

Neutral Citation no. [2007] NICH 2

Ref: **HARC5825**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **15/5/2007**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION**

BETWEEN:

HUGH WESLEY MORRIS

Plaintiff;

and

**THOMAS NEWELL
and FRANCIS NEWELL**

Defendants.

HART J

[1] The plaintiff is a farmer who has lived all his life on lands situated at 123 Dunavan Road, Kilkeel, County Down. His father William Morris owned these lands before him, and Hugh Morris acquired title to them by an Indenture of Conveyance from his father dated 17th November 1982. These lands lie to the east and south of a road which leads from the Newry Road out of Kilkeel. They have been referred to as the “blue land” during the case. Mr Morris claims to have acquired title by adverse possession to 8.76 hectares of land to the west of the laneway which is the continuation of the road to 123 Dunavan Road. The defendants Thomas Newell and Francis Newell purchased the disputed lands by way of an Indenture dated 21st March 1977 from Mrs Teresa Flanagan, the widow and personal representative of William Flanagan who was the previous owner. The disputed lands are coloured orange on the map attached to the Writ. They have been referred to as “the orange land” throughout the proceedings and I shall use the descriptions blue land and orange land in this judgment.

[2] Mr Morris claims a declaration that he is the owner of, and entitled to possession of, the orange land, and also seeks an injunction restraining the defendants, their servants or agents from trespassing on the land. In addition it was originally part of the plaintiff's claim that he was entitled to aggravated and exemplary damages for personal injuries (including anxiety), loss and damage sustained by reason of what were claimed to be acts of harassment by the defendants of Mr Morris and members of his family since in or about August 2000. It appears that from in or about that time Thomas and Francis Newell carried out major works on the orange land, filling in a lake which had formed in an old sand pit and levelling the ground. However, the claims for damages as a result of the alleged harassment of Mr Morris and his family were not pursued, and as a result the various allegations which were set out in considerable detail in the pleadings, in particular the plaintiff's replies dated 31 January 2006 to the defendants' Notice for Further and Better Particulars dated 1 April 2004, were not explored in the course of the evidence.

[3] It is common ground that the law which applies to this case is that expounded by Lord Browne Wilkinson in JA Pye (Oxford) Limited v. Graham [2003] 1 AC page 419, because the land in question in these proceedings was not registered land and therefore is unaffected by the decision of the European Court of Human Rights in the Pye case. Mr Michael Lavery QC on behalf of the plaintiff accepted that the burden of proof is upon the plaintiff.

[4] In the light of the judgment of Lord Browne Wilkinson in Pye the issues in the present case may be formulated as follows.

(1) Has Mr Morris dispossessed the Newells, who are paper owners of the property, by going into ordinary possession of the orange land for 12 years without the consent of the Newells? See Pye at [36].

(2) Did Mr Morris assume possession of the orange land in the ordinary sense of the word? See Pye at [38] at page 453 a.

(3) It is not the nature of the acts done by Mr Morris as a squatter, but the intention with which he did them which determines whether or not he was in possession of the orange land. See Pye at [40], page 436 a/b.

(4) Mr Morris must show that throughout the relevant period he "has been dealing with the land in question as an occupying owner might have been expected to deal with and that no one else has done so". Pye at [41] citing the judgment of Slade J in Powell's case. As the question of the extent of the physical control exercised by Mr Morris, and whether it was exclusive physical control, is central to this case it is appropriate to set out in full what Slade J said on this at pages 470-471 of Powell's case in the following passage approved by Lord Browne-Wilkinson.

“(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed . . . Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor had 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 clear from that passage, and Lord Browne Wilkinson’s remarks immediately following them, that Mr Morris has to show that he had exclusive physical control of the orange land during the relevant period.

(5) In order to establish that he had exclusive physical control it is necessary for Mr Morris to establish that he intended in his own name and on his own behalf to exclude the world at large, including the Newells, so far as is reasonably practicable and so far as the process of the law will allow. See Pye at [43].

(6) The Writ in this case was issued on 13 September 2002 and Mr Morris therefore has to establish that he had exclusive possession of the orange land throughout the 12 years from 13 September 1990.

[5] Much of the evidence in this case relates to the recollection of the witnesses about events that occurred over many years from the late 1970s until the present day. However there are some matters which can be established with some certainty. The Newells bought the orange land by an Indenture dated 21 March 1977 from Teresa Winifred Flanagan, the widow and personal representative of William Flanagan. Before they bought the orange land William Flanagan had rented the land to a man called Charles Stephenson who opened a sand pit on the land.

[6] On 23 November 1977 the Newells sold a portion of the land they had bought from Mrs Flanagan to Mr Morris for £1,500. This area of some 3 roods 565 square yards then became part of the blue land and title to that part of the

land is not in dispute. This small area is at the south western corner of the blue land.

[7] At some stage Mr Morris claimed that he had bought lands from Mrs Flanagan for £25,000 in cash and had entered into possession of them. At a date which was not established in evidence one Mary Murney as personal representative of Mrs Flanagan took proceedings in the County Court to remove Mr Morris from these lands. Mr Morris lost his case in the County Court and again on appeal to the High Court. No details of these proceedings were proved, other than that Mr Morris accepted that he had ultimately paid the costs of both sets of proceedings totalling £8,542.41.

[8] Mr Morris accepted in cross examination by Mr Mark Orr QC on behalf of the Newells that he was involved in a boundary dispute with his brother who owns property adjoining the blue land further along the roadway leading to the Newry Road. He also accepted that there was a dispute between himself and Mr Rodgers over cattle which strayed on to Mr Rodgers' land. This land is on the western side of the roadway leading to 123 Dunavan Road, faces the blue land and is immediately to the north of the orange land. It also emerged that he had had a dispute with Mr Paul Kearney who bought land to the west of the orange land. I shall refer to the evidence of Mr Rodgers and Mr Kearney later.

[9] Mr Morris' evidence was that he had made use of the orange land prior to the Newells' purchasing the lands when Charles Stephenson opened the sand pit to which earlier reference has been made. He said that he used the land for grazing when Mr Stephenson was extracting sand from the sand pit, and did not pay any rent for this to Mr Flanagan. He accepts that the Newells then purchased the land, which in the light of their title deeds was in March 1977, and that they used the land for a short period thereafter. His evidence was that, as he put it, they pulled out of the orange land in 1978, and never returned, thereby abandoning the land. He said that thereafter he had no contact with the Newells, nor did he see them on the land.

[10] Mr Morris claims that he exercised control of the land in the following ways.

(a) At the foot of the roadway (coloured pink on the map) which runs down from the Newry Road there is a gate which was referred to as Gate A. The gate is at the point where the road performs a right angle turn to Mr Morris' farmhouse, but at Gate A there commences a laneway on the blue land and which runs in a south westerly direction along the edge of the orange land. Mr Morris said that he opened Gate A as required to allow the Newells' vehicles use this lane to take sand from the sand pit on the orange land.

(b) After the Newells left in 1978 he placed a lock on Gate A.

(c) As and when required he permitted Cyril Hanna and Leroy Murney to take water from the sand pit which was by now flooded.

(d) On one occasion he allowed Harry O'Haire to dump three or four loads of topsoil on the orange land. The topsoil came from Jim Graham, who carries on a building firm in Kilkeel. Mr Morris was far from sure when this happened, his best estimate being that it had happened perhaps 8 to 10 years ago, i.e. in 1996 to 1998.

(e) He used the lands to graze sheep, cattle and horses on it all the year round.

[11] Mr Morris has had four strokes since 2001 and I take this into account when assessing his ability to identify when events occurred in the past.

[12] Evidence was given in support of his case by various members of his family. His daughter Sharon Graham, who is now 26, was born on 25 June 1980. She accepted that she has little memory for events before she was 5 years old, and therefore her recollection commences in or around 1985 at the earliest. She gave evidence that Gate A was always locked and that the family had horses on the orange land. When asked about mushroom compost being placed on the land she said that this happened from 2000 when the dispute arose about the ownership of the land. She described how as a child she threw stones into the lake in the sand pit, and she recalled Cyril Hanna washing his trailer at the lake from time to time.

[13] Wesley John Morris, who is 35, is a son of the plaintiff. He lived on the blue land from the time of his birth until he moved into Kilkeel in 1993. He also gave evidence that there was a lock on Gate A at all times. He described how Cyril Hanna and a Mr Elmore, to whom I shall refer to in due course, obtained the key to open Gate A when they wished to have access to the lake on the orange land. In Mr Hanna's case this was to enable him to wash his slurry tanker. He also described how slurry from the farm operations on the blue land was placed on the orange land. However, I am satisfied from his answers in cross examination that while slurry was dumped on the orange land this was simply to avoid their own land being "tracked" i.e. cut up by tractor tyres. I am satisfied that the slurry was not put on the orange land in order to fertilise it and so improve it for grazing, but that the orange land was simply used as a convenient dumping ground for slurry. He also described the circumstances in which photographs of 7A and 7B were taken. These show horses on the orange land, but I am satisfied that the photographs were taken after the Newells starting clearing the orange land in 2000.

[14] Evidence was also given by Mrs Ivy Elizabeth Irvine, who is a daughter of Mr Morris. She was born on 26 December 1969 and was married on 3

October 1991. Until the date of her marriage she lived on the family home on the blue land. She is employed as a post woman by the Post Office. She gave evidence that she remembered the Newells extracting sand from the orange land between 1977 and 1979, but I am satisfied that she then tried to play down the significance of what she had said when she said that she at least remembered sand coming from the sand pit on the orange land. She maintained that the machines on the orange land which were involved with the removal of the sand had gone by 1980 when she was in the habit of skimming stones on the lake. She described how Cyril Hanna would regularly ring the house in order to make arrangements to be let through Gate A when he went to the lake, and that the key to Gate A was kept in their house on the blue land. She said that cows and sheep ran through both the orange and blue lands all the year round.

[15] Evidence was also given on behalf of Mr Morris by witnesses other than members of his own family. One of these witnesses was Martin Higgins. Mr Higgins was born in June 1964. He was brought up in a house further up the roadway towards the Newry Road, and played on the Morris farm as a school boy. He said that he recalled the Newell brothers using the sand pit during a period he described as being in the late 1970s and early 1980s. He would have been 16 in 1980, and in 1982 or 1983 he started work with Gilbert Ash in Belfast. This involved him leaving home about 6.00 am and returning about 6.30 pm. He was therefore absent from the lands during the day, but he said that until 1991 or 1992 he still worked with Mr Morris and was about the farm at weekends and during the long evenings. He gave evidence that there was a lock on Gate A which Mr Morris replaced with a new lock to which Mr Morris had the key. He gave evidence that Mr Morris used the orange land at all times, mostly for grazing horses. He remembered there being feeder rings for hay on the orange land, as well as troughs for meal, and he recalled filling both in 1982 or 1983. He also described how on three or four occasions he and others shot clay pigeons with Mr Morris' permission. As Mr Morris grazed the lands he assumed that they belonged to Mr Morris. In cross examination it was put to him that it was possible that he did not see the Newells' lorries in the early 1980s because he wasn't there during the day in the course of the working week, and he accepted that this was a possible reason why he would not have seen the Newells' lorries at that time.

[16] Evidence was also given on behalf of Mr Morris by Kevin Quinn. He described how on two Saturdays about a week apart, he, his brother and Mr Higgins took clay pigeon traps on to the orange land and shot over the lake for about an hour. In order that they could do this Mr Morris drove his horses off the orange land and opened the gate at Gate A. He said that this happened at the end of July or the beginning of August 1986.

[17] Mr Henry Elmore gave evidence that he carried on business as a fish processor and wholesaler in Lisburn between 1967 and 1986, and that he

employed Mr Morris to drive one of his lorries from Kilkeel to Lisburn for several years until 1986. He and Mr Morris remained friendly, and thereafter he paid social visits to Mr Morris from time to time, mostly on Sundays when he would bring his children. His children, particularly the three elder girls, were interested in horses. Whilst Mr Elmore was in business as a fish processor he described washing his lorries at the lake on the orange land, gaining access through Gate A which Mr Morris would open for this purpose as it had a chain and padlock on it. He said that he was there hundreds of times, although his work visits slackened off when Mr Morris took over responsibility for driving one of the lorries, and he accepted that whilst it was 1978 and 1979, or perhaps a little later, when he went there to wash his vehicles, his visits had become less frequent by 1986.

[18] Mr Elmore described how in the late 1970s or early 1980s he mostly saw cattle on the orange land, although he said he did see silage rings on various occasions, and later saw sheep and horses. He accepted, however, that he was not really interested in these matters and assumed that they belonged to Mr Morris. After 1986 his observation of the use to which the orange land was put was limited to seeing the horses which he and his children looked at on the land. He said that he never saw anyone on the orange land except Mr Morris.

[19] In cross examination Mr Elmore accepted that there had been machinery on the land early on during the period when he was paying his visits, which he thought was in the early 1970s. He said that he didn't see sand being extracted, although he did agree that there was machinery present, but said he thought it was Mr Morris's. There was no suggestion that Mr Morris ever had machinery on the land, and any machinery he saw could therefore only have been Mr Stephenson's before the Newells' bought the land, or was machinery used by the Newells in connection with their sand extraction activities after they purchased the orange land.

[20] Mr Elmore also accepted that on one occasion, which he was unable to date, he had seen a pile of mushroom compost on the land. This is of some significance because the evidence of David Francis Newell was that between 1991 and 1998 when he was carrying on a mushroom farm business on the Newells' lands at Ballynahatten he dumped mushroom compost from that business three or four times each year. If David Newell's evidence is correct that the mushroom business did not start until 1991, and there was no suggestion that Mr Morris had been involved in bringing mushroom compost to the orange land, then Mr Elmore must have seen compost dumped on the orange lands by the Newells some time in the 1990s.

[21] I now turn to the evidence given on behalf of the defendants. This evidence was principally that of Thomas Newell who has been in partnership with his brother Francis since the death of their father in 1957. Francis Newell did not give evidence and therefore his brother's evidence represents their case.

Thomas Newell said that they sold the small piece of land to Mr Morris that is now part of the blue lands by Indenture of 23 November 1977 for £1,500. He described how they purchased the orange lands in 1977, and then expanded a sand pit which had originally been started by Charles Stephenson. That first summer of 1977 they took a cut of hay from the orange land, and bought a mechanical shovel, a screener and a stock piler before the end of that summer. They then stripped the surface of the land to enable the sand pit to be exploited.

[22] I am satisfied that the surface of the land was stripped in February and March 1980 by a contractor, W T Kinnear of Gilford, using a bulldozer. There is a copy receipt which was produced showing that work of this nature was done, and I accept that this was when the work was done, and not in 1978 as Mr Morris implied.

[23] Mr Newell described how he and his brother then employed one Harry Cunningham, who is now deceased, to take charge of the sand pit. Mr Cunningham was present from Monday to Friday until 5.00 pm, and until lunch time on Saturday. Mr Higgins said that he knew Mr Cunningham and saw him driving the shovel at the sand pit, and he saw lorries which had Newell Brothers on the door. I accept that the machinery which Mr Newell has described was the machinery seen by Mr Elmore, and that Mr Cunningham was present at the sand pit on the orange land for some years after the Newells bought the lands, and during that time was responsible for selling and loading sand onto customers' vehicles.

[24] Mr Newell said that there had not been a gate at the point where Gate A was later established, and that it was he who put the gate in place, he thought in 1978 or 1979. On 1 November 1980 a wayleave agreement was signed with NIE in order for an electricity pole to be placed on the orange land.

[25] He and his brother found that the quality of the sand on the orange land was not as good as it might have been, and their sand business gradually slowed. In 1984 and 1985 they bought a sand washer which was installed on land he had inherited at Lisnacree outside Kilkeel. He said that whilst this was mainly used to wash stones from the river there, they still removed sand from the orange land from time to time. When he did this it was taken by an employee called Seamus Murney who died in a car accident in 1988. After his death they wound the sand business down, and around 1990 sold all the machinery to Jim Graham.

[26] Mr Newell said that after 1992 not much use was made of the land until the pit which had filled with water was filled in between 2000 and 2002. The only use made of it was that between 1990 and 1995 his nephew David dumped mushroom compost on the orange land. In addition, when a new form of record keeping known as the IACS was instituted by the Department of

Agriculture in 1993, in that year and every year thereafter he claimed that the land was theirs on documents submitted to the Department for subsidy purposes, although he only put some ewes on the land for a week in 1993 when he thought that it was necessary to have stock on the land in order to qualify for registration under the IACS.

[27] In the course of cross examination he said that the orange land was only used every two to three months to remove sand between 1984 and 1989, and that the sand business had closed in 1990. He accepted that when sand was taken intermittently from the sand pit on the orange land no man was kept there full time.

[28] A number of receipt books were produced by Mr Newell. These show regular sales of sand from Newell Brothers until 7 June 1984, and thereafter all the sales appear to relate to stones. The books do not record that the sand came from the orange land, but they do provide some support for the contention of the Newells that sand was taken intermittently from the orange land until 1984. Mr Newell said that he did not have an alternative location from which sand could be taken because he did not buy such a site at Bell's Hill until 1986, although he had inherited Lisnacree from his uncle in 1978 or 1979. They therefore could have taken sand from Lisnacree before he got the screening equipment in 1985. A document was produced which was described as a "Lease Contract" with the Hungarian International Bank which purported to show that the agreement relating to various pieces of machinery was entered into in March 1985, and it seems unlikely that sand sold by Newell Brothers prior to 1985 could have come from any where except the orange land.

[29] Evidence was given that the Newells applied for and obtained a grant of planning permission dated 8 October 1980 which permitted the extraction of sand from the orange lands up to 31 March 1981. When it was suggested to Mr Newell that this indicated that sand extraction ceased in March 1981, he was somewhat disingenuous as to why work would have been carried on after that time, saying that he didn't know the date when he had to stop. He was driven to admit that what happened was that as the planning authorities did not bother them Newell Brothers just worked away. It is apparent from the defendant's evidence that they did not comply with the requirement of the planning permission that the upper half of the site (marked yellow on the planning documents) be restored to agricultural production within two years of the issue of consent, that is by October 1982, nor did they comply with the requirement that the whole site should be restored to agricultural production within four years of the completion of extraction, in other words by 30 April 1985.

[30] Evidence was given on behalf of the Newells by Robert James Graham, a building contractor who trades in Kilkeel as J Graham & Sons. He is related to Mr Morris as his mother and Mr Morris were first cousins. Mr Morris accepted

that Mr Graham had no interest in the lands and nothing to gain from this dispute, but maintained that Mr Graham was telling lies, although no motive for this was suggested.

[31] Mr Graham gave evidence that in 1981, when he was foreman of the company he now runs, he brought loads of topsoil and rubble to the orange land to be dumped in the pit, the driver of his vehicle being Harry O'Haire. Once these loads had been dumped in the pit, sand was then taken in the same lorries from the sand pit.

[32] Mr Graham also said that he took sand from the orange land until 1991. However, the receipt books to which reference has already been made do not support this as they show that Newell Brothers sold stones from 1984 onwards, and indeed Mr Newell conceded that after 1985 Mr Graham got stones from the Lisnacree site. Nevertheless, as already stated, Mr Morris gave evidence that he did allow Harry O'Haire to dump three or four loads of top soil which had come from Mr Graham on the orange land. Although Mr Morris said that he thought this had happened perhaps 8 to 10 years ago, it does provide a degree of corroboration for Mr Graham's evidence, and I consider that Mr Morris is mistaken when he thought that the topsoil and rubble were dumped 8 or 10 years ago, and that it was probably in or around 1981 that this took place. However, I did not find Mr Graham's recollection of events after 1981 to be reliable, contradicted as it was by the receipts showing that stones were sold after June 1984.

[33] I have already referred to David Francis Newell dumping mushroom compost. He was born on 1 January 1971, and is the son of Francis Newell and therefore nephew of Thomas Newell. He gave evidence that he left school aged 16 in 1987 and in September 1987 went to Greenmount Agricultural College for a year. He said that in 1988 as he had no driving licence Seamus Murney drove him to the orange land on two or three occasions until he was killed. On each of these occasions five to six loads of sand were taken from the higher ground which was not covered by water. In order to gain access to the orange land they had to go through Gate A, which he described as closed but not locked.

[34] He also described how he dumped mushroom compost on the orange lands three or four times a year between 1991 and 1998 when the mushroom business was in operation. He also said that he shot over the orange land on occasion.

[35] Evidence was given on behalf of the defendants by Paul Kearney. His lands adjoin the orange and blue lands and he bought his land at auction in 1994. Since then as can be seen from the photographs which were produced he has built large chicken sheds on his land beside the orange land. However this was not his first acquaintance with the orange land because from the 1970s until he built his chicken farm he carried on business as a small builder. He

gave evidence that in the early 1980s, when he was working on various jobs in the Kilkeel area, from time to time he bought loads of one or two tons of sand from the Newells at the orange land. He would bring in his trailer through Gate A and would pay £2 to £5 a time for each load. He found that the gate was always open during the day. After 1985 he did not take sand from the orange land as he was no longer doing jobs in the Kilkeel area. He was cross-examined at some length about the nature of his work and the absence of any records to support his recollection, but I do not consider the absence of records in the least surprising in view of the passage of time since the events he was describing.

[36] After he bought the lands he now occupies in 1994 he carried out substantial construction work on the land, levelling hedges and fields to make the site for the chicken houses. He also opened a road on to the site from the Belmont Road which is to the west of the orange land. This construction work lasted from 1994 until 1996. He gave evidence that during the construction work, and until 2001 when the pit on the orange land was filled in, with the consent of Thomas Newell he made use of the pit. The pit was still filled with water, and he pushed a substantial amount of the spoil, trees and rocks which resulted from the construction works on his lands into the pit.

[37] Each year until 2001 he also made use of the water in the pit to soak the slats from the chicken houses before the slats were cleaned. When the pit was filled in after the Newells levelled the lands he built a concrete tank which he described as being the size of the chancery court to do this. Mr Morris accepted that Mr Kearney did soak his slats in water on the orange land each year, but said that this was done in a sheugh. I am satisfied that is incorrect and the scale of the operation carried out by Mr Kearney could not possibly have been performed in a sheugh.

[38] Mr Kearney's evidence was that there was a sheugh on the orange land which Mr Newell kept open in order to prevent flooding of both Mr Kearney's lands and those of an another neighbour, Mr Campbell, whose lands lay further down stream. At times he was aware that Thomas Newell pumped water from the sand pit into the sheugh on Mr Kearney's land. He also described how he permitted the Newell's to keep machinery on his land when they were levelling their own lands from August 2000 onwards and their machinery had been damaged. He described how he saw mushroom compost piles on the land and saw Mr Newell shooting over the orange lands.

[39] Evidence was given on behalf of the defendants by Patrick Rodgers. Mr Rodgers bought land on the opposite side of the road from the blue land from the Order of Nuns who run the St Louis Convent nearby. He purchased the lands in September 1999, but he was a local man and said he believed that the Newells owned the orange land, which he knew as "Newell's Pit".

[40] He described how he had a right of way over the pink lane leading to the blue land. He gained access to his land through a gate on the pink lane not far from Gate A which he said he never saw locked.

[41] He accepted that he had had a dispute with Mr Morris because on a number of occasions Mr Morris' cattle broke on to his land. That this occurred was accepted by Mr Morris' counsel in cross examination. Mr Rodgers said that the cattle always came on to his land through the orange land and so he fenced that side of the orange land. Relations between himself and Mr Morris were strained because he believed that Mr Morris drove the cattle on to his land at night. He gave evidence that he once found his gate blocked with stone. He also described how in either 2003 or 2004 subsidy payments to which he was entitled from the Department of Agriculture and Rural Development were held up because Mr Morris claimed that he was entitled to Mr Rodgers' land. This evidence was confirmed by Mr McCullough and the allegation was not challenged in cross examination.

[42] Mr McCullough was called on behalf of the defendants. He is an officer of the DARD who has been responsible for the inspection of lands for livestock subsidy schemes for the Kilkeel area since 1994. In that capacity he has had dealings with both Mr Morris and the Newells. He described the operation of the Integrated Administration and Control System (IACS), and in a detailed analysis and exposition of the relevant records showed that since 1993 until the IACS was superseded by the completely new Single Farm Payment Scheme with effect from 2004 the Newells claimed all of the orange land for forage and subsidy purposes.

[43] His evidence was that most farmers claim as much as they can, but Mr Morris had not claimed at any time that the orange land was part of his lands so far as the DARD were concerned. However, in May 2003 Mr Morris had claimed that some of the Newells' ground in County Armagh was his for IACS payment purposes. Mr McCullough described how he pointed out to Mr Morris that this was not permitted, and could give rise to penalties being imposed upon his subsidy payments for what is technically known as an over declaration. Mr McCullough said that he was astonished that Mr Morris was insistent that he was not going to change his claim and intended to make a claim for 2004.

[44] The evidence relating to the use and occupation of the orange land by the Newells since they purchased the lands in March 1977 therefore falls into a number of separate periods. The first relates to the period from then until 1984 or thereabouts. Apart from Thomas Newell's evidence about the sand business during this period there is the evidence of the planning permission granted in October 1980 which is contemporary evidence of occupation and user of the lands by the Newells. In addition there is documentary evidence which I am satisfied is consistent with sales by them of sand from the orange lands until

the summer of 1984. Then there is the evidence of Mr Kearney that he regularly took sand from the orange land until 1985. Despite the criticisms that were made of Mr Kearney in evidence, and the fact that he also has had a dispute with Mr Morris over a right of way, I am satisfied that Mr Kearney was a truthful and reliable witness, and I accept that he regularly bought sand on the orange land until mid 1984 or thereabouts. There is also the evidence of Mr Higgins that the Newells' lorries were taking sand from the sand pit until the early 1980s. In addition there is the evidence of Mr Graham that he dumped spoil on, and drew sand from, the orange lands in 1981. Taking all of this evidence together I am satisfied that, contrary to what Mr Morris and members of his family allege, the Newells were in exclusive possession of the orange land and actively using it from March 1977 until at least mid 1984. I do not accept the evidence of and on behalf of Mr Morris that he was using the orange land in any way during that period.

[45] The second period commences in mid 1984. After that time, because of their business interests at Lisnacree and the unsatisfactory quality of the sand on the orange land, the Newells appear to have made little use of the land for several years. Although Thomas Newell said that between 1984 and 1989 sand was taken from the orange land every two to three months by Seamus Murney, Mr Murney died in 1988 and there is no independent evidence to substantiate this usage. The receipts that were produced only show the sale of stones from mid 1984 onwards, and I am satisfied that the stones did not come from the orange land. There is the evidence of David Newell that he took sand on a number of occasions in 1988 with Mr Murney before Mr Murney died, and in addition that he shot over the land on a few occasions between the ages of 18 and 25, in other words between 1989 and 1996. Given David Newell's obvious interest in the outcome of these proceedings I consider that confirmation from an independent source is necessary to corroborate his evidence and none has been forthcoming for this period.

[46] The plaintiff's photographs make it clear that from time to time the plaintiff's horses wandered on to the orange land and grazed on it. I do not find this at all surprising. I consider it likely that the photographs of the horses which have been produced show them on the orange land in the latter part of the 1980s. The land was of little value to the Newells at that time, and, as I have already stated, they appear to have taken little interest in it. I therefore accept that Mr Morris' horses were able to graze on the orange land from time to time, although the photographs do not suggest that the land was of any real value as grazing land, as much of it was covered in gorse and heaps of spoil created by the excavation of the sand pit. I am not persuaded that the land was used for grazing by cattle or sheep, at least not to any material extent. Whilst it is difficult to establish how long this usage by Mr Morris's horses continued, I consider that it did not commence until sometime after mid 1984 and ceased well before 1994 when Mr Kearney purchased his land. The visit by Mr Quinn and others to shoot clay pigeons on two Saturdays in 1986, which I accept

happened, falls within this period. They certainly appear to have regarded Mr Morris as the owner. On balance I consider that the evidence tends to show that Mr Morris did have exclusive occupation of the lands from sometime after mid 1984 until 1990.

[47] The next period commences in or around 1990. The defendant's evidence is that they were using the orange land during the 1990s as a dump for mushroom compost. Mr Elmore accepted that he saw mushroom compost on the orange land, although he was unable to say when. That provides support for the Newells' user of the lands for this purpose in the 1990s.

[48] Thomas Newell included these lands in his IACS forms from 1993 onwards whereas Mr Morris did not. I find this a most unusual omission if, as Mr Morris claims, his cattle and sheep were grazing on the land to any significant extent during that period. On his evidence the Newells had abandoned the land since 1978, yet he did not assert his occupation and ownership of the land for subsidy purposes. This failure does not sit easily with his assertion that he was in exclusive occupation of the lands since in or about 1978.

[49] When Mr Kearney purchased his land in 1994 he regarded the Newells as owners of the orange land and obtained their permission to tip spoil into the pit, and it is clear that he did this without objection from Mr Morris. It seems from his evidence that this must have occurred between 1994 and 1996 during the construction of his chicken houses. Thereafter he soaked the chicken slats in water, again without objection by Mr Morris. Finally he describes how he permitted Mr Newell to pump water from the pit into the sheugh on his land and he saw Mr Newell keeping his sheugh open. I am satisfied that Mr Kearney's evidence should be accepted, and it shows that Thomas Newell and his brother were using the orange land by pumping water and clearing the sheugh on the orange lands from 1994 onwards. In addition, it is clear from the evidence of Mr Elmore that mushroom compost was dumped on the lands, and this provides some support for David Newell's evidence that he was responsible for that. Taking this evidence as a whole, I am satisfied that the Newells were using, and in exclusive physical occupation of the orange land, in the early 1990s, and certainly from 1994 onwards at the latest, until they started to fill in the pit and level the surface of the orange land from August 2000 onwards.

[50] So far as Mr Morris and his family are concerned, despite the evidence of Mr Higgins and Mr Elmore I do not accept that there was a lock on the gate at Gate A at any material time. The presence of a lock would undoubtedly have led to earlier disputes had Mr Morris attempted to prevent the Newells or their customers from going to the orange land along the right of way which they appear to have exercised on the laneway which ran through the blue land. Even taking into account the lack of interest in the lands which the Newells

displayed in the second half of the 1980s, I consider it unlikely that Mr Morris would have failed to assert his claim to these lands by locking Gate A if he considered it necessary to do so. It is perhaps of some significance that the only photograph produced of this gate is to be found in the plaintiff's bundle of photographs at 5A, and although it shows a horse tethered on the orange land beside Gate A, there is no sign of any lock or rope on Gate A.

[51] Looking at the evidence as a whole I am satisfied that the plaintiff has failed to discharge the burden of proof upon him of establishing that he had exclusive possession of the lands in question for an uninterrupted period of 12 years at any material time, the plaintiff's case therefore fails and there will be judgment for the defendants.