

**THE HIGH COURT  
DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN**

[2017 No. 182 CA]

**BETWEEN****MARY BYRNE****PLAINTIFF**

**AND  
DUBLIN COUNTY COUNCIL**

**RESPONDENT****JUDGMENT of Mr. Justice Meenan delivered on the 22nd day of March, 2018.****Background**

1. This is an appeal from the Circuit Court concerning the ownership of a plot of land ("the land") situated at the rear of No. 33 Brian Road, Marino, Dublin 3. A number of properties on St. Declan's Road, Brian Road and Brian Avenue, Marino adjoin the land.

2. The plaintiff is the owner of No. 33 Brian Road and the defendant has the paper title to the land.

3. In order to determine whether the plaintiff has acquired title by adverse possession of the land it is necessary to examine the history of both No. 33 Brian Road and the land. No. 33 Brian Road was formerly owned by the plaintiff's grandfather, Mr. Michael Byrne. Mr. Byrne died on 23rd February, 1960 and he bequeathed the property to his wife, Mrs. Bridget Byrne.

4. On 3rd March, 1981, Mrs. Byrne was registered as the fee simple owner of No. 33 Brian Road (Folio DN 23259F). Mrs. Byrne died on 8th January, 1993 and she bequeathed No. 33 Brian Road, including the land, to her children, subject to the right of any of her children or grandchildren to purchase same. The plaintiff, a grandchild of Mrs. Byrne, purchased No. 33 Brian Road in 1993. The plaintiff has been living in No. 33 Brian Road and maintains that she has been in exclusive possession of the land since 1993.

5. It would appear that the defendant let the land in or around 1934 in four plots to Mr. Byrne at a rent of 37p per annum per plot. The rent was paid until 1985 and no payment has been made since. An order of the Assistant City Manager of the defendant dated 13th October, 1994 states:-

"Re: Plot of ground at rear St. Declan Road, Brian Road and Brian Avenue, Marino.

The large garden colour red on the attached map was let to Mr. Michael Byrne, the tenant purchasers of No. 33 Brian Road, in the early thirties. It was let as four plots at rents of 37p per annum each. The last rent was paid for 1985. Some of the residents of the houses surrounding the plot wish to obtain part of the site for use in conjunction with their present holding. Accordingly, it is desired to terminate the original tenancy of Mr. Michael Byrne.

Mr. Michael Byrne and his widow Mrs. Bridget Byrne are now both deceased. The house, 33 Brian Road, is reputed to be now occupied by their granddaughter.

I recommend that notice to quit be served on the present owner of No. 33 Brian Road in respect of the large garden at the rear."

The "large garden" at the rear is the land the subject matter of these proceedings.

6. Following the said order of the defendant's Assistant City Manager, a notice to quit the land was served on the defendant, dated 19th December, 1995. The notice to quit stated:-

"I hereby give notice that you are required to deliver up possession of the plot of ground at rear 33 Brian Road, Marino, Dublin on 19th February, 1996.

Please remove all your goods and belongings from the area by the above date.

If you refuse or neglect to deliver up possession of the said plot of ground on the said 19th February, 1996, ejectment proceedings will be instituted against you.

Dated 19th day of December, 1995.

Signed: Assistant City Manager."

7. Subsequent to the notice to quit, there was correspondence between the then solicitors for the plaintiff and the defendant. Unfortunately, some of this correspondence has been mislaid and all that is now available are the replies from the defendant. These letters dated 26th January, 1996 and 20th February, 1996 indicate an intention on the part of the plaintiff to become registered as the owner of the land in the Land Registry.

8. The plaintiff gave evidence that the land was effectively used as the garden for No. 33 Brian Road. In the early years, the late Mr. Byrne used the land to grow fruit and vegetables; he constructed a glass house and kept hens on the land. Following the death of Mr. Byrne, Mrs. Byrne continued to use the land as part of the garden. She fenced off part of the land with a wire mesh fence so as to make the land inaccessible by any route other than through No. 33 Brian Road. It would appear that in the years after the death of Mr. Byrne, the growing of fruit and vegetables ceased, hens were no longer kept and the glass and hen houses fell into disrepair. However, during this period it would appear that the grass was cut and the boundaries were maintained on a regular basis by the Byrne family.

9. In November 2010 the plaintiff applied to the Property Registration Authority for first registration on the grounds of long possession. Following an exchange of correspondence, the plaintiff did not proceed with this application but subsequently renewed the application in August 2015.

10. The renewed application brought about a reaction from the defendant and the neighbours which led to these proceedings. Doors,

gates and gaps began to appear in the boundary walls, fencing and bushes. The neighbours started planting and using the land for social events. Presumably, this was all with the aim of establishing that the plaintiff had not acquired title to the land and that the defendant could proceed with its plan to divide the land among the neighbours.

11. It is common case that the defendant owns the paper title to the land. The defendant proposes to divide up the land amongst the adjoining neighbours. However, should the plaintiff successfully establish that she has acquired title to the land by way of adverse possession then this division cannot proceed. It is in these circumstances that the dispute now comes before this Court.

### Statutory Provisions

12. The relevant provisions of the Statute of Limitations Act 1957 (as amended) are:-

Section 13(2):-

"The following provisions shall apply to an action by a person (other than a State authority) to recover land—  
(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;"

Section 17(2):-

"(a) A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period.

(b) The right of action of a person entitled to land subject to a tenancy from year to year or other period, without a lease in writing, shall be deemed to have accrued at the date of the determination of the tenancy, unless any rent or other periodic payment has subsequently been received in respect of the tenancy, in which case the right of action shall be deemed to have accrued on the date of the last receipt of rent or other periodic payment."

Section 24:-

"Subject to section 25 of this Act and to section 49 of the Registration of Title Act, 1964, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

### Legal Authorities

13. There are numerous authorities on the issue of adverse possession. The Supreme Court decision in *Dennis Dunne v. Irish Rail and Córas Iompair Éireann* [2016] IESC 47 sets out clearly the principles which a court should apply in dealing with a case such as this. It is not necessary to set out the facts of Dunne as it is clear that cases of adverse possession are particularly fact specific.

14. I refer to the judgment of Laffoy J. where she states:-

"7. The trial judge (at para. 4.3) stated that the general principles seemed to him to be well summed up in a passage from the judgment of Slade J. (as he then was) in *Powell v. McFarland* [1979] 38 P & C.R. 452 at p. 470. The trial judge then quoted three of the four principles outlined by Slade J. when delivering judgment in the Chancery Division of the English High Court, which were in the following terms:

"(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 of 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 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."

The trial judge then quoted, and suggested as being to like effect, the passage from the judgment of Lord O'Hagan in *Lord Advocate v. Lord Lovat* (1880) 5 App Cas 273 at p. 288 quoted by Charleton J. at para. 10 in his judgment. He then summarised the position (at para. 4.5) as follows:

"It seems to me, therefore, that the nature of the possession which must be established is one which must be objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to."

In my view, that statement is indisputable"

15. In his judgment, Charleton J. stated:-

"8. The extent of usage required for possession adverse to the holder of the title deeds might first usefully be considered. Buildings and lands vary markedly as to character and potential use. It is that character and the range of uses to which land may be put that determines if a possession is adverse to the rights of the original owner... It is the ordinary use to which such land may be put that assists in determining whether possession has been taken of it. A residential dwelling is defined by the fact that people live in it. Possession is taken of a flat or a house by moving in to it and living in it as if the place belonged to the possessor...

9. It cannot suffice for adverse possession merely to occasionally visit or to sporadically use the land or premises in

question. What is required is a use inconsistent with the title-holder. Relevant, therefore, is the extent of the land or premises, the character of the realty and the ordinary use to which same would be put. In a series of cases, it has been consistently held that a particular analysis of the individual circumstances of possession must be made by the trial judge..."

and

"13. Intention to possess may be proven by direct testimony but, given the tendency towards mistakes of memory and exaggeration in such cases, is perhaps more reliably established as an inference from the particular circumstances of a given case; in other words, intention to exclude the owner is best judged from the facts on the ground. That will be a matter for the trial judge. Where no, or minimal, use is made of land, it may be a simple matter not to draw an inference that there was an intention to exclude the title holder..."

### Submissions

16. Mr. Gavin Ralston S.C., on behalf of the plaintiff, submitted that the 12 year period required for adverse possession commenced on 19th February, 1996, the date of the expiry of the notice to quit. It is submitted that during this 12 year period the plaintiff was in clear possession of the land and had the intention to possess the land. Maintenance of the land and securing of the boundaries are demonstrative of such.

17. Mr. Paul Burns S.C., on behalf of the defendant, made two principal submissions:-

(i.) When the plaintiff purchased No. 33 in 1993 she only acquired No. 33 Brian Road (Folio DN 23259F). She never acquired any interest in the land. Service of a notice to quit did not confirm any title or confer any title to the land on the plaintiff.

(ii.) The plaintiff fails the tests to establish adverse possession set out in the *Dunne* case. Reliance is placed on the passage of Charleton J., set out a para. 15 above, to the effect that "It cannot suffice for adverse possession merely to occasionally visit or to sporadically use the land or premises in question..."

### Decision

18. As to whether adverse possession has been established it is necessary for the court to decide, in the words of Charleton J., what is "the character of the realty and the ordinary use to which same would be put." In my view, the land is a garden and this Court must establish whether the plaintiff has been using the land in a manner that is consistent with it being her garden.

19. The plaintiff's grandfather used the land for the growing of fruit and vegetables. He also constructed glass houses. Following his death in 1960, the plaintiff's grandmother came into possession of the land and paid rent until 1985. In the years before her death in January, 1993, the growing of fruit and vegetables effectively ceased, presumably, resulting in the greenhouses falling into disrepair. This was the situation when the plaintiff acquired her interest in the 1993.

20. Gardens vary between those with well manicured lawns, herbaceous borders and flowers and shrubs for every season, to those which have been handed back to nature. In this case the garden, like many, falls between the two. The plaintiff gave evidence of regularly mowing the grass, keeping the boundaries in shape and, from time to time, holding family events in the garden during the summer. This is as much as many do in their gardens.

21. It is the case that since 2009 the plaintiff undertook a number of significant improvements to the garden. For example, the removal of the glass house and laying a patio area with an adjacent chimney/barbeque area. However, it does not follow that the plaintiff only began using the land as a garden from this time.

22. Evidence was given by neighbours that they rarely, if ever, saw the plaintiff in her garden. I attach little weight to this. The plaintiff is in full-time employment and, apart from a lodger, lives alone. I do not think that it is at all surprising that the plaintiff is not more frequently seen in her garden which, on the evidence of the neighbours, can only be viewed from the upstairs windows of neighbouring houses.

23. It is also clear that the defendant had no involvement with the land. The defendant did not cut the grass, maintain the boundaries or provide any access route other than through No. 33 Brian Road, a private dwelling house.

24. A number of neighbours gave evidence of gaining access to the land where the boundary was delineated by bushes. However it was not until 2015 that gates or doors were constructed in the boundary fences/walls to enable access.

25. By reason of the foregoing, I conclude that the plaintiff had both the requisite intention to possess (*animus possidendi*) and the factual possession of the land. Although the defendant owns the paper title, it has carried out no act of ownership on the land since the service of a notice to quit on the plaintiff in December 1995 other than indicating a desire to subdivide the land amongst the neighbours.

26. It was submitted by the defendant that when the plaintiff purchased No. 33 Brian Road in 1993 she acquired no interest in the land. I have already detailed the evidence that supports the plaintiff's factual possession of the land and the requisite intention to possess. I believe that this situation was accepted by the defendant when it served the notice to quit. I refer to the wording of the notice to quit which required the plaintiff to "deliver up possession". Further, by letter dated 20th February, 1996 from the Assistant Law Agent of the defendant to the plaintiff's then solicitor it is stated:-

"My clients have now served a notice to quit on your clients and they intend to resume possession of the site..."

The defendant took no further steps to obtain possession of the land.

### Conclusion

27. By reason of the foregoing, I find that the plaintiff acquired title by way of adverse possession to the land on 20th February, 2008, 12 years after the expiry of the notice to quit. Therefore, I affirm the order of the Circuit Court.

