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WEAH4884.T

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

Delivered: 03/02/2009

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

BETWEEN:

MARGARET HEARTY

Plaintiff/Appellant;

and

PATRICK FINNEGAN & ELIZABETH FINNEGAN

Defendants/Respondents.

WEATHERUP I

[1] This is an appeal by the plaintiff against the decision of the County Court Judge to dismiss an Equity Civil Bill by which the plaintiff seeks a declaration of entitlement to a right of way for all purposes over lands of the defendants in Folio 28062 County Armagh in order to facilitate access for the proposed residential use of the plaintiff's lands in Folio AR12935 County Armagh.

[2] The plaintiff presently enjoys a right of way for agricultural purposes along a laneway from the Carrive Road, Silverbridge, County Armagh. This laneway runs from the public road in a northerly direction. On the left-hand side of the laneway are four fields belonging to the plaintiff. After the plaintiff's four fields the next field on the left belongs to the defendants and on that field a cattle shed has been built at the side of the laneway. After the defendants' field the next field on the left belongs to the plaintiff. It is over that part of the laneway, where the defendants own the field on the left, that the plaintiff claims the right of way for all purposes to gain access to the next field on the left and another field beyond, both owned by the plaintiff. Accordingly, the plaintiff's folio is physically divided in that there are four fields and two fields separated by the defendants' field with the cattle shed. The

laneway then sweeps to the right towards a new house which has been constructed at the end of the laneway and is occupied by a member of the defendants' family.

[3] The defendants are the owners of further lands beyond the field on the left of the laneway and other lands around the house at the end of the laneway. The plaintiff has exercised a right of way for agricultural purposes to the two fields. The plaintiff has now obtained planning permission for the construction of a residence on the site. The defendants dispute the existence of a right of way for residential purposes.

[4] The plaintiff's right of way has arisen by prescription so technically there is a fictional lost grant and the nature of the right of way depends upon the circumstances at the date of the grant.

[5] Counsel referred to a number of authorities on the issue of the permitted use of an easement acquired by prescription. A review of the authorities was conducted by the Court of Appeal in England and Wales in McAdams Homes Ltd v Robinson & Another [2004] EWCA Civ 214. In 1949 an owner obtained planning permission to construct a bakery and from that building he devised a foul and drainage system that was constructed to connect to the public sewer. In making that connection the system travelled past a cottage. Moving forward to the year 2000, planning permission was obtained for the erection of two detached four bedroom houses on the site of the bakery. The issue then arose as to whether the easement of drainage was such that it could be used for the benefit of the two detached four bedroom houses that had been recently erected. The trial judge rejected the claim for a right of drainage for the new development. The grounds for rejection were that it was not in the contemplation of the parties at the commencement of the easement that the bakery would cease to be used as a 'manufactury'. The redevelopment of the bakery and its subsequent residential use involved a completely different type of use, it was a radical change. The construction of the new drainage system would create a substantial additional flow that would be generated by the development.

[7] Neuberger LJ at paragraph 50 stated that there were two questions to be posed in a case such as this - first, whether the development of the dominant land, that is the site that had the benefit of the easement, in this case the right of way, in that case the right of drainage, represented a radical change in the character or a change in the identify of the site as opposed to a mere change or intensification in the use of the site; and secondly, whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land, in that case the cottage, in this case the defendants lands.

[8] In relation to the first question the Court concluded that the combination of structural change involving the destruction of one of the buildings on the site and its replacement by two other buildings and the change of use from purely industrial to purely residential, meant that the Judge's conclusion that there was a radical change in the character of the site was one that he was entitled to reach. On the second

question the Court concluded that the exercise that the Judge had carried out should have been to compare the flows of water from the site through the pipe by reference to the likely range of levels of flow from a bakery and then from two houses and to consider the potential intensities of use. The Court concluded that the Judge's view that the increase in flow of water as a result of the development did represent a substantial increase on the burden on the servient land should be accepted. I draw attention, in relation to the second question, to the assessment of any increased burden as being an exercise that compares not merely the actual use and the proposed use but the likely range of levels of use that would be accommodated by the actual and proposed uses of the lands.

[9] The first question is this - is the development of the plaintiff's site, by the building of the house, a radical change in character or a change in identity of the site as opposed to a mere change or an intensification in the use of the site? It will be noted from that formulation that change is permitted in the use of the site if that does not involve a radical change in the character or a change in the identity of the site.

[10] Neuberger LJ cited three instances that illustrate a radical change in the character or change in the identity of the site. The first case was Wimbledon & Putney Commons Conservators v Dixon [1875] 1 Ch D 372 where a right of way was enjoyed for an agricultural use, including building works at farmhouses and cottages on the holding. It was held that the right of way could not be used for residential development on the site as that would involve a radical change in the character of the site. The second case was Milner's Safe Co Ltd v Great Northern & City Railway Co [1907] 1 Ch 208 where a right of way existed to cottages that had been used as residences and for warehousing and the proposed use was for the purposes of an underground railway. That seems as clear as it could be that there was a radical change in the character and change in the identity of the site. The court asked whether there was a different "mode of occupation", which was found to be the case. The third example was RCP Holdings Ltd v Rogers [1953] 1 All ER 1029 where a right of way to the land for an agricultural use could not extend to a proposed development of a camping site on the land as that was a radical change in the character of the land.

[11] On the other hand Neuberger LJ also gave three instances of what would amount to a mere change or intensification in the use. The first case was British Railways Board v Glass [1965] Ch 538 where there was increased use of a right of way for the purposes of a caravan site, which was the long established use of the site. It was held that the increased use was permitted and did not amount to a radical change in the character or change in the identity of the site. The second case was Cargill v Gotts [1981] 1 WLR 441 which concerned the right to extract water from a pond for the purposes of the agricultural use of watering animals. However the farm changed to develop arable farming and there was a resultant increase in the water that was taken from the pond, as the water was now used for crop spraying. The court found that there was no change in the character of the use but a change in

the intensification of the use. Water used for crop spraying was just as much used for agricultural purposes as the watering of bullocks and the fact that more water may be required for crop spraying was not sufficient to destroy or alter the nature of the right asserted or the easement acquired. Finally, the case of Giles v County Building Constructors [1971] P & CR 978 where there was a right of way to two attached dwelling houses. The dwelling houses were demolished and replaced by a three-story block of six flats, a bungalow, a house and eight garages. Was that a radical change of use or was it an intensification of existing use? The court found it was the latter. There was a residential use and even though there had only been two dwellings originally and then there were many more dwellings. This was found not to involve a radical change in the character of the residential use.

[12] In the present case the first question is whether the proposed development amounts to a radical change in the character or change in the identity of the plaintiff's lands served by the right of way, in which case the right of way would not be permitted for the proposed use, or whether there is a mere change or an intensification of the existing use, in which case the right of way would be permitted. What is proposed by the plaintiff is the construction of a residence on the site. There are two fields served by the right of way. One field is used for grazing and one field is covered in whin and does not appear to have a particular use at the moment, but I treat both fields as having a present agricultural use. The particular agricultural use is presently limited to the grazing of a few cattle for part for the year.

[13] Against that background of agricultural use by grazing the site the plaintiff is entitled to use the right of way for other agricultural use and for the intensification of the existing agricultural use. The proposed development will not affect the whin field, but will affect part of the grazing field, which will accommodate the dwelling house. Thus there will be a residential use on part of the site and the remaining part of the grazing field will presumably remain for grazing. I am satisfied that this is not a mere change of use or an intensification of use. The proposed residential use involves a radical change in the character and a change in the identity of the plaintiff's lands. It is, in effect, a different mode of occupation of the lands. What is currently an agricultural use will become a mixed residential/agricultural use.

[14] The second question is whether the use of the plaintiff's lands, as redeveloped, would result in a substantial increase or alteration in the burden on the defendants' lands. An assessment must be made that takes account of the likely range of activity for the present agricultural use and then of the proposed agricultural/residential use. The plaintiff would be entitled to intensify the existing use for agricultural purposes, so there might have been an increase in the stock on the lands, if gazing permitted, or ploughing of the field or the sowing of seed or development for the housing of the stock on the land or the clearing of the whin for additional agricultural use. Account must be taken of the reasonable prospects for the long-term agricultural use of the land. Comparison must be made with the likely range of residential/agricultural use to determine if the proposed development will represent a substantial increase or alteration in the burden on the defendants' lands.

[15] An example of a radical change of use that did not increase the burden arose in Atwood v Bovis Homes Ltd [2001] Ch 371 where the dominant land had been used for agricultural purposes, with a prescriptive right to drain surface water over neighbouring land. The proposed change in the dominant land involved the development to a housing estate, clearly a radical change of use. However it was held that the right to drain surface water over neighbouring land could still be enjoyed because the dominant owner, through the medium of a water drainage scheme, was going to ensure that the quantum of surface water passing over the neighbouring land would remain wholly unaffected by the development. This represents a striking example of the distinction that may emerge from the application of the two questions that have to be asked.

[16] Returning to the facts of the present case, the issue is whether there will be a substantial increase or alteration in the burden of the right of way on the defendants' lands. There will clearly be some increase and alteration of the use of the right of way in that it will accommodate a residential use for the plaintiff, which use will extend to visiting family and friends and will include access for all private servicing vehicles that might visit residential premises and all public services that might attend.

[17] Counsel for the defendants referred to the defendants' present arrangements for the management of their cattle on their lands. The defendants use the field between the plaintiff's lands and the cattle shed on that field and the laneway beside the cattle shed as a 'crossover' for cattle travelling from their lands on the left-hand side of the lane to their lands around the defendants' house at the end of the lane. There is a gate on the laneway at the crossing point which the plaintiff must open and close to pass to the entrance to the plaintiff's two fields and which the defendants use to regulate the passage of cattle from the fields on the left to the fields around the house. The defendants are concerned about the management of their cattle and the inconvenience of additional checks on their cattle in light of the proposed residential use. I do not accept that such concerns would represent an increased burden on the servient lands. The issue will not be considered in terms of the movement of the defendants' cattle.

[18] It is a question of fact and degree as to whether the increase and alteration in the use of the right of way will involve an increase or alteration in the burden of the right of way on the defendants' lands that could be described as substantial. The overall position is that, in view of the likely nature and extent of the use that would be made of the right of way if it also served a residential property, I am satisfied that the introduction of the residential use on the plaintiff's lands would amount to a substantial increase and alteration in the burden on the defendants' lands.

[19] Accordingly, as both questions have been answered against the plaintiff, I refuse the plaintiff's application for a declaration as to a right of way for residential purposes. I should, of course, emphasise, lest there should be any doubt about it,

that the plaintiff enjoys a continued right of way for agricultural purposes. I dismiss the plaintiff's appeal.