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FOREWORD BY THE RT HON LADY DORRIAN RETIRED SENATOR OF THE COLLEGE OF JUSTICE AND FORMERLY THE LORD JUSTICE CLERK AND PRESIDENT OF THE SECOND DIVISION OF THE INNER HOUSE OF THE COURT OF SESSION

It is a great pleasure to introduce the 13th volume of the Aberdeen Student Law Review. As with its predecessors, the standard of the work contained within serves as tribute to the scholarship and intellectual approach of the contributors and editors. The former are to be congratulated for the quality of their disquisitions and the latter for selecting such interesting articles, and encouraging academic writing of the highest calibre.

The subject matter ranges from an examination of how the concept of possessory rights, in particular that of adverse possession, can be understood or explained within a registered title-based system, to the potential ramifications of the decision of the American courts in *In Re Purdue Pharma LP*, with an interesting incursion en route into the important question of access to justice in public interest judicial review cases. The international dimension is continued in the final case note on the decision of the US Supreme Court in *Dobbs v Jacson Women's Health Organisation* (overturning *Roe v Wade*) and the potential for the approach taken therein generally to affect the protection of constitutional rights.

It will be apparent therefore that this collection of articles demonstrates the strength of legal scholarship and analysis at the University of Aberdeen, so important to the future development of the law. Readers will be informed, educated and impressed.

Rt Hon Lady Dorrian
Honorary Editor, Aberdeen Student Law Review
Edinburgh, May 2025

FOREWORD BY DR EUAN WEST, LECTURER AT THE SCHOOL OF LAW, UNIVERSITY OF ABERDEEN

Since my time on the Aberdeen Student Law Review's editorial board, now some years (and volumes) ago, it has been a pleasure to see the publication continue to flourish. Volume 13 maintains that trend. Not only are the articles thought-provoking; they are also a pleasure to read. Doubtless each author is passionate about their subject, but that does not prevent any of them from writing about it clearly, and from making their arguments accessible to non-experts. Perhaps most importantly, the legal analysis of each article is up to the usual high standard that readers have come to expect from the ASLR.

No publication is assembled overnight. The process of promoting it to potential contributors, of reviewing submissions and of editing and proof-reading those which have been accepted for publication is onerous and time-consuming. It requires a significant degree of focus, patience and perseverance, often in the face of other pressing commitments. Yet challenges have their rewards. There is satisfaction to be had in seeing the final draft in print, and many of the skills acquired in editing the work of others and of engaging with legal areas that we might otherwise neglect or avoid remain useful long after our time as editors has come to an end. That, at least, is my experience. There are many ways of improving our legal writing and of sharpening our analytical skills, but editing the work of others is an especially strong one.

The ASLR is written, and edited, by students and alumni of the University of Aberdeen's School of Law, yet I know from my own time as an editor how much of its success depends on the continuing support of staff, both academic and administrative. As Honorary Secretary, it has been my privilege to play some small role in that tradition of support. I hope that you enjoy reading this volume's contributions as much as I did.

Euan West
Honorary Secretary, Aberdeen Student Law Review
Aberdeen, February 2025

EDITORIAL FOREWORD

The Aberdeen Student Law Review has always attracted submissions from students on a range of issues which reflect their interests in some of the most significant legal issues of the day, as well as a search for a deeper analysis of the law - and we are confident to say that Volume 13 is no different in this respect to the volumes that have preceded it. Authors have, we believe, written persuasively about the concerns of weakening constitutionally guaranteed, but unenumerated rights, in the United States; exploring the interaction between the doctrines underpinning access to justice with the practical reality of the costs of accessing that justice in Scotland as well as in England and Wales; and exploring the difficulties in accommodating tort victims' rights to sue their tortfeasors in insolvency, seen especially in the light of the influence American jurisprudence on the matter may have on the development of our own laws here in the United Kingdom. We would like to the thank the authors for their articles and the passion they have put into their projects, and hope that that dedication to academic rigour and argumentation is self-evident to readers in the following pages. We would also like to thank both the members of the Editorial Board and our peer reviewers, for their time, effort, and commitment to the ASLR and for making Volume 13 a reality.

Volume 13 would also not have been possible without the generous support of the ASLR's sponsors, Stronachs. This support also takes the form of the Stronachs' Prize, a prize that is awarded to an author for the best paper published in that year's volume of ASLR, recognising the outstanding quality of that submission. We are very happy to announce that this year's Stronachs' Prize has been awarded to Bethany Hunter for her paper, 'Doctrinal Considerations for England's Land Registration Project: A View from Scotland'.

The ASLR remains as the only mechanism for students at the University of Aberdeen's Law School to internally subject their academic thinking to rigorous scrutiny and peer review, and if one flicks back through the previous volumes of the ASLR, one can find authors and Editorial Board members who have gone on to achieve careers in practice, academia and have even gone on to attain positions within the Law School as members of staff. Serving as the Editors in Chief for Volume 13 of the ASLR has certainly been educational, rewarding, and a highlight of our time at Aberdeen, and we would like to wish the best of luck to Erin Lewis and Zoha Nawaz, for their tenures as the incoming Editors in Chief of the Aberdeen Student Law Review.

Christiana H. Cameron and Syed M. Humaid Adil
Editors in Chief, Aberdeen Student Law Review
Glasgow and Oxford, February 2025

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DOCTRINAL CONSIDERATIONS FOR ENGLAND'S LAND REGISTRATION PROJECT: A VIEW FROM SCOTLAND

Bethany Hunter*

ABSTRACT

England's traditional doctrine of land law differs from Scotland's in many important ways. One of the most significant differences is England's recognition of possessory rights. This recognition further gives rise to an important concept in English land law: relativity of title. As England has attempted to reform its land law over the years, and establish a system where title flows entirely from the Land Register, the Law Commission has attempted to reconceptualise this understanding of title and possessory rights. No concept is more emblematic of the Law Commission's struggle to implement these changes than adverse possession, which no longer sits well in a registered title-based system. It will be argued that Scotland's doctrinal understanding of land law, which does not place emphasis on possessory rights, has, thereby, always been more favourable for land registration. In reforming its land registration scheme, however, England missed an opportunity in failing to consider a similar approach to Scotland.

Keywords: Land registration, English land law, positive prescription, adverse possession, Scots land law

1. Introduction

When reforming adverse possession in registered land, the Law Commission (LC) has sought to bring the doctrine in line with the principles and objectives of land registration. In doing so, they have, arguably, removed its teeth and instituted procedural requirements which do not succeed in bringing about the change in doctrine they allegedly seek. As a result of its possessory nature, England's traditional land law does not lend itself to land registration or register-based title. Land registration projects aim to give purchasers a complete view of the properties that are available and allow them to have full knowledge of the obligations or encumbrances that might affect a property they wish to purchase.[1] This can 'give holders of

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[1] Judith-Anne Mackenzie and Aruna Nair, *Textbook on Land Law* (17th edn, OUP 2018) para 6.2.1.

land formal rights and increase their tenure security',[2] which has always been of particular importance for English landowners who, in the past, would have to contend with numerous competing interests relating to their property.[3] Historically, this resulted in English landowners only being able to prove 'a relative title – an entitlement that is better than that of whoever is disputing it – rather than an absolute title indisputable by anyone at all'.[4] In pursuing the goals of land registration and the redefinition of the source of ownership, reforms have struggled fully to alter this status quo and have created dichotomous regimes for unregistered and registered land. This is most evident in the doctrine of adverse possession, which progressed from medieval recovery actions to a perceived quirk within the modern land law, that still relies on possession's connection to ownership. Because of this, adverse possession is in fact still antithetical to modern understandings of ownership within the land registration project. The Land Register in England has attempted to account for this by creating separate operations of the limitation principle for registered and unregistered land and abolishing the notion that title to registered land can be extinguished by possession alone.[5] However, the introduction of such title-based ownership, inherent under the Land Register, remains undermined by adverse possession. The reforms further entrench a fundamental legal difference in the nature of ownership in registered and unregistered land. On this basis, a missed opportunity to harmonise these types of ownership, bringing unregistered land into the modern era, as well as further promoting the new doctrine that title must flow from the register, will be discussed.

The Scottish land registration project and positive prescription of title was always better poised to achieve this harmonisation. The Scottish system of *a non domino* dispositions has had many of its own complications, but, at its core, remains faithful to a title-based conception of property ownership. While many commentators recognise that adverse possession is emblematic of the principles of English land law, few recognise that the same is true for its Scottish equivalent. Further, it will be shown that the practical justifications, as well as public and political concerns, regarding the doctrines of adverse possession and positive prescription, have detrimentally impacted their most recent reforms. This analysis will demonstrate that even though full agreement as to the desirability of adverse possession or positive prescription is highly unlikely, each doctrine is truly a product of its own property law system and history. Additionally, while there is a fundamental lack of appreciation of this fact in relation to the Scots law, the reforms within the Land Registration etc (Scotland) Act 2012 are more congruent,[6] perhaps accidentally, with a title-based land ownership system, than those for adverse possession in the Land Registration Act 2002.[7] Therefore, it will become apparent that even though the LRA responded to practical and societal concerns, it was a missed opportunity to truly bring English property law in line with a title-based system.

[2] John W Bruce and others, *Land Law Reform: Achieving Development Policy Objectives* (World Bank Publications 2006) 143.
[3] See Mackenzie and Nair (n 1).
[4] Elizabeth Cooke, *The New Law of Land Registration* (Bloomsbury Publishing 2003) 244.
[5] Chris Bevan, *Land Law* (4th edn, OUP 2024) 156-199.
[6] Hereinafter 'the 2012 Act'.
[7] Hereinafter 'the LRA' or 'the 2002 Act'.

1.1 Scope of discussion

It should be briefly noted what topics will not be dealt with in this article. It will not discuss issues of forgery of deeds or titles. Registration errors will only be mentioned where relevant, such as in relation to positive prescription and the Keeper's warranty. There will not be much detail on *JA Pye (Oxford) Holdings Ltd v Graham*,[8] and the subsequent ECtHR and Grand Chamber decisions, as, following the Grand Chamber decision, the doctrine of adverse possession is ECHR compliant and much of the case's interest is not directly related to the present discussion. Lastly, the classes of title dealt with will be freehold (i.e. ownership), not leasehold or other prescriptive rights in English law, such as easements and *profits à prendre*.

2. Origins of Adverse Possession and English Land Ownership

Limitation, in its basic form, operates as a check on gratuitous possessory claims to one's land. This section will help to contextualise the origins of limitation and how this spurned adverse possession. This detailed history will also aid in the analysis of the modern law. The subsequent sections will look at the way in which land registration was introduced and developed in England, how the LC has affected the LRA, and where the law stands today.

2.1 Early history: The assize of novel disseisin and limitation

The need for limitation periods, in relation to possessory claims on land, sprang from the storied past of the assize of novel disseisin.[9] This assize essentially required a dispossessed landowner to bring an action before the 'itinerant justices' of the court in order to regain possession.[10] Holdsworth describes the action as such protecting 'the man in possession from attack; and it restores a person disseised if he takes proceedings *at once*'.[11] The act of 'disseisin' is best understood as usurping one who has seisin, possession, in freehold land.[12] The introduction of this action resulted in a dispossessed owner no longer being encouraged or obliged simply to take his land back by force.[13] He could now have recourse to the court. Further, when the action was in its infancy, there were strict time limits within which to bring a claim.[14] However, by 1242, these restrictions were loosened and there was all but no limitation on when one could bring an action.[15]

[8] *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3.
[9] Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (2nd edn, first published 1898, Liberty Fund 2010) 155-156.
[10] ibid 155.
[11] William S Holdsworth, *A History of English Law*, vol 2 (Methuen & Co 1909) 5 (emphasis added).
[12] George P Costigan, 'Conveyance of Lands by One Whose Lands Are in the Adverse Possession of Another' (1905-1906) 19(4) Harvard Law Review 267, 268-69; NB, whilst further qualifications of what exactly constitutes disseisin exist, they will not be dealt with here.
[13] Pollock and Maitland (n 9) 156.
[14] E.g., where the disseisor was actually on the land in question, proceedings had to commence within just four days: Holdsworth (n 11) 5.
[15] ibid 6-7.

Unsurprisingly, these developments revealed many flaws with the assize and fuelled the evolution of the closely related and versatile writ of entry sur disseisin.[16] Such writs of entry were 'extensions' of the novel disseisin,[17] available where a party to the assize of novel disseisin had died,[18] where the central question was whether the possessor had come into possession in the manner they claimed,[19] or in circumstances where the wrong committed did not amount to disseisin.[20] This action was also able to remedy the defect of the 'tortious' or personal nature of the novel disseisin, bringing these possessory actions under the remit of real actions for rights in land.[21]

Therefore, it must be stressed that, upon its introduction the assize of novel disseisin was not concerned with returning *ownership* to the dispossessed, but only *possession*.[22] This is because 'the question of the ultimate better right… remained always to be tried out, if necessary, in an action begun by writ of right'.[23] Additionally, this writ would not restore ownership as we might think of it, but instead only allowed the successful claimant to defend his 'title' against third parties for a year and one day after winning his action.[24] In this way, seisin was the singular legal way in which to 'have' a freehold estate in land.[25] Holdsworth acknowledges that, during these incredibly early evolutions of the law, the larger concern was determining only the 'dispute between litigants' as opposed to the practical, theoretical, or legal nature of ownership and possession of land.[26] Even so, as more cases were tried, more 'incidental questions of law and fact' were considered by the court.[27] This illusory understanding of how an owner truly 'owns' property remains central to the present discussion, as well as to discussions surrounding property law today.[28]

Eventually, we see this question as to 'which party has the better right' become fundamental to the nature of English land law and begin to underpin many aspects of its operation – historical and modern.[29] As we know, the modern English landowner has not, in actuality, traditionally 'owned' their land, but rather owned the 'collection of rights and duties' in relation

[16] GDG Hall, 'Early History of Entry Sur Disseisin' (1967-68) 42 Tulane Law Review 584; Donald W Sutherland, *The Assize of Novel Disseisin* (Cambridge University Press 1973) 169-171.
[17] Joseph Biancalana, 'The Origin and Early History of the Writs of Entry' (2007) 25(3) Law and History Review 513, 516.
[18] George E Woodbine, 'Cases in New Curia Regis Rolls Affecting Old Rules in English Legal History' (1930) 39 Yale Law Journal 505, 507.
[19] Holdsworth (n 11) 8.
[20] Hall (n 16) 584.
[21] ibid; cf Holdsworth's contention that the novel disseisin should in fact be considered among the real actions as it relates to recovery of 'freehold interest in lands' (Holdsworth (n11) 1), even in opposition to Bracton who considered it a personal action (Frederic William Maitland (ed), *Bracton's Note Book,* vol 1 (Cambridge University Press 2010) 135).
[22] Pollock and Maitland (n 9) 156.
[23] John Fischer Williams, 'Sovereignty, Seisin, and the League' (1926) 7 British Yearbook of International Law 24.
[24] Holdsworth (n 11) 6.
[25] Costigan (n 12) 267.
[26] Holdsworth (n 11) 4.
[27] Holdsworth (n 11) 6.
[28] Kevin Gray, 'Property in Thin Air' (1991) 50(2) Cambridge Law Journal 252, 252.
[29] Williams (n 23) 24; Holdsworth (n 11) 4.

to their particular parcel.[30] As shown above, this was more significant a distinction before the introduction of a title-based Land Register; the changes that the registration project introduced will be discussed below.

2.2 The beginning of legislative intervention

Legislative reform was introduced by the Limitation Act 1623.[31] The 1623 Act applied to many types of actions, including instituting a restriction on the time in which an owner with a better title could bring a claim against an adverse possessor.[32] Gray and Gray note that this 'indirectly' and 'inescapably' led to the doctrine of adverse possession, as an adverse possessor could now wait out the relevant limitation period.[33] This essentially protected their possessory claim against 'all prior rights of recovery', giving them an absolute title and supplanting the 'true' owner.[34]

The next relevant era of land reform came in the mid-nineteenth century with the introduction of voluntary land registration.[35] Here, limited compulsory land registration was introduced by the Land Transfer Act 1897.[36] This Act only allowed an adverse possessor to gain a registered title if the current registered proprietor had a mere possessory title.[37] Once general compulsory registration was introduced under the LRA,[38] a possessor could petition the court for rectification of the register in their favour.[39] The court, however, retained discretion as to whether or not to grant such rectification,[40] and the legal requirements to give effect to the adverse possessor's title were complex to say the least.[41] Under section 75(1) of the 1925 Act, the Limitation Act would operate in the same way as before registration, and allow a possessor to gain an interest in an estate following the relevant limitation period. Upon reaching the end of the limitation period, the registered owner would not have their title extinguished but would be deemed to be holding the property in trust for the benefit of the possessor.[42] The possessor then had the option to apply to become the registered proprietor once the registrar was 'satisfied as to the applicant's title'.[43]

As introduced, the Land Register is intended to give purchasers any and all information needed to make an informed decision on a given property. Moreover, the 1925 reforms were intended to reduce the number of overriding interests that could compete for a given piece of property,

[30] Mackenzie and Nair (n 1) 1.3.
[31] 21 Ja I c 16 (hereinafter 'the 1623 Act').
[32] Kevin Gray and Susan Gray, *Elements of Land Law* (5th edn, OUP 2009) para 9.1.1; Limitation Act 1623 (21 Ja I c 16).
[33] ibid.
[34] ibid.
[35] Mackenzie and Nair (n 1).
[36] ibid.
[37] Elizabeth Cooke, 'Adverse Possession – Problems of Title in Registered Land' (1994) 14(1) Legal Studies 1.
[38] The 1925 Act; Mackenzie and Nair (n 1).
[39] Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 1.
[40] ibid 1.
[41] ibid 2.
[42] The 1925 Act, s 75(1).
[43] Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 2; The 1925 Act, s 75(2)-(3).

and increase 'dynamic security' for purchasers.[44] Curiously, under section 70(1)(f) of the 1925 Act, one of these overriding interests could be an adverse possessor claiming under the Limitation Act.[45] This gave two options to the adverse possessor. The method of instituting a trust to allow conveyance of the land and give the registered owner options in disposing of it can be considered 'ingenious,' but unfortunately presented numerous problems:[46] namely, under this system the adverse possessor is being treated almost favourably compared with any other party coming into contact with the land.[47] Additionally, the trust mechanism is far removed from the position in unregistered land where the owner's title is extinguished.[48] This can lead to dichotomous outcomes for cases involving registered as opposed to unregistered land. We see this happening through the divergent outcomes of *Fairweather v St Marylebone Property Co Ltd*,[49] and the nearly identical *Spectrum Investment Co v Holmes*.[50]

While in *Marylebone* there was a positive outcome for the proprietor, *Spectrum* found that the same outcome was not possible in registered land.[51] As Cooke points out, these myriad issues contradicted the aims of the 1925 reforms, as they were intended to cut down on some of the complexity and allow for more certainty in land transfers.[52]

2.3 The Law Commission Reports leading to the Land Registration Act 2002

Clearly, as time passes, issues will arise in practice that need to be remedied. Firstly, in the LC's Report 254, it was suggested that the status of the possessor's overriding interest under section 70(1)(f) of the 1925 Act, where they have 'rights acquired or in course of being acquired', was unsatisfactory.[53] The LC argued for repeal of the section on the basis that it was illogical and undesirable to protect the rights of a possessor who had not yet met the limitation period, and of whose presence an owner or prospective buyer may not even be aware.[54] Thus, in the resulting LRA, section 70(1)(f) of the 1925 Act was repealed.[55]

When focusing in more detail on the state of adverse possession, the LC explains that 'while the present law can be justified as regards unregistered land, it cannot in relation to registered title'.[56] They argue that their proposed system for registered land would be 'consistent with the

[44] Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 39-45.
[45] Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 3.
[46] ibid 3-4.
[47] ibid 4.
[48] ibid 2. NB *Lewis v Plunkett* [1937] 1 All ER 530, [1937] Ch 306, 310-311 (Farwell J): 'the effect of the Statutes of Limitations is not to convey any estate or interest from the person in whom it was originally to the trespasser… but on the other hand the estate… is put an end to once and for all'.
[49] [1963] AC 510; Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 6-8.
[50] [1981] 1 WLR 221.
[51] Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 7.
[52] ibid 1-3; Cooke, 'Adverse Possession – Problems of Title in Registered Land' (n 37) 39-45. See also Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) 10.28-10.39 (hereinafter 'LCR 254').
[53] LCR 254 (n 52) 5.43.
[54] ibid 5.46-5.48.
[55] LRA 2002, sch 13.
[56] LCR 254 (n 52) 10.2.

principles of title registration'.[57] This is because it responds to a more limited class of practical circumstances that would be assisted by a doctrine of adverse possession because registration has somehow fallen short.[58] These circumstances are: disappearance of the registered proprietor,[59] when parties have concluded 'dealings' and failed to register them,[60] where the register is inconclusive,[61] and where *bona fide* possession results from a 'reasonable mistake as to rights'.[62] Thus, the LC's proposals, and the resulting LRA, were intended to allow adverse possession only in these cases, where it would be 'essential to ensure the marketability of land or to prevent unfairness'.[63] They also explain that the new 'substantive law' of adverse possession aims to bolster registered title against potential adverse possessors.[64]

As we can see in the Consultative document and subsequent draft bill, the LC is sure to delineate the utility of adverse possession in relation to registered and unregistered land.[65] They do so primarily on the basis that possession is integral to the operation of *relativity* of title for unregistered land, whereas the Land Register acts as the *basis* of title for registered land.[66] The LC further cites 'public disquiet' over judicial decisions, such as the famous *JA Pye (Oxford) Holdings Ltd v Graham*,[67] as support for their reforms.[68] Following this, the aforementioned reforms from LCR 254 were incorporated, some modified based on consultation responses, into the draft bill.[69] The resulting scheme was thereby intended to balance protection of registered title against allowing adverse possession to operate where it would serve the land in question, as noted in *Best v Chief Land Registrar*.[70] These reforms and the present state of adverse possession will now be explained in relation to both registered and unregistered land.

2.4 Registered Land under the 2002 Act

As explained above, an adverse possessor under the 1925 Act would have an overriding interest in the land before the end of the limitation period, which was discontinued, along with the section 75 trust mechanism, under the LRA.[71] Accordingly, the LRA disapplies the operation of the Limitation Act 1980 in relation to registered land, thereby introducing 'an unprecedented premise' into English land law that a registered owner will not be barred from their ownership rights by 'mere lapse of time'.[72] This accomplishes the LC's goal of making the Land Register

[57] ibid.
[58] ibid 10.11-10.16.
[59] ibid 10.13.
[60] ibid 10.14.
[61] E.g., where boundary lines are 'undetermined': ibid 10.15.
[62] ibid 10.16.
[63] ibid 10.43.
[64] ibid 10.44.
[65] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) Part XIV (hereinafter 'LCR 271').
[66] ibid 14.2-14.4 and 14.54; LCR 254 (n 52) 10.5-10.10.
[67] [2000] Ch 676.
[68] LCR 271 (n 65) 14.4.
[69] ibid.
[70] ibid 14.6; *R (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17 [22].
[71] Mackenzie and Nair (n 1) 7.2.3; Gray and Gray (n 32) 9.1.32; LRA 2002, sch 6, para 9(1).
[72] Gray and Gray (n 32) 9.1.21; LCR 271 (n 65) 14.5 and 14.9.

the dominant source of title and ownership. It does not, however, take into account that possession is still necessary as the starting point for adverse possession claims.

Procedurally, the responsibility is on the adverse possessor to make their claim to the Land Register for rectification in their favour after possessing the relevant property for ten years.[73] After the application is submitted, the registrar is required to notify the paper owner of the property in question and the owner has the right to object to rectification.[74] However, as the LC stated in the draft bill, this notification is crucial for the owner as they are being given one chance, and one chance only, to object to the application.[75] Objections can be worked out between the parties,[76] or may require resolution by the Adjudicator to the Land Registry.[77] The Adjudicator is able to evaluate the case, often founded on one of the Paragraph 5 exceptions, and decide whether to direct the Chief Land Registrar to give effect to the original rectification application.[78]

Paragraph 5 exceptions allow for an adverse possessor's claim to succeed even where the paper owner has objected.[79] These exceptions include, equity by estoppel,[80] i.e. it would be 'unconscionable' to dispossess the applicant because the proprietor had 'expressly or impliedly encouraged' the possession, which the adverse possessor relied on to their detriment.[81] Secondly, the possessor may be entitled 'for some other reason' in addition to the adverse possession,[82] and, lastly, a reasonable mistake regarding a boundary may have occurred.[83] As noted later on by the LC, the first two exceptions are not based on adverse possession. Rather, they give an 'adverse possessor' the ability to justify their possession on some other grounds, the second exception being the most explicit example of this.[84] In deciding these cases, the relevant Adjudicator will use the well-known common law tests for evaluating the conduct

[73] LRA s 97, sch 6 para 1(1); HM Land Registry, 'Practice Guide 4: adverse possession of registered land' (HM Land Registry 2021) ch 2 < www.gov.uk/government/publications/adverse-possession-of-registered-land/practice-guide-4-adverse-possession-of-registered-land> accessed 12 March 2022.
[74] LRA, sch 6, para 2.
[75] Gray and Gray (n 32) 9.1.24; LCR 271 (n 65) 14.6. For the argument that the 2002 Act allows adverse possessors to ensure continued possession by avoiding the making of an application to be registered as proprietor, see 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.
[76] LRA 2002, s 73(1).
[77] LRA, s 73(7).
[78] LRA, sch 6 para 5; Gray and Gray (n 32) 9.1.25-9.1.30.
[79] LRA, sch 6 para 5.
[80] LRA, sch 6 para 5(2)(b); Gray and Gray (n 32) 9.1.28.
[81] For a practical example see *Ashworth v Stroud and Stroud* [2022] UKFTT 0056 (PC), REF/2020/0092 concerning the effects of an oral agreement regarding possession of a car-turning area which was later enclosed as per the agreement.
[82] LRA, sch 6 para 5(3). Gray and Gray (n 32) give the example of receiving the property under the will of a deceased proprietor 9.1.29. For a practical example, see *Kitney v Deadwood Properties Ltd* [2021] UKFTT 0426 (PC), REF/2019/0139 where solicitors failed to register the purchases of garages at auction so the possessors had indeed purchased the relevant property. This is probably the least-used ground. See Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) Ch 17 (hereinafter 'LCR 380').
[83] LRA 2002, sch 6 para 5(4)-(5); Gray and Gray (n 32) 9.1.30. For a practical example see also *Tucker and Hill v Campbell and Campbell* [2022] UKFTT 0071 (PC), REF/2020/0309, where the disputed land was a section of driveaway bounding neighbouring properties.
[84] LCR 380 (n 82) 17.33-17.44.

needed for adverse possession: physical possession, that is adverse to the 'true' owner, and the intent to possess the property.[85]

2.4(a) Unregistered land: Limitation Act 1980

Under the common law, in order to prove adverse possession, a possessor must have factual possession, *factum possessionis*, and intention to possess, *animus possidendi*.[86]

The finer details of factual possession are famously explained by Slade J in *Powell v McFarlane*.[87] The first requirement, regarding unregistered land, is continuous possession for twelve years.[88] During these twelve years, there needs to have been 'an appropriate degree of physical control' and evidence that one has been using the land 'as an occupying owner might have been expected to deal with it'.[89] This means the courts, or indeed Adjudicators for registered land, will have discretion as to what constitutes the requisite degree of possession in a given case.[90] In general, such possession must be open,[91] and adverse.[92] It cannot be consensual or otherwise based on permission or agreement with the paper owner.[93] Therefore, in order to be defeated on this ground, the possession would have to be under a relevant title, e.g. a licence, that would indicate permission on the part of the paper owner.[94]

The intent to possess must also be proven.[95] This intent can be *mala fide* or *bona fide*,[96] and must be deduced from the conduct of the possessor.[97] Additionally, the law does not require 'an intention to own or even an intention to acquire ownership' as the test is merely *possession*.[98]

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[85] *Buckinghamshire CC v Moran* [1990] Ch 623; *Colchester Borough Council v Smith* [1992] Ch 421.
[86] Gray and Gray (n 32) 9.1.43; John F Josling, *Periods of Limitation* (4th edn, Oyez Pub 1973) 74. See also *Paradise Beach and Transportation Co v Robinson* [1968] AC 1072; [1968] 1 All ER 530.
[87] (1977) 38 P & C R 452 [470]; Gray and Gray (n 32) 9.1.43; Mackenzie and Nair (n 1) 7.3.1.1; HM Land Registry Practice Guide 4 (n 73) section 2.4.
[88] *Seddons v Smith* (1877) 36 LT 168; Limitation Act 1980, s 15(1).
[89] *Powell* (n 87) [470] (Slade J), approved by the House of Lords in *JA Pye (Oxford) Ltd and Others v Graham and Another* 2002 UKHL 30 [31]-[56]; Gray and Gray (n 32) 9.1.52.
[90] *Red House Farms (Thornden) Ltd v Catchpole* [1977] 2 EGLR 125 (where shooting on the relevant land was sufficient to establish possession); Mackenzie and Nair (n 1) 7.3.1.1; Cooke, *Land Law* (n 44) 246-47 ('fencing an area and padlocking the gate' as in *Buckinghamshire CC v Moran* [1989] 2 All ER 225, [1990] Ch 623); Gray and Gray (n 32) 9.1.52.
[91] Gray and Gray (n 32) 9.1.46; *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273 [296] (Lord O'Hagan): 'The open assertion of a right to protect the waters by the Respondent and by him alone, the universal admission of that right by non-resistance to it… these things corroborate at once the case of title and the case of possession'.
[92] Gray and Gray (n 32) 9.1.46-7; Mackenzie and Nair (n 1) 7.3.1.1; Josling (n 86) 74; *Treloar v Nute* [1976] 1 WLR 1295.
[93] E.g. licence and lease. See Gray and Gray (n 32) 9.1.47-9.1.48; *Smith v Lawson* (1998) 75 P & C R 466.
[94] *Rhondda Cynon Taff County BC v Watkins* [2003] 1 WLR 1864.
[95] Gray and Gray (n 32) 9.1.43; Cooke, *Land Law* (n 44) 247; Mackenzie and Nair (n 1) 7.3.1.2.
[96] Gray and Gray (n 32) 9.1.54; Mackenzie and Nair (n 1) 7.3.1.2; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85 [87E] (Gibson LJ).
[97] Gray and Gray (n 32) 9.1.55; HM Practical guide 4 (n 73) 2.2; *Powell* (n 87) approved by *Pye* (n 89).
[98] *Buckinghamshire CC* (n 90) approved by *Pye* (n 89).

From these modern developments, we see the clear implementation of the LC's recommendations and how adverse possession has been fundamentally changed for registered land. We will now consider the closely related Scottish doctrine of positive prescription.

3. Origins of Positive Prescription and Scottish Land Ownership

Scottish land registration has a much longer and more complex history than its English counterpart. As far back as 1504, there were numerous statutes detailing the recording of deeds which documented the 'ceremony of sasine',[99] a process of land transfer for lands held from the Crown.[100] The most important of these early attempts at land registration was the Registration Act 1617, which created the Register of Sasines where the Keeper recorded the collection of deeds relating to each property.[101] The creation of the Register of Sasines was likely in response to the need for 'reliable records',[102] publicity, and the protection of buyers.[103] It can also be noted that the 'suitability' of Scots law's treatment of land transfer, 'with its insistence on writs, not…mere possession', encouraged this early introduction of registration.[104] In these early days of the Sasine Register, the purpose of conveyance publicity ranged from providing information for lenders and buyers, to fathers investigating their daughters' potential husbands.[105]

According to Reid, the 1617 Act[106] was quite 'unclear' on its direct effect on the nature of ownership in Scotland.[107] In adding the step of registration on the Register of Sasines, one could argue that ownership would not pass until such registration occurred. However, the statute went out of its way to explain that the recording of the writs would be 'without prejudice to a right' to use those writs against the 'maker thereof',[108] and any of his successors.[109] For centuries after the institution of the Register, a debate was waged over the legal importance and effect of registration: did it confer a real right or merely recognise an existing one? Was it

[99] The Scottish counterpart to seisin discussed above. NB the special notarial and procedural requirements.
[100] Kenneth G C Reid, 'From Registration of Deeds to Registration of Title: A History of Land Registration in Scotland' (2015) University of Edinburgh Research Paper Series 2015/29, <https://dx.doi.org/10.2139/ssrn.2655598> accessed 17 March 2022, 1.
[101] The 1617 Act; Reid (n 100) 2; George L Gretton and Andrew J M Steven, *Property, Trusts, and Succession* (4th edn, Bloomsbury 2021) 7.3; George L Gretton and Kenneth G C Reid, *Conveyancing* (5th edn, W Green Reuters 2018) 6-02.
[102] Reid commits no more to these theories than Ockrent, whom he cites, see Reid (n 100) 2; L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (William Hodge & Company 1942) 45-53.
[103] Reid (n 100) 2. NB Bell *Principles* §772, explaining that the Register of Sasines was intended to protect against forgers through publicity of conveyancing which would also allow the public to be informed.
[104] Reid (n 100) 2.
[105] ibid 3.
[106] c 16; RPS 1617/5/30.
[107] Reid (n 100) 6.
[108] Wording altered from the original: 'maker thairof'.
[109] Reid (n 100) 6.

as essential to conveyance as symbolic delivery of the sasine through earth or stone?[110] Lord Kames believed the former,[111] while Ross believed the latter.[112]

This question found a preliminary answer, some 200 years after the register was created, from the Court of Session in *Young v Leith*.[113] In considering the question, Lord Fullerton, with unanimous support of a full bench, notes that the Scottish system of registration had been built by 'many successive enactments, some of them resting on very questionable principles'.[114] In explaining the effects of the 1617 Act, Lord Fullerton states that the Act's provisions resulted in unregistered conveyances '[having] no effect against a third party, who has acquired a perfect right' to the relevant heritable property.[115] Further, Erskine argued that the real right in land was 'perfected' through the 'necessary solemnity' of 'notarial instruments', such as deeds.[116] Thus, the 1617 Act made registration an 'essential' part of the 'attestation by notarial instrument' and as important as any other requirement. Therefore, it is argued, registration became necessary for constituting the real right in land.[117] However, as a result of the perplexing phrasing of the Act, it could be construed that certain parties could not rely on a failure to register as a basis for legal action and, in such cases, there would be no real right, but there could be a personal one.[118] This incongruity within the Act was its main weakness as it seemed to treat all writs and rights the same, while creating different effects for different classes of people coming into contact with the relevant property.[119] All of this is to say that the Act was poorly drafted and left the court to come to this conclusion:

> It is of the very essence of a real right, not only to found a preference against a less perfect right, but to prevent any third party from acquiring a perfect right to the lands, which most certainly an unregistered seisin does not.[120]

[110] Reid (n 100) 5-6.
[111] Henry Home, Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (2nd edn, Edinburgh: Printed for William Creech 1800) 295.
[112] Walter Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, vol 2 (2nd edn, 1822) 210.
[113] (1847) 9 D 932; later upheld by the House of Lords in (1848) 2 Ross LC 103.
[114] ibid 933.
[115] ibid 934.
[116] ibid 935.
[117] ibid 935.
[118] Largely in relation to certain subordinate rights like reversion: ibid 935.
[119] ibid 935-938.
[120] i.e., a registered title must constitute a real right because an unregistered title cannot; the court in *Young,* (n 113) 937, further argued this point when discussing the subsequent Act of 1693 which gave priority to registered seisins over unregistered ones. This can be contrasted with the confusion introduced by the opposite finding in *Sharp v Thompson* 1997 SC (HL) 66 and the subsequent course correction by *Burnett Trs v Grainger* 2004 SC (HL) 19. See also, Reid (n 100) 7; Land Registration etc (Scotland) Act 2012, s 50; Kenneth G C Reid and George L Gretton, *Land Registration* (Avizandum 2017) 1.5.

The Register of Sasines underwent reforms in the mid-nineteenth century intended to simplify and clarify the conveyancing process.[121] These reforms were specifically in 1845,[122] 1858,[123] and 1868.[124] Each of these enactments served to establish the orthodox understanding of ownership only passing upon registration of conveyance.[125] However, it must be noted that the Register of Sasines was a register of deeds, and not a register of title like the modern Land Register,[126] the main difference being that a register of title has every right relating to a property in one place, whereas a register of deeds has these recorded as they come.[127]

Title registration systems, also referred to as the Torrens system,[128] first gained traction in civilian and common law systems alike in the mid-nineteenth century,[129] but one would not find its way into Scotland until the Land Registration (Scotland) Act 1979, after the recommendation of the Reid Committee in 1963.[130] The main detriment of the Scottish Sasines system was the cost and complexity associated not only with administration, but also with any sort of dealings with the Register. This had made property transactions immensely costly and time-consuming for practitioners and buyers.[131]

3.1 Origins and development of positive prescription

In Scots law, the doctrine of positive prescription is closely related to, but still varies from, adverse possession. Deriving originally from Roman law, positive prescription was known under the action of *usucapio* which allowed a *bona fide* possessor to gain ownership after a certain number of years.[132] Johnston describes much of the history of prescription in the Roman and Scottish legal traditions as 'tortuous', because it consists of many minor alterations in the time limits for a number of actions.[133]

The full details of these changes need not be delved into here, but what will be noted is that *longi temporis praescriptio* began to be used specifically for land, while *usucapio*, related to

[121] This remains relevant for titles which have yet to be moved to the new Land Register; see *Ardnamurchan Estates Ltd v MacGregor* 2020 SC (SAC) 1, [13]-[18], keeping in mind that *a non domino* registration was not allowed in this case as the applicant had improperly conveyed lands to themselves in the same capacity, i.e., not as an individual disponing to a company of which they were director. The Land Registration (Scotland) Act 1979 introduces the new Land Register with the 2012 Act reforming it.
[122] Infeftment Act 1845 (8 & 9 Vict c 35).
[123] Titles to Land (Scotland) Act 1858.
[124] Titles to Land (Consolidation) (Scotland) Act 1868.
[125] Reid and Gretton (n 120) 1.6.
[126] Introduced by the Land Registration (Scotland) Act 1979 and reformed in the Land Registration etc (Scotland) Act 2012; Reid and Gretton (n 120) 1.13-1.17.
[127] Reid and Gretton (n 120) 1.15.
[128] ibid 1.14.
[129] Sir Robert R Torrens introduced the system in South Australia in 1858.
[130] Reid and Gretton (n 120) 1.15-1.17.
[131] ibid 1.16.
[132] Three years under Justinian: David Johnston, *Prescription and Limitation of Actions* (2nd edn, W Green 2012) 1.14; Mark Napier, *Commentaries on the Law of Prescription in Scotland* (Macpherson & Syme 1854) 2. For more detail on the doctrine under the *ius civile*, see Paul du Plessis, *Roman Law* (5th edn, OUP 2015) 7.2.2. See also the closely related *longi temporis praescriptio*, a clear precursor to the English adverse possession and Scottish negative prescription (du Plessis 3.3.2.2; Johnston 1.15).
[133] Johnston (n 132) 1.16.

moveables and 'acquisitive' prescription, generally required a period of ten or twenty years.[134] In the medieval era, civilian Glossators and Commentators began adapting the Roman traditions to the practical problems they were facing, with others attempting to find balance between the principle within canonical and civilian law.[135] Thus, the notable jurist Grotius, by whom Stair was much influenced,[136] had access to a 'vast, disparate and highly sophisticated' breadth of legal writings that allowed him and others to tackle the many facets of prescription.[137] Even so, prescription has nearly always been within the exclusive remit of statute as opposed to common law.[138] Hume and Craig even assert that prescription in Scots law was 'little recognised' and that it is peculiar that it failed to permeate judicial decisions without statutory intervention.[139] This is perhaps an incidental occurrence, but it would appear to the author to indicate that Scotland was not as concerned with possession's significance for land ownership as England was at this time.

The first of such statutory interventions was the 1594 Act[140] which provided, '[t]hat none shall be compelled to produce procuratories or instruments of resignation, precepts of *clare constat* or other precepts of sasine of lands or annualrents possessed by them before the space of 40 years…'[141] and did not require proof of the presumed title where forty years' *positive* prescription had run.[142] This was replaced by the 1617 Act[143] which had the more succinct title, 'Act XII, Regarding prescription of heritable rights,'[144] and required both production of a charter for the land and possession of it for forty years' time.[145]

Johnston notes that this began the law's requirement for proof of the title upon which possession was predicated.[146] This is an understandable development as this enactment came in conjunction with the new registration requirements discussed above. Therefore, a prescriptive claimant's ability to prove that their possession was founded on the relevant charter, deed, writ, etc., would be enhanced by the existence of the register. Additionally, one can see the inception of ownership deriving from the register to influence further the operation

[134] ibid 1.18-1.19.
[135] ibid 1.20-1.22.
[136] ibid 1.21.
[137] ibid 1.22.
[138] ibid 1.24. Cf the afore-discussed English progression of adverse possession which was, of course, instituted by the 1623 Act, but had its origins in the common law actions.
[139] Johnston (n 132) 1.24.
[140] c 218.
[141] ibid; RPS 1594/4/35: 'For remedy whereof, our said sovereign lord…declares that none of his highness's lieges may be compelled after the space of 40 years to produce procuratories or instruments of resignation, precepts of clare constat or other precepts of sasine of lands or annualrents whereof the present heritable possessors…are and were in possession by the space of 40 years together, and that the wanting and lack thereof, nor none of them, shall be no cause of reduction of the infeftments'.
[142] Johnston (n 132) 1.27.
[143] c 12.
[144] RPS Ref 1617/5/26.
[145] Johnston (n 132) 1.28.
[146] ibid 1.27.

of positive prescription as the 'foundation writ' becomes more essential with each reform of the law.[147]

3.2 Effects and defects of the Land Registration (Scotland) Act 1979

When the Land Register was introduced by the Land Registration (Scotland) Act 1979 anyone was able, in theory, to grant a disposition to another party, who would be able to acquire title after a prescriptive period of twenty years.[148] For example, if A granted land to B, even though C was the true owner, if B subsequently registered her title she would be able to acquire good title after twenty years.[149] As noted by Johnston, there is no method by which positive prescription can run under the Prescription and Limitation (Scotland) Act 1973 with 'no deed at all': i.e. registration of some title is required to gain an indefeasible title.[150] Even though the registration of title was generally considered preferrable to the old registration of deeds system, the 1979 Act had numerous problems, not the least of which was uncertainty over the legal effects of registration introduced by section 3(1).[151] The Scottish Law Commission defined three 'rules' that had practically flowed from section 3(1), namely, that: registration can create or transfer a real right; registration can vary or extinguish a real right; and primary rights will be subject only to the 'encumbrances' entered in the register.[152]

While we have said above that recording deeds in the Register of Sasines was generally understood to constitute ownership, this was not the unequivocal legal position until the 1979 Act.[153] With the institution of a register of title, the law was now not conveying ownership based on the tenor of the underlying deed; rather, it was based on the act of registration alone, a proposition that Reid and Gretton found 'startling and unsettling'.[154] However, it should be noted that even with ownership flowing from registration, the importance of the 'foundation writ' in relation to prescription cannot be overstated.[155] Under this registration system, and indeed the old Sasine Register, prescription in relation to heritable property exists primarily 'to cure bad titles',[156] not to confer ownership as such.[157] As Johnston states, 'the effect of prescription is to raise an irrebuttable presumption that a title is good and to exclude all inquiry

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[147] Johnston (n 132) 7.25; Napier (n 132) 104-112; see *Maule v Maule* (1828-29) 7 S 527, 535 (Lord Balgray): 'No prescription (positive) can possibly take place without, first, a clear and distinct title; second, continued and unequivocal possession. These are the primary requisites and essentials of all positive prescription'. Lord Balgray's comments may be found at page 9 of the report's appendix.
[148] The 1979 Act, inserting s1 and 1A into the 1973 Act; Kenneth Reid, *The Law of Property in Scotland* (Law Society of Scotland 1996) para 672-673.
[149] ibid 672-673.
[150] The 1973 Act; Johnston (n 132) 17.01.
[151] Scottish Law Commission, *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Scots Law Com Discussion Paper No 128, 2005) 5.1-5.8 (hereinafter 'SLC DP 128'); Reid and Gretton (n 120) 2.7.
[152] SLC DP 128 (n 151) 5.8.
[153] Reid and Gretton (n 120) 2.7.
[154] ibid.
[155] 'The writ upon which possession follows' (Johnston (n 132) 7.25); Gretton and Reid, *Conveyancing* (n 101) 7.25.
[156] *Alexander v Inglis* (1826) 5 S 53, [57] (LP Hope).
[157] i.e., saving ownership from challenge or rebuttal: see LC Responses 380 (n 225).

into the validity of the prior title or the terms on which it was granted'.[158] This then means that positive prescription cannot run in relation to unregistered land, because a registered title of some sort is required, and there is no need for a separate prescriptive regime in relation to it.

Alternatively, *a non domino* registration can appear very strange or as a method of bypassing legitimate conveyancing practices.[159] Unfortunately, the 1990s saw 'unscrupulous developers' attempting to take advantage of conveyancers and speculatively acquire possession and ownership of 'property which rightly belong[ed] to other people'.[160] Falconer and Rennie describe advertisements in national newspapers explaining '[h]ow to claim Free Land and Property', using positive prescription or adverse possession as appropriate.[161] The English Land Registry quickly released press statements to refute this, but Falconer and Rennie see the event as a sort of 'sea change' for the moral tenor of conversations around *a non domino* registration and adverse possession.[162] Moreover, at the time the Keeper was not bound to accept any and all *a non domino* dispositions and was entitled to reject those considered to be 'frivolous or vexatious'.[163] However, this exercise of discretion was never fully defined with regard to the Register of Sasines and similarly had little clarity under the Land Register.[164] Notwithstanding this lack of clarity, in the period between 1994 and 1996, in Midlothian alone, the Keeper rejected ten out of ninety-two *a non domino* applications as being 'obviously of a speculative, frivolous or vexatious nature'.[165]

The Keeper having sole responsibility for catching these speculative and illegitimate applications was not the only concern, however, as this period of land registration was one of transition. After the institution of the Register, it was made operational in a piecemeal fashion for the local authorities across Scotland, and in the late 1990s was not operational for the whole country.[166] Therefore, if the Keeper granted a speculative disposition just before extension of the register to that particular area, any subsequent transfer by the speculator would trigger neither first registration, nor recording in the Register of Sasines.[167] On top of this, the Law Society of Scotland noted that practitioners were in a rather difficult position and needed to take particular care in this area in order to fulfil their clients' wishes, but not at the expense of the true owner of a given property.[168] More generally, there is the oft-cited issue with the 1979 Act of the Land Register's 'Midas touch' which allowed registration alone to confer

[158] Johnston (n 132) 7.27.
[159] Alec M Falconer and Robert Rennie, 'The Sasine Register and Dispositions a Non-Domino' (1997) 42(2) JLSS 72.
[160] ibid 72; SLC DP 128 (n 151) 4.47; closely related to Reid and Gretton's critique that registration favoured acquirers (Reid and Gretton (n 120) 2.9).
[161] Falconer and Rennie (n 159) 72.
[162] ibid. NB also that they state publications of the sort advertised had already existed in relation to adverse possession.
[163] Falconer and Rennie (n 159) 73; 1979 Act, s 4(2)(c).
[164] ibid 73.
[165] ibid. Four of those ten dispositions were related to a single property.
[166] Gretton and Reid, *Conveyancing* (n 101) 7.16.
[167] Falconer and Rennie (n 159) 74. NB, further, that the Register of Sasines would be not closed until the 2012 Act s 48, with all areas of Scotland having access to the Land Register since 2003 (Johnston (n 132) 17.15).
[168] Falconer and Rennie (n 159) 74.

indefeasible title on the registered proprietor.[169] The SLC's critiques and proposed reforms in this regard will now be explained.

3.3 Consultative documents on positive prescription and parliamentary debate

The SLC, in their 2005 Discussion Paper and 2010 Report, explained that the 1979 Act had been silent on positive prescription in relation to the new Land Register, which had resulted in reliance on the doctrines that had governed the Register of Sasines.[170] This meant that there was a rather significant oversight on the part of the 1979 Act as prescription was only able to run where the Keeper had excluded indemnity.[171] Thus, rectification in favour of a possessory claimant with an *a non domino* disposition was not always possible.[172]

An important inclusion in the SLC's draft bill is the proposed section 86(2),[173] which makes it official that the effect of prescription on an otherwise void title will be to confer ownership on the possessor.[174] This helped to clear up the uncertainty within the 1979 Act with regard to void title. Further, the change in the draft bill aligns with Johnston's argument that the effect of registration was not to gain ownership, but only to make the title 'sufficient'.[175] Hence, we see this makes it clear that prescription will result in good title *and* ownership.

The other major change introduced was the notification period that allows for objection by the true paper owner.[176] This procedure came about in response to the fact that the 1979 Act had struck an unfair balance between the rights of the 'true' owner and the prescriptive or fraudulent acquirer.[177] Under the 1979 Act, an owner was notified only once the prescriptive period had elapsed – not when the *a non domino* disposition was originally filed.[178] This can be seen as an oversight on the part of the drafters of the 1979 Act, potentially tipping the scales too far in favour of the possessor.

The SLC considered three central approaches to fixing this imbalance: namely, notification,[179] possession,[180] and discretion procedures.[181] They preliminarily concluded that the solution should be notification through possession of the acquirer, presenting possible problems for the

[169] Johnston (n 132) 17.07; Frances Rooney and others, 'How Far Can We Rely on the Land Register?' (2015) 60(11) Journal of the Law Society of Scotland 35.
[170] Scottish Law Commission, *Report on Land Registration: Volume One* (Scot Law Com No 222, 2010) 35.3 (hereinafter 'SLCR 222'); SLC DP 128 (n 151) Part 3: arguing that positive prescription should have been able to run on any registered title.
[171] SLCR 222 (n 170) 35.3; Reid (n 148) 674.
[172] Reid (n 148) para 673.
[173] Para 18(4), of the eventual draft bill presented to Parliament, inserted s 5(1A) in the 1973 Act.
[174] SLCR 222 (n 170) 35.5-35.9.
[175] SLCR 222 (n 170) 35.5; Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Scots Law Com Discussion Paper No 125, 2004) Part 3-4 (hereinafter 'SLC DP 125').
[176] Explained in more detail below; see s 43 of the 2012 Act.
[177] SLC DP 125 (n 175) 4.30-4.36; SLC DP 128 (n 153) 4.50; Reid and Gretton (n 122) 2.9.
[178] See also the Land Registration (Scotland) Rules 1980, r 21(2).
[179] SLC DP 125 (n 175) 4.32.
[180] ibid 4.41-4.43.
[181] ibid 4.47-4.52.

true owner. Of most importance is the criticism that with the nature of some properties, particularly those that are large, it is unrealistic to assume that a proprietor would reasonably be able to recognise such possession in the same way as being notified directly by the Land Register.[182] In subsequent discussion papers and reports, they become more committed to this concept and reiterate that notification in the English model is unfavourable.[183] In DP 128, they explain that initial rejection by the Keeper of any suspicious *a non domino* application is preferable to acceptance with notification and subsequent challenge by the owner as the former approach creates certainty and efficiency.[184] This can also be disputed, however, as one can argue that, as a result of the ill-defined parameters under which the Keeper operates, the reliance on her discretion is not as certain as the SLC would have us believe. In the final publication before the 2012 Act, the SLC do, however, provide that the Register should be able to opt for notification procedures in relation to prescriptive claimants, but stop short of recommending it as a requirement.[185]

The draft bill presented to Parliament and the eventual 2012 Act, however, makes notification to the 'underlying owner' a requirement.[186] In the Policy Memorandum on the draft bill, paragraph [63] specifically notes that the idea of possession being sufficient notification is undermined when one considers the practical operation of such a system. This is because many landowners may not even be in full knowledge of the land that they would need to be monitoring to prevent the occupation.[187]

The policy aims underpinning the new treatment of prescriptive claimants and *a non domino* dispositions are essentially to bring abandoned land back into 'economic' use, just as the LRA sought to do for English land.[188] As discussed, there is also much emphasis on balancing the rights of the 'true' owner against any possessor – a preference that is clearly shown in the resulting Act. Further, presumably in response to issues such as those detailed by Falconer and Rennie, there is great emphasis on introducing statutory provisions which codify the Keeper's 'ad hoc' practices to encourage greater confidence in this area.[189]

3.4 The Land Registration etc. (Scotland) Act 2012

[182] *Pye* (n 89): the paper owner was not able constantly to monitor the property to prevent or even notice an adverse possessor. Cf the rebuttal to this argument, however, that anyone who owns such a parcel of land takes on the responsibilities therefore, such as monitoring against possessors.
[183] SLCR 222 (n 170) 16.24-16.25; SLC DP 128 (n 151) 4.54-4.57.
[184] SLC DP 128 (n 151) 4.56.
[185] SLCR 222 (n 170) 16.24.
[186] s 44 of the 2012 Act; SP Bill 6 Passage of the Land Registration etc (Scotland) Bill [as introduced] Session 4 (2011) Policy Memorandum [127].
[187] Policy Memorandum (n 186) [63]; NB the proposed requirement of seven years of abandonment before occupation or application to the register began which did not make it into the bill as enacted. This is most likely for the best as the burden of proof here is immeasurably and practically difficult: how is an acquirer meant to prove this and, equally problematically, how is the Keeper meant to assess such conditions? However, one can see a perhaps-inadvertent connection to Roman law which predicated prescriptive possession on the assumption that the true owner had physically or mentally abandoned the land (Napier (n 132) at 11).
[188] Policy memorandum (n 186) [58]-[63].
[189] ibid [58]-[59]. See also Stage 1, 319.

The 2012 Act has a similar strategy for curbing prescriptive claims as the LRA 2002 does in relation to adverse possession: chiefly, the requirement for notification of the 'true' owner.[190] Additionally, if there is no response on the first notification, the Keeper must re-notify.[191] Alongside this, any prescriptive claimant in Scotland must wait a year before initially submitting their application of title to the Register and,[192] if there are no objections after sixty days since notification, the applicant will be considered a 'provisional' owner until the expiry of a 10-year prescriptive period.[193] Gretton and Reid note that the double-notification procedure in particular will result in a pool of successful prescriptive claimants so small as effectively to render the doctrine null in relation to heritable property.[194]

Possession must be held 'openly, peaceably, and without judicial interruption' in order for prescription to take effect at the end of the period.[195] This is true for the modern law as well and closely mirrors the requirements for adverse possession.[196]

In terms of doctrinal developments, the 2012 Act made some important changes to the 1973 Act in terms of the effects of positive prescription. As stated above, positive prescription traditionally only operated to make a title 'unchallengeable' and did not guarantee a prescriptive claimant ownership at the end of the prescriptive period.[197] The 2012 Act, however, introduced a change to this understanding by inserting s 5(1A) into the 1973 Act which states that any reference to a real right being exempt from challenge will be understood 'as including reference to acquisition of the real right by the possessor'.[198]

Thus, we can see that positive prescription, just like adverse possession above, is difficult for claimants to establish. We will now look at the desirability of this fact from a practical and doctrinal point of view, particularly analysing how English law conflicts with the principles of land registration as revealed by adverse possession.

4. Comparative Analysis and Further Considerations

4.1 What did England disregard?

The new doctrine of adverse possession for registered land has altered the possession-based tradition of English law, but unfortunately remains ill-fitting.[199] Through the Land Register,

[190] 2012 Act, s 43(4); Gretton and Reid, *Conveyancing* (n 101) 13-15.
[191] 2012 Act, s 45(1)-(3); Gretton and Reid, *Conveyancing* (n 101) 13-15.
[192] 2012 Act, s 43(3); Gretton and Reid, *Conveyancing* (n 101) 13-15.
[193] 2012 Act, s 43(6)(a); Gretton and Reid, *Conveyancing* (n 101) 13-16.
[194] Gretton and Reid, *Conveyancing* (n 101) 13-14-13-16.
[195] 1973 Act, s 1(1); 2012 Act, s 43(3); Reid (n 148) paras 672-673.
[196] Save for the 'peaceably' requirement, Gray and Gray (n 32) 9.1.50-9.1.51. NB that grant of a deed *a non domino* and intention of the possession can be mala fide or bona fide, but the possession itself must not be hostile.
[197] Johnston (n 132) 16.04-16.07.
[198] ibid 16.07.
[199] Cooke, *The New Law of Land Registration* (n 4) 139; Fiona Burns, 'Adverse Possession and Title-by-Registration Systems in Australia and England' (2011) 35 Melbourne University Law Review 773, 807-808.

England is attempting to establish a 'new conceptualisation of ownership or dominium', with possession no longer being a deciding factor.[200] On top of this, the LC is adamant in promoting the new understanding that title is derived from the fact of registration.[201] This new regime, however, does not go far enough to supplant that traditional conception of land ownership.[202] Adverse possession, of both unregistered and registered land, is the largest oversight. The main reason for this, from a doctrinal perspective, is that a claim for adverse possession is still based on possession, first, and title, second. In other words, even though an adverse possessor cannot extinguish the registered owner's title with their possession alone, the possession is still the primary prerequisite for a registration application under Schedule 6 of the 2002 Act.

It can be conceded that many of the practical objectives that the LC and Parliament were addressing with the reformation of adverse possession were indeed well thought through: for instance, protecting registered title from adverse possessors and incentivising land registration.[203] However, even such practical considerations are all too often treated in an unduly alarmist tone by the LC,[204] politicians,[205] and reporters.[206] These remarks often fail to reflect the doctrine's utility, and such treatment is equally evident regarding positive prescription. A number of practitioners have expressed concern regarding the court allowing insufficient possession to constitute prescription.[207] While public perception of a legal method for 'stealing' another's property will most likely never be very favourable, the practical benefits for conveyancing can be recognised.[208]

As the SLC and LC argued, prescription and adverse possession can allow properties to come back into use and return to the market, which only helps the economic viability of said market across the UK. Further, even where adverse possession and prescription are depicted as very unfair, there are cases where the operation of these doctrines actually offers the best chance for

[200] Gray and Gray (n 32) 9.1.20.
[201] LCR 254 (n 52) 10.3; the judiciary has also taken care to emphasise this fact, see *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ): land registration in England is 'not a system of registration of title but a system of title by registration'.
[202] Christopher Jessel, 'Concurrent Fees Simple and the Land Registration Act 2002' (2014) 130 Law Quarterly Review 587, 599, 606.
[203] LCR 254 (n 52) 10.3.
[204] ibid 10.19: the LC frequently reiterated the comment by Nourse LJ that adverse possession is 'possession as of wrong' and used this as a justification for reforms; George L Gretton, 'Reforming the Law of Prescriptive Title to Land' in Douglas Bain, Roderick R M Paisley, Andrew R Simpson, and Nikola J M Tait (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (Aberdeen University Press 2018) 70-71.
[205] HL Deb 30 Oct 2001, vol 627, col 1333.
[206] Geraint Smith, 'Squatters Who Lived like Ghosts Sell the House for £103,000 (And It's All Perfectly Legal)' *Evening Standard* (London, 08 Jul 1996) 77; 'The House Is Yours… for Free' *The Guardian* (London, 23 July 1999) 82. Cf the neutral to appreciative treatment of squatters who created a free art gallery and did not wish to sell the property: Elizabeth Hopkirk, 'Derelict Terrace Gets TV-Style Makeover… from Squatters: Community Spirit Raised to an Artform' *Evening Standard* (London, 14 Oct 2003) 14.
[207] Lord Hope of Craighead, 'A Puzzling Case of Possession' in Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Open Book Pub 2015) 37; Robert Rennie, 'Possession: Nine-Tenths of the Law' (1994) SLT 261, 264-65.
[208] Gretton especially seeks to clarify that the doctrine should not be seen as a legal mechanism for taking of land, but rather one that allows long-held possession to 'ripen into ownership' (Gretton (n 204) 70).

fairness.[209] For example, where a possessor or prescriptive claimant has been investing time, energy, and money into a property that the registered proprietor has not been – 'is it fair that [the proprietor's] right to recover the property should exist… *for ever*?'.[210] These justifications dovetail ably as not only does prescription protect the possessor in the latter example: that fairer outcome also gives effect to the other (economic) justification for prescription, increasing the property value in a way that the registered proprietor was not.

Gretton even argues that possession should serve a *greater* role in Scottish conveyancing in order to provide solutions in certain situations, as where improper conveyancing is done by solicitors who are no longer in business, or where problems arise from the looser adherence to conveyancing practice in the Highlands and Islands.[211] Gretton also explains that prescription operates 'by *reuniting title with possession*'[212] and where title and possession are too separate it has a 'sterilising effect' on the economy of property markets.[213] Additionally, he notes that while the 2012 Act makes *a non domino* registrations nearly impossible, the Keeper adopted a policy of reduced scrutiny in 2014 that might make them more common over time.[214] Therefore, he advocates, in contrast to the position favoured in this article, for removing the 'colour of title' requirement and increasing the requisite length of possession to compensate for any possibility of an increased number of claims.[215] By making prescription more possession-based, he believes that the most common issues with the current position will be solved. It can be agreed that the most recent reforms to the law of prescription have led increasingly to possession preceding applications for registration, just as in England, and have thereby further divided possession and title. Additionally, in a system where title is the basis of ownership, positive prescription may need to exist to remedy faults on the register and to minimise the number of derelict buildings.

However, from this author's perspective, such expansion of positive prescription, in the manner suggested by Gretton, fits as uneasily with a title-based system as the introduction of a Land Register does with a possession-based system. This is because each is antithetical to the other. If the primary root of ownership is a registered title, it should not be made easier to gain ownership or to allow prescription to run without first registering a title.[216] The same can then be said of a system which is based on possession. If possession generally precedes ownership, then it is difficult to see why registration of title would be of any particular significance when it comes to the acquisition of ownership or the running of prescription (or, more accurately for

[209] Gretton (n 204) 72.
[210] ibid 71-72; Reid and Gretton (n 120) 17.12.
[211] Gretton (n 204) 72-78.
[212] ibid 72 (emphasis added).
[213] ibid.
[214] ibid 69; Kenneth G C Reid, '"Tell Me Don't Show Me" and the Fall and Rise of the Conveyancer' in Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Open Book Pub 2015) 15. NB Johnston's contention is that positive prescription will become more relevant given that it can now run on any title and not only where the Keeper has excluded indemnity (Johnston (n 132) 16.02). Unfortunately, this was difficult to verify as the Registers of Scotland do not publish the number of prescription applications that they receive, and this is therefore just mere speculation.
[215] Gretton (n 204) 75-78.
[216] *A non domino*, defeasible, or otherwise.

English land law, the running of a limitation period). Thus, it makes sense that the introduction of such a change would require extensive statutory intervention and the creation of a new doctrinal understanding. Accordingly, this new doctrinal understanding would need to recognise that if title registration is to precede absolute title acquired through sale, through transfer, or otherwise, then it must also precede other methods of acquiring ownership such as the completion of a limitation period.

Within Scots law, we have already seen that foundation writs have always been important for the operation of prescription. Throughout the history of land registration and property law, it has been accepted that prescription works because it essentially fortifies the underlying deed and protects it from challenge.[217] It is true that Scots law has valued, and still values, possession.[218] However, possession alone should not determine whether and, if so, when prescription (or a limitation period) begins to run, where the Register is meant to be, to some degree, infallible. This also, however, does not mean that the Register should be the be-all and end-all of ownership. As Gretton explains, often the situation on the ground for possessors may not match the register and this divide will only increase over time.[219]

In attempting to convert English property law, from a system of title by possession, to one of title by registration, the LC and Parliament have not done enough. As stated, where the legal *basis* of title has changed, it would be logical for the legal mechanics which underpin the acquisition of title to change.[220] Put another way, rather than having a negative prohibition on recovering ownership, the positive vesting of title is more in line with the operation of a Land Register. Nourse LJ in *Moran* states that prescription is based on the 'legal fiction' that the land has been 'granted' to the squatter, while limitation is founded on the intentions and actions of the squatter – implying that this is more sensible because the law is not assuming anything on behalf of the parties.[221] Alternatively, this author would argue that where the granting of title is based on an entry in a register, with the ability to perfect such a title into ownership through the passage of time, then limitation, no matter how rooted in the common law tradition, no longer serves its original purpose. This is because limitation, specifically for adverse possession, is then creating an exception to the new doctrinal understanding of land ownership in which the squatter is applying for title based solely on a period of possession.[222] The concept of limitation only has relevance for unregistered land, as registered title will not be extinguished by the completion of a limitation period and possession alone cannot deprive a

[217] For a full discussion of the interesting and complex historical operation, see Johnston (n 132) ch 16. NB that the puzzling outcome under the historical operation of positive prescription (as opposed to acquisitive prescription) could have been aided with reference to the English doctrine that extinguished the 'true owner's' estate - a Scottish owner would be barred from challenging a prescriptive title while the prescriptive title holder had possession and a so-called "unchallengeable" title – but not true ownership. As Johnston recognises, this position did little to hamper conveyancing practice but was certainly odd from an academic point of view.
[218] Stair, *Institutions*, II, 1, 8: 'Possession is the way to property, and in some cases doth fully accomplish it, and hath in it a distinct lesser right than property'; see also Napier (n 132) 10.
[219] Gretton (n 204)
[220] Jessel (n 202) 599 and 606. NB Jessel is largely concerned with how a co-existing common law title might undermine a registered one.
[221] *Buckinghamshire CC v Moran* (n 90) 644-645.
[222] Cooke, *The New Law of Land Registration* (n 4) 135.

registered proprietor of the land in question.[223] Even so, the requirements and procedure for rectification in favour of an adverse possessor still undermine the new understanding of land ownership because it remains rooted in possession first. Prescription historically, even with the 'legal fiction' of the Scots *a non domino* registration, has acknowledged that title precedes possession, and such possession does not magically mature into ownership; rather, the imperfect title is perfected through possession over time giving rise to an owner's title.

Therefore, a possible consideration from which the LC could have benefitted was the recognition that England's unregistered land should no longer be based on possession either. They have instead, in each Report, reaffirmed their support for the dichotomous treatment of land.[224] If property ownership is to be based solely on registration, then it would be sensible for all types of land to fall under the same broad principle, that ownership and related rights flow from the register and possession is not sufficient to preclude another's ownership or other lesser rights, such as servitudes or real burdens. This, unfortunately, puts us in the murky territory of having to re-conceptualise English law's relativity of title, as the common law allows a possessor to have an estate in land that is a fee simple and merely lesser than the absolute title of the owner.[225] Thus, in order to dispense with the possibility of possession based title in a land register system, one would also have to dispense with another fundamental part of England's land ownership - possession based relativity of title. On account of this, even if such a change would be desirable in theory, it could perhaps cause too much disruption to be in any way practical. However, one can also argue that as the Land Register will only become more important, it is all the more relevant that reform of unregistered title is done effectively.

In any case, the LC is careful, and correct, to point out that a change in treatment of unregistered land is not *strictly* necessary for three reasons: the existence of first registration triggers, incentives for voluntary registration, and issues with an adverse possessor who may choose to register a title gained under the 1980 Act.[226] These concerns, however, were related primarily to proposals for how to treat the highly specialised case of an adverse possessor who is attempting to register a title for the first time, where the proprietor had no notice of the claim, and where the possessor is not in actual occupation, rather than to wider doctrinal considerations.[227]

It would appear that, as far as the LC is concerned, such critiques as have been discussed in this section are irrelevant, as the operation of the system has been successful so far, with 87.4

[223] ibid 139.
[224] See also Jessel (n 202) 606.
[225] Law Commission, *Updating the Land Registration Act 2002: Analysis of Responses* (Law Com No 380, 2019) 17.141-17.143 (hereinafter 'LC Responses 380'); the wider practical issues associated with the fact that an adverse possessor can have a fee simple where they 'stay quiet' and do not submit a Sch 6 application are dealt with by Mark Pawlowski and James Brown, 'Adverse Possession and the Transmissibility of Possessory Rights – The Dark Side of Land Registration?' (2017) 2 Conveyancer and Property Lawyer 116.
[226] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Consultation Paper No 227, 2016) 17.51-17.52 (hereinafter 'LC CP 227').
[227] ibid 17.49-17.62.

per cent of land in England and Wales now being registered.[228] As stated earlier, their chief concerns are practical in nature and not doctrinal. Therefore, the doctrinal concerns discussed in this section would not warrant any intervention and the LC has consistently brushed them off in Consultative Documents and the subsequent Reports.[229] However, as discussed above, the author would argue that internal and doctrinal consistency remains a relevant concern. In this way, while the LRA reforms were correct not to allow ownership to be supplanted by possession alone, they did not replace possession with a mechanism that accomplishes the change in conception of ownership that they sought to affect.

4.2 Possibilities for England moving forward: Possessory title

One option discussed by the LC in 2016 when reviewing the LRA is that an adverse possessor could register for possessory title of currently unregistered land under section 9(5) of the LRA, and after twelve years have their title become absolute.[230] The LC recommended against such a change and, during their consultation, most respondents agreed that this was not the state of the law, and that it should not become the law either.[231] This article would disagree on both points. This recommendation was coupled with the question whether the LRA Schedule 6 procedure should be the sole method through which an adverse possessor may apply for registration,[232] and whether a possessor with a reasonable yet mistaken belief in their title could register a possessory title.[233] These last two related recommendations will not be considered in as much detail as the first, as many of the points discussed in relation to the first recommendation can be applied to them.

One of the main concerns that the LC had with allowing an adverse possessor to register possessory title prior to the completion of the limitation period is, as explained above, that adverse possession cannot be claimed where it flows from some other permission, agreement, or title.[234] The argument is that adverse possession must, by definition, be *adverse*, so having a title, even for the sake of argument *a non domino* or possessory, would defeat one's claim and bar the running of time.[235] A rebuttal to this is that the requirement for possession to be outwith a title is more concerned with the consent of the proprietor, than with the existence of a title itself. Therefore, where a possessory title was to be registered in relation to an estate, that title would be equivalent to *a non domino*. Since such a registration is inherently not a 'good' or infallible title, it does not actually undermine this requirement. In other words, the registration of a possessory title by a possessor and not an owner is inherently not permission. Therefore, this author does not agree with the LC recommendation that a possessory title

[228] HM Land Registry, Land Registry Annual Reports and Accounts 2019/2020: Transforming in Uncertainty (Crown Publishers July 2020) 5.
[229] LC CP 227 (n 225) 17.51; LCR 380 (n 82) 17.4, see footnote 5 on page 371; LC Responses 380 (n 225) 17.98.
[230] LC CP 227 (n 226) 17.66; LC Responses 380 (n 225) 17.98.
[231] LC CP 227 (n 226) 17.66-17.70, primarily concerned with possessors circumventing Sch 6 and undermining the protection that this offers proprietors; LC Responses 380 (n 225) 17.108-17.119.
[232] LC CP 227 (n 226) 17.71; LC Responses 380 (n 225) 17.120-17.131.
[233] LC CP 227 (n 226) 17.79; LC Responses 380 (n 225) 17.132-17.143.
[234] See also *Parshall v Hackney* [2013] EWCA Civ 240; LC CP 227 (n 226) 17.66.
[235] LC CP 227 (n 226) 17.66-17.69.

should only be registerable in relation to unregistered land where the limitation period has expired. There is, in fact, no reason why a possessory title could not be registered preceding or during possession of an estate. Additionally, the proposition regarding possessory title being available in relation to unregistered land would have served to clear up some of the issues identified above: namely, it would allow unregistered land to be possessed with a title that could then become absolute by means of prescription, aiding in harmonising the separation between unregistered and registered title. Furthermore, it would bring unregistered land onto the register.

Such a view was not strictly taken by the consultees on the LC's recommendations. As stated before, the majority agreed with the LC's proposal.[236] In terms of disagreement, it was argued that the LC's preference for the registered owner is too far removed from the practical reality;[237] that a possessor has a title that is good against everyone except the owner; that the LC has failed to address why that means that the possessor's title cannot be registered;[238] and that there is no reason why a registered possessory title could not exist alongside the unregistered freehold title.[239] This article would support the view of Ms Goymour that, for the reasons explained above, there is no reason why a registered possessory title would automatically negate a claim of adverse possession.[240] The LC will not concede this point until subsequent case law and tribunal decisions confirm that registration of possessory title does not preclude adverse possession.[241] Even with this understanding, their most recent recommendation remains the same and only considers the position for where an adverse possessor has mistakenly, but with a reasonable belief that limitation has expired, registered a possessory title before the end of the limitation period.[242] This is unsatisfactory for a number of reasons, not the least of which being that it creates a very complex and niche-like area of law: problems which could easily, and within current principles, be avoided.

Upon consultation, the second recommendation, namely that Schedule 6 be the only method by which registration of title gained through adverse possession may be applied for, was generally upheld.[243] This is unsurprising as the LC is dedicated to directing all adverse possession claims through this procedure. Lastly, the third recommendation, regarding the mistaken registration of possessory title by one who had a reasonable belief that the limitation period had ended, was discarded.[244] This was largely due to the issue of defining and assessing this 'reasonable belief'.[245] Any criticisms of this particular recommendation are similar to those

[236] LC Responses 380 (n 225) 17.109.
[237] ibid 17.115.
[238] ibid 17.116.
[239] ibid 17.117.
[240] ibid 17.118. This is in opposition to the holding in *Parshall* (n 234).
[241] LCR 380 (n 82) at 17.111-17.113; *Moore v Buxton* [2009] EWLandRA 2007_1216 [24]-[28]; *Joslin v Hipgrave* [2015] UKFTT 0497 (PC) [21]-[24]; cf *Sexton and Kember v Gill* [2015] EWLandRA 2013_0472 at [19]; see also *Walker v Burton* [2013] EWCA Civ 1228; cf that the possessors' mistaken and honestly held belief was an important factor and the case law will most likely continue to be highly complex on this point.
[242] LCR 380 (n 82) 17.107.
[243] ibid 17.102.
[244] ibid 17.120.
[245] ibid 17.119.

in the preceding paragraph as this was another unnecessary requirement. We have seen that the most recent LC proposals stop just short of remedying this doctrinal inconsistency and choose instead to entrench it further.

5. Conclusion

This article has sought to describe and engage with the rich histories of adverse possession and positive prescription. Each of these doctrines has been massively curtailed by the institution of, and many reforms to, their respective land registers. Throughout this discussion it has been argued that the Scots law of positive prescription, on the simplest understanding, has been better equipped to interact with a land register. After all, the importance of a paper deed or title has been more significant for a longer time than in England. Consequently, the English treatment of adverse possession has seen more difficulty in fully matching up to its new registration system. This is also to be expected as English legal conceptions of ownership and title were not entirely conducive to a Land Register in the first place. While the English land registration project is certainly impressive, it has yet to harmonise the legal positions of unregistered and registered land. This appears to be painfully evident in the modern operation of adverse possession. As argued in Part 4.1 of this article, the doctrinal inconsistencies now present in English property law are difficult to resolve without some major shifts in the foundations of this area of law. Even though the LC and practitioners alike have accepted that registered land now operates under title-based ownership, it remains true that the peripheral legal quirk of adverse possession does not. While it can be accepted that adverse possession may be fully abolished or curtailed even further so that it ceases to be of much relevance, it should still be recognised that each aspect of a legal system should reflect the fundamental principles from which they derive.

To state this another way, and conclude on perhaps a poetic note, it is interesting to consider the tenor of any such discussion on property law and the principles that constitute it. Taking a page from Gray, one can easily conclude that property itself is just as good as 'thin air': no more substantive or tangible.[246] It consists in legal 'fictions'.[247] While he was speaking principally in relation to the question of what is, or is not, 'property', one can see the relevance of such a characterisation for the question of what is, or is not, ownership. For that matter, what does adverse possession or positive prescription have to do with it? As discussed throughout the exploration of these concepts, ownership depends entirely on what the law is prepared to protect and defend. Ownership is only as good as one's ability to claim based on it – to recover what has been disseised. Under the Land Register, this means ownership is only as good as the name on the title sheet. This then raises a question pondered by many, a question which will most likely never be answerable, but which is certainly interesting to consider, regarding how to balance the protection of a perfectly good title against an apparently contrary practical reality. That reality may in some cases be *prima facie* unlawful, as in the case of trespass, but it could constitute adverse possession or form the basis for positive prescription in others. The

[246] Gray (n 28) 252, 292.
[247] ibid.

balancing act, then, concerns the owner and the usurper. This illustrates, therefore, the eternal struggle in which the LC, SLC, Holyrood, and Westminster have been, and currently are, engaged. However, this is, perhaps, not the actual conflict. The true conflict, within the law of property, is between title and another's possession – not the rights of the parties in relation to either piece. As stated throughout, prescription acts by 'reuniting title with possession'.[248] This union should be appreciated as a remarkable solution to the struggle between these concepts; there should never be only title with no concern for the realities of possession, just as there should never be possession with no regard to who holds valid title. While it is unlikely that the LC or Parliament will accept this proposition, it would most certainly benefit the cohesion and comprehensibility of a 'new normal' for English property law if this union were better appreciated and understood.

[248] See Mackenzie and Nair (n 1).

PUBLIC INTEREST JUDCIAL REVIEW IN ENGLAND AND SCOTLAND: THE EMERGING PROBLEM OF ACCESS TO JUSTICE

Emmet Doogan*

ABSTRACT

Access to justice is one of the fundamentals necessary for upholding the rule of law. Thus, doctrinal and practical barriers to justice pose a threat to the rule of law. Public interest judicial review is a type of judicial review that typically has ramifications wider than the sole issue under challenge. This article argues that whilst there is sufficient doctrinal access for challengers to access justice, the practical reality of costs and costs measures acts as an insurmountable barrier to justice for most. This argument will be demonstrated by analysing the doctrinal barriers to justice (standing) in England and Scotland, then turning to the practical barriers (cost) in both jurisdictions. This article seeks to analyse the existence and causes of the barriers to justice while suggesting where they could be improved upon.

Keywords: Access to justice, rule of law, public interest judicial review, standing

1. INTRODUCTION

Judicial review is often considered one of the pillars of the United Kingdom's constitutional framework, 'ensuring that government authority is exercised lawfully and legitimately [and] protecting the public from any potential abuses of Power'.[1] The court's supervisory power is utilised through individuals challenging 'the lawfulness of decisions made by public bodies and others exercising public functions'.[2] It seems that the nature of this type of action relies on individuals pursuing litigation. This poses the question how strong this constitutional pillar is if most individuals cannot bring a judicial review claim. Access to judicial review has previously been described as a 'simple and quick procedure, decided without trials of fact on the papers'.[3] While this is true to some extent doctrinally, in practice the costs 'seem extraordinary'.[4] The problem facing public law appears practical rather than doctrinal, as pointed out by Lord Neuberger:

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[1] Hereinafter 'UK'; John Stanton and Craig Prescott, *Public Law* (3rd edn, Oxford University Press 2022) 422.
[2] Ivan Hare, Catherine Donnelly, Joanna Bell and Robert Carnwath (eds), *De Smith's Judicial Review* (9th edn, Sweet and Maxwell 2023) para 1-001.
[3] Tom Hickman, 'Public Law's Disgrace' (*UK Constitutional Law Association*, 9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/> accessed 16 January 2024.
[4] ibid.

> It is all very well for us to sing the praises of our legal systems, to congratulate ourselves on the high quality of our judges and lawyers, and to take pride in the popularity of the common law in international business. But we have a serious problem with access to justice for ordinary citizens and small and medium sized businesses.[5]

The extent of the current situation is exemplified by Lord Neuberger's usage of the phrase 'serious problem', which is conservative compared with the language favoured by many other commentators. Using such terms as 'crisis' and 'disgrace' to describe the present situation has become commonplace.[6] Additionally, international rankings show that the UK's most significant area of weakness is access to civil justice, for which the UK ranks 30th out of 31 regional countries.[7] In an otherwise strong rule of law performance, it is apparent that access to justice undermines the rule of law in the UK. Whilst judicial review is only one aspect of civil justice, it is integral that all areas of access to justice are investigated and improved upon to uphold the rule of law.

Having briefly considered the decline in individuals' ability to partake in judicial review claims, this discussion turns to public interest judicial review, which can be viewed as a potential stopgap.[8] Public interest litigation is an instance of judicial review with ramifications wider than those for the litigant. Thus, a matter of great public importance can be litigated with broader implications that induce change. This article seeks to demonstrate that there is an access to justice problem concerning public interest judicial review. It is primarily thought that the conversation has moved beyond the issue of standing due to the liberal test in England and the recent liberalisation in Scotland.[9] There are, however, some differences between the approaches north and south of the border, which are analysed in relation to principles of access to justice in an effort to determine whether standing is as liberal as suggested.

The primary challenge for public interest judicial review concerns the cost of raising an action as a result of legal fees and legal costs. It is generally accepted that these fees make judicial review largely inaccessible. Therefore, the existing measures that are in place to facilitate particular public interest challenges will be analysed to highlight their inefficacy. This article aims to show that the ineffectiveness of cost measures coupled with high legal costs poses a barrier to justice.

2. PUBLIC INTEREST JUDICIAL REVIEW AND ACCESS TO JUSTICE

[5] Lord Neuberger, 'Access to Justice' (Welcome Address to Australian Bar Association Biennial Conference, London, 3 July 2017) 4.
[6] Hickman (n 3). See also, Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Bristol University Press 2017).
[7] World Justice Project, 'WJP Rule of Law Index' (*World Justice Project* 2023) <https://worldjusticeproject.org/rule-of-law-index/country/2023/United%20Kingdom/Civil%20Justice/> accessed 1 October 2024.
[8] The treatment of the term 'Public interest judicial review' is considered in the following section.
[9] The Independent Review of Administrative Law (IRAL CP No 407, 2021) para 2.44.

As public interest judicial review and access to justice are integral themes of the analysis central to this article, they require further clarification.

2.1 What is Public Interest Judicial Review?

The term 'public interest judicial review' is central to this discussion, and its connotations require clarification.[10] Firstly, PIJR is a natural subcategory of public interest litigation since individuals use judicial review 'as a tool' to pursue the public interest.[11] Thus, many of the discussions which assist in determining the meaning of PIJR refer to public interest litigation rather than judicial review specifically.[12] Judicial review, however, will be the only form of litigation discussed in this article. As Mullen states,

> [p]ublic interest litigation may be defined as any litigation in which the person raising the action or intervening in the action seeks to advance a widely shared interest rather than an interest which is specific to him/her and includes both cases which seek to advance only interests which are widely shared and cases in which a litigant who does have a personal stake in the outcome also presents public interest arguments.[13]

This definition distinguished PIL from ordinary judicial review in two different ways. Firstly, there must be a 'widely shared interest'; as such, if the issue to which the challenge relates affects only the claimant, it cannot be a public interest case. Secondly, the claimant must 'seek to advance' said interest, which can be done via public interest arguments during submissions.

Ramsden, whilst distinguishing PIL from strategic litigation, admits their similarities but attributes a moral element to PIL:

> Both public interest litigation and strategic litigation share the same technique – use of the court for structural change – but differ in terms of their underlying ethic. Whereas public interest litigation embodies to some degree a cause in itself – with this cause itself somewhat ambiguous but generally understood to be concerned with assisting marginalised and underrepresented communities.[14]

Whilst it can be argued that Ramsden's definition is technically more accurate, it significantly blurs the lines between strategic and public interest litigation. Consequently, for this article, Mullen's conception of PIJR will be followed: challenges that seek to advance interests beyond those of individual challengers.[15]

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[10] Hereinafter 'PIJR'.
[11] Chris McCorkindale and Paul Scott, 'Public Interest Judicial Review in Cross-Border Perspective' (2015) 26 King's Law Journal 412, 413.
[12] Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38(4) Civil Justice Quarterly 407, 407-426. See also Tom Mullen, 'Public Interest Litigation in Scotland' [2015] Juridical Review 363-383.
[13] Mullen (n 12) 363.
[14] Michael Ramsden, 'Strategic Litigation in English Judicial Review' (2023) 28(4) Judicial Review 261, 262.
[15] See, Mullen (n 12) 363.

Therefore, a public interest challenge can be said to occur where an individual who holds a private right interest in the matter at hand presents arguments supportive of a broader interest. Alternatively, PIJR can also arise from group challenges where a group – such as a non-governmental organisation (NGO) or pressure group – seeks to represent the wider public interest.[16] The latter is more controversial when it comes to standing and it will be considered further in the subsequent section. Nonetheless, the barrier of high costs arguably impacts all individuals with a potential public interest claim. Consequently, both are directly affected, and group challengers are considered in the final section of this article.

2.2 Examples of Public Interest Judicial Review

To understand the barriers to accessing PIJR, it is necessary to look at illustrative examples to provide the foothold for the substantive discussion.

R (on the application of Reilly and Another) v Secretary of State of Work and Pensions saw claimants succeed in their appeal.[17] It was held that the 2011 regulations were *ultra vires* as they did not satisfy the requirements of the primary legislation.[18] Although the applicants had a private interest in the decision of the case, the broad implications of the case – the applicants represented a wider class of recipients of job seekers' allowance – made it a PIJR.[19]

This case exemplifies the difference between solely personal judicial reviews and public interest instances. Whereas in a regular judicial review claim the decision or one-off policy decision might impact only those involved in the case, *Reilly* concerned a challenge to the legality of certain regulations, which challenge had a potentially wider impact. Thus, settlements in PIJR cases are inadequate. Where PIJR actions are raised, the proceedings need to be pursued in full: that is, they ought to culminate in a judicial decision.

An alternative example which illustrates the other type of PIJR is the case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement.*[20] Here, the award of aid to fund a dam in Malaysia was successfully challenged. World Development Movement, a campaigning organisation which had no private interest, was allowed to stand based on principles concerning the vindication of the rule of law.[21] Their case was aided by the absence of a more suitable applicant.[22]

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[16] Peter Cane, 'Standing Up for the Public' [1995] PL 276.
[17] *R (on the application of Reilly and Another) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453.
[18] ibid [31] (Neuberger SCJ and Toulson SCJJ).
[19] ibid 455; Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice', in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart, Oxford 2016) 84.
[20] *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 WLR 386 (hereinafter, '*World Development Movement*').
[21] Paul Craig, *Administrative Law* (8th edn, Sweet and Maxwell 2016) para 25-025.
[22] *World Development Movement* (n 20) 387.

The court has endorsed the use of campaigning organisations, as they have been seen to favour these 'repeat players' over individual litigants.[23] The access to justice analysis will include individuals' and organisations' ability to access PIJR proceedings.

2.3 Access to justice

In this article's analysis of 'access to justice', this key concept must be clarified before further issues can be considered. The term may be regarded as axiomatic, and so apparently in no need of elaboration. However, as suggested by Cornford, 'access to justice' most likely falls under Dworkin's idea of an 'interpretive concept'.[24] This assertion is further clarified: 'an interpretive concept is something assumed to be desirable but whose exact nature is in dispute', which suggests 'access to justice' to be broadly popular but the proper application of the concept is disputed. [25] As much can be evidenced by the overwhelming political support for access to justice, coupled with the highly controversial nature of the principle's proper application. [26] This article utilises a broad understanding of access to justice as a concept concerning access to multiple components: first, access to the production and promulgation of legal knowledge; second, access to guidance about that knowledge; and third, access to courts and related institutional fora.[27]

Having discussed the scope of what will be considered, evaluating what constitutes an affront to access to justice in each component is necessary. It is beneficial to divide the potential barriers to justice into two categories: doctrinal and practical. Doctrinal barriers cover principles of the court that can potentially bar access to justice, such as standing or *locus standi*.[28] The practical barriers concern the costs entailed by access to justice, primarily advice fees, court fees and adverse costs.

The test for 'determining whether there has been an unconstitutional impediment to access to justice', found in *R (on the application of UNISON) v Lord Chancellor,* can be repurposed for examining access to justice in judicial review for areas both within and outwith judicial controls.[29] Lord Reed held that measures 'will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice'.[30] Thus, when evaluating the doctrinal barriers, it will be considered whether there is a real risk that persons will be effectively prevented from accessing justice components.

[23] Mullen, 'Access to Justice' (n 19) 84.
[24] Tom Cornford, 'The Meaning of Access to Justice' in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart, Oxford 2016) 28.
[25] ibid.
[26] Owen Bowcott, 'Access to Justice a Greater Concern than Free Healthcare Poll' (*The Guardian*, 13 April 2015).
[27] William Lucy, 'The Normative Standing of Access to Justice: An Argument from Non-Domination' (2016) 33 Windsor Yearbook of Access to Justice 231, 234 – 39.
[28] Courts and Tribunals Judiciary, 'The Administrative Court Judicial Review Guide 2024' (Courts and Tribunals Judiciary, October 2024) [6.3].
[29] [2017] UKSC 51, [2020] AC 869.
[30] ibid [87].

In determining insufficient access to justice caused by the practical barrier of costs, it is useful to borrow from the Aarhus Convention.[31] The convention provides that environmental judicial reviews must not be 'prohibitively expensive' to comply with the demands of access to justice.[32] The meaning of this was clarified by the Court of Justice of the European Union:[33]

> [T]he persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result.[34]

While this requirement is binding only as regards environmental cases, it can also be extended to consider all PIJR when analysing access to justice. As such, it will inform the analysis below.

3. DOCTRINAL BARRIERS: STANDING

This section will analyse the doctrinal barrier to PIJR known as standing to determine whether the courts promote access to justice. The discussion will focus on the position in England with a comparative analysis of the position in Scotland.

The dominant view that has persisted in England is that the largely liberal approach to standing poses no threat to access to justice for group PIJR.[35] However, due to a recent halt in this liberal approach resulting from a recent decision, this section will analyse the impact of this decision in order to determine whether the sentiment that standing in England poses no threat to access to justice remains true.[36]

Although Scotland has traditionally been restrictive in its approach to standing as regarding groups raising public interest claims, antithetically to the position in England, it has faced reform in the past decade. Thus, the discussion follows the liberalisation of standing in Scotland to determine whether there is sufficient access for groups representing the public interest.

3.1 England

Standing or *locus standi* is a significant requirement to access judicial review as one of the prerequisites to permission to apply, restricting the availability of judicial review to those with a 'sufficient interest' in the matter.[37] Stanton and Prescot describe 'sufficient interest' as a

[31] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).
[32] ibid, Art 9.
[33] Hereinafter, 'CJEU'.
[34] Case C-260/11 *R (Edwards) v Environment Agency* (No 2) [2013] 1 WLR 2914, para 35, as discussed in Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19 Edinburgh Law Review 36, 50.
[35] McCorkindale and Scott (n 11) 416.
[36] *R (The Good Law Project) v Prime Minister* (*Runnymede)* [2022] EWHC 298 (Admin), [2022] ACD 50, hereinafter '*Runnymede*'.
[37] Senior Courts Act 1981, s 31(3).

'particularly broad' test.[38] Since legislation provides no further guidance, the use of this test is illustrated largely by case law.

The operation of standing in PIJR cases depends on the case. For instance, in *Reilly* it was held that 'persons whose legal rights and obligations are directly and adversely affected […] will have standing to challenge it'.[39] For other cases, such as *World Development Movement*, where an association or NGO seeks 'representative standing' the test is more intricate.[40] As a result, it is necessary to look at the test for organisations raising public interest challenges, as this is where the potential access to justice subversion occurs.

The approach in England was recognised as a liberal one as early as 1995 in the *World Development* case, which has been reaffirmed recently in *R (McCourt) v Parole Board*.[41] Auburn, Moffet and Sharland provide:

> The courts have adopted an increasingly liberal approach to both individuals and groups bringing judicial review claims in the public interest. If an individual or group seeking to represent the public demonstrates that they have a real and genuine interest in the decision under challenge they are likely to have standing.[42]

In *R (McCourt)*, Rose LJ confirmed this to be an 'accurate high-level summary of the law on standing'.[43] Thus, while the law on standing is not indiscriminately wide, the courts have discretion in cases where it is of importance to vindicate the rule of law to extend eligibility to those who may otherwise have lacked sufficient interest. Consequently, the liberal part of the test does not consist so much in a wide range of eligible candidates as in the *potential* for the range of candidates to be widened where the court deems it necessary.

This general point-to-point consistency would suggest that there has been unchallenged continuity in the liberal position. While this is beyond the scope of this article, it is relevant to point out that this is not strictly correct, as this approach has faced challenges from the government and the judiciary.[44] This journey is explored in far more depth by McCorkindale and Jack in their 2015 comparative piece.[45]

Nonetheless, what is important for the current analysis of access to justice is the present configuration of the law on standing. Sufficient interest experienced some pushback in the recent case of *R (The Good Law Project Limited and Runnymede Trust) v Prime Minister*

[38] John Stanton and Craig Prescott, *Public Law* (2nd ed, Oxford University Press 2020) 422.
[39] *Reilly* (n 17); Courts and Tribunals Judiciary (n 28) [6.3.2.4].
[40] *World Development Movement* (n 20). See also Cane (n 16).
[41] *World Development Movement* (n 20) [392]-[396] (Rose LJ); [2020] EWHC 2320 (Admin), [2020] ACD 127 [31]-[32].
[42] Jonathan Auburn, Jonathan Moffett and Andrew Sharland, *Judicial Review: Principles and Procedure* (Oxford University Press 2013) para 24.26.
[43] *R (McCourt)* [2020] EWHC 2320 (Admin), [2020] ACD 127.
[44] McCorkindale and Scott (n 11) 414–419.
[45] ibid.

(hereinafter *Runnymede)* where standing was not conferred on the Good Law Project.[46] The court stated:

> No individual, even with a sincere interest in public law issues, would be regarded as having standing in all cases. We do not consider that the position differs simply because there is a limited company which brings the claim.[47]

This decision did not advance the liberalisation trend to which public law has become accustomed over the last forty years. On the contrary, it has been regarded as putting 'the brakes on the liberalisation current'.[48] Notably, the decision appears to contradict the judgment in *R v Secretary of State for Foreign Affairs ex P Rees-Mogg* where 'sincere concern for constitutional issues' was deemed sufficient *locus standi*.[49] Considering that 'public law issues' differ only slightly from 'constitutional issues', it appears a more restrictive approach was followed in *Runnymede*. However, while this case appears to be a retraction from the prior position, the judgment is based on principles that have been salient throughout the development of the current liberal approach and, in fact, discussed in detail by Lord Justice Singh and Mr Justice Swift in *Runnymede*.[50] The court's reasoning can be explained through two principles.

Firstly, a better-placed claimant can be to the detriment of other claimants.[51] The inverse of this also true; where there are no other possible claimants this is to the benefit of the claimant as shown in *Rees-Mogg* since if 'Rees-Mogg did not have standing then no one did'.[52] In cases involving better-placed challengers, the court identified which claimant was most relevantly affected by the decision under challenge. Unfortunately, the court has yet to divulge details as to what goes into making this decision.[53] For example in *Mayor of London* the court merely stated, in relation to victims challenging Parole Board decisions, that *'*[t]hese are, or would be, obviously better-placed challengers'.[54] While it was logical to regard victims as having the strongest-standing claims to challenge the release of offenders, this highlights the narrow scope of the 'better-placed challengers' category. It would be unreasonable to suggest that the victims were best placed to challenge maladministration in any other context, which calls into question why the courts are turning away potential challengers (interest groups) who are better placed, experientially and financially, than the victims themselves.

The case for standing was also advanced by the importance of the issue being disputed, with the matter concerning the ratification of the European treaties.[55] Therefore, *Rees-Mogg* had

[46] Hereinafter, 'GLP'; [2022] EWHC 298 (Admin), [2022] ACD 50.
[47] ibid [57].
[48] Paul Law and Trevor Wan, 'Standing up for Public Interest Standing: The Hong Kong Experience' (2022) 27(2) Judicial Review 99, 101.
[49] *R v Secretary of State for Foreign Affairs ex p Rees-Mogg* [1994] QB 552 (QB).
[50] *Runnymede* (n 36).
[51] ibid [28], [59].
[52] *R (DSD and NBV and Others) v The Parole Board and others* [2018] EWHC 694 (Admin), [2019] QB 285 [110]; Cf Auburn, Moffett and Sharland (n 42). See also Stanton and Prescott (n 38) 432-433.
[53] *Parole Board* (n 52) [110].
[54] ibid.
[55] Stanton and Prescott (n 38) 433.

multiple factors leading the court to apply the most lenient conception of standing. Conversely, in *Runnymede*, a better-placed candidate was found to have standing, leading the court in that case to apply the most restrictive conception of standing to the GLP. appears to contradict *Rees-Mogg*, but the principles applied are consistent with the precedent discussed. This point is also found in the *Mayor of London* case.[56]

Turning to the second principle in relation to which *Runnymede* can be explained, the decision in that case appears to have taken inspiration from the *Rose Trust Theatre* case as it could be argued that both *Rose Trust Theatre* and *Runnymede* hold disapproval for attempts to circumvent the rules of standing through the incorporation of a company. [57] However, in both cases the court had legitimate alternative factors dictating a more restrictive test. Therefore, the impact on the overall test of standing was not altered by *Runnymede* as significantly as originally thought.

Nevertheless, it would appear, from *Runnymede,* that when faced with a potentially better-placed challenger, the court's reasoning for preferring Runnymede Trust was that it was 'an organisation which exists specifically to promote the cause of racial equality', the exact issue at hand.[58] Hence, as was the case in *Rose Theatre Trust,* a collection of claimants with no interest do not gain sufficient interest merely because they have formed a corporate body together; more importantly, even if the specific interest is genuine, it will not be actionable if the interest is too wide.[59] It must, therefore, be considered to what extent this change alters access to justice.

3.2 England: Access to justice

Although the new approach arguably restricts group standing, the primary reason why the GLP failed to have sufficient interest was due to the existence of a better-placed potential claimant. Nonetheless, any group attempting to receive standing via a special interest or expertise in a dispute must have a sufficiently distinct interest or expertise where they would be a potentially better-placed challenger.[60] This has the effect of limiting specialist public interest challengers, as seen with the GLP, which had seen some success in the last half-decade.[61] This raises the question whether restrictions placed upon a liberal test will create a real risk of impeding access to justice.

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[56] *Parole Board* (n 52).
[57] *R v Secretary of State for the Environment Ex p Rose Theatre Trust Co* [1990] 1 QB 504 (QB); Stanton and Prescott (n 38) 429-430.
[58] *Runnymede* (n 36)
[59] ibid [57]
[60] ibid [58]-[59].
[61] Mark Thorton, 'Effectively Holding 'Bad Chaps' to Account? Considering the Good Law Project's Procurement Judicial Review Claims' (*Medium*, 11 January 2022) <https://lawspring.org/effectively-holding-bad-chaps-to-account-4576ea1bf0f0> accessed 19 February 2024.

A decade ago, when the government was pushing for reforms restricting the test on standing, 'having been subject to broad criticism, the standing proposal was promptly dropped'.[62] However, the responses to the suggested reform can assist in the analysis of the new approach.[63] For example, McGarry suggested that,

> [a] more restricted approach to standing may also exclude those bringing judicial review claims as representatives of others. In turn, this may deny redress to those whose rights are directly and tangibly affected but who do not have the means, for financial or other reasons, to bring a claim on their own behalf.[64]

After considering McGarry's observations, the suggested reforms referred to above can be considered more restrictive than the new approach developed in *Runnymede*. As discussed above, the new approach only restricted representative groups who did not have a sufficiently distinct 'particular interest', making the restriction less severe than that in McGarry's example. Moreover, it could be argued that if it were not for the fact that Runnymede Trust also raised an action, there is a substantial chance that the GLP would have received standing since there was no apparently better alternative: that is to say, even though the decision in *Runnymede* was critical of GLP's overly broad articles of association, the decision did not bar the GLP from having standing due to said articles. It was held that the broad nature of the articles did not confer a distinct 'particular interest' and that 'it cannot be supposed that GLP now has carte blanche to bring any claim for judicial review no matter what the issue and no matter what the circumstances'.[65]

Acting as a claimant is also not the only option that presents itself to an organisation when seeking to assist a challenge for PIJR, the reason being that interest groups, such as GLP, can champion and support individuals who have a direct interest in bringing a legal action in their name.[66] This highlights that name proceedings are not the only way groups can support individuals seeking redress on the basis of their rights.

The new approach does not bar group legal actions, only those with an interest so wide as potentially to give rise to standing in all cases, especially where there is a better-placed group willing to raise a challenge. Therefore, standing, in light of *Runnymede*, does not pose a real risk to persons/groups accessing judicial review as it does not reach the threshold for actively preventing access to justice, but it does reduce the convenience of access to the courts.

3.3 Scotland

[62] Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703, 2013) para 79. See also McCorkindale and Scott (n 11) 418
[63] McCorkindale and Scott (n 11) 418.
[64] John McGarry, 'Importance of an Expansive Test of Standing' (2014) 19 Judicial Review 60, 64.
[65] *Runnymede* (n 36) [58].
[66] Mullen, 'Access to Justice' (n 19) 84.

The position north of the border has unique origins compared with England due to its private law considerations which have resulted in a requirement for 'title and interest'.[67] Lord Dunedin tentatively provided this test, stating that he did not want to 'risk a definition'.[68] Naturally, this test was 'not… reconsidered in a systematic way by the highest civil court since' 1915:[69] that is, until *AXA General Insurance Ltd and others v HM Advocate and others* broached the matter in 2011, allowing the Supreme Court to 'get Scots law moving on this point at long last'.[70] Lord Hope held:

> I think that the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the court's supervisory jurisdiction that lie in the field of public law.[71]

It was thought this was a clear enough signal to the Court of Session to adopt the liberal approach.[72] Nevertheless, this was not the case as seen in *Walton v The Scottish Ministers* where the court favoured 'a particularly narrow approach'.[73] When the decision in *Walton* was appealed, the Supreme Court had an opportunity to reinforce their decision in *AXA*, by specifying more clearly what would constitute sufficient interest.[74]

The Court of Session in *Walton* focused on Lord Hope's use of the phrase 'directly affected' to revert to their restrictive ways.[75] Lord Reed, however, explained in the Supreme Court that 'a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates'.[76] Thus, 'directly affected' and 'reasonable concern' are the two main criteria for standing that arose from *AXA*.

The sufficient interest test was subsequently placed on a statutory footing in the Courts Reform (Scotland) Act 2014.[77] Nonetheless, in an article in 2015, McCorkindale and Scott were still hesitant to conclude that the liberal approach was now the settled position as, at the time, the Outer House had appeared again to 'construe narrowly the "directly affected" test'.[78] Since this article was published, however, the Inner House has overturned this decision, reinforcing *Walton*. Lord Carloway held:

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[67] *D&J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7.
[68] ibid 12.
[69] *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46, 2012 SC (UKSC) 122, [2012] 1 AC 868, 887.
[70] Robert Reed, 'The Development of Judicial Review in Scotland' (2015) 4 Juridical Review 325, 332.
[71] *AXA General Insurance Ltd* (n 69) 917.
[72] Reed (n 70).
[73] [2012] CSIH 19. See also Mullen (n 12) 369.
[74] [2012] UKSC 44, 2013 SC (UKSC) 67 [92].
[75] ibid.
[76] ibid.
[77] Courts Reform (Scotland) Act 2014, ss 89, 27B(2)(a).
[78] *Christian Institute v Lord Advocate* [2015] CSIH 64, 2016 SC 47 [37].

> This, in turn, means that the person must be directly affected by the matter, which means that the petitioner must have a "reasonable concern" or be able to express such a concern "genuinely" on the part of a section of the public which he seeks to represent.[79]

Whilst there was a tendency for the Scottish courts to revert to a restrictive tradition, it now seems clear that the liberal approach is settled.[80] The Scottish approach is now 'undoubtedly a lower test', but does it provide sufficient access to justice for PIJR?[81]

3.4 Scotland: Access to justice

To restate the test that is relevant to PIJR, petitioners must be able to express a reasonable concern genuinely on the part of a section of the public they purport to represent.[82] This is strikingly similar to the English decision in *Runnymede*, as discussed above, where it was held that the GLP articles of association were so broad that they could not have standing.[83] This is not surprising when the two 'helpful statements of principle' used by the High Court arise from *AXA* and *Walton*.[84] The harmonisation attempted by the Supreme Court, therefore, had a limiting effect south of the border and a broadening effect in Scotland.

The current rules on standing look similar on paper, but there appears to remain a marked difference between how standing operates in practice in England and in Scotland. For instance, there was an expectation in lieu of the widening of the test that there would be a 'significant increase in organisations lodging judicial review petitions', which 'has not yet come to pass'.[85]

A persuasive justification for this is the lack of certainty around what constitutes sufficient interest. Even though the components of sufficient interest have been re-examined multiple times, there has been extremely limited advice on the practical considerations the court will take into account for standing.

The reluctance of *AXA* and *Walton* to provide practical considerations was due to the holding in those cases that the merits of standing depend greatly upon the particular context.[86] The court decided to let future case law provide context-specific practical considerations, which appeared reasonable.[87]

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[79] [2015] CSIH 64 [40]
[80] Douglas Jack and Christ McCorkindale, 'Standing in Scots Public Law Litigation' (Human Rights Consortium Scotland, 16 Jan 2020) <https://hrcscotland.org/2020/06/16/widening-who-can-take-a-human-rights-case/> accessed on 11 December 2023.
[81] Lorna Drummond, Frances McCartney and Anna Poole, *A Practical Guide to Public Law Litigation in Scotland* (W Green 2020) para 4-051.
[82] ibid 104.
[83] ibid ch 2, para 10.
[84] *Runnymede* (n 36) [23]-[27].
[85] Mhairi Snowden and Janet Cormack, 'Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland' (Human Rights Consortium Scotland, November 2018) 7.
[86] *AXA General Insurance Ltd* (n 69) [170] (Reed SCJ); *Walton* (n 74) [92] (Reed SCJ).
[87] Mullen (n 12) 372.

However, that approach is contingent on a body of case law which, in the event, has not materialised. As a result, the Scottish position remains uncertain. This creates a paradox: the position surrounding standing is uncertain, leading to hesitancy from petitioners to bring claims and, resultantly, no new case law emerges exploring the practical considerations of what constitutes 'sufficient interest'. Thus, the state of uncertainty is maintained, and a vicious cycle ensues.

From the limited cases that have emerged post-*AXA*, the practical considerations that have been uncovered tend to a restrictive approach. For example, 'engagement in a consultation process may be required to show sufficient interest'.[88] To reinforce the uncertainty argument, the limited practical considerations that have been developed have unclear applications as it is unknown to what extent public participation will be considered.[89] Notably, the uncertainty surrounding standing in Scotland has influenced the limited uptick in petitions for judicial review not only from individuals, but also from organisations.[90] This is undoubtedly influenced by the suspicion that the court will revert somewhat to their reactionary ways and, for that reason, the inability to predict accurately whether the threshold for standing will be met must play a role in deciding whether to pursue public interest litigation.[91]

Ultimately, while the test in Scotland is strikingly similar to that in England – when considering whether there is a real risk that a person will effectively be prevented from having access to judicial review – the unpredictability of whether a specific instance will reach the threshold of standing operates as a practical barrier of vagueness rather than a strict, doctrinal one. This obstacle is less direct than it was under the pre-*AXA* position since the current position merely increases the risk of a challenge and, technically, it does not form a doctrinal barricade.

Although the current position is not desirable, there appears an obvious solution – utilisation of English case law. As discussed, the lack of case law north of the border has deprived Scottish organisations of valuable guidance; no such problem exists south of the border. Therefore, it would be wise for the Scottish courts to continue the harmonisation of the two systems and set out that organisations may rely on English cases in the hope of providing more certainty to PIJR in Scotland.

However, because standing in Scotland appears more akin to a practical barrier, analysing it in isolation proves futile. Thus, the broader practical considerations, such as costs, must be added to the equation before conclusions can be reached. As Toohey J stated:

[88] Drummond and others (n 81) para 4-065.
[89] ibid.
[90] Snowden and Cormack (n 85) 7.
[91] ibid.

> Relaxing the traditional requirements of standing may be of little significance unless other procedural reforms are made. there is little point in opening doors to the courts if litigants cannot afford to come in.[92]

The next section will consider whether litigants can effectively afford to enter the door opened by standing.

4. PRACTICAL BARRIERS: COST

While the last section focused on the doctrinal barrier to accessing the courts via standing, this section focuses on the practical barrier of costs. The latest review of administrative law (the Independent Review of Administrative Law) acknowledged concerns raised about the current costs regime.[93] Notably, JUSTICE submitted that costs were not only 'prohibitively expensive', but also that the measures designed to alleviate costs had serious defects.[94] The review ultimately made no recommendations, concluding that further research and evaluation were necessary.[95] This section aims to aid that research by considering the cost of PIJR, as well as analysing the suggested problems in the cost protection measures. The section will consider in turn the costs of PIJR and legal aid, cost-capping orders, protective expenses orders, and crowdfunding.[96]

4.1 Costs

High costs are frequently at the forefront of general discussions concerning access to justice, specifically access to legal advice and to the courts.[97] At the core of this is the cost of legal representation, which is necessary for effective navigation of the legal system.[98] An individual's legal fees are not the only concern since cost-shifting – the party against whom the court has decided paying their opponent's legal costs – became standard practice.[99] Cost-shifting is understood to benefit wealthier litigants.[100]

This is true of all civil litigation. However, some factors distinguish judicial review, one being that a successful judicial review does not result in damages unless there is a simultaneous claim based on another cause of action.[101] Moreover, in most PIJR, the claimant will be at an economic disadvantage when challenging a public body.

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[92] John Toohey, 'Address to a Conference of The Australian National Environment Law Association' (1989) as cited in *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 [31].
[93] Hereinafter 'IRAL'; Independent Review of Administrative Law (n 9) para 4.11.
[94] ibid para 4.12.
[95] ibid para 4.14.
[96] Cost-capping orders are hereinafter referred to as 'CCOs', and Protective Expenses Orders are hereinafter referred to as 'PEOs'.
[97] Joe Tomlinson and Alison Pickup, 'Reforming Judicial Review Costs Rules in an Age of Austerity' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (Oxford University Press 2020) 205.
[98] Mullen, 'Access to Justice' (n 19) 84.
[99] Narelle Bedford, 'The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law' (2018) 30 Bond L Rev 119, 120; see also Civil Procedure Rules part 44-46.
[100] Tomlinson and Pickup (n 97) 212.
[101] Courts and Tribunals Judiciary (n 28) 93.

Due to the lack of empirical evidence, there is a sense of uncertainty about the exact amount judicial review costs, but it is generally agreed that judicial review is too expensive for most people.[102] Thus, multiple anecdotal accounts are necessary to form the basis of analysis for this article, therefore, importance has been placed on considering the potential inaccuracies that can arise from such evidence.

4.1(a) England

The problem of high and adverse costs is not new. Chakrabarti and others discussed the matter as far back as 2003.[103] In 2017, Hickman labelled this phenomenon as 'public law's disgrace' in an article that explained costs within judicial review.[104] Although Hickman also admitted that these were 'fairly loose estimates', it can be argued that his estimations are authoritative considering he is a barrister who has acted in many public interest challenges, such as *Rielly*.[105]

When explaining the extent of an adverse costs order, he said that for a simple two-hour judicial review, it would be around £8,000 – 12,000 (reduced for in-house solicitor rates).[106] Meanwhile a day-long review at full rates would reach £40,000-100,000, and the cost of a two-day review could range between £80,000 and £200,000. It is important to note that this is just the successful party's costs, which would be added to the other party's legal expenses. Elsewhere, it has also been claimed that adverse legal costs for a full hearing can cost upwards of £30,000.[107]

4.1(b) Scotland

The Scottish evidence was more limited than evidence for England and Wales. However, a similarly exorbitant trend can be identified by some notable published costs, such as those arising from the Scottish Government's section 35 challenge. The costs for external counsel alone were £221,346.49, which lands just above the upper range provided by Hickman (taking account of inflation, it is still within the range).[108]

An inference can also be drawn from the protective expenses orders in some cases, assuming that without the order the costs would be substantially higher. The cases of *McGinty and*

[102] Ravi Low-Beer, 'Funding Public Law Costs and How to Pay for It' (*The Public Law Project*) <https://publiclawproject.org.uk/content/uploads/data/resources/46/JR-North-Funding-Public-Law-notes.doc> accessed 16 March 2024.
[103] Sami Chakrabarti, Julia Stephens and Caoilfhionn Gallagher, 'Whose Cost the Public Interest?' [2003] PL 697, 699.
[104] Hickman (n 3).
[105] ibid para 6. See also *Reilly* (n 17).
[106] Hickman (n 3).
[107] Public Law Project, 'An Introduction to Judicial Review' (*Public Law Project*, 6 February 2019) <https://publiclawproject.org.uk/resources/an-introduction-to-judicial-review-2/> accessed on 5 January 2024.
[108] Scottish Government, 'Gender Recognition Reform - Section 35 Order: Judicial Review Cost' (1 November 2023) <https://www.gov.scot/publications/gender-recognition-reform-section-35-order-judicial-review-costs/> accessed 17 March 2024; Bank of England, 'Inflation Calculator' (18 September 2024) <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> accessed 29 September 2024.

Another Petitioners and *Walton* awarded protective expense orders of £30,000 and £40,000, respectively.[109] It is, therefore, reasonable to suggest that adverse cost orders in Scotland and England and Wales are extremely high.

Moreover, court fees tend to be overlooked. Whilst they do not reach the high amounts of legal fees when compounded with such other costs, they increase the potential monetary liability in England and Scotland.[110] It is worth noting that while legal aid offers relief from court fees, cost-capping orders (CCOs) and protective expenses orders (PEOs) do not.[111] Group challenges will therefore always be liable for court fees regardless of personal circumstances.

These costs are irrelevant without analysing them in the context of an individual's ability to pay them. Due to the high legal fees and the risk of an adverse cost order, it leaves three categories of litigants who can afford judicial review: high net worth entities, those with applicable litigation insurance, and individuals or organisations with cost protection.[112] The first two categories, in practice, represent a very small percentage of the population. Thus, with all other claimants relying on some form of cost protection measure in the face of 'prohibitively expensive' costs, the measures must effectively alleviate these costs or risk enabling a substantial barrier to justice.

To reiterate, directly affected individuals and organisations representing the public can raise PIJR actions. However, different cost protection measures apply to different claims. Legal aid can be utilised by individuals directly affected and those representing the public, but not organisations.[113] Therefore, the current state of legal aid will be analysed, followed by an analysis of CCOs, PEOs and, finally, crowdfunding.

4.2 Legal aid

The most apparent counterargument against the claim that a large section of potential claimants has no access to judicial review, due to high costs, would be that they have access to legal aid. In theory, legal aid can undeniably reduce costs as it covers personal legal fees and offers protection from paying the successful party's costs.[114] However, it is not the function of legal aid that has come under frequent criticism, it is its availability following reforms.[115]

The relevant restriction to legal aid occurred early in the regime of austerity with cost-cutting measures commencing in 2010 in England and Wales.[116] The application for legal aid is means-

[109] [2010] CSOH 5; See also *Marco McGinty v The Scottish Minsters* [2011] CSOH 163.
[110] Public Law Project, 'An Introduction to Judicial Review' (n 107). See also Drummond and others (n 81) para 2-04.
[111] Drummond and others (n 81) para 2-03, 2-081.
[112] Hickman (n 3).
[113] Mullen (n 12). See also McCorkindale and Scott (n 11) 425-432.
[114] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), s 26.
[115] Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Bristol University Press 2017) 37-38.
[116] ibid 12.

tested, which requires 'stringent financial eligibility criteria' as set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[117] There are three requirements an applicant must meet to access legal aid: gross income limit of £2,675 per month, disposable income limit of £733 per month, and disposable capital limit of £8,000.

Hirsch conducted extensive research comparing these caps to the realities of what working people can afford and found great problems, specifically with the disposable income cap.[118] He considered this the 'most important and systematic way in which people are subject to costs that they cannot afford under this system'.[119] He assessed that a couple with one child 'has 28% less than they require for MIS [minimum income standard] at the income at which they are excluded from legal aid.[120]

A similar conclusion was reached by Hickman, who concluded that disposable income does not include council tax, bills, and travel expenses.[121] Thus, in practice, the limit is less than £170 a week, which is comparable to one hour of billable work for a London solicitor.[122] With the legal aid limit excluding people who fall below the 'minimum income standard' to meet their material needs, the means test restriction is far too limited. Thus, it is submitted that even though judicial review is a financially impossible for some people, they do not qualify for legal aid. This is not restricted to individuals who have a low income since many others who earn above the disposable income limit are also unable to pursue judicial review due to the financial burden. Legal aid is, therefore, insufficient in providing access to those who cannot afford to apply for judicial review due to its overly strict financial eligibility criteria.

Scotland, undergoing a similar trend, has reduced funding towards legal aid, but it could still be considered better coverage than the one in England.[123] Nonetheless, the calculation of the number of people who find themselves in the limbo of the limit to access legal aid and those who can afford to litigate is not simple. With the restrictiveness of the limit, the total can be assumed to be substantial. Moreover, outwith eligibility is the issue of the availability of legal aid providers, which is currently in crisis (notably, in the Northeast).[124]

The restriction of legal aid has clear negative effects on access to PIJR since it is often a prerequisite for individuals undergoing wider public interest challenges. This can be witnessed as some solicitors only pursue public interest arguments where their client is protected from liability as it is 'unfair to expect individuals in precarious financial positions to take on the risk

[117] Tomlinson and Pickup (n 97) 211.
[118] Donald Hirsch, 'Priced out of Justice? Means Testing Legal Aid and Making Ends Meet' (The Law Society: Centre for Research in Social Policy, March 2018).
[119] ibid 38.
[120] ibid 4.
[121] Hickman (n 3).
[122] ibid.
[123] Katie Boyle, Diana Camps, Kirstie English and Jo Ferri, 'The Practitioner Perspective on Access to Justice for Social Rights: Addressing the Accountability Gap' (Nuffield Foundation, May 2022) 101.
[124] Tomlinson and Pickup (n 97) 211.

of cases which may have more structural benefits than individual benefits for them'.[125] Consequently, the reduction in legal aid is likely to reduce further the already limited number of public interest challenges as it poses an undue financial risk to the individual.

With the liberalisation of standing, however, PIJR is not restricted to directly affected individuals. As such, organisations can start legal proceedings on behalf of groups or merely in the broad public interest. However, these groups cannot access legal aid and must rely on alternative cost-limitation measures.

4.3 Cost-Capping Orders (CCOs)

CCOs emerged from the statutory evolution of the English common law protective cost orders and were developed and introduced by statute specifically for the purpose of judicial review.[126] In *R (Corner House Research) v The Secretary of State for Trade and Industry*, a five-part test was developed for PCOs which was later refined by statute.[127]

CCOs were introduced in the mid-2010s by the Criminal Justice and Courts Act 2015 with the intention of reforming PCOs.[128] The statutory alteration to PCOs faced criticism from commentators and the IRAL, suggesting that the effectiveness of CCOs has greatly decreased.[129] Thus, it is necessary to explore these criticisms.

4.3(a) Consideration of the number of people affected

The new statutory provision set out the requirements for granting a CCO, summarised as follows: the proceedings must be of a public interest nature and, it would be reasonable to withdraw the claim should the CCO not be granted.[130]

What has been controversial is what the courts should consider as 'public interest proceedings'. Notably, the court must consider the 'number of people likely affected if relief is granted'.[131] This appears to imply that the public interest is engaged 'only where many people are affected'.[132] This idea of public interest proceedings results in a restrictive cap since it is applicable only to matters which affect a large number of people who can access a CCO, thus barring many public interest cases from successfully obtaining one.

Nonetheless, this criticism appears overstated, as the judicial treatment of this provision is not nearly as restrictive as the ordinary reading might suggest. Mr Justice Ouseley, for instance,

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[125] Boyle, Camps, English and Ferri (n 123) 101.
[126] Hereinafter 'PCO'; Criminal Justice and Courts Act 2015, ss 88-90.
[127] [2005] EWCA Civ 192, [2005] 1 WLR 2600 [74]. See also Christopher McCorkindale and Paul Scott (n 11) 426.
[128] ibid.
[129] Independent Review of Administrative Law (n 9) para 4.12.
[130] The 2015 Act, s 88(6).
[131] ibid s 88(8).
[132] McCorkindale and Scott (n 11) 429.

held, 'I am not precluded from taking into account the interests of those indirectly affected'.[133] This liberal approach is exemplified in *GLP v Minister for the Cabinet Office*, where it was accepted that while the number of people directly affected was limited, there was a legitimate interest on behalf of taxpayers and, thus, a CCO was granted.[134] This highlights how the intended restrictive approach has little impact on its practical application and, as a result, this criticism holds little weight.

4.3(b) Uncertain application

Another point emphasised by Jackson, in his 2017 supplementary report on civil litigation, is that the criteria for granting a CCO are 'unacceptably wide', leading to uncertainty regarding the outcome of the application.[135] This convincing point is evidenced by the criteria summarised above, which is largely non-descript and is not likely to provide a clear working test. Moreover, regarding the court's consideration of s 88(8)(a): 'the number of people likely to be directly affected', its application can vary substantially from what an ordinary reading of the Criminal Justice and Courts Act 2015 would indicate, providing more uncertainty to the criteria.

It is argued that the uncertainty concerning CCOs is excessive and, where there is high uncertainty, there is an equally high risk. Resultantly, a measure whose original purpose was to alleviate risk has added an extra element of undue risk; a risk which not all potential claimants can bear, with the result that those claimants have no access to public interest judicial review.

4.3(c) Permission necessary

The Criminal Justice and Courts Act 2015 dictates that leave for judicial review must be granted before an order is made.[136] Claimants must, therefore, go through the substantial permission stage before the outcome of the CCO application is known. Hickman provided cases where the claimant's costs were in excess of £5,000, but the adverse cost order was £3,000 at the permission stage.[137] Therefore, claimants are offered no protection from full liability until after the permission stage.

Applying for a CCO appears especially bothersome when considering a crucial component for an application is that without an order the applicant would have to withdraw their JR application.[138] Thus, when an applicant is denied an order, they will most likely forfeit their

[133] *The Queen on the Application of Beety v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) (QB) [19].
[134] *Good Law Project Ltd v Minister for the Cabinet Office and Another* [2021] EWHC 1083 (TCC), [2021] Costs LR 517 [21]-[22].
[135] Rupert Jackson, 'Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs' (Judiciary of England and Wales, 2017) 129.
[136] The 2015 Act, s 88(3).
[137] Hickman (n 3).
[138] The 2015 Act, s 88(6)(b).

own legal costs and open themselves up to a potential adverse cost order as they will be unable to continue with the challenge.[139] This adds a further element of risk to the process that likely dissuades potential claimants from raising a claim. This suggests that the application for a CCO is 'prohibitively expensive' in itself, which adds to the already costly process of judicial review.

McCorkindale and Scott attempt to contextualise the reforms by explaining that their aim was to 'encourage claimants […] to consider more carefully the merits of bringing a judicial review'.[140] It is arguably for that reason that PCOs were identified as something that could be restricted, leading to this adverse effect. Therefore, it is reasonable to suggest that the aim of this change was contrary to the promotion of access to justice.

4.3(d) Claimants' ability to recover

Another change in the statutory application introduced limits to claimants' ability to recover costs as part of having their own liability limited.[141] For example, if an application for a CCO is successful and having won, they go on to seek an adverse cost order, the amount they can recover is limited. Thus, 'applicants are punished both for being unsuccessful and too successful'.[142] As already noted, if the claimant fails to achieve a CCO, they are liable; after the reform, if they succeed, there is a chance they cannot recover all their costs. This appears especially harsh considering judicial review provides no compensation, making it unreasonable for individuals and organisations representing those wronged or acting for the benefit of the wider public as they will be rewarded with a financial deficit.

David Lock is critical of this provision, stating:

> This appears to be an example of the executive persuading the legislature to make it more difficult for citizens of modest means to challenge the executive. That appears hard to justify on any rational basis, given the disparity in resources between individuals and government bodies.[143]

This clearly shows another example of how the reform to cap costs was aimed at dissuading public interest litigants from lodging claims. Further, this proves that whilst CCOs are measures intended to promote access to justice, they have been changed to such an extent that they are ineffectual. Thus, the high costs in PIJR are not remedied by a CCO since the prospects of a successful application for such an order are too uncertain and costly to be an effective remedy to high costs. It would also be reasonable to suggest that the application for a CCO is itself 'prohibitively expensive'.

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[139] David Lock, 'Protective Cost Orders and Cost Capping Orders: The New Law' (*Landmark Chambers*, 18 August 2016) < https://www.landmarkchambers.co.uk/wp-content/uploads/2018/07/16-08-12-PCOs-and-Costs-Capping-Orders-v4.pdf> accessed on 17 January 2024.
[140] McCorkindale and Scott (n 11) 425-432, 427; Ministry of Justice, *Judicial Review: Proposals for Reform* (Cm 8703, 2013) 113.
[141] The 2015 Act, s 89(2).
[142] McCorkindale and Scott (n 11) 429.
[143] Lock (n 139) 12.

4.4 Protective Expenses Order (PEOs)

PEOs are the Scottish equivalent of PCOs; as with standing, the Scottish common law adopted an English approach. Scotland adopted the criteria provided in the *Corner House* case in *McArthur v Lord Advocate*.[144] Thus, the approach largely follows pre-statutory intervention PCOs. However, the common law PEO is not the only type of PEO in Scotland because there are also statutory environmental PEOs which are derived from the Aarhus convention.[145]

Since there are two types of PEOs in Scotland, the majority of the analysis below will focus on a comparison of the two, highlighting the features which do not adequately protect the litigant from extensive costs in the common law approach.[146] A criticism central to Mullen's argument is that the maximum liability provided by the common law approach is too extensive (£30,000 in *McGinty* and £40,000 in *Walton*).[147] Meanwhile, the cap for Environmental PEOs found in ch 58A is set at £5,000. Mullen argues that the justification for environmental PEOs has no substantial distinction from the justification for common law PEOs. As such, the difference between the monetary caps is anomalous.[148]

Arguments have been advanced to justify said discrimination, pointing to 'floodgates' and a 'disproportionate burden on public authorities'; however, this does not follow when the lower caps in environmental cases have witnessed no such floods.[149]

Another criticism of the common law PEO is that the uncertainty in the cap is vast. While the common law PEO has been prone to set high caps (£30,000 - £40,000), the court has also granted caps as little as £1,000.[150] At first glance, this may appear to be a positive example of lowering caps in common law PEOs; however, it highlights the uncertainty that comes with the common law approach. Organisations seeking a cap could receive protection as low as £1,000 or £40,000, making strategic funding planning increasingly more difficult.

This uncertainty is further entrenched due to the overall lack of PEOs in Scotland, as their application is 'relatively rare' compared with the application of PCOs in England.[151] As witnessed with the law on standing, where there is a lack of certainty, an absence of new case law concerning PEOs exacerbates the uncertainty.[152] Thus, not only are PEOs relatively ineffective, but they are also under-utilised due to uncertainty.

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[144] *Corner House* (n 127) 192; 2006 SLT 170.
[145] Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Order) 2018, ch 58A. See also Aarhus Convention (n 31) art 9.
[146] Mullen, 'Protective Expenses Orders and Public Interest Litigation' (n 34). See also McCorkindale and Scott (n 11) 412-439.
[147] ibid.
[148] Mullen (n 12) 382.
[149] ibid 366.
[150] *Hillhead Community Council v Glasgow City Council* [2015] CSOH 35, 2015 SLT 239.
[151] Drummond and others (n 81).
[152] Snowden and Cormack (n 85) 7.

The Aarhus Compliance Committee held in 2020 that environmental PEOs were not effective in ensuring that environmental judicial review was not 'prohibitively expensive'.[153] This point is convincing since if environmental PEOs are ineffective in providing full access to justice, then common law PEOs are even less effective.

Scotland and England, therefore, have largely ineffective cost-capping measures. Consequently, a large portion of petitioners – those who do not have deep pockets or litigation insurance – do not have effective remedies to overcome the barrier of 'prohibitively expensive' costs.

Nevertheless, official measures to overcome costs are not the only available remedies, as the recent phenomenon of crowdfunding has been touted as the much-needed fix to high costs. The evidence underpinning this idea will be explored next.

4.5 Crowdfunding

Crowdfunding is unlike the other cost-facilitation measures discussed thus far. It is a 'market-based response to public spending cuts' and the ballooning cost of judicial review.[154] Whereas legal aid and CCO/PEOs developed from statute and case law, crowdfunding can be viewed as a natural result of the failures of official measures to tackle the primary problem: high costs. The very existence of crowdfunding is additional evidence of the inefficacy of other measures.

Crowdfunding is a mechanism for securing funding from interested parties/supporters. It is not limited to litigation, with its popularity primarily stemming from start-ups. Crowdfunding has gained prominence in the legal world through various successful campaigns, most notably involving the GLP, which has utilised crowdfunding for many of its challenges.[155] The GLP, whilst having their critics, has been somewhat successful in meeting its goals.[156] However, there is more to their operation than solely relying on crowdfunding. They have specific criteria for case selection, access to pro bono advice, and access to solicitors willing to work subject to crowdfunding limitations.[157] Crowdfunding, therefore, is one of the many factors in the GLP's success, but a direct inference of the effectiveness of crowdfunding cannot be taken merely from their success.

Whilst commentators have conceded that crowdfunding does have the potential to raise the sums required for judicial review in a relatively short time, the success stories only paint a

[153] Compliance Committee to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 'Second Progress Review of the Implementation of Decision VI/8K on Compliance by the United Kingdom of Great Britain and Northern Ireland with Its Obligations under the Convention' (2020).
[154] Sam Guy, 'Access to Justice on the Market: An Empirical Case Study on the Dynamics of Crowdfunding Judicial Review' [2021] PL 678.
[155] Joe Tomlinson, 'Crowdfunding Public Interest Judicial Reviews: A Risky New Resource and the Case for a Practical Ethics' [2019] PL 166, 174.
[156] ibid.
[157] Jolyon Maugham, 'The Lawyer as Political Actor' (Annual Mary University of London Law Lecture, London, 2013).

partial picture.[158] Tomlinson asserts that crowdfunding attempts that fail are far more frequent. However, he had no empirical data to reinforce this claim.[159] Guy has since conducted an extensive analysis of crowdfunding, which provides the tools to explore Tomlinson's claim.

Guy found that almost two thirds of the money raised funded only 13 per cent of the cases.[160] Due to the limited number of cases receiving the majority of total funds, the average raised per fund was skewed. Once the outliers were adjusted, it was determined that the mean was £10,209.90 and the median raised was £6,330 per campaign.[161] As already highlighted, £5,000 is not an unusual cost for just the permission stage and is certainly not enough for a full judicial review.[162]

Guy attributes the inequality in fundraising to three factors: topic appeal, marketing, and luck.[163] These should not be the meritocratic principles dictating which specific causes receive justice and which do not. Such reliance upon captivating the public to donate through general appeal or through dedicating time to marketing could necessitate greater investment in the first place, placing a further cost barrier upon justice. In practice, the requirement to find favour with the public, translates into the mobilisation of 'pre-existing political sympathies, antipathies and affiliations';[164] thus, the public interest is at risk of being overshadowed by the interest of pre-existing sectors of the public through crowdfunding.

Tickell carried out a similar empirical analysis of crowdfunding in judicial review in Scotland, and, whilst utilising a smaller sample size, the key takeaways were similar to Guy's.[165] Tickell characterised his findings as indicating 'a comparatively small number of high-value, high-contribution campaigns, and a much larger volume of campaigns raising comparatively modest sums from comparatively modest numbers of people'.[166] The same conclusion can, therefore, be drawn: whilst crowdfunding is very effective in some cases, the story of the majority is that of 'modest sums' that cannot be expected to cover the full costs of judicial review.

Nor is it only the inefficacy of crowdfunding that has drawn criticism from commentators; so too has its apparent undermining of the legal aid system.[167] The work of crowdfunding and the pro bono community has papered over the cracks left by the decrease in public funding.[168] Therefore, if there is a public perception that crowdfunding can operate in place of legal aid systematically, it could be used to justify further cuts to public spending, increasing the barrier

[158] Tomlinson (n 155).
[159] ibid.
[160] Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86(2) MLR 331, 338.
[161] ibid 338.
[162] Hickman (n 3).
[163] Guy, 'Access to Justice on the Market' (n 154) 678.
[164] Andrew Tickell, 'The Continuation of Politics by Other Means: Crowdfunded Litigation in Scotland (2015-2021)' (2022) 26 Edinburgh Law Review 100, 106.
[165] Guy, 'Mobilising the Market' (n 160) 338.
[166] Tickell (n 164) 102.
[167] Boyle, Camps, English and Ferri (n 123) 77.
[168] Tomlinson (n 155) 18.1.

to justice. Tomlinson urges against this, stating, '[t]here is, to be clear, not an ounce of systematic evidence that crowdfunding somehow fills the gap left by recent reductions in the availability of legal aid'.[169]

Empirical evidence suggests that only a minority of cases in England and Scotland benefits significantly from crowdfunding and that the majority of crowdfunding campaigns are ineffective. Hence, along with the other measures intended to tackle the high-cost barrier, crowdfunding is ineffective, leaving the barrier very much intact.

4.6 Access to justice

The preceding sections have focused on the possible defects highlighted by the IRAL in accessibility as a result of the barrier of 'prohibitively expensive' costs.[170] The numbers underpinning judicial review were analysed, finding that a judicial review lasting a day would most likely cost upwards of £30,000.[171] The extent of the costs of judicial review meant that, without additional measures, the fee itself blocks the process for many potential litigants.

Legal aid was also explored, which highlighted that, due to restrictive means, many people are denied legal aid. Legal aid is, therefore, far too restrictive to be an effective measure, since it excludes many people who otherwise cannot afford judicial review. PIJR is directly affected by this due the fact that many solicitors rely on clients receiving legal aid to pursue public interest issues. Thus, legal aid's reduction sees a reduction in PIJR.[172]

Cost-capping orders like legal aid have suffered from restrictive reform in the 2015 Act.[173] It was argued that the government actively wanted to discourage potential litigants from applying for judicial review and they manage to do so by restricting CCOs. These restrictions materialise through pushing the granting of the CCO until after permission, forcing litigants to incur liability before they know whether the claim is viable; making the cap reciprocal, meaning claimants may be in a deficit even if they win; and the general uncertainty due to the wide test which increases the risk further. All three changes appear to be contrary to access to justice as their intentions are plainly to dissuade potential claimants.

Protective expenses orders lacked the deliberately ineffectual legislative intent present in the creation of CCOs. However, this did not ultimately make a difference, as they were also found to be an ineffective measure. The primary fault of the PEO was its high cap; whilst it does protect litigants against full liability, it cannot be said that a cap of £30,000 or £40,000 is not 'prohibitively expensive'. The differences in cap value also added to the uncertainty surrounding PEOs, increasing the risk further.

[169] ibid.
[170] Independent Review of Administrative Law (n 9) para 4.12.
[171] Public Law Project, 'An Introduction to Judicial Review' (n 107).
[172] Boyle, Camps, English and Ferri (n 123) 101.
[173] The 2015 Act.

Finally, crowdfunding was discussed as an alternative means of meeting the costs of the legal proceedings. While crowdfunding was not mentioned in the IRAL, the publishing of new systematic studies into the application of crowdfunding in judicial review made it significant to analyse as a type of funding. The data for Scotland and England was ultimately ubiquitous in showing that crowdfunding succeeds in funding judicial review only in a limited number of cases. Consequently, since in most cases crowdfunding does not raise sufficient funds for judicial review, it cannot be considered a sufficient systematic remedy to the barrier of costs.

The defects in the cost measures highlighted in the IRAL have been clearly evidenced throughout this section, demonstrating the consequential need to analyse the possible solutions to 'prohibitively expensive' costs which undoubtedly act as a barrier to justice.

Alongside the many discussions of the failures of cost measures to prevent prohibitively expensive costs to access PIJR, there have been discussions about potential solutions.[174] As noted above, the UK is an international outlier in relation to access to civil justice and, thus, it is advisable to look abroad to understand how higher ranked countries deal with the issue.

A popular suggestion has been to point to the costs systems in Germany and New Zealand, which both rank substantially higher than the UK when it comes to access to civil justice.[175] However, a solution which has captured the imagination of commentators is already found within the UK: qualified one-way cost shifting.[176] This cost measure exists in personal injury claims and has the effect of protecting claimants from a cost order upon defeat, but the defendant is still liable for the claimant's costs.[177] The potential benefit of QOCS is clear as it tackles two of the tree main problems currently acting as a barrier to justice (legal costs, adverse cost orders and uncertainty). While the problem of legal costs remains, the threat of adverse costs is removed and, with that, much of the uncertainty is as well.

The justification for QOCS identified by Jackson as the 'asymmetric relationship' found in personal injury claims (single litigant vs repeat player) is undoubtedly present in PIJR.[178] Regardless of the identical basis, the government chooses not to implement QOCS but has not officially rejected the proposal.[179] The government's snubbing of QOCS has led commentators to seek out watered-down solutions such as an expansion of the current Aarhus rules to all judicial review claims.[180] While this solution does not tackle the problem as effectively as QOCS, the solution needs to be palatable to have a chance of being implemented.[181] From

[174] Hickman (n 3). See also Zuckerman, 'The Law's Disgrace' (UK Constitutional Law Association 27 February 2017) < https://ukconstitutionallaw.org/2017/02/27/adrian-zuckerman-the-laws-disgrace/> accessed 1 October 2024.
[175] Rupert Jackson, 'Fixed Costs – The Time Has Come' (IPA Annual Lecture January 2016) 8-9.
[176] Hereinafter 'QOCS'; Jackson (n 135) 127; and Hickman (n 3).
[177] Civil Procedure Rules Part 44.14.
[178] Rupert Jackson, 'Review of Civil Litigation Cost: Final Report' (Judiciary of England and Wales, December 2009) 89.
[179] Jackson (n 135) 127.
[180] ibid 129-130.
[181] ibid.

examination of QOCS and the Aarhus rules above, it appears that both solutions would greatly improve the prospect of access to justice in PIJR were they to be introduced.

5. CONCLUSION

Often what is represented about English PIJR is its early adoption of a 'liberal approach' to standing and, by extension, the importance to judicial review of vindicating the rule of law. While some suggest that the decision in *Runnymede* was a step back from the liberal approach, after analysing the decision, it can be argued this was not the case. *Runnymede* focused on the important principle that better-placed claimants can act to the detriment of others, which the court undoubtedly used to signify their disapproval of attempts to gain universal standing. Consequently, the test for standing is slightly narrower, as those acting on behalf of an interested group need to demonstrate a sufficiently distinct interest. However, if a similar situation were to arise where the GLP was the only option, it could be argued that the court would find that they had sufficient interest due to a lack of an alternative claimant. It is submitted that the approach to standing in England does not pose a real risk of preventing access to justice.

Standing in Scotland, by contrast, emerged from the opposing perception of being a traditionally conservative approach that has been liberalised by the Supreme Court. It was found that, in theory, the tests north and south of the border were almost indistinguishable; in practice, however, there is a lack of certainty concerning what considerations the Scottish courts would take into account when deciding on standing. This has ultimately added unnecessary risk to the application of PIJR. In isolation, said risk is arguably not a fatal doctrinal infringement of access to justice, but rather one that must be considered an additional practical barrier to justice. However, if the courts continue the trend of harmonisation by relying on English case law, this barrier may arguably be surmountable.

The liberal nature of standing is partly the reason why many perceive judicial review to be a quick and simple process. This appears to be a symptom of the ignorance of the practical realities of raising a PIJR challenge. As discussed throughout this article, raising legal proceedings is uncertain and challenging if the claimant is relying on measures to assist with costs, a difficulty which was identified in both of the jurisdictions considered.

John Toohey solidified this with his view that standing has little significance without further reform as there is little point in opening the doors to PIJR if most people cannot afford to come in. The fact that judicial review is unaffordable is for the most part uncontroversial, however, the effectiveness of subversion measures is more so. After analysing the measures for cost protection in England and Scotland, it is apparent that they offer limited systemic protection for PIJR claimants. This is because even after accounting for the application of cost measures, public interest judicial review's cost remains 'prohibitively expensive' in many cases.

The IRAL called for further investigation into the impact of costs on access to judicial review and concluded that reform is needed after having analysed the costs and measures in relation

to PIJR. Each cost measure examined was found to have at least one fatal flaw regarding providing access to justice on a systemic level, demonstrating that the current costs regime is undoubtedly 'prohibitively expensive'. Thus, a further report providing solutions for the problems identified is essential to promote access to judicial review. Ultimately, there is a clear lack of access to justice in both England and Scotland due to the practical barrier of costs undermining the rule of law

Whilst the intention of this article was not to focus upon solutions to the problem, from the brief analysis offered here, it appears clear that cost measures which should have a positive impact on the access to PIJR exist in varying degrees. However, due to the political undesirability of making such changes, the currently defective state of access to justice will most likely remain.

A RELEASE OR A RECKONING? NON-DEBTOR RELEASES IN UK CORPORATE INSOLVENCY LAW: A CASE STUDY OF *IN RE PURDUE PHARMA L P*

Matthew Paton*

ABSTRACT

Non-debtor releases are one of the most consequential issues in UK insolvency law, yet there is virtually no commentary at present. This article will discuss the US bankruptcy case of *In Re Purdue Pharma LP* [prior to the recent US Supreme Court decision].** and consider various arguments for and against the implementation of a Chapter 11 reorganisation plan which restricts victims' rights to sue tortfeasor directors/owners. The article will go on to address the impact of non-debtor releases in the UK and how UK judges may approach these cases. The variety of UK insolvency law procedures will be considered and the most likely mechanism used for implementing non-debtor releases, the Part 26A Restructuring Plan, is considered at length. The article will conclude by considering whether there will be an influx of cases into the UK courts and suggests that UK judges should be prepared accordingly.

Keywords: non-debtor releases, UK insolvency law, US bankruptcy law, unsecured creditors

1. INTRODUCTION

The case of *In re Purdue Pharma LP*[1] has been hailed as 'perhaps the most socially important bankruptcy case in history.'[2] Purdue Pharma manufactured one of the most popular opioid drugs in the United States and consequently played a prominent role in facilitating the opioid

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** In June 2024, the US Supreme Court issued the conclusive opinion in the case and the leading decision regarding non-debtor releases in the US. In a 5-4 split decision, the court held that non-debtor releases are not permitted under the US Bankruptcy Code. This article was written prior to the release of the US Supreme Court's opinion, although it has been briefly revised to reflect the court's decision. Nevertheless, for the purpose of the article's overall focus – the UK's treatment of non-debtor releases – and to aid in analysis and evaluation, the article considers numerous arguments, predominantly from commentary in the months and years preceding the Supreme Court decision, in an attempt to allow the UK evaluation to flourish. Accordingly, this article is not a case analysis of the US Supreme Court's decision, but instead, a consideration of non-debtor releases in general with a particular focus on the facts of *Purdue*.

[1] In *re Purdue Pharma L P* 22-110 (2nd Cir 2023).

[2] Hereinafter 'US', '*Purdue'*; Adam J Levitin, 'Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances' (2022) 100 Texas Law Review 1079.

epidemic across the US.[3] Subsequently Purdue and its owner, the Sackler family, faced several lawsuits for their involvement. In 2019 Purdue and its affiliate and subsidiary companies filed for bankruptcy protection. The company proposed a reorganisation plan which stated that in return for billions of dollars, the Sacklers would receive complete immunity from all past, present and future opioid-related civil claims.[4] These 'releases' are known as third-party or non-debtor releases: both terms will be used interchangeably throughout this article. They are controversial, not least because none of the Sackler family has personally filed for bankruptcy protection in the US.

The US Bankruptcy Code was intended to be used by companies in financial peril.[5] However, the Code has increasingly been utilised by large corporations and third parties to suit their needs. The question is, why are US courts happy to approve Chapter 11 plans that extinguish the right for mass-tort victims to have their day in court? Ignoring this question risks allowing large corporations and their owners to circumvent accountability for mass-torts.

However, as will become apparent, the possibility of a 'legal transplant' from the US is undesirable and possibly perilous for involuntary creditors in the United Kingdom, especially tort or delict victims.[6] That is because the US situation is formed by a set of facts not created by legislators and judges, with the input of academic literature and experts, but by a cavalry of lawyers representing the largest corporations in the US in an attempt to prevent their clients from ever having to sit within a courtroom's walls. While substantial arguments are presented for their benefits, the extent and breadth of cases which may inhibit similar non-debtor releases could represent a significant threat to corporate insolvency law.

Part 2 begins by providing an overview of the framework of UK corporate insolvency law, focusing on the smorgasbord of insolvency procedures available to companies in the UK. Part 3 will dissect the case of *Purdue*, considering the Court of Appeal's rationale through critically analysing US literature and commentary. Part 4 will show disparities between the US and UK systems and discuss the current situation of third-party releases in the UK. Part 5 will then evaluate whether UK courts are prepared for a 'UK Purdue Pharma' and explain the procedure that UK debtors will most likely use to release third parties from tortious or delictual liability.

Throughout this article, the evident social and legal risks associated with individuals making billions of dollars through fraudulent and misleading conduct which leaves victims without appropriate recourse ought to become only more apparent. Furthermore, the lack of UK discourse on the topic is alarming and perhaps calamitous. This article aims to explain the significance of non-debtor releases and hopes to encourage extensive further literature in the UK. For the purpose of brevity, this article cannot provide a complete assessment of the

[3] For a comprehensive outline of the story of Purdue Pharma and the Sackler family, see Patrick Radden Keefe, *Empire of Pain: The Secret History of the Sackler Dynasty* (Picador 2022).
[4] *Purdue* (n 1).
[5] Lindsey D Simon, 'Bankruptcy Grifters' (2022) 131 Yale Law Journal 1154, 1162.
[6] Hereinafter 'UK'.

situation in the UK or the US. However, it attempts to add new thoughts and ideas into an area of corporate insolvency law often overlooked by UK academics.

2. CONTEXTUAL FRAMEWORK

2.1 What is Insolvency?

The purpose of insolvency law is not to save all companies from failure.[7] As one commentator remarks, 'insolvency is a fact of life.'[8] Companies exist in an efficient and competitive marketplace, resulting in some companies succeeding and other companies failing. In such a situation, insolvency procedures allow the company the opportunity to reform its standing where it is likely to result in an increased benefit to those involved.[9] Still, what is meant by insolvency?

Simply, a company will be deemed insolvent if it finds itself unable to pay its debts.[10] However, often no legal consequences arise for a company upon merely being insolvent.[11] There are two principal tests for determining a company's ability to pay its debts in the UK: the 'cash flow' test and the 'balance sheet' test.[12] However, in the interests of conciseness, these tests will not be considered further as they are ancillary to this article's content. Also, it should be noted that the term 'bankruptcy' will be used when considering the US context, and 'insolvency' will be used when examining the UK.

Before engaging in a comprehensive analysis of the *Purdue* case and third-party releases, it is crucial to consider, generally, the landscape in which these matters exist. The following sections will concisely introduce the various insolvency procedures available to UK companies and assess their applicability to the facts of this article.

2.2 Corporate Insolvency and Rescue Procedures in the UK

2.2(a) Company Voluntary Arrangements[13]

A CVA can be utilised before a company is insolvent as a means of restructuring debt and operate as an early-stage mechanism for companies in financial distress; yet it should be understood that the relevant provisions are located in the Insolvency Act 1986.[14] Regardless of the unusual statutory locus, a significant feature of a CVA is that it is a 'debtor-in-possession'

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[7] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 117.
[8] Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet and Maxwell 2017) 4-5.
[9] ibid.
[10] Finch and Milman (n 7) 119.
[11] However, the same cannot be said for actions of directors of the company. See Finch and Milman (n 7) 119.
[12] Insolvency Act 1986, s 123(1)(e) and 123(2).
[13] Hereinafter 'CVA'.
[14] See Jennifer Payne, 'Debt Restructuring in the UK' (2018) 15(3) European Company and Financial Review 449.

procedure, this means that the company's directors remain in control throughout the process.[15] A major incentive to utilise a CVA is the ability to enforce the arrangement against dissenting creditors. However, this power is not as widespread as that under other procedures;[16] for example, a CVA cannot bind dissenting secured or preferential creditors without their consent.[17]

Furthermore, a CVA only binds creditors who voted, or who were entitled to vote, at the meeting approving the arrangement.[18] Additionally, a CVA lacks a statutory moratorium; therefore, creditors may still be able to enforce their claims during the process.[19] The culmination of disadvantages discussed above reflects the realism of the situation. CVAs never reached the lofty heights of large corporate restructurings that legislators may have hoped for in 1985-86.[20] For these reasons, and because the author is not aware of any cases where CVAs have been effectively used to release third parties from liability, they will be mentioned only in a comparative context throughout this article.

2.2(b) Part 26 Schemes of Arrangement

In the years after the 2008 financial crisis, schemes of arrangement have increasingly been used by financially distressed companies.[21] Similar to a CVA, a SOA is not strictly an insolvency procedure. The relevant provisions are found in Part 26 of the Companies Act 2006. The legislators may have learnt from the unusual categorisation of CVAs in 1985-86. SOAs benefit by avoiding any 'insolvency stigma' as they are grounded within company law. Accordingly, the utilisation of a SOA is deemed more appropriate than the utilisation of a CVA for a complex restructuring involving several classes of creditors.[22] A SOA can bind dissenting secured and preferential creditors. However, whilst wider than a CVA, the ability to 'cram-down' creditors is not unrestricted: SOAs can only bind dissenting creditors within classes.[23] This means that 75 per cent in value of each class of creditors voting either in person or by proxy must approve

[15] However, commonly CVAs are utilised during administration proceedings. In that case, the administrator would already be in control of the company. It is also possible, though less frequently used, for a CVA to be utilised by a liquidator. For further discussion of CVAs in administration see Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet and Maxwell 2019) ch 1, s 4.
[16] See 2.2.c Part 26A Restructuring Plan.
[17] Insolvency Act 1986, s 4(3) and (4).
[18] ibid s 5(2)(b).
[19] Originally, there was no moratorium available for companies seeking to enter a CVA. The Insolvency Act 1986 introduced a CVA-specific moratorium. However, this was only available for small companies and subject to some exceptions. Following the introduction of the Corporate Insolvency and Governance Act 2020, these provisions were repealed by Part A1 which outlined wider moratorium provisions which can be used by any company seeking to enter a CVA: see Payne (n 14).
[20] See Peter Walton and others, 'Company Voluntary Arrangements: Evaluating Success and Failure' (*Association of Business Recovery Professionals,* 2018) para 4.1.2.1 <https://publications.aston.ac.uk/id/eprint/37094/1/R3_ICAEW_CVA_Report_May_2018.pdf> accessed 3 February 2024, which demonstrates how most CVAs are utilised by small or micro-companies and addresses the overall stagnation of CVAs.
[21] Hereinafter 'SOA'; Payne (n 14) 458.
[22] Andrew Keay and David Walton, *Insolvency Law: Corporate and Personal* (5th edn, Jordan Publishing 2020) 196. See, eg, *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch); [2002] 2 BCLC 510.
[23] Companies Act 2006, s 899(3).

the scheme for the court to sanction it.[24] Moreover, similarly to a CVA, SOAs offer no statutory moratorium.[25] Regardless of their imperfections, SOAs have been extensively utilised as a way to release third parties in corporate restructurings.[26]

2.2(c) Part 26A Restructuring Plan

The Part 26A restructuring plan was introduced following the enactment of the Corporate Insolvency and Governance Act 2020.[27] The procedure was inserted into the Companies Act 2006 Part 26A. Its proximity to SOAs is reflective of the various similar features between the two procedures.[28] Additionally, similarly to a SOA and CVA, a Part 26A plan is a 'debtor-in-possession' procedure. However, unlike the others, Part 26A outlines a 'financial difficulty' test which must be satisfied.[29] The procedure also introduced provisions allowing courts the power to sanction a plan affecting all creditors, including dissenting classes, where the 75 per cent threshold was not met.[30] This manoeuvre, known as a 'cross-class cram down', is incredibly powerful. However, there are conditions which the court must satisfy to utilise the mechanism.[31]

Whilst a new procedure, the Explanatory Notes to the 2020 Act maintain that the existing body of Part 26 cases should be utilised 'as appropriate' in deciding Part 26A cases.[32] As discussed below, the cross-class cram down is the most fundamental mechanism for releasing third parties as against dissenting creditor classes. Moreover, restructuring plans have been termed 'virtually a blank canvas',[33] with the debtor holding the paintbrush. Therefore, as will be highlighted, a Part 26A plan will almost certainly be the procedure utilised by a UK company in the position of Purdue Pharma.

2.2(d) Other Procedures

Prior to the enactment of the Enterprise Act 2002, administrative receivership was a moderately well-utilised procedure by floating charge holders. The 2002 Act, however, shifted the spotlight onto administration, leaving administrative receivership in the dark.[34] Accordingly, the procedure is rarely used in practice anymore due to the commercial practicality which

[24] ibid s 899(1).
[25] However, it is conceivable that a company may utilise Part A1 of the Insolvency Act 1986 when seeking to enter a SOA, therefore granting the company moratorium protection.
[26] See 4.2 Third-Party Releases in the UK.
[27] Hereinafter 'Part 26A plan'.
[28] See *Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), in which Snowden J, at [215], emphasised the 'commonality' between Part 26 and Part 26A.
[29] See Companies Act 2006, s 901A(2).
[30] ibid, s 901G.
[31] See 5.1 A Transatlantic Perspective: Transferring the Purdue Judgment to the UK.
[32] Explanatory Notes to the Corporate Insolvency and Governance Act 2020, para 16.
[33] Eugenio Vaccari, 'Corporate Insolvency Reforms in England: Rescuing a "Broken Bench"? A Critical Analysis of Light Touch Administrations and New Restructuring Plans' (2020) 31 International Company and Commercial Law Review 645.
[34] See Insolvency Act 1986, s 72A.

administration provides for insolvent companies.[35] Therefore, this article will not consider administrative receivership any further.

Administration and liquidation are the most commonly used insolvency procedures in the UK.[36] However, they are both ineffective for releasing third parties from liability. For convenience of exposition, the following analysis shall consider liquidation; however, for the most part, the arguments apply equally to administration.[37]

The role of the liquidator is to collect in and realise the company's assets, ascertain claims, distribute dividends to creditors and investigate the cause(s) of the company's failure.[38] It is not the role of the liquidator to act as an agent or mediator for the purpose of securing a contractual agreement between creditors and non-debtors. Furthermore, a debtor would most likely wish to retain control throughout the process. Therefore, it can be made definite that a 'debtor-in-possession' procedure is vital when releasing third parties from liability. Accordingly, this article will concentrate on SOAs and Part 26A plans.

Whilst the relevant insolvency procedures may now be clear and understood, it may not be clear what secured or unsecured creditors are or how tort or delict victims are categorised in insolvency. The next section of this article aims to answer those questions succinctly.

2.3 A Brief Note on Creditor Ranking

The *pari passu* principle is often considered central to corporate insolvency law,[39] it asserts that 'all unsecured creditors are required to share and share alike in a common pool of assets and realisations',[40] the idea being that losses should be carried equally amongst unsecured creditors. The UK Supreme Court has held that the *pari passi* principle represents 'the fundamental principle of equality.'[41] However, the principle is 'formally confined' to liquidation and administration.[42] The relevance of *pari passu* is diminished when considering SOAs or Part 26A plans; there is no statutory obligation upon debtors using these procedures to comply with the *pari passu* principle. Consequently, a thorough analysis of *pari passu* and creditor ranking rules is unnecessary for this article.[43] However, a succinct description of certain creditor ranking matters augments the discussion of non-debtor releases.

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[35] See The Insolvency Service, 'Company Insolvency Statistics: October to December 2023' (Gov.uk, 30 Jan 2024) < www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2023/commentary-company-insolvency-statistics-october-to-december-2023 > accessed 19 February 2024.
[36] ibid.
[37] Albeit administration does have some differences to liquidation. For example, an administration may attempt to rescue a company as a going concern.
[38] Finch and Milman (n 7) 21.
[39] However, see Rizwaan Jameel Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60(3) Cambridge Law Journal 581.
[40] van Zwieten (n 15) 121.
[41] *The Joint Administrators of Lehman Brothers Limited v Lehman Brothers International (Europe) (In Administration) and others* [2017] UKSC 38 [20] (Lord Neuberger).
[42] van Zwieten (n 15) 122.
[43] For a thorough discussion, see van Zwieten (n 15) ch 8.

A secured creditor is 'a creditor of the company who holds in respect of his debt a security over the property of the company.'[44] Consequently, secured creditor claims are satisfied before any unsecured creditors receive payment, at least in liquidation and administration. In contrast, an 'unsecured creditor' is a creditor who does not hold in respect of his debt a security over the property of the company.[45] An unsecured creditor has no enforceable right in the debtor's property prior to insolvency; they may sue the debtor only for a personal claim and enforce that claim through a court order against the debtor.[46] At present, tort or delict victims rank as ordinary unsecured creditors upon a company's winding-up.[47] This means that they will be treated *pari passu* and rank equally with all other unsecured creditors, even though tort and delict victims are evidently involuntary creditors in that they 'involuntarily extend credit to the debtor in the… amount of [their] damages.'[48] The result is that individual tort or delict victims will generally, in practice, receive little or nothing in insolvency proceedings due to secured creditors recovering ahead of them.

This understanding can be advanced through the concept of the 'externalisation of tort risk'. The concept involves a questionable incentive by which companies undertake 'more risk-laden projects'[49] or merely grant more secured loans. This will reduce the expected value of the company's unsecured creditors' claims in the event of insolvency and shift some of the costs onto involuntary creditors, leaving the mass-tortfeasor shareholders to receive the benefits.[50] Due to constraints, this article will not continue a direct analysis of tort or delict creditors in insolvency law: a topic deserving of its own article. Nevertheless, the focus of this article is a case involving tort and delict victims and the analysis which follows is formed with an emphasis on tort and delict creditors in particular.

With the context now outlined, this article will turn to consider the US case of *Purdue Pharma*. The case is widely acknowledged as the modern leading case on non-debtor releases. Furthermore, with an increased desire to replicate 'Chapter 11-like' procedures in the UK, and the UK becoming a venue for mass tort litigation, this article's discussion of *Purdue* illustrates areas of consideration for UK academics, practitioners, judges, and legislators.[51]

[44] Insolvency Act 1986, s 248(a).
[45] ibid s 248(a).
[46] Finch and Milman (n 7) 62.
[47] Louise Gullifer and Jennifer Payne, *Corporate Finance Law: Principles and Policy* (3rd edn, Hart Publishing 2020) 3.
[48] Christopher M E Painter, 'Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of the Times' (1984) 36(4) Stanford Law Review 1045, 1054.
[49] See Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (1st edn, OUP 2005) 140.
[50] ibid.
[51] See *Vedanta Resources Plc v Lungowe* [2019] UKSC 20; *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

3. PURDUE PHARMA L.P. AND NON-DEBTOR RELEASES IN THE US

Over the past 25 years, several parties across the US have sued Purdue Pharma and the Sackler family for their involvement in the opioid epidemic.[52] However, those parties now find themselves 'trapped in the matrix of bankruptcy.'[53] This is because the Sackler family are, to borrow one US commentator's terminology, bankruptcy grifters – 'parasites' who have embedded themselves within the case of Purdue Pharma.[54] How can the Sacklers 'attach' themselves to Purdue's bankruptcy? The Sacklers have not filed for personal bankruptcy, and bankruptcy grifters are not permitted under the US Bankruptcy Code.

This position has been engendered by judges, considering complex restructurings with tragic facts, who find themselves with one option: providing non-debtors with access to the bankruptcy process in return for substantial financial contributions toward the company's bankruptcy. The result is an 'infiltration' of parasites into Chapter 11 cases and risks enabling mass-tortfeasor owners/executives to sidestep their genuine liability for mass-torts and other harmful acts. This chapter will investigate Purdue Pharma and consider third-party releases in the US.

3.1 Before Purdue

Initially, it is necessary to define what is meant by a non-debtor release. Chapter 11 of the US Bankruptcy Code allows companies to continue operating and form an agreement to pay their creditors under a pre-arranged reorganisation plan. A reorganisation plan is a 'highly negotiated, multiparty contract between the debtor and its body of creditors'.[55] These plans have often been used by companies which face an onslaught of litigation and provide claimants with damages in a streamlined way.[56] However, to effect the reorganisation, these plans may require additional financial support; this is where non-debtors become involved.

Non-debtors may be directors or owners of the debtor company, such as the Sacklers in the case of Purdue.[57] Initially, it may be surprising that owners/executives would contribute monetarily to the plan. However, when a company faces numerous lawsuits, it is exceedingly likely that owners/executives are also subject to litigation. Consequently, non-debtors do not contribute without assurances. They hope their contribution to the plan will be enough to warrant a release from all civil liability.[58] A third-party release extinguishes a claimant's claim

[52] Purdue (n 1) [12a].
[53] Simon (n 5) 1157.
[54] ibid 1157.
[55] Dorothy Coco, 'Third-Party Bankruptcy Releases: An Analysis of Consent through the Lenses of Due Process and Contract Law' (2019) 88(1) Fordham L Rev 231, 234.
[56] Simon (n 5) 1162-1164.
[57] Under the company law doctrine of separate legal personality, directors and owners (shareholders) are not typically liable for the company debts. However, there are certain circumstances where directors and/or owners may be liable for company debts, including in issues concerning insolvency/bankruptcy law.
[58] See *Purdue* (n 1) [12a].

over their objection.[59] Therefore, a third-party release is a non-consensual discharge of a creditor's personal claim against a debtor.

Consensual releases do not cause much controversy; however, the ability to enforce a reorganisation plan against non-consenting claimants raises important questions. Those questions of the appropriateness of third-party releases and their impact on claimants cannot be overstated and will be discussed throughout this chapter. However, this chapter begins with a discussion of the origin of non-debtor releases in the US.

The origin of third-party releases in the US arose from corporate exposure to asbestos litigation. By the 1970s, several asbestos-related companies had been forced into bankruptcy.[60] The first non-debtor release was used in the reorganisation of Johns-Manville Corporation, a leading producer of asbestos products.[61] Although the company had a stable balance sheet and could meet its current liabilities, the company was concerned about future liabilities from personal injuries which would not manifest until years later.[62] Having filed for Chapter 11 bankruptcy, the company's reorganisation plan used 'new and innovative ways' to deal with its liabilities.[63]

The plan created two trusts to pay all asbestos-related claims: for property-damage claims and health-related claims. To ensure that claimants could recover only from those trusts, the plan required the court to issue an injunction.[64] This injunction, known as a channelling injunction, required all claims against the company to be settled through the trusts.[65] More importantly, the plan also 'prohibit[ed] all parties with asbestos-related personal injury or property damage claims from suing certain protected entities', those entities being the company and its insurers.[66] Thus, the channelling injunction and plan allowed claimants to recover damages but safeguarded the company and its insurers from continued liability. Unsurprisingly, following Johns-Manville Corp's reorganisation plan, several other asbestos companies used this blueprint.[67]

The widespread use of non-debtor releases and channelling injunctions by asbestos companies caught the attention of Congress, and, in 1994, the Bankruptcy Code was amended by section 524(g). This provision explicitly allows for the use of non-debtor releases and channelling injunctions in the reorganisation of companies facing asbestos litigation, subject to certain requirements.[68] Following the enactment of the new provision, the courts expanded their approval of non-debtor releases beyond the confines of asbestos litigation, notwithstanding the limits of section 524(g). The courts used the Bankruptcy Code's equitable powers under section

[59] Levitin (n 2) 137.
[60] Douglas G Smith, 'Resolutions of Mass Tort Claims in the Bankruptcy System' (2008) 4(4)1 UC Davis Law Rev 1613, 1618.
[61] In *re Johns-Manville Corp* 97 B.R. (Bankr S.D.N.Y. 1989).
[62] ibid [176]-[177].
[63] Simon (n 5) 1172.
[64] In *re Johns-Manville Corp* 68 B.R. (Bankr S.D.N.Y. 1986) [622], [624]-[628].
[65] Simon (n 5) 1159.
[66] ibid.
[67] ibid.
[68] See 11 USC s.524(g)(4)(A)(ii).

105(a) to justify approving these plans, and several other mass-tort cases have similarly relied on section 105(a) to confirm releases for insurers, distributors, vendors, and shareholders.[69]

Bankruptcy grifters, like the Sacklers, appear emboldened by the court's expansion of non-debtor releases and are pushing the boundaries of bankruptcy precedent beyond recognition. The remainder of this chapter discusses *Purdue Pharma* in depth; however, it is vital to understand that the practices permitted by US courts are not found in any provision of the US Bankruptcy Code and have never been authorised by Congress or the Supreme Court.[70]

3.2 Purdue: Facts of the Case

Purdue was purchased by the Sackler family in the 1950s. In the intervening years, family members held various executive and board-level positions within the company. Whilst a moderate success, it was not until 1995 that the company became a pharmaceutical Goliath. In 1995, Purdue developed, and the Food and Drug Administration approved, Oxycontin, a controlled-release semisynthetic opioid analgesic.[71]

Without the scientific verbiage, Purdue aggressively marketed that the time-release formulation of the capsule prevented the drug from posing a threat to abuse or addiction.[72] The so-called 'wonder drug's' popularity boomed. However, in 2000, State governments began to alert Purdue to the widespread abuse of Oxycontin, and the FDA forced Purdue to remove the 'low addiction' label attached to the drug.[73] In subsequent years, almost 2,600 civil lawsuits have been filed against Purdue and the Sacklers by individuals, State governments, and federal agencies. Between 2008 and 2016, Purdue distributed almost $11 billion of the company's revenue to Sackler family trusts and holding companies.[74] Unsurprisingly, this manoeuvre reduced Purdue's assets significantly, leaving the company in a pointedly weakened financial position as it defended numerous lawsuits.

By 2019, the Sacklers had stepped down from the board of directors. In the same year, due to the colossal stack of cases, Purdue filed for Chapter 11 bankruptcy.[75] However, crucially, the Sackler family did not. Following two years of fraught negotiations and several amendments to the reorganisation plan, in 2021, a New York Bankruptcy Court approved the plan.[76] The fundamental element of the agreement was the Sacklers' contribution of at least $4.325 billion to the debtors' estate over approximately nine years.[77] In exchange, the Sacklers would receive complete immunity from all past, present, and future opioid-related civil claims. However, on

[69] See *In re Dow Corning Corp* 280 F.3d 648 (6th Cir 2002); *In re The Delaco Co* No 04-10899 (Bankr S.D.N.Y. 2004); *In re TK Holdings Inc* No 17-11375 (Bankr D Del 2018).
[70] See Simon (n 5) fn 149.
[71] Hereinafter 'FDA'; *Purdue* (n 1) [16a] and [17a].
[72] ibid [17a].
[73] ibid.
[74] ibid [19a].
[75] ibid [21a].
[76] In *re Purdue Pharma L.P.* 633 B.R. 53, [108] (Bankr S.D.N.Y. 2021).
[77] ibid [108].

appeal, the District Court rejected the plan. The Court held that there existed no statutory authority which permits non-debtor releases such as the ones found in the plan.[78]

The decision of the District Court was appealed, and the case came before the United States Court of Appeals for the Second Circuit. However, prior to the case being heard, an agreement was filed which provided in total a $6 billion Sackler family contribution to the plan. Unquestionably, $6 billion is a significant sum; however, the court estimates the claims against Purdue and the Sacklers to be more than $40 trillion.[79]

Following the Court of Appeal's decision to reinstate the Bankruptcy Court's approving judgment, the case was conclusively appealed to the US Supreme Court – where, at the time of writing, the case is currently under consideration.[80] Thus, whilst the plan is not yet binding, it is the most insightful plan yet for considering the effect of third-party releases in the US and how that impacts claimants' treatment.[81]

The next section of this chapter will discuss the rationale adopted by US courts when approving non-debtor releases and elaborate on the ancillary legal structure of these releases.

3.3 Purdue: Role of the Court and Relevant Law

Before continuing, it may be unclear why Purdue opted for bankruptcy proceedings as opposed to facing the multidistrict litigation proceedings brought by the victims.[82] MDLs are a consolidation of proceedings which have been filed individually across the US. While they have proved incredibly popular,[83] they possess a fundamental drawback. MDLs cannot bind parties who have not filed lawsuits, meaning that even after the completion of the MDL, it is possible for future suits to arise.[84] These shortcomings are eradicated by bankruptcy.

Moreover, bankruptcy permits the discharge of all liabilities, and bankruptcy courts can then channel all present and future claims into a settlement fund, allowing debtors the finality they crave.[85] Additionally, the fact that certain bankruptcy courts authorise non-debtor releases is a fundamental reason why Purdue and others utilise bankruptcy proceedings to resolve mass tortious liability.

Purdue is not the first debtor to attempt to release third parties from liability through Chapter 11; US courts have been 'divided over the propriety of non-debtor releases for more than three

[78] In *re Purdue Pharma L.P.* 635 B.R. 26 (Bankr S.D.N.Y. 2021).
[79] *Purdue* (n 1) [22a].
[80] See the comments at the beginning of the article and *Harrington v Purdue Pharma L.P.*, No.23-124, 2024 WL 3187799 (June 27, 2024).
[81] See, ibid; Simon (n 5) 1190.
[82] Hereinafter 'MDL'.
[83] See Elizabeth Chamblee Burch, 'Litigating Together: Social, Moral, and Legal Obligations' (2011) 91(87) Boston University Law Review 87.
[84] William Organek, 'Mass Tort Bankruptcy Goes Public' (2024) 77(3) Vanderbilt Law Review 723.
[85] ibid 757.

decades.'[86] It is understood that the Bankruptcy Code does not explicitly permit third-party releases outside of asbestos litigation.[87] Nevertheless, it does not explicitly prohibit such releases either. Accordingly, so-called pro-release courts state that the equitable powers of sections 105(a) and 1123(b)(6) of the Bankruptcy Code allow for non-debtor releases of other mass-tortfeasors.[88] As far back as 1989, some courts have held that non-debtor releases may be granted under section 105(a), even for pharmaceutical companies.[89] However, so-called anti-release courts maintain that third-party releases violate section 524(e).[90] This provision states that 'the discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.'[91] Conversely, pro-release courts argue that section 524(e) does not expressly mention third-party releases; only the impact of the debtor's discharge more generally. Therefore, they contend that section 524(e) does not prohibit the use of a separate order releasing third parties from tortious liability.[92]

In addition to these two arguments, others maintain that even if section 524(e) is not an obstacle, sections 105(a) and 1123(b) quite simply do not have the powers to permit non-debtor releases.[93] It is conjectured that section 105(a) may be used only to enforce other provisions contained in the Bankruptcy Code. Thus, since no provisions permit non-debtor releases outside of asbestos litigation, section 105(a) cannot be relied on to release the Sacklers from liability.[94]

Whilst the inconsistent judicial response has resulted in no definitive test when considering non-debtor releases in the US, the following section outlines two principal elements of the test adopted by the Court of Appeal in *Purdue*.

Firstly, the debtor and the non-debtor must share an 'identity of interest', ensuring sufficient subject matter jurisdiction over the claims of the release.[95] In *Purdue*, the Court of Appeal Judges agreed with the Bankruptcy Court's characterisation of the claims as 'fundamentally overlapping',[96] however, their reasoning is somewhat perplexing. The Sacklers are covered by the Sackler-Purdue Indemnity Agreement, meaning that they have 'a reasonable basis to seek indemnification from the Debtors [Purdue]' where the Sacklers have to pay damages to opioid victims.[97] The court construed that this possibility meant the claims of Purdue and the Sacklers had a 'high degree of interconnectedness' because the Sacklers could diminish the estate of

[86] Joshua M Silverstein, 'A Revised Perspective on Non-Debtor Releases' (2023) 43(10) Bankruptcy Law Letter 1, 5.
[87] See, the discussion on Second Circuit Case Law in *Purdue* (n 1) [58a] and [59a].
[88] Silverstein (n 86) 5.
[89] See, *In re A. Robins Co* 880 F.2d 694 (4th Cir 1989) [701].
[90] Silverstein (n 86) 5.
[91] 11 U S C s 524(e).
[92] See, *Dow Corning Corp* (n 69).
[93] Silverstein (n 86) 6.
[94] See, *In re Digital Impact Inc* 223 B R [1], [4-5], [14] (N D Okla. 1998); In *re Sybaris Clubs Int'l Inc* 189 B R [152], [155-56], [159] (Bankr N D Ill 1995).
[95] *Purdue* (n 1) [66a].
[96] See ibid [30a].
[97] ibid [51a].

Purdue.[98] This rationale stems from the case of *Master Mortgage*,[99] in which it was held that the identity of interest will usually be based upon a relationship of indemnity between the debtor and third party. Thus, a claim against the non-debtor is, in essence, a claim against the debtor. Accordingly, the court held that because the release of the non-debtor's liability is 'conceivabl[y], indeed likely' to have a direct impact on the recoverable estate of Purdue, there exists a statutory jurisdiction to impose the releases.[100]

Notwithstanding the court's finding of 'interconnectedness',[101] critics contend that non-debtor releases simply act counter to bankruptcy policy and allow solvent non-debtors to force extraordinary settlements onto mass-tort victims.[102] Additionally, the Sackler family profit from several of the essential and procedural benefits of bankruptcy, whilst only incurring a fraction of the downsides. The Sacklers are not under obligations of transparency and financial disclosure, and principally, they do not have to make all their assets available for distribution to creditors, as is indicative of a typical bankruptcy.[103]

Secondly, the Court held the release must be 'essential' to the debtor's reorganisation to warrant utilising sections 105(a) and 1123(b)(6).[104] The simplest method of evidencing this element is by way of proving that the contribution by the third party is contingent upon their release from liability.[105] This was summarised by the court, in quoting an earlier judgment, to be that without the releases, 'there is little likelihood of [a plan's] success.'[106] The court then utilised *Metromedia* to advance this point.[107] However, the court's interpretation of the case warrants further consideration.[108]

In *Metromedia*, the Court of Appeal found that, '[a] non-debtor release … should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan.'[109]

Moreover, the court was reluctant to conclude that releases outside of asbestos-related cases were allowed and worried that permitting such releases would result in abuse by non-debtors.[110]

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[98] ibid [36a].
[99] (1994) 168 B R 930, [935] (Bankr W D Mo).
[100] *Purdue* (n 1) [50a].
[101] ibid [49a].
[102] Gerard McCormack, 'Debt Restructurings, Debt Grifting and the Limits of Contractualism' (2023) 32(3) International Insolvency Review 474, 490 (discussing Ralph Brubaker, 'Mandatory Aggregation of Mass Tort Litigation in Bankruptcy' (2022) 131 Yale Law Journal Forum 960).
[103] See Simon (n 5) 1208.
[104] *Purdue* (n 1) [72a]; Joshua M Silverstein, 'Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations' (2006) 23 Emory Bankruptcy Developments Journal 13.
[105] See, eg, *In re Am Family Enter* 256 B R 377 (D N J 2000).
[106] *In re Master Mortgage Inv Fund Inc* 168 B R 930 (Bankr W D Mo 1994).
[107] *In re Metromedia Fiber Network Inc* 416 F 3d 136 (2nd Cir (2005)).
[108] *Purdue* (n 1) [67a].
[109] *Metromedia* (n 107) [143].
[110] See Jeanne L Schroeder and David G Carlson, 'Third-Party Releases under the Bankruptcy Code after Purdue Pharma' (2023) 31 American Bankruptcy Institute Law Review 1, 55.

Notwithstanding, these contentions, the court did allow the release and confirmed the plan.[111] The Court of Appeal in *Purdue* appears to have drawn inspiration from the final decision and not the aforementioned reasoning. The effect of this is to eliminate the importance of context when considering non-debtor release plans, *Metromedia* did not concern tort-afflicted victims or involve facts with as wide-spread implications.

This section closes with two final remarks made by the District Court in *Purdue*, which were overturned by the Court of Appeal. Firstly, the releases afforded to the Sacklers by the Court of Appeal extinguish particular personal liabilities, such as any liability for fraud or wilful and malicious injury,[112] which cannot even be discharged by filing for personal bankruptcy.[113] Secondly, the Court of Appeal's rationale of 'essential' and 'unique' circumstances when authorising non-debtor releases will increasingly fall foul of the idiom: 'when every case is unique, none is unique.'[114]

These points emphasise the requirement for defined precedent when determining these cases. It is concluded here that the Court of Appeal's decision allows bankruptcy grifters the option to 'cling on' to a debtor's bankruptcy and drastically curtails the substantive and procedural obligations under the Bankruptcy Code. With this understanding, the following section further scrutinises the negative implications of allowing non-debtor releases. Nonetheless, the section also considers arguments for allowing the Sacklers the releases they crave.

3.4 Implications of the Case: Is Chapter 11 Overreaching?

In drafting Chapter 11, there was a predominant focus on the consensual contractual relationships between the debtor and their lenders, suppliers, and [115] Other parties – such as tort victims – may be dragged into bankruptcy occasionally, and their claims would be tangential to the overall bankruptcy. However, releasing non-debtor mass-tortfeasors from liability is moving beyond any explicit authority of Chapter 11. Therefore, immediately, the way Purdue is attempting to utilise the Bankruptcy Code is the exact opposite of how the drafters intended the code to be used.[116] In other words, bankruptcy grifters have thwarted the intention of Congress. Additionally, US commentators contend that bankruptcy judges are willing to yield to debtors'[117] Some even note that 'in the face of mass-tort litigation' some judges believe 'that equity supersedes the strict requirement of the Code.'[118] Having established the framework within which Purdue is attempting to release the Sacklers from

[111] *Metromedia* (n 107) [38].
[112] See 11 U.S.C. s.523(a)(2), (4), (6).
[113] David S Kupetz, 'Purdue Pharma and the Non-Consensual Release of Direct Claims against Non-Debtors' (2022) Norton Annual Survey of Bankruptcy Law 269, 309.
[114] ibid 309.
[115] See Anthony J Casey, 'Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy' (2020) 120 Columbia Law Review 1709.
[116] Pamela Foohey and Christopher K Odinet, 'Silencing Litigation through Bankruptcy' (2023) 109 Virginia Law Review 1261, 1279-80.
[117] Melissa B Jacoby, 'Shocking Business Bankruptcy Law' (2021) 131 Yale LJ F 409, 411.
[118] Peter M Boyle, 'Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy' (1992) 61 Fordham Law Review 421, 431.

liability, this section examines the central reason why US courts cannot release third parties, outside of asbestos litigation: the deprivation of a claimant of their fundamental rights.

The US Supreme Court has consistently held that fundamental rights are protected in bankruptcy.[119] Bankruptcy courts do not have the power to deprive individuals of their trial rights. This is confirmed by the procedural due process clause of the Fifth Amendment.[120] If the Sacklers had personally entered bankruptcy, the claimants would have had their day in court; had the opportunity to present their claims against the Sacklers; and, if requisite, obtained a fair distribution from the Sackler estate.[121] Furthermore, some US commentators have termed non-debtor releases as 'theft' from the claimants.[122] The reorganisation plan is robbing the claimants of their ability to recover damages through court proceedings in exchange for a cash payment equating to a proportion of a contribution made by the non-debtor.[123] When a non-debtor's contribution does not equate entirely to what the claimant is due, the non-debtor release should not be authorised.

However, others have argued that some critics in the media have overstepped in their disparagement of the *Purdue* case. The criticism stems from the implication by some that the releases in the plan also protect the Sacklers from criminal liability.[124] This is, however, 'a frivolous argument'.[125] The Bankruptcy Code contains no powers to prevent criminal proceedings of any description. Furthermore, the Sacklers are not 'getting-off-free'; courts require the released party to '[contribute] substantial assets to the reorganisation'.[126] Additionally, the prospect of a non-debtor release induces individuals and corporations to provide a significant contribution, which increases the funds recoverable by claimants and simultaneously reduces the legal and administrative costs that would result from multiple lawsuits.[127]

Furthermore, it has been argued that the funds provided by the Sacklers allow for the 'most meaningful economic recovery for the overwhelming majority of victims.'[128] Purdue has unremittingly contended that without approval of the Sackler releases, the plan will not be successful. In a recent case, a court held that non-debtor releases have constitutional authority

[119] Martin J Bienenstock and Daniel S Desatnik, 'Coerced Releases: Are Non-Consensual Third-Party Releases in Bankruptcy Code Chapter 11 Cases Allowed by the Constitution and the Bankruptcy Code?' (*Harvard Law School,* 2023) <https://bankruptcyroundtable.law.harvard.edu/2023/09/19/coerced-releases-are-non-consensual-third-party-releases-in-bankruptcy-code-chapter-11-cases-allowed-by-the-constitution-and-the-bankruptcy-code/> accessed 13 February 2024.
[120] US Const Amendment 5; ibid.
[121] Bienenstock and Desatnik (n 119).
[122] See Schroeder and Carlson (n 110) 4.
[123] ibid.
[124] See, eg, Zachary Wolff, 'The Worst Drug Dealers in History are Getting away with Billions' *CNN* (Atlanta, 3 September 2021) <https://perma.cc/7RZH -RLHB> accessed 11 January 2024.
[125] Anthony J Casey and Joshua C Macey, 'In Defense of Chapter 11 for Mass Torts' (2023) 90(3) University of Chicago Law Review 973, 992.
[126] *Dow Corning Corp* (n 69).
[127] Casey and Macey (n 125) 1001.
[128] ibid 986.

and could be permitted.[129] Interestingly, the court limited its decision to the facts before it, holding that the releases were 'absolutely required' for the success of that plan.[130] The incessantly juxtaposing and piecemeal judicial reasoning in these cases amplifies the need for consensus.

Unsurprisingly, the publicity of *Purdue* has garnered legislators' attention. In 2021, the 'Non-Debtor Release Prohibition Act' was introduced to the House of Representatives. So far, the bill has received lacklustre support with six Democratic cosponsors at the time of writing.[131] Whilst the bill aims to prohibit entirely the use of third-party releases in cases such as *Purdue*, it is more probable that the Supreme Court's upcoming decision will have a greater impact in the foreseeable future on third-party releases in the US. Nevertheless, it is hoped that this chapter has reinforced the consequences of permitting non-debtor releases. Having extensively considered the US situation, this article will direct its attention to the condition of non-debtor releases in the UK.

4. RELEASED THIRD PARTIES VS MASS TORT CLAIMANTS

4.1 Chapter 11 vs UK Procedures

The ability under Chapter 11 to utilise a cross-class cram down and its prevalent usage in large corporate reorganisations did not go unnoticed in UK insolvency circles.[132] Certainly, Chapter 11 had some influence on the arrival of the Part 26A plan; the similarities between Part 26A and Chapter 11 may allow for further inspiration and guidance to be drawn from the latter when considering non-debtor releases. Nevertheless, for simplicity, the requirements for implementing a cross-class cram down under Chapter 11 will not be explored in depth. However, a brief note about the US test is appropriate.

Two specific requirements must be satisfied when attempting to cram-down dissenting classes: the cross-class cram down must not discriminate unfairly, and it must be fair and equitable with respect to each dissenting, impaired class.[133] Regarding the former, some commentators have suggested that the courts typically interpret the phrase to mean that dissenting classes should receive equal treatment in comparison with other similarly situated classes.[134] This description essentially creates a 'horizontal equity' between the classes and protects creditors from unfair allocation contrary to the liquidation value.[135] The other requirement that the plan is 'fair and

[129] *In re Millennium Lab Holdings* II LLC, 945 F3d 126 (3rd Cir 2019).
[130] ibid.
[131] See Nondebtor Release Prohibition Act H R (2021-2022) [4777] <www.congress.gov/bill/117th-congress/house-bill/4777> accessed 4 Feb 2024.
[132] See, eg, Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (1st edn, Cambridge University Press 2014).
[133] 11 USC s.1129(b).
[134] Rodrigo Olivares-Caminal and others, *Debt Restructuring* (3rd edn, Oxford University Press 2022) 126.
[135] David A Skeel, 'The Empty Idea of "Equality of Creditors"' (2018) 166 University of Pennsylvania Law Review 699, 713.

equitable' requires utilisation of the 'so-called absolute priority rule (APR)'.[136] This means that a junior class of creditor should not recover until the senior classes have recovered in full and that no senior class may recover more than it is owed.[137]

In contrast, the UK legislator chose not to include such a mechanism in the Part 26A plan. Nonetheless, there are arguments that the legislator left the decision of utilising and applying the APR to judges.[138] However, UK judges have noted the absence of the words in the statute and Snowden J has held that they should not be read into the provision either.[139] He goes on to note that, 'without a frame of reference by which to assess what is (or is not) just and equitable, such a test would be meaningless and would not carry matters any further forward'.[140] Thus, whilst there are certainly similarities between Part 26A and Chapter 11 plans, it has been suggested that the 'design differences' between the two are too significant to allow a direct transplant of the US 'fair and equitable' requirement to the UK.[141] In Chapter 11 plans, all creditors are included, whereas, in the UK, it is possible to propose a plan to certain classes of creditors only.[142] This may allow the debtor to propose a more favourable Part 26A plan exclusively to tort or delict victims or propose a plan which excludes such victims. The practical effects and benefits to a debtor of either of these manoeuvres are untested.

Sarah Paterson has examined this issue in the context of SOAs. Through utilising a recent case, she describes how Snowden J declined to sanction the scheme partly because the company had sought to engage only with certain creditors and kept others at arm's length.[143] Granted, the case was centred upon different facts and involved a SOA, as opposed to a Part 26A plan. However, she utilises Snowden J's rationale and goes on to say that the possibility of excluding certain creditors is exemplified when considering Part 26A plans: 'as a debtor may seek to exclude an entire class from its negotiations and to impose a plan it has agreed with the remaining classes'[144]

She suggests that the debtor should be required to show an attempt to bargain with the dissenting classes, but that rational bargaining was unattainable, thus requiring the court to sanction the cross-class cram down.[145] This author finds the situation is further amplified when considering non-debtor releases. The ability to restrict negotiations to willing creditors may leave non-consenting creditors, such as tort victims, with little recourse. Ensuring judges

[136] Sarah Paterson, 'Judicial Discretion in Part 26A Restructuring Plan Procedures' (2022) <https://ssrn.com/abstract=4016519> accessed 10 February 2024 1, 10.
[137] Olivares-Caminal (n 134) 171-172. For a definition of senior and junior classes, see Donald Rutherford, *Routledge Dictionary of Economics* (3rd edn, Routledge 2013) 320, 537.
[138] Paterson (n 136) 11.
[139] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) [219].
[140] ibid.
[141] Paterson (n 136) 10.
[142] Companies Act 2006, s 901F(5). It should be noted, however, that where a class of creditor is not included in a plan, their rights will remain unaffected in law following the plan's implementation. The situation is different to those of dissenting creditors who are included in the plan. Their rights will be affected in law by the implementation.
[143] *Re Proactis Holdings Plc* [2021] EWHC 2493 (Ch), [23] and [103] – [123].
[144] Paterson (n 136) 26.
[145] ibid 26.

confirm that non-consenting creditors were included in the rational bargaining somewhat rebalances the horizontal equity between consenting and non-consenting creditors. The following section builds upon this analysis and considers the current state of non-debtor releases in the UK.

4.2 Third-Party Releases in the UK

Third-party releases are not an entirely novel arrangement in UK insolvency law, as highlighted by the case of *Re T&N Ltd (No.3)*.[146] The case was decided under the Companies Act 1985 and concerned claims from current and future employees for personal injuries caused by asbestos exposure. In facts similar to the US case of *Johns-Manville Corp*,[147] the insurers of the company would form a fund of £36.74 million to be held on trust, ready to pay the damages as they arose, with the stipulation that no employee may assert a personal injury claim against the company or its insurers. It was argued that such a scheme was not an arrangement between T&N and its creditors and, accordingly, could not be upheld. However, the court dismissed those arguments and affirmed the scheme.[148] In the court's view, the term arrangement had a broad meaning, and the scheme was practically a 'tripartite matter', as opposed to a bilateral matter between the debtor and creditor.[149] The court held that the scheme was 'an integral part of a single proposal affecting all the parties'.[150] However, the judge held where the connection between the subject-matter of the scheme and the relationship between the company and its creditors was subject to further relaxation and expansion, objections on discretionary grounds to sanctioning the scheme would also increase.[151] This highlights the apprehension within the UK judiciary when setting precedent on these matters[152]

In a more recent case, it was held that a release should be 'necessary to give legal or commercial effect to the compromise or arrangement between the scheme company and its creditors.'[153] The indispensable nature of a third-party release appears to be the foundation of UK courts' decision-making, a point evident in *Noble Group Limited*.[154] The case was centred around a complicated group restructuring, where the court held that a ricochet claim against the debtor, akin to the Sackler-Purdue Indemnity Agreement, may undermine the efficacy of the scheme unless the release was granted.[155] Several other cases have adopted and approved this reasoning, such as *Re APCOA Parking Holdings GmbH*,[156] *Re Lecta Paper UK Ltd*,[157] and *Re*

[146] [2006] EWHC 1447 (Ch).
[147] *In re Johns-Manville Corp* 97 B.R. (Bankr S.D.N.Y. 1989).
[148] See the opinion of David Richards J in *Re T&N Ltd (No.3)* [2006] EWHC 1447 (Ch).
[149] ibid [52].
[150] ibid.
[151] See McCormack (n 102) 492.
[152] See *Re Lehman Brothers International (Europe) (In Administration)* [2009] EWCA Civ 1161 [83] (Longmore LJ).
[153] *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).
[154] *In the Matter of Noble Group Limited* [2018] EWHC 3092 (Ch).
[155] Without the release of the non-debtor, the creditors would instigate their claims against them, which in turn creates ricochet claims from the non-debtor to the debtor. See also *In the Matter of Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) [44].
[156] [2014] EWHC 3849 (Ch), [2015] Bus LR 374 [149] (Hildyard J).
[157] [2020] EWHC 382 (Ch) [21] (Trower J).

Codere Finance 2 (UK) Ltd.[158] It has been suggested that the flexibility of SOAs and their 'commercial drive' align them positively with third-party releases.[159] It is easy to imagine then that there are numerous cases involving non-contractual arrangements (e.g. cases involving torts and delicts) which utilise SOAs to release third parties. However, to the best of the author's knowledge, the UK has seen almost no cases on the subject since *T&N Ltd (No.3)*.[160] Nevertheless, the extensive practical use of SOAs for releasing third parties cannot be ignored. With this point in mind, it is imperative to consider the current requirements imposed on third-party releases for SOAs and whether they apply, or can apply, to all non-debtor releases in the UK.

Jennifer Payne outlines four conditions for releasing non-debtors from liability in the context of SOAs.[161] The last two are largely auxiliary: the creditors' rights against the non-debtor cannot be proprietary, thus, non-debtors cannot utilise a release to avoid a creditor's claim over title in land,[162] and the SOA must make commercial sense and (directly and indirectly) benefit scheme creditors.[163]

The first substantive requirement is that the scheme should be focused on a 'give and take' between the non-debtor and the creditors.[164] As mentioned above, Payne details how the courts have termed 'arrangement' very broadly.[165] Continuing, she considers the historical definition, and it appears that the historical breadth afforded to the term has since allowed for third-party releases to be labelled 'arrangement[s]'.[166] Intriguingly, the courts have been resistant to the broadening of the phrase but appear restricted by decades of precedent.[167] Longmore LJ in *Re Lehman Brothers* noted that 'the decision in *T&N Ltd (No.3)*… on this point [is] near the outer limit of the scope of s.895'.[168]

Returning to Payne's 'give and take' requirement, as insightful as it may be, it focuses on contractual third-party releases, not tortious releases such as in *Purdue*. Certainly, her comments are informative and encapsulate the 'give and take' requirement, referring to the fact that the creditors and the non-debtor must attempt to 'meet in the middle', and that compromise is a requisite for both parties.[169] However, Payne's comments ignore the lack of bargaining power which unsecured involuntary creditors hold. Thus, for SOAs incorporating non-debtor

[158] [2020] EWHC 2441 (Ch) [138] (Falk J).
[159] Ilya Kokorin, 'Third-Party Releases in Insolvency of Multinational Enterprise Groups' (2020) 11 European Company and Financial Review 107, 122.
[160] [2006] EWHC 1447 (Ch).
[161] Payne (n 132) 23-24.
[162] See ibid 23.
[163] See ibid 23.
[164] Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (2nd edn, Cambridge University Press 2021) 24.
[165] ibid 23-24.
[166] ibid 24.
[167] See Mann J's comments in *Re Jelf Group* [2015] EWHC 3857 (Ch) [10].
[168] *Lehman Brothers* (n 152) [83].
[169] See Payne's analysis of *Re Uniq plc* [2011] EWHC 749 (Ch) in Payne (n 164) 22-23.

releases which involve tortious or delictual creditors, the requirement for give and take must be altered. Failure to do so leaves tort or delict victims with plenty to give and nothing to take.

Secondly, Payne contends that the 'creditors' rights against a third party shall be sufficiently closely connected with claims against the primary debtor'.[170] This point was discussed by the English Court of Appeal in *Re Lehman Brothers*.[171] In the case, Longmore LJ utilised *T&N Ltd* to explain the requirement, which has since been approved in a subsequent Part 26A plan case.[172]

Whilst several cases have confirmed the requirement for a 'sufficient nexus' between the creditors' rights and the claims against the company,[173] there are concerns that the requirement has been weakened since *Re Lehman Brothers*.[174] The courts appear more willing to consider other claims which may affect the proposed scheme's success. For example, in the High Court case of *Noble Group Limited*, Snowden J noted that '[t]he jurisdiction is not, however, limited to guarantees and claims closely connected to scheme claims'.[175] Although heard at a lower court than *Re Lehman Brothers*,[176] the case most likely indicates a transition towards maximising the number of successful arrangements, possibly at the expense of involuntary creditors.

An analysis of Payne's work highlights the uncertainty which exists at present. In comparison with her earlier edition of text on SOAs, her more recent edition utilises vaguer language when discussing the issues of assessing the proximity of claims.[177] Moreover, her lack of further clarification merely implies that judges should pay attention to this requirement. How UK courts walk this tightrope is unknown and poses a fundamental question when considering the future of non-debtor releases in the UK. If judges are more fixated on allowing the release of non-debtors in the most time-efficient manner, they prima facie leave involuntary creditors with even weaker prospects of receiving anything from the arrangement.

The final part of this article discusses the concept of a 'UK Purdue Pharma' and how UK judges may handle such a case. Given the limited volume of articles, and in an attempt to simplify the recommendations posited, the final part focuses on a select few commentators' viewpoints and considers the impact of non-debtor releases in the UK following *Purdue*.

[170] Payne (n 164) 24.
[171] *Lehman Brothers* (n 152) [83] (Longmore LJ).
[172] See, *In the Matter of Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) [165].
[173] See, *Re APCOA Parking Holdings GmbH* (n 156); *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch); *In the Matter of Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch).
[174] *Lehman Brothers* (n 152).
[175] *Noble Group* (n 154) [25].
[176] *Lehman Brothers* (n 152).
[177] See Payne (n 164) 25.

5. CROSSING THE ATLANTIC: A SIMPLE VOYAGE FOR PURDUE

5.1 A Transatlantic Perspective: Transferring the Purdue Judgment to the UK

In the previous chapter, there was a significant focus on SOAs. However, as set out from the beginning of this article, a plan such as Purdue's quickly crumbles without the ability to enforce a cross-class cram down. Therefore, when considering transferring the *Purdue* judgment to the UK, it is critical to analyse the cross-class cram down in Part 26A.

When attempting to implement a Part 26A plan involving a cross-class cram down, two conditions must be satisfied before the judge. Firstly, the court must ensure that none of the dissenting classes of creditors would be 'any worse off than they would be in the event of the relevant alternative.'[178] Part 26A provides that, 'the relevant alternative is whatever the court considered would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned'.[179] Secondly, at least 75 per cent in value of one class of creditors, which would receive payment under the plan or has a 'genuine economic interest' in the company, must have voted to approve the plan.[180]

Predictably, 'identifying the contours of the relevant alternative will often not be a straightforward matter'.[181] In one case, Zacaroli LJ disputed the company's negative proposition of the relevant alternative and sided with the shareholders' more positive outlook.[182] This case highlights a looming concern, that companies, and institutional secured creditors, may have perverse incentives to present a pessimistic outlook hoping to leave other creditors with no funds and take the surplus value for themselves.[183] A recent SOA case highlighted this situation: the company maintained that the alternative to the scheme was an insolvency proceeding.[184] However, following the court's rejection of the plan, the company presented two amended SOAs – both of which provided improved terms for dissenting creditors.[185]

Returning to Part 26A, *Virgin Active* attempted to implement a cross-class cram down in their restructuring plan.[186] The facts of the case do not warrant consideration due to complexities surrounding classes of creditor landlords. However, the judgment has allowed for some interesting academic commentary. Paterson has suggested that dissenting creditors should be able to argue that they would obtain improved terms in the event of the relevant alternative.[187] She goes on to note that this would allow the creditor to continue their contractual relationship

[178] Companies Act 2006, s 901G(3).
[179] ibid, s 901G(4).
[180] ibid, s 901G(5).
[181] Paterson (n 136) 3.
[182] *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch).
[183] Paterson (n 136) 4.
[184] *In the matter of ALL Scheme Limited* [2021] EWHC 1401 (Ch); *In the matter of ALL Scheme Limited* [2022] EWHC 1318 (Ch).
[185] See ibid.
[186] See *Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch).
[187] Paterson (n 136) 5.

with the debtor and avoid the 'potentially scant distribution to unsecured creditors' in a formal insolvency procedure.[188] To transfer Paterson's logic to the facts of this article provides for an interesting evaluation.

Virgin Active and Paterson's comments concern a consensual contractual relationship. However, her rationale is fundamental for ensuring that tort or delict victims can argue that the relevant alternative is not the maximum value achievable outside of the restructuring plan. Whilst this analysis is hypothetical, upholding tort or delict victims' claims is imperative to the success of Part 26A. Paterson notes that 'it is easy to see why… court[s] may wish to avoid the complexities involved in this analysis',[189] referring to investigating the accuracy of the relevant alternative. However, this difficulty is a consequence of using the relevant alternative as the central point in determining the fairness of the plan.[190] Consequently, when considering the facts of the *Purdue* judgment in the UK, establishing a precise relevant alternative is imperative and essential.

In section 3.2, this article considered Jennifer Payne's discussion of the broad and flexible meaning of 'arrangement'. Paterson aligns herself with Payne's approach, but neither she nor Payne focuses on non-contractual cases or considers how 'crammed-down' tort or delict victims are forced to give up their personal rights against non-debtors. Nevertheless, her analysis provides an insight into how the judiciary historically considered such matters[191]

Thus, historically, judges appear to have been reluctant to approve schemes which eliminate claimants' rights and prevent them from recovering from subsequent judgments. The drive away from this understanding is somewhat perplexing, and the introduction of Part 26A only muddies the waters further.

Although the negatives of non-debtor releases have been extensively discussed throughout this article, the following section assesses why the UK may be willing to yield to these negatives, and welcome non-debtor releases with open arms.

5.2 Is Selective Borrowing from the US the Best Option for UK Courts?

In the author's view, third-party releases are *elementally novel* in the UK in that the facts of *Purdue* have never been considered in the UK, and the situation is undefined. However, any desire directly to replicate the US approach must be met with stern caution.

Foremostly, the connection between the third party and the debtor has increasingly widened. US practices, which initially facilitated the avoidance of liability by insurers, have fostered a situation by which 'affiliates, distributors, and even co-defendants with tenuous legal links to

[188] ibid.
[189] ibid.
[190] ibid.
[191] *In re NFU Development Trust Ltd* [1972] 1 WLR 1548.

the debtor' are benefitting from third-party releases.[192] As evident by now, the Sackler family's exposure outside of the Chapter 11 plan would be considerably larger than the $6 billion contributed. Nevertheless, they maintain that the funds allow Purdue 'meaningfully [to] pay claimants'.[193] Were the UK to adopt this approach, corporate insolvency law would undeniably change. The consequential reduction in recovery for claimants and the inability rigorously to challenge a proposal may have undesirable consequences. Such as a situation where the biggest companies, their directors and owners can act as they choose, with the understanding that should insolvency beckon, they may pay a small sum, relative to their exposure, and avoid any other liability.

Additionally, it is an assumption of both the US and UK legal systems that judges are fallible and that there is a general availability of appellate review.[194] However, one commentator has noted that appellate rights are 'often illusory' in US bankruptcy overall.[195] Elsewhere it has been suggested that this is due to the 'equitable-mootness doctrine',[196] which holds that some appeals should not be heard because of the remedy they seek, mainly the unwinding of a reorganisation plan approved by the judge that has already been implemented.[197] This situation is augmented by non-debtor releases which further reduce 'public oversight in Chapter 11 and [intensify] the authority of [first instance courts]'.[198] Moreover, non-debtor releases exacerbate the issue of 'debtor-friendly venue[s]'[199] and the knock-on consequences of *forum shopping*. These matters will now be considered.

The UK has often been seen as an attractive forum shopping venue due to the availability of SOAs and, more recently, Part 26A plans.[200] Forum shopping is the process in which a debtor will decide in which jurisdiction to commence insolvency proceedings.[201] The US has seen a continued rise in the popularity of certain venues, such as Delaware and the Southern District of New York.[202] Judges in these forums are renowned for 'their legal expertise, sophistication and proficiency in managing large and complicated Chapter 11 cases'.[203] The UK's relevance as a corporate restructuring venue, as regards non-debtor releases, is contingent then upon the situation in the US being unwelcome; the UK must adopt some form of non-debtor release structure for non-contractual cases to avoid diminishing the use of UK procedures by large multinational companies facing tortious or delictual liability.

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[192] Simon (n 5) 1202.
[193] ibid.
[194] Levitin (n 2) 143.
[195] ibid.
[196] See Kupetz (n 113) 304, in which he argues that 'it is a judge-made abstention doctrine unrelated to and separate from the constitutional and statutory prohibitions against the court's hearing moot appeals'.
[197] Bruce A Markell, 'The Needs of the Many: Equitable Mootness' Pernicious Effects' (2019) 93(3) American Bankruptcy Law Journal 377.
[198] Melissa B Jacoby, 'Corporate Bankruptcy Hybridity' (2018) 166 University of Pennsylvania Law Review 1715, 1733.
[199] Simon (n 5) 1206.
[200] See Jennifer Payne, 'Debt Restructuring in Transition' (2023) 139 Law Quarterly Review 101.
[201] See Markus Petsche, 'What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice' (2011) 45(4) International Lawyer 1005.
[202] McCormack (n 102) 494.
[203] ibid 494.

However, this outcome may lead to a situation similar to that in the US: a lack of consensus, with judges reluctant to develop precedents, leaving victims to receive significantly reduced damages. For the UK to adopt the structure of the US would be illogical and perilous. US commentators have addressed the lack of trust which could permeate non-debtor release mechanisms, unless either legislators or the courts ensure that claimants' rights are protected by enforcing restrictions and requirements on third parties.[204] With that in mind, the final section of this article will consider some of the factors to which the UK courts should endeavour to have recourse to when considering a 'UK Purdue Pharma'.

5.3 A 'UK Purdue Pharma': Are UK Courts Prepared?

As displayed throughout this article, there is a lack of discourse amongst UK academics around non-debtor releases concerning involuntary creditors. Such a situation forces reliance on US academics' recommendations; the most prominent suggestions come from Lindsey Simon.[205] She provides several proposals to amend the bankruptcy process for non-debtors in the US.[206] This section considers some of her recommendations and utilises them as foundations upon which a UK mass-tortfeasor non-debtor release caseload could be constructed.

Firstly, as discussed above, the Sacklers have attached themselves to Purdue's bankruptcy without any of the ramifications of declaring personal bankruptcy – this must change. If non-debtor releases are to become more commonplace in the UK, then non-debtors should be subject to the rules of transparency and full disclosure. This situation would allow claimants access to better information about non-debtors, which would maintain fairness.[207] Moreover, non-debtors must make all their assets available for distribution to emulate personal insolvency. It has been suggested that with just this requirement, the allure of 'latching' onto insolvency proceedings may be diminished.[208] Even with this amendment there are still some incentives for non-debtors to 'latch' onto corporate insolvency procedures such as the likely lesser impact of reputational harm and the avoidance of certain restrictions arising from personal insolvency.[209]

Secondly, a primary concern with non-debtor releases is establishing whether their contribution is precise and fair. The non-debtor's contribution must 'equitably compensate claimants'.[210] Thus, a requirement for non-debtors to provide financial information, including information relating to their assets, liabilities, and insurance protection, would allow the court to determine how much the non-debtor can *truly* contribute.

[204] See Simon (n 5) 1216.
[205] ibid.
[206] ibid 1205-1216.
[207] ibid 1207.
[208] ibid 1207.
[209] ibid 1207.
[210] ibid 1208.

Additionally, judges must require a degree of procedural conduct which closely mirrors civil litigation.[211] For example, claimants should have the ability to opt out of the plan and raise their claim outside of insolvency proceedings.[212] Although this may limit the 'collective nature' of insolvency, it has been argued that if judges uphold the first two suggestions, then very few claimants would choose to opt-out owing to the increased disclosure and additional information available.[213]

It is easy to argue that judges must uphold these conditions when sanctioning a non-debtor release plan. However, an alternative possibility would prevent non-debtors, like the Sacklers, from ever making it across the Atlantic – government intervention. This option is the neatest way to address the unavoidable issue of tortious or delictual non-debtor releases in the UK. Simon maintains that eliminating non-debtor releases, the so-called 'nuclear approach', is 'impractical, given its long-established practice in Chapter 11 and general acceptance by the bench and bar.'[214] But as insightful as that may be, the logic does not stand up in the UK context. The UK does not have a long-established practice of permitting non-debtor releases involving tort or delict victims and, thus, no stringent precedent to disrupt. Therefore, it could be argued that there is little difficulty for the UK legislator in enacting a statutory provision which 'swiftly eradicates' non-debtor releases and avoids the unattractive, consensus-lacking US situation. However, this argument overlooks critical factors. For example, enacting legislation is a difficult and protracted process. The lack of discourse on the topic will only reduce the efficiency of any bill. Therefore, relying on the legislator alone would be an oversight.

The alternative solution is, of course, the judiciary. Judges have a vital role in sanctioning Part 26A plans. By adopting the above recommendations, they could safeguard against the infiltration of non-debtor 'insolvency grifters'.[215] However, there are other issues here, which have been covered previously, such as upholding the attractiveness of the UK as an insolvency venue and the issues of appellate review in these cases. Indeed, these questions must be deliberated on further and in more depth. However, similarly to the position in the US, judges will undoubtedly craft the early precedent and rationale of a 'UK Purdue Pharma'. This author hopes that UK judges are alert to the pitfalls of their US counterparts and that they seek to maximise the effectiveness of non-debtor releases for all parties involved, not just non-debtors.

6. CONCLUSION

It would be incorrect to conclude this article by holding the UK position to be confused, convoluted, or unpredictable because the UK has no position to critique. The core of this article has been to outline the necessity for increased discussion of non-debtor releases in the UK. Granted, the UK has considered several third-party releases in SOAs, and judges are no

[211] ibid 1211.
[212] Foohey and Odinet (n 116) 68.
[213] ibid.
[214] See Simon (n 5) 1205.
[215] ibid 1206.

strangers to the concept. However, the introduction of the Part 26A plan and its ability to implement a cross-class cram down significantly alters the framework. Utilising existing case law and understanding in the context of tort or delict victims is not particularly beneficial as it fails to consider the dynamic context. Admittedly, this article has attempted this task, yet this was aided in large part by US commentary because of the general absence of UK literature. Possibly, the decision of the US Supreme Court will provide a springboard for dialogue; however, others will await a UK case before weighing in. In doing so, it is suggested that the UK will most likely suffer from the same confusion as in the US.

Nevertheless, a direct 'legal transplant' is not the solution. The UK is in a fortunate position. It can analyse the US' complications and implement a more rigid and harmonious regime prior to a case being heard. Part 26A provides the ideal procedure for non-debtors, thanks to its similarities to Chapter 11. However, when considering non-debtor releases, UK judges must remember that the two are not correlative and that UK insolvency law and US bankruptcy law still have noteworthy variances. The impact of the *Purdue* decision on UK insolvency law is unknown. However, UK judges should prepare for an influx of cases as the practicalities of forum shopping arise and the increasing prevalence of non-debtor releases grows worldwide. In sum, it appears that the UK is merely awaiting its moment in the non-debtor releases spotlight.

Case Note: *Dobbs* v *Jackson Women's Health Organization*

Valentina Menéndez Ron*

ABSTRACT

The US Supreme Court decision in *Dobbs v Jackson Women's Health Organization* overturned the landmark cases of *Roe v Wade* and *Planned Parenthood v Casey*, effectively ending the constitutionally guaranteed right to an abortion in the US. Applying an originalist interpretation, the majority opinion determined that the right to an abortion was not guaranteed by the US Constitution. The concurring opinions, while emphasising the need to return regulating abortion to the states, offered little reassurance that other rights based on substantive due process would not be revisited. The dissent on the other hand warned of the decision's potential to erode other unenumerated rights and highlighted its negative impact on certain communities. The analysis delves into these concerns by exploring the implications of the Court's originalist approach, the broader impact on substantive due process rights, and the disproportionate harm to marginalised communities, concluding that the decision in *Dobbs* has far-reaching implications beyond just abortion rights, affecting the interpretation of other constitutional rights and furthering the marginalisation of historically oppressed groups.

Keywords: Abortion, US Supreme Court, Constitutional law, originalism, 14th Amendment.

1. INTRODUCTION

Dobbs v Jackson Women's Health Organization was a landmark US Supreme Court case that determined access to an abortion was not a constitutional right.[1] The decision marked a significant departure from the five decades of precedent set by *Roe v Wade* and *Planned Parenthood of Southeastern Pa v Casey*.[2] This case note will start by delving into the facts, the issue, and the judgment in *Dobbs*, and will subsequently analyse the significance of the case. The analysis will scrutinise the broader implications of this case, with particular emphasis on the originalist approach to Constitutional interpretation utilised by the majority, its repercussions on other rights originating from the substantive due process doctrine, and its wider impact on society.

2. FACTS

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[1] 142 SCt 2228 (2022) (hereinafter *Dobbs*).

[2] 93 SCt 705 (1973); 112 SCt 2791 (1992).

In 2018, Mississippi enacted the Gestational Age Act, imposing a prohibition on abortion beyond the 15-week gestational period, with very limited exemptions.[3] Consequently, the Center for Reproductive Rights initiated legal proceedings against the state on behalf of the Jackson Women's Health Organization (JWHO), the only remaining abortion clinic in the state,[4] to challenge the constitutional validity of the ban.[5] Mississippi's District Court blocked the Act from taking effect, its decision grounded on over fifty years of precedent according to which states lacked the authority to enforce abortion bans prior to the point of foetal viability.[6] The US Court of Appeals for the Fifth Circuit affirmed this decision in 2019.[7] In 2020, the state Attorney General's office filed a petition for certiorari with the US Supreme Court, which was granted.[8]

3. ISSUE

The US Supreme Court granted writ to address the question of 'whether abortion prohibitions before viability are always unconstitutional'.[9] Mississippi argued that the US Constitution does not directly guarantee a right to abortion, and therefore the court 'should reconsider and overrule [*Roe*] and [*Casey*].'[10] Additionally, it was argued that the Fourteenth Amendment, which guarantees citizens' liberty against state control and had previously been broadened to recognize unenumerated constitutional rights, only protected fundamental rights that were 'deeply rooted in US history and tradition', which was not the case for abortion.[11] Therefore, the Act should not be subjected to the higher level of scrutiny required by the 'undue burden' standard set out in *Casey*; instead, it should be evaluated on a rational basis review, the most lenient level of judicial review.[12]

In contrast, JWHO contended that, in this case, there was a particular need to follow stare decisis, the doctrine that dictates that courts must follow legal precedent. [13] The Court in *Casey* had already considered similar issues to those raised by Mississippi in *Dobbs*, and had reaffirmed *Roe*'s core principles.[14] Moreover, JWHO argued that abortion rights were

[3] Richard Fausset, 'Mississippi Bans Abortions After 15 Weeks; Opponents Swiftly Sue' *The New York Times* (20 March 2018) <https://www.nytimes.com/2018/03/19/us/mississippi-abortion-ban.html> accessed 31 October 2023.
[4] 'The Case in Depth' (*Center for Reproductive Rights*) <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/dobbs-jackson-womens-health/> accessed 27 October 2023.
[5] *Dobbs* (n 1) 2244.
[6] ibid.
[7] ibid.
[8] ibid.
[9] ibid 2313.
[10] ibid.
[11] See *Roe* and *Casey* (n 2); *Washington v Glucksberg* 521 US 702, 721 (1997).
[12] 'READ: Transcript of Supreme Court Oral Arguments in Dobbs v Jackson Women's Health' (*CNN*, 1 December 2021) <https://www.cnn.com/2021/12/01/politics/read-transcript-dobbs-jackson-womens-health/index.html> accessed 27 October 2023.
[13] American Bar Association, 'Understanding Stare Decisis' (16 December 2022) <https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/> accessed 01 October 2024.
[14] ibid.

grounded in the Due Process Clause of the Fourteenth Amendment and the protection of personal autonomy that had been decided in *Griswold v Connecticut*.[15] JWHO also emphasised the practicality and effectiveness of the 'undue burden' standard, pointing to the fifty-year history of consistent application in court rulings.[16]

4. JUDGMENT

The US Supreme Court discarded the original question of 'whether abortion prohibitions before viability are always unconstitutional' and decided that the critical question was 'whether the Constitution, properly understood, confers a right to obtain an abortion'.[17] In June 2022, a majority of the Justices determined that the US Constitution did not confer such a right, and that *Roe* and *Casey* must, therefore, be overruled.[18] Additionally, it was determined that rational basis review was the most suitable standard for evaluating state restrictions on abortion.[19]

4.1 The Majority Opinion

Justice Alito delivered the majority opinion and was joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. After determining that the right to have an abortion cannot be found in the US Constitution, the majority examined whether this right was protected as a fundamental right by the Due Process Clause of the Fourteenth Amendment, as argued in *Roe* and *Casey*.[20] To determine whether the right fell into this category, the majority followed the test in *Washington v Glucksberg* and considered whether the right to an abortion was 'deeply rooted in the nation's history and tradition' and 'essential to the concept of ordered liberty'.[21] Therefore, a right could only be recognized if it existed at the time of the Fourteenth Amendment's enactment. In 1868, abortion was widely regarded as a crime under the common law and, with that narrow historical focus, the majority concluded that the right to an abortion could not be considered fundamental, as it was not deeply rooted in history.[22]

The US Supreme Court also considered whether the principle of stare decisis could compel them to uphold *Roe* and *Casey*. While recognizing the importance of stare decisis, the majority believed that circumstances did exist where the court must be willing to reconsider, and potentially overturn, constitutional decisions.[23] Justice Alito used as examples some important cases from the Warren Court, such as *Brown v Board of Education*.[24] Five factors were identified, drawn from prior cases, which strongly favoured overruling *Roe* and *Casey*: (1) the nature of the error (*Roe* was 'egregiously wrong' and *Casey* 'perpetuated its errors'); (2) the

[15] 381 US 479 (1965).
[16] 'READ: Transcript of Supreme Court Oral Arguments in Dobbs v Jackson Women's Health' (n 12).
[17] *Dobbs* (n 1) 2313, 2244.
[18] ibid 2242.
[19] ibid 2284.
[20] ibid 2246.
[21] *Glucksberg* (n 11) 721; ibid 2246.
[22] ibid 2248.
[23] ibid 2243.
[24] 347 US 483 (1954).

quality of reasoning (the reasoning in *Roe* was weak, with no solid foundation in constitutional text or history); (3) workability (*Casey*'s 'undue burden' standard for evaluating abortion regulations was 'unworkable'); (4) disruptive effect on other areas of the law (both cases distorted many 'important but unrelated legal doctrines'); and (5) absence of concrete reliance (there could only be limited reliance on these precedents since abortions are often unplanned).[25] Based on this, the majority concluded that it was inappropriate to continue adhering to these decisions.[26]

The majority also stated that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion', meaning other fundamental rights born from substantive due process would not be affected by this decision.[27] Abortion was considered to be different from other fundamental rights since it destroys a 'potential life'.[28]

4.2 Concurring Opinions

Justices Kavanaugh and Thomas, while joining the majority, wrote separate concurrences. Justice Kavanaugh made the point that the Constitution was neutral on the issue of abortion, and that the Court was simply returning regulatory powers to the States.[29] He also reaffirmed the statement made by Justice Alito that the *Dobbs* decision would not affect other precedents 'involving issues such as contraception and marriage'.[30]

Justice Thomas, on the other hand, did not try to reassure the public that other fundamental rights should be preserved. Instead, he argued that 'the Due Process Clause does not secure any substantive rights'[31] and that the Court should then reconsider past cases that granted rights based on substantive due process, going all the way to *Griswold*, and eliminate the doctrine entirely.[32]

4.3 Concurring in Judgement

Chief Justice Roberts concurred only in the judgement. His more moderate reasoning was that overturning *Roe* and *Casey* was 'unnecessary to decide the case before us'.[33] Thus, he had hoped that the Court would exercise judicial restraint, deciding only whether Mississippi's ban on abortions after fifteen weeks of pregnancy was constitutional, the original question to the

[25] *Dobbs* (n 1) 2265 - 2277.
[26] ibid 2278.
[27] ibid.
[28] ibid 2261.
[29] ibid 2305.
[30] ibid 2309.
[31] ibid 2301.
[32] ibid 2300-04.
[33] ibid 2311.

court.[34] He stated that he would overturn the viability line, which would make Mississippi law constitutional, and leave the constitutional issue of abortion for another day.[35]

4.4 Dissenting Opinion

Justices Breyer, Sotomayor, and Kagan jointly dissented. Their main focus was their concern over the majority's decision to depart from stare decisis and overrule *Roe* and *Casey*. They were critical of the majority's reliance on the historical roots of rights and their disregard for the rejection of this test in *Obergefell v Hodges*.[36] For the dissent, it was argued that '[t]he Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply:'[37] This approach, they said, had the potential to affect other rights, such as contraceptive and interracial marriage rights, despite the majority's reassurances that these other rights were to be left intact.[38] The dissent argued that the conclusion to the majority's reasoning was closer to Justice Thomas' opinion, as it was hard to conceive how it was possible 'neatly [to] extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse).'[39]

In contrast to the majority, the dissent had a steady focus on how the decision would affect pregnant people.[40] They mentioned the negative consequences of the decision for women's rights, particularly in Mississippi, which has high infant mortality rates and limited access to contraceptives.[41] They also discussed how the majority failed to acknowledge, in their historical analysis, the exclusion of women from voting, and from other legal rights, at the time of the Fourteenth Amendment's adoption,[42] and ignored evolving social norms and constitutional amendments like the Nineteenth Amendment, which granted women the right to vote. The dissent suggested that simply '[b]ecause laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today.'[43]

5. ANALYSIS OF THE CASE

The decision to eliminate the constitutional right to an abortion has significant consequences, for it is the first time that the US Supreme Court has taken away a fundamental right.[44] The

[34] ibid.
[35] ibid 2310.
[36] 576 US 644 (2015); ibid 2326.
[37] ibid 2326.
[38] ibid 2319.
[39] ibid 2330.
[40] ibid 2319.
[41] ibid 2339.
[42] ibid 2324-25.
[43] ibid 2324-25, 2333.
[44] 'Supreme Court Case: Dobbs v. Jackson Women's Health Organization' (*Center for Reproductive Rights*) <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/> accessed 29 October 2023.

Court's reasoning raised serious concerns about its approach to constitutional interpretation and its implications for women's reproductive rights.[45]

5.1 Originalism

The Court in *Dobbs* embraced an originalist approach to constitutional interpretation, provoking backlash from the dissent and legal commentators alike.[46] They presented their view as objective by relying on *Glucksberg*'s test of history and tradition.[47] The Court proceeded to impose an 'unrealistic requirement that fundamental rights must have been recognized in 1868', going further than the analysis used in *Glucksberg*.[48] The majority focused on how abortion was criminalised by three quarters of the states at the time, ignoring the fact that those laws were rarely enforced and prosecution mainly took place when a woman died in the process.[49] Moreover, in 1868, women's rights were severely limited.[50] Justice Alito also used treatises by Sir Matthew Hale, an English jurist known for his misogynistic views,[51] to demonstrate that, even before States enacted statutory provisions banning abortion in the 1800s, the common law regarded it as criminal.[52]

Yanking narrow historical facts out of context and relying on them to impose limitations on reproductive rights today shows a disconnection from the current social context, highlighting a downside of the originalist approach.[53] This approach was rejected in *Obergefell* on this basis, and a broader approach, acknowledging as a 'constitutional imperative' the need to recognize freedoms that are 'urgent in our own era', was proposed.[54] Otherwise, the Court would only further perpetuate the oppression of marginalised individuals whose rights were not firmly rooted in history and tradition.[55]

Justice Alito tried to justify this by arguing that recognising a right to an abortion went against the intent of the Framers of the Constitution.[56] The majority, however, disregarded the purpose of the Reconstruction Amendments, including the Fourteenth Amendment, which was to end

[45] ibid.
[46] *Dobbs* (n 1) 2326; ibid.
[47] *Glucksberg* (n 11) 721.
[48] The Ezra Klein Show, 'Liberals Need a Clearer Vision of the Constitution' (Daily US Podcast, 5 July 2022) <https://www.youtube.com/watch?v=AWmo4uDaS-s> accessed 26 October 2023.; *Glucksberg* (n 11) 710, 720, and 727; Nat Ray, 'Legal Analysis: What Dobbs Got Wrong' (*Center for Reproductive Rights*, 15 March 2023) <https://reproductiverights.org/what-dobbs-got-wrong/> accessed 31 October 2023.
[49] Ray (n 48).
[50] *Dobbs* (n 1) 2324-23 and 2333.
[51] Jill Elaine Hasday, 'On Roe, Alito Cites a Judge Who Treated Women as Witches and Property' (*The Washington Post*, 9 May 2022) < https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist/ > accessed 11 November 2024.
[52] *Dobbs* (n 1) 2236; Ray (n 48).
[53] The Ezra Klein Show, 'Liberals Need a Clearer Vision of the Constitution' (n 48).
[54] *Dobbs* (n 1) 2326; Sarah Burns and Sarah Wheeler, 'Dobbs Employs Narrow Framing to Narrow Fundamental Rights' (*Oxford Human Rights Hub,* 18 July 2022) <https://ohrh.law.ox.ac.uk/dobbs-employs-narrow-framing-to-narrow-fundamental-rights/> accessed 29 October 2023.
[55] Ray (n 48).
[56] *Dobbs* (n 1) 2247; Mark Lemley, 'The Imperial Supreme Court' (2022) 136 Harvard Law Review 97.

slavery and 'its concomitant social conditions, of which reproductive control was central.'[57] The Reconstruction Amendments promised equality and liberty that had not then been achieved, thus anchoring their meaning in 1868 goes against their very own purpose.[58] The Framers intended for the Constitution to include both enumerated and unenumerated rights, as per the Ninth Amendment, as they 'understood that the world changes.'[59] Thus, contrary to what the majority argued, the Framers did allow for 'future evolution [of rights] in their scope and meaning.'[60] Abortion arguably falls under this approach.[61]

The problem with the Court's decision in *Dobbs* does not seem to be limited to a specific theory of constitutional interpretation. Whether through originalism, stare decisis, or alternative approaches, the conservative Justices would have reached the same conclusion since they applied these methods to suit their interests, which in this case, was to overturn *Roe* and *Casey*.[62] After all, it was only after the Court granted certiorari that 'Mississippi changed course' by altering its question.[63] This shift coincided with the confirmation of Justice Barrett to the US Supreme Court, creating not only a conservative majority, but a majority that harboured reservations about the precedent set by *Roe* and *Casey*.[64]

5.2 Substantive Due Process

The decision to eliminate the constitutional right to an abortion has significant implications extending beyond reproductive rights. The dissenting opinion in *Dobbs* highlighted a concerning scenario where the decision threatened the broader landscape of liberty jurisprudence.[65]

Historically, the Court has used the doctrine of substantive due process to protect unenumerated rights under the Fourteenth Amendment's Due Process Clause.[66] In *Griswold*, the Court recognised a right to privacy by examining zones of privacy protected in other parts of the Constitution.[67] This reasoning was later used in *Loving v Virginia*, where the Court held that criminalizing interracial marriage violated the Due Process Clause of the Fourteenth Amendment.[68] Then came *Roe*, and a long list of other rights, making them 'all part of the same

[57] Burns and Wheeler (n 54).
[58] Angie Gou, 'Cherry-Picked History: Reva Siegel on "Living Originalism" in Dobbs' (*SCOTUSblog*, 11 August 2022) <https://www.scotusblog.com/2022/08/cherry-picked-history-reva-siegel-on-living-originalism-in-dobbs/> accessed 27 October 2023.
[59] *Dobbs* (n 1) 2325.
[60] ibid.
[61] ibid 2317.
[62] Lemley (n 56).
[63] *Dobbs* (n 1) 2313.
[64] Gou (n 58).
[65] *Dobbs* (n 1) 2330.
[66] 'Overview of Substantive Due Process' (*Legal Information Institute*) <https://www.law.cornell.edu/constitution-conan/amendment-14/overview-of-substantive-due-process> accessed 31 October 2023.
[67] *Griswold* (n 15) 483-488.
[68] 388 US 1 (1967).

constitutional fabric'.[69] If we are to follow the logic in *Dobbs*, the majority – if not all – of these rights are in danger, since contraception, same-sex intimacy, and marriage between individuals of different races or of the same sex, were not explicitly protected – or were, in some cases, explicitly criminalized – in 1868.[70]

Justices Alito and Kavanaugh argued that the decision did not cast doubt on any of these rights, with Justice Alito borrowing the 'potential life' argument from *Roe* as the distinguishing factor between abortion and other rights.[71] However, Martha Minow has pointed out that this could potentially be problematic, especially since contraception can also be said to interfere with 'potential life'.[72] It also undermines the complexities of conception, gestation and the different contraceptive methods, and their role in preventing pregnancy.[73] Justice Thomas, on the other hand, clearly states that, in his view, Due Process should only be procedural and that these other decisions and rights should be revisited.[74] The only Fourteenth Amendment right that he did not question was that of interracial marriage. Whether he omitted to do so due to his own interracial marriage, or because he would preserve *Loving* on its other grounds of equal protection, is unclear.[75] In the end, 'either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.'[76]

5.3 What about the other side?

In his judgement, Justice Alito mentioned how both sides of the case had made 'important policy arguments' with respect to the issue of abortion.[77] The side that was in favour of restricting abortion put forward several arguments relating to modern developments since *Roe*: maternity leave being guaranteed by many states, 'safe haven' laws, and health insurance covering medical costs relating to pregnancy.[78] A priori, these could be considered compelling arguments if we do not consider forcing someone to go through an unwanted pregnancy. However, the conservative justices failed to acknowledge the interests and reality of pregnant people in the US.[79] *Dobbs* will disproportionately affect marginalised communities, including black, indigenous, and low-income communities, among others.[80] With the implementation of

[69] *Dobbs* (n 1) 2319.
[70] Martha Minow, 'The Unraveling: What Dobbs May Mean for Contraception, Liberty, and Constitutionalism' (2023) 23 Harvard Public Law Working Paper 1; Christopher R Leslie, 'Justice Alito's Dissent in Loving v. Virginia' (2014) 55 Boston College Law Review 1563.
[71] *Dobbs* (n 1) 2261, 2278, 2309.
[72] Minow (n 69) 13.
[73] ibid.
[74] *Dobbs* (n 1), 2302.
[75] Minow (n 70) 7; Aaron Keller, 'Here's Why Justice Thomas Didn't Mention Interracial Marriage When He Asked the Court to Rethink Several Cases after Overturning Roe v Wade' (*Law & Crime*, 25 June 2022) <https://lawandcrime.com/legal-analysis/heres-why-justice-thomas-didnt-mention-interracial-marriage-when-he-asked-the-court-to-rethink-several-cases-after-overturning-roe-v-wade/> accessed 1 November 2023.
[76] *Dobbs* (n 1) 2319.
[77] ibid 2259.
[78] ibid 2258.
[79] Risa Kaufman and others, 'Global Impacts of Dobbs v. Jackson Women's Health Organization and Abortion Regression in the United States' (2022) 30 Sexual and Reproductive Health Matters 22.
[80] ibid 23.

state bans, many individuals seeking abortions in the US must now travel across state lines, creating additional financial difficulties for those already struggling economically.[81]

Furthermore, maternal mortality rates among black and indigenous people are significantly higher.[82] Thus, banning abortion, which is statistically safer than pregnancy and delivery, is a direct assault on efforts to improve racial equity in healthcare.[83] To address this, the Federal Government sought to safeguard abortion rights in all states with the Women's Health Protection Act, the Bill having repeatedly been passed by the House of Representatives but having failed before the Senate.[84]

6. CONCLUSION

Since June 2022, abortion is no longer a fundamental right protected by the US Constitution. However, *Dobbs* is not solely about abortion; it concerns how the US Supreme Court interprets the US Constitution and disregards the rights of people who have been historically marginalised. It remains to be seen whether this decision, based on an originalist approach, will indeed affect other fundamental rights, as some of the dissenting Justices have argued. Something we do know for sure is that 'for people who could become pregnant [...] the world has already changed.'[85]

[81] ibid.
[82] Anuli Njoku and others, 'Listen to the Whispers before They Become Screams: Addressing Black Maternal Morbidity and Mortality in the United States' (2023) 11 Healthcare 438.
[83] Katy Backes Kozhimannil, Asha Hassan and Rachel R Hardeman, 'Abortion Access as a Racial Justice Issue' (2022) 387 The New England Journal of Medicine 1537.
[84] Justin Goldberg, 'Women's Health Protection Act (WHPA)' (*Center for Reproductive Rights*, 23 June 2023) <https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care/> accessed 1 November 2023.
[85] Minow (n 70) 41.