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Judgment: approved by the Court for handing down | *Delivered:* 8/7/05
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

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BETWEEN:

FRANK STEWART

Plaintiff/Respondent;

and

FOLD HOUSING ASSOCIATION

Defendant/Appellant.

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KERR LCJ

Introduction

[1] This is an appeal from a decision of Deputy Judge Canavan, sitting in the County Court Division of Fermanagh and South Tyrone, whereby he made a decree in favour of the plaintiff for £10000 and costs. The damages awarded were in respect of the loss of conacre letting of lands belonging to the plaintiff at Tattykeel, Omagh, County Tyrone.

Factual background

[2] The plaintiff has been the owner of lands at Tattykeel since 1968 or 1969. The lands comprise seven fields of approximately 65 acres in total. From about 1969 a family called McDonagh, who are part of the travelling community, were accustomed to encamp on the roadside near the plaintiff's lands. The plaintiff's fences were often damaged and horses belonging to the McDonaghs gained access to his fields where they grazed.

[3] In 1982 Omagh District Council acquired one of the plaintiff's fields compulsorily and erected on it concrete stands on which the McDonaghs could park their vehicles. A tenancy agreement was made between the Council and the McDonaghs which specifically forbade the keeping of animals other than one dog on each of the twelve 'pitches' on the site. Despite this the McDonaghs kept horses and these horses were allowed to graze on the plaintiff's lands. The plaintiff claims that the site was policed by the Council and "trespasses and nuisances were controlled". It appears, however, that the McDonaghs continued to keep horses and they continued to graze on the plaintiff's lands. Complaints to the Council and the police about the trespass of McDonaghs' horses on to his lands were made regularly by the plaintiff between 1968 and 1999. As the Deputy County Court judge found, these met with limited success.

[4] In September 1996 the government established a working party to consider the options for accommodation for members of the travelling community. One of the areas considered for the provision of housing was Tattykeel. This spawned a new government policy which was launched by the housing minister, Lord Dubs in August 1999. The Northern Ireland Housing Executive was identified as the agency most suited to implement the new policy. In April 1999 a housing need assessment had been prepared by the Lee Hestia association and sent to the Housing Executive. As a result, Tattykeel was one of four pilot schemes chosen to begin the implementation of the policy. In the housing need assessment for the Tattykeel site, Lee Hestia had recorded that the McDonaghs had currently eight horses and could on occasions have up to twelve horses on site. It then stated: -

> "Horses are a very important part of this extended families (*sic*) culture and they are keen that appropriate accommodation be provided for them. Stabling and grazing land is therefore required to be incorporated within the Omagh scheme."

[5] Fold Housing Association is registered with the Department for Social Development under article 124 of the Housing (Northern Ireland) Order 1981. It is a non profit making body. On 30 July 1999 NIHE offered Fold the opportunity to develop travellers' houses at Tattykeel. In order to bring this about the lands at Tattykeel were conveyed from Omagh District Council to Fold on 13 December 2000. When the houses were developed stabling for six horses was supplied. There was a dispute as to whether the document referred to in the preceding paragraph had been brought to the attention of Fold. Mr Jeffrey Miller-Wilson, a representative of Fold, gave evidence that he had seen it before the lands were conveyed to Fold in December 2000. Mr Brian Coulter, the chief executive of Fold, believed that it may only have come to its attention after legal proceedings were begun. For reasons that will appear presently, not a great deal turns on this point. I am satisfied that Fold

was aware that horses were grazed by the McDonaghs on neighbouring lands and that this had caused considerable difficulties in the past. The essential issue will be what effect this had on their avowed liability to the plaintiff.

[6] The tenancy agreement that had been made between the district council and the McDonaghs continued until the new houses were constructed whereupon a new agreement between the McDonaghs and Fold was entered into on 10 December 2001. Clause 10 of the new agreement, in so far as is material, provided: -

> "(10) **Nuisance**
>
> (a) The tenant or members of the tenant's household or visitors shall at all times show proper consideration for other tenants, neighbours and staff members of Fold housing association and their agents."

[7] Under the repair and maintenance obligations provided for in clause 7 of the agreement, it was stipulated that tenants, members of their household or visitors were not allowed to keep any horse, pony or other animal in the common areas that related to the general housing scheme or in the garages attached to their homes.

[8] The day to day management of the development and support for the tenants was provided by Lee Hestia on foot of an agreement made between Fold and that organisation dated 7 December 2001.

[9] The history of planning for housing on the site began with the grant in 1998of planning permission to Omagh District Council for eight semi-detached houses together with garages. The Council's plan for houses on the site did not proceed but NIHE was appraised of the plan and of the Council's concern about the desire of the McDonaghs to keep horses on the site. On 27 March 2000 NIHE applied for planning permission to develop eight bungalows on the site. The site plan showed an intention to provide stables but permission for these was not applied for. At a meeting on 9 January 2001 residents and landowners close to the Tattykeel site raised concerns particularly about the proposal to provide stables. They also recounted the difficulties that had been experienced with horses trespassing on lands adjacent to the site, particularly those of Mr Stewart. That meeting was attended by a number of representatives of organisations including NIHE and Fold. It was agreed that Fold should re-examine the issues of the proposed stables and the land requirement for horses.

[10] It became clear that the travellers would not agree to the housing development unless stabling was incorporated into the development. Fold

therefore applied on 25 July 2002 for planning permission for stables and a workshop within the site. The environmental health department of Omagh District Council advised the Planning Service of the Department of the Environment that permission for this proposal should not be granted unless Fold could demonstrate that :-

(a) adequate lands were available for the grazing of horses;
(b) suitable arrangements were made for the storage/disposal of animal waste so as to avoid public health nuisance conditions or pollution of water courses;
(c) suitable health and safety arrangements were put in place so as to ensure that occupants of the site and the general public were not endangered by the keeping of animals on the site; and
(d) the facilities for the keeping of horses were such as to ensure the welfare of the animals.

[11] Planning permission was granted on 10 January 2002 but the recommendations of the health department were not included as conditions to the permission; instead the Planning Service appended these to the grant of planning permission as 'informatives – environmental health comments'. On the day before the grant of planning permission a further meeting was held at which representatives of Fold were informed of the very serious concerns about the keeping of horses within the site and the trespass of the horses on to adjacent land. Eventually eight houses and associated stables were built. Attempts were made to obtain funding for the purchase or rent of lands from the plaintiff to provide grazing but this has proved impossible.

[12] Between 1985 and 1999 the plaintiff let the lands to a Mr William Reid. He died about 1999 and the plaintiff then engaged his brother, Patterson Stewart, a local auctioneer, to act on his behalf in the letting of the lands. They were duly advertised and in due course were let to a Mr McKenna at an annual rent of £8500. During the first year of letting, 1999, there was a considerable increase in the number of horses grazing the plaintiff's lands. By the year 2000 sometimes as many as seventeen horses were to be found there. Considerable damage was done to the plaintiff's lands. At the end of the 1999 season Mr McKenna refused to renew the agreement to take the lands unless the rent was reduced to £4250 for the year 2000. Unfortunately the trespass by the horses continued and eventually in July 2000 Mr McKenna removed his cattle and refused to pay the second instalment of rent due to the end of October of that year. The plaintiff has been unable to obtain a tenant for the lands ever since. Silage has been cut from the lands at a fraction of the rental income. The horses continue to trespass.

The case for the plaintiff

[13] For the plaintiff Mr Brangam QC submitted that this was a unique housing development and that Fold should be taken to have had actual or constructive knowledge that stabling and grazing provision were integral to its success. Moreover, Fold had been made aware that the issue of horses trespassing on Mr Stewart's lands was an ongoing problem that required to be addressed before the scheme was undertaken. The design and construction of the houses with associated stables made the trespass of the horses on Mr Stewart's land inevitable unless other grazing land was provided, Mr Brangam claimed. Despite this, Fold had recommenced the construction of the stables after proceedings had been issued by Mr Stewart. It ought to have discontinued the scheme until some means of abating the nuisance caused by the trespass of the horses was found.

[14] Mr Brangam submitted that, by providing stables for this development, Fold should be taken to have authorised the continuing trespass by the McDonaghs' horses on the plaintiff's lands. They had done nothing to abate that nuisance. By effectively placing the travellers on the site adjacent to the plaintiff's lands and acquiescing in their horses' trespass on his lands, Fold had adopted the nuisance.

The case for the defendant

[15] For the defendant Mr O'Donoghue QC submitted that there was nothing in the exchanges between NIHE and Fold that suggested that the latter would ever be responsible for the provision of grazing land. Its role was confined to the provision of the housing development. He referred to a meeting that had taken place in NIHE offices in Adelaide Street, Belfast on 27 March 2000 where Mr Aengus Hannaway of NIHE suggested that Fold should make a preliminary submission to the Department of Social Development for the housing scheme with layout drawings, house types and outline specifications. No suggestion was made that Fold should make proposals about the grazing lands. This, Mr O'Donoghue claimed, tied in with an updated report from Lee Hestia in September 1999 in which it was envisaged that grazing lands would be funded other than by Fold. It was simply not Fold's responsibility to fund this facility, he said.

[16] Mr O'Donoghue also pointed out that at a meeting that took place on 9 January 2001 Mr Miller-Wilson on behalf of Fold outlined clearly its position to Mr Stewart. The travellers would not participate in the scheme unless a paddock and six loose boxes were provided. During that meeting Mr Stewart indicated that he was willing to rent lands to Fold for grazing purposes provided he was properly reimbursed and effective legal agreements were drawn up.

[17] On 31 January 2001 Mr Hannaway had visited the McDonagh family to discuss the matter of the horses. Michael McDonagh had informed him that he had an agreement with one Stephen Keyes who had sub-let land from Mr McKenna and that he believed that there should be no problems with the horses that could not be resolved within the scheme.

[18] Finally, Mr O'Donoghue drew attention to the fact that subsequent to this meeting, Mr Miller-Wilson attempted to explore the raising of money to lease lands from Mr Stewart. A proposal was made by Fold through its solicitor that it was prepared to facilitate the leasing of land by the McDonagh family from Mr Stewart. This was rejected by Mr Stewart. All of these efforts to accommodate the problem with the horses illustrated, Mr O'Donoghue claimed, that far from acquiescing in the trespass of the horses both Fold and NIHE had been actively engaged in trying to bring it to an end.

Legal issues

[19] Although the Civil Bill adumbrated various heads of claim both before the Deputy County Court judge and this court the plaintiff's action was confined to the claim that the defendant was liable in nuisance.

[20] For present purposes the definition of nuisance to be found in paragraph 19.01 of the 18th edition of *Clerk & Lindsell on Torts* will suffice: -

> "The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land … a private nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land."

[21] There can be little dispute that Mr Stewart has suffered an interference with the enjoyment of his land over many years because of the trespass by the horses. They have not only damaged the lands, they have been responsible for cattle straying on to the road and ultimately they caused his tenant to determine his tenancy of the lands. This activity clearly constitutes a nuisance and those responsible for it (provided that responsibility can be established) would be liable in nuisance to the plaintiff.

[22] In the course of the appeal a good deal of debate was engaged on whether Mr Stewart could sue the McDonaghs for nuisance. On his behalf Mr Brangam drew attention to the difficulty in establishing who owned the individual horses. It appears that on an earlier incident when a horse strayed on to the road and caused a fatal traffic accident and on that occasion the police were unable to discover the owner of the horse. Mr O'Donoghue

challenged the claim that it would not be possible to identify a suitable defendant, pointing out that much of the exchanges between the various agencies associated with the housing development and the travellers were conducted with Michael McDonagh who gave every indication that he was 'the head of the clan'.

[23] It does not appear to me that this issue is of other than peripheral importance. Even if it could be shown that Mr Stewart could maintain a cause of action against the McDonaghs, this will not extinguish any valid claim against the defendant. Conversely, the difficulty in bringing home liability to the McDonaghs will not fortify his claim against Fold. That claim must be judged on its own intrinsic merits.

[24] A landlord may be liable in nuisance even if he is not in occupation of the lands. If, for example, a landlord lets lands for the purpose of permitting his tenant to do an act that amounts to a nuisance or where he expressly authorises conduct amounting to a nuisance, he will be liable. He will also be liable if, with knowledge that a nuisance is continuing he fails to take reasonable measures within his power to bring it to an end – see *Sedleigh-Denfield v O'Callaghan* [1940] A C 880, 894: -

> "In my opinion an occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance." – per Viscount Maugham

[25] It is clear, however, that mere awareness that the activities of a tenant constitute a nuisance will not alone be sufficient to render a landlord liable. In *Southwark LBC v Mills and others Baxter v Camden LBC* [1999] 4 All ER 449 at 465/6, Lord Millett said: -

> "Once the activities complained of have been found to constitute an actionable nuisance, more than one party may be held legally responsible. The person or persons directly responsible for the activities in question are liable; but so too is anyone who authorised them. Landlords have been held liable for nuisances committed by their tenants on this basis. It is not enough for them to be aware of the nuisance and take no steps to prevent it. They must either participate directly in the commission of the nuisance, or they must be

> taken to have authorised it by letting the property: see *Malzy v Eichholz* [1916] 2 KB 308."

[26] This approach was also followed in *Hussain and another v Lancaster City Council* [1999] 4 All ER 125 where it was held that a landlord could not be responsible for acts of nuisance committed by the tenant unless the landlord had specifically authorised them. This general line of authority is also exemplified by the decision in *Smith v Scott* [1973] Ch D 314 where at page 321 Pennycuick V-C said:-

> "In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance: *Harris v. James* (1876) 35 L.T. 240. But this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let: *Rich v. Basterfield* (1847) 4 C.B. 783 and *Ayers v. Hanson, Stanley & Prince* (1912) 56 S.J. 735; and see generally *Clerk and Lindsell on Torts,* 13th ed. (1969), p. 805, para. 1426; *Salmond on the Law of Torts,* 15th ed. (1969), p. 89 and *Winfield and Jolowicz on Tort,* 9th ed. (1971), p. 348. I have used the word "certain," but "certainty" is obviously a very difficult matter to establish. It may be that, as one of the textbooks suggests, the proper test in this connection is "virtual certainty" which is another way of saying a very high degree of probability, but the authorities are not, I venture to think, altogether satisfactory in this respect."

[27] In *Lippiatt and another v South Gloucestershire Council* [1999] 4 All ER 149. In that case the defendant council owned a strip of land which was occupied by a group of travellers. The plaintiffs, who were tenant farmers of adjacent land, brought proceedings for nuisance against the council in which they alleged that the travellers had frequently trespassed on their land, obstructed access to a field and carried out various activities on it, including dumping rubbish, leaving excrement and tethering animals. They further alleged that the council had been aware of the travellers' presence on its strip of land, and had tolerated it. At the start of the trial, the council applied to strike out the claim on the grounds that it had no prospect of success. That application was granted by the judge who held that the council could not be liable for actions committed by the travellers on the plaintiffs' land. The plaintiffs appealed.

The Court of Appeal held that the judge was wrong to strike out the plaintiff's claim because the court was not precluded from holding a defendant occupier liable for a nuisance consisting of repeated acts on the plaintiff's land, which, to the defendant's knowledge, were committed by persons based on his land.

[28] Mr Brangam relied heavily on *Lippiatt* to support his claim that Fold's knowledge that horses belonging to the McDonaghs would trespass on the plaintiff's lands rendered them liable in nuisance. One may first observe that the Court of Appeal in that case did not conclude that the failure of the council to take steps to abate the nuisance would amount to nuisance, merely that it was arguable that they would do so. Moreover the Court was principally exercised by the argument that the activities complained of, since they took place outside the council's lands could not render them liable. The judge had held that since the activities of the travellers did not involve the use of the council's land, they fell outside the scope of the tort. Evans LJ held that *Smith v Scott* provided clear authority for the proposition that there was no rule of law which prevents the owner occupier of land from being held liable for the tort of nuisance by reason of the activities of his licensees which take place off his land. This is not an issue that arises in the present case.

[29] But Evans LJ also addressed the question of possible liability of owners of land for nuisances created by licensees in this later passage of his judgment (at page 157): -

> "It may be that the correct analysis, where it is alleged that the owner/occupier of the land is liable for the activities of his licensees, is that he is liable, if at all, for a nuisance which he himself has created by allowing the troublemakers to occupy his land and to use it as a base for causing unlawful disturbance to his neighbours … If that is correct, then strictly the question whether the owner/occupier has 'adopted' a nuisance created by the travellers (question (2) above) may not arise. For that reason, I express no other view than that, on the facts alleged in the present case, the council's objection that the claim in nuisance cannot succeed, as a matter of law, must be rejected, and the appeal should be allowed."

[30] Sir Christopher Staughton pointed to the difference between the situation where, as in the *Lippiatt* case, the travellers were licensees and that where, as here and in *Hussain*, those causing the nuisance are tenants. At page 160 he said: -

> "… there is in my judgment a difference between a case such as *Hussain*'s case, where the offenders were (for the most part) tenants of the defendant with an interest in the land, and the present case where they are either licensees of the council or else trespassers, and can be moved on. In the latter case, the council may be found to have adopted the nuisance by failing to exercise its power to turn out the travellers once their habitual misbehaviour became apparent. Alternatively, it can be said that the nuisance becomes that of the council in leaving the travellers on the land, if that amounts to anything different from what I have said before."

[31] From these authorities the following principles relevant to this case may be derived:-

1. Where the land from which the nuisance emanates is subject to a tenancy, the landlord may be liable, notwithstanding that he does not have possession and control of the land.
2. The landlord can only be held liable when he expressly or implicitly authorised the creation or continuance of the nuisance.
3. The landlord will be deemed to have authorised the nuisance if, to his knowledge, it is certain to result from the purposes for which the property is let.

Conclusions

[32] In this case the plaintiff has failed to satisfy me on the balance of probabilities that the defendant authorised the creation or continuance of the nuisance. I am entirely satisfied that Fold was aware of the problem with the horses at the time that the housing development was under discussion and when the tenancy agreement was drawn up but that is a far cry from their having authorised the continuation of the nuisance. The view may well be taken that they were foolhardy to have proceeded with the development until the problem with the horses had been sorted out but again this cannot be regarded as having acquiesced in, much less authorised, the persistence in the trespass of the McDonaghs' horses on the plaintiff's fields.

[33] The preponderance of the evidence points clearly to the conclusion that, so far from authorising the continuation of the nuisance, Fold was engaged in efforts to overcome the problems with the horses. These efforts may have been ineffectual but the fact that they were made is incompatible with the notion that they had impliedly sanctioned or authorised the continuing trespass. Mr Millar-Wilson had attempted to facilitate an arrangement between the parties for the leasing of fields for grazing. He can hardly be said

therefore to have been complacent about the problem. He even went so far as to enter into informal negotiations with the plaintiff's solicitors in an effort to arrange the leasing of lands. This is simply and plainly inconsistent with the suggestion that Fold was inactive about the horses' problem. In evidence he categorically denied having consented or encouraged the travelling community in bringing horses on to neighbouring lands. Nothing that was put to him challenged that assertion and I see no reason not to accept it.

[34] Mr Hannaway gave evidence that after NIHE became aware of the horses problem he had a meeting with Mr McDonagh on 31 January 2001. He obtained an assurance from Mr McDonagh that he had an arrangement with a local farmer that would deal with the problem. Although NIHE is not a defendant in this matter this is again evidence that those associated with the development were not encouraging or acquiescing in the continuation of the nuisance.

[35] Rhonda Smith, the care services manager of Fold, pointed out in her evidence that the tenancy agreement with the McDonaghs stipulated that they should not cause a nuisance to neighbours. She produced a scheme visit report on a visit to the site on 15 April 2002 which recorded that she had raised the matter of the horses with Michael McDonagh and had been assure by him that he had made his own arrangements about the grazing of his horses. Again, one can only deduce from this evidence that Fold had not encouraged or authorised or acquiesced in the trespass by the horses or the nuisance that they caused. It can be said that they must have anticipated trouble continuing but this cannot be regarded as equivalent to authorising the nuisance.

[36] The Deputy County Court judge concluded that the granting of a tenancy to the McDonaghs "resulted in the virtual certainty that the nuisance complained of for so many years would not only continue but might increase as a result of the increased accommodation provided on the site". I am afraid that I cannot agree with this conclusion although, in fairness to the Deputy County Court judge, much more evidence was called before me than was available to him. Fold had reason to apprehend that the trespass might continue but there was simply no basis on which it could be said that this was virtually certain.

[37] I have great sympathy with the dilemma that Mr Stewart has faced and the plight that he has suffered because of the wanton trespass of the McDonaghs' horses but I am entirely satisfied that Fold is not liable for the nuisance that has resulted from those activities. The appeal will be allowed and the plaintiff's claim must be dismissed.