

**Neutral Citation No. [2005] NICH 3**

*Ref:* **CAMF5283**

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

*Delivered:* **26/05/05**

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

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**CHANCERY DIVISION**

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**BETWEEN:**

**GUY PATRIC SCOTT-FOXWELL AND JULIAN BASIL SCOTT-FOXWELL**

**PLAINTIFFS;**

**-AND-**

**THE RIGHT HONOURABLE THE LORD BALLYEDMOND,  
NORBROOK LABORATORIES LIMITED**

**-AND-**

**BALLYEDMOND CASTLE FARMS LIMITED**

**DEFENDANTS.**

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**CAMPBELL LJ**

[1] Between 1950 and 1961 Guy Patric Scott- Foxwell and his brother Julian Basil Scott-Foxwell lived, with their parents, in a cottage on the Ballyedmond Estate on the shores of Carlingford Lough. In 1961 the family left Northern Ireland and went to live in England,

[2] In the early 1970's the two brothers took the opportunity to purchase the cottage and garden from members of the Nugent family who were then the owners of the Ballyedmond estate. By an indenture of conveyance of 14 January 1974 they became joint tenants in fee simple of the property.

[3] Subsequently the remaining estate was divided into two parts. In 1982 Lord Ballyedmond, as he is now, purchased from the owner of one part of the estate, Ballyedmond Castle and the surrounding 40 acres. The other part was purchased in October 1985 by Norbrook Laboratories Limited, of which Lord Ballyedmond is the chairman and managing director.

[4] The cottage and its garden to which the Scott-Foxwell's acquired the paper title in 1974 form the subject matter of these proceedings. They lie to the west of a lane leading from the county road to the shores of Carlingford Lough. The northern and western boundaries of the property are contiguous to a large field, referred to in evidence as the Shore Field. To the south there is a low wall where the garden meets the Lough shore.

[5] Since October 1985 title to the Shore Field has been vested in Norbrook Laboratories Limited with Ballyedmond Castle Farms Limited occupying the field as a tenant since 1988.

[6] On 19 October 2001 the Scott-Foxwells issued the present proceedings asking for a declaration that none of the defendants had any interest in or entitlement to the cottage and garden and for an injunction to restrain them from trespassing on the land. In their defence the defendants asserted that the Scott-Foxwell's title to the cottage and garden had been extinguished.

[7] Mr Lavery QC, appearing with Mr Michael Keogh for the Scott-Foxwells, informed the court that the proceedings are now brought in the name of Guy Patric Scott-Foxwell only, as his brother has recently passed his interest to him.

[8] The parties agreed that the onus of proof was on the defendants and so they began.

*The issues*

[9] The present proceedings were issued on 19 October 2001 and two issues arise on the pleadings. Did the defendants or any of them dispossess the Scott-Foxwells prior to 19 October 1989? If so, did they remain thereafter in possession for a period of 12 years?

*The acts of physical possession relied on by the defendants*

[10] In the pleadings and in their replies to notices for particulars the defendants rely on a number of matters as evidence of factual possession by them. These are in summary form;

(a) *The erection of fencing on the lands*

The defendants say that when the land was acquired in 1985 a substantial area of it needed fencing, including the erection of gates and that this was carried out by early 1986. It is stated that the gate leading from the laneway to the lands was locked within the same period of time.

(b) *The erection of the gate on the lands*

This is stated to have occurred as set out in (a)

(c) *The erection of "No Shooting" signs on the land in dispute.*

These signs are described as having been put up on the estate and especially on the part of the disputed land facing the lane.

(d) *The carrying out of a programme of maintenance.*

This programme it is said included clearing up the debris lying around the cottage. Stones in the hedge facing the lane were put back in place and briars were trimmed. Wire that made it difficult for livestock to enter the cottage for shelter was removed. Bales of hay and silage were occasionally left close to the cottage and inside it for livestock to feed on in adverse weather.

(e) *Regular walking of the lands.*

This is claimed to have included walking on the land while rounding up livestock and when hay and silage was put into the cottage for livestock. Also when the cottage was entered for the purpose of counting livestock and when maintenance work was carried out.

(f) *Running livestock on the lands.*

From the date of possession in 1985 it is claimed that livestock grazed on the lands all year but mostly in spring, summer and autumn.

(g) *Housing of livestock on the lands.*

This it is said occurred throughout the year and in particular when the cottage was occupied by young livestock being fed in bad weather.

(h) *The removal of old fencing.*

Such fencing as existed when the defendants went into occupation was lying flat and these remnants were removed as they endangered the welfare of livestock.

(i) *The assertion of ownership in October 1998*

Mr Scott-Foxwell visited the lands in October 1998 and he was challenged by Lord Ballyedmond who claimed ownership of it.

During the trial the following acts, additional to those pleaded, were relied upon;

(j) *The placing of feeders on the land*

It was claimed by the defendants that they placed feeders for livestock on the land and that a trailer carrying silage was, from time to time, parked on the land.

#### *The defendant's evidence*

[11] Mr R. C. F. Jones is a veterinary surgeon and he was a founder member of Norbrook Laboratories Limited in the early 1960's. At that time he was in private practice and in 1984 he began working full-time with the company, holding the position of veterinary director. The company has carried out research and commercial farming on the lands at Ballyedmond since they were purchased. Responsibility for the welfare of the animals, good husbandry and the treatment of illness lay with Mr Jones. On occasions he was there all day taking samples and at other times he was there for shorter periods. It was part of his brief to walk the lands at unspecified times to inspect the stock.

[12] The Shore Field, which is almost 11 acres in area, was used for grazing, silage and general farming. Mr Jones said that in 1986 there was no demarcation between the cottage garden and the Shore Field other than a few strands of barbed wire which were overgrown with grass. It was possible to drive in a Land Rover from the field into the garden. He remembered distinctly seeing a feeder for animals in the garden about 10 yards from the front of the cottage. He assumed that it had been placed there as this was a sheltered area. The feeder was not in the garden on a permanent basis, and he was unable to say when it was put there or when it was removed. The area surrounding the feeder became trampled down and there was animal

excrement in the general vicinity of it. The machinery used to make silage in the Shore Field was not brought into the cottage garden as the grass was flattened and would be difficult to cut and there was a danger that the machinery could become entangled in the barbed wire and damaged.

[13] Mr Jones recollected treating two young calves, for enteritis, in the cottage in the mid to late 1980s. He also recollected some six months later driving down the lane from the county road to beside the cottage and climbing over the gate, with his equipment, to treat a cow with milk fever that was lying close to the cottage. He described the gate that he climbed as being made of rusted tubular galvanised metal and looking as if it had not been opened for years. It was covered with brambles and secured with cord. He said that sometimes animals were put in the cottage so that they could be treated there and it was also used as a small-scale store for one or two bales of hay. It was far from perfect as an environment for treating animals and it was used on a temporary basis in an emergency until the animal could be moved to a more suitable place. He said that he had seen animals in the cottage once in a period of some 20 years.

[14] According to Mr Jones when a Dr Paul Capstick came to work for Norbrook Laboratories about 1984 he was interested in buying the cottage and Lord Ballyedmond told him that it would not be for sale. When Mr Jones himself wished to buy it, 10 to 15 years later, Lord Ballyedmond made it clear to him that it was not for sale.

[15] Mr Jones described Lord Ballyedmond as being fastidious about the way in which his property and that of his companies is maintained, requiring this to be to a high standard. He agreed that nothing was done to the cottage over the years though it was in a dilapidated state and the garden, which could easily have been brought up to the same standard as the adjoining Shore Field, was left untended. He accepted that since these proceedings were issued the garden has been brought up to the standard of the adjoining Shore Field and has now become part of it. He suggested that the previous lack of attention to the cottage and garden was due to the fact that Lord Ballyedmond, as the owner of a number of properties, has to have a management programme with an order of priorities.

[16] Mr Trevor Russell lives just over half a mile from Ballyedmond Castle and he is the owner of land on the opposite side of the lane to the cottage and garden. Between March 1963 and October 1985 his father took the Shore Field (which they knew as the Sea Field) from the Nugent estate and used it for grazing and silage. He and his father made another entrance into the field further up the lane from the cottage. The gate at the entrance to the cottage from the lane was rusted and falling apart and always tied up with bull wire. Prior to 1985 there was a high hedge beside this gate though it was not as high at the lower end towards the shore. When Mr Russell and his father

farmed the Shore Field they did not use the disputed area which was then fenced off with four or five strands of barbed wire. He was unsure about the boundary with the field at the rear of the cottage which was overgrown.

[17] Mr Russell said that the cottage was known to him as Scott-Foxwell's. When he was very young he knew Mr Scott-Foxwell senior and also one of his sons, who fished out of Kilkeel. He knew also that the sons bought the property between 1974 and 1985 though he never saw them there when he farmed the Shore Field. He said that he is on his own land, on the opposite side of the lane to the cottage, at most three times each year when he is cutting silage. He has not seen the Scott- Foxwells on any of these visits.

[18] Since he and his father ceased to be tenants of the Shore Field in 1985 Mr Russell has not been in the field. He said that the hedge at the side of the lane has been trimmed, more at the sides than at the top. He thought that this work was carried out by Brendan Murray, possibly with his brother. The entrance gate at the cottage has now been replaced with a galvanised one but he is unable to say when this took place.

[19] Mr Niall Sloan lives just over half a mile from the disputed land. He travels down the lane from the county road and across the foreshore to the east to reach his own lands. He keeps sheep on his lands and in the past he was down the lane once or twice a week and in the last two years he has been down it every day. Mr Sloan said that the cottage and garden are always referred to as Foxwell's land though he does not know them.

[20] In the past 8 years Mr Sloan said that he has seen cattle in the cottage garden probably twice. He is unable to say if they were grazing there but they were in that general area and he did not see any fencing to keep them out.

[21] Mr P.B. Murray lives close to the entrance to the lane from the county road. He is a farmer and agricultural contractor and his wife is a manager with Norbrook Laboratories. His land adjoins Mr Russell's and he owns a building beside the shore, where he wintered cattle. This brought him down the lane everyday in winter though not in the past few years. After the Russells' tenancy of the Shore field ended Mr Murray's sheep strayed along the shore and into the garden and he also saw sheep and cattle from Ballyedmond in there. They were not there all the time but possibly two or three times a year.

[22] Mr Murray said he and his brother cut the hedges for a number of years on both sides of the lane for their own benefit and continued to do so for a few years after Norbrook bought the Ballyedmond property until they obtained their own machinery. Lord Ballyedmond in his evidence did not agree with this and he said that his employees cut the hedge on the east boundary of the lane as was necessary from the moment when the lands were

purchased. The gate at the entrance to the cottage from the lane was, according to Mr Murray, made from wrought iron and was replaced about 8 or 10 years ago and there has been a chain on it for 7 to 10 years. Initially, as a contractor for Norbrook, he cut hay in the Shore Field. At that time the disputed area was fenced off from the field but the fence deteriorated after a few years.

[23] Mr Murray said that his father always referred to the cottage and garden as Foxwell's and that people from the Killowen Road, including his mother, used to go in to the garden to pick gooseberries without anyone objecting. Pheasant were introduced into the estate some 10 to 15 years ago and signs were then erected at the bottom of the lane prohibiting trespassing and shooting. He said that two or three times a year he saw cattle that had strayed into the cottage garden.

[24] Lord Ballyedmond gave evidence that when the company bought the land in 1985 it was made clear to him that the purchase did not include the small area of the cottage and garden. He believed at all times that although it was not part of the purchase, it formed a part of the estate and had been left unattended. He asked Mr Lennox Cotton, the solicitor acting for the vendors, and Commander Nugent, one of the vendors, for the names of the owners of it as it was of interest to him. Their obfuscatory response, as he described it, was on the lines that they had not seen the owners for years and no names were forthcoming. While he did not make a conscious decision to acquire the land he knew that if he continued to be in open possession of it for 12 years he would acquire title to it. If in the interim anyone claimed ownership he realised that he would have had to acknowledge their title. So he went into possession and did not make any effort to discover the identity of the legal owners and assumed that the owners had abandoned it. From 1985 to the present he has regarded himself as the owner.

[25] Although he was aware that others referred to the land as Scott-Foxwells' but he did not know them and it was not until 1998 that he met Patric Scott-Foxwell on the land. On this occasion Mr Scott-Foxwell had a saw in his hand and was cutting branches from the hedge to make a little fence along the boundary between the cottage garden and the Shore Field. Lord Ballyedmond said that he had this removed.

[26] His evidence was that when his company acquired the Shore Field there was no demarcation between it and the cottage garden nor was there anything of significance between the garden and the shore of the Lough. There was a gate in the lane which was old and rusty and people climbed over it to trespass and shoot on the land. He had it refurbished almost immediately after he purchased the property and it was locked and secured and barbed wire was rolled across the top. The boundary was also secured and in late July and early August 1989 the fences from the road to the shore

were improved by a Phillip Barclay, an employee of his at that time. The hedges were cut from the time of purchase and signs forbidding trespassing and shooting were also erected. At the end of February or early in March 1988 Philip Barclay replaced the old gate that had been refurbished, with a new one. Lord Ballyedmond said that on the evening before he gave evidence he had spoken to Philip Barclay who is living in Portugal.

[27] Lord Ballyedmond said that in the past the cottage had been badly vandalised and that when he saw it first the roof was falling in and there were no windows and only rotten frames. Loose slates and timber that could be a danger to livestock were cleared away but the cottage itself did not merit any maintenance. Children and young people used to come in from the shore and it was in order to deter them that the briars and thorns in the garden were left untouched. The cottage was used occasionally to store bales of hay and new feeders were placed in the garden for livestock in the winter of 1986- 1987. These were not removed when the season was over and only replaced when they were worn out. In addition there were occasions when a mobile silage trailer was brought in to carry feed for animals though it was not kept there permanently. His recollection of the feeders and trailer was revived at a consultation when he was shown an aerial photograph which will be referred to later.

[28] The high hedge at the bottom corner of the garden was described by Lord Ballyedmond as providing shelter for animals when an east wind is blowing up the Lough, and he said that this together with the cottage makes it a good area for calves. He himself walked the lands once every few weeks and he noticed that the garden had become badly cut up with the number of livestock using it.

[29] From 1991 formal meetings were held to manage the estate and minutes were kept of these meetings. These show that in 1991 it was decided to obtain prices for fencing the Shore Field along its boundary with the Lough shore. This distance of almost a mile was, according to the witness, to include the area in front of the cottage garden. In the minute of a meeting on 28 January 1993 it is stated that fences along the shore were to be tidied and the witness said that this also included the area in front of the cottage garden. In April 1994 when a decision was recorded to replace the fence, he said that the boundary fence between the cottage and the shore was also to be replaced.

[30] In June 2000 an application was lodged in the name of Ballyedmond Castle Farms Limited for planning permission for a farm manager's house. About 85% of the proposed dwelling was to be situated in the Shore Field and the remainder within the cottage garden. In the application the company is described as being in actual possession of every part of the land to which the application relates and entitled to a fee simple absolute. Permission for this development was granted without any restriction placed on the use to be



made of it. In amended replies to the notice for particulars it is stated that the certificate was completed by an architect and that the reference in it to the owner as Ballyedmond Farms Limited ought to have been to Norbrook Laboratories Limited.

[31] In an aerial photograph taken for the Ordnance Survey on 19 September 1986, two objects are to be seen that may be feeders. In an aerial photograph taken in 1989 nothing similar is seen though it was suggested by the defendants that in this photograph the vegetation in the garden appears to be flattened as though animals had trampled on it. In a third aerial photograph, taken in 1991, there is nothing similar to the objects seen in 1986.

*The plaintiff's evidence*

[32] Mr J.G. Rooney is a farmer and he lives at Mayobridge. He was employed by Norbrook Laboratories at Ballyedmond from October 1988 to August 1993. Initially he was a laboratory assistant, taking blood samples in the farmyard. When no trials were going on he worked as a stockman feeding cattle. He also helped with cutting silage twice a year and spreading slurry after the silage was cut. At this period of his employment he was not in the Shore Field on a regular basis. Early in 1991 he was appointed head stockman and became responsible for the cattle and from then until August 1993, when his employment with the company ended, he was involved in checking and feeding them.

[33] He was aware that there was a cottage and garden beside the Shore Field but he was never inside the cottage. The garden was overgrown with briars and there was a heavy hedge making it unsuitable for grazing. In his time he did not see a silage trailer parked in the garden nor did he see any feeders there. The ground in the garden did not appear to him to be trampled down. Cattle may have taken shelter in the garden on a cold wet night but he could not see why they would graze on such poor vegetation when there was lush grass available in the field. There was a means of access to the cottage and garden from the Shore Field but as he had only been down the lane on two or three occasions he was unable to say if the gate leading from the lane was kept locked. Any feed provided for stock in the Shore Field was kept at the far side of it distant from the cottage garden. When slurry was being spread none was put on the disputed land.

[34] Mr M. J. Cunningham has a fish farm on Carlingford Lough and he uses the lane to gain access to the foreshore. He has had a fish farm there for 12 to 13 years. Some time after 1994 he needed a covered place to grade oysters and he made inquiries about the ownership of the derelict cottage. He inspected it and found it to be dry and capable of being made secure. He saw no sign of cattle or of feeding troughs and unlike the estate, which was almost manicured, this area was rough. Local people told him that the cottage was

owned by the Scott-Foxwells. Eventually he got word to a Mr Scott-Foxwell who was living in Scotland. The reply came back that he was not interested in selling or leasing the cottage as he intended to live there when he retired.

[35] Mr Cunningham said that in 1994 the gate on the lane was a traditional red "Mourne" gate and the area around it was overgrown and he gained access to the garden from the shore. Sometime after he had made this approach to Mr Scott- Foxwell the landscape changed, the gate was replaced and the garden appeared to become part of the estate. Mr Cunningham informed Mr Scott- Foxwell about these changes.

[36] Mr G.P. Scott- Foxwell was born in Newry in 1950 and he lived with his parents in this cottage at Killowen between 1950 and 1961 when the family moved to Dorset. They continued to pay rent for the property in the hope that one day they would be allowed to purchase it. In 1974 the opportunity came to them. After they bought it he and his brother tidied up the cottage and put in new panes of glass and whitewashed it. In 1975 Mr Scott- Foxwell returned to live in Northern Ireland and he fished out of Kilkeel until 1983 when he moved to the West of Scotland to fish there. In August 1986 he returned to Kilkeel and remained there until September 1987.

[37] In his younger days he and his brother gave parties at the cottage. In July or August 1987 when he was living in Kilkeel he visited the cottage to show his wife where he was brought up. The roof was still intact though the windows had been broken and there was rubbish inside. There was no sign of any other use being made of either the cottage or garden. There was no hay in the cottage and there were no feeding troughs in the garden. It was in rough grass with brambles and gooseberry bushes just as he had left it. There had been a semblance of a fence between the garden and the field in 1983 but he was unable to say if it was still there in 1987.

[38] In 1998 word reached him in Mallaig, through Kilkeel men with fishing boats there, that there was activity around the cottage. He returned to see for himself and in October 1998 he met Lord Ballyedmond who ordered him off the land. He took legal advice from a solicitor and letters were exchanged but he was not advised to issue proceedings. As Lord Ballyedmond is wealthy and he is a wage earner he had to wait until he had gathered up sufficient funds to issue these proceedings in 2001.

*The Limitation (Northern Ireland) Order 1989*

[39] No action may be brought by Mr Scott- Foxwell after the expiration of 12 years from the date upon which the right of action to recover his land accrued to him. At the expiration of this time limit his title to the land is extinguished (Articles 21 and 26 of the Limitation (Northern Ireland) Order 1989).

[40] In *J.A.Pye (Oxford)Ltd. v Graham* [2003] 1AC 419 at para.40 Lord Browne-Wilkinson said that there are two elements to possession;

“(1) a sufficient degree of physical custody and control ("factual possession"); (2) 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.”

Lord Browne-Wilkinson went on to refer with approval to the description of factual possession given by Slade J. in *Powell's case* 38 P& CR 470 where he said, at pp 470-471:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] 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 ... 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.”

It is clear, from Lord Browne-Wilkinson’s speech, that what is required of the person in factual possession is an intention to possess and not an intention to own the land.

#### *Finding on factual possession*

[41] Lord Ballyedmond claims that personally or through his company he has been in factual possession since the company acquired the rest of the estate in 1985.

[42] There was an inconsistency in the defendants' evidence about the replacement of the gate leading from the lane. The case made in the pleadings and particulars that this was completed by early 1986, was not pursued at the trial. There it was said that the gate was refurbished and that it was locked and barbed wire was rolled across the top soon after the property was purchased and that a new gate was fitted later, in March 1988. Mr Jones said that he climbed a gate to attend a sick cow in the mid to late 1980's and he thought that the gate was an old country gate tied with cord. It is unlikely that he could have failed to notice barbed wire rolled across the top of it or that he would have described the gate as he did if it was a new one. Mr Sloan gave evidence that the gate was replaced between 1994 and 1996. Mr Murray agreed with Mr Sloan and he said that there has been a chain on it for 8 to 10 years. The evidence of Mr Cunningham supports the view that it was, at the earliest, 1994 before the gate was replaced. I am not satisfied by the evidence before me that the gate was refurbished, as was suggested, before it was replaced or that the replacement of the gate occurred before 1994.

[43] Before the defendants' purchased any of the land Mr P.B. Murray and his brother cut the hedges on both sides of the lane for their own benefit and that of others using the lane. This included cutting the hedge by the cottage garden. The issue as to whether the defendants took over the hedge cutting as soon as the lands were purchased, as Lord Ballyedmond said, or as Mr Murray claimed, after they had obtained their own machinery is not important. On either version of events hedge cutting by the defendants probably began before October 1989. What is important is the significance to be attached to the defendants cutting the area of the hedge between the cottage garden and the lane. Is this to be interpreted as an act of possession in the context of this case? Mr Murray and his brother when they cut the hedges on the lane side did not make any claim to possession of the lands bounded by the hedges. Those engaged in hedge cutting for the defendants may have continued to cut the last part to the shore for the same reason as the Murrays did so in the past. I do not regard cutting the hedge or, assuming that the reference in the reply to the notice for particulars is correct, putting some loose stones back in the ditch, as constituting unequivocal acts of possession of the land within.

[44] The defendants also rely on the placing of signs prohibiting shooting on the estate. They say these were erected on the change of ownership, or soon thereafter, to keep trespassers out. The sign at the bottom of the lane has been there, according to Mr Sloan for 10 to 15 years. Mr Murray said that the sign went up when pheasant were introduced to the estate and he said this was 10 to 15 years ago. In light of this evidence from Mr Sloan and Mr Murray it is uncertain that the sign was in place by October 1989.

[45] Mr Jones said that in a period of 20 years he saw calves inside the cottage once only. He saw one or two bales of hay stored there 15 to 20 years

ago. If Mr Rooney is correct, when he was head stockman between 1991 and 1993 the cottage was never used. This is supported by the evidence of Mr Cunningham when he inspected the cottage in 1994 when there was no sign of cattle having used it. While it may have been used by Mr Jones to treat two calves in an emergency, I do not accept that the cottage was used from 1989 and for the ensuing 12 years as place to shelter and feed cattle in bad weather, or to store hay.

[46] Since about 1987 or even earlier there has been no physical barrier between the Shore Field and the cottage garden other than a dilapidated fence that was there in the early days and later fell to the ground. Since the grass in the garden was very poor compared with the grass in the Shore Field itself there was nothing to attract animals there other than as a place of shelter. The bottom corner of the garden does provide protection from an east wind and in extreme weather conditions I accept that animals may have used it for this purpose. Mr Murray said that he has seen them there 2 or 3 times a year. In the last 8 years Mr Sloan said that he has seen them there probably on two occasions. It is likely that as farmers they would notice what was happening on neighbouring farm land and their evidence is consistent with a limited use of the garden of the cottage for shelter by livestock.

[47] According to Lord Ballyedmond there have been cattle feeders in the cottage garden from the winter of 1986. He said that they remained there throughout the year and were replaced when worn out. Mr Jones described seeing a feeder close to the cottage but he said that it was not there on a permanent basis. He was the only witness, other than Lord Ballyedmond, who noticed feeders in the garden. Mr Rooney did not see any feeders during his period as stockman and Mr Cunningham did not see any feeding troughs in 1994. Nor did Mr Scott-Foxwell see any feeders on the land when he visited it in the summer of 1987. The aerial photograph taken in September 1986 tends to support the evidence of Lord Ballyedmond but the absence of any similar objects in the photographs taken in 1989 and 1991 suggests that they were not there at other times. There may have been occasions over the years when cattle grazing in the Sea Field have strayed into the garden to find shelter from the wind and they may have been provided with feed when they were there, but I do not accept that this occurred to an extent where it could be said that the defendants were in physical occupation of the garden between October 1989 and October 1991.

[48] In the reply to the notice for particulars it is stated that when the property was acquired in October 1985 a substantial part of it needed fencing including the erection of gates. The evidence of Lord Ballyedmond was that between the date of acquisition and 1986 this was carried out to keep livestock in and people from coming on to the lands. There was no evidence that the boundary hedge between the lane and the cottage had to be fenced to make it stock proof or to keep people from entering. The evidence is that people

continued to have access from the shore to the garden over a low wall which remained unfenced for a number of years. The existing hedgerow at the lane may well have been sufficient for the purpose of keeping animals in without any work being required and as Mr Jones discovered the entrance gate could be climbed. Lord Ballyedmond said that in the summer of 1989 the fencing on the lands was reinforced and improved and that the fence from the road to the shore was reinforced and improved but again there is no evidence if anything was required by way of reinforcement or improvement beside the cottage and garden. It is said that in 1990 a fence such as there is today was erected and a photograph, taken on 30 September 2004, and produced at the trial shows a post and wire fence on the inner side of the hedge. In the absence of evidence that the area in question has been fenced by the defendants since October 1989 I am not persuaded that work that was done to secure the estate owned by the defendants was also done in the area in question.

### *Conclusion*

[49] It is apparent that in recent years the defendants have had a firm intention to possess this piece of land and that they have been in factual possession of it. They have failed to discharge the onus, which is upon them, of proving that they, or any of them, have had a sufficient degree of physical control or an intention to exercise such custody and control over it for the requisite period of 12 years from October 1989. Accordingly I find that Mr Scott-Foxwell has not been dispossessed and that he is entitled to a declaration.