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*Ex Tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **27/2/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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ROBERTA ANN YOUNG

-v-

DAVID RUSSELL
THOMASINA PHYLLIS RUSSELL
DAVID BOYD

_____

DEENY J

[1] This is an action brought on for trial today by Roberta Anne Young against David Russell, Thomasina Phyllis Russell and David Boyd. It is part of a more complex series of proceedings brought by Mrs Young and initially her husband against Mr James Hamilton and a number of other persons including the three defendants I have just named. They were the fourth, fifth and sixth defendants in the original action which was heard over some 20 days of evidence and was subsequently considered by the Court of Appeal in Northern Ireland. The learned trial judge on the first occasion accepted that the plaintiff had been treated with some incivility but did not find in favour of her but against her claim. She appealed that decision to the Court of Appeal in Northern Ireland.

[2] Their Lordships, no doubt mindful of Order 1 Rule 1 of the Rules of the Court of Judicature and the overriding objective of dealing with matters justly, but also in a practical way that avoided waste and unnecessary expense made the following finding i.e. that the learned trial judge who had previously considered the matter had not advanced sufficient reasons to explain his findings and that the two causes of action, and the Lord Chief Justice refers expressly to the two causes of action, interference with the right of way and harassment, were to be considered by a different judge of the Chancery Division on the basis of the transcripts of the evidence which had been prepared for the Court of Appeal.

[3] Those two causes of actions are to be found in the writ of summons drafted and bearing the name of experienced junior counsel, but not one of the counsel

appearing before me today and the writ is confined to those two. In hindsight it may have been that a claim for slander of title by one or more of the defendants against the plaintiff might have been made. The plaintiffs ultimately succeeded before another court in showing that the Russells, the defendants here, insofar as they are defendants, were misplaced in thinking that they had rights relevant to the laneway adjacent to the properties of the plaintiff and the defendants. But, of course, such a claim has to be made within a short period of time and by the time learned counsel had this matter that period of time looks as though it was well elapsed because this writ of summons is dated 2006 and it may well be that that counsel was conscious of the time limit and did not plead it for that reason or perhaps his instructions did not cover that point. In any event it was not pleaded and there has never been a successful amendment and it is not before the court now. Clearly no application could realistically have been made to amend to plead it now after a hearing before the Court of Appeal itself in all the circumstances. I say this because a great of deal of what in fact concerns the plaintiff Roberta Anne Young and still exists in even the most recent written submission put in on her behalf by Mr Brian Kennedy QC and Mr Timothy Warnock of counsel, still relates to the slander of title. That is the submission of Mr Michael Humphreys Q.C., who appears for the fifth and sixth defendants Thomasina Phyllis Russell and David Boyd, and it seems to me that that submission, which I need not set out at length, is entirely correct in law. So that matter is not before me.

[4] The two matters before me are whether on the basis of these transcripts the three defendants are guilty of either harassment or an interference with a right of way. I say the three defendants but in fact Mr David Russell passed away on 2 May 2009. No letters of administration have been taken out to his estate by his widow Thomasina Phyllis Russell. There are no personal representatives to the estate. Mr Humphreys invites me to conclude that that is for the normal reason i.e. there is nothing worth administering, but whatever the reason there are no such personal representatives. The plaintiff could have applied to the court pursuant to Order 15 Rule 7 to appoint a person to represent the estate of this deceased and she did not do so, quite possibly because her solicitors also shared the view that there was nothing in the estate worth suing.

[5] The matter was very properly raised by Mr Humphreys at the commencement of the hearing before me today, 27 February 2013. Mr Kennedy, making it clear that he was doing so under strict instruction from his client, applied to continue the action against "the personal representatives of David Russell when appointed". I rejected that application. It seems to me entirely misplaced. I need not quote the case law but it is trite law in my view that one may commence proceedings against a deceased person before personal representatives are appointed, but that some person must be appointed on behalf of the estate before the trial of the action. I believe that is well-established by the case law and, of course, it is common sense because there is nobody to instruct anybody on behalf of the estate unless there is a legal person with responsibility for the estate. I therefore have, a little earlier today, dismissed the claim against David Russell. In all the circumstances I made no order as to costs.

[6] That leaves his widow and their nephew Mr David Boyd, represented here today by Mr Humphreys. He raised a very valid matter early in the discussions this morning and the matter he raised was this that yesterday he had conveyed to the plaintiff's representatives, without prejudice to the submissions set out in his helpful written submissions, and I have received, I must put on the record, helpful written submissions from counsel on the other side which I think I have briefly averted to, that without prejudice to his submissions his clients had instructed him to offer undertakings not to interfere with the plaintiff's laneway. Those undertakings were on behalf of the fifth and sixth defendants as they were in the original proceedings and are as set out at paragraph 18(b), (c) and (d) of the amended statement of claim.

[7] Now despite that constructive offer Mr Kennedy, despite being given an opportunity for a further consultation with his client, was instructed to refuse that offer and he was then in the difficulty that, entirely properly, he and his instructing solicitors, both yesterday and, I gather, today, thought it right to inform the Legal Services Commission of the development that had occurred. I do not resile from saying that I encouraged the plaintiff to accept those undertakings as an apparently sensible resolution of this matter. She felt unable to do so and wished the court to decide the matter. The Legal Services Commission then were unwilling to support the matter further, but as no more costs would be incurred by completing this happily short hearing before luncheon I am proceeding to an outcome now.

[8] The evidence I shall briefly deal with separately against the defendants. Mr David Boyd accepted that he blocked the laneway in dispute in May 2001, nearly 12 years ago. There is some dispute as to whether that was for 20 minutes or perhaps an hour. I say nothing against Mr Boyd, whom of course I have not heard, I am going on the basis of the transcript, but for these purposes I will take the longer period of time. He also threw the then co-plaintiff Mr Young's jacket out of his car at some point; it had been hanging on the hedge. Those matters do not in my view amount to either substantial interference with the right of way of the plaintiff, nor do they amount to harassment. Substantial is what an interference with an easement should amount to be a tort; see Halsbury's Law of England, Volume 87, 5th Edition, paragraph 968, and see the cases referred to by Mr Humphreys and indeed by counsel for the plaintiff in skeleton arguments. I do not think it is necessary for me to set those out. I think it is clear and good law and I reject the suggestion that those two incidents, perhaps of incivility to use Mr Justice Treacy's word, do amount to a tortious act. The maxim de minimis non curat lex is of ancient standing and in my view is still valid. Neighbours will sometimes have disagreements, which is inevitable, words may be exchanged and sometimes smaller actions taken. They should not, it is clear, under the laws of this country, lead to a finding that a tort has been committed. Such small exchanges do not amount to substantial interference. Clearly nor do they amount to harassment which must involve a course of conduct which has to involve at least two or more incidents; the coat and the parking of the vehicle were both on the same day. So it seems to me that the plaintiff fails in her

action against Mr David Boyle. I enter judgment for Mr David Boyle and will hear counsel on the issue of costs at the conclusion of this oral judgment.

[8] Now the position about Mrs Russell is that on one view one might have thought that there was a case of substantial interference with a right of way, because there are allegations of the lane being frequently blocked and constant abuse between 2001 and 2007. But, of course, these matters were tried with counsel representing the defendants and indeed with the learned trial judge clearly taking a keen interest in the matter and I have the benefit of the transcript. It seems to me that despite the best efforts of counsel for Mrs Young it really all melts away into very very little indeed. I am not going seriatim through the transcript, the relevant passages of which counsel had helpfully alerted me to in their submissions. I accept the submission of Mr Humphreys that there was a lack of particulars about these allegations of blocking the lane. I note that when Mrs Young, the current plaintiff, was asked about this, for example at page 348 of the transcript, that she did not give particulars then and that her allegation that her builders were being blocked in coming up the lane was a hearsay allegation. Not only was it hearsay but it was weak hearsay because she did not name the builder or builders who were the source of the information. She did not give any dates or times, she had not kept any diary. Mr Young also admitted elsewhere in the transcript that he had not kept any diary of these alleged incidents. I think it perhaps helpful and in the hope, perhaps forlorn hope, that an appeal might be avoided and the Court of Appeal's time not wasted further, to refer to one passage which I think gives some flavour of the plaintiff's case.

[9] On 26 March 2009 Mr W. Young was giving evidence and it is to be found at pages 457 and 458 of the transcript and I read from it:

> "Mr Justice Treacy: Just let me be clear about that. So far as 2005 are concerned you said that in January 2005 they started block [sic] the laneway? How many times in January 2005 was the laneway blocked by the Russells?
>
> The witness –[that is Mr Young]: Three occasions that I can recall.
>
> The Judge: In January?
>
> The witness: Oh no sorry in January, twice in January.
>
> Mr Justice Treacy: Twice in January, did you keep a diary of any of this?
>
> The witness: No, we didn't unfortunately, that was one of the mistakes that we probably made.

The Judge: Were you not asked by anybody to keep a diary?

The witness: No.

The Judge: So you say anyway it was two times?

The witness: Yes, well I had in January and my wife had one in January and then there was another two.

The Judge: And well on the occasion in which you were involved who was it who was blocking the laneway?

The witness: Mr Russell was driving the vehicle and Mrs Russell was sitting beside him.

The Judge: And how long, and this was at the Carrowdore Road end?

The witness: The Carrowdore Road end, yes.

The Judge: And how long was it blocked for?

The witness: The January incident I think it may, Mr Hamilton I think it was involved in that one as well, I think it may have gone on for 3 or 4 hours. I believe maybe, I think maybe James Hamilton phoned my wife in work that day and mentioned to her about the ….

The Judge: Were you involved in that incident as well?

The witness: Well I was trying to, I didn't actually know that they were there. Seemingly they had been there for a couple hours before I went down. But I was going down in the January one I think it was maybe about 4.00 o'clock in the afternoon.

The Judge: And what happened?

The witness: Well they wouldn't move and it was same, the same thing would you ….

> The Judge: Were you driving or walking?
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> The witness: I was driving.
>
> The Judge: You were driving?
>
> The witness: Yes.
>
> The Judge: And how long did that persist?
>
> The witness: Well on all three of those occasions I have to be fair probably only about 10-15 minutes because they eventually moved and let me out."

That illustrates the wholly unsatisfactory basis for a claim here. First there was two incidents, then it was three, then it was back to two, but there were two others and then he had not seen one and his wife had seen the other and then Mr Hamilton is dragged in and it is meant to be 3 or 4 hours and then it turns out it is 10 or 15 minutes. How anybody really could seriously found an appeal against the judge based on that I really do not know, but it is certainly not convincing to me. Again in the hope, I fear forlorn hope, that an appeal might be avoided or least that public money is not wasted on a further appeal, I refer to the transcript at pages 400 to 403. I won't set that out in full, but that is Mr Michael Humphreys' able cross-examination of the present plaintiff Mrs Roberta Young in which he successfully reduces her complaints to Mrs Russell cutting a hedge once in 2007 and seeing lights through her window at night, one night, which she believed were to do with Mrs Russell and she was relieved that it was Mrs Russell!

[10] Now having considered the written submissions on both sides here I ask myself whether the plaintiff has proven on the balance of probabilities, the onus being on her, that there has been substantial interference with her right of way as required by law. I consider that she has failed to discharge that burden on the material on the transcript before me. I have considered whether the small incidents that are established, and I bear in mind Mr Kennedy's point that neither Russell gave evidence, and I am not satisfied that they amounted to what Parliament intended by harassment and I do not find that that tort is made out either. There may have been a measure of incivility. It was an unfortunate dispute; it is clear the Russells thought that they had rights which another court has found they did not have. Perhaps they were uncivil and language was used possibly on occasions that should not have been but it does not amount in my view to harassment.

> [11] For completeness I ask why did the Russells not give evidence? Because Mr David Russell was dead at the time of the trial and Mrs Russell was over 80 years of age and now in sheltered accommodation. It seems to me the plaintiff's case is not borne out and I

enter judgment for Mrs Thomasina Russell against the plaintiff also, so giving judgment for both defendants against the plaintiff.