The Rule in Leigh v Jack – Judicial Heresy or Inspiration?

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The rule in Leigh v Jack\(^1\) has been the target of much judicial and academic criticism since its inception. As property lawyers know, this rule prevents adverse possession from taking place where the current use by the squatter is not inconsistent with the owner’s future plans for the property. While the English judiciary has delivered the final nail in the coffin in respect of the rule in recent times, its status remains more controversial elsewhere. This paper begins by briefly tracing the history of this rule in its country of origin and then describes its current standing in both Ireland and Ontario, Canada. Its primary aspiration, however, is to critique certain arguments which were recently made in the Irish and Canadian context in favour of the retention of the rule in Leigh v Jack (or the ‘inconsistent use test’ as it is known in Canada) on the basis that it ensures that the position of the owner is more effectively protected.

Buckley made a case for the retention of the rule in Leigh v Jack in an article which appeared in the Irish Conveyancing and Property Law Journal in 2006.\(^2\) This article was published during the period of uncertainty over the compatibility of the pre-2003 English adverse possession regime with article 1 of the First Protocol of the European Convention on Human Rights which preceded the Grand Chamber decision in Pye (Oxford) Ltd v United Kingdom.\(^3\) He also claimed that the rule in Leigh v Jack still formed part of Irish law, thus insulating the Irish Government from a legal challenge akin to that arising in Pye. In an article appearing in the McGill Law Journal in 2010,\(^4\) Katz maintained that the adoption of an ‘inconsistent use’ model of adverse possession would permit the radical transformation of squatters into owners without collapsing into a moral paradox where the law appears to reward the theft of land. She believes that this approach recognises the authority of the owner to set an agenda for the land and to remain the owner without maintaining possession but also fills a vacancy in ownership where the owner is no longer exercising his authority and the land has become agenda-less.

This paper concludes that the retention/reincarnation of the rule in Leigh v Jack would be an extremely flawed method of reforming the Irish law on adverse possession to afford more protection to the owner, particularly in light of the pragmatic alternative of introducing a qualified veto system of adverse possession.

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\(^1\) (1879) 5 Ex D 264.
\(^3\) (2008) 46 EHRR 45