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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **17/04/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

_____

BETWEEN:

MICHAEL GERARD McCANN

Plaintiff

and

HUGH KENNETH McCANN

Defendant

_____

HORNER J

Introduction

[1] These proceedings primarily involve a claim by Hugh Kenneth McCann ("H") that he has acquired exclusive title to all the lands he holds as tenant in common with his brother Michael Gerard McCann ("M"). They are the fourth and final set of proceedings in a number of different legal disputes that have overwhelmed the McCann family in general, and H and M, the two brothers, in particular, following the death of their father, Myles McCann ("the deceased") on 18 November 2001. The various disputes have involved:

(i) A claim for trespass involving M trespassing on H's lands by repositioning the boundary fence of his house. The proceedings were issued in the County Court by H on 11 April 2006.

(ii) H's claim for, inter alia, a declaration that the Will made by the deceased on 14 September 2001 be set aside in favour of an earlier Will which gifted H the deceased's lands. M and the other siblings were defendants in the proceedings which were issued on 6 September 2007. The solicitor who acted in respect of the execution of the Will and other documents was also alleged to have been guilty of negligence.

(iii) M also issued proceedings in September 2007 against the solicitors involved in the drawing up of the Will.

(iv) The present proceedings were issued by M against H on 21 May 2007 claiming, inter alia, sale in lieu of partition of Folio 36387 County Tyrone, an area of approximately some 61 acres, and an adjacent area of unregistered land comprising a field of some 10 acres which had been owned by the Mullins. When taken together these two pieces of land are known as the "Mountain Lands" and I refer to them as such during the rest of this judgment. H responded with a defence in October 2007 and then with a counterclaim on 14 February 2011 which has been the subject of major amendments.

[2] This internecine strife, which has consumed the family from the deceased's death, has been expensive both in the amount of costs that have been incurred by each side and more importantly in the terms of the breakdown of human relationships. It is disappointing that the parties to the present dispute have been unable to resolve this matter between themselves without resorting to a contentious hearing. There is no doubt that the other sets of proceedings which have now been concluded did affect the relationship between the brothers. H clearly regarded M as being primarily responsible for H having to issue the earlier probate proceedings in order to ensure that he effectively succeeded to the deceased's farming business. Further, H could be said to have emerged as the winner in those other proceedings. In any event all the different sets of proceedings have also served to increase the acrimony and upset among the family members and certainly appear to have led to a complete breakdown of trust and confidence between H and M.

[3] The real issue in these proceedings is between H and M. It relates to H's claims in respect of the Mountain Lands. These claims over the years have undergone a metamorphosis. Originally the defence served by H claimed that the Mountain Lands, of which approximately 61 acres were gifted to H and M in 1979 by the deceased and the other approximately 10 acres purchased by H and M from the Mullins, had been farmed *with the consent of M*, as co-owner. By his counterclaim served for the first time in February 2011, H alleged, inter alia, that M, having originally agreed to a partnership to farm the lands, had emigrated to America in 1981 without warning and had placed upon him the entire burden of improving and farming the lands. It was claimed that M was in breach of contract and that there was some estoppel operating. As a consequence, H claimed, he had entitlement to substantial compensation for his contribution to the Mountain Lands, including an initial claim of £500,000 for wages and £375,000 being the increase in value of the Mountain Lands. This claim, made by H during a period when he had no legal representation, has not been pursued before me. It was only following a further amendment by H in 2012 that for the first time H claimed he had acquired title to the whole of the Mountain Lands by adverse possession and asked for a declaration to

that effect. This has since been the subject of further amendment. Both the plaintiff and the defendant had been allowed considerable latitude in amending their pleadings. It is easy to detect from the correspondence and the amendments to the pleadings a growing sense of injustice on H's part as to how M has conducted himself both in respect of the making of the deceased's last Will and the husbandry of the Mountain Lands. I have no doubt that H now believes that he is genuinely entitled to the Mountain Lands to the exclusion of M. Whether there is any legal substance to this is the central issue which I have to decide.

[4] The two main parties in this action are not dishonest men but the effects of the various sets of legal proceedings on each of them have resulted in a loss of objectivity. These legal disputes, and this case in particular, have consumed their efforts for these last 6 years. The present proceedings have become a battle which each is so determined to win that they seem to have difficulty in giving any testimony which detracts from their case. They had before these legal disputes arose been the best of friends and true brothers. H was best man at M's wedding. M was godfather to one of H's sons, Michael. Now each seems to regard the other, it would appear, as an enemy to be vanquished at all costs. As such their evidence in this case was often unreliable, predetermined by the outcome each hoped to achieve. I have been particularly circumspect as to what claims I have accepted from each of them unless it is supported by other independent evidence. The other witnesses did their best to tell the truth, although it is always difficult to remember events that have occurred many years ago. Sharon McCann, M's wife who gave evidence, was patently truthful. Forthright and candid, I considered her to be reliable, never afraid to volunteer an answer regardless of its effect on her husband's case.

The Facts

[5] The deceased and Kate McCann had 8 children. H was the only one of the McCann children involved in farming. It was expected that he would take over the family farm from the deceased when he died. It is clear that H had a difficult relationship with the deceased. For example H for periods of time did not talk to the deceased. Mr Mullan, who worked on the farm and knew both the deceased and H, said that they did not get on the best and that they stayed out of each other's way. M was a joiner/builder and was not involved in the farming business. He had a workshop on the yard attached to the Mountain Lands which he used until he left for the USA in 1988. His relationship with the deceased seems to have been good.

[6] It was M's initiative to persuade the deceased to transfer 61.07 acres of the Mountain Lands to H and M in 1979. The deceased made a transfer on the basis that H and M would reclaim and upgrade the lands. The transfer of the 61.07 acres out of folio 6428 to make folio 36387 County Tyrone was for natural love and affection and was registered on 2 May 1979 with H and M being tenants in common of undivided

shares of that land. The value of the land transferred to them was stated to be £18,000. H and M then bought approximately 10 acres of adjoining land from the Mullins for £1,000 which together with the lands that had been transferred to them by the deceased comprised the Mountain Lands. The finance for this was provided by the Northern Bank. H and M had opened a joint account with the Bank at its Beragh branch and the security for the borrowing was not just the Mountain Lands but also other farmland owned by H at Ballygawley. M used his footballing connections with Girvan and Harte contractors to enter into a contract with them to upgrade 45 acres of the Mountain Lands. This was grant assisted and the price to be paid to Girvan and Harte was £28,950. M worked on the reclamation of the Mountain Lands with H but they had a row about how M was erecting the fencing and M left. That seems to have been M's last contribution to the reclamation and improvement of the Mountain Lands. M left for the United States in 1981 where he was away for a number of months. He then returned and continued on with his business as a joiner and contractor from premises on the Mountain Lands until 1988 when he left for the United States returning finally in 1994, a married man with two small children. During his period in the United States he returned intermittently on short visits to Northern Ireland. Both M and H have remained jointly liable for the indebtedness of the joint account through the years. Obviously the amount of the debt had changed as interest had been added and payments had been made by H into the joint account. At least some of these payments into their joint account will represent profits made from H farming the Mountain Lands.

[7] The work on the Mountain Lands was completed in February 1983 when a final payment to Girvan and Harte Contractors of £7,850 was made for levelling 48.25 acres. H worked the Mountain Lands acres where he grazed his stock. Any profits made were used to pay off the debt to the Northern Bank for which H and M remain jointly liable. Interest rates were high in the late 1980s and 1990s and there was no doubt that H must have been under financial pressure bringing up a young family, farming all his lands including the Mountain Lands and servicing the debt to the bank. But there appears to have been no ill-will between H and M. There was never any suggestion of H making any complaint to M who claims that it was always understood that H would farm the Mountain Lands on his own. Indeed, as I have recorded, when M married Sharon in 1990 it was H who travelled over for the wedding to the States and acted as M's best man. M came back for a few short visits to Northern Ireland after the wedding, before he returned home with his family in early 1994. When he returned, M did not involve himself in farming the Mountain Lands. In 1996 M became a US citizen, although both M and Sharon and their two children continued to make their life in Northern Ireland with M continuing in his business as a joiner/contractor. From his return he did not use the workshop on the Mountain Lands for business purposes. For the period from 1979, and even when M was in the US, H and M remained firm friends and brothers. I heard no evidence of any disputes or any ill-will between them apart from the incident involving the fence

which appears to have been long forgotten and forgiven. They both got on with their respective businesses. At no time did H ever complain to M that he was not helping to farm or improve the Mountain Lands or ask him to become involved in his farming enterprise. By the same token M did not ask H to permit him to become involved in farming the Mountain Lands or to share in any profits which H may have made from farming the Mountain Lands. Up to 1988 they met regularly at M's workshop which was on the Mountain Lands. When M left for the United States, they remained close. This did not change when M returned with his family in 1994. H worked his farm including the Mountain Lands and M concentrated on his contracting business. There was never any suggestion from H that he had been let down by M and similarly M appeared content that H should have the right to use the Mountain Lands for his farming enterprise. The relationship between them up to an unexplained incident in 1998 appeared to be both close and cordial. There were no further rows or disputes until the problem arose with the deceased's final Will, although I judged both men to be persons who would be quick to take offence and both share similar fiery temperaments. Their relationship changed irrevocably on the death of the deceased in late 2001.

[8] The deceased had made a Will on 14 November 1988. This left all his lands to H. The deceased had made a new Will on 14 September 2001 and for various reasons, which I do not need to go into in these proceedings, this Will left H in an appreciably worse position than he had been under the 1988 Will. The deceased was in poor health when he made the 2001 Will and he died on 18 November 2001. This final purported arrangement of the deceased's assets under the later Will resulted in a family dispute. Kate, the deceased's wife and H and M's mother, died on 3 March 2003. At her funeral there was an unseemly family row and H claims efforts were made to prevent him carrying her coffin. Relationships which had been tense became fractured and hostile. There can be no doubt that H regarded M as being instrumental in what had happened. This major fallout amongst the family in general, and between H and M, in particular, led to litigation about, inter alia, the Will and M's use of land adjoining his house which shared a boundary with H's land. This litigation, as I have recorded, has been resolved largely to the satisfaction of H. The amount of resentment generated by these proceedings should not be underestimated. H said in his evidence that the final fracture in his relationship with M was when the deceased was dying and M got him to sign documents. He said, "I took great offence". He confirmed that he had never a "harsh word" with M until 2001. As I stated earlier, I placed little weight on the evidence of either H or M unless there was some independent corroboration as both now see everything, whether consciously or sub-consciously, through a distorting prism that reflects their own desires for a successful outcome to this case, the final piece of litigation.

[9] H initially made a case that he must have known was untruthful, namely that M had permanently emigrated to America in 1981. In the opening of the adjourned

proceedings in September Mr McDonnell QC for H said that M had emigrated in late 1981 or early 1982 to America where he married in 1990. Apart from short visits, it was asserted, M did not return until 1994. These instructions given by H to his legal team were false and misleading and H must have known this to be the case. He persisted with this version of events when he gave his evidence at the first hearing. I conclude that H's story about M emigrating to the U.S. from 1981 was designed whether consciously or sub-consciously to allow H to explain why he had not complained to M about his lack of contribution to farming the Mountain Lands if this had been the original intention of both H and M, as H now alleges.

[10] I conclude that there was an implied agreement and understanding that H would farm the Mountain Lands on his own. (I will come back to this issue later in the judgment). This can be the only explanation for what happened. Otherwise I would have expected H, who had not been slow to make his feelings known, to have complained to M about this behaviour in failing to assist with farming the Mountain Lands. I would also have expected M to have complained about being excluded from the opportunity to farm the Mountain Lands and enjoy a share of any profit which so accrued. I have no doubt that M was expected to help in the reclamation works and that M leaving, when H complained about the fencing, and then going to the United States for six months, created some temporary disharmony. But I do stress that this was temporary. The arrangement referred to above seems to have worked to both parties' satisfaction. If it had not, I have no doubt that H would have expressed his displeasure to M in no uncertain terms. Instead they both seemed to get on well up to 2001 when the dispute about the deceased's Will erupted. This interpretation ties in with the pleading in the original defence served by H that he had occupied the Mountain Lands with the consent of M. I have no doubt that Ms Grattan, junior counsel then acting for H, would not have drafted such a defence unless H had given her specific instructions to that effect. Indeed at the second hearing H did not seek to demur from this proposition when it was put to him by Mr Coyle BL who acted for M.

[11] I do not find that M paid H £1,000 on his return from the United States in 1982 as M now claims. If he had, I would have expected this payment to have been pleaded. The first time this claim was made was some 30 years after the payment was made and after the hearing had commenced. H emphatically denies ever having received such a payment. There is no independent evidence to vouch such a payment being made.

[12] On the basis of all the evidence I conclude that when M left in 1988 he kept some of his plant and some curios/articles stored in the new workshop. There were also some objects belonging to Myles, their brother, which were kept in the new workshop, with M's permission. While M never returned to work in that workshop when he came back from the States, those items remained in the workshop until they

were finally removed by H after the dispute arose over the deceased's 2001 Will in 2001.

[13] M originally alone, and later with Sharon, walked the Mountain Lands, whether for the pleasure of a walk or to enjoy a picnic or to collect berries. Turf was also cut by M and collected from field 20. Access to field 20 was primarily, but not always, by the concrete lane from the yard of the Mountain Lands. A quad bike was used on the Mountain Lands by M and his family and friends. These activities were necessarily intermittent but they would have been carried out on a regular basis during the time when M was resident in Northern Ireland and on the occasions when M visited his home from the United States between 1988 and 1994.

[14] While M may have hunted on the lands before 1989, I do not accept M hunted on the lands with a gun from the period after he had handed in his licence at the end of the 1980s. His evidence as to hunting on the Mountain Lands after that date is contradictory and inconsistent. There has been no other evidence adduced by M to corroborate this claim.

Legal discussion

[15] The law in respect of adverse possession so far as it relates to "squatters" was authoritatively set out in the House of Lords in J A Pye (Oxford) Limited v Graham [2002] UKHL 30. The relevant legal principles are summarised by Carswell LCJ at paragraphs [12]-[14] of his judgment in Re Faulkner [2003] NICA 5 when he gave effect to the Pye decision. He stated:

> "[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 is reasonably practicable and so far as the processes of the law will allow'."

[16] The issue in this case does not involve a squatter. It is an unusual one in that it involves a claim by an owner of an undivided share that he has adversely acquired

the share of the other co-owner. The law in Northern Ireland is different from England and Wales. It is not possible for one co-owner of land in England and Wales to be in adverse possession against other co-owners. This is not the position in Northern Ireland, or the Republic of Ireland, or many present or former members of the Commonwealth. The position is set out in Jourdan and Radley-Gardner's, "Adverse Possession" (2nd Edition) page 609:

> "**The Historical Position**
>
> **Before 1833**
>
> 29-05 Before the Real Property Limitation Act 1833, one tenant in common could not maintain an ejectment against another, because the possession of one tenant in common was the possession of the other, and, to enable the party complaining to maintain an ejectment, there had to be an ouster of the party complaining. But where the plaintiff had not been in the participation of the rents and profits for a considerable length of time, and other circumstances concurred, the judge was to direct the jury to consider whether they should presume there had been an ouster.
>
> 29-06 Outside the law of adverse possession, that remained, and still remains, the position. Each tenant in common is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share, the injured party can bring an action for an account. If one of them should go so far as to oust the other, he is guilty of a trespass.
>
> **From 1833 to 1925**
>
> 29-07 The Real Property Limitation Act 1833, Section 12 altered the position so far as running of time is concerned. That section provided that if one of several co-owners of land was in possession of more than his share, such possession was not to be deemed to be the possession of the other co-owners.

> 29-08 The effect of this section was to make the possession of joint owners separate, so that time could run in favour of any co-owner of land who took possession of more than his share of the land. That position was not affected by the Real Property Limitation Act 1874.
>
> 29-09 There were many cases between 1833 and 1926 where the possession of one or more co-owners to the exclusion of the others extinguished the titles of those not in possession. Since then, there have been cases considered by the Privy Council on appeal from Commonwealth jurisdictions where the applicable law was the same as under the Real Property Limitation 1833 and the Real Property Limitation Act 1874, where one co-owner has been held to be in adverse possession against his co-owners."

It therefore follows that with co-owners the issue of primary concern to the courts where one co-owner claims to have acquired a title of another co-owner is whether that co-owner has discontinued his possession of his share of the lands.

[17] The relevant statutory framework in Northern Ireland has already been set out in the extract from Carswell LCJ's judgment in Re Faulkner. There is one additional provision which I should draw attention to and which concerns co-owners. Article 24 states:

> *"Possession of one co-parcener, etc., not to be possession of others*
>
> 24. Where any one or more of several persons entitled to any land as co-parceners, joint tenants or tenants in common have been in possession of the entirety or more than his or their undivided share or shares of the land-
>
> (a) for his or their own benefit; or
>
> (b) for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the land,

> then, for the purposes of this Order, that possession is not to be treated as having been the possession of the last-mentioned person or persons or any of them."

The interpretation of a similar statutory provision to Article 24 was considered by Eve J in Glyn v Howell [1909] 1 Ch 666 where he said:

> "That section, so far as it is necessary for the purposes of this case, is in these words: 'When any one or more of several persons entitled to any land as tenants in common, shall have been in possession of the entirety, or more than his or their undivided share or shares of such land for his or their own benefit, such possession shall not be deemed to have been the possession of the last-mentioned person or persons or any of them.' The 'last-mentioned person or persons' refers to the person or persons "entitled to the other share or shares of the same land."

[18] Accordingly, the key question when there is a claim by a tenant in common to have extinguished the title of his co-owner is whether that tenant in common has discontinued possession or been dispossessed. If the co-owner is not in possession then the other tenant of the undivided share will be in possession of the whole of the land and as a co-owner will normally have the necessary intention to possess the entire land.

[19] One such case is Paradise Beach and Transportation Co Ltd and Others v Cyril Price-Robinson and Others (1968) AC 1072. Lord Upjohn gave the main advice on behalf of the Privy Council. This was one of the cases referred to by Jourdan and Radley-Gardner at 29-09. He said at page 1079C-E:

> "There has been no appeal from those findings nor has there been any dispute that the respondents who are the successors in title of Roseliza Price ('Roseliza') and her sister Victoria Hanna ('Victoria') both original takers under the testator's will were each entitled to 10/105 undivided shares in the land. The respondents, however, claim that Roseliza and Victoria and their successors have been in exclusive possession of the land since the death of the testator or for more than 20 years before action brought and that the title of the petitioners is barred by the relevant statutes of limitations. That is the sole

> question before their Lordships but it is divided into issues of fact and law; counsel for the second appellant in the main developed the challenge to the correctness of the findings of fact of the learned judge on the question of possession as well as his conclusions upon the relevant law while counsel for the remaining appellants developed his argument upon the footing that the judge erred only in law."

He then went on to say at page 1082G-1083E:

> "On to the Statute of James the common law engrafted the doctrine of 'non adverse' possession, that is to say, that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely, 'adverse possession'; so that there had to be something in the nature of ouster. But in practice it was very difficult to discover what was sufficient to constitute adverse possession; thus the possession of one co-tenant was the possession of the rest though undisputed sole possession for a very long time might be evidence from which a jury could properly presume ouster. Doe d. Fishar & Taylor v. Prosser. All this was swept away by the Act of 1833 as was explained in an illuminating judgment of Denman C.J. in Culley v. Doe d. Taylerson. After pointing out that at common law the possession of one tenant in common was possession of all and that there must be an ouster he continued
>
> > 'The effect of this section [No. 2] is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section.'

He then went on to point out that this section standing alone would not have affected the possession of co-tenants for at common law the possession of one was possession of the other and the position would have remained to be determined by the rules of the common law.

He then quoted section 12 and held that the effect of the section was to make the possession of co-tenants separate possessions from the time when they first became tenants in common and that time ran for the purposes of section 2 from that time."

Lord Upjohn then said at page 1084A-F:

"Counsel for the appellant, however, has argued that though this may represent the law where a third party (an intruder) is in possession that does not apply where no one is in wrongful possession. He points out truly that Roseliza and Victoria were rightfully in possession of the whole land and were committing no wrong by farming all of it, see Henderson v Eason; Jacobs v Seward.

So he submits that time has not yet started to run because the petitioners could not sue them as no wrong has been committed by those in possession; put in another way it was argued that time cannot run in favour of the co-tenants in possession until they commit a wrong.

Furthermore it was argued that while a right to enter arose in 1913 that was not a right to 'make an entry' for the purposes of section 1 of the Act of 1874 for such a right did not arise until an intruder was in possession or until there was some wrongful act by the co-tenants in possession.

These arguments necessarily led to the submission that where a co-tenant was lawfully in possession of the whole there must be some wrongful act showing a possession inconsistent with the co-tenants' right to re-enter; something which counsel could not attempt

> to define but which was short of adverse possession under the pre-1833 law.
>
> Their Lordships have no hesitation in rejecting this argument; to adopt it would defeat the whole object of the Act of 1833. It seems to their Lordships clear from the language of the Act and the authorities already referred to that subject to the qualification mentioned below where the right of entry has accrued more than 20 years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants' possession. That right of entry (ignoring immaterial facts as to the widow and Nehemiah) accrued in 1913."

There can therefore be no doubt that where co-owners are concerned, and a claim is made by one co-owner that he has acquired title to the other co-owner's share, the investigation of the court is concentrated on whether the co-owner, whose title it is claimed has been extinguished, has been in possession of his or her share of the lands. If that co-owner has been in possession, time does not run. If that co-owner has not been in possession, then time does run.

[20] I also draw attention to Lord Browne-Wilkinson's judgment in Pye and in particular paragraphs 33-35, where he discusses at length the errors that have arisen because of the mis-understanding of the phrase "adverse possession". He expressly approved the decision in Paradise Beach when he said at paragraph 34:

> "The same was held to be the law by the Privy Council in a carefully reasoned advice delivered by Lord Upjohn in Paradise Beach and Transportation Co Limited v Price-Robinson [1968] AC 172."

[21] Lord Browne-Wilkinson expressly approved the comments made by Slade J in Powell v McFarlane [1977] PNCR 452 at pages 470-2. This judgment was also referred to by Carswell LCJ in Re Faulkner with approval. In Powell's case Slade J said at page 472:

> "The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. **An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest**

> **acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession.** The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner." (My emphasis)

[22] This ties in with what the Privy Council said in an appeal from the Court of Appeal of Jamaica in Wills v Wills (2003) UKPC 84 at paragraph [32]:

> "Their Lordships do not therefore see the outcome of this appeal as likely to cause to trouble for the large number of Jamaican citizens who work overseas and contribute to their families' welfare and the Island's economy. Most of them will come home on a fairly regular basis, will retain the bulk of their possessions at home, and will not (on coming home) be treated as guests in their own houses. But if (as must sometimes happen) that a Jamaican working overseas forms new attachments, starts a new life, and entirely abandons the former matrimonial home, he or she will (within the ample period of 12 years) have to consider the legal consequences of that choice."

Clearly the advice of the Privy Council was that the co-owner who emigrated from Jamaica to the USA by keeping her possessions in the jointly owned home and by not being treated as a guest on her return visits, would have acted sufficiently to negative any claim of discontinuance of possession on her part. In those circumstances, as a legal owner these modest acts of possession by that co-owner would have been sufficient to prevent time running against her.

[23] The position in Ireland is the same with respect to what is required to be proved to demonstrate that a legal owner of an undivided share of land has been

dispossessed. In Denis Dunne v Irish Rail (2007) IEHC 314 Mr Justice Clarke said at paragraph 4.9 after quoting with approval a passage in Powell v McFarlane, to which I have already referred, said:

> "It is, therefore, important to emphasise that **minimal acts of possession by the owner of the paper title** will be sufficient to establish that he was not, at least at the relevant time of those acts, dispossessed. The assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will continue in possession with even minimal acts. A dispossessor will need to establish possession akin to that which an owner making full but ordinary use of the property concerned, having to regard to his characteristics could be expected to make. It is not, therefore, a question of weighing up and balancing the extent of the possession of an owner and a person claiming adverse possession. **Provided that there are any acts of possession by the owner, then adverse possession cannot run at the relevant time**." (My emphasis)

[24] In Anthony Kelleher v Botany Weaving Mills Limited (2008) IEHC 417 Ms Justice Maureen H Clarke said at paragraph 21:

> "In the recent decision in Gleeson v. Feehan (29 May 2001 unreported) Finnegan P. confirms that quite **minimal acts of possession** by the owner of the paper title will be sufficient to establish that he was not dispossessed."

[25] Accordingly, in this case it will be necessary to consider whether M has been dispossessed in the context of someone who is a co-owner with a legal title and who is able to establish that he remained in possession by relying on "quite minimal acts of possession".

[26] It was also claimed on behalf of M that as he had given his consent, H's possession could not constitute "adverse possession". Therefore time could not run against M to extinguish his title. Mr McDonnell QC on behalf of H, responded to this argument on the basis it involved a misunderstanding of what was adverse possession where co-owners were concerned. If H was in sole possession of the Mountain Lands, then he had factual possession and as a co-owner he had the necessary intention to possess all of the lands, including M's undivided share. I

consider that Mr McDonnell is correct in his submissions. Of course when a licence has been granted by one co-owner to the other, the grantor will still have a right to use the lands for purposes which are not inconsistent with the granting of that licence. When a licence has been granted that anticipates the grantor being away for 12 years or more, one would expect that arguments might arise about estoppel, implied terms, or collateral contracts. So, in other words, one might reasonably expect that the grantor will say it was done so on the basis that time would not run against him. This is not the situation here. It was never intended that H would have exclusive possession of the Mountain Lands. It was always intended, I find, that M would remain able to make what use he could of the lands as long as that use did not interfere with H's farming enterprise. In any event no such claim whether of implied term or otherwise is pleaded by M and I can safely leave these possible arguments to be determined in another case when the evidence and the pleadings demand such an adjudication.

[27] For the sake of completeness the law in respect of an implied licence is, I understand, as follows.

[28] In London Borough of Lambeth v Rumbelo (25 January 2001 unreported) Etherton J propounded the following test of whether there had been an implied consent. He said:

> "In order to establish permission in the circumstances of any case two matters must be established. Firstly, there must have been some overt act by the landowner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given. It is, however, irrelevant, whether the users were aware of those matters. … Secondly, (it must be established that) a reasonable person would have appreciated that the user was with the permission of the landowner?"

This was followed by Mr Lewison QC sitting as Deputy High Court Judge in Bath and North Somerset District Council v Nicholson.

[29] This test was considered and accepted by the Court of Appeal in Colin Dawson Windows Limited v Borough Council of King's Lynn and West Norfolk (2005) EWCA Civ 09. This test was approved by Sir Martin Nourse in giving the judgment for the Court of Appeal in Batsford Estates (1983) Company Limited v Taylor and Another.

[30] I consider that the test has been satisfied. There were demonstrable circumstances from which the inference could be drawn that H had been given

permission by M to farm the lands on his own and that a reasonable person would have appreciated that such user was with permission. I note:

(a) H accepted in his defence that he farmed the lands with the consent of M.

(b) He accepted this in court under cross-examination.

(c) He made no complaint about M's failure to contribute to the farming enterprise when I would have expected him to do so, if both H and M were to use the Mountain Lands for farming purposes.

(d) H made no attempt to exclude M from using the Mountain Lands for purposes other than farming.

(e) Both H and M continued to be liable in respect of the debt of the joint account with the Northern Bank incurred, at least in part, to fund the reclamation of the Mountain Lands.

[31] In any action for sale in lieu of partition, as here, the Partition Act 1868 empowered the court to substitute a more convenient remedy of sale upon certain criteria being satisfied: see Conway on Co-Ownership of Land at 3.48. The 1876 Act brought in a number of procedural changes. Following the passing of 1868 Act, one or more co-owners could compel the sale of the entire co-owned land instead of partition, and enjoy the divided share of the proceeds of sale as opposed to a divided share of the property itself: see Conway at 3.49. In Northern Bank v Beattie (1982) 18 NIJB 18 Murray J determined that where a party was entitled to a half interest or more in the property there was an absolute entitlement under Section 4 to have the property sold and the proceeds divided between the co-owners. Under Section 3 the court has a discretion and will order sale when "a distribution of the proceeds would be more beneficial for the parties interested than a division of the property". The court must take into account, inter alia:

"(a) The nature of the property;

(b) The number of parties interested;

(c) The absence or disability of any of those parties;

(d) Any other circumstance."

The onus of proof is on the party seeking a sale. However, a court can take into account the breakdown in relationship between two co-owners if it considers that this will prevent them from co-operating with each other: see 5.24 of Conway.

[32] The issue of the taking of accounts was raised by H's senior counsel should sale in lieu of partition be ordered by this court. However, I was not addressed by H's counsel on this issue in any detail. M's counsel made no submissions whatsoever on this issue and this is not criticism because given the way the case ran I would not have expected him to have addressed me on this issue. Therefore, it would, in the circumstances, be inappropriate for me to comment further. I will provide, should it be necessary, such guidance and directions as the Master might require in the event of a sale of the Mountain Lands co-owned by H and M: see below. It does seem to me that this issue is covered comprehensively in Chapter 11 of Conway's treatise on Co-Ownership.

Discussion

[33] As I have remarked this case was originally presented on the basis that M had emigrated to the USA in 1981 and that he only returned to Northern Ireland in 1994. It was then subsequently alleged that he emigrated in 1989. Regardless of M's movements, I have to determine whether H has "adversely possessed" (in the legal sense) the Mountain Lands so as to extinguish M's title. It is accepted that in order to do so there must be "adverse possession" for a continuous period of 12 years or more. It also has to occur in a period up to 2007 when a writ of summons is issued by H. Once the land has been adversely possessed for 12 years or more, it does not matter if M goes back and there is intermittent or even full possession for short periods by him. As Clarke J said in Denis Dunne, "once title is extinguished it cannot be re-activated by means of minimal acts of possession".

[34] M did not work the land and he did not rent it. He was free to use it for any other purpose that did not interfere with H's farming activities. The only way in those circumstances he could possess his share was by using the Mountain Lands for his enjoyment and that of his family. The obvious way to do that was to walk the land at regular or irregular intervals and to use it for recreational purposes. I have found that this is exactly what he and his family did. M walked the land as did Sharon and members of his family. The family picnicked on the land. They gathered berries from the land. They used field 20 for cutting peat. Up until 1989 they had used the Mountain Lands to graze brood mares which M owned jointly with his brother-in-law. Finally, they also drove the quad bike on the Mountain Lands. H claims he was unaware of those activities. I treat his evidence, as I do the evidence of M, with considerable scepticism for the reasons I have set out. It is significant that H did not call any witness to provide corrobation of his claims. I also conclude that M stored items in the new workshop until after the death of the deceased. These consisted of plant, curios and other articles. Some of these

belonged to his brother, Myles, and were stored there with M's permission. Of course, through all of this, M did remain jointly and severally liable to the bank for the debt which had been incurred from the time of the reclamation of the Mountain Lands. These modest acts of possession when exercised by Mas a legal owner are, I find, sufficient to show he was not dispossessed and that he remained in possession. However, in respect of the other outbuildings which H used for his farming business, excluding the new workshop and the yard used by M, I do find that M was dispossessed by H and/or that he discontinued possession. There is no doubt that H feels that he has been shabbily treated by M who left him with the entire responsibility for the Mountain Lands, and then attempted, he thinks, to try and prevent him inheriting what was rightfully his. I find that this sense of injustice is of a relatively recent nature and post-dates the deceased's death. There can be no doubt that H's feelings towards M changed following the dispute over the Wills. As I have said, I have no doubt that H now believes that he is genuinely entitled to the Mountain Lands to the exclusion of M.

[35] I find that H had a licence to farm M's share of the Mountain Lands. But this was a licence that also allowed M to enjoy the Mountain Lands in such a way as best suited M and his family. M did enjoy the Mountain Lands following their acquisition by walking them, by using them for recreation purposes, on his own and with his family, by driving the quad bike and by cutting peat from field 20. This is why H was driven to claim that he has not seen M on the Mountain Lands at all. Although he did resile from this extreme position when he accepted that M took peat from field 20 and used the concrete lane to access it. But then he had no option for M had used H's tractor with H's consent to bring the peat down on at least one occasion. M also used the new workshop, first for his own business and then for storage purposes.

[36] I am of the view that an order for partition would not be appropriate. The nature of the Mountain Lands, less the farm outbuildings used by H, would make it very difficult to divide so as to achieve a fair result – some of the land is pasture and improved land and some remains peat bog. The difficulty is compounded by the fractious relationship which presently exists between H and M. The prospect of the Mountain Lands being divided by agreement in the present circumstances is remote. There is little or no chance of H and M, given the complete breakdown of relations between them, being able to farm or work the lands side by side even if the Mountain Lands could be divided. I make no further comment about the accounting exercise which will have to follow any sale of the Mountain Lands. I will provide further guidance in due course, if so required.

Conclusion

[37] I find that M had discontinued possession of the buildings H used for farming the Mountain Lands. These buildings do not include the new workshop in

which M stored plant and various articles. I do not consider that M was dispossessed in respect of the Mountain Lands, the new workshop or the yard. I am of the view that the use that M made of the Mountain Lands, the new workshop and the yard was such that, as legal owner, he could not be said to have been dispossessed. In the circumstances, and particularly because of the relationship between H and M and the difficulty of dividing the Mountain Lands fairly, although M is entitled to slightly less than the moiety of the Mountain Lands, it is appropriate to order sale in lieu of partition.

[38] Finally, it is especially disappointing to see a family that has enjoyed such good internal relationships split asunder by a dispute over land and the subsequent legal proceedings. I urge the parties even at this late stage to stand back and see if it is possible to find an accommodation, which, even if it is not to their complete satisfaction, is one with which they can live. The litigation path will bring nothing but further heartache, upset and very considerable expense. It is still not too late to turn back, reach agreement and repair fractured relationships.