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Judgment: approved by the Court for handing down | *Delivered:* **24/10/2014**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2014 No. 90989

BETWEEN:

COUTTS AND COMPANY (AS TRUSTEE OF THE ESTATE OF FITZHENRY AUGUSTUS SMITH (DECEASED))
-and-
SSE RENEWABLES DEVELOPMENTS UK LIMITED

Plaintiffs;

-and-

JOHN COLLINS, MARTIN COLLINS, BRENDAN DOUGLAS AND BARRY DOUGLAS

Defendants.

MR JUSTICE DEENY

[1] Pursuant to a writ of summons of 12 September 2014 the plaintiffs herein issued a notice of motion on the same date. The first relief sought on the notice of motion was an order restraining the defendants and each of them whether by themselves or their servants or agents from obstructing and/or preventing the plaintiffs, their servants and agents from entering on to, being on, accessing and/or egressing lands situate and known as Ballymongan Hill, Ballymongan Mountain, Country Tyrone (the Mountain). Further relief sought was to the like effect restraining the defendants from interfering with the plaintiffs constructing and operating wind turbines on the Mountain in accordance with planning permissions J/2005/0104/F and J/2011/03335/F granted by the Department of the Environment (NI) on 27 August 2009 and 13 October 2013 respectively. Further related reliefs were sought.

[2] The matter was commenced in the Queen's Bench Division. It was transferred to the Chancery Division. The interlocutory proceedings were heard by me on 16 and 17 October 2014. Mr Jonathan Dunlop of counsel appeared for the plaintiffs, Mr Aiden Sands for the first and second defendants and Mr Keith Gibson for the third and fourth defendants. All three counsel provided helpful written and oral submissions to the court.

[3] The case is one of some complexity. The second plaintiff is engaged in generating electricity from renewable sources such as wind farms. This Mountain on the Donegal border of County Tyrone has been identified as suitable for such purposes. The second plaintiff would like to erect a wind farm on the Mountain of some eight wind-turbines (with nine a possibility).

[4] It has reached an agreement for lease with the first plaintiff and the same solicitors and counsel acted for both plaintiffs in the proceedings before me. There was no affidavit on behalf of the first plaintiff although there were affidavits from two solicitors in Messrs Pinsent Masons, solicitors for the plaintiff, who had investigated the title.

[5] The law in relation to interlocutory injunctions was clarified in the landmark judgment of the House of Lords in American Cyanamid Co v Ethicon Limited [1975] AC 396. There is a tendency, which also appeared in this case, to over summarise and therefore blur the effect of the judgment of Lord Diplock in that case. For convenience I quote my own analysis of the matter in McLaughlin & Harvey Limited v Department of Finance and Personnel [2008] NIQB 122 at paragraph [6], cited, inter alia, in Lamey v Belfast Health and Social Care Trust [2013] NIQB 91:

> "It can be seen that the test laid down by the House of Lords, is sequential.
>
> (i) Has the plaintiff shown there is at least a serious issue to be tried?
>
> (ii) If it has, has it shown the damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?
>
> (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties.
>
> (iv) Where other factors are evenly balanced it is prudent to preserve the status quo.

(v) If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account.

(vi) There may be special factors in individual cases.

I would add, seventhly, the court has an overall discretion to do what is just and convenient in the circumstances. I would remind parties of the statutory basis for the exercise of the court's power in this regard. Section 91 of the Judicature (NI) Act 1978 empowers the court to grant a mandatory or other injunction 'in any case where it appears to the court to be just and convenient to do so for the purpose of any proceeding before it'. That again makes clear that the court has an overall discretion to exercise this power when it is 'just and convenient to do so'."

[6] In drawing attention to the overall discretion that remains after addressing the individual elements identified by Lord Diplock I am reflecting the views of Lord Goff in R v Secretary of State for Transport ex parte Factortame Limited (No. 2) [1991] 1 AC 643. I also now take into account the dicta of Lord Hoffman in National Commercial Bank Jamaica Limited v Olint Corporation Limited [2009] 1 WLR 1405 (PC). I note this at paragraphs [17] and [18]:

"The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

> 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able

> to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

I note Mr Gibson's citation of paragraph [21]. I observe that this was a decision of the Privy Council and that American Cyanamid is still the binding decision within our courts.

[7] The facts of this case perhaps test the limitations of the Cyanamid categories but do not, in my view, rupture them. The plaintiffs' submission is that they have established a serious issue to be tried in the sense that they have at least an arguable case both that the first plaintiff is the valid owner of Ballymongan Mountain and that, despite the undisputed rights of the defendants, they are entitled to proceed with these major works of construction on the Mountain. I shall now examine that dual proposition.

[8] It is fair to say, as a preface, that this matter has come on in a short space of time. The defendants blame the plaintiffs for this in failing to bring proceedings at an earlier date, a view with which I have considerable sympathy. The court must, nevertheless, do its best to see that justice is done.

[9] The first plaintiff's title, on which the second plaintiff relies, arises in this way. FitzHenry Augustus Smith was the owner of an estate of land in County Tyrone. This included Ballymongan Mountain and adjoining lands. He died on 6 September 1930 having made a Will dated 21 March 1928 naming the first plaintiff as the trustee of his estate. After some specific bequests and a life interest to his wife, Kathleen Muriel Smith, his estate was to pass in trust for the benefit of the testator's nephew, Cecil Henry Briscoe. The latter was given a power of appointment. Coutts and Company took out a grant of probate on 7 November 1930.

[10] Cecil Henry Briscoe died on 8 December 1963. In his Will he made express reference to the Will of his late uncle FitzHenry Augustus Smith and he too made some specific legacies and left a life interest to his wife but thereafter two thirds of the residue was left absolutely to his daughter Constance and one third to his daughter Stella. Mr Stuart Nelson, solicitor, in a supplementary affidavit of 20 October 2014 for the plaintiff, for which I gave leave at the hearing, avers that the said daughter Constance subsequently married becoming Constance Phyllis Morrogh Ryan and that she made a Will dated 26 November 1999 and died on 5 August 2010. In that Will she named her daughter Nicola Maxwell as her residual beneficiary. Mr Nelson further avers that the daughter Stella named in the Will of Cecil Henry Briscoe is one Stella Smith and that he and Mr Ian Huddleston, also a partner in the firm of Pinsent and Mason, met with both of these ladies and solicitors acting on their behalf for the purpose of agreeing the agreement for lease dated 12 June 2014 which both Nicola Maxwell and Stella Smith have signed.

[11] It was necessary to obtain the consent of these ladies as Messrs Coutts and Company had no express or statutory power to lease the lands as opposed to selling them. Attention was drawn to this in a helpful opinion of Ms Sheena Grattan, of counsel, which was made available to the court, on consent.

[12] The first title question is whether the late FitzHenry Augustus Smith did own the Mountain. No deed has so far been presented to the court in proof of that, other than a deed of conveyance of 24 November 1903 between FitzHenry Augustus Smith of the one part and Archibald Vernon Montgomery of the other part, relating to an entail.

[13] However, in the course of the hearing before me and in the exchange of affidavits sufficient evidence has emerged for me to conclude that the plaintiff has a good arguable case that it is the owner of the land as trustee. The third defendant, Mr Brendan Douglas, in a helpful affidavit of 24 September 2014, in seeking to establish his own rights drew attention to an important document. This was produced by the Land Purchase Commission of Northern Ireland under the Northern Ireland Land Act 1925. It is entitled Schedule of Arrears and deals with the "Estate of FitzHenry Augustus Smith, County of Tyrone". It was exhibited to an affidavit of William H Todd sworn on 22 December 1925. It deals with the townland of Ballymongan. It sets out the names of tenants and sub-tenants or other occupiers and the area in acres, roods and perches which they occupied. The right hand column in this document of two pages then addresses rights of grazing and of turbary on two plots of land. The document has been extensively, but meticulously, amended in ink by a person who signs on 13 May 1930. The name of the person is unclear. The rights of the defendants I will turn to in a moment but what is clear is that they had rights on plot X which was Ballymongan Mountain. They held those rights because they tenanted, and in many cases later owned through the Land Purchase Commission's transactions, land adjoining the Mountain. A series of maps were carefully examined at the hearing which showed a relationship between the amount of acreage taken from FitzHenry Augustus Smith and the number of "sums" or shares which the then tenants enjoyed by way of grazing or turbary rights on either plot A Crighdenis or plot X the Mountain. This document establishes the rights of the defendants here but by necessary implication it also bears out the fact that the Mountain itself over which they exercised rights was owned by Mr Smith. Further support is given to that by an affidavit of Albert Charles Frecker, Manager of the Trustee Department of Coutts and Company dated 19 October 1931.

[14] Furthermore the court has to take into account that if Mr Smith was not the owner of the land there would have to be another owner. It was conceivable that that might be the state as a result of compulsory purchase of this estate. In the event there are some pointers against that in the document but the plaintiff's solicitors have also obtained written confirmation by email from the Departmental Solicitors on behalf of the Department of Finance and Personnel that neither that department nor the Department of Agriculture and Rural Development claimed any interest in

the land. The other possibility might have been that this land was owned in commonage and it is clear that the parties all operated for a time as if that was the case but no actual evidence in support of that has emerged. I therefore conclude, sufficiently for these interlocutory purposes, that the plaintiff estate has ownership of the Mountain.

[15] It is more than five years since the first and primary planning permission on which the second plaintiff relies was granted. But I was satisfied from the affidavit evidence put before me that sufficient works of development by way of preparation of a site access road and clearing of vegetation had taken place to secure the permission for the second plaintiff so that the permission has not lapsed. See High Peak DC v Secretary of the State for the Environment [1981] JPL 366 and R (On the Application of Brent LBC) v Secretary of State for Communities and Local Development [2008] EWHC 1991 (Admin). I need not go so far as the judge in that latter case in holding that the threshold for claiming that development has begun is a very low one. Even on a stricter test the plaintiffs have shown enough here.

[16] The case being made on behalf of the plaintiffs involves the first plaintiff being not merely the owner of the Mountain but being entitled to carry out the steps it wishes to carry out despite any rights which the defendants may enjoy. Part therefore of Lord Diplock's first heading must be whether they have established that there is a serious issue to be tried that they are entitled to do what they want to do despite the rights which, in part, they acknowledge the defendants enjoy. In part this key issue overlaps with Lord Diplock's fifth point about the relative strength of one party's case over the other and in part it might be considered a special factor. In any event it is something I have to consider with appropriate care.

[17] I can deal with the issue of turbary rights briefly. Most of the turbary rights of the defendants are on plot A Crighdenis. It is entirely clear to me that insofar as the defendants do have turbary rights on plot X they would not be sufficient at this interlocutory stage to justify preventing the plaintiffs from carrying on with their preliminary works, at the very least.

[18] The issue of grazing rights is a more difficult one. The area of the Mountain has been measured at 508 acres. The first and second defendants are descended from Michael Collins, one of the tenants named in the schedule of areas of 22 December 1925. Mr Collins was there recorded as the tenant of 89 acres and one rood the largest single holding on the adjoining part of Mr Smith's estate. This entitled him to eight sums grazing on plot X, the Mountain. But Mr Sands submitted that in addition his clients were the successors in title of Philip O'Donnell, item 10 on the Schedule, who occupied 37 acres and was entitled to four and one eighth sums of grazing. They were also the successors in title, he submitted, again without objection, of Mary McCrory and Hannah Byrne the tenants of 26 acres 2 roods with the right to graze seven and three fifths sums on the Mountain. This made them not only the largest former tenants but entitled them on counsel's calculation to some 18% of the total sums which constituted the unit of measurement

on Mountain grazing in this instance. It is common case that the Mountain was not geographically divided with regard to these sums. They entitled the holder of the rights to grazing to that extent, which presumably the local people translated into the number of sheep that one was entitled to put on to the Mountain.

[19] Consistently with those rights the Collins's have the biggest interest on the Mountain and have a flock of some 600 sheep. All of the sheep, it is averred, spend part of the year on the Mountain. The numbers of the flock are borne out by records exhibited to Mr Collins's affidavit in returns to DARD. The Collins's are concerned about any works on the Mountain particularly at two sensitive seasons – Mr Sands said that was now when the sheep were tupped by the rams and again in the New Year when lambing took place. Mr Collins averred that a shortage of conacre available to him for his sheep meant that he would have to keep a considerable proportion of the flock on the Mountain this winter because he had nowhere else to put them. He had been told that the whole flock would have to be cleared off the land to allow the works of construction to proceed. This does not seem to have been expressly denied and is plausible enough. Earlier visits to the site by the plaintiffs' employees were linked, inter alia, by the defendants to the sheep leaving the Mountain and disappearing into the adjoining forest, which happens to be over the county and thus international border.

[20] The rights of the Douglas's are of a smaller dimension. They stem from a maternal ancestor James Mongan who is named at item 15 on the Schedule of Areas as the tenant of 26 acres and 3 roods with grazing of what appears to be three and two third sums on the Mountain. The Douglas's only keep a flock of about 40 sheep on the Mountain.

[21] I should also acknowledge Mr Sands' submission, although at this stage based on only a single assertion by his deponent, that the Collins family had acquired rights exceeding the 18% under the Schedule of Areas by prescription. They had been keeping a large flock for a long period of time, it was said, neither secretly nor by force nor with the permission of either of the owner of the land nor of other persons with grazing rights. This must be acknowledged as a perfectly respectable argument which will have to be tested at trial if pleaded out and relied on by the first and second defendants. Acquisition of an easement, in this case a profit a prendre or easement by grazing rights by prescription is acknowledged on the authorities. The long exercise of rights by the Collins family makes it quite possible that they have acquired such rights over the decades.

[22] The construction of this wind farm on this Mountain will indisputably interfere substantially with the current rights of the defendants. The preliminary work that the plaintiffs were to carry out will have a not insignificant measure of interference. It has been averred that 20%-25% of the area would be impacted on a long term basis. While at one point that seemed an unnecessary concession on the part of the plaintiffs it may in fact be realistic. Photographs of another wind farm in County Londonderry submitted by the plaintiffs showed that not only was there a

road from one turbine to the other but that there was a sufficient turning circle, hard surfaced, at each turbine, presumably to allow vehicles engaged in repair and maintenance to turn safely. Whether animals will graze close to the turbines is currently an open question.

[23] Mr Gibson, in his erudite submissions, cited Well Barn Shoot Limited v Shackleton [2003] All ER (D) 182 (Jan), C. A. That was a case about sporting rights on what was described as a shooting estate which the defendants wanted to develop for residential development. The court, per Carnwath LJ, as he then was, concluded that the test was whether there would be a substantial interference with the rights of the plaintiff. That in turn followed from the dictum of Scrutton LJ in Peech v Best [1931] 1 KB 2, 10. "It appears to me that fundamentally changing the character of the land over which sporting rights are granted …. if it has the necessary effect of substantially injuring the rights of others is a derogation from grant and is a substantial interference with profit a prendre granted."

[24] Counsel cited authorities in support of the proposition that the court would not permit the grantor to derogate from his grant. "A grantor having given a thing with one hand", as Bowen LJ put it in Birmingham, Dudley and District Banking Company v Ross "is not to take away the means of enjoying it with the other". Johnston and Sons Limited v Holland [1988] 1 EGLR 264, per Nicholls LJ. See also Yankwood Limited v London Borough of Havering Ch. Div. 6 May 1998 All England Official Transcripts (1997) 2008 per Neuberger J. Counsel submits it is perfectly clear that this would amount to a derogation of grant.

[25] Mr Dunlop's answer to this is not to claim that the grant does not bind the successors of the grantor, wisely, but to suggest this is not a grant situation because these rights stem from the Land Purchase Commission rather than from the late FitzHenry Augustus Smith. This is clearly a matter that will require further research. The Schedule of Areas would imply that the rights already existed and were merely being recorded and measured by the Land Purchase Commission. That would imply that the grantor was indeed Mr Smith or his predecessors in title. Once granted could those rights be taken back or reduced by the estate? The answer to that question will require research, perhaps into Ulster tenant right amongst other things.

[26] It seems to me that the plaintiffs here face a real difficulty in seeking to show that the first plaintiff in the shoes of FitzHenry Augustus Smith is entitled to lease the land for a wind farm when previously it was given over to the grazing of sheep.

[27] I now turn to the other factors identified by Lord Diplock which can be dealt with in shorter form. His second heading is the question of damages. The first part of that is whether damages would be an adequate remedy for the plaintiff if I refused the injunction but they succeeded ultimately at trial. Averments on behalf of the plaintiffs are to the effect that some £15m in profit would be lost if they are not allowed on the site now to allow them to complete the wind farm by May 2017. The

justification for that is that the government scheme of subsidies for wind farms changes after that date and the present regime, implicitly a profitable one to the second plaintiff, will be replaced by a much more uncertain arrangement. I take into account the submissions of counsel for the defendants but it seems to me that while one must take the precise figure cum grano salis the prospect of substantial profits being lost if that deadline is not met is a realistic one. It is quite clear that the defendants are not claiming they would be a mark for damages equating to a loss of profits of anything like that. There is therefore a significant factor in favour of the plaintiffs here.

[28] The second part of that second criterion is more difficult i.e. would damages be an adequate remedy for the defendant if an injunction is granted now but they ultimately succeed in persuading the court that the plaintiffs have no right to interfere with their grazing rights on the Mountain. It is accepted that the second plaintiff is a substantial company, or a part of a substantial company, and is a mark for damages. However there is unhappiness about whether the entire farming business of the Collins's, in particular, based on this large flock of sheep, would be remedied by a subsequent award of damages. It seems to me that that is dealt with by the nature of the injunction and its duration. If the nature of the injunction requiring the defendants to permit the plaintiffs on the Mountain is carefully modulated it should be compatible to a degree with the presence of the sheep. In the sense of awarding loss of profits for interference with the business there should be no difficulty. The defendants have presumably made tax returns on their profits from that farm business and can be compensated if those profits fall. However I think one has to acknowledge that there is a particular factor here if the loss of profits stems from the death of sheep falling down bore holes or indeed sheep aborting because of machinery frightening them and causing them to flee. The defendants have a statutory duty under the Welfare of Farmed Animals Regulations (NI) 2012. Are the plaintiffs free of responsibility? Again that is something that could be looked at further at trial but it is a factor that one has to take into account.

[29] Given my views on Lord Diplock's first and second criteria it is necessary for me to look at the third criterion: if there is doubt about the issue of damages the court will then address the balance of convenience between the parties. The plaintiffs say that this is a large project which will bring benefits to the neighbourhood. They are promising to make a local contribution of £161,000 per annum. They will create employment. They have reached agreement with the 18 other families who have rights on the Mountain to pay them a stream of income, albeit modest, if and when the wind farm is in operation. The second plaintiff will lose substantially it says if the project does not go ahead.

[30] But the defendants do express a concern, which I accept as genuine about the impact on their farming business, particularly in the case of the first and second defendants. The fact that any of these defendants may also have been prepared to negotiate with the second plaintiff with regard to their rights, a matter on which Mr Dunlop sought to press me, is not to be taken as necessarily inconsistent with their

concern for the loss of their farming business, rather the reverse. It appears to me therefore that the balance of convenience is not a completely black and white matter here but needs to be addressed in particular by thinking what injunction might be given to the plaintiffs pending trial.

[31] The fourth criterion in American Cyanamid is to consider where other factors were evenly balanced that it is prudent to observe the status quo. The defendants say this is in their favour.

[32] The fifth criterion is: if the relevant strength of one party's case is significantly greater than the other that may legitimately be taken into account. As I made clear above I see considerable force in the submissions of the defendants here with regard to their grazing rights but, as the likely trial judge, I do not wish to reach any conclusion on this matter prematurely and would not be happy to find that the strength of one party's case here is significantly greater than the other.

[33] The House of Lords acknowledged that there may be special factors in individual cases. That might include the delay on the part of the plaintiffs in bringing the application which should not be a bar to them succeeding but is nevertheless relevant to the exercise of the discretion by the court. If they had moved after they had a confrontation with two of the defendants a year ago no interlocutory injunction would be required. We would have had a trial by now. At one point the defendant's threatened to bring proceedings themselves. The risk of physical harm to the livestock might conceivably be a special factor also and Mr Sand submitted that the issue of title might be ascribed to this heading as well.

[34] It can be seen therefore that the court does return in this particular case to the exercise of a discretion to do what is just and convenient in the circumstances. In this case I also take into account Lord Hoffman's encouragement to avoid irremediable prejudice to one party or the other.

[35] I conclude that I should grant an injunction to the plaintiffs, pending the trial of this action, in the terms of paragraph 1 of their notice of motion of 18 September i.e. an order restraining the defendants and each of them whether by themselves, their servants or agents, from obstructing and/or preventing the plaintiffs, their servants or agents from entering on to, being on, accessing and/or egressing land situate at and known as Ballymongan Hill, Ballymongan Mountain, County Tyrone. That will cover any pedestrian access to the Mountain by the plaintiffs, their servants and agents. However, if they want to take on to the Mountain, as they do, the Argo all-terrain vehicle for carrying out seismic tests it is not to be driven at a speed in excess of 3 mph i.e. a walking pace that should be less likely to scatter or scare sheep. That applies to any other vehicles. Mr Gary Brides in his second affidavit suggested this maximum indeed of 3 mph, although as Mr Gibson pointed out he was quoting for the maximum speed of the vehicle over water rather than over land. But on a bog or mountain it is a not inappropriate speed which the plaintiffs have proposed. Furthermore the defendants, either through their solicitors

or another conduit to be established, should be informed 24 hours in advance when the vehicle will be on the lands. They should indicate in advance whether it is going to be operating north or south of the Mountain in case the defendants consider it would assist in diverting sheep in advance away from it and also to allow them to monitor the speed of the vehicle. The vehicle may pull behind it the trailer used for seismic investigation.

[36] I am concerned by the desire, the urgent desire, of the plaintiffs to sink bore holes on the property. They, of course, undertake to cover these at night to avoid sheep falling into them but the drilling of such bore holes is bound to be quite a major work. It seems to me that given the quite real prospect that the plaintiffs may not be entitled to pursue this matter at all without the agreement of the defendants that the just and convenient course to adopt here is that the drilling of bore holes can only occur when the sheep are off the mountain. In the normal course of events that might normally happen in the middle of winter between the current mating season and the lambing season in the New Year. It is suggested that some 250 sheep might have to be left on the Mountain this winter because a lack of land available on conacre for them. The solution to that seems to me to be for the plaintiffs to furnish alternative pasturage or housing for the animals. If the profits of this development really are of the extent claimed by the plaintiffs this would not be unduly onerous. They will also have to be responsible for the costs of moving the animals to the pasturage or housing while they are carrying out the boring work. They will be obliged to leave any bore holes in a safe condition at the completion of the work.

[37] The relief sought in the second paragraph of the notice of motion I adjourn to the trial of the action. The court will seek to facilitate the parties, despite the fact that the High Court is again 20% under strength, by an early trial. But it seems to me that quite a lot of work of various kinds needs to be done leading up to the trial.

[38] The defendants are to permit the plaintiffs on foot forthwith. The rest of the injunction to be granted will take effect as soon as a draft order has been furnished by the plaintiffs, having been shared between counsel to seek agreement and then approved by the court. It can address any matters not expressly dealt with in this interlocutory judgment.