

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

ALISTAIR NIGEL HAYES

Plaintiff;

And

MARLYN McGUIGAN, THOMAS JOHN McGUIGAN, GABRIEL McGUIGAN  
WENDY CLARKE, NOELEEN McGINLEY AND THOMAS JAMES McGUIGAN  
Defendants.

[No. 2]

DEENY I

[1] The plaintiff in this action is the freehold owner of buildings and lands known as Muckamore Old Mill, Seven Mile Straight, Antrim, contained in Folio AN 126524 of County Antrim. The defendants are the joint owners as tenants in common of neighbouring land situate and known as No. 7 Seven Mile Straight, Antrim and contained in Folio 28134. It is the plaintiff's claim that, originally through a mapping error in a transfer of the part of the lands, a strip of land on the southern boundary of the plaintiff's Folio 126524 has been inadvertently included in the defendant's Folio at 21834. They sought a declaration that the boundary was as indicated on a map attached to the writ of summons and an order that the Land Registry entries be amended accordingly. In a subsequent amendment of the statement of claim, with leave, the plaintiff also claimed adverse possession of the strip of land to the north of the stream between it and the mill buildings. The defendant denied that there was any error but said that in any event it was not the error the plaintiff claimed, it was too late for rectification and that they or their predecessors in title had had exclusive possession of the strip of land, including watercourse, in question.

[2] The court had the benefit of submissions oral and written from Mr Keith Gibson for the plaintiff and Mr Kevin Denvir for the defendants. The matter was

heard before me on 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> September 2011. Although the net value of the property in question is not necessarily considerable the issues of fact, and to a degree law, were not without their complexity. Rather than risk a summary which proves inaccurate I propose therefore to deal with the evidence and issues as they arose seriatim.

[3] Mr Paul Mulholland's Certificate of 8 February 2008 is the basis of the plaintiff's case. Mr Mulholland has worked in the Land Registry of Northern Ireland since 1970. He was the chief mapper until the digitalisation of mapping in 2002 but he has continued to work in the office as a caseworker since then. He and the court were shown a series of maps and photographs. The plaintiff's exhibit map A is a map of 1902 and was the subject of cross-examination. It clearly shows a symbol which is like an elongated f. Mr Mulholland explained that this was known as a brace and had formerly been used in the Land Registry to link two pieces of land and the conjoined measurement of the same. It emanates from the Ordnance Survey. The plaintiff's exhibit map A clearly shows such a brace running from the verge immediately north of the watercourse to the area closer to the then existing mill wall and indeed underneath later buildings, supporting his case that this ground was part of the same holding as the mill at this stage.

[4] The plaintiff's exhibit map B is a map of 1921 and again shows such a brace linking that area to the top of Grangers Lane. It also shows the end of the watercourse angling into the mill consistent with the view of the plaintiff's architect Mr John Hutcheson, that at some stage that had been culverted over. That is the situation on the ground currently. I find on the evidence, including the admissions of the defendant's own witnesses, that the watercourse was used for draining water from the mill which was thus carried back to the river Six Mile Water.

[5] Map C is a map of 1962 from the ordinance survey. I find that the line shown north of the watercourse marks a fence which the mill owners had erected at some stage. Between that fence and the watercourse I find, on all the evidence including that of Mr Hutcheson, that there was a footpath. The dimensions and substance of this footpath would have varied over the years.

[6] The first defendant Miss Marlyn McGuigan twice expressly referred to this as the worker's lane. It ran from what were the mill-workers cottages up to the main entrance to the mill. It was clearly for their convenience. Those mill cottages are now known as Abbey View.

[7] The plaintiff's exhibit D is a blow up of an aerial photograph. A feature discernible on that is consistent with the fence referred to in the previous paragraph. It clearly shows the path also referred to which can be seen to be narrowed by vegetation as it reaches Grangers Lane which runs north from the 7 Mile Straight. Map E of the plaintiff's exhibits is dated 1986. Again we see the line of the fence. We also see that the northern line of the watercourse stops short of Grangers Lane. I

draw from this and the other parts of the evidence that the watercourse did indeed become culverted at this point. I accept Mr Gibson's submission that the southern boundary of the watercourse is virtually identical with the hedge line and that the lower line seen on this and other maps is meant to indicate the southern line of the watercourse but in all likelihood the hedge as well. The plaintiff's map exhibit F is consistent with that. His exhibit G is the contact print for the aerial photograph.

[8] The court was provided by Mr Mulholland of the Land Registry with an original map of an area of County Antrim. Marked upon it and edged in blue were "Lands for sale and repurchase" being the Estate of Captain Robert Thompson. This map bears the stamps of both the Land Purchase Commission (1925) and of the Land Registry of Northern Ireland (1926) and is referred to as 'Exhibit A in an affidavit of Henry Barton'. On the northern edge of the estate of Captain Thompson on this map, with the aid of a magnifying glass, I discern and I find that the blue line runs along and includes the watercourse which runs between the then bleach works, now the mill and what are now the lands of the defendant. It is true to say that at one or two spots the blue pigment is not fully over the watercourse but it seems to me that that is merely a matter of the application of the blue pigmentation. It seems to me a likely inference that the stream would be retained within the ownership of the estate to avoid it becoming a nuisance and also to allow it to be used by the estate if necessary. The estate in question was that of Muckamore Abbey.

[9] Unfortunately, an error occurred when Robert Thompson Esq was transferring the lands, which include the lands of the defendants, to Jeremiah Cupples in 1949. A map that seems to have been presented by the solicitor then acting begins correctly as it comes from Grangers Lane and moves west to run along the northern boundary of the watercourse. But just before the small building shown on the corner of the mill buildings it turns down the middle of the road. This was an error.

[10] A greater error is then committed. The Land Registry map that then issued using, as did the 1926 map, Ordnance Survey no 50, exaggerates the area by running the red line north of the watercourse. Indeed the red line literally goes over the corner of the mill buildings as therein depicted. I find that was an error. It is partly explicable as the blue map submitted was on a scale of 1:2500 whereas the Land Registry map, although an official map, was only on a scale of 6 inches to 1 mile which I take to be 1:10,560.

[11] It is the defendants' case that the placing of that red line entitles it to the ownership not only of the hedge and watercourse but to a strip of land north of the same. They point to a series of subsequent Land Registry maps which, understandably in the circumstances, repeat and reflect what I find to be an error. In so finding I am mindful of the provisions of ss 11, 64 and 69 of the 1970 Act and see the useful summary at 2.20 ff in Moir on Land Registration (2011). I will turn to the law in more detail later in this judgment.

[12] In so finding I agree, at least in part, with the conclusion of the Land Registry as expressed by Mr Mulholland and adopted by the Deputy Registrar of Titles Mr John Gibson that there has been encroachment on the northern folio by folio 28134, belonging to the defendants. See Land Registry Notice of Encroachment 21 February 2008. I differ from Mr Mulholland insofar as I have come to the conclusion that the defendants are the legal owners of the watercourse.

[13] Mr Denver referred to the hedge and ditch presumption i.e. that a man digging a ditch throws the earth back on to his own side of the ditch rather than unto his neighbour's land. If however one reads the judgment of Lord Hoffman in Alan Wibberley Building Limited v Insley [1999] 2 All ER 897 at 900 one sees that it is made plain that that presumption has no application in this case. That is because, as is made clear by the 1926 map, the ditch here was in existence before the boundary was drawn.

[14] I heard the sworn evidence of Mr Alistair Minford, a contractor, and of the first defendant Miss Marilyn McCutcheon. Her evidence is to the effect that as a child of 8 or 9, she saw her grandfather and other relations working to clear the watercourse or sheugh as she referred to it in the parlance of that part of the country. She says again that her father and others on occasions cleared the watercourse after her mother bought back the land from the Government in 1988. Her grandfather had lost possession of it by vesting for public works in 1969. I accept the honesty of her evidence and that of Mr Alistair Minford in his sworn evidence that he worked to some degree on the watercourse in 1999 but more extensively in 2001. An affidavit of William Murphy supported that evidence. On that second occasion he says that he did a thorough digging out of several feet of muck from the stream, thus deepening it. He also removed quite a lot of material from the stream including parts of a fireplace which had blocked the culvert about half way along the row of mill cottages before the stream goes underground under those houses.

[15] In direct answer to myself Miss McCutcheon admitted that she had no memory of her father laying cinder on the cinder footpath (which may or may not be subject to a public right of way). It deteriorated into soil and grass as time went on. It was not being maintained. There is no evidence of assertion of title by the Defendants over the land north of the watercourse save that they would have traversed the ground while clearing the ditch.

[16] The fact that the McGuigans did work on the watercourse is at least in part linked to the fact that the Land Registry map showed them as the owners. Therefore in 1999 council officials came out to Miss McCutcheon's mother, although the lady was unwell, requiring her to have the stream cleared. Hence the work referred to above.

[17] These witnesses were cross-examined by Mr Gibson and I take into account the points he established. However it does not seem to me that I should reject their evidence. I therefore conclude that he has not shown on behalf of his client exclusive possession of the watercourse.

[18] The defendants' evidence is not inconsistent with the plaintiff's evidence in that those works that might have been carried out without the knowledge of the then owner, Mr James McIvor. I accept the honesty of his testimony but he did accept that, although he was not aware of the alleged works of 2001, it was possible they were done without his knowledge. He lived in Belfast. He had various interests. It is not suggested that he had a full-time caretaker at the location. In any event part of the works were further down at the mill cottages where they would have been of little or no interest to him. It seems to me that there is no evidence at all of the McGuigans exercising possession of the ground past the end of the watercourse. Indeed the reverse is true. I accept the evidence of Mr Hutcheson and other witnesses that the proper conclusion is that the mill owners had culverted over the stream at some point i.e. in exercise of ownership of the land at that point. I conclude that the path, which was probably maintained by them in past years before the mill closed down, was for the benefit of their workers. I find that the plaintiff has proven, through his predecessors, adverse possession of the land to the north of the stream and to the west of the end of the open stream of watercourse.

[19] The court in dealing with this registered land is bound by the provisions of the Land Registration Act (Northern Ireland) 1970. Part 8 thereof deals with Rectification and Indemnity. I set out Section 69 in full:

“69.-(1) Subject to subsection (3), where any error (whether of misstatement, misdescription, omission or otherwise) occurs in the register, the court, upon such application and in such manner as may be prescribed by rules of the appropriate court and after such notices, if any, as it may direct, may order such error to be rectified upon such terms as to costs or otherwise as it may think fit.

(2) Where, in the opinion of the Registrar, an incorrect entry in, or omission from, the register is of a clerical nature, he may, after making such enquiries (if any) and serving such notices (if any) as he considers necessary, rectify the register.

(2A) The Registrar may in his discretion, after making such enquiries (if any), serving such notices (if any) and obtaining such consents (if any) as he considers necessary, amend any mistake in, or omission from, any document

presented to the Land Registry, if, in his opinion, the mistake or omission is of a clerical nature.

(2B) The Registrar may, after making such enquiries (if any) and serving such notices (if any) as he considers necessary, order the rectification of the register where all persons interested-

- (a) consent to the rectification; or
- (b) do not, within the prescribed period after being served with notice of the Registrar's intention to order the rectification, notify the Registrar in writing that they object to the rectification.

(2C) Where the Registrar exercises the power conferred by subsection (2) or (2B) he may make such order as to the costs of rectification as the persons interested may, in writing, agree.

(3) The register shall not be rectified under subsection (1) so as to affect the title of a registered owner, unless such rectification can be made without loss or damage to any person claiming for valuable consideration and in good faith through such registered owner and unless -

- (a) the registered owner or, as the case may be, a person claiming as aforesaid through the registered owner or anyone acting on behalf of either has, by his act, neglect or default, been in any way responsible for, or has contributed to, the error; or
- (b) in the case of an error made before such registered owner was so registered, he was, in fact, aware of such error at the time of his registration as owner; or
- (c) in the case of an error made after such registered owner was so registered, he or a solicitor acting on his behalf became aware of such error at a time when such error was capable of being rectified without causing loss or damage to

any person except the expense of such rectification;  
or

(d) the immediate disposition to such registered owner, or the disposition to any person through whom he claims otherwise than for valuable consideration, was void; or

(e) such registered owner acquired the land otherwise than for valuable consideration and rectification of the error could have been made against the person through whom he claims if such person had been the registered owner; or

(f) such registered owner consents to rectification;

but so that this subsection shall-

(i) limit the power of the court to rectify the register only where the registered owner of the land is in possession thereof; and

(ii) not limit the power of the court to rectify the register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner.

(4) The provisions of subsections (1) and (3) shall extend, with any necessary modifications, to the rectification of the register by order of a court of competent jurisdiction, exercising any jurisdiction based on the ground of fraud or mistake, in like manner as those subsections apply to the rectification of errors by order of the court."

[20] It can be seen that Section 69(2) would have allowed the registrar to correct this error if "all persons interested consent to the rectification" per Section 69(2) (a) (ii). Such consent was not forthcoming from the defendant.

[21] I am satisfied that an error of misdescription did occur here in the register in 1949. However any order I make is subject to sub-section 3 of Section 69. Turning to that I find that sub-paragraphs (a) to (f) do not apply here and are not said by

counsel to apply as, for example, the registered owner does not consent to rectification. The relevant provisions would therefore read as follows:

“A register shall not be rectified so as to effect the title of [the defendants, because they will suffer loss and damage by loss of a strip of land in their current registered title]

But so that this sub-section shall -

- (i) limit the power of the court to rectify a register only where the registered owner of the land is in possession thereof; and
- (ii) not limit the power of the court to rectify a register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner.”

As I have found above I have concluded that the defendants are not in possession of the land north of the sheugh or watercourse. From time to time they may have been on that land to drain the watercourse in question. That was because they were the registered owner of the watercourse at that time but I find that the possession of the land north of the watercourse and west of its open state was exercised exclusively by the plaintiff and his predecessors in title. Therefore to make an order rectifying the title by limiting the defendants’ northern boundary to the northern part of the watercourse would comply with Section 69(3)(i) (and in my view (ii)). A difficulty does arise if I were to limit the defendants to the southern boundary of the watercourse because on the evidence before me there were some acts of possession by them in regard to that watercourse. Furthermore the acts of the plaintiff and his predecessors in title with regard to the watercourse are in themselves intermittent. This provision at Section 69(3) (i) applied to the evidence tends to leave the defendants in possession of the watercourse but no more.

[22] The court has a wide discretion to rectify the register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner. This is what Mr Gibson urges me to do. But it is hard to see that that would be unjust to the plaintiff. The previous owner bought the property without, apparently, being told of this boundary problem by his solicitors. Not only that but at a time when he was contemplating the resale of the property in 2005 he applied for first registration of his title. The solicitors put in a map consistent with the plaintiff’s present case but the Land Registry, in accordance with the then boundary of folio 28134, altered it and only gave first registration of the diminished property without the land which I have found to be actually in the possession of Mr McIvor’s predecessors in title and of him and the limited company to which he transferred the title for family reasons. Again the evidence of Mr Alistair Hayes the



plaintiff himself is that the error in the southern boundary of his title was not drawn to his attention. In fairness to Mr McIvor's solicitors it would appear that they sent the Deputy Registrar's Notice of Encroachment and other papers to Mr Hayes' solicitors, as they discovered them in turn to the defendants' solicitors in the course of this action. The injustice, if any, would be to Mr Hayes because in walking his land he concluded that the hedge was the natural boundary of his property. But in finding that he owns the land north of the stream all he loses is one side of the hedge and the stream and the necessity to maintain the stream. It is hard to see how that creates any injustice.

[23] On the other side when the late Mrs McMcGuigan, as I believe she now is, repurchased the land from Government in 1988 she was repurchasing the land in folio 28134 as then described. The evidence of her daughter is that she believed that she had acquired the sheugh. I do not think that at any time they seriously believed that they owned more land north of the watercourse. I am not persuaded therefore that it would be "unjust not to rectify the register against the registered owner" to the extent I have in mind. The onus is on the plaintiff to persuade me of that. The preferable view therefore is that I should rectify the register to the extent of drawing the northern boundary of folio 28134, certainly so far as it marches with the plaintiff's land along the northern side of the stream but concluding when the stream goes under ground.

[24] That course avoids the rather absurd position of a tiny strip of land running up to Grangers Lane across the top of the RMC land.

[25] That finding is consistent with evidence of Mr John Hutcheson RIBA on behalf of the plaintiff that there are no physical features supporting the 1949 boundary land north of the watercourse. However, for the reasons stated I cannot accept his view that the line of trees is the boundary. I accept his evidence that the mill owners altered the line of the stream at the western end towards Grangers Lane i.e. a clear assertion of possession and ownership. This does not seem to be true further along nor did he assert so. I note the matters put to him in cross-examination but it seems to me that they really all stem from the original 1949 error. I do note and accept the point made on behalf of the defendants, that clearly there was a measure of uncertainty on the part of Mr McIvor or those advising him as to the boundary. Indeed in support of the view which I have formed I note the Commercial Property Standard Enquiry responses furnished by Mr McIvor's solicitors to Mr Hayes' Solicitors (ignoring for the moment the corporate nature of the parties as at 8 August 2005). At Q. 1.1 (a) there is a reference to the Land Registry map when produced i.e. as giving the physical boundaries of the property. In answer to Q. 1.2 "To whom do the Boundary Features belong if they do not lie wholly with the property?" the answer given includes "...remaining boundary features fences, hedges etc belong to neighbouring properties." Indeed this answer given to the current plaintiff's solicitor appears to have been passed to a lender on the property without dissent.

[26] Mr McIvor put in a road between 1998 and 2000, as he agreed in cross-examination. This was certainly an act of ownership along the land immediately north of the stream but, in part, within the registered title of the defendants. It attracted no dissent from them. It was probably 2000, thus facilitating the use of Mr Minford's digger in 2001.

[26] Fixing the boundary at the northern boundary of the stream of course accords with my own reading of the map of 1926.

[27] I take into account the evidence of Mr James McIvor, who gave evidence, unlike Thomas McGuigan Snr. At one stage he had discussed the watercourse with Mr McGuigan. He said that he had said at that time that either he owned it or that they shared the ownership but that elicited no reply from Mr McGuigan. Silence in that context would not indicate consent in my view but more likely the cautious reticence of a farmer. Mr McIvor himself said that he was unsure just where the boundary was but Mr McGuigan never suggested to him that he owned anything "our side of the stream". I accept that evidence which is supportive of the conclusion to which I have come. Mr McIvor, who is a civil engineer by profession, drew the map at B2 Section 2 page 34 which was submitted for first registration. But no member of the firm of solicitors, neither the conveyancing partner nor the senior partner, drew to his attention that the Land Registry had sent back a map which did not concur with his view of his property. As indicated above I accept the honesty of his testimony but it is of relevance to whether an injustice was done to the plaintiff here that two successive men of business did not look at their own title in detail nor learn of this issue from their solicitors. The Notice of Encroachment from the Deputy Registrar was not drawn to his attention but as I have found appears to have been sent to Mr McIvor's solicitors and in turn to Mr Hayes' solicitors. With regard to the stream Mr McIvor fairly agreed that he had not looked at the Land Registry maps but simply got on with it with respect to working at the stream and laying down the road to give access to a 'Cash & Carry' which a prospective tenant wanted to open on his property. The evidence of David Alan Knight and Alan Sean Wallace is noted as is that of Declan Cosgrove but does not alter the view which I have formed.

[28] Without going through them sequentially I have taken into account the written and oral submissions of counsel. I note Mr Denver's submission that I should not order rectification because the title had passed hands so many times. Save in regard to the question of injustice it seems to me that that is not in law a bar to making the order sought.

[29] The plaintiff is not barred by delay or laches. Unlike estoppel laches is a personal disqualification and will not bind successors in title: Nwakobi v Nzekwu [1964] 1 WLR 1019. In any event its role must be limited in dealing with a claim where the statute of limitations applies either directly or by analogy. Mr Hayes

himself acted promptly in this matter when the issue was drawn to his attention: Beale v Kyte [1907] 1 Ch 564 at 566. I consider that there was no acquiescence.

[30] Obviously this case is completely different from a situation where the registered owner had built on the land in the belief that he was the owner of it where clearly equity would be likely to run in his favour.

[31] I remind myself of the heavy onus of proof which rests on the plaintiff claiming rectification. Rooney & McParland Ltd v Carlin [1981] NI 138. I remind myself of the judgment of Girvan LJ in Armstrong v Shields [2010] NI Ch 10. I agree with his citation and reference to Section 11 of the Land Registration Act as to the conclusive evidence of the title shown on the register but note the opening words of the Section:

“Save as is otherwise provided by or under this Act ...”

Clearly that takes me to the proper application of Section 69 of the Act. See also Section 64. I have taken into account Mr Denvir’s citations of Halsbury’s Laws Volume 16 (2nd Reissue) at paragraph 439. I also take into account the passage at paragraph 6 of Halsburys Laws of England on Mistake volume 77 (2010). I note, inter alia, this sentence for which authority is cited.

“In rectifying a document, the courts acts on the principle that the parties are to be placed as far as possible in the same position as that in which they would have stood if the error to be corrected had not been made.”

[32] I note that in Attorney General & County Council of Down v Newry No 1 Rural District Council [1932] NI 50 Andrews LJ, sitting as a judge of the Chancery Division, held that while delay on the part of the County Council had disentitled them to an injunction the laches of a realtor is not necessarily to be attributed to the Attorney General and on the facts of that case was not so attributed. McCausland & Ors v Young & Ors was considered by my predecessor Black J in [1948] NI 72. There was a settlement where alteration required the consent not only of the life tenant but of his son Connolly Robert McCausland. The father included in a resettlement at Clause 15 a prohibition on a member of the Roman Catholic Church succeeding to the estate. In the events that happened Colonel Connolly Robert McCausland, as he had then become, was received into the Roman Catholic Church on 3 May 1940. When this became known to the trustees of the settlement and other parties, including his sister Mrs Thompson McCausland as she became, he at first was disinclined to seek the adjudication of the court until “the law changed or the administration of it in that part of our country ceased to be in the hands of those who now control such matters”, a statement which Black J found curious. He later changed his mind and sought an order of the court for rectification of the deed because he had assented to it without legal advice or indeed it being drawn to his

attention at all. Black J held that he would have been entitled to that save that he was guilty of laches and acquiescence. He had allowed his sister to come into possession of the property. There had been financial transactions. Duty and taxes had been paid. His sister and her husband had changed their names to Thompson McCausland. The matter is set out in full at pages 108-112 of the report. He was therefore precluded from the relief which he had sought. However, he in turn had a son, the late Marcus Edgcumbe McCausland. At the time of this hearing Marcus McCausland was a minor. Black J held at page 113 as follows:

“Has he lost that right of action through the laches and acquiescence which I have held must be imputed to his father? It is of course well established that a person cannot be fixed with laches or acquiescence until he is fully cognisant of his rights, or at any rate of the facts and circumstances giving rise to them.”

He concluded that Marcus was not bound and was entitled to the relief sought and the alteration of the settlement to allow him to come into the estate. The decision of the court was upheld by the Court of Appeal in the case of the same name at 1949 NI 49 (although Andrews LCJ and Babington LJ did not fully agree on all the points argued before them).

[33] On foot of that and the other authorities I conclude that the present owner is not precluded from obtaining rectification by any delay or acquiescence on the part of his predecessors. He is entitled to a declaration. Further and in the alternative I find, applying the principles discussed in this court and on appeal in *Gallagher v NI Housing Executive* [2009] NI Ch. 2 and NICA 50, that he can rely on title by adverse possession to the ground west and north of the watercourse running west from near Granger's Lane. I order that the Land Registry titles of the two folios be rectified to reflect that. The plaintiff's architect should prepare a map as soon as possible for the approval of the court to reflect that Order and be attached to it.