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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

ON APPEAL FROM THE COUNTY COURT DIVISION OF ARMAGH AND SOUTH DOWN

BETWEEN:

AIDAN O'BRIEN AND MARITA O'BRIEN

Plaintiffs/Respondents;

-and-

BENEDICT MARTIN

Defendant/Appellant.

HORNER J

A. INTRODUCTION

[1] Benedict Martin ("the appellant") lives with his wife, Maura Martin at 21 Charlemont Road, Moy. He appeals against the decision of the County Court Judge for the Division of Armagh and South Down whereby the County Court Judge found that Mr Aidan O'Brien and Mrs Marita O'Brien ("the respondents") are entitled to the ownership of an area of land comprised in Folio Number 6477 County Armagh ("the disputed land") which is in front of their dwelling house but across on the other side of the road from where they live at 17 Charlemont Road, Moy. The County Court Judge also ordered rectification under the Land Registration Act (NI) 1970 and further that the appellant be restrained from inter alia interfering with the respondents' use or enjoyment of the disputed land. He further ordered that each side should be responsible for their own costs. Finally, it is important to note that on 22nd October 2015 the County Court Judge made an order that the appellant had no legal entitlement to the disputed land.

[2] The appellant and his wife and the respondents are close neighbours on the Charlemont Road but on opposite sides of a junction where it joins the A29. The respondents presently enjoy the use of the disputed land which is in front of their

house although it lies on the opposite side of the Charlemont Road. Construction of the O'Briens' house commenced in 2001 and it was completed in 2004. The disputed land is cultivated and looked after by them and is of a similar nature to the garden surrounding their own house. The respondents do not have a paper title to the disputed land. This was held by Garth Calow of PWC, the trustee in bankruptcy of Martin Reid and Florence Reid, the previous legal owners. Apparently legal title has reverted to Martin Reid because he claims to have sold the land in 2014 to the appellant for £3,000. The Land Registry understandably will not register the appellant as the owner while these proceedings are outstanding and the respondents continue to assert their ownership under Articles 21 and 26 of the Limitation (Northern Ireland) Order 1989 and Section 53 of the Land Registration Act (NI) 1970.

[3] Although the value of the disputed land is modest this has not deterred either side. The original Civil Bill was heard in the County Court over many days spread over two years. Substantial costs were undoubtedly incurred. It has taken a full week in the High Court to hear all the evidence adduced by either side. There has never been any prospect of compromise. Each side is equally determined to be vindicated regardless of the cost.

[4] The evidence established that the disputed land was cultivated from at earliest in the summer of 2005 by the respondents. In Powell v McFarlane [1977] 38 P and CR 452 Slade J said at 477-478 that ploughing and cultivating agricultural land was an act "so drastic as to point unquestionably in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned".

[5] I have no hesitation in concluding that the disputed land was possessed in the legal sense in the summer of 2005 when the Quinns, contractors, on behalf of the respondents mulched and did other acts to the disputed land and also to the lands surrounding the recently constructed house. An aerial photograph of July 2005 reveals the disputed lands to be indistinguishable from the lands legally owned by the respondents and surrounding their newly constructed house. To be fair Mr Williamson, counsel on behalf of the appellant, in carefully thought out cross-examinations of the respondents and their witnesses concentrated for the most part on the period of time preceding 2005. It was in this period from 2001 to 2005 where battle was effectively joined. The equity civil bill was issued on 15 October 2014, that is a period of some 9 years after the disputed land could first be said to have been cultivated by or on behalf of the respondents. Accordingly the period on which this court must concentrate, and which to be fair to the parties' legal representatives there was considerable focus, is that period when the respondents first acquired the site in 2001 to the summer of 2005 when the disputed land was first cultivated by the respondents' contractor and thereafter the grass on it was cut by Peter, the respondents' son.

[6] I heard much evidence in the course of this appeal. I have taken it all into account. However it would be a pointless exercise to refer to it all and also it would make the judgment unpardonably long. I have attempted to highlight the evidence

on the key issues. I have also heard detailed legal submissions and received lengthy written submissions and been referred to many, many cases quoted as authority for different propositions. Instead of dealing with all the legal issues and cases which would be unnecessarily laborious, I have sought to distil the legal principles which are relevant to this particular case. However as will become clear these claims for adverse possession are necessarily fact specific.

B. BACKGROUND INFORMATION

[7] The appellant is an undertaker who previously had his own haulage business until he became bankrupt in the mid-90s. He then drove for other employers. He also owns land in the vicinity on which he cultivates Christmas trees for onward sale in November and December. His wife is a retired school teacher and they have two children both of whom are grown up and no longer live at home. The first respondent is a surgeon at the local hospital and the second respondent is a housewife. As I have recorded their son Peter cuts the grass at their house and also on the disputed land.

[8] There are a number of other witnesses of fact who gave evidence including witnesses who had carried out work in the construction of the respondents' new home and those in the locality who lived close by or visited the area on a regular basis. Both the appellant and the respondent were ably represented. Mr Williamson barrister-at-law appeared for the appellant and Mr McDonnell barrister-at-law appeared for the respondents. Both counsel concentrated on the central issues and provided helpful detailed summaries and submissions on both the law and the facts.

[9] The respondents had been looking for a suitable site on which to build their dream home. They had contacted Francis Martin, the appellant's brother and reached an agreement with him to purchase lands which he owned adjacent to what is the Charlemont Road. These lands are contained in Folio AR 2645 and were purchased by the respondents on 28 March 2001. They are immediately opposite but across the road from the disputed land which then formed a triangle of rough ground bounded on three sides by a sheugh and banks together with a fence. The land had not been used and gave the impression of being abandoned, perhaps left over from the construction of the A29 which passes close by. The section of the Charlemont Road which runs past the appellant's house connects to the A29. That section of the old Charlemont Road now runs past the respondent's house and forms an off-shoot of the Charlemont Road. It has been inaccurately described as being abandoned. However it does not lead anywhere so far as I can determine although it does connect with the section of the Charlemont Road which continues past the appellant's house.

[10] The respondents' builder, Oliver Gribben, went on site in April 2001. He claimed that he used the disputed the land as part of the site. He put down hardcore, invited infill with a sign on the adjacent highway, levelled the ground, stored plant, parked vehicles and stored material during the construction of the

house. Work was also carried out to improve the drainage to the disputed land which was affecting the adjacent site.

[11] The disputed land appears to have been first cultivated in the summer of 2005 when there were various processes applied to it and mulching, in particular, was carried out on it. Similar processes were carried out to the lawns surrounding the respondents' house which had just been constructed. In 2006 both the land round the respondents' new house and the disputed land were reseeded. It would appear that both the gardens of the new house and the disputed land have been treated in a similar fashion from 2005 onwards at the latest. Both are cut regularly by Peter O'Brien. I have visited the site and note the condition of the disputed land which remains carefully maintained and resembles the lawn across the road at 17 Charlemont Road.

[12] The appellant's evidence painted a different picture as to what happened, at least before the summer of 2005. Before the appellant's transport business had become insolvent in 1996, the appellant had used the disputed land for parking his vehicles from 1990 to 1994. He had erected a diesel tank and a lock up container on the disputed land. The walls of the diesel tank can be seen clearly in an aerial photograph of 2 May 2000. Other subsequent photographs no longer show the walls. For a period of six weeks from the beginning/mid-November up to Christmas the appellant would have stored between a 100-200 Christmas trees he had harvested from other lands on the disputed land for collection by lorry. The trees would have been stored there for 2 to 3 hours at a time. The appellant did this until 2005/2006. The appellant did not notice any lorries or plant on the disputed land during the construction of the respondents' house. He also did not see any stockpiling of material. He did not see any dumping of rubble, or any levelling of the disputed land or any sign requesting infill for the disputed land. It is right to say that he was away during the week but he would have returned most weekends.

[13] The respondents claim that the appellant is motivated by spite. The appellant's brother who sold them this site enjoyed a right of way over their garden. The appellant's brother, Francis Martin gave the appellant permission to use it. However this was exercised, it is claimed by the respondents for no good reason, by a tractor driver employed by the appellant. He caused damage to the respondents' garden. The respondents complained to Francis Martin, who refused to permit the appellant access thereafter. More importantly, a prospective sale of the back field from Francis Martin to his brother, the appellant, fell through and it is clear that this caused the appellant considerable upset. After this incident in 2012 the relationship between the appellant and the respondents seems to have deteriorated. I was never offered a satisfactory explanation as to why the appellant chose to purchase the disputed land. The impression I had of the appellant in the witness box was someone who was "thran" and who was determined that his will should prevail. He appeared to have taken this interference by "interlopers" very seriously. I had the impression that this animosity might cloud his judgment and skew his testimony. However I am not concerned with the motivation of the parties in general and the

appellant in particular. I have to reach my conclusion on the evidence and whether there has been adverse possession for the requisite period of 12 years and more. However it does perhaps explain why both sides became locked in litigation and prepared to expend considerable sums on legal costs over an area of undistinguished land probably worth substantially less than the costs that have been run up in the County Court alone, never mind on this appeal.

C. STATUTORY PROVISIONS AND LEGAL PRINCIPLES AND ADVERSE POSSESSION

Statutory framework

[14] The respondents have applied to be registered as owners of the disputed land based on Section 53 of the Land Registration Act (Northern Ireland) 1970, sub-sections (1) and (2) of which read as follows:

> "53(1) Subject to the provisions of this section, the Statute of Limitations (Northern Ireland) 1958 shall apply to registered land as it applies to unregistered land.
>
> (2) Where there has been a defeasance of an estate in any registered land in consequence of any of the provisions of the said Statute and -
>
> (a) a person claims to have acquired a right by possession to be registered as owner of an estate in that land; or
>
> (b) the personal representatives of a deceased person claim that the deceased or such representatives in right of the estate of the deceased had acquired such a right;
>
> the person so claiming or, as the case may be, the personal representatives may apply to the Registrar, in such manner as may be prescribed, for registration of the title to that estate."

[15] The Limitation (Northern Ireland) Order 1989 has replaced the Statute of Limitations (Northern Ireland) 1958. Article 21(1) of the Order states:

> "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."

[16] The title of the true owner is extinguished at the expiration of the time limit fixed by the Order for the recovery of land, namely 12 years after the right of action has accrued: see Article 26. Schedule 1 to the Order deals with the accrual of rights of action to recover land and 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 lands; 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 at the date of the dispossession or discontinuance."

[17] In Pye (Oxford) Limited v Graham [2002] UKHL 30 Lord Browne-Wilkinson made it clear at paragraphs [36]-[38] that there is no question of the true owner having to be "ousted". The question to be asked:

> "Is simply whether the defendant squatter has dispossessed the paper order by going into ordinary possession of the land for requisite period without the consent of the owner."

[18] 8(1) to (3) of Schedule 1 provides:

> "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."

Legal Principles

[19] Carswell LCJ giving the decision for the majority of the Court of Appeal In The Matter of Sir James Dennis Compton Faulkner [2003] NICA 5(1) considered the relevant principles which apply to adverse possession at paragraph [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'."

[20] I consider that given the particular circumstances of this case there are a number of other legal matters and principles which deserve to be highlighted.

[21] It is the intention to possess which is important, not the intention to own. As Lord Hope said in Pye at [71]:

> "The only intention which has to be determined is an intention to occupy and use the land as one's own."

It is also important to appreciate that "exclusivity is the essence of possession": see Lord Hope again at [70].

[22] In Smith v Waterman [2003] EWHC 1266 Ch at paragraph [19] Blackburne J said in respect of the animus possidendi:

> "There are two elements to this :
>
> (a) A subjective intention to possess (which involves showing that the trespasser actually had the requisite intention to possess) and
>
> (b) Some outward manifestation of the trespasser's subjective intention which makes clear that intention to the world at large."

[23] In Pye Lord Browne-Wilkinson rejected any suggestion that there was no need to show an intention but instead said that:

> "Such intention may be, and frequently is, deduced from the physical acts themselves." [40]

[24] Lord Hutton also said in Pye at paragraph [76]:

> "I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion."

[25] In Tecbuild Limited v Chamberlain [1969] 20 P&Cr 663 Sach LJ said:

> "In general intent has to be inferred from the acts themselves."

In Powell v McFarland Slade J said at page 476:

> "Though past or present declarations as to his intentions, made by a person claiming that he had possession of land on a particular date, may provide compelling evidence that he did *not* have the requisite animus possidendi, in my judgment statements made by such a person, on giving oral evidence in court, to the effect that at a particular time he intended to take exclusive possession of the land, are of very little evidential value, because they are obviously easily capable of being merely self-serving, while at the same time they may be very difficult for the paper owner positively to refute. For the same reasons, even contemporary declarations made by a person with effect that he was intending to assert a claim to the land are of little evidential value for the purpose of supporting a claim that he had possession of the land at the relevant date unless they were specifically brought to the attention of the true owner."

In Bolton MCB v Musa [1998] P&Cr 38 Peter Gibson LJ commented on evidence from a possessor as to his/her intention as follows:

> "… such self-serving evidence is hardly ever likely to be of assistance."

[26] I agree. I do not find the evidence of the respondents as to their intention over 16 years ago to be particularly helpful. Such evidence is necessarily self-serving. It can be difficult to look back and give accurate testimony as to your intention at a

particular point of time over ten years ago. It is far better to look at the objective facts to determine intention than to place reliance on a stated intention especially, when, as here, it was claimed that there were differences between the evidence given by the respondents, and in particular Mrs O'Brien, on their intention at the County Court and on appeal.

[27] The evidence necessary to establish possession is fact sensitive. In Gallagher v Northern Ireland Housing Executive [2009] NICA 50 at [14] Girvan LJ said:

> "It is thus apparent that the question whether or not a squatter has acquired possessory title by adverse possession is fact specific and it will often be a question of fact and degree. Due respect must be accorded to a trial judge's assessment of the facts."

[28] As Slade J said in Powell at page 471:

> "Whether or not acts of possession done on parts of an area established title to the whole area must, however be a matter of degree. It is impossible to generalise that 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 that 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."

Accordingly where the land in question is marshy bog land, the use of land for shooting may be sufficient to establish possession: see Red House Farms (Thorndon) Limited v Catchpole [1977] 2 EGLR 125. This will almost certainly not be sufficient in respect of ordinary agricultural land: see Powell v McFarlane pages 477-478 where Slade J said that such an action in those circumstances would almost simply amount only to the taking profits. However he did say in Powell v McFarlane at page 472:

> "There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned. The ploughing up and cultivation of agricultural land is one such act …"

[29] The actions in the context of any particular land which is subject to an adverse possession claim must be clear and not ambiguous. In Pye Lord Hutton said:

> "It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess."

As Slade J said in Powell at page 472:

> "In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

[30] Finally it is essential that there "must be continuous adverse possession for the limitation period if the right of the owner to recover possession and its title are to be barred": see Jourdan and Radley-Gardner on Adverse Possession (2nd Edition) at 1.34.

[31] Of course this does not mean that the squatter has to use the land continually. He can still be in continuous possession, but again it depends on the nature of the land. Pennycuick J said in Bligh v Martin [1968] 1 WLR 804 at 811:

> "Possession is a matter of fact depending on all the particular circumstances of the case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user … In the case of farmland, this must habitually be the position; for example, as regard arable land during the winter months."

Again it all depends on the particulars circumstances whether it can be said that there has been the continuous "adverse possession" necessary to establish a possessory title.

[32] Finally in response to the suggestion that the respondent's decision to use the disputed land, and if they are believed, to possess the disputed land with the intention of acquiring it, was in some ways questionable from a moral point of view,

Neuberger J in Purbrick v Hackney London Borough [2004] 1 P& CR 34 provides the answer at paragraph [25] when he says that the legal owner has no-one to blame but him/herself :

> "… it is to some extent implicit in the present law of adverse possession, that an owner of property who makes no use of it, whatever, should be expected to keep an eye on the property to ensure that adverse possession rights are not being clocked up. A period of 12 years is a long period during which to neglect a property completely."

D. THE EVIDENCE

[33] Mr O'Brien, the first respondent, swore an affidavit on 9 October 2014. He had given evidence in the County Court. I would have expected his affidavit to set out in some detail his claim for adverse possession. It did not do so and in the event he sought to supplement his affidavit with oral testimony. He claimed that:

(a) His contractor raised the ground level on both the site and on the disputed land.

(b) The contractor improved the drainage on the disputed land.

(c) After the lands were raised they were "top soiled, ploughed and rotavated at the same time as the lands around the dwelling house". It would appear in August 2005 Maurice Quinn and Charles Quinn were employed to "plough, mulch and rotavate the disputed land.

(d) Grass seed was sown in 2006 in order to provide both the garden at 17 Charlemont Road and the disputed land with a lawn finish.

Mr O'Brien's other evidence stated what happened after 2006 and as I have concluded that the evidence established that the disputed land was treated as an integral part of 17 Charlemont Road and cultivated from the summer of 2005 onwards at the latest, and thus "adverse possession has been established from this date, I need not consider this further". However evidence was given confirming that further works were carried to the sheugh, to the embankments and the removal of the old concrete and wire fencing.

[34] Mr O'Brien's evidence before me was that the disputed land appeared to be "abandoned, neglected". He claimed that he would not have bought the site without being able to acquire the disputed land. He said that he had asked his solicitor, now deceased, about acquiring the land but he had been told that this was a waste of money and that he could "go back in 12 years" and presumably acquire

the disputed land by adverse possession. This advice, if true, was poor. I would have expected a competent solicitor to have advised his client to fence off the land that he intended to acquire by adverse possession, or at the very least, to put up signs making it clear that the land was out of bounds to all those bar himself.

It would in any event have been an easy matter to find out who was the paper owner. If, for example, it was the Crown who had vested the disputed land for the major roadworks, for example, which is a possibility 30 years not 12 years would have to pass before the Crown's title was quieted. Mr O'Brien obviously did not know this.

[35] Mr O'Brien claimed that between April 2001 and July 2004 only his workmen were on the disputed land. Necessarily this excluded the appellant from selling Christmas trees or parking his vehicles during this period. He said that the improved drainage on the disputed land had been executed because of flooding to the adjacent site where the construction work was taking place. His other evidence related to what happened post-2006 and I do not consider it necessary to set it out given my conclusion as to use of the disputed land during that period. Under cross-examination he said that:

(a) The disputed land was 3-6 inches below the roadway and sloped down to the sheugh. It had to be elevated to allow storage of materials and vehicles. It was raised to the level of the roadway.

(b) The raising and levelling of the disputed land permitted vehicles to be parked, plant to be located and materials to be stored.

(c) He did not deny that the appellant had previously levelled the disputed land with rubble and hardcore to facilitate storage of the diesel tank and container locker.

(d) Oliver Gribben, his building contractor, used the lands for parking cars, work vehicles etc.

(e) There was more hard core and top soil left on the disputed land by Oliver Gribben.

(f) Improvement was made to the system of drainage and excess water was diverted into the sheugh.

(g) He denied that any use to the disputed land was made by the appellant whether by storing Christmas trees on an intermittent basis in the 6 weeks leading up to Christmas or by parking lorries on it over the weekend.

(h) He accepted that there was no photographic evidence to support his claims in respect of the period between when work was commenced on site and the house was completed.

[36] Mr O'Brien also gave evidence of the tractor driver employed by the appellant cutting up his garden by using the right of way reserved by Francis Martin and his reaction and that of Francis Martin.

[37] The evidence of the first respondent can be summarised by saying that the acts relied upon by the respondents during the pre 2006 period largely comprised of the various actions taken by their contractors and their men on the disputed land during the construction of their new house. These activities on the disputed land during this period should have been obvious to the outside world and especially those who had occasion to use Charlemont Road The first respondent also gave evidence of finding out that the disputed land had been sold by Martin Reid who had once again acquired them (presumably from his trustee in bankruptcy) to the respondent. Reid had offered to sell the disputed land to the respondents if they increased the purchase price agreed with the appellant. The respondents refused and launched proceedings to establish that they now enjoyed good title to the disputed land by 2014 by reason of their adverse possession of the disputed land.

[38] The affidavit of Mrs O'Brien broadly supported her husband's evidence although there was a mistake as to dates on which nothing turned. In the witness box she denied that the appellant had made any use of the disputed land whether to store Christmas trees or to park his motor vehicle. She swore that she had been a regular attender on site during the construction work. She had wanted from the start to incorporate the disputed land into the building site but could not do so because it was being used by the contractor(s) to park motor vehicles and store materials. She said that they had transformed the disputed land. In cross-examination she maintained that heavy machinery, motor vehicles and materials were stored on the disputed land with their permission.

[39] Frances Barrett, a friend of the respondents, gave evidence. She was a regular attender on site and visited approximately twice per month as she was building her own house at the same time. She gave evidence of building materials, pipes, stones and mixtures being on the disputed land. She never saw the appellant store Christmas trees on the disputed land. This state of affairs continued until the home was completed.

[40] Damien Hughes was employed by the contractor, Oliver Gribben between 2002 to 2004. He parked vehicles on the disputed land. Materials including pipes, gravel and sand were stored on the disputed land. The appellant never used the disputed land. In answer to questions in cross-examination he said:

(a) It was not water logged all the time.

(b) The appellant did not use it to store trees or to park his lorry.

(c) He could not remember drainage work being carried out.

[41] Oliver Gribben was the main contractor. He personally supervised the construction of the building work because there was no foreman. He is married to the first respondent's sister. He claims he put rubble down because the lorries were "sponging down" on the disputed land. He stored materials on it. He thought it was abandoned land between the two roads. There was limited hard standing and he sought to obtain fill from "everywhere and anywhere" even advertising for it by erecting a sign proximate to the A29. He laid down rubble from the back of the site to raise it up. He excavated down and cleared out the sheugh. This also involved digging a drain across the road and putting down stones and a perforated pipe. He said that as a contractor he kept "everything on the disputed land". He denied that the appellant stored Christmas trees on the disputed land. He said at the end of 2004 he removed the rubble and top soil on the disputed land and the site. The disputed land was left covered in soil to an agricultural finish from October 2004. In his diary of April 2004 he recorded working on the area of the disputed land and drawing rubbish from it to the dump.

[42] In answer to cross-examination he said:

(a) There was no base for the diesel tank when he went on site on the disputed land.

(b) He deposited hardcore/fill on the disputed land.

(c) He stored plant from day one on the disputed land and used it as and when required e.g. the cement mixer was situated on the disputed land from time to time, depending on demand.

(d) Drainage work was carried out to service a manhole and work carried out to the sheugh to allow water on the disputed land to run away.

(e) He levelled rubble on the disputed land with his digger.

(f) He left the disputed land in a much better condition than when he found it in 2001.

(g) There was only a skim of rubble on the disputed land.

(h) The storage of material was confined to the apex area at the top of the disputed land.

(i) The disputed land was used for parking vehicles "constantly".

[43] Mr Quinn gave evidence of himself and his brother using a grass mulching machine, land leveller and plough on the disputed land and site in 2005. They ploughed it and stones were lifted. No distinction was made between the disputed land and the site where the respondents had constructed their house.

[44] Eugene Campbell carried out extensive landscaping in 2006 to the site and to the disputed land. He ploughed the disputed land and levelled it. He put in herringbone drains. He put down top soil. He then came back and did further work in 2008 on the disputed land. He told Ms O'Brien that the disputed land was owned by Mr Reid and that he had been made bankrupt.

[45] Mr Costelloe's evidence was confined to the period post 2010. Peter O'Brien the respondents' son, gave evidence of moving into the new house and of being responsible for maintaining the lands including the disputed land. He said that the disputed land was first left with an agricultural finish and that he mowed and strimmed it. However after the further works were carried out in 2006 it was treated in the same way as any of the other lawns and cut on a regular basis with a ride on mower.

Benedict Martin

[46] I had some difficulty with his evidence. He seemed to harbour an obvious animosity towards the respondents. Whether this was due to the respondents being instrumental in his being banned from the right of way over the respondents lands or being responsible for his failure to acquire the field behind the respondents' house following a complaint to his brother, I am not sure. However I had the strong impression that their behaviour still rankled with him. I could not understand why he had to use the disputed land for storing Christmas trees and this was never explained to my satisfaction. His evidence was he had parked his lorries on the land in 1990 to 1994 and that he had constructed a diesel and lock up container. The last vestiges of these were moved in 2000/2001/2002.

[47] His evidence was that he continued to use the disputed land to park his lorry there during the early 2000s, he used it for storing Christmas trees up to 2005, he never saw any sign that fill was wanted for the disputed land, he never saw materials or vehicles on the disputed land. He said that the lands were not marshy but dry. He admitted that he was away during the week. There was a mound of soil beside where the diesel tank is situated but this had been placed there by him. There was drainage works to the disputed land during the construction of the respondents' home. He did strike a Seat car belonging to the builders, this was on the opposite side of the road of the disputed land. Matters did change in summer time of 2005 when the disputed lands were ploughed and rotavated. Further landscaping was carried out by Eamon Campbell in 2006. He was not concerned about what was happening on the disputed land.

[48] On cross-examination he denied parking his lorry outside his house at the weekend and maintained he parked it on the disputed land. He claimed he needed the disputed land to gain access to other lands he owned which I did not accept or even understand. There was no explanation offered as to how the disputed land created an obstruction to his access. He accepted that his solicitors had sent a letter to the trustee in bankruptcy of Martin Reid claiming that he had acquired title to the disputed land in 2013 by adverse possession. He did not believe that he had acquired such title. I have the greatest of difficulty in understanding why any solicitor would send such a letter without clear instructions from his client, especially when there was absolutely no basis for the claim. As I have recorded previously the judge dismissed any claim he had to the disputed land in 2015.

Mrs Martin

[49] She gave her evidence in a very fair and truthful manner. She described moving in Charlemont Road in 1989. She was aware of the respondents building their home, but did not notice any change to the disputed land, but there is a possibility that this "would have escaped my attention". She was out and about from 2001 to 2005 but cannot remember seeing anything on the disputed land of the nature described by the contractor and those working there. Her knowledge of the disputed land seemed to commence in 2008 when she was aware of it being mowed by the respondents. She confirmed that her husband had put hardstanding down at the end nearest to them. She accepted her work as a teacher would take her away for most the day and that her view of the disputed land would have been obstructed by a hedge. Her evidence about the trees being stored or loaded from the disputed land was not persuasive and she seemed uncertain. She said that the disputed land was not used for storing trees after 2001. In 2001 to 2004 she had no recollection of seeing any activity or equipment on the disputed land. Her husband did use a corner of the disputed land for re-potting trees in 2006 for 3 to 4 weeks.

Brian Devlin

[50] From February to March 2004 he repaired a Ford Cargo lorry on the disputed land where there was core fill. This was at the apex nearest the turn off on the A29. During this time he saw no activity on the disputed land. He said that he had worked for the appellant in the past.

Mr Gerry Mellon

[51] He is a neighbour. He lives close to his business which is on the Charlemont Road and involves selling cars. He did not want to attend court to give evidence for one neighbour or against another. He did want to help the court. His evidence was that he had seen neither building materials nor plant on the disputed land during the construction phase of the respondents' house. He had a perfect view as he cut the grass of the verge outside his house which was some 50 yards adjacent to the disputed land. He also carried out at least 5 to 6 test drives per day. These would

have taken him past the disputed land. He claimed that he had noticed that the disputed land was revamped but this was well after the construction of the respondents' house.

Ms Martin

[52] Ms Martin is the daughter of the appellant. She is 27 years old. She played on the Charlemont Road every day after school between 2001 to 2005. She would have regularly cycled up and down the road. She said that only her daddy's lorries were parked on the disputed land. She told the court that her father used it intermittently coming up to Christmas. She never saw any motor vehicles, materials or plant on the disputed land during the construction phase. She stopped playing on the Charlemont Road at the age of 15/16 in 2004/2005. However she would have passed it on her way to and from school. She noticed the change in 2008/2009 when it became a lot tidier. She also gave evidence of bales of hay being stored on the disputed land which was the first time that this particular claim had ever been made. She does admit to seeing a trench across the disputed land but that is all. She had no recollection of any work being done by the Quinn brothers in the summer of 2005. She is sure she had a "tree house" on the disputed land and used ramps on the disputed land for her bicycle when work was being carried out to construct the respondents' new house.

Benedict Junior

[53] He was born on 30 April 1987**.** He commenced university in 2005. He remembers the remnants of the old diesel tank on the disputed lands. He took a bus from a bus shelter beside the disputed land in 1998 to 2005. He would also have used the Charlemont Road to access his grandparents' house. He could not remember any work being carried out on the disputed land whether by Oliver Gribben or at all, nor could he remember vehicles or plant being located on the disputed land. He said that these and any materials were stored on the site across the road. He accepted that it was possible that work could have been carried out on the disputed land he was not aware of it. He gave evidence of helping his father with the Christmas trees on the disputed lands from 2002 to 2004.

E. DISCUSSION AND FINDINGS

[54] It is very difficult to reach conclusions on issues where, as here, there is contradicting, credible evidence. Memory does play tricks and it can be difficult to remember not only events but the sequence in which those events occurred where more than ten years has passed. However the burden of proving adverse possession on the balance of probabilities remains throughout with the respondents.

[55] I consider that those working on the respondents' new house will have the most reliable recollection. They will know where plant was stored, where vehicles were parked, where materials were located, when and where infill was put down and whether the disputed lands was levelled. They will know whether flooding of

the site occurred and whether this required drainage works on the disputed land. These matters were all critical in the completion of the respondents' house. I consider that I can rely on Mr Gribben, Mr Hughes and Mr Quinn, who all struck me as being decent, honest, hardworking men. In reaching that conclusion I must emphasise that I found Mrs Martin and the Martin off-spring together with Mr Mellon to be credible witnesses doing their best in difficult circumstances to remember what had taken place many years ago. However I am persuaded to the requisite standard by the totality of the evidence of those who carried out the work on the disputed land rather than those who were mere casual observers as to what was happening on the disputed land during the period when construction work was on-going on the adjacent site. It is not that I do not believe the other witnesses who gave contradicting evidence as to the use to which the disputed land was put in the period between 2001 to 2005, it is just that they would have no particular reason to observe exactly what was happening on the disputed land. Accordingly, on the balance of probabilities I am satisfied that what took place on the disputed land during the time when the house was under construction was:

(a) The laying down of rubble and infill.

(b) The levelling and raising of the site.

(c) The parking of vehicles.

(d) The positioning of plant such as cement mixers.

(e) The storing of materials including stones and soil.

(f) The carrying out of drainage works and the improvement of drainage to the disputed land.

[56] Further I am satisfied that in the context of this derelict, apparently abandoned land, this amounted to factual possession and clearly evinced the intention on the part of the respondents to possess the disputed land. If, I had any doubts about the intention to possession which I do not, then there are the testimonies of the respondents themselves. I accept that such evidence is self-serving. Essentially I have stood back, examined the totality of all the evidence and taken a broad view. This has led me to conclude that the respondents have dealt with the disputed land for 12 years and upwards as an occupying owner might have been expected to do so.

[57] It is clear that from 2005, there can be no room for any doubt given that the land is cultivated and treated in exactly the same way as the site on which the respondents had constructed their new house. The work carried on by the Quinns in 2005 clearly amounted to cultivation of abandoned lands and as Slade J in Powell the action of ploughing up and cultivating agricultural land is so drastic as to point in unquestionably to "an intention on the part of the doer to appropriate the land

concerned". This intention was further reinforced by the work the following year of Eugene Campbell who levelled, rotavated, ploughed and planted grass seed to produce a lawn like finish and complete the transformation of which had previously been a piece of wasteland. The disputed land has been maintained by the respondents in a pristine fashion to date, as I witnessed when I attended at the conclusion of the evidence.

[58] I accept that there is no strong evidence to what happened to the disputed land between Oliver Gribben completing the construction of the house and leaving the site and the work of the Quinns the following year. There is some evidence that the grass on the disputed land was cut and that weeds were strimmed by Peter O'Brien, although this was not particularly strong. However given the nature of the land, while there may not have been continual use of it from the date of the completion to the house on the adjacent site to the commencement of work being carried out by the Quinns and Eugene Campbell, I am satisfied that in the circumstances there was continuous possession. Accordingly in those circumstances I am satisfied that in respect of the period from 2001 when work commenced on site, the respondents had possession of the disputed land, that is both factual possession and the intention to possess until work was carried out by the Quinns in 2005. I do not think given the nature of the works carried out to the disputed land and the manner in which they have been kept to date from 2005 that it could be seriously contended that the respondents had not adversely possessed the disputed land from the summer of 2005. Accordingly in those circumstances I am satisfied that the respondents have acquired a possessory title following their "adverse" possession of the disputed land from 2001 to the date of issue of the civil bill. Further I am fortified in my conclusion by the fact that the very experienced County Court Judge, His Honour Judge Finnegan, who heard this case at great length over an extended period of time and in considerable detail at first instance, reached the same conclusion.

F. CONCLUSION

[59] In the circumstances and for the reasons which I have set out, I dismiss the appeal. I will hear the parties on the issue of costs.