A Minimal Approach to Adverse Possession

Dooley v Flaherty [2014] IEHC 528 (Irish High Court)

Professor John Mee, School of Law, University College Cork

In *Dooley v Flaherty*,[1] the Irish High Court rejected the adverse possession claim of an overholding tenant who had lived a "modest and frugal"[2] life in a virtually derelict house. The basis for the decision was that the paper owner had engaged in minimal acts of possession during the limitation period. The law of adverse possession in Ireland differs in some respects from that in England and Wales, one important difference being that Irish law on the adverse possession of registered land has not been the subject of radical curtailment as in England and Wales.[3] However, the core elements of the law of adverse possession are the same in the two jurisdictions. Therefore, it is hoped that a critique of the approach of the court in *Dooley* will be of wider interest.

It will be argued in this note that the judgment in *Dooley* reflects a misunderstanding, the origins of which are discernible in the earlier Irish case law, of the role of minimal acts of possession by the paper owner. In principle, the fact that the paper owner engages in such acts can demonstrate that, despite acts of possession by the squatter during the same time period, the paper owner never lost possession of the land and so time never started running against him. However, matters are different if a point in time can be identified at which the squatter has successfully taken possession of the land to the exclusion of the paper owner. After that event has started time running, minimal acts of possession on the part of the paper owner are insufficient to stop it; instead, the

[1] [2014] IEHC 528 (available on BAILII).

[2] *Ibid*, [14] and [26].

[3] See Land Registration Act 2002, Part 9 and Sch 6. Note the proposals in the Irish Law Reform Commission *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005) pp 327-332, which would have curtailed the scope of the Irish law on adverse possession in relation to both registered and unregistered land. Nothing appears to turn on the question of whether or not the disputed land in *Dooley* was, prior to the sale that triggered the dispute, registered land and the judgment does not, in fact, clarify this point.

paper owner must actually retake possession to the exclusion of the squatter.[4] Minimal acts of possession by the paper owner are also insufficient in a scenario such as *Dooley* where the running of time is triggered by the statutory termination, for limitation purposes, of an oral periodic tenancy under which the squatter was already in possession to the exclusion of the paper owner.

The decision in *Dooley* also prompts a reflection on the merits of this statutory rule in relation to oral periodic tenancies, whereby a landlord can lose title due to allowing a tenant to remain in occupation without paying rent. The rule continues to apply in both Ireland and England and Wales although, as will be discussed at the end of this case note, it has been the subject of contrasting law reform recommendations in the two jurisdictions.

The Facts and the Decision

In 2012, the disputed property, a house in the city of Galway that was "in a total state of disrepair and virtual dereliction"[5] was offered at auction along with a number of other "distressed" properties.[6] The "windows and external doors were decayed and decrepit". There "was no internal flush toilet and the external toilet did not work properly …. [and] there was no hot water supply within the property".[7] The premises were described prior to the auction as being vacant,

---

[4] Or, of course, take legal proceedings within the limitation period or obtain a written and signed acknowledgement of title from the squatter.

[5] *Dooley*, [25].

[6] *Dooley*, [9].

[7] *Dooley*, [25]. It was argued on behalf of the paper owners in *Dooley* that, in order for an adverse possession claim to succeed, the property must be capable of use and enjoyment and that the disputed property did not satisfy this test (see *Dooley*, [25]-[29]). It is clear in principle that the nature of the disputed property can be a relevant issue in assessing whether a squatter has succeeded in taking possession with *animus possidendi*. However, as will emerge from the discussion in this case note, this question did not actually arise on the special facts of *Dooley* because the squatter was already in possession of the house prior to the commencement of the limitation period. This latter point was not made by Hogan J but his conclusion (at [26]) was that the decrepit state of the premises, and the fact that the defendant had not taken more care of the property during the running of the limitation period, ultimately had "no relevance to the question of whether [the defendant's] possession was adverse to the true owner". See also *Purbrick v Hackney London Borough* [2003] EWHC 1871 (Ch); [2004] 1 P & CR 34 where Neuberger J, as he

"subject only to a life tenancy at a peppercorn rent in favour of one Paddy Flaherty"[8] who had died in 1995 and who had been the defendant's uncle. Immediately after the auction, having paid a deposit, and presumably with the permission of the vendor, the purchasers inspected the property. They were accompanied by a locksmith, who picked the lock, and "as they were touring the property [the defendant] came 'out of nowhere'".[9] The defendant had in fact been living in the property for almost 60 years.[10] No "For Sale" sign had been placed on the premises and the defendant had been unaware that the property was being sold at auction.[11] The purchasers subsequently sought to eject the defendant[12] and he resisted on the basis that he had acquired title to the property through adverse possession for the applicable 12 year limitation period.

It was accepted on both sides that the defendant had initially been a tenant of the former owner of the house and had made one payment of IR£5 in rent in 1998. According to Hogan J, "the precise nature of the [defendant's] tenancy [was] hard to determine",[13] though it was "certainly a parol tenancy, as

---

then was, stated (at [21]) that "it would require a rare case where the mere failure to carry out improvements to a dilapidated property, or property out of repair, meant that the squatter did not have sufficient physical possession." Neuberger J also regarded (at [23]) the failure to improve the property "as irrelevant to the issue of [the squatter's] intention to possess". Unfortunately, for reasons of space, it is not possible to discuss these issues further in this case note.

[8] *Dooley*, [1]. It is possible in Irish law for leasehold tenure to co-exist with a freehold estate such as a life estate, contrary to the orthodox position of English law: see JCW Wylie *Irish Land Law* (5th ed, 2013) pp 287-295. The future creation of leases for freehold estates has been prohibited in Ireland: Land and Conveyancing Law Reform Act 2009, ss 12 and 14.

[9] *Dooley*, [9].

[10] The defendant had lived in the house all his life: *Dooley*, [13].

[11] *Dooley*, [19].

[12] The purchasers had commenced vendor and purchaser proceedings against the vendors (the relevant statute in Ireland being the Vendor and Purchaser Act 1874), on the basis that the contract entitled them to acquire the property with vacant possession. These proceedings were said by Hogan J, without further explanation, to have been settled on the basis of "a small reduction in the price": *Dooley*, [12].

[13] *Dooley*, [30].

there was no lease in writing".[14] It appeared that upon Paddy Flaherty's death in 1995, his brother, Michael Flaherty Senior, took over the role of tenant. When Michael Flaherty Senior died in 1998, the tenancy then passed to his son, also Michael Flaherty, who was the defendant in the case.[15] Hogan J concluded that "[v]iewing the evidence as a whole, the payment of rent by [the defendant] in September 1998 was probably consistent with the existence of a weekly tenancy".[16] The consequence was that "the tenancy must be deemed to be determined at the end of that week once Mr. Flaherty ceased to pay rent".[17] This followed from section 17(2)(a) of the Statute of Limitations 1957 (the Irish equivalent of the Limitation Act 1980, Schedule 1, paragraph 5(1)), which provides that "[a] tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period". The legislation goes on to state that, in these circumstances, the limitation period begins to run from the determination of the tenancy.[18] Thus, the single payment of rent by the defendant in 1998 only delayed the start of the limitation period by a week from the date of that payment.[19]

Having established that time began to run in 1998, Hogan J posed the following question: "was the running of time ever thereafter interrupted?"[20] In this respect he found the decision in the earlier Irish case of *Dunne v Iarnród Éireann*[21] to be "most instructive".[22] In this case, Clarke J emphasised that "[t]he

[14] *Ibid*.

[15] *Dooley*, [1].

[16] *Dooley*, [30].

[17] *Dooley*, [31].

[18] See s 17(2)(b) of the Statute of Limitations 1957; Limitation Act 1980, Schedule 1, paragraph 5(1). Note that the relevant legislative provisions include the proviso that, if any rent has subsequently been received, the right of action is deemed to have accrued at the date of the last receipt of rent. This could have been relevant on the facts of *Dooley*: see the discussion in note 55 below.

[19] Contrast *Batsford Estates (1983) Co Ltd v Taylor* [2005] EWCA Civ 489; [2005] 2 EGLR 12, where the claimant's occupation could be explained on the basis of a (genuine) implied permission by the paper owner.

[20] *Dooley*, [32].

[21] [2007] IEHC 314 (Irish High Court; BAILII).

assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis".[23] He accepted the view of Slade J in *Powell v McFarlane*[24] that "the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession".[25] The claimant in *Dunne* had grazed horses on the disputed land. During the relevant time period, the paper owner had, on one occasion, sent out a contractor to repair a fence in response to a complaint from a neighbour and had also engaged in renovation works to a neighbouring railway station, over a year and a half, which must have involved the occupation by its workers of at least a portion of the disputed field. On the basis of "the very low threshold which, on the authorities, I am required to apply",[26] Clarke J in *Dunne* found that the actions of the paper owner in the case before him were sufficient to demonstrate that he had not been dispossessed.

The paper owner in *Dooley* had also engaged in some limited acts in relation to the disputed property. In 2008, following a complaint from a neighbour that the state of the roof of the disputed property was having adverse consequences for the neighbour's property, the owner's "employees gained access to the property by going through a neighbour's attic to repair an area which had been damaged by dampness".[27] At around the same time, the paper owner arranged for one of his employees to repair the slates on the roof of the disputed house.[28] Hogan J accepted the defendant's evidence that he had been

---

[22] *Dooley*, [33].

[23] [2007] IEHC 314, [4.9].

[24] (1977) 38 P & CR 452.

[25] *Ibid*, 472, quoted by Clarke J [2007] IEHC 314, [4.9]. See also *Williams Brothers Direct Supply Ltd v Raftery* [1958] 1 QB 159, 171 *per* Morris LJ. On the Irish position, see U Woods "The Position of the Owner under the Irish Law on Adverse Possession" (2008) 30 Dublin University Law Journal 298, 307-313. Note also the discussion under the heading "Use of land by both squatter and true owner" in S Jourdan and O Radley-Gardner *Adverse Possession* (2nd ed, 2011), pp 130-149. In the Northern Irish context, see *McCann v McCann* [2013] NICh 7, [21]-[25]; [34], [37].

[26] [2007] IEHC 314, [5.4].

[27] *Dooley*, [8].

[28] *Dooley*, [8] and [37].

unaware that this work had taken place but pointed out that "the repair work on the roof was done openly for the world at large to see and observe".[29] Referring to the repairs to the slates and to the damp area of the roof, Hogan J concluded that "[t]here is no doubt at all but that this is a sufficient act of possession on the part of the owner such as would arrest the running of time, even if this also obviously fits into the category of a minimal act of possession in the manner envisaged in *Dunne*".[30] Furthermore, the paper owner had also insured the property throughout the relevant period.[31] Hogan J also felt that this was an act of possession sufficient to satisfy the *Dunne* test.[32] Thus, Hogan J resolved the case in favour of the paper owner on the basis that the paper owner's minimal acts of possession during the limitation period were sufficient to defeat the defendant's adverse possession claim.

The Significance of "Minimal Acts" by the Paper Owner in *Dooley*

It is submitted, with respect, that there is a fundamental flaw in the approach adopted by Hogan J in *Dooley*. The significance of "minimal acts of possession" by the paper owner is that they can show that he never ceased to be in possession of the land, so that time never began to run in favour of the squatter. Such an argument is not, however, available to the paper owner in a situation such as that in *Dooley*, where the squatter was already in possession under a tenancy and the statute dictates that time begins to run in his favour at the moment that the tenancy is, under the statute, deemed to have ended. To explain this point more fully, it will be necessary, first, to clarify the legal rules applicable to the adverse possession claim in *Dooley* and then to look more closely at the basis on which "minimal acts of possession" by the paper owner are capable of defeating an adverse possession claim in other contexts.

The dispute in *Dooley* arose in "the very specific context of a former tenant holding over, where special principles apply".[33] Unlike more typical

[29] *Dooley*, [38].

[30] *Dooley*, [37].

[31] *Dooley*, [39].

[32] *Ibid*.

[33] Jourdan and Radley-Gardner note 25 above, p 298.

adverse possession cases, it was not governed by section 14 of the Statute of Limitations 1957, which is the Irish equivalent of paragraph 1 of Schedule 1 of the Limitation Act 1980. Those provisions deal with cases where the paper owner of land "has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession".[34] The situation was instead governed by section 17(2)(b) of the Statute of Limitations 1957, which is the Irish equivalent of paragraph 5 of Schedule 1 of the Limitation Act 1980. As has been seen,[35] this provision states that the landlord's cause of action accrues, and therefore the limitation period starts to run, upon the determination of the periodic tenancy at the end of the first period.[36]

Significantly, in this type of case, the squatter does not face the normal hurdle of establishing that he has started the clock running by taking possession of the land. The familiar test in *Powell v McFarlane*,[37] which requires acts of physical possession coupled with *animus possidendi*, does not apply because the squatter, rather than the paper owner, was already in possession as tenant prior to the start of the limitation period. This was confirmed by the English Court of Appeal in *Williams v Jones*.[38] The trial judge had found that the claimant would not, on the balance of probabilities, have been able to satisfy the *Powell v McFarlane* test.[39] However, the trial judge had held that "once non-payment of rent occurs, and if you remain in occupation, then that is a sufficient act of

---

[34] Section 14 of the Irish Statute of Limitations 1957. Paragraph 1 of Schedule 1 of the Limitation Act 1980 is worded in very similar terms.

[35] See text following note 17 above.

[36] Or, if rent is subsequently received, on the date of the last receipt of rent. On the applicable law in England and Wales, see Jourdan and Radley-Gardner note 25 above, pp 507-519.

[37] (1977) 38 P & CR 452, as approved by the House of Lords in *Pye*.

[38] [2002] EWCA Civ 1097. Schiemann and Carnwath LJJ concurred with the judgment of Buxton LJ. Buxton LJ relied upon the earlier Court of Appeal decision in *Hayward v Chaloner* [1968] 1 QB 107. Note also *Mitchell v Watkinson* [2013] EWHC 2266 (Ch), affirmed [2014] EWCA Civ 1472. *Williams v Jones* was discussed, with apparent approval, by the Northern Irish Court of Appeal in *Gallagher v Northern Ireland Housing Executive* [2009] NICA 50, [15]-[17].

[39] See the passage from his judgment that was cited by Buxton LJ [2002] EWCA Civ 1097, [16]. Buxton LJ noted that, while this did not affect the decision in the case, he did not agree with the judge's conclusion on this point: *ibid*, [31]-[33].

possession".[40] Accepting this approach, Buxton LJ stated that, when the tenancy is deemed to determine by the statute, "the possession held by the tenant moves from being a possession with the landlord's consent to being possession held without his consent, and thus for limitation purposes adverse".[41]

In order to assess whether the minor acts of possession on the part of the paper owner should have been decisive in *Dooley*, it is necessary to look at the rationale behind the relevant rule. The starting point is the proposition that possession is unitary, so that "[e]xclusivity is of the essence of possession".[42] The result is that "an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time".[43] "Minimal" acts of possession on the part of the paper owner can be decisive because of "the presumption that the true owner remains in possession of the land".[44] As Lord Browne-Wilkinson explained in *JA Pye (Oxford) Ltd v Graham*,[45] "[o]nce possession has begun, as in the case of the owner of land with a paper title who has entered into occupation of it, his possession is presumed to continue".[46] Gray and Gray refer to this as "a fairly heavy presumption"[47] and suggest that

---

[40] Quoted by Buxton LJ: [2002] EWCA Civ 1097, [30].

[41] [2002] EWCA Civ 1097, [19]. It should be emphasised that, as in respect of any action to recover possession of land, the limitation period cannot begin to run in the squatter's favour unless he or she is in possession of the land at the relevant time and, furthermore, time will stop running if, during the limitation period, the squatter ceases to be in possession: Limitation Act 1980, Schedule 1, para. 8; (Irish) Statute of Limitations 1957, s. 18. This is reflected in Buxton LJ's recognition in *Williams* [2002] EWCA Civ 1097, [20] of the possibility of "an extreme case" in which "a tenant might have so feeble a connection with the land (the example given in argument was of a man who has gone off to Australia leaving the front door of the demised premises open) that on the determination of the tenancy he could not be said to be in possession at all". On the facts of *Dooley*, it seems clear that the squatter was in possession at the time the tenancy was deemed to have determined and that he did not subsequently, during the limitation period, cease to be in possession.

[42] *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, [70] *per* Lord Browne-Wilkinson.

[43] *Powell v McFarlane* (1977) 38 P & CR 452, 470 *per* Slade J.

[44] C Harpum, S Bridge, M Dixon *Megarry & Wade: The Law of Real Property* (8th ed, 2012), p 1467.

[45] [2003] 1 AC 419.

[46] *Ibid*, [70].

[47] K Gray and S Gray *Elements of Land Law* (5th ed, 2009), p 1178.

"[i]ntermittent acts of control by the paper owner merely serve to reinforce this presumption".[48]

The difficulty with applying this reasoning to the situation in *Dooley* is that there could not have been a presumption that the possession of the paper owner continued because the paper owner was not in possession immediately prior to the commencement of the limitation period. At that time, the claimant was already legally entitled to occupy, and in factual occupation of, the property as a tenant (and, of course, "[t]here can be no tenancy unless the occupier enjoys exclusive possession").[49] On the facts of *Dooley*, the presumption of continuance of possession operated against, rather than in favour of, the paper owner.[50] In order to defeat the adverse possession claim, the paper owner would have to show that he had actually retaken possession of the property. As explained by Pennycuick J in *Bligh v Martin*,[51] in order to retake possession from the squatter, the paper owner must show that he or she "took possession in the ordinary sense of that word, to the exclusion of the wrongful occupier".[52] This approach was approved by the Court of Appeal in *Zarb v Parry*,[53] where Arden LJ confirmed "that the factual possession of the adverse possessor must be brought to an end".[54] Looking at the facts of *Dooley*, it is obvious that the fact that the paper owner insured the house had no effect on the squatter's factual possession

---

[48] *Ibid*.

[49] *Street v Mountford* [1985] AC 809, 818 *per* Lord Templeman; Wylie *Irish Land Law* note 8 above, p 868.

[50] Compare *Mitchell v Watkinson* [2013] EWHC 2266 (Ch), [63] *per* Morgan J; Jourdan and Radley-Gardner note 25 above, p 113 and p 512.

[51] [1968] 1 WLR 804 (Ch D).

[52] *Ibid*, 812.

[53] *Zarb v Parry* [2011] EWCA Civ 1306; [2012] 1 WLR 1240 (CA).

[54] [2012] 1 WLR 1240 (CA), [43]. See also *ibid*, [71] *per* Lord Neuberger MR. Compare the treatment of minor acts by the paper owner in two English cases which, like *Dooley*, involved former tenants holding over: *Williams v Jones* [2002] EWCA Civ 1097, [26] (the fact that the husband of one of the paper owners had erected a TV mast on the property was dismissed as "an act of casual trespass"); *Mitchell v Watkinson* [2013] EWHC 2266 (Ch) (the former tenant was occupying the land through its licensee, a cricket club, and at one point the club had, at the insistence of the landlord's agent, removed rubble from the land; however, this did not amount "to the tenant (through the club) ceasing to be in possession of the land" (at [74]).

of the property. The other acts, related to the repair of the roof and attic of the house, were also clearly insufficient as they did not involve any exclusion of the squatter from his continued possession of the property. Thus, it is submitted that the decision in *Dooley* was wrong on the facts on which it was decided.[55]

Wider Issues Relating to 'Minimal Acts of Possession' by the Paper Owner

While the facts of *Dooley* were unusual, in that they involved a tenant holding over, the approach taken in the judgment perpetuates a misunderstanding of the significance of minimal acts by the paper owner that is of wider significance in the Irish law of adverse possession. Even in more typical adverse possession scenarios, the potential role of minimal acts by the paper owner is not to "interrupt"[56] or "arrest"[57] the running of time after the limitation period has commenced, but instead to demonstrate that it has never started running. This misconception can also be discerned in the judgment in *Dunne*, where Clarke J asked whether the squatter could "establish a single continuous twelve year period … in which he was in exclusive possession of the lands in question … and during which twelve year period no act of possession, however slight, occurred by or on behalf of" the paper owner.[58] What this test overlooks is the fact that a decisive shift occurs if the squatter can establish that, at a particular point in time, he has taken physical possession with the appropriate *animus possidendi* (having rebutted, where applicable, the presumption that the paper owner's possession has continued, which presumption might be bolstered by evidence of

[55] It should, however, be noted that the landlord gave evidence that he had also collected rent from the defendant in 2004, i.e. in the middle of the limitation period. The defendant, on the other hand, maintained that he had not made any further payments of rent after the first payment in 1998. This evidence as to the payment of rent in 2004, if it had been accepted, would have been fatal to the defendant's adverse possession claim: see note 18 above. Hogan J did not attempt to resolve the conflict of evidence between the parties, which he saw as "simply pit[ting] one person's word against another", because he believed that it was preferable to resolve the case "by reference to the established facts": *Dooley*, [20]. On the view taken in this note, however, the resolution of this conflict of evidence was crucial to the proper determination of the case.

[56] *Dooley*, [32] ("was the running of time ever thereafter interrupted?")

[57] *Dooley*, [37] and [38].

[58] [2007] IEHC 314, [4.9].

continuing "minimal" acts of possession on the part of the owner). As Jourdan and Radley-Gardner explain, "[o]nce the squatter has taken actual possession, the paper owner can only stop time running by gaining actual possession, or by commencing an action to recover the land".[59] Thus, it is misleading to assert, as Clarke J did in *Dunne*, that the claim will be defeated if the paper owner can demonstrate minimal acts of possession at any stage in the running of the limitation period. Minimal acts of possession during the limitation period, falling short of retaking actual possession, will be insufficient if they occur after the squatter has successfully taken possession to the exclusion of the paper owner.

A final comment in respect of "minimal" acts of possession relates to Hogan J's view that the fact of insuring the property could qualify as an act of possession on the part of the paper owner, apparently sufficient on its own to defeat the defendant's claim to adverse possession on the facts of the case.[60] While there does not appear to be any authority directly in point, Jourdan and Radley-Gardner note that "[t]he payment of rates or other taxes could not constitute the factual element of possession", going on to suggest that "the payment of taxes levied on the person in possession is evidence of the *animus possidendi*".[61] It seems clear that, as with the payment of rates or taxes, the payment of insurance premiums cannot logically be seen as a physical act of possession. It is perhaps questionable whether the payment of insurance has much bearing on intention to possess since the most obvious implication of the

---

[59] Jourdan and Radley-Gardner note 25 above, p 133.

[60] The extraordinary implication of the judgment in *Dooley* seems to be that any adverse possession claim, no matter how clear the claimant's *animus possidendi* and no matter how extensive his or her physical acts of possession, could be defeated by the simple fact that the paper owner had – without approaching within a hundred miles of the property – insured the property at any point during the running of the limitation period. On the other hand, Hogan J took the view (*Dooley*, [40]) that it was "doubtful" if correspondence from the paper owner to the squatter "seeking an acknowledgment of rent paid can be regarded as amounting to a positive act of possession". Compare *Mahon v O'Reilly* [2010] IEHC 103 (Irish High Court; BAILII): sending annual letters asserting ownership insufficient to prevent time from running; *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078 (CA), 1083-1086: sending letter demanding possession did not amount to retaking possession from squatter.

[61] Jourdan and Radley-Gardner note 25 above, p 304.

fact that the paper owner continues to insure the property during the limitation period is merely that the paper owner assumes, correctly, that he or she has an insurable interest in the property. It is possible, however, that the payment of insurance premiums by the true owner could be of mild significance in terms of providing evidence that the owner intended to continue in possession (or in terms of casting indirect light on the intention of the squatter).[62]

Conclusion

This note has criticised the approach in Hogan J's judgment to the significance of minimal acts of possession by the paper owner, falling short of retaking possession, during the limitation period. On the view of the law taken in this note, the appropriate result in the case would have been for the squatter to have succeeded in his claim.[63] By way of conclusion, it is worth briefly considering the merits of the rule that would have formed the basis for the squatter's success if the law (as understood by the current writer) had been correctly applied, i.e. the rule providing for the artificial termination, for limitation purposes, of oral periodic tenancies where rent is not collected.

Jourdan and Radley-Gardner argue that English law on this point should be changed, as was recommended in 1977 by the Law Reform Committee, so that time would only run against the landlord from the time that the periodic tenancy is actually determined.[64] As an example of a case illustrating the rule's potential to cause injustice, they point to *Hayward v Chaloner*,[65] where the paper owners, "loyal churchmen all", lost title to their lands after showing "generous

---

[62] In the Australian case of *Bree v Scott* (1904) 29 VLR 692, 702, Madden CJ suggested that the fact that the paper owner had paid the municipal rates on the land "affords a very slight inference in his favour that the person in possession is not holding for herself". He went on to explain (*ibid*) that if the squatter "is there as the servant or tenant of the true owner you may be perfectly sure that she would not pay the rates".

[63] Unless the unresolved conflict of evidence discussed in note 55 above were to have been resolved in favour of the paper owner.

[64] Jourdan and Radley-Gardner note 25 above, p 508, referring to the recommendation of the Law Reform Committee in its *Twenty-First Report (Final Report on Limitation of Actions)* (Cmnd 6923, 1977) paras 3.56, 46.

[65] [1968] 1 QB 107.

indulgence" to the rector of a church by not collecting rent in respect of an oral periodic tenancy.[66] In England and Wales, a parallel rule deeming a tenancy at will to end for limitation purposes after a year[67] was removed by the Limitation Amendment Act 1980.[68] Ireland, however, retains this latter rule,[69] as do various Commonwealth jurisdictions.[70] Thus, if the rule in relation to oral periodic tenancies were to be reformed in Ireland, it might have to form part of a slightly larger reform project.

In fact, as in England and Wales, the area under discussion has been the subject of a law reform recommendation in Ireland. However, the Irish proposal goes essentially in the opposite direction, involving an extension of the artificial termination rule (currently restricted to oral periodic tenancies) to periodic tenancies in writing.[71] In a 1989 Report, the Irish Law Reform Commission (LRC) took the view that it was "remarkable" that, in a case where a periodic tenancy in writing had not been otherwise determined, a landlord could recover possession no matter how long rent "had been unpaid and the tenant and his successor remained in possession without acknowledging the title of the landlord".[72] The LRC also felt that it was anomalous that a different position prevails in the case of a tenancy for a certain term, where time starts to run when the term has elapsed.[73] This recommendation was reiterated by the LRC in 2005[74] but, in the

---

[66] *Ibid*, 123-124. Russell LJ commented (*ibid*, 124) that "their reward may be in the next world … [b]ut in this jurisdiction we can only qualify them for that reward by … dismissing their action".

[67] In s 9(1) of the Limitation Act 1939.

[68] s 3(1).

[69] Statute of Limitations 1957, s 17(1).

[70] See *Megarry & Wade*, note 44 above, p 1474, citing *Ramnarace v Lutchman* [2001] 1 WLR 1651 (Trinidad and Tobago).

[71] Law Reform Commission *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30–1989), pp 27-29 (on BAILII). See also JC Brady "Periodic Tenancies in Writing and the Running of Time" (1986) 80 Gazette of the Incorporated Law Society of Ireland 253; *Foreman v Mowlds* (Irish High Court, *ex tempore*), noted (1985) 3 Irish Law Times 47; *Sauerzweig v Feeney* [1986] IR 224 (Irish Supreme Court); *Dooley*, [40]-[43].

[72] *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30–1989), p 28.

[73] *Ibid*. For the proposition that time runs in favour of the tenant at sufferance in such cases, see *Megarry & Wade*, note 44 above, p 1474 (and pp 793-794) and Wylie *Irish Land* Law note 8 above, p 1060.

context of a decision to exclude the reform of adverse possession from the relevant Act, did not feature in the major overhaul of Irish land law represented by the Land and Conveyancing Law Reform Act 2009.

Although the arguments seem to be finely balanced, it may be that the retention of the current rule on oral periodic tenancies can be defended.[75] Certainly, in practical terms in Ireland, the rule is not likely to be altered in the near future (and it is more likely, in fact, that it will be confirmed and extended to written periodic tenancies). None of this, of course, provides any consolation to the squatter in *Dooley* who, it has been argued, should have benefitted from the rule but did not.

---

[74] *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), p 323 (BAILII).

[75] Note that, in rejecting the Law Reform Committee's recommendation for modification of the rule in England and Wales, Lord Hailsham argued that "[i]f a periodical tenant could never prescribe against his landlord when the latter vanished, he would be disinclined to improve or maintain the property and would have difficulty in making title for the purposes of a mortgage for improvements, and so on": Hansard, HL Official Report (5th series) col 1232, 25 June 1979, quoted by Jourdan and Radley-Gardner note 25 above, p 508.