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

Delivered: **22-01-09**

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

**CHANCERY DIVISION**

**No. 2007/60419  
No. 2007/136088**

**NORTHERN IRELAND HOUSING EXECUTIVE**

**-v-**

**NOEL GALLAGHER**

**DEENY I**

[1] These proceedings arise out of the use by Mr Noel Gallagher of land at Creggan Hill on the edge of the City of Derry. By Writ number 2007/68419 the Northern Ireland Housing Executive seeks possession of lands situate at that location, in the townland of Glassagh and registered under Folio 20206 No. 23 County Londonderry. It seeks other reliefs including an injunction restraining the defendant from trespassing on to the said lands. A further claim by the Housing Executive was in relation to a field, adjoining the Bishop's Field beside a school off Circular Road in the same area but in the event the defendant Noel Gallagher did not assert any title to that land by way of adverse possession or otherwise. What he did do was to assert a right of way by adverse possession from the said Circular Road to the said Bishop's Field and that constituted the second element in the hearing before the court.

[2] Mr Dermott Fee appeared with Mr Aidan Sands for the Housing Executive and Mr Mark Orr QC appeared with Mr Foster for Mr Gallagher. The court had the benefit of helpful oral submissions from counsel in the course of the hearing. The case turned on whether Mr Gallagher had successfully run a title by adverse possession against either the Executive's field above described between Glassagh Road and Circular Road or their land for a right of way to the Bishop's Field nearby.

[3] It is convenient in this case to refer to the law relating to such a claim before considering the facts as found by the court. The topic has been the subject of recent consideration by the Court of Appeal in Re Faulkner [2003]

NICA 5. The relevant law is summarised by Carswell LCJ at paragraphs [12] to [14] of his judgment and I gratefully adopt that for the purposes of this judgment.

“[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 was 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.'"

[4] I would just add a little to that summary of the law. Firstly, section 53 of the Land Registration Act (N.I) 1970 was relied on by Mr Gallagher in his counter-claim. Secondly at paragraph [21] of his judgment Higgins J., dissenting, quoted a further paragraph as a summary of the views of Slade LJ in which he said that the trespasser seeking to dispossess the legal owner "should be required to adduce compelling evidence that he had the requisite *animus possidendi* in any case where his use of land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner". (That is a quote from Slade J in Powell's case at page 476).

[5] The matter was considered by the House of Lords in J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419; [2002] 3 All ER 865. The decision of Slade J in Powells case was cited with approval by Lord Browne-Wilkinson who delivered the principal Opinion of the House, subject to short concurring judgments. At paragraph 40 he pointed out that "there are two elements necessary for legal possession:

(i) A sufficient degree of physical custody and control ("factual possession");

(ii) An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession."

[6] At paragraph 41 Lord Browne-Wilkinson quoted the views of Slade J on factual possession in Powell's case at pages 470-471 which is already set out at paragraph 14(iii) of the judgment of Lord Carswell above. Lord Browne-Wilkinson said of that statement that he agreed with the statement of the law which is all that was necessary in that case.

[7] It should be noted that Lord Hutton in his judgment, at paragraphs [74] to [80], expressly quoted with approval the same passage from the judgment of Slade J in Powell v McParland at page 476 regarding the need for compelling evidence. I also note the words of Slade LJ when sitting in the Court of Appeal in Buckinghamshire County Council v Christopher Mounie [1990] 1 Ch. 623 (affirming Hoffman J) with regard to the need for very clear evidence in the factual context existing there. I mention these points for completeness but on the evidence before me it is not necessary to apply a stricter test than that apparently applied by the majority in Re Faulkner to form a view in this action.

[8] It was agreed between the parties that the onus of proof fell upon Mr Gallagher to prove his case and he was called as the first witness after the action was opened by Mr Fee and Mr Orr. Mr Gallagher was born 28 December 1949. He and his father had had a coal business in the city over the years. He also owned and took land as well and dealt in horses. I had the opportunity to consider Mr Gallagher and his evidence at close hand. He was the subject of a courteous and careful cross-examination by Mr Fee. His response to that care and courtesy was on many occasions a degree of evasiveness or braggadocio which was not persuasive. In the light of his demeanour and the answers given by him I concluded that he was not a witness whose evidence I could safely rely on unless there was some corroboration of it. However, Mr Orr contended that such corroboration existed, particularly in the evidence of Mr Patrick Doherty, a veterinary surgeon, now aged 76, who had visited horses owned by the plaintiff or his family and kept on the Creggan Hill from time to time over a long period of years. I have taken his evidence into account and also the evidence for the plaintiff in the form of the testimony of Mrs Ann Barr. I accept entirely the good faith and reliability of Mr Doherty and Mrs Barr and also of Mr Gerry Deeny although his evidence was only on a very secondary point.

[9] The thrust of the plaintiff's case was simply that they own the legal title in succession to the former Londonderry Corporation. They had built houses in the land up to and including Circular Road and they had no immediate use thereafter for this field lying behind some outdoor playing fields behind Circular Road. However, they now wish to build houses on the disused recreation area and the field is necessary to provide the necessary amenity land to facilitate the granting of planning permission for this further housing. In that way it has acquired some not insignificant value.

[10] Mr Gallagher's case was that he and his late father had been keeping horses on the field in question for decades. Initially they took the land from the former Corporation on payment of a small rent but in circumstances which were outlined, and seemed credible, they ceased to pay rent but continued to use the land. Has he shown that they exercised "a sufficient degree of exclusive physical control"? Has he shown that they had the intention of asserting ownership of the land, an *animus possidendi*? It seems to me that he has not succeeded in either regard. I briefly refer to the relevant factual matters.

[11] Firstly, he only built a fence around this land very recently. I find this was done just before and for some months after the issuance of proceedings. By his own admission earlier fencing had only been of a repair nature designed to keep animals in. Part of the fence had been replaced by the Army with his "permission", he says, but that does not assist him. While it is not a requirement that the person asserting adverse possession must actually build on the land or carry out other works of a similar nature it is certainly a helpful indicator both of the fact of ownership and the intention to possess the land. This case can be distinguished from that of *Faulkner* in which there was building, fencing and dredging of a channel over a period of years. There was no equivalent here. There was no contention that Mr Gallagher or his father here ploughed this land. There was a half-hearted suggestion that they might have put fertilizer on it at times but the documentary evidence in support of this was very slight. Indeed the slightness of the documentary evidence was a pointer against an alleged ownership of many decades.

[12] In particular, although Mr Gallagher was the owner of agricultural land otherwise, he had made no attempt at any stage to seek grant aid or set aside payment or more recently any single farm payment from his alleged ownership of the land.

[13] Although the fields are at the top of the Creggan Hill, and therefore quite elevated and exposed he had never built any structure, even of the simplest kind, to give shelter to his horses on the field. I accept that he did graze horses on the field from time to time but I do not accept that they were in such numbers or of such duration as he contended. While Mr Doherty, MRCVS, gave evidence of visiting horses fairly steadily over the years it must be borne in mind that he was speaking not only of this field but of the Bishop's field, which on the evidence is retained in the ownership of Dr. Hegarty, Bishop of Derry. Mr Gallagher grazes animals on that field, with the permission, whether reluctant or otherwise, of the Bishop. When Mr Doherty therefore speaks of visiting animals it seems to me that he is mostly speaking of seeing them on the Bishop's field, although not always. This is supported by Mr Gallagher's own admission that the quality of the land in Bishop's field is superior to that of the field contended for on the Glassagh Road. If he was really asserting ownership of this land I find it surprising that he never built

any physical structure at all to shelter horses on the land, particularly if he was doing so with the frequency and in the numbers that he contends for. When taxed about this point he said that he had put hardcore down on which to leave foodstuffs the animals. On balance I accept his evidence in this regard but it is clear, and I find as a fact, on foot of the oral evidence and the photographic evidence before the court that he was careful to put the hardcore beyond the hedge line of the Housing Executive field in an adjoining field owned by a Mr Doherty. That field was not securely fenced from the Executive's field in question and so the horses that were there tended to wander from one to the other. However, it seems significant to me that he did not chose to place the hardcore inside the fence into the Executive field which he said he was using as an owner. This is a pointer against his ownership in my view.

[14] Mrs Barr's evidence as to the number of horses she saw there is to be preferred to his evidence of larger numbers being there regularly. The presence of ragwort on the land and its clearly fairly poor condition adds to the paucity of invoices as indicating a lack of user which would convey a de facto ownership of the land.

[15] Furthermore, while he gave evidence that he had put a new gate at the Executive's field beside the Bishop's Field and put a padlock and water containers there at some stage, there was no such evidence from him about the field or gate at the Glassagh Road; in particular there was no attempt to padlock that field. He himself admitted that from time to time local people would walk themselves or walk dogs or even hunt with dogs across the field in question. He was not succeeding in excluding them nor did he try to do so. Indeed, at one point he grew potatoes on part of the field which might have supported his case but he alleged that those were dug up and removed by local people. He did not continue with that experiment. For all these reasons I conclude that what Mr Gallagher has shown is some use, which might be described as opportunistic, of a field which the Executive was not actively using but that he has not established sufficient exclusive physical control nor indeed any intention to exert the same until very shortly before the issuance of proceedings by the Executive. He falls very far short of achieving the necessary 12 years adverse possession. The executive is entitled to an order for possession of the lands.

[16] In a defence and counterclaim served 31 March 2008 to the action 2007/136088 the defendant Noel Gallagher counterclaims for a declaration that he is entitled to a right of way over and along that portion of the lands outlined in yellow on a map annexed to the statement of claim, with or without vehicles and/or livestock for the purpose of gaining access to and egress from the neighbouring lands shown outlined in red on the said map and of which the defendant is in occupation. I confirm that the defendant was no longer claiming ownership of lands bounded in blue on one of the



maps attached in the papers. He is in possession, however, of the adjoining Bishop's field. Mr Fee QC accepted that that was sufficient for him to attempt to run a claim for right of way. It does not seem to me however that his evidence is sufficient for that purpose. Off the Circular Road there is a spur and between that spur and the field there is initially a path and then a grassy area. The indications are strongly that the defendant and his family, including now a son, were making their way from the public road across that grass but that they were doing so into the blue field, which he now admits the Executive owns. That is where we see a gate and padlock. He attempted to assert that there was evidence of exercise of a right of way into some kind of informal opening in the hedge into the Bishop's field but that indication by him fell far short of satisfying the court on the balance of probabilities that he had for even a few years let alone for 20 exercised a right of way from the public road into that field. It seems to me clear that the blue field was not fenced from the Bishop's field. In practice Mr Gallagher has been using both and he has, not surprisingly, used the modern gate into the blue field, which is nearer the road, as a means of access. I therefore find against him on his counterclaim with regard to the right of way also.

[17] If it was thought necessary by the Housing Executive I would be agreeable to granting them such injunctive relief as they require over and above the order for possession, to protect their ownership of the land between Glassagh Road and Circular Road and the blue field beside the Bishop's field.