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Judgment: approved by the Court for handing down | *Delivered:* **07/02/2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF SIR JAMES DENNIS COMPTON FAULKNER

BETWEEN:

JULIE ELIZABETH BROWN AND ELIZABETH BROWN

And

SIR JAMES DENNIS COMPTON FAULKNER

———

CARSWELL LCJ

[1] The dispute to which this appeal relates concerns the title to a small piece of land on the shore of Strangford Lough at Ringhaddy, which has been used for some years for the purpose of keeping boats and has been termed in this litigation 'the boat park'. It adjoins a slightly larger piece of ground in Folio 42295 County Down, of which the respondent Sir Dennis Faulkner is the registered owner. The respondent claims to have acquired a right by possession to be registered as owner of the boat park, which at present is contained within the lands registered in Folio 1568. The lands in the latter folio comprise a dwelling house and garden and an adjoining quay, of which the appellant Miss Julie Elizabeth Brown is the registered owner. The respondent applied under section 53 of the Land Registration Act (Northern Ireland) 1970 to be registered as owner of the boat park, but his application was dismissed on 22 June 2000 by the Deputy Registrar of Titles. He appealed to the High Court and by order made on 3 August 2001 Coghlin J allowed the appeal. This appeal has been brought from the judge's decision.

[2] Folio 1568 at one time was a larger holding, now split into several smaller portions. Part of it was transferred in December 1978 by the registered owner Nancy Green to the Northern Bank Executor and Trustee Company Limited as trustee for the respondent's family and registered as Folio 42295. Previous to this transaction, in 1973 the then registered owner of

Folio 1568 Thomas Farrell transferred to Garfield Brown a plot of approximately one acre on the south west side of Folio 42295, which was registered as Folio 37553. In 1988 a bungalow was constructed on this plot, which is now the residence of Garfield Brown's widow, the appellant Mrs Elizabeth Brown. In 1976 Thomas Farrell transferred Folio 1568 to Nancy Green, who in 1979 transferred the residue of that folio to Garfield Brown. That residue now constitutes the present Folio 1568, on which Miss Brown's bungalow was built in 1991.

[3] The Ringhaddy area has been a popular location for boating for many years. The earliest photograph contained in the evidence put before us, taken in 1939, appears to show only farming activity in the vicinity of the disputed land, but in the 1962 aerial photograph one can see a number of boats drawn up on what is now Folio 42295 and the boat park, while Ringhaddy Quay is crowded with parked cars. The area to the south west of the cottages by the quay, corresponding roughly to the boat yard and possibly part of Folio 42295, appears to have been known then as Bob Dougal's boat yard. In the 1962 aerial photograph the disputed boat park does not appear to be distinct from the surrounding land. A photograph taken in 1964 shows small boats scattered over these pieces of land, while rails leading down to the water and a boat cradle are in evidence. Another photograph, dating from the same year, shows a number of boats moored offshore. The scale of marine activity has increased since then. Photographs from the 1980s show a larger number of boats moored and aerial photographs taken in 1992 and 1996 show a further quay or marina to the south west of Folio 37553 and cars and boats parked at what is known as the Cruising Club.

[4] In the 1940s the Faulkner family lived at Tullynakill House, about five miles from Ringhaddy. In 1943 several islands in Strangford Lough were bought by the family and transferred to the respondent, then a schoolboy, and his brother. The family thenceforth farmed these lands, on which the respondent was himself engaged after leaving school in 1944 until about 1947 or 1948, when he joined the family business. Access was obtained by boat from Ringhaddy, and it was the respondent's case that they used the boat park and regarded it as their piece of ground. The respondent suggested that it had been acquired by his family by some transaction which could not now be traced. There was produced in evidence a map delineating the boat park, as if it were the subject of a transfer or lease, but its connection with any particular transaction could not be established. The judge decided to place no significance upon this document, but one might infer from its existence that for some purposes the boat park was regarded as distinct from the rest of Folio 1568, which is at least consistent with the respondent's case. For some time after the year 1950 or thereabouts the respondent did not himself use the boat park for any purpose, as he lived elsewhere and sailed at Whiterock and in other parts of the world.

[5] The judge examined all of the evidence in detail, but was not satisfied that the respondent had established a sufficient case of adverse possession during the period between 1943 and 1973. The respondent did not attempt to challenge this conclusion on the hearing of the appeal. The judge was, however, satisfied that adverse possession by the respondent had been proved for a period of twelve years and upwards from 1973 and that the title of the registered owner had been extinguished. Counsel for the appellant submitted that the facts did not support such conclusions and that the judge should have dismissed the appeal. We must therefore examine the judge's findings of fact and the grounds for his conclusions. Under Section 7(*a*) of the Land Registration Act (Northern Ireland) 1970 an appeal lies to this court without leave where the decision involves any question of law, but insofar as this appeal involves only question of fact we give leave under Section 7(*b*).

[6] The facts which the judge regarded as indicia of the exercise by the respondent of possession adverse to the true owner may be summarised as follows:

1. The boat park was used constantly by the respondent's nephew David Faulkner, son of the respondent's late brother Brian, and his siblings from the early 1970s until the Cruising Club was founded in 1983. It is not clear to what extent the respondent used it for sailing himself during this time and the evidence was equivocal, though it was accepted by the appellants that he frequently was on Folio 42295 and walked his dog on the boat park land.

2. A shed, made out of a railway container, was placed on the boat park land by the Faulkner family prior to 1964 and used for storage purposes.

3. The respondent fenced off the boat park from the land now contained in Folio 1568 prior to 1973 and erected a gate giving access to it. According to the respondent's evidence, which the judge appears to have accepted, the fence and gate were renewed in 1972 or 1973 when relations between himself and Thomas Farrell became cool. The 1978 transfer map shows fencing on both the north east and south west sides of the boat park. Mrs Elizabeth Brown accepted that when she and her husband bought Folio 37553 in 1973 they were aware of fencing around the boat park. No objection was ever made by any person to the erection of the fence and gate.

4. In 1977 or 1978 the respondent arranged for a contractor to use his machinery to clear the foreshore and cut a channel from the boat park into the lough. This channel can be clearly seen in the 1996 aerial photograph. Again, no objection was made by any person to this being done.

5. In 1977 the respondent applied for and obtained planning permission to erect a net store on the boat park land.

6. James Hunsdale, who had been boatman to the Faulkner family, used the boat park with the respondent's permission. His nephew Ronnie Campbell used the boat park to store his boat and trailer from about 1979. The judge was not prepared to accept his evidence that he had obtained specific permission from the respondent to do so. He did find, however, that the respondent was aware of and approved of the user and that Mr Campbell built him a dinghy free of labour charge in return for his not charging him for the use of the land.

7. When Miss Brown's bungalow was built the land on which it was situated was raised some feet above the level of the boat park and no provision was made for access between the bungalow and lands and the boat park, which one might expect if the boat park was in the possession of the owner of the bungalow. When the bungalow was under construction it was the respondent and not Mr Garfield Brown who asked Mr Campbell to keep his boat on the moorings instead of in the boat park for a period, to facilitate the contractor in his use of the boat park while he worked on the foundations.

[7] In the appeal to the High Court the appellants relied on two factors, which the judge did not regard as fatal to the respondent's case. One was the fact that the gate to the boat park was rarely secured and the other was that members of the public regularly used the boat park as a means of access to the shore without objection from the respondent or anyone else. In respect of the first the judge held that although locking a gate can be a strong indication of the exercise of dominion necessary for adverse possession and at times may be of critical importance (see, eg, *Buckinghamshire County Council v Moran* [1989] 2 All ER 225 at 237), it was not of such crucial significance in this case. In respect of the general public user the judge expressed the opinion that given the rural location of the disputed land and the general goodwill that exists between those concerned in the recreation of sailing and boating, such use did not significantly undermine the respondent's case. Neither conclusion was challenged on appeal and we ourselves agree with both.

[8] The factual findings on which the appellants' counsel founded most strongly were that from 1973 it was the respondent's brother Lord Faulkner (until his death in 1977) and his family who were the primary users of the boat park and that the respondent did not personally use the boat park for his own use after he acquired Ringhaddy House in 1980, where he had his own access to the shore of the lough.

[9] The judge held at page 18 of his judgment that the possession of the boat park was "a single possession exercised on behalf of the [respondent] and his brother jointly", that after Lord Faulkner's death his family continued to use the land, and that Mr Hunsdale and Mr Campbell also continued to use it with the respondent's permission. He therefore was satisfied that the respondent had established on the balance of probabilities both the factual possession and the intention to possess necessary for adverse possession for a period in excess of twelve years from 1973.

[10] The main thrust of the argument developed by Mr McCloskey QC on behalf of the appellants was that on the facts the respondent had not established sufficient exclusive physical control of the boat yard to satisfy the requirements of adverse possession. For much of the period propounded by the respondent there was a shared possession, not personal possession by the respondent. Any personal possession by him was relatively short in duration and discontinuous. He accordingly had failed to establish the necessary continuous period of twelve years' adverse possession on his part, occupying and dealing with the land as an occupying owner might be expected to do.

[11] The respondent's application to be registered as owner of the lands comprised in the boat park was based on section 53 of the Land Registration Act (Northern Ireland) 1970, subsections (1) and (2) of which read as follows:

> "53.-(1) Subject to the provisions of this section, the Statute of Limitations (Northern Ireland) 1958 shall apply to registered land as it applies to unregistered land.
>
> (2) Where there has been a defeasance of an estate in any registered land in consequence of any of the provisions of the said Statute and –
>
> > (a) a person claims to have acquired a right by possession to be registered as owner of an estate in that land; or
> >
> > (b) the personal representatives of a deceased person claim that the deceased or such representatives in right of the estate of the deceased had acquired such a right;
>
> the person so claiming or, as the case may be, the personal representatives may apply to the Registrar, in such manner as may be prescribed, for registration of the title to that estate."

[12] Limitation of actions to recover land is now dealt with by the Limitation (Northern Ireland) Order 1989. The period is prescribed by Article 21(1) as twelve years:

> "21.-(1) Subject to paragraph (2), no action may be brought by any person (other than the Crown) to recover any land after the expiration of twelve years from the date on which the right of action accrued –
>
> (a) to him, or
>
> (b) if it first accrued to some person through whom he claims, to that person."

By Article 26 the title of the true owner (sometimes called for convenience the "paper owner") is extinguished at the expiration of the time limit fixed by the Order for the recovery of land, viz twelve years after his right of action accrued. The accrual of rights of action to recover land is dealt with in Schedule 1 to the Order. Paragraph 1 provides:

> "1. Where the person bringing an action to recover land, or some person through whom he claims –
>
> (a) has been in possession of the land; and
>
> (b) has, while entitled to possession of the land, been dispossessed or discontinued his possession,
>
> the right of action is to be treated as having accrued on the date of the dispossession or discontinuance."

The House of Lords has stated in *J A Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865 that the search for ouster in which courts were wont to engage is unnecessary, and that the question is simply whether the squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner (per Lord Browne-Wilkinson at paras 36-38).

[13] Paragraph 8 of Schedule 1 goes on to make further provision in respect of adverse possession. The material portions are contained in sub-paragraphs (1) to (3):

> "8.-(1) No right of action to recover land is to be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (in this paragraph referred to as 'adverse possession').
>
> (2) Where –
>
> (a) under paragraphs 1 to 7 a right of action to recover land is treated as accruing on a certain date; and
>
> (b) no person is in adverse possession of the land on that date,
>
> the right of action is not to be treated as accruing unless and until adverse possession is taken of the land.
>
> (3) Where –
>
> (a) a right of action to recover land has accrued; and
>
> (b) after the accrual, before the right of action is barred, the land ceases to be in adverse possession,
>
> the right of action is no longer to be treated as having accrued and no fresh right of action is to be treated as accruing unless and until the land is again taken into adverse possession."

Sub-paragraph (4) deals with rent charges and sub-paragraphs (5) and (6) abrogate the doctrine of implied licence which the courts had developed, but which is not material to the present case.

[14] The principles evolved by the common law governing the establishment of sufficient adverse possession were summarised by Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 at 470-2 in terms whose correctness was subsequently confirmed by the Court of Appeal in *Buckinghamshire County Council v Moran* [1990] Ch 623 and by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865:

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in

possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*'animus possidendi'*).

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive 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.

….

Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.

….

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.

(4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley MR in *Littledale v Liverpool College* (a case involving an alleged adverse possession) as 'the intention of

> excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as it reasonably practicable and so far as the processes of the law will allow."

[15] The adequacy of the *animus possidendi* is not in dispute in the present case, for there is a sufficient inference from the facts that the respondent intended to exercise proprietorial rights over the boat park at all material times: cf the discussion of this topic by Neuberger J in *JA Pye (Oxford) Limited v Graham* [2000] Ch 676 at 704-8 and by Mummery LJ in the Court of Appeal in that case at [2001] Ch 804, 817-820. Nor was there any doubt that the possession, if established, was adverse, for no question arose of any licence or permission for the use of the land. The issue in the appeal was whether the respondent's own acts sufficed to constitute the necessary factual possession on his part.

[16] The judge's conclusion was that the respondent and his brother Brian exercised joint possession from 1973 until the latter, then Lord Faulkner, died in 1977. It would follow that he considered that such interest as the latter had acquired before his death by adverse possession passed to the respondent by survivorship. The judge was of the opinion that thereafter the respondent's acts were a sufficient exercise of dominion over the lands to complete a possessory title in his own right. It is clear from such cases as *Asher v Whitlock* (1865) LR 1 QB 1 and *Maher v Maher* [1987] ILRM 582 that when several persons have run a title by adverse possession as joint tenants the survivors take the interest of any who die without severing the joint tenancy. It appears to be correct in principle that where two persons are in joint possession, but the paper owner's title has not yet been extinguished, the survivor takes the interest of the other on his death: cf Halsbury's Laws of England, 4th ed, vol 28, para 988, where it is stated:

> "While a person who is in possession of land without title continues in possession, then, before the statutory period has elapsed, he has a transmissible interest in the property which is good against all the world except the rightful owner, but an interest which is

> liable at any moment to be defeated by the entry of the rightful owner; and, if that person is succeeded in possession by one claiming through him who holds until the expiration of the statutory period, the successor has then as good a right to the possession as if he himself had occupied for the whole period."

This conclusion is in my opinion supported by the statement of Lord Macnaghten giving the decision of the Privy Council in *Perry v Clissold* [1907] AC 73 at 79, when he said:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

[17] The judge's decision can accordingly be supported as a correct conclusion in law, if the facts are sufficient, contrary to the appellants' argument, to establish adverse possession by the persons and for the periods accepted by him. Indeed, the respondent could possibly make a case for registration on the alternative basis that he was in adverse possession from 1973 to 1980 and Lord Faulkner's children thereafter for a further period. It is well established that one can have a series of persons in possession adverse to the paper owner – whether or not adversely to each other – and either the latest may run a title or they may agree that one of them shall have the benefit of their interests: see *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 3 All ER 129 at 135h, per Nicholls LJ; *Cheshire & Burn's Modern Law of Real Property,* 15th ed, pp 891-3; Gray, *Elements of Land Law,* 3rd ed, pp 262-3, 267. As Kay LJ stated in *Willis v Earl Howe* [1893] 2 Ch 545 at 553, a continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, will bar the true owner. I regard the propositions of law set out in *Renaghan v Breen* [2000] NIJB 174 and *Belfast City Council v Donoghue* (1993, unreported) as valid, though I would reserve my opinion about the correctness of their application to the facts of the latter case.

[18] This was not the way in which the case was pleaded or proved, however, and I bear in mind that a claim made on such a basis might be successfully met by the riposte, which was in fact relied upon by the appellants' counsel, that the occupation by the several members of the Faulkner family was a "shared" possession and insufficient to qualify as

adverse possession. Mr McCloskey relied on the decision of Buckley J in *Morris v Pinches* (1969) 212 EG 1141, where it formed a secondary ground for refusing a claim to a possessory title that the claimant had not himself occupied the land continuously, but it had been used for varying periods by different members of his family. The judge left open the possibility, however, that the family members could together have made out a claim to a title, but that was not the basis on which the case had been put forward. I accordingly shall not express any concluded opinion on the question whether a title could be established in such a fashion in the present case.

[19] **I** have come to the same conclusion as Coghlin J. While one might question the sufficiency of the evidence to found a joint possession between 1973 and 1977, I am not prepared to differ from the conclusions of the judge, who had the advantage of seeing and hearing the evidence. I share his opinion that the respondent thereafter exercised sole dominion over the boat park.

[20] It was he who arranged for the contractor to cut the channel in 1977 or 1978. It was by his permission that James Hunsdale and Ronnie Campbell used the boat park for storing boats, and it was through him that Ronnie Campbell was asked to move his boat from the land to facilitate the contractor building the foundations to Miss Brown's bungalow. The nature of the boat park was such that relatively slight and infrequent acts sufficed in our view to constitute possession and demonstrate an intention to possess. It is also worthy of note that at no time during the whole period from 1973 to the time of the respondent's application for registration did any of the Brown family or their predecessors carry out any act in respect of the boat park which could be regarded as that of an owner or attempt to put forward any claim to the land.

[21] In my opinion the appropriate conclusion to be drawn from these facts is that the respondent himself commenced to run a possessory title from 1977 at latest. I accept the judge's view that from 1973 to 1977 it was a joint possession with his brother Brian, and that the respondent on Brian's death became sole possessor of the land. In my opinion the user of the land from 1980, when the respondent moved to Ringhaddy House, was by others on behalf of and with the permission of the respondent. He was still exercising dominion over the lands in various significant respects. He arranged for Mr Campbell's boat to be moved in or about 1991. Mr Campbell made a dinghy for him in or about 1994 in return for his permitting to use the boat park without charge. I accordingly am of opinion that the respondent exercised sufficient dominion over the boat park, first as joint possessor and then in his own right, to constitute adverse possession for a continuous period of upwards of twelve years from 1973. The title of the paper owner was accordingly extinguished and the respondent became entitled to be registered as owner of the land.

[22] I would therefore dismiss the appeal and affirm the judge's order reversing the decision of the Deputy Registrar of Titles. I would direct that the respondent should be registered as owner of the piece of land known as the boat park, hitherto part of the lands in Folio 1568 County Down.