**Neutral Citation No. [2009] NICA 50** | *Ref:* **GIR7639**

*Judgment: approved by the Court for handing down* | *Delivered:* **26/10/09**
*(subject to editorial corrections)*

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

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**BETWEEN:**

**NOEL GALLAGHER**

**Defendant/Appellant**

**and**

**NORTHERN IRELAND HOUSING EXECUTIVE**

**Plaintiff/Respondent.**

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**Before: HIGGINS LJ, GIRVAN LJ and McLAUGHLIN J**

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**GIRVAN LJ**

[1] This is the judgment of the court.

[2] This is an appeal from an order of Deeny J made on 22 January 2009 whereby he awarded the respondent ("the Executive") possession of the lands more particularly marked on the map attached to the Writ of Summons issued by the Executive on 24 June 2007 ("the disputed land"). He rejected the appellant's counter claim asserting a possessory title to the disputed land.

[3] Mr Michael Lavery QC appeared with Mr Finbar Lavery on behalf of the appellant. Mr Fee QC and Mr Sands appeared on behalf of the respondent. We are indebted to counsel for their helpful submissions in the appeal.

**The background to the proceedings**

[4] The disputed land is registered land being part of the lands in Folio 20206 No 23. These lands lie along the Glassagh Road on the outskirts of Londonderry. The lands were originally acquired by the Executive's predecessor in title, the Londonderry Corporation ("the Corporation"), for the purposes of housing development. House building was carried out in the 1950s on other parts of the Corporation's land in the vicinity of the disputed land which was an area treated by the Corporation as an open public space for the use of local residents. As a result of reorganisation of local government and public housing the lands including the disputed land vested in the Executive in the early 1970s.

[5] The appellant and his father carried on a coal business in Londonderry and they also kept and dealt in horses. The evidence established that the appellant's father initially rented the disputed land from the Corporation from about 1955 to 1966 using the land for the grazing of horses. The precise nature of the letting arrangement was not established in the course of the hearing. In addition to grazing by horses the land was at one time also grazed by cattle and pigs. At some point around 1966 rent ceased to be demanded by the Corporation. It was the appellant's evidence that a representative of the Corporation told his father that that decision was taken because it was no longer cost effective to collect the rent and keep up the fences.

[6] It was the appellant's case that thereafter he continued to use the disputed land in a manner that showed he had possession of the land adversely to the interests of the Corporation and subsequently the Executive when it became the paper owner. He asserted that he was entitled to a declaration of ownership by reason of his adverse possession of the land for a period in excess of the statutory limitation period.

[7] The Executive became aware in or around 2004 that the appellant was grazing horses on the disputed land. In February 2007 solicitors on behalf of the Executive wrote to the appellant requiring him to remove the animals from the land. The appellant refused to do so and asserted a claim to it. It appears that subsequent to the Executive's demand for possession the appellant carried out work in installing a more effective fence around the land than had theretofore existed. It appears that the Executive took little interest in the lands until 2004 and its present interest arises out of the fact that it now wishes to build houses in the area and the disputed land is needed to provide the necessary amenity land to facilitate the granting of planning permission for housing.

**The appellant's claim**

[8] The disputed land comprises land roughly the shape of an inverted L. Beside the disputed land is another large field known as Doherty's field which links into the L shaped disputed lands to form a rectangle. Doherty's field had been used by the appellant's father for many years from the death of the owner Mr Doherty in the 1970s and has more recently been used by the appellant. The appellant agreed to purchase that land from its then owner in 1994. He has continued to occupy the land although the title has not been formally transferred to him. Doherty's field is not fenced off from the adjoining disputed land and there is the remnant of hedge between them. Any livestock kept on Doherty's field can graze freely across the disputed land. The appellant in addition has the use of another field known as the Bishop's field which is not connected to the disputed land and is a short distance from it. That land does not form part of the present dispute nor does the appellant's asserted claim to a right of way to the Bishop's field which was dismissed by Deeny J.

[9] It was the appellant's case that the appellant and his predecessor clearly had possession since the letting from the Corporation. Since they had possession on foot of the letting the burden lay upon the Executive to prove that it had done some acts or asserted itself in some way so as to bring to an end the legal possession that the appellant had enjoyed up to that point.

[10] The appellant relied on a number of matters which he claimed established that he was in possession of the lands adversely to the paper owner. He relied primarily on the use of the land for grazing for the horses and contended that he kept a relatively large number of horses over the years which freely grazed the lands. These horses, he claimed, were kept by way of horse dealing and horse training. On occasion a veterinary surgeon, Mr Doherty, would attend the lands to deal with veterinary problems affecting the horses. Over the years the appellant repaired rough fencing around the disputed land which kept his horses in. He also claimed that on occasions he fertilised the land, put lime on it and on one occasion applied a weed killer. On one occasion he grew potatoes on part of the land but this was an unsuccessful venture as local residents removed the potatoes. He also relied on the fact that he permitted the Army to replace part of the fence and remove part of a hedge which was providing cover to snipers. He also relied on the fact that he had in place an area of hard core standing to enable him to feed the horses. He claimed that that area was located partly on Doherty's field and partly on the disputed land and that this helped to demonstrate his animus possidendi of the disputed land.

[11] Having heard and seen the appellant in the witness box and heard the evidence of the witnesses Deeny J concluded that the appellant fell very far short of establishing the necessary 12 years adverse possession. He concluded

that he could not safely rely on the appellant's evidence (whom he clearly regarded as an unsatisfactory witness) unless there was some corroboration for it. The transcript of the evidence amply demonstrates that the trial judge was entitled to form the view which he did.

[12] The judge's findings can be summarised thus:-

(a) He accepted that the appellant grazed horses on the disputed land over the years since the end of the letting arrangements between the appellant and his predecessor and the Corporation. His horses also grazed on Doherty's field and on the Bishop's field. The quality of the Bishop's field was superior to the disputed land. The judge concluded that most of the horses would have been grazing on the Bishop's field in light of the evidence of Mr Doherty.

(b) He concluded that the number of horses involved in the grazing was smaller than that contended for by the appellant who estimated that the numbers ranged from around 35 down to 11 in some years.

(c) The judge accepted that the appellant had put down hard core over an area of ground which was used as hard standing for the horses. He concluded that this was placed not on the disputed land but on Doherty's field.

(d) The horses wandered across Doherty's field and the disputed land. There was rough fencing around the disputed land but not between Doherty's field and the disputed land. The judge concluded that by the appellant's own admission the appellant's work on the fencing was only of a repair nature.

(e) The judge accepted that part of the fence had been replaced by the Army with the purported permission of the appellant.

[13] The judge concluded that certain matters were adverse to the appellant's claim. He decided that the appellant deliberately put the hard core beyond the hedge line of the disputed land on to Doherty's field and from this he drew the inference that the appellant was not asserting title to the disputed land. Secondly, the poor condition of the lands, the presence of ragwort and the absence of invoices showing expenditure on maintenance of the land were pointers against the appellant's claim. Thirdly, the appellant admitted that

from time to time local people walked across the land with and without dogs and on occasions hunted with dogs on the land. The appellant made no effort to exclude them. While on one occasion the appellant tried to grow potatoes on part of the land this had been unsuccessful because local people had come on to the land and lifted the potatoes. The appellant also drew an adverse inference against the appellant because he did not seek grant aid or set aside payment in relation to the land. The judge also drew an inference against the appellant because no structure had been constructed on the land to stable the horses.

**The relevant legal principles**

[14] There was no dispute between the parties as to the governing principles to be applied. The relevant statutory provisions are to be found in Article 21(1), Article 26 and paragraph 8 of Schedule 1 of the Limitation (Northern Ireland) Order 1989. The principles evolved by common law governing the establishment of sufficient adverse possession were summarised in Slade J's judgment in Powell v. McFarlane [1977] 38 P&CR 452 at 470 to 472 and confirmed by the Court of Appeal in Buckingham County Council v. Moran [1990] Ch 623 and in the House of Lords decision in J A Pye (Oxford) Limited v. Graham [2002] 1AC 419 ("Pye.") These were reiterated or applied by this court in Re Faulkner [2003] NICA 5. A party claiming possessory title must show both factual possession and an intention to possess (animus possidendi). Evidence of factual possession must show an appropriate degree of physical possession. The paper owner and the squatter cannot both be in possession at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances and regard will be had to the nature of the land and the manner in which land of that kind is commonly used or enjoyed. Carswell LCJ in Re Faulkner at paragraph 14 pointed out:-

> "Everything must depend on the particular circumstances but broadly I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

It is thus apparent that the question whether or not a squatter has acquired possessory title by adverse possession is fact specific and it will often be a question of fact and degree. Due respect must be accorded to a trial judge's assessment of the facts.

**Conclusions**

[15] Mr Lavery QC in his skeleton argument placed considerable reliance on the proposition that since the appellant and his predecessor in title had been in possession of the disputed land on foot of a tenancy and had over-held after the conclusion of the tenancy the possession which they had on foot of the tenancy must be considered to have continued thereafter with the appellant treating the land exactly as he had under the tenancy. Although he did not cite authority for that proposition his argument finds support in Williams v. Jones [2002] EWCA Civ 1097. In that case the respondent was a tenant of an area used for rough grazing paying rent until 1973 after which he remained on the land. The Court of Appeal concluded that the distinction between a trespasser case and a former tenant case was that in the former animus possidendi would be required in order to establish that the paper owner was dispossessed. That was not necessary in a former tenant case because the freeholder had allowed the tenant into possession and he would normally be taken to continue in possession when he overholds. In that case it was considered that while sheep grazing would be an equivocal act in a trespasser case it was not in a former tenant case where the occupier is continuing with the actions that he carried out while in possession as a tenant.

[16] However, if Mr Lavery's point is to be valid it requires evidence that the appellant had indeed been a tenant of the disputed land on foot of a tenancy which conferred possession on him. The trial judge did not find that a tenancy existed and considered that the former arrangement with the Corporation was probably a licence. He was undoubtedly correct to so conclude. Agricultural tenancies are extremely uncommon in Ireland for historical reasons (see the discussion in McCall v. HM Commissioners of Revenue and Customs) [2009] NICA 12.) On the other hand grazing or agistment lettings are commonly entered into. While they are called "lettings" they partake of the nature of a licence with a profit à prendre, paramount occupancy remaining with the landowner. Often they require the grazier to maintain the land to keep up the crop for his grazing and to maintain the fencing to keep his livestock in.

[17] If, as is much more likely, the former arrangement in this case was a licence rather than a tenancy the appellant could not call in aid the approach in Williams v. Jones since he had not been in possession of the disputed land on foot of a letting in the nature of a tenancy. He thus bore the burden of proving in the normal way that he had been in adverse possession for the statutory period after the cessation of the earlier letting. Where a person is allowed to use and occupy land as a licensee, is not given exclusive possession and overholds on the expiry of the licence it is suggested in Jourdan on Adverse Possession at paragraph 9.39 that "he will not be treated as manifesting the animus possidendi if he simply continues to use the land as before". The appellant (who probably occupied the disputed land formerly as a licensee) does not start off with a form of presumption that he

was continuing in possession as an overholding tenant. He must prove by his actions that he was in adverse possession for the relevant period after the cessation of the letting. An overholding licensee can establish such possession if the evidence points to that conclusion. This happened in Pye where the Grahams overheld after the termination of a grazing licence. In that case the objective facts demonstrated that the Grahams made such use of the disputed land as they wished irrespective of whether or not it had been subject to the terms of a hypothetical grazing agreement. They spread dung on the land, harrowed it and rolled it, overwintered dry cattle and yearlings in a shed on the land and repeatedly did things on the disputed land which they would have had no right to do under a mere grazing agreement even if it had still been in force. (See Lord Brown Wilkinson at [2003] 1 AC 419 at 443, paragraph 58).

[18] What is clear is that a party seeking to establish a possessory title must establish his case by:-

> "clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly clear to the world at large by his actions and words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

(per Slade J in Powell v. McParland [1977] 38 P&CR 452 at 472 in a judgment which the House of Lords in Pye considered to be entirely correct.) Slade J later pointed out that a trespasser whose user of land was equivocal was required to adduce "compelling evidence" of animus possidendi. In Lambeth London Borough Council v. Blackburn [2001] EWCA Civ 912 Clarke LJ said:-

> "It is thus of crucial importance that the trespasser's acts must be unequivocal. They must make it clear to the owner, if present on the land, that they intended to exclude the owner, as Slade J put it "as best he can"".

[19] The grazing of the lands by the appellant's horses was the key matter relied upon by the appellant to found his claim. His other actions apart from the unsuccessful attempt to grow potatoes related to that grazing activity. Grazing of land by itself is equivocal . Land can be grazed pursuant to a profit à prendre or a licence. Non-exclusive grazing licences are commonly granted with the owner retaining a right to use the land in any way that did not prevent

the licensee's use for grazing. In a number of cases the courts have considered mere grazing without other acts of possession as being insufficient to establish adverse possession (see for example A G v. Rees [1859] 4 D G & J 55 at 65, Littledale v. Liverpool Corporation [1900] 1 Ch 19 and Hollenshed v. Wheawell [1956] 167 EG 278. In Powell v. McFarland the squatter at the start of the limitation period was a teenage boy, used the land to graze the family cow, took a hay crop and made rough and ready if widespread repairs to the boundary fence to make them stock proof and allowed a friend to tether a goat on the land. On occasions he shot pigeons and rabbits on the land. Slade J held that the squatter's use of the land had simply amounted to the taking of profits from the land:-

> "These activities were equivocal within the meaning of the authorities in the sense that they were not necessarily referable to an intention on the part of the plaintiff to dispossess the paper owner and to occupy the land as his own property. At first any objective informed observer might probably have inferred that the plaintiff was using lands simply for the benefit of his family's cows during such period as the absent owner took no steps to stop him without any intention to appropriate the land as his own."

[20] Mr Lavery took issue with the judge's inference that the appellant had deliberately placed the hard core in Doherty's land and deliberately avoided trespassing on the disputed land. The judge regarded it as significant that he did that. It is however, unnecessary, to speculate on the question whether he deliberately avoided trespassing on the Executive land. The fact is that the judge concluded justifiably on the evidence that the hard core was not on the Executive's land. The hard core accordingly provided no evidence to assist the appellant. Mr Lavery also criticised the judge for concluding that Mr Doherty, the veterinary surgeon in his evidence identified the Bishop's field as the area where most of the appellant's horses were located. It is correct that Mr Doherty did not give evidence to that effect. Mr Doherty's evidence, however, only corroborated the appellant's evidence about the presence of horses grazing on the disputed land. He could not speak to the nature or quality of the appellant's use of the disputed land. His evidence does not of itself assist the appellant in establishing possession. The evidence did point to the Bishop's land being better quality land and hence would have had better grazing potential than the disputed land. That evidence might tend to suggest that it was likely that there would have been more horses on it. It is not, however, necessary to come to any concluded view on that issue.

**Disposal of the appeal**

[21] Even if there is some substance in Mr Lavery's challenge to the judge's conclusions on those latter points, this does not assist the appellant since the rest of the evidence fell short of establishing possession by the appellant or animus possidendi. The appellant's actions were at best equivocal and not necessarily referable to an intention to possess or an intention to dispossess the paper owner. We conclude accordingly that the trial judge was correct to dismiss the appellant's counterclaim and make the order which he made. Accordingly we dismiss the appeal.