Neutral Citation No. [2004] NIQB 66 | *Ref:* **SHEF4061**

Judgment: approved by the Court for handing down | *Delivered:* **8/10/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF FERMANAGH AND TYRONE

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Record No. 203/02

List No. 79076

BETWEEN:

TONY AND FRANCES DONNELLY

Plaintiffs/Respondents;

-and-

JIMMY DOYLE

Defendant/Appellant.

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SHEIL LJ

[1] This title civil bill appeal involves a dispute between the plaintiffs, Mr and Mrs Donnelly, and the defendant, James Doyle, as to the ownership of a laneway leading to the plaintiffs' house off the Derrybard Road outside Fintona in County Tyrone. The issue first came before the court pursuant to a civil bill issued by the plaintiffs on 8 November 2000. The order of that court made on 12 December 2002 decided the dispute in favour of the plaintiffs, holding that the plaintiffs and their successors in title owned the totality of the laneway marked A to D on the map annexed to the civil bill and that the defendant and his successors in title have a right of way across the laneway between points C and B on the map annexed to the civil bill. The defendant now appeals that decision to the High Court.

[2] There has never been any dispute that the plaintiffs own the laneway beyond D leading up to their house. The defendant has a separate means of access, which is his main means of access, to his own lands from the Derrybard Road, save for access to his "meadow field" in respect of which the plaintiffs say that he has only a right of way across the laneway from points C to B, which right of way was granted by the McIlroys to Mr Doyle in 1985 when gates were erected at that point.

[3] The defendant maintains that the plaintiffs have only a right of way over the said laneway for all purposes between A and D and that the defendant owns the said laneway between A and D, in respect of its upper part across its whole width and in respect of its lower part, nearest to the Derrybard Road, across half its width, the other half thereof belonging to a Mr Nixon, who now lives in England. Points A and D are marked on the copy of the ordanance survey map submitted to the court on behalf of the plaintiff, which was prepared by Mr McCann, architectural consultant, the plaintiffs' lands and the laneway being hatched in red while the defendant's lands are hatched in green. That map, through no fault of Mr McCann, does not show the lower part of the laneway between A and D, across half its width, as belonging to Mr Nixon. An accurate representation of the position is to be seen on the map annexed to the defendant's Lands Certificate, Folio 3186 County Tyrone, the defendant being registered as owner thereof on 28 November 1975.

[4] The plaintiffs bought their lands and a derelict house thereon from a Mrs McIlroy on 28 October 1987. The lands purchased by the plaintiffs from Mrs McIlroy are not registered lands. The plaintiffs have always believed that their purchase in October 1987 from Mrs McIlroy included the laneway along its entire length and its entire width from the Derrybard Road and that the defendant had only a right of way across it from C to B to gain access to what has been referred to as "the meadow field" which formed part of the defendant's registered land comprised in Folio 3186, County Tyrone. That was also the understanding of Mrs McIlroy.

[5] When all the relevant title documents and maps are examined in this case, some of which were not before the court below, it would appear that <u>according to those documents and maps</u> the defendant's contention as to ownership of the said laneway is correct as set out above. The provisions of Section 64(1) of the Land Registration Act (Northern Ireland) 1970 should however be noted, reading as follows:

> "Except as provided by this Act (*and no reliance is placed on any such exception in this case*), the description of any land in any register shall not be conclusive as to the boundaries or extent of the land."

See Wallace's Land Registry Practice in Northern Ireland, 2nd Edition at page 10. I consider that the maps produced to this court are accurate in their representations.

[6] That however is not an end to the matter. Mr McHugh, the plaintiffs' counsel, maintains that the plaintiffs prior to the issue of the civil bill on 8 November 2000 had established title to the laneway between points A and D by reason of at least 12 years adverse possession by the plaintiffs and their predecessors in title, the McIlroys, pursuant to Section 17(3) of the Statute of Limitations (Northern Ireland) 1958 and Section 53 of the Land Registration Act (Northern Ireland) 1970. As already stated, the plaintiffs accept that the defendant has a right of way across the laneway between points C and B.

[7] At this point it must be noted that Mr Nixon who, according to the title documents produced to the court, is the owner of the lower part of the laneway between points A and D nearest to the Derrybard Road, as to half its width, was not made a party to these proceedings and accordingly any decision of this court is not binding as against him in respect of that half of the width of the lower part of the laneway nearest to the Derrybard Road between points A and D.

[8] As already stated the plaintiffs, Mr and Mrs Donnelly bought the property from Mrs McIlroy on 28 October 1987. Mrs McIlroy had been left the property by her uncle, Michael Hanna, who died in 1974; in the later stage of his life he lived there only occasionally due to ill health. At that time Mrs McIlroy was unmarried. She worked in Belfast during the week, returning home each weekend to live with her mother at Trillick Road, some two miles away from the said property. On her marriage to her late husband, Patrick McIlroy on, 17 July 1976, she and her husband lived initially with her mother at Trillick Road outside Fintona, moving three years later to live in Fintona, where she lived until her husband died on 20 March 1986. In July 1986 she moved to live on the Dromore Road, approximately 1½ miles from the laneway which is the subject of the dispute in these proceedings.

[9] Mrs McIlroy stated that when she took over the property in 1974 from her uncle, Michael Hanna, the laneway was already overgrown with bushes and was not passable. The land was rented out to neighbouring farmers, Tony Irwin and Moses Irwin. The Irwins were able to get access to the land from their own lands and did not have to use this laneway for access thereto. The laneway remained overgrown as nobody used it or did any work to it, such as trimming the hedges or filling potholes.

[10] On 24 May 1985 the McIlroys applied for planning permission to renovate the derelict house at the end of the laneway. They received planning permission to do so on 30 September 1986. In the meantime however Mr

McIlroy had died on 20 March 1986. Mrs McIlroy subsequently put the property on the market, it being sold to the plaintiffs in October 1987.

[11] Prior to his death on 20 March 1986, Mr McIlroy had engaged the services of a Mr McWilliams, a local contractor, to do pipe work at "the kesh" at the lower end of the laneway where there was a problem with water lying due to the surface having deteriorated. Mr McWilliams, whose men carried out the work, was paid by Mr McIlroy for this work. This work was done in anticipation of the work which would be carried out in due course pursuant to the planning permission which was applied for on 24 May 1985 and eventually granted on 30 September 1986. No further work of any kind was done by anybody to the laneway prior to Mr McIlroy's death on 20 March 1986; it remained overgrown, grassy, very muddy and was not passable save with considerable difficulty on foot.

[12] After the plaintiffs had bought the property from Mrs McIlroy in October 1987, the plaintiffs applied on 30 November 1988 for planning permission for improvements to the derelict house, which permission was granted on 24 January 1989. In 1989 Mr Donnelly, the first named plaintiff, filled in the potholes in the laneway and had the hedges cut. In 1995 the plaintiffs had the surface of the laneway concreted along its entire length and width at a cost to Mr Donnelly of approximately £8,000. The defendant, who knew or must have been aware of that work, never made any offer to pay for that work carried out to the laneway nor did he ever even comment thereon to the plaintiffs or assert ownership thereto at that time.

[13] The dominant owner of a right of way has a right to repair it, which right is not limited to making good the defects in the original soil by subsidence or other natural causes, but includes the right of making the road reasonably fit for the purpose for which the right of way was granted: Halsburys Laws of England, 4th Edition, Volume 14 at paragraph 163. This right may extend to even building a made road or spreading gravel on it in order to accommodate the right of way, so long as there is not undue interference with the rights of the owner of the servient land: Gale on Easements, 17th Edition at paragraphs 1-82/83. The work carried out by Mr Donnelly in 1989 of filling in potholes and cutting the hedges in the laneway is, per se, equally consistent with his having only a right of way over the laneway as with ownership of it. It is equally clear that the concreting of the whole laneway by the plaintiffs in 1995 is, per se, again equally consistent with the plaintiffs merely exercising their right to repair the right of way. The same is true of the pipe work which Mr McIlroy had carried out at "the kesh" in 1985, prior to his death on 20 March 1986.

[14] I have no doubt whatever that up until late 1999/early 2000, the defendant always thought that this laneway was owned by the plaintiffs and their predecessors in title, the McIlroys, and that he (the defendant) had only

a right of way across it from C to B to his "meadow field" which, as already stated, was granted by the McIlroys to Mr Donnelly in 1985. The McIlroys and the plaintiffs always thought likewise. I accept Mr Donnelly's evidence as to the slurry incident in 1994 when he told the defendant "not to come up that lane again", and that the defendant made no reply thereto by way of any assertion that he owned the laneway or any right of way along its length. It was only when the dispute arose in the present case in late 1999/early 2000, when the defendant sought unsuccessfully to build a house in the meadow field and sought unsuccessfully to sell the meadow field because of objections with regard to his having no right of way along the laneway, that the defendant realised on inspection of the maps that, contrary to his earlier belief, he appeared to be the owner of the laneway insofar as the documents of title were indicators thereof and that it was the plaintiffs who had only a right of way along the laneway. It was clear to anybody who heard the evidence given by the defendant and the other evidence given in this case that the defendant was fabricating much of his evidence to support his case. I do not consider that his evidence, as he gave it in the witness box, with regard to his alleged user of the laneway and the alleged maintenance of the hedges by him was capable of belief and I reject it. I do not consider that the evidence of Mr Irwin, who was called on behalf of the defendant, assists me in resolving the issues in this case.

[15] The defendant/appellant starts with the advantage that, as already stated above, he has the paper title to the property, which fact gives rise to presumption that he is in possession of it. That presumption is however a rebuttable presumption. I consider that the presumption is rebutted in the present case by reason of the works carried out by Mr McIlroy and later by Mr Donnelly when taken in conjunction with the fact, as found by this court, that the defendant always thought that the laneway was owned by the plaintiffs and their predecessors, in title, the McIlroys, and that he (the defendant) had only a right of way across it to his "meadow field" and that the McIlroys and the plaintiffs always thought likewise. That work in the circumstances of this case pointed to an assertion of exclusive possession. In *Hughes v Cork* (1994) EGCS 625 the squatters took possession of the disputed land in the erroneous belief that they owned it. The trial judge held that the squatters had not acquired possessory title because they believed they owned the land and therefore did not believe that they were acting adversely to the true owners. The Court of Appeal reversed that decision, Saville LJ stating:

> "The learned judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot ex-hypothesi have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say doing something illegal,

> could acquire such a title, while those who did not realise that they were doing anything wrong would acquire no rights at all. I can see no reason why, as a matter of justice or common sense, the former but not the latter should be able to acquire title in this way. What the law requires is factual possession together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else. Obviously, if the possessor knows or believes someone else has a paper title to the land, he must intend to exclude that person along with everyone else. But in the absence of such knowledge or belief it is my judgment sufficient for this part of the second requirement simply to establish a manifest intention to exclude everyone."

In Wylie's Irish Land Law, Third Edition, at paragraph 23.25, the learned author states:

> "The general rule is that mistake does not stop time running and squatters' rights are often acquired by such means, eg, were neighbouring land owners make a mistake as to where the boundary lies between their adjoining lands."

This is what happened in the present case.

In *Murphy v Murphy* [1980] IR 183, the Irish Supreme Court held that, in the absence of fraud, a person's title can be extinguished by adverse possession even though he might be unaware of the fact that he was the owner of the land in question and therefore did not appreciate the significance of the squatters' actions; see O'Higgins CJ at 199. There is no suggestion of fraud in the present case on the part of the plaintiffs or their predecessors in title, the McIlroys.

[16] Having considered the evidence in this case, I consider that the plaintiff and their predecessors in title, the McIlroys, had, prior to the issue of the civil bill by the plaintiff on 8 November 2000, by adverse possession acquired ownership of the laneway by virtue of Article 21 of the Limitation (Northern Ireland) Order 1989.

[17] Mr Doyle, the defendant/appellant, asserts that in the event of the court holding that the Donnellys the plaintiffs/respondents, have acquired a title to the laneway between A and D by adverse possession (as this court has now held), he has a right of way along the laneway between A and D. One cannot however have a right of way over one's own land and accordingly it is

difficult to see how the defendant or his predecessors in title could have had a right of way over the laneway prior to losing their title by adverse possession. In any event any right of way which the defendant may have had along the laneway between A and D on the map annexed to the civil bill had been abandoned. While mere non-user without more, however long, cannot amount to abandonment, such non-user is evidence from which abandonment may be inferred depending upon all the circumstances: see Gale on Easements 17th Edition at paragraph 12-45. I have already referred to the slurry incident in 1994 when Mr Donnelly told the defendant "not to come up that lane again" and that the defendant made no reply thereto by way of any assertion that he had even a right of way along its length. In the circumstances of the present case I hold, as just stated, that any right of way between A and D had been abandoned. The defendant still has, however, a right of way across the laneway from C to B.

[18] Accordingly I affirm the Order of the learned County Court Judge.

Mr McHugh, Counsel for the plaintiffs/respondents

Mr MacNeil, Counsel for the defendant/appellant

20 October, 12, 28 November, 2 December 2003, 17 September 2004