of Unregistered Leasehold Land’ [2002] 36 Irish Jurist 304.
[6] Martin Dockray, ‘Why do we need adverse possession’ (1985) Conveyancer and Property Lawyer 272; Jeffrey Evans Stake, ‘The uneasy Case for Adverse Possession” (2000-2001) 89 Georgetown Law Journal 2419; Neil Cobb and Lorna Fox, ‘Living Outside the System? The (im)morality of urban squatting after the Land Registration Act 2002’ (2007) 27(2) Legal Studies 236.

public and the media are often shocked by the doctrine,[7] some academics[8] and many legal practitioners are highly defensive of the law in this area.[9] Proponents of the current law point out the valuable functions performed by the doctrine and consequently argue for the maintenance of the status quo.[10] Even if one accepts that the current law has the potential to produce undesirable outcomes, the task of reforming the law presents certain challenges. I argue that it is possible to preserve the valuable functions performed by the doctrine while also addressing these unfair outcomes.

This article explains how the introduction of a qualified veto system of adverse possession could improve the law in certain key respects by: (1) conferring more protection on the owner (who could veto an application by a squatter); (2) restricting the extent to which undeserving squatters could rely on the doctrine; but also (3) ensuring that the doctrine continues to perform the useful functions that it currently performs (through reliance on the qualifications to that veto). As it is necessary to examine a number of complex features of the law in making the case for reform, I will begin my discussion with a road map to outline the article.

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[7] Media coverage of adverse possession cases tends to be negative. See Gabrielle Monaghan, 'Call for reform of squatter's rights law' *Sunday Independent Business* (Dublin, 25 May 2025) 1; Gabrielle Monaghan, 'Squatter's Rights: How to stop someone legally taking ownership of your land' *Sunday Independent Business* (Dublin, 25 May 2025) 8-9. Following the Irish case of *O'Hagan v Grogan* [2012] IESC 8, see T Healy, 'Squatter wins rights to widow's house 30 years after he broke in' *Irish Independent* (Dublin, 17 February 2012).

[8] Cobb and Fox (n 6). See also John Wylie, 'Adverse Possession – Still an Ailing Concept?' (2017) 58 Irish Jurist 1. 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 (e.g. the abolition of the doctrine or the introduction of a qualified veto system).

[9] Two submissions to the government were made by the Conveyancing Committee of the Law Society of Ireland arguing against the fundamental reforms proposed by the Law Reform Commission in its *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005): *Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (December 2005); *Supplemental Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (January 2006).

[10] The Irish government made a third party submission to the European Court of Human Rights which emphasised the important functions performed by the doctrine in Ireland. See *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [50]– [51].

A Road Map

Part 1 of this article commences with a brief overview of how Ireland and certain other jurisdictions near and far have tackled or resiled from reforming the thorny issue of adverse possession. The qualified veto system of adverse possession introduced in England and Wales pursuant to the Land Registration Act 2002 (the '2002 Act') is of obvious interest. So also, is the *Pye* case which, while winding its way through the English courts,[11], prompted the Irish Law Reform Commission to make certain radical proposals for reforming the Irish law on adverse possession. [12] These reforms were ultimately jettisoned in response to submissions by practitioners that they would be too costly to implement and liable to create undesirable tensions between neighbours.[13] It is possible that the reactions of Irish practitioners to the Law Reform Commission proposals may have prompted the more conservative approach adopted by the Northern Ireland Law Commission in 2010 in its assessment of the need to address ethical concerns relating to the doctrine. [14]

Part 2 of the article explores the existing doctrinal protections for the owner conferred by Irish case law on adverse possession. It has been intimated that Irish case law makes it more difficult to dispossess an owner engaged in minimal actions in relation to the land or an owner with future plans for the land in question.[15] It has also been suggested that the adverse possession claim involved in the *Pye* case would not have been successful if heard before the Irish courts.[16] The veracity of such an argument would considerably undermine a case for reform designed to confer additional protection on owners. Following a substantive review of the case law, this argument is rejected and, instead, I

[11] *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.
[12] Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005) 327-330.
[13] See the submissions by the Conveyancing Committee of the Law Society of Ireland (n 9).
[14] Northern Ireland Law Commission (n 1) [2.45]; Northern Ireland Law Commission, *Report Land Law* (NILC 8-2010), [12.6]-[12.7].
[15] Niall Buckley, 'Adverse Possession at the Crossroads' (2006) 11(3) *Conveyancing and Property Law Journal* 59, 61-64.
[16] ibid.

suggest that it is not beyond the bounds of possibility that a case, on all fours with *Pye*, could succeed before the Irish courts.

If Irish law affords only limited protection to the owner against losing title by adverse possession, it is worth exploring the available empirical evidence to ascertain whether such owners are vulnerable and in need of additional protection. This empirical analysis forms the basis for Part 3 of the article. A review of an internal survey conducted in 2008 by the Property Registration Authority[17] (the '2008 survey') of adverse possession applications and the Irish case law on adverse possession reveals that the majority of claims arise between family members or neighbours. It seems reasonable to assume in this peculiarly familial or neighbourly context that such owners fail to take action out of a desire to avoid conflict or because they imagine and trust that the occupier recognises that their presence is simply tolerated. It is submitted that such owners are vulnerable and would benefit from a system of adverse possession which would warn them if they are in danger of losing title through adverse possession, i.e., a veto system.

Moving away from the emphasis on the position of the owner, Part 4 and Part 5 of the article explore the extent to which the current law facilitates claims by undeserving and deserving squatters and whether the law could be reformed to restrict claims by the former. As discussed in Part 4, the worthiness of a squatter's claim is sometimes assessed by examining whether they possessed 'good faith', i.e., 'a belief in ownership'. A review of the relevant statutory provisions and case law reveals that bad faith squatters are equally as likely to be successful in an adverse possession claim. Part 4 of the article concludes by pointing out that the good faith/bad faith distinction is not always a sufficiently sophisticated mechanism for identifying adverse possessors who deserve to acquire title. Part 5 involves an examination of the categories of squatters revealed by the 2008 survey and how qualifications to a veto system could be best fashioned to preserve worthy claims. Certain categories of 'deserving' squatters are particularly noteworthy in the Irish context given the merits of their claim and/or for utilitarian reasons: good faith possessors of a boundary strip, possessors of abandoned land, informal purchasers, family members with an estoppel claim and owners who hold under a defective unregistered paper title. Part 5 discusses how the

[17] Note that property registration services in Ireland now operate through Tailte Éireann.

introduction of a qualified veto system could preserve the role played by the doctrine in these contexts but also limit claims by undeserving squatters. The conclusion highlights the importance of adverse possession in our modern land law system and reiterates the long overdue case for reform to address the current potential for unfair outcomes.

Part 1: The Need for Reform: Perceptions

To set the context for this discussion, a snapshot is provided of how certain jurisdictions have, over recent decades, either reformed the law on adverse possession or viewed the case for reform. In Ontario, Canada, a prohibition system of adverse possession was introduced in relation to registered land in 1990. Section 51 of the Land Titles Act 1990 prohibits the acquisition of title by adverse possession in relation to land which has been registered. Although 99.9% of titles in that jurisdiction are now registered under the land title system, many of these titles were automatically converted in recent years without a proper investigation of title.[18] In reality, it may be many years before the doctrine of adverse possession is rendered redundant in Ontario. Even at that point, it is not beyond the bounds of possibility that Ontario could be forced in the future to reintroduce adverse possession in a registered land context. New Zealand and a number of Australian territories which also operated a prohibition system of adverse possession in relation to registered land were forced to re-introduce the doctrine to counteract marketability difficulties which arose due to a culture of informal transactions and a high incidence of abandoned land.[19]

[18] This took place as part of the POLARIS programme which involved the automation of all records in relation to land transactions and ownership. Such titles were, therefore, registered subject to qualifiers which specifically preserve the rights of adverse possessors which 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.

[19] New Zealand in 1963, South Australia in 1945, Queensland in 1952 and New South Wales in 1979. See Malcom McKenzie Park, *The Effect of Adverse Possession on Part of a Registered Title Land Parcel* (D Phil thesis, University of Melbourne, 2003) ch 6.

In the U.S. State of Oregon, a mandatory good faith requirement was introduced[20] which applies to adverse possession claims lodged after January 1, 1990.[21] In addition to proving the traditional elements of the doctrine, the claimant must be able to prove that when they or their predecessor first entered into possession of the property they honestly believed that they were the actual owner of the property. They must also be able to prove that this belief continued throughout the limitation period, had an objective basis and was reasonable under the particular circumstances. The proponents of this reform wished to prevent bad faith adverse possessors obtaining title to land and to protect large landowners who cannot keep a close watch on encroaching neighbours. The legislature was also concerned about the friendly neighbour who could lose property after passively assenting to their neighbour's use of the property to avoid animosity.[22]

Closer to home, in England and Wales a qualified veto system of adverse possession was introduced pursuant to the 2002 Act which applies only to registered land.[23] Under the 2002 Act a person who has been in adverse possession of a registered estate in land for at least 10 years[24] is entitled to apply to be registered as proprietor of that estate.[25] The Land Registry must serve the registered proprietor of the estate, or of any charge or any superior registered estate (if the estate is leasehold) with notice of the application[26]

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[20] 2013 Oregon Revised Statutes §105.620. For a critique of this approach to reform see Una Woods, 'The 'Undeserving' and the 'Deserving' Squatter under the Irish Law on Adverse Possession' Part 2, in Bjorn Hoops and Ernst Jacobus Marais (eds), *New Perspectives on Acquisitive Prescription* (Eleven International Publishing 2019).

[21] Where the limitation period expired before that date, it is not necessary for the claimant to prove a belief in ownership. See *Liberfreund v Gregory* 206 Or App 484, 136 P3d 1207 (2006).

[22] House Hearings 3195 before the Subcommittee on Civil Law and Judicial Administration of the House Committee on the Judiciary, 65th Or. Leg. (1989) (audiotapes on file with Oregon State Archives).

[23] The Act introduces a divergence between the law governing adverse possession of registered and unregistered land. 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 Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) [14.2].

[24] Note that the limitation period for actions to recover unregistered land continues to be 12 years. See Limitation Act 1980, s 15(1).

[25] Land Registration Act 2002, Sch 6, para 1.

[26] Land Registration Act 2002, Sch 6, para 2.

and any person who receives such a notice is entitled to veto the application by serving a counter-notice.[27] However, the adverse possessor will be entitled to be registered as proprietor of the estate if there is no response to the notices served[28] or if no action is taken to repossess the land within two years of the rejection of the adverse possessor's application.[29] 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,[30] the applicant will be registered in spite of an objection by a notice recipient. The first exception/qualification to the veto is where the applicant can prove an equity by estoppel. The second exception permits reliance on the doctrine if the squatter is entitled for some other reason to be registered, e.g., where there was an informal transfer. The third exception facilitates the registration of a squatter who owns adjacent land and who reasonably believed that the land, which is the subject matter of the application, was theirs throughout the limitation period. During the transitional period before the 2002 Act became fully operational, the old law regulating adverse possession continued to govern registered land. It was the old law which had to be applied and considered in *Pye* which wound its way through the English courts over 20 years ago.[31] This litigation could be described as representing the highpoint of disquiet in relation to the doctrine in this part of the world.

The *Pye* litigation originated with an action brought by Pye Ltd to recover possession of 25 hectares of valuable land from the personal representatives of Michael Graham, who had been a neighbouring farmer and claimed to have acquired title to the land by adverse possession. The company had bought the land with plans to develop it in the future. Although the House of Lords ruled in favour of the Grahams, some dissatisfaction with the old adverse possession

[27] Land Registration Act 2002, Sch 6, paras 3 and 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.

[28] Land Registration Act 2002, Sch 6, para 4.

[29] Land Registration Act 2002, Sch 6, paras 6 and 7.

[30] Law Com No 271 (n 23) para 14.36.

[31] *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676; *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804; *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.

regime was apparent. In the House of Lords, Lord Hope observed: 'The unfairness in the old regime which this case has demonstrated lies … in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.'[32]

Pye Ltd proceeded to bring an application against the UK government pursuant to Article 34 of the European Convention on Human Rights ('ECHR'). 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 Article 1 of the First Protocol to the ECHR. 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*.[33] It held, by ten votes to seven, that the old system of adverse possession did not violate Article 1 of the First Protocol.

Before the *Pye* case reached the European Court of Human Rights, the Irish Law Reform Commission were in the final stages of drafting proposals which would ultimately form the basis of the Land and Conveyancing Law Reform Act 2009. In a 2005 report[34] the Law Reform Commission reacted to the controversy generated by the *Pye* litigation, noting: 'it must be recognised that on occasion the doctrine may operate unfairly' and 'it appears to exact a very severe penalty on a landowner (the loss of the land) through a mere oversight or mistake.'[35] While the Law Reform Commission included certain radical proposals for reforms in its report, it seems reasonable to speculate that these proposals may have been compiled hastily as a response to *Pye*. Currently, the Land Registry deals with the majority of adverse possession applications (either as section 49 applications or applications for first registration based on possession).[36] The Law Reform Commission proposals would have removed this facility, imposing instead a mandatory requirement for a court application for a vesting order[37] to be granted in certain limited circumstances[38] and subject to the payment of compensation,

[32] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL [73]; [2002] 3 All ER 886.
[33] (2008) 46 EHRR 45.
[34] *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 - 2005).
[35] ibid [2.06].
[36] In the first quarter of 2025, 879 section 49 applications and 668 applications for first registration based on possession (ie Form 5s) were received by Tailte Éireann.
[37] Draft Bill, s 129 contained in the Report (n 34) 327.
[38] Draft Bill, s 130(2) provides that a vesting order shall be made only if one of the following conditions are satisfied: (1) from the lack of response to notices, inquiries, searches,

if appropriate.[39] In two submissions[40] made to the government, the Conveyancing Committee of the Law Society of Ireland was highly critical of these proposals. The Committee argued that requiring a court application would impose disproportionate and unnecessary costs on claimants. It noted that the payment of compensation would be inappropriate in many cases and would clog up the courts or create undesirable tensions between neighbours. It argued strongly in favour of maintaining the status quo and awaiting the Grand Chamber decision in *Pye* before assessing whether reform was necessary. As a result of these submissions, none of the reforms relating to adverse possession found their way into the Land and Conveyancing Law Reform Bill 2006, or ultimately the Land and Conveyancing Law Reform Act 2009. The Grand Chamber decision in *Pye* crushed any possibility that the European Convention on Human Rights would act as a catalyst for the reform of the Irish law on adverse possession, and it could also be argued that this decision nullifies the case for the introduction of reforms to the doctrine in Ireland designed to confer additional protection on the owner.[41] However, in *Dunne v Irish Rail*, Laffoy J noted that the doctrine of adverse possession remains 'controversial'. She commented, '[t]here 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.'[42]

Finally, it is worth noting that in 2010, the Northern Irish Law Commission expressed the view that the law on adverse possession should not be reformed to accommodate ethical concerns and that it would not be appropriate at this

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advertisements or from statutory declarations or other evidence furnished it is reasonable to assume that the owner has abandoned the land or is unlikely to be found; (2) owing to a mistaken assumption as to the position of the boundary between the applicant's land and the owner's land, the applicant has throughout the period encroached upon part of the owner's land reasonably believing it to be part of the applicant's land; (3) where the application relates to land comprised in a deceased person's estate, it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes, or; (4) in any other case, in the interest of settling the title to land in the fairest manner, it is appropriate to make the order. See Report (n 34) 329-330.

[39] Draft Bill s 130(2). See Report (n 34) 330.

[40] *Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (December 2005); *Supplemental Submission From Conveyancing Committee of the Law Society Re Adverse Possession* (January 2006) (n 9).

[41] 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.

[42] *Dunne v Irish Rail* [2016] IESC 47 [23].

stage to adopt a veto system of adverse possession.[43] It is interesting that the Commission did not definitively reject this option but noted that it would require a more in-depth analysis of the circumstances in which adverse possession arises and whether such a system could be extended to unregistered land.

To conclude, a variety of perceptions have been expressed on the need for reform of the law on adverse possession both here and abroad. A strong case for reform must be based on an investigation of the current protections for the owner and the circumstances in which the doctrine is typically relied on. Any proposed reforms should also be designed to ensure that 'the baby is not thrown out with the bathwater' i.e. that the valuable role performed by the doctrine in certain deserving cases is preserved. The remainder of this article is devoted to addressing this challenge.

Part 2: The Protection Afforded to the Owner Under the Current Law on Adverse Possession

As a first step in examining the case for reform of the law on adverse possession in Ireland, it makes sense to explore the protection currently afforded by the Irish law to the owner.[44] It has been suggested by Buckley[45] and, indeed, intimated in the Land Registry practice direction on adverse possession[46] that the decision in *Pye* would not have been reached in Ireland (i.e., the Grahams would not have been successful in their adverse possession claim). This argument is based on a viewpoint that the owner is less easily dispossessed under Irish law. More specifically, it is argued that in Ireland the owner has to do less to maintain possession, and, also, that future plans on the part of the owner would prevent adverse possession from taking place. The implication is that the actions of company representatives in *Pye* of visiting the land from time to time would have

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[43] Northern Ireland Law Commission (n 1) para 2.45; Northern Ireland Law Commission, *Report Land Law* (NILC 8, 2010) para [12.6]-[12.7].

[44] For a more detailed discussion, see Una Woods, 'The Position of the Owner under the Irish Law on Adverse Possession' (2008) 30 *Dublin University Law Journal* 298.

[45] Niall Buckley, 'Adverse Possession at the Crossroads' (2006) 11(3) *Conveyancing and Property Law Journal* 59 61-64.

[46] Practice Direction on *Adverse Possession – Title by Adverse Possession to Registered Land* <https://tailte.ie/legal-practices-practise-directions-adverse-possession-title-by-adverse-possession-to-registered-land/> (accessed 7 May 2025) [2.1].

sufficed to maintain possession and, also, that the company's plans to develop the land in the future would have prevented its dispossession.

The argument that the owner has to do less to maintain possession is based on the High Court decision in *Feehan v Leamy*.[47] After the plaintiff bought the land there was some drawn out litigation over the title. In the meantime, a squatter started grazing cattle on the land. The only use the owner made of the land was to visit it and look over the hedge or gate into it. He did this on a number of occasions each year. The court held that the owner had not been dispossessed. This very lenient approach contrasts with earlier case law which focused on this issue where the court was able to point to stronger actions which prevented dispossession, e.g., walking over the land,[48] putting up for sale signs or clearing trespassers off the land.[49] According to Laffoy J in an *obiter* comment made in *Dunne,*[50] the lenient approach adopted in *Feehan* may not be followed in future case law. She stated:

> It is not beyond the bounds of possibility that in some future case a different view may be taken of the effect of the legal owner of land merely gazing over a wall or fence on to the land several times in a year and that such action may not be found to be sufficient to prevent a trespasser on the land being in adverse possession.[51]

It would, in my view, be dangerous to rely on *Feehan v Leamy* to assume that an owner's visits to the land (without, at least, walking over it) could be viewed as sufficient to maintain possession.[52]

It has also been argued that the rule in *Leigh v Jack* still applies in Ireland to prevent adverse possession from taking place if the owner has future plans for the land.[53] Two conflicting High Court decisions deal directly with this rule: *Cork*

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[47] [2001] IEHC 23.
[48] *Browne v Fahy* (HC, 24 October 1975).
[49] *Mulhern v Brady* [2001] IEHC 23.
[50] [2016] IESC 47.
[51] ibid [21].
[52] For further discussion, see Woods 'The Position of the Owner under the Irish Law on Adverse Possession' (n 44) 310-314.
[53] Buckley argues that the rule in *Leigh v Jack* continues to play a role in Irish law, see Buckley, 'Adverse Possession at the Crossroads' (n 45) 64. In contrast, Woods argues that it cannot be

Corporation v Lynch,[54] and *Durack (Seamus) Manufacturing Ltd v Considine.*[55] The rule was applied in the former, but was rejected in the latter. In *Considine,* Barron J acknowledged that if the squatter is aware of the owner's future plans and this impacts on his intention to possess, so that the owner only intends to possess on a temporary basis, this may prevent adverse possession from taking place. Although the Supreme Court has yet to rule on the issue, a close reading of the case law reveals that the High Court has, for the most part, leaned against the adoption of the rule in *Leigh v Jack.*[56]

However, before the Grand Chamber decision was delivered in *Pye*, Buckley argued that the retention of the rule could be construed as affording additional protection for the owner, thus ensuring that the Irish law would not be deemed to be incompatible with the European Convention on Human Rights.[57] The notion of resurrecting the rule in *Leigh v Jack* to provide more protection for the owner seems surprising given that the Irish Law Reform Commission has twice recommended statutory clarification that it does not apply.[58] If more protection is needed for the documentary owner of the land, the application of this rule is an inelegant and haphazard method of meeting such a need.[59] The rule in *Leigh v Jack* does not tell us how specific the owner's future plans have to be. Also, the rule does not protect the owner who has yet to decide on what he will do with the land in the future or where the original plans of the owner have been forgotten or are unclear.[60]

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confidently asserted that the rule forms part of Irish law. See Woods, 'The Position of the Owner under the Irish Law on Adverse Possession' (n 44) 317-322.

[54] [1995] 2 ILRM 598.

[55] [1987] IR 677.

[56] Woods, 'The Position of the Owner under the Irish Law on Adverse Possession' (n 44) 317-322.

[57] Buckley (n 45) 64.

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

[59] For a discussion of this point, see Una Woods, 'Protection for Owners under the Law on Adverse Possession: An Inconsistent Use Test or a Qualified Veto System?' (2020) 57(2) Osgoode Hall Law Journal (2020) 342.

[60] *Tracey Enterprises MacAdam Limited v Drury* [2006] IEHC 381. Although evidence was given that the disputed plot may have been acquired with the intention of extending quarrying onto it, Laffoy J was not convinced of this. She cited, with approval, Barron J's statement in *Considine* that the owner's future plans are only relevant in so far as they may impact on the *animus possidendi* of

As I have argued elsewhere, it cannot be confidently asserted that the owner is less easily dispossessed under Irish law on adverse possession.[61] It is quite possible that the Grahams would have been successful in their claim if the circumstances in *Pye* were presented to the Irish courts.

Part 3: The Case for Additional Protection for Vulnerable Owners

If the current Irish law on adverse possession is not more protective of the owner than the law in England and Wales (operating before the 2002 Act), it is worth considering whether there is a case for reforming the law on adverse possession to provide additional protection for owners. Owners who lose title through the operation of the doctrine do not always evoke sympathy – it seems to depend on whether they are perceived to be guilty of wrongdoing. The case for more protection for owners thus hinges, at least to some extent, on whether such owners are viewed as vulnerable or blameworthy. In an article published in the aftermath of the introduction of the English reforms Cobb and Fox strongly expressed the view that such owners were blameworthy.[62] They argued that the old law on adverse possession (operating before the 2002 Act) was completely justified on the basis that it quite rightly punished the landowner who was a bad land steward and who failed to maintain effective oversight of his land. They felt that such owners essentially got their 'just deserts' under the old law. Cobb and Fox were particularly critical of local authorities who had 'forgotten' whether a property formed part of its portfolio.[63] It is regrettable, however, that Cobb and Fox failed to draw on empirical data to support their conclusions. In contrast, this writer had access to an internal survey conducted by the Property Registration Authority[64] in 2008 which provides a good indication of the most common circumstances of parties to an adverse possession claim in Ireland. The survey involved an analysis of one month's section 49 applications (adverse possession applications in relation to registered land) in respect of two counties (Cork and

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the squatter. However, her views must be considered *obiter* as the case was ultimately decided on the basis that the defendant's acts of possession were insufficient and he did not have the requisite *animus possidendi*.

[61] Woods, 'The Position of the Owner under the Irish Law on Adverse Possession' (n 44) 323.

[62] Cobb and Fox (n 6).

[63] ibid 255-256.

[64] Note that property registration services in Ireland now operate through Tailte Éireann.

Waterford).[65] Although the data is 17 years old, it has been recently confirmed that the results of this survey 'do not appear to be significantly out of line'[66] and they can, I suggest, safely be taken to approximately represent the circumstances of applicants relying on the doctrine at the present time.

The survey revealed that 56% of these claims involved adverse possession between family members, typically in relation to property forming part of an unadministered estate.[67] Although objections are frequently made in relation to section 49 applications, once the limitation period has expired, such an objection has no legal basis and will not prevent registration. Where siblings have entitlements under an unadministered estate and only one enters into possession following the death of the deceased owner, those out of possession are clearly in a very precarious position as the Irish law currently stands.[68] For example, 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 formalise a consensual 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 which has been made to justify the English position which precludes adverse possession in such circumstances.[69] Of course, there may be an ethical justification for allowing the sibling in possession to rely

[65] Note that this internal 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, as it was then, for sharing this information with me, particularly CEO Liz Pope, who patiently discussed it with me.
[66] Confirmed on May 22, 2025. I am grateful to Áine Ruddy, Head of Legal Standards and External Liaison, Registration, Tailte Éireann who was helpful in this respect. She did point out that these figures do not account for Bord na Móna and State Property cases, many of which are lost/incomplete transfers.
[67] The survey revealed that 25% of claims involved lost/informal transfers, 12% of applications involved strangers in title (e.g., abandoned land); 6% involved boundary issues and 1% involved commonage. The merits of these claims shall be discussed in the next section.
[68] Una Woods, 'Adverse Possession and Unadministered Estates: An Unfair Solution to a Redundant Irish Problem' (2016) 67(2) Northern Ireland Legal Quarterly 137.
[69] Gareth Miller, 'The Administration of Estates and Adverse Possession' (2000) 150 New Law Journal 940, 946.

on the doctrine. This situation shall be explored below when discussing whether certain squatters deserve to rely on the doctrine.

Although only a minority of adverse possession disputes reach the courts, an analysis of reported Irish case law reveals that most of these disputes arise between family members or neighbouring landowners.[70] The number of adverse possession cases involving family members is unsurprising and reflects the experience of Tailte Éireann in dealing with section 49 applications. Adverse possession disputes typically arise between neighbours where one party encroaches on land which is not being used by the owner. The fact that the dispute has ended up before the courts indicates the contentious nature of the dispute, the entrenched position of the parties and, consequently, the discordant relationship which can be predicted for these parties into the future regardless of the outcome.[71] 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. Although it is impossible to speculate on the circumstances which 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 recognises 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 familiarise themselves with the law, it seems harsh to denigrate them as blameworthy for failing to formalise the arrangement or commence litigation. It is submitted that many owners are vulnerable and would benefit from

[70] 34 cases are listed in the Appendix to Una Woods, 'Protection for Owners under the Law on Adverse Possession: An Inconsistent Use Test or a Qualified Veto System' (n 59) 379-380. In 16 of these cases, there was a family relationship between the parties. 14 cases involved neighbouring landowners, 3 cases involved a pre-existing contractual relationship between the parties, and only 1 case involved strangers. While this review was conducted in 2014, more recent case law reflects this trend.

[71] As 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' (2000-2001) 89 Georgetown Law Journal 2419 2433. Ackerman and Johnson list the 'creation of division and animosity between neighbours' as a disadvantage/problem of adverse possession. See William G Ackerman and Shane T Johnson, 'Outlaws of the past: A western perspective on prescription and adverse possession' (1996) 31 Land and Water Review 79 94.

a system of adverse possession which would warn them if they are in danger of losing title through adverse possession, namely a veto system.

The merits of the most common adverse possession claims cannot be adequately assessed without also exploring the extent to which the law facilitates claims by 'undeserving' squatters and identifying when an applicant may deserve to be registered as owner. These 'deserving' applications could be facilitated through the formulation of certain qualifications to the veto system. A qualified veto system of adverse possession would, accordingly, hone the operation of the doctrine so that it only facilitates applications by deserving/worthy adverse possessors. This is the focus of the remainder of this article.

Part 4: The Facilitation of Claims by Bad Faith Squatters

The worthiness of a squatter's claim is sometimes assessed by considering whether they possessed good faith or a belief in ownership. Bad faith (sometimes referred to as 'advertent') squatters or those who form the intention of acquiring title without paying for it are frequently regarded as unworthy beneficiaries of the doctrine. Aside from certain references to the impact of fraud [72] or an acknowledgement of title,[73] the Statute of Limitations 1957 is ostensibly neutral when it comes to the impact of bad faith or an acquisitive intention on the running of the limitation period. It is necessary, therefore, to examine how these issues

[72] Section 71(1) of the Statute of Limitations 1957 provides that where the action is based on or concealed by the fraud of the defendant or his agent, the running of the limitation period is postponed until such time as the fraud is discovered or could with reasonable diligence have been discovered. However, section 71(2) provides that once a transaction in favour of a *bona fide* purchaser without notice of the fraud has taken place, it is no longer possible to rely on section 71(1), thus relegating the significance of the squatter's initial fraudulent behaviour once a *bona fide* transaction has taken place and the dynamic security of purchasers becomes relevant.

[73] Section 51 of the Statute of Limitations 1957 provides for the fresh accrual of the right of action if the defendant or his agent makes a written and signed acknowledgment of the title of the owner to that owner (or the owner's agent). Such an acknowledgement of the owner's title could be deemed irrefutable proof that the squatter knew that he was not the true owner of the land and, therefore, a constraint on bad faith adverse possession. However, it may also refresh the limitation period where the squatter 'worthily' intends to enter into a formal transaction in relation to the property if the opportunity presents itself. For example, it is long established that an implicit acknowledgement of the owner's title, such as an offer to purchase the property, will suffice to halt the running of the limitation period. See *Edginton v Clark* [1964] 1 QB 367.

have been treated by the Irish judiciary and whether they prevent a finding of *animus possidendi* on the part of the adverse possessor.[74] Although it was difficult to determine from the facts of some case law whether the adverse possessor believed he was the owner,[75] in the vast majority of the cases which I reviewed,[76] it seems likely that the adverse possessor did not possess the land in good faith.[77] Despite the presence of bad faith, the adverse possessor was equally as likely to succeed.[78] The conclusion reached is that the presence of bad faith will not prevent a successful adverse possession application in Ireland and, counter-intuitively, good faith on the part of the adverse possessor has the potential to create more difficulties in proving *animus possidendi*. For example, in *Kelleher v Botany Weaving Mills Ltd*[79] the High Court ruled that *animus possidendi* could not co-exist with a belief in ownership. However, the court failed to take into account the Irish Supreme Court decision of *Murphy v Murphy*[80] where it was clearly established that an adverse possessor who believes he is the owner can satisfy the requirement for *animus possidendi*.[81] Therefore, the *Kelleher* development is

[74] *Animus possidendi*/an intention to possess (the mental element) is a critical proof, together with strong acts of possession (the physical element), in demonstrating adverse possession in 'Adverse Possession and Subjective Intent' (1983) 61 Washington University Law Quarterly 331, Professor Richard H. Helmholz reached an unexpected conclusion, following a survey of 850 appellate decisions. He noted that a bad faith adverse possessor is less likely to succeed in court despite the absence of an explicit good faith requirement. He deduced that the courts prefer the claims of an honest person over those of a dishonest person and distinguish the claims through the application of the more elastic elements of the doctrine.

[75] In some cases, it was possible to hazard a reasonable guess in relation to the presence of good faith or bad faith based on the circumstances presented. For example, it was assumed that the adverse possessor who went into possession following an intestate death on title was aware of the entitlements of the other next-of-kin. Therefore, these claimants were categorised as bad faith adverse possessors. See, for example, *Martin v Kearney* [1902] 36 ILTR 117 and *Christie v Christie* [1917] 1 IR 17.

[76] See the Appendix to Woods, 'The "Undeserving" and the "Deserving" Squatter under the Irish Law on Adverse Possession' (n 20).

[77] It was only possible to identify two cases where the court seemed to accept that the adverse possessor believed he was the owner: *Murphy v Murphy* [1980] IR 183 and *Kelleher v Botany Weaving Mills Ltd* [2008] IEHC 417.

[78] The results of 34 cases were set out in the Appendix to Woods, 'The "Undeserving" and the "Deserving" Squatter under the Irish Law on Adverse Possession' (n 20). 15 claimants were successful, while 19 were unsuccessful.

[79] [2008] IEHC 417.

[80] [1980] IR 183.

[81] ibid 202.

unlikely to lead to an established precedent.[82] As it currently stands, the Irish law on adverse possession is highly accommodating of applications by bad faith squatters. When reviewing the merits of adverse possession claims it may, on initial consideration, be tempting to argue that the law should be reformed to preclude claims by bad faith squatters.

In this context, it is interesting to consider an article published in 2006 by the Northwestern University Law Review which is frequently cited in academic literature discussing bad faith adverse possession.[83] The author, Lee Anne Fennell, turns the conventional morality argument on its head by suggesting that bad faith squatters, typically viewed as undeserving beneficiaries of the operation of the doctrine, in fact deserve the approbation of the law. Fennell argues that *only* bad faith squatters should succeed under the doctrine.[84] While I would not endorse Fennell's view,[85] it is indubitably the case that certain adverse possessors who are aware that they technically do not own the land could still be considered worthy beneficiaries of the doctrine, for example those in adverse possession of abandoned land or pursuant to an informal transaction/transmission. It is evident that the good faith/bad faith distinction is not always a sufficiently sophisticated mechanism for identifying adverse possessors who deserve to acquire title. As I shall demonstrate below, the presence of good faith should play only a very limited role in filtering deserving claimants from less meritorious claims.

Part 5: How Best to Fashion Qualifications to a Veto System to Preserve Claims by 'Deserving Squatters'

It is helpful at this point to revert to the 2008 survey to identify the extent to which the law currently facilitates claims by (un)deserving squatters and how the qualifications to a veto system could be best fashioned to preserve worthy

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[82] For a more detailed critique of the decision in *Kelleher*, see Woods 'The "Undeserving" and the "Deserving" Squatter under the Irish Law on Adverse Possession' (n 20).
[83] Lee Anne Fennell, 'Efficient Trespass: The Case for "Bad Faith" Adverse Possession' (2006) 100 Northwestern University Law Review 1037. Cobb and Fox (n 6) also imply that the old law on adverse possession was to be praised for facilitating claims by advertent urban squatters in forgotten local authority properties.
[84] For a critique of this argument see Woods 'The "Undeserving" and the "Deserving" Squatter under the Irish Law on Adverse Possession' (n 20).
[85] ibid.

claims. Certain categories of 'deserving' squatters are particularly noteworthy in the Irish context given the merits of their claim and/or for utilitarian reasons. The remainder of this article discusses them in the following order: good faith possessors of a boundary strip; possessors of abandoned land; informal purchasers; family members with an estoppel claim and; owners who hold under a defective unregistered paper title.

A. Boundary Squatters

The 2008 survey revealed that 6% of section 49 applications involve a boundary issue. A broad range of remedies are currently available in Ireland to resolve the disputes that may arise in connection with boundaries. [86] I have argued elsewhere[87] that although adverse possession and the doctrine of proprietary estoppel are valuable remedial options, a mistaken improver (who carries out an improvement on land they believe they own) may fall between two stools when it comes to availing of these remedies. If the improvements were carried out in reliance on a representation by the owner or if the owner acquiesced in a mistake made by a neighbour, the improver may be entitled to a remedy under the doctrine of proprietary estoppel. Alternatively, someone who can prove adverse possession of a boundary plot for the limitation period will acquire title to it. However, if there has been no representation or acquiescence by the owner and the limitation period has not expired, no adequately structured remedy is available to the mistaken improver. It is easy to imagine a scenario where the owner simply has not noticed the building encroachment or improvement until after it takes place but before the expiry of the limitation period, in which case the builder/improver is left without a remedy.[88] Therefore, it could be argued that

[86] For example: the owner may be able to sue for damages or obtain an injunction to prevent a neighbour trespassing; it may be possible to obtain a works order (see Land and Conveyancing Law Reform Act 2009, ss 43 - 47) to carry out repairs or maintenance to a party structure; the equitable remedy of rectification may be available in relation to a transaction if the boundaries were misdescribed in a deed or inaccurately outlined on a map, or; a claim for compensation may be brought against the State if a rectification or refusal to rectify the register arises due to an error originating in the Land Registry. For a more detailed discussion, see Una Woods, 'Adverse Possession and Boundary Disputes: Lessons for Ireland from Abroad' (2016) 8(1) International Journal of Law in the Built Environment 56.

[87] See Woods, 'Adverse Possession and Boundary Disputes: Lessons for Ireland from Abroad' ibid.

[88] Unless an extremely broad application of estoppel principles is taken, as was the case in *McMahon v Kerry County Council* [1981] ILRM 419. The approach adopted in this case, of

legislation should be introduced which is targeted at protecting mistaken improvers/building encroachers akin to the legislation which operates in Australia and Canada. Ideally, this legislation would facilitate the consideration of a broad range of factors and provide for flexible remedies to resolve such difficulties.[89]

It is true that the introduction of such legislation would render the doctrine of adverse possession somewhat redundant if a building encroachment or mistaken improvement has taken place on the boundary plot. However, the doctrine of adverse possession may still have a valuable role to play in the resolution of boundary disputes where no building has taken place but the possessor has developed a 'strong psychological attachment' to the boundary plot.[90] Such an attachment to the land is more likely to develop if the occupier believed themselves to be the owner over a long period of time which is most likely to happen when an error is made over the position of a boundary. More significantly, it could be argued that the complete eradication of the doctrine's role in the resolution of boundary disputes may have a profound impact on the marketability of properties.[91] Currently, the doctrine provides a degree of assurance to purchasers that 'what they see is what they get.' This is particularly important under the Irish registered title system as the conclusive nature of the register does not extend to boundaries.[92] If the physical boundaries appear obvious on the ground, typically purchasers and their solicitors will pragmatically assume that

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recognising an estoppel in the absence of any real unconscionability on the part of the legal owner, has been described by Professor John Mee as extreme and an example of a hard case making bad law. It seems unlikely that it will be relied on as a precedent in the future. See John Mee, 'Lost in the Big House: Where Stands Irish Law on Equitable Estoppel' (1998) 33(1) Irish Jurist 187.

[89] For a more detailed discussion, see Woods 'Adverse Possession and Boundary Disputes: Lessons for Ireland from Abroad' (n 86) 68.

[90] For a more detailed discussion, see Woods, 'Adverse Possession and Boundary Disputes: Lessons for Ireland from Abroad' ibid (n 86) 69. In a similar vein, Stake has formulated a loss aversion rationale for adverse possession. See Jeffrey E Stake, 'The Uneasy Case for Adverse Possession' (2000) 89 Georgetown Law Journal 2419. Also, Cobb and Fox (n 6) have attempted to rely on Radin's personhood theory (Margaret Jane Radin, 'Property and personhood' (1982) 34 Stanford Law Review 957) to justify the traditional adverse possession regime which operated in England and Wales before the introduction of the Land Registration Act 2002.

[91] For a more detailed discussion, see Woods (n 86) 72.

[92] Registration of Title Act 1964 s 85 specifies that the outline of the property, as it appears on the Land Registry map, shall not be conclusive as to the precise line of the boundary or the extent of the land unless the boundaries have been entered as conclusive pursuant to the procedure provided by the 1964 Act, ss 87- 88. This facility is rarely relied upon.

they correspond to the boundaries as described in the deed or as outlined on the Land Registry map. If the vendor has been in adverse possession of a boundary strip for at least 12 years, this will resolve most discrepancies. Imposing a requirement for good faith (i.e., an objectively reasonable belief in ownership) in relation to adverse possession of boundary land would ensure that the doctrine is available where the location of the physical boundary fails to coincide with the legal boundary. It would ensure that the doctrine operates in a more targeted fashion to provide a remedy for those who deserve it and cannot be accommodated by other legal mechanisms. I have argued that mistaken improver legislation, the doctrine of proprietary estoppel and 'good faith' adverse possession should operate in tandem to provide alternative methods for settling a boundary dispute.[93] As is the case with the English veto system, a qualification should be included for good faith adverse possession applications in respect of boundary land.[94] This is the only situation where the adverse possessor should be required to demonstrate good faith.

B. Abandoned Land

The 2008 survey revealed that about 12% of section 49 applications involved strangers in title. This is typically the case where land has been abandoned. Where land has been abandoned, awarding title to the resourceful squatter who is fully aware that he was not the owner (i.e., a bad faith squatter) can be justified as a pragmatic response to overarching societal concerns.[95] 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.[96] An alternative approach would be to award title to the State, as is the case with the estate of a

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[93] Woods (n 86) 72-73.

[94] Recently, it was clarified by the English Supreme Court in *Brown v Ridley* [2025] SC 7 that an application can be made at any time where the applicant had 10 years reasonable belief in ownership.

[95] A number of US academics have justified the doctrine on the basis that it operates in cases of imputed or constructive abandonment. See Christopher H Meredith, 'Imputed Abandonment: A fresh Perspective on Adverse Possession and a Defence of the Objective Standard' 29 (2010) Mississippi College Law Review 257 and Scott Andrew Shepard 'Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests' (2010-2011) 44 University of Michigan Journal of Law Reform 557.

[96] *Armory v Delamirie* (1722) 93 ER 664 and *Parker v British Airways Board* [1982] 1 All ER 834.

deceased person who dies intestate without next of kin.[97] 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.[98] Also, recognising (and in due course, augmenting) the title of the possessor in this situation builds on the long established common law doctrine of relative title, which recognises a possessory title in the absence of a superior paper title.[99] The veto system of adverse possession provides an effective (if not fool proof – dependant on the owner keeping his contact details up to date) method of conferring extra protection on an owner but also allows abandoned land to be identified (where no response to the notice is received) and brought back onto the market.

C. Informal/Lost Transfers

The 2008 survey revealed that 25% of applications involved informal/lost transfers.[100] In England and Wales, the Law Commission, when deliberating the 2002 reforms, noted that when a dealing takes place 'off the register', the applicant does not represent a 'land thief' and it would be unjust to allow the registered owner to veto the applicant's registration.[101] The possessor in these cases could be described as the 'true' owner of land, often entitled to an equitable interest under an enforceable contract for sale. The informal purchaser would, in any event, be entitled to regularise their position by seeking an order for specific

[97] Succession Act 1965, s 73.

[98] 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.

[99] *Asher v Whitlock* (1865) LR 1 QB 1, 6 (per Cockburn CJ).

[100] The survey included lost transfers in this category. The requirement for registration is an essential legal formality in relation to dealings with registered land which means that if a deed of transfer was lost before it was registered, the transaction can be categorised as an informal one. Where an application for first registration is based on lost/destroyed deeds, it could be argued that strictly speaking this is not an adverse possession application. Typically, an applicant would be required to re-construct the past history of the title, in so far as possible, and supply evidence of possession of the land. In addition, it would be necessary to file an affidavit which detailed the whereabouts of the deeds before their loss/destruction and efforts made to recover them. See Brendan Fitzgerald, *Land Registry Practice* (2nd edn, Roundhall 1995) 375-377.

[101] *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) para 10.14.

performance of the contract for sale. It would be important to ensure that the doctrine of adverse possession is preserved as a pragmatic and expedient alternative method of regularising their position in certain circumstances. I have argued elsewhere that the reforms to the law on adverse possession introduced in England and Wales by the 2002 Act leave the informal purchaser in possession, who was intended to receive preferential treatment, in a precarious position.[102] Despite certain case law which is typically cited,[103] it is far from clear whether such a purchaser will be able to prove that their possession was adverse. It is submitted that the introduction of a qualified veto system of adverse possession in Ireland should be preceded or accompanied by legislative clarification on when time begins to run in favour of a purchaser in possession against the vendor who has entered into an incomplete but enforceable contract for the sale of land. A right of action should be deemed to accrue on the determination of the vendor's licence or the payment of the purchase price, whichever occurs earlier.[104]

D. Family Members

Finally, it is necessary to revisit the 2008 survey to discuss the 56% of Section 49 applications which involved a family member making an application in relation to land forming part of an unadministered estate following a death on title. While the potential vulnerability of family members who have lost title through adverse possession has already been discussed, it is vital to also assess the merits of such a claim from the perspective of the squatter. The historical justification for the operation of the doctrine in these circumstances was that it enabled the ownership of small farms to be updated in an era when will making was uncommon, emigration was widespread and grants of administration were rarely taken out. One child – typically the eldest son – would go into possession of the

[102] 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, Una Woods 'Adverse Possession and Informal Purchasers' (2009) 60 Northern Ireland Legal Quarterly 305.

[103] See the critique of *Bridges v Mees* and *Hyde v Pearce* 1 [1982] 1 WLR 560 in Woods 'Adverse Possession and Informal Purchasers' (n 102). See also *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) para 10.14.

[104] Woods 'Adverse Possession and Informal Purchasers' (n 102). I recommended the introduction of legislative clarification in England and Wales of when a right of action is deemed to accrue against such purchasers. In 2010 the Northern Ireland Law Commission endorsed this recommendation to clarify the law on adverse possession in this respect (n 1) [2.88], [2.98].

farm, the rest of the children would move elsewhere and after the limitation period the eldest son could regularise his position by making an adverse possession application.[105] The role played by the doctrine of adverse possession in this context was acknowledged in the Oireachtas debates which preceded the enactment of section 126 of the Succession Act 1965 which reduced the limitation period for claims in respect of the estate of a deceased person from 12 years to six years.[106] This amendment was clearly intended to promote reliance on the doctrine to resolve a problem perceived to be unique to rural Ireland at the time. More recently, in its third party submission to the Grand Chamber in *Pye*,[107] the Government of Ireland referred to the role played by the doctrine in facilitating the intergenerational transfer of farms in Ireland[108] and argued that the doctrine represented a proportionate means of achieving this and other legitimate aims, justifying any potential interference with the property rights of owners.[109] In sharp contrast, in England and Wales a co-owner under an unadministered estate is absolutely precluded from relying on the doctrine of adverse possession; it has

[105] The law governing the application of adverse possession where those with co-ownership entitlements go into possession under an unadministered estate is very technical and is explored at length in Woods, 'Adverse Possession and Unadministered Estates: An Unfair Solution to a Redundant Irish Problem' (n 68).
[106] 215 *Dail Debates* Col 2027. Succession Act 1965, s 126, has given rise to confusion and controversy in this area. It amended the Statute of Limitations 1957 Act, s 45, which imposed a 12-year limitation period on actions in relation to any entitlements in the estate of a deceased person. The new limitation period is six years unless the right of action was fraudulently concealed, in which case the 1957 Act, s 71 applies. This amendment was clearly designed to speed up the clarification of title to land which forms part of an unadministered estate. However, a lacuna in the application of the new limitation period was highlighted by the High Court decision in *Drohan v Drohan* [1984] IR 311 and the subsequent Supreme Court decision in *Gleeson v Feehan* [1993] 2 IR 113. The court, in both instances, ruled that s 126 only applies to actions brought by those entitled to a share in the estate and not to actions brought by the personal representative. Therefore, following an intestate death, if a grant has not yet been extracted and one of the next-of-kin has been in possession, another can extract a grant and rely on the 12-year limitation period to bring an action. In the aftermath of *Gleeson*, practitioners called for reform in this area and the Law Reform Commission in its *Report on Land Law and Conveyancing Law (7): Positive Covenants over Freehold Land and Other Proposals* (LRC 70 - 2003) recommended that a uniform limitation period of 12 years should be applied to claims by beneficiaries and by personal representatives. This reform has yet to be implemented.
[107] Third party submission by the Irish government, 23 August 2006. See *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45.
[108] ibid [13].
[109] ibid [24].

been argued that it would be unfair to allow a strong willed occupying member of the family to obtain title by adverse possession as a result of the generous attitude of other members of the family.[110]

I have argued elsewhere that the peculiarly agricultural role played by the doctrine in updating the ownership of farms following a death on title is no longer significant and may be more myth than reality.[111] The traditionally casual approach to the administration of estates comprising agricultural land may have disappeared during recent decades due to the advent of EU grants. On the death of a farmer, his family will wish to ensure that any outstanding entitlements under the single farm payment scheme are paid into his estate, and they will be conscious of the need to transfer the ongoing entitlements. These entitlements pass separate to the land and in the absence of a specific bequest, they pass to the residuary legatee. The Department of Agriculture requires the submission of a grant of probate or a grant of administration intestate and a valid herd number to secure the transfer of inherited entitlements. Frequently, waivers are also submitted to allow the entitlements to be transferred to the person who is inheriting the farm.[112] Once the grant has been extracted, it is a fairly simple matter to update the land register – which explains why the doctrine may no longer be relied on to the same extent to update farm ownership following a death on title.[113]

However, as the facts of a recent case illustrate, if the putative farming son is farming the land in partnership with his father before his death, the entitlements will continue without any need for a grant. It is a distinct possibility that, in such circumstances, the parties may neglect to update the ownership of the farm. As recently as 2018, in *Hamilton v ACC Loan Management Ltd*[114] the doctrine of

[110] Gareth Miller, 'The Administration of Estates and Adverse Possession' (2000) (150) 6941 New Law Journal 940 946.
[111] Una Woods 'Adverse Possession and Unadministered Estates: An Unfair Solution to a Redundant Irish Problem' (n 68) 149-150.
[112] I am grateful to the Inheritance Enquiry Unit of the Department of Agriculture for discussing these requirements with me.
[113] While there is no guarantee that the person inheriting the farm will update the register following the issue of the grant, it is likely that obtaining the grant would be viewed as the most onerous part of this process.
[114] [2018] IECA 127.

adverse possession was relied on by the plaintiff son to update ownership of a farm following the intestate death of his father. His father had died in 1992 and was survived by his wife and five children. As the plaintiff was farming the land with his father before his death, he had a herd number and was in receipt of grants such as single farm payments, headage payments, and REPS grants. Although the wife, the plaintiff's mother, extracted a grant in 1993, she did not execute an assent until 2006 and then vested the land in herself and quickly transferred it to the plaintiff's brother who used it as security for a loan. When receivers were appointed to take possession of the land, the plaintiff claimed he was entitled to the land by virtue of adverse possession. The plaintiff was successful in the High Court and this ruling was upheld by the Court of Appeal. Although the circumstances of this case portray a sympathetic plaintiff, the case was described as giving rise to a number of curiosities.[115] Peart J noted:

> The facts and circumstances giving rise to the proceedings are unusual, and certainly demonstrate the importance of promptly attending to legal formalities fully and completely upon the death of a landowner.[116]

While the Northern Ireland Law Commission has argued that the doctrine of adverse possession continues to perform a useful function in relation to succession to registered farmland[117] and refers to two recent cases to demonstrate this point: *Renaghan v Breen,*[118] and *Meyler v Ferris,*[119] neither of the cases cited by the Northern Ireland Law Commission involved a family member who had gone into possession of a farm many years ago and was now attempting to update the ownership of land forming part of an unadministered estate.[120]

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[115] ibid [8]-[9].

[116] ibid [3].

[117] Northern Ireland Law Commission, *Supplementary Consultation Paper Land Law* (NILC 3, 2010) (n 1) [2.29].

[118] [2000] NIJB 174.

[119] [2009] NICA 16.

[120] In *Renaghan*, the disputed land comprised a house and yard which had been the subject matter of an informal transfer to the plaintiff's great grandfather dating back to the 1880s. It had subsequently passed down through the family line to the plaintiff. The court was satisfied that adverse possession had been established against the registered owner, by the cumulative adverse possession of the plaintiff's predecessors or in the alternative by the plaintiff's 12 years of adverse possession since 1975. Although the disputed land in *Meyler* was a farm, the paper title was completely up-to-date until the death of the owner, Bridie Ferris, in 2005. She had left the land to

On deeper reflection, it appears to be difficult to assess the extent to which the doctrine is relied on to update ownership of farms in modern times. Although there is anecdotal evidence to suggest that the doctrine continues to play a limited role,[121] Tailte Éireann have clarified that it is not possible to provide a breakdown of section 49 applications which would indicate reliance on the doctrine to update farm ownership. It should also be pointed out that, frequently, adverse possession cases between family members will not involve farmland and might involve, for example, a sibling going into possession of the family home or an investment property. It is arguable that it is no longer appropriate to make the remedy of adverse possession automatically available to such siblings. Adverse possession is a crude mechanism to rely on to resolve the disputes which 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 may be that there are adequate remedies available to a sibling in possession where the merits of the case favour him/her. If, for example, the sibling in possession had been groomed to take over a farm or the family business or they looked after an elderly parent on the understanding that they would inherit the family home they may be entitled to a remedy in proprietary estoppel.[122] Alternatively, they could bring a section 117 application if they can demonstrate that a parent failed to make adequate provision for them by will or otherwise.[123] It should be noted that section 117 is currently unavailable in the case of an intestate death and it would be important to extend it to intestacies as has been recommended by the Law

her niece but her nephew claimed in these proceedings to have acquired title to the farm by adverse possession. The court was satisfied, however, that any acts of adverse possession by the defendant had only begun in 2001 and, therefore, the limitation period had not expired

[121] I would like to thank Aisling Meehan, a solicitor specialising in agricultural law, who discussed the matter with me. She was of the view that farmers are still relying on adverse possession to update title. She also mentioned that it is often used in the context of informal land swaps between neighbours.

[122] *Naylor v Maher* [2018] IECA 32

[123] *McDonald v Norris* [2000] 1 ILRM 382.

Reform Commission.[124] These remedies, although more expensive to administer, facilitate a tailored and more just response.

Although these alternative remedies exist, they must be sought within a two-year limitation period.[125] Where such a meritorious sibling has stayed in possession for many years it may be pragmatic and fair to fashion a qualification to the veto system of adverse possession to allow them to update the ownership of land in question. When the Law Reform Commission was considering restricting the law on adverse possession by introducing the requirement for a mandatory court application for a vesting order, it envisaged a continuing role for the doctrine in the context of unadministered estates. The court would be permitted to grant a vesting order if the adverse possession application related to land comprised in a deceased person's estate and 'it was reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes.'[126] However, the introduction of an approach which appears to require the court to guess the subjective views of the deceased owner seems unwise, especially when the doctrine of proprietary estoppel provides a much more stable basis for the grant of a remedy in such circumstances[127] It seems likely that in many cases where it was intended that a particular sibling would inherit a property, a representation to this effect would have been made to that child and they would have relied on it to their detriment (by sacrificing an education or a job elsewhere and moving home to care for a parent or work in the family business). It would make sense to provide a qualification to the adverse possession system to cater for an applicant who could prove the additional element of an estoppel.

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[124] Law Reform Commission, *Report on Land Law and Conveyancing Law* (LRC 30 - 1989) 21-24 and, more recently, the Law Reform Commission, *Section 117 of the Succession Act 1965: Aspects of Provision for Children* (LRC 118 – 2017) para 3.52.

[125] It may be necessary to revisit the short limitation period imposed by s 9(2)(b) of the Civil Liability Act 1961.

[126] The court would also have the option of ordering the payment of compensation. The requirement for a court application and the possibility of compensation were criticised by the Law Society of Ireland as they would increase costs and clog up the courts unnecessarily given that the Land Registry procedure has been operating successfully to date.

[127] *Smyth v Halpin* [1997] 2 ILRM 38 where 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.

Following the death of the owner, under a veto system of adverse possession, the veto could be extended to any personal representative appointed and any beneficiaries entitled under the will or the rules on intestacy.[128] If one successor makes an adverse possession application, those out of possession would be able to veto the application unless the successor in possession can demonstrate that they also possess an equity by estoppel.[129] If they fail to exercise their veto, because they have no objection to the registration of the applicant as owner or they have abandoned their interests, the application would proceed. Also, the personal representative's veto would not be effective against an adverse possessor solely entitled under the deceased owner's will or the rules governing intestacies. Therefore, the doctrine would continue to play a very limited role where the unadministered estate involved abandoned interests or an informal transmission.

E. Curing Title Defects in the Context of Unregistered Conveyancing

As the 2008 survey only involved section 49 applications, the extent to which the doctrine of adverse possession is relied on to cure defects in unregistered title remains unknown. Historically, this has been acknowledged as one of the primary purposes of the doctrine. As Ballantine commented in an article published by the Harvard Law Review in 1918:

> The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; *the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing*.[130]

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[128] Where such information is not available, notice could be served by posting site notices or advertising in newspapers.

[129] If the veto is exercised, the dispute will have to be resolved between the successors. The adverse possessor may have to negotiate releases from the objectors if he wishes to be registered as the sole owner and if these releases are not forthcoming, and the beneficiaries are not prepared to be registered as co-owners, the property would have to be sold in the course of administration and the proceeds distributed amongst them.

[130] Henry W Ballantine, 'Title by Adverse Possession' (1918) 32 Harvard Law Review 135, 135 emphasis added.

In Ireland it has long been acknowledged that the doctrine of adverse possession plays an essential role in the investigation of title to unregistered land by curing title defects, thereby facilitating transactions in relation to such land. The majority of claims which arise from a conveyancing error are unenforceable following twelve years adverse possession. This provides a comfort blanket to a purchaser's solicitor that a vendor who can establish a chain of title back to a good and sufficiently mature root of title will also have extinguished any such claims. Although it may be that the role played by adverse possession in curing title defects is sometimes exaggerated,[131] nevertheless, in Ireland it remains an important element of a multi-faceted, inter-connected system which achieves a fair result when such defects surface. It is a matter which I have discussed in more detail elsewhere,[132] but a summary of the conclusions drawn are helpful at this point. Issues arising from defects in title tend to be resolved in a satisfactory manner in Ireland through the operation of a combination of doctrines and remedies (e.g., rescission, rectification, and reliance on implied covenants for title), but also through conveyancing practices and the requirement for first registration. Adverse possession plays a role in curing title defects, but only a complementary one. Some adverse claims which are not revealed by a standard investigation of title are defeated by adverse possession, while others are not because of the postponement of the limitation period or the inability to prove adverse possession throughout the limitation period. Other defects may be revealed on an investigation of title by the purchaser's solicitor or the Land Registry and, if they cannot be cured, they may result in a qualified title being conferred on first registration. This qualification may eventually be cured through the passage of time.[133]

[131] Fennell (n 83) 1061–1063. Fennell goes one step further and argues that role played by the doctrine in this context is redundant.

[132] Una Woods, 'Adverse Possession, Unregistered Land and Title Defects: A Fly in the Ointment of Irish Reform' in Conway and Hickey (eds.) *Modern Studies in Property Law: Volume 9* (Oxford: Hart Publishing, 2017) 61.

[133] It is also possible that certain defects may not be revealed on an investigation of title and may survive first registration and perhaps even a transaction in favour of a purchaser for value relying on the register. The defect may give rise to a right to rectify the register and could be converted into an overriding interest binding a purchaser for value if coupled with actual occupation of the land. See *Boyle v Connaughton* [2000] IEHC 28.

It would be important to preserve the role played by adverse possession in facilitating transactions in relation to unregistered land. However, in contrast with the view expressed by the Law Commission of England and Wales, [134] it is submitted that it is not necessary to restrict the veto system of adverse possession to registered land to achieve such a result. Tailte Éireann would be responsible for the administration of the qualified veto system of adverse possession in relation to both registered and unregistered land. In practice, a person claiming a title based on adverse possession of registered or 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.[135]

The extension of the veto system to unregistered land would ensure consistency in the level of protection afforded to the registered and the unregistered owner against the risk of squatting. Including unregistered land within the scope of a new veto system of adverse possession would also mean that practitioners would not have to be familiar with two different systems but, more significantly, it would make the law more accessible to non-lawyers. Finally, many unregistered titles in Ireland relate to very valuable urban land, making it even more important that the owners of such land are adequately protected by the law in this area.

An important qualification to the veto system would operate in the context of an application for first registration of unregistered land where the title is 'less than perfect' but the applicant has been in adverse possession for the duration of the limitation period. This phenomenon is known as 'colour of title' adverse possession and is unique to the United States.[136] The American doctrine was the product of legislative and judicial responses to distinctly American economic and geographic realities in the context of the early settlement of the country. The land

[134] Law Commission (n 23).
[135] For a discussion of the steps which would need to be taken where it is not possible to ascertain the true owner or the title to the land which is being adversely possessed, see Woods, 'Adverse Possession, Unregistered Land and Title Defects: A Fly in the Ointment of Irish Reform' (n 132) 76-77.
[136] Note, however, that a requirement to prove 'just title' to rely on prescription (the civil law equivalent to adverse possession) is widespread in civil law jurisdictions. See, for example, DJ Cusine, 'Adverse Possession of Land in Scots and English Law' (1996) 45(3) International and Comparative Law Quarterly 667.

was wild and uncultivated and was generally granted by the government and resold in large tracts. In the early days, records of state grants were not well kept, and grants were often duplicated or overlapped. Many deeds were defective as few lawyers resided in the back country and speculative trading resulted in land being sold several times over, resulting in great confusion over land titles.[137] The Arkansas Supreme Court adopted the following definition:

> Color of title is in law, no title at all. It is a void paper, having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title…. It must purport to pass title. In form, it must be a deed, a will or some other paper or instrument by which title usually and ordinarily passes.[138]

It is submitted that the extension of a veto system of adverse possession to unregistered land could be facilitated by the creation of an exception to cater for the adverse possessor of unregistered land who can also prove a title which approximates 'colour of title' in American terms. This exception would be specifically designed to cure defects or uncertainties in title. Where an application for first registration is made by a person who can prove possession for 12 years which commenced under a defective title, in most cases, a person with technical rights in the land due to a defect in title would not be entitled to object to or veto the application.

In the current compulsory registration environment, this facility would operate in tandem with the option for an applicant to apply for first registration with a qualified title if it is not yet possible to prove adverse possession for the limitation period. In due course, most defects would be cured by the passage of time. This approach emulates what is happening in practice in the Land Registry which adopts a pro-registration approach and where registrations frequently occur on the basis of an imperfect title where the defect cannot be cured if it is accompanied by proof of 12 years possession.

The extension of the veto to unregistered land coupled with this exception to cater for defective titles represents a fundamental distinction between, on the one

[137] In the United States, where the adverse possession has colour of title the claimant benefits from a much shorter limitation period, often only five or seven years.
[138] *Bailey v Jarvis* 208 SW 2d (Ark 1948) 13 15, quoting *State v King* 87 SE 170, 171 (W Va 1915).

hand, the qualified veto system of adverse possession which I propose for Ireland and, on the other, the system introduced in England and Wales which applies only to registered land, and which preserves the old law of adverse possession in relation to unregistered land.

Conclusion

The various roles which have been ascribed to the 'strange and wonderful' doctrine of adverse possession[139] and the 'ideas of right and wrong'[140] which the doctrine raises make it a fascinating topic to study. This article engages with both of these aspects of the doctrine. It examines the importance of adverse possession as a remedy in the resolution of a broad range of land law difficulties and it considers whether the doctrine should be reformed so that it operates in a manner that produces a fairer result.

In his seminal 1985 article, Dockray asked: '[w]hy do we need adverse possession'?[141] Since then, other academics have struggled to locate the doctrine's modern niche.[142] This article confirms that one of the most important functions performed by the doctrine continues to be the one emphasised by Dockray – its role in curing title defects and facilitating the conveyancing of unregistered land. However, it also demonstrates that the doctrine performs a vital, subsidiary, and perhaps under-appreciated role in facilitating the extension of the registered title system.[143] This role is poised to assume even greater importance over the next couple of decades as efforts are made to bring the remaining unregistered titles onto the land register. It is also submitted that the doctrine has a valuable role to play in bringing abandoned land back onto the market and that it offers an expedient and inexpensive solution to address the difficulties which may arise following an informal transaction or circumstances raising an equity by estoppel. Finally, it is maintained that the doctrine may still

[139] Stake (n 71) 2419.
[140] Rosemary Auchmuty, 'Not just a good children's story: A tribute to adverse possession' [2004] Conveyancer and Property Lawyer 291, 307.
[141] Dockray (n 6).
[142] Stake (n 71); Fennell (n 83).
[143] Woods, 'Adverse Possession, Unregistered Land and Title Defects: A Fly in the Ointment of Irish Reform' (n 132).

have a significant role to play in resolving certain boundary disputes. Therefore, it is submitted that there is a strong case for retaining a streamlined version of the adverse possession doctrine within the panoply of Irish property law remedies to resolve the specific issues just mentioned.

The article also engages with the perceptions of unfairness which have emerged in relation to the doctrine in recent times. These rumblings of discontent appear to have been a response to the failure of the law to adequately respond to the 'demerit' of certain possessors,[144] and the vulnerability of many owners. The doctrine of adverse possession has been variously described as 'unprincipled', 'inexpedient',[145] 'title by theft', 'a primitive method of acquiring land without paying for it' and 'an anomalous instance of maturing a wrong into a right'.[146] It is argued that these concerns are justified. The law in Ireland facilitates unmeritorious claims by adverse possessors and affords inadequate protection to the owner. Consequently, it is submitted that reform is warranted; more specifically I maintain that the introduction of a qualified veto system of adverse possession in Ireland would hone the doctrine so that it continues to fulfil the valuable functions mentioned above, while also operating in a manner which is fairer.

The veto system of adverse possession is an effective method of conferring extra protection on an owner. It allows abandoned land to be identified and brought back onto the market. Furthermore, through the formulation of qualifications to the veto, it allows the doctrine to be refined to facilitate applications where appropriate for utilitarian reasons or based on the merits of the claim. The role of administering the qualified veto system of adverse possession over both registered and unregistered land would fall to Tailte Éireann. This would avoid expensive court proceedings and, provided adequate resourcing was made available, would ensure that applications could be completed as expeditiously as possible.

[144] James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press 1913) 197. Ames, in contrasting prescription in the civil law with adverse possession under the common law system remarked: 'English lawyers regard not the merit of the possessor, but the demerit of the one out of possession.'
[145] Dockray (n 6) 284.
[146] Ballantine (n 130), 135.

It is submitted that adverse possession is not a 'relic' or 'an ailing concept'[147] but a valuable feature of the modern Irish property law landscape. However, reform is long 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, and to prevent undeserving squatters from relying on the doctrine. Consequently, this article makes the case for the introduction of a qualified veto system of adverse possession to address the potential for unfair outcomes.

[147] JCW Wylie, 'Adverse Possession: An Ailing Concept?' (1965) 16 Northern Ireland Legal Quarterly 467 489.