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

Delivered: **04/04/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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NOTICE OF APPEAL UNDER COUNTY COURTS (NORTHERN IRELAND) ORDER 1980

No. 07/051983/08

IN THE COUNTY COURT DIVISION OF ARDS BY THE COUNTY COURT JUDGE

BETWEEN:

LAWRENCE PATTERSON
AND
DAVID SMYTH

Plaintiffs/Appellants;

-and-

ROBERT JAMES SHAW
AND
DEIRDRE KATHLEEN SHAW

Defendants/Respondents.

_____

HORNER J

[1] This is an appeal from the decision of the County Court Judge for the Division of Ards dated 9 November 2016 whereby he dismissed the application of Robert James Shaw and Deirdre Kathleen Shaw ("the Shaws") to commit Lawrence Patterson ("LP") but ordered LP to reinstate the "old right of way" within three months from 23 September 2016. David Smyth ("DS"), his neighbour who lives at the end of the same lane which includes the old right of way, joined LP for the appeal by order of Master Hardstaff. There was another order made by the County Court Judge but that was to involve a judicial review. No such judicial review proceedings have been instituted and the court has heard nothing on this particular issue.

[2] Unfortunately this case has had a sad history as disputes over rights of way often do. It is a story of what can happen when neighbours fall out. Instead of enjoying living in the attractive County Down countryside, the parties have been and remain locked in a bitter and acrimonious dispute about the use and configuration of a short stretch of an undistinguished country lane, which I will refer to as "the old right of way" in this judgment. Compromise appears to be regarded as surrender. The different proceedings down the years, and there have been too many to mention, have clearly hardened the hearts of those participating in them. Any victory however small seems to be a cause for celebration. Any defeat is regarded as a disaster. The consequence of such attitudes is unending, expensive litigation, enriching the lawyers but impoverishing the parties. Indeed, the Shaws have been made bankrupt on account of the costs they owe to LP. As the costs awarded to LP could not be recovered from the Shaws, LP chose not to have representation at the last County Court hearing. However, LP and DS were represented by solicitors and counsel on this appeal. The Shaws remain self-representing.

Background information

[3] The Shaws' property is served by the old right of way, which as I have said comprises part of a laneway which also serves the properties of LP and DS. Directly across from the Shaws' property is the McConnells' old property which now lies vacant. It includes a garage which opens out onto the old right of way and across it there is an area known as 'the hammerhead' which allows a car reversing out of the garage to turn and proceed on down to the adjacent public road. Up the laneway past the old right of way there is LP's property. Past LP's property and further up the laneway lies DS's property.

[4] The McConnells' property comprised two Land Registry folios. This was sold in 2014 when DS became the registered owner of these two folios in November of that year. These two folios contained the laneway which included the old right of way. DS and LP entered into an agreement to create a new jointly owned folio. This comprised the old right of way and also additional land on which DS and LP constructed a new right of way which runs broadly parallel to the old right of way until it joins up with the old laneway. The old right of way and the new right of way are now separated by a retaining wall and fence because they are at different levels. This new right of way was designed to provide access along the entire right of way for all vehicles which LP and DS might need for their respective farming businesses. Access to the old right of way has been and continues to be limited by various restrictions imposed in a County Court judgment of Her Honour Judge McReynolds and which I will discuss later on in this judgment. The new right of way was no doubt designed to end the legal wrangling which has been taking place for over 20 years. Unfortunately it did not have the desired effect because the Shaws now claim that this new right of way wrongfully interferes with the old right of way. They claim that part of the land shown on the folio as comprising the burden of the old

right of way is captured by the new right of way. Mr Shaw also complains that it is narrower, at least in places, and it was now not possible for two vehicles travelling in opposite directions to pass because the area immediately adjacent to the McConnells' garage had been taken up and can no longer be used as a layby. However it is not disputed that the new right of way will take traffic away from the old right of way.

Litigation history

[5] There has been much litigation which relates directly or indirectly to the old right of way. There have been at least 10 separate claims and/or appeals. I intend to provide only the briefest and most general of overview of the history of the litigation to date.

[6] In 1988 legal proceedings commenced with a dispute about the whole laneway including the old right of way. Elizabeth Meadows, who lived in the property now occupied by the Pattersons, established a right of way along the lane (which included the old right of way) from the adjacent public road on foot and with vehicles.

[7] In 1997 proceedings were commenced between LP and the McConnells about the whole right of way from the public road to LP's property. This ended in an agreement about (1) the width of the right of way, (2) fencing of part of the right of way and (3) that the engineers would produce a map to reflect their agreement.

[8] In 2008 proceedings were commenced between LP and the Shaws as to LP's use of the right of way. The hearing lasted four days in May 2008. Her Honour Judge McReynolds held that as between the Pattersons and the Shaws, and solely in respect of the old right of way, that the size and dimensions of any vehicle using the old right of way was to be limited to 7 feet 9 inches wide, six tonnes in weight and 25 feet in length.

[9] These proceedings were appealed to the High Court where they came before Deeny J. As in the present case he was submerged with papers from both sides. The case was reviewed many times. Mediation was tried but was unsuccessful. Relationships had deteriorated. Complaints were made to the PSNI, to public officials, Assembly members, MPs, the Lord Chief Justice and eventually the Prime Minister. Deeny J struck out the appeal as he considered it to be an abuse of process and awarded costs against the Shaws.

[10] Further proceedings were launched by the Shaws against the Pattersons and against James J Macaulay, solicitor, before McCloskey J. There were, inter alia, disputes about the maps which had been used and claims of mapping errors. The final result was that the claim by the Shaws for defamation, fraud and collusion was thrown out.

[11] There are other proceedings brought by the Shaws to set aside a statutory demand. These proceedings went all the way to the Court of Appeal. As a consequence the Shaws were made bankrupt. In January 2015 they returned to the Chancery Court seeking to re-open the order of Mr Justice Deeny and claiming inter alia an infringement of Her Honour Judge McReynolds' decree. Deeny J held that the Shaws did not have the locus standi to pursue their application on 2 January 2015. He stayed the proceedings until further order of the court.

[12] The Shaws then issued the present proceedings by way of notice of motion in the County Court for committal for contempt, claiming LP had breached the 2008 order of Her Honour Judge McReynolds. No ordinary civil bill or equity civil bill was issued. At the hearing before the County Court Judge both sides had no legal representation. The Shaws were bankrupt. LP had obtained orders for costs against the Shaws but he has been unable to recover his costs. He decided not to risk incurring further costs and therefore did not instruct solicitors to act for him in the County Court. The Judge dismissed the committal application. However, he then ordered that Lawrence Patterson "do within three months from 23 September 2016 reinstitute the right of way in accordance with Her Honour Judge McReynolds order and map dated 22 January 2009". He awarded neither costs nor damages. It was this order that has been appealed by LP and to which DS has been joined as an appellant with his consent. It is the subject of the present proceedings before this court. The Shaws cross-appealed but as I have noted this cross-appeal has gone nowhere. Indeed, I am unable to make any sense of the final order. In any event no judicial review has taken place and the cross-appeal has not been the subject of any argument or any judicial determination by this court.

Discussion

[13] As I observed there was no legal representation on either side before the County Court when the last order was made on 9 November 2016. The County Court is a creature of statute. Any appellate court must of its own motion take any point as to its own appellate jurisdiction or as to the lower court's jurisdiction, even if the respondent refuses to argue the point: see Re Rowan Hamilton [1927] NI 132 and Valentine on Civil Proceedings: The County Court at 19.03. Should the Appellate Court conclude that the lower court does not have jurisdiction, then the Appellate Court should allow the appeal and substitute the order that the lower court should have made: see Benson v NIRTB [1942] AC 520 and see also Valentine on Civil Proceedings: The County Court at 19.03.

[14] In this case the Notice of Motion for Committal was dismissed. The County Court order then went on to require LP to reinstate the right of way. The court had no jurisdiction to do so. There was no civil bill or equity civil bill before the court seeking any such relief. There was no valid originating application that would have given the County Court Judge the power to make such an order. The right under Article 34(1) of the County Courts (NI) Order to grant such relief as an injunction can only be exercised if the plaintiff has "properly invoked the court's jurisdiction under

some process of the County Courts Order or other statute": see 2.86 of Valentine. An example of where this can be done is where an equity civil bill has been issued under Article 14 of the County Courts (NI) Order. In the absence of a valid originating application, the County Court Judge does not have the power to grant an ancillary remedy such as a mandatory injunction: see Thornton v McTaggart [1910] 44 ILTR 119. Accordingly, this court has no option but to allow the appeal. The County Court Judge in this case did not have the jurisdiction to make the order he did requiring reinstatement of the old right of way.

[15] In case I have reached the wrong conclusion in my determination of the issue of jurisdiction, I propose to set out in brief terms why I would have reached the same conclusion on the merits.

[16] The claim made by the Shaws is predicated on the basis that there has been disturbance and/or interference with the old right of way that the Shaws enjoy over what is now LP's and DS's land, formerly owned by the McConnells.

[17] The legal test as to what can give rise to a cause of action of disturbance of a right of way does not depend on whether the remedies sought is abatement or an action for nuisance: see Paine and Co Limited v St Neots Gas and Coke Co [1939] 3 All ER 812 at 823-4. Not every interference with the full enjoyment of an easement will amount in law to a disturbance. Gale on Easements 20th Edition at 13.03 states that in order for a plaintiff to prove that an interference amounts in law to a disturbance it is necessary to prove:

> "(1) His title to the easement by express or implied grant or reservation or prescription;
>
> (2) The scope of the easement, which in the case of an express easement will depend on the construction of the grant, in the case of an implied easement, on the circumstances giving rise to the implication and, in the case of prescription on the nature of the use made of the servient land at the beginning of and throughout the period relied upon;
>
> **(3) That there has been a substantial interference with the right to which he is entitled**." (Emphasis added)

[18] In B&Q Plc v Liverpool and Lancashire Properties Limited [2001] 81 P&CR 20 the court had to consider whether a proposal to construct an extension which would reduce the area of the yard and the turning circle available to the plaintiff's vehicles, albeit that turning facilities were available to the plaintiffs within their own demise, would constitute disturbance. Blackburn J set out the following propositions of law:

> "(1) The test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue the use of the whole of what he contracted for is reasonable;
>
> (2) It is not open to the grantor to deprive the grantee of his preferred modus operandi and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse.
>
> (3) If the grantee has contracted for the **relative luxury** of an ample right, he is not to be deprived of that right, in the absence of an express reservation of a right to build upon it, merely because it is a relative luxury and the reduced, non-ample right would be all that was reasonably required;
>
> (4) The test is one of convenience and not of necessity or reasonable necessity; provided that which the grantee is insisting upon is not unreasonable, the question is **can the right of way be substantially and practically exercised as conveniently as before**?;
>
> (5) The fact that an interference with an easement is infrequent and, when it occurs, is relatively fleeting, does not mean that an interference cannot be actionable."

Gale on Easements at 13-11 states:

> "In deciding what is a substantial interference with the dominant owner's reasonable user of the way, all the circumstances must be considered; for example, the reciprocal rights of the persons entitled to use the way; also the case of persons carrying burdens along the way."

[19] Mr Hannaway, the principal of Hannaway and Hannaway, land and chartered engineering surveyors, whose practice specialises in land and boundary determination, mapping and measurements gave evidence to the court. He was a most impressive witness. He was able to explain how the advance of technology has made maps much more accurate. He is able to measure angles and distance to one

eighteenth of a degree accuracy. The maps he is able to produce are accurate to 2-3 mms.

[20] Mr Hanaway was asked to answer three questions in his report. These can be summarised as follows. They were:

(i) Could a vehicle of the size determined by Judge McReynolds traverse the old right of way as presently constituted?

(ii) Has there been a reduction in the width of the old right of way either in the bottom section or further on up that would reduce the old right of way given its present profile compared to what was there previously?

(iii) On whose lands has Mr Shaw laid the concrete blocks?

[21] Mr Hannaway answered the first question as follows, namely:

> "I have shown the shape of a vehicle at the greatest permitted size on our mapping at appendix E. I would note that Mr Shaw has constrained the width of the lane by the placing of concrete blocks. These blocks are outside his [property's boundaries] and are trespassing on the land identified as a right of way contained within [the folio jointly owned by DS and LP].
>
> It is my opinion that a vehicle of the stated size can successfully traverse the laneway as it now is and could do so with even greater ease should Mr Shaw place concrete blocks correctly at the edge of his folio boundary."

[22] In answer to the second question he says:

> "When one compares the laneway as it is with what was there before as recorded by Brennan (a consulting engineer who prepared a report and map in 1997) and the Ordinance Survey for Northern Ireland, *the laneway is currently wider than before*. It would be wider still if the obstructions placed by Mr Shaw were correctly positioned wholly on his own land."

[23] In response to the third question he says that in his opinion the blocks placed by Mr Shaw had been placed outside the lands owned by the Shaws and are located on the folio now owned jointly by LP and DS.

[24] I had an opportunity of visiting the locus. There is no doubt that because of the construction of the new adjacent right of way that a sloping section adjoining the adjacent public road and immediately adjacent to the entrance to the old right of way and which is shown on old photographs as being covered with trees and shrubs, cannot now be accessed. It is also true that this is shown on the folio as being a burden and forming part of the old right of way. But regardless of what was shown, this section could never have been used as part of the old right of way to access the public road. It was both too steep and covered with impenetrable trees and shrubs. The construction of the new entrance with the removal of the shrubbery provides a much better sight line to the right for emerging motorists. I have looked at the old photographs and have no doubt that the entrance to the old right of way and the old right of way itself are improved and they can now be used substantially more conveniently by the Shaws than before.

[25] There is another area further up the old right of way at the top of the slope but before the turn off into the Shaws which was immediately adjacent to McConnells' garage. This is an area on which Mr Shaw claims a Landrover was parked for some period of time. It is again shown as forming part of the right of way but it is a thin slice of land adjacent to the well-defined track which formed the old right of way. It was argued this was never part of the old right of way. It was used, even on the Shaws' evidence to park motor vehicles. There seems much force in this submission. It also seems to me that with the new sight lines it is highly unlikely that any vehicle will enter the old right of way when there is a vehicle established on the old right of way. There should be no difficulty for the vehicle at the bottom waiting until the vehicle about to descend the slope exits on to the public road. However if I am wrong in this assessment which is shared by Mr Hannaway, there is the area of the hammerhead on the opposite side of the old right of way to the garage. A vehicle is able to pull in here, if required. Mr Shaw claimed that this was his land but it clearly is not as is demonstrated by the maps of the various folios. It is outside the land which he owns. It was designed to permit vehicles to reverse out of the McConnells' garage and to turn round so that they could traverse the right of way and exit on to the public road. Both LP and DS, who own the hammerhead have made it clear that they agree to Mr Shaw and/or his visitors being at liberty to use the hammerhead as an overflow area in the unlikely event that this is required to allow two vehicles to pass. Further, there can be no doubt that the Shaws do not own the hammerhead area and that the blocks that have been placed on the old right of way immediately adjacent thereto are unnecessarily and unlawfully restricting access and egress along the old right of way. It is also clear that the old right of way has not been restricted by the new right of way and is at least as wide as before and probably wider. Thus, making it easier for vehicles to pass and repass.

[26] I accept Mr Hannaway's expert evidence. The Shaws did not attempt to challenge it and asked him no questions. I am not surprised. I visited the location and both drove and walked up and down the old right of way. There can be no doubt that the old right of way can now be substantially and practically used more

conveniently than before. Furthermore, access and egress along the old right of way will be even better when the Shaws remove the blocks which are clearly situate on land owned by LP and DS and which constitute a trespass and/or a nuisance.

[27] During the course of evidence the Shaws claimed that they had been ambushed by LP and DS. They had no idea that the hammerhead did not belong to them. They indicated that if that was the case they were going to issue proceedings against their previous solicitors and/or estate agents. Whatever the Shaws' perception, one fact is absolutely clear - the hammerhead does not form part of the land which they own. LP and DS own the hammerhead and in the spirit of compromise are content that those using the old right of way may in the future make use of it in the unlikely event that a vehicle will be required to permit another vehicle to pass on that section of the old right of way. This represents a substantial improvement on what existed before.

Conclusion

[28] The court grants the appeal. The County Court Judge had no jurisdiction to make the order he did. In any event, even if he did have jurisdiction, the circumstances are such that there was no evidence to warrant a conclusion that the old right of way had been disturbed. It has, as a matter of fact, been substantially improved. It can now be used more conveniently than before. Those using the old right of way now have better sight lines, the old right of way is now wider, especially when the blocks placed upon it by the Shaws are removed, and following the construction of the new right of way, there will now be less traffic upon it.

Land Registry

[29] After the evidence had concluded and just before I was about to give judgment the Shaws asked if the court would investigate the changes in the Land Registry (and Ordnance Survey) maps of their property and of the old right of way. Accordingly, Mr McCoy, who is a Deputy Registrar at the Land Registry, attended court and gave oral testimony. His evidence can be summarised thus:

(a) There is no doubt the Land Registry map of 2017 of the old right of way and the Shaws' land and the 2016 and earlier maps of the Shaws' land and the old right of way differ.

(b) The right of way is differently shaped. The hammerhead is smaller and there are other minor but obvious changes.

He drew attention to Rule 149 of the Land Registry Rules (NI) 1994 which states:

"**Revision of registry map and verbal description**

> 149-(1) The Registry map with a verbal description of land in the folio may be revised at any time upon lodgement of such evidence and after the giving of such notices (if any) as the Registrar considers necessary.
>
> (1A) Where it has been brought to the attention of the Registrar that the positional accuracy of any folio boundary has been effected by a revision of Ordnance Survey digital mapping detail, the Registrar may, after making such enquiries and serving such notices (if any) as he considers necessary, arrange for such folio boundary to be reinstated as accurately as possible.
>
> (2) The Registrar may revise the verbal description of the land in the folio and make the description conformable with the registry map, whenever the latter is revised."

[30] Mr McCoy explained that the folio maps were for information only. They were constantly being updated and upgraded. They had been realigned in light of the increasingly accurate ordnance survey maps which were being produced. This was an ongoing project. The realigning takes place within certain tolerances. Mr McCoy freely admitted that "the rules and tolerances used will not provide perfect results in every case". However, the Land Registry will consider reasonable complaints, look at the maps and, if a complaint was correct, would furnish amended maps to align the boundaries. If there was a continuing dispute then a court order might be required.

[31] There is no doubt that the Shaws saw some nefarious forces at work in the changes to the maps affecting their boundary and the old right of way. They were concerned that there would be further litigation because a wall owned by them had, they claimed, been affected by a realigned boundary. I am satisfied that there was nothing sinister going on and that the slightly different configured maps represented positional improvement reflecting more accurate mapping techniques and technology.

[32] It is also clear that this complaint is a diversion from the present proceedings. While I have determined that the County Court had no jurisdiction, I have also attempted to rule on the merits of whether there has been some disturbance and/or interference of the old right of way. These mapping variations, although the Shaws appear to regard them as very important, do not assist the court in determining whether the old right of way has been the subject of disturbance and/or interference. The Shaws' ability to use the old right of way has not been adversely affected by any of the minor mapping amendments. The Shaws indicated they intended to embark on further proceedings about the realignment of the right of way and/or the boundaries to their property. I would counsel them not to do so. The alterations are

minimal. They will simply end up chasing a chimera. They will obtain neither satisfaction nor peace of mind, as I think they probably know but are reluctant to admit. For their own health both physical and mental, they should desist from further litigation and accept and enjoy what they have.

Further thoughts

[33] There has been endless litigation over this unprepossessing country laneway in the heart of rural County Down. Huge effort and expense have been expended by all sides. While the lawyers involved may be richer as a consequence, the parties are undoubtedly poorer. Relationships have deteriorated. I would urge the parties to see reason, to make up and put these matters behind them before they completely destroy their lives. Previous litigation should be forgotten and the desire to settle old scores foresworn. Memories of past disputes have left bitterness and rancour and no doubt caused financial pain. The Shaws appear to be decent hardworking people, so far as I can judge, undone by a dogged, relentless and foolhardy pursuit of what they perceived to be their legal rights. The Shaws now effectively enjoy their own right of way which is demonstrably better than the one which existed before the construction of the new right of way. Each party should treat the decision of the court as a line in the sand and look to the future not the past. It is only then that they will be able to enjoy their respective properties to the full.

POSTSCRIPT

I provided both parties with a draft judgment and an opportunity within a period of 24 hours for the parties to draw to my attention any typographical errors etc. The defendant's solicitors pointed out that:

(i) Mr Smyth did not live at the end of the laneway.

(ii) The house where the McConnells lived was not vacant.

These are assumptions I had made from the evidence, but they in no way affected my conclusion on the main issues. I invited the Shaws to agree that they were correct. The Shaws did not do so but claimed that there were other factual errors that went to "the heart of the 10 year alleged dispute". They wanted leave to make submissions in respect of these factual errors. In the circumstances I have decided to make the draft judgment the final one.