

BETWEEN

ÚDARÁS EITLÍOCHTA NA HÉIREANN

IRISH AVIATION AUTHORITY AND DAA PUBLIC LIMITED COMPANY

PLAINTIFFS

AND

GERARD MONKS AND MARK MONKS

DEFENDANTS

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 7th day of July, 2017.**

1. In these proceedings, the plaintiffs seek injunctions and other relief including a declaration that the second named defendant does not possess any estate, right, title or interest in a property comprised in Folio 2591R of the Register, Co. Dublin, known as "McCabe's field". The first named defendant has consented in writing to the making of final orders in favour of the plaintiffs in these proceedings and did not participate in the substantive hearing of the matter before the court. Throughout this judgment, Mr. Mark Monks ("the second named defendant") shall be referred to as "the defendant".

2. Specifically, the plaintiffs seek an injunction restraining the defendant, his servants or agents from preventing, interfering with, impeding, threatening and/or obstructing the plaintiffs and/or their servants or agents from engaging in the construction of the new Air Traffic Visual Control Tower at Dublin Airport and any ancillary or necessary works thereto. They also seek a declaration that the defendant is in breach of an order of the High Court (Kearns J.) made on 10th November, 2003, in the matter of *Aer Rianta Cuideachta Phoiblí Theoranta v. Mark Monks* [2000 No. 10996 P.] and the plaintiffs seek damages for trespass.

**Factual Background**

3. McCabe's field comprises some 0.425 acres and is situate adjacent to the boundary of Dublin Airport and close to the Air Traffic Visual Control Tower and associated car park, the fire station and some hangars. McCabe's field will play an important role in the development of the northern runway and more specifically in relation to the development of the new Air Traffic Visual Control Tower which will service that runway. Planning permission for the new control tower was granted on 12th February, 2010. At no time during the planning process did the defendant lodge any objection or make submissions to An Bord Pleanála or assert any ownership claim to McCabe's field. On 12th December, 2016, BAM Civil Limited commenced preparatory works on McCabe's field. Shortly thereafter, the defendant arrived at the field and a dispute took place concerning the ownership of the site. This is the central issue in these proceedings.

4. On 2nd March, 1928, the Minister for Industry and Commerce was registered as owner of the lands in Folio 2591R. On 14th February, 2007, Dublin Airport Authority was substituted as owner. The lands comprised in Folio 2591R incorporated McCabe's field.

5. On 23rd December, 1992, Aer Rianta purchased four parcels of land from Mr. James Monks, the father of the defendant, in consideration of the sum of £340,000.00. The lands purchased were as follows:-

- (i) 42.862 acres being part of the property comprised in Folio DN329 which was commonly used for grazing;
- (ii) outhouses and buildings known as the "Twenty-two cowshed, the Feeding Shed and the Calf Shed" adjacent to Huntstown House which was part of Folio DN329;
- (iii) 0.425 acres being part of Folio DN2591R (McCabe's field); and,
- (iv) a dwelling house being the property comprised in Folio DN15150 which was across the road from McCabe's field (hereinafter referred to as "the dwelling house").

6. Before Aer Rianta bought the land from Mr. James Monks, the parties to the agreement realised that there was a mistake in Folio 2591R in that McCabe's field had been included in the folio since 1939. This was known to both Aer Rianta and Mr. James Monks in 1992. Prior to the sale of the lands Mr. James Monks had an established use of McCabe's field and had intended applying to the land registry to be registered as full owner by long possession. However, when he decided to sell the lands to Aer Rianta, the parties to the sale agreed it was not necessary for McCabe's field to be included in the deed of transfer as it was already registered in the name of the Minister for Industry and Commerce. Instead, the matter was addressed by way of a statutory declaration dated 23rd December, 1992, in which Mr. James Monks confirmed that he had agreed to sell McCabe's field to Aer Rianta, that the purchase price had been paid, that he had withdrawn his application for registration in the land registry in respect of those lands and that he no longer had any interest whatsoever in McCabe's field.

7. On the same day as the deed of transfer, Aer Rianta entered into a caretaker's agreement with Mr. James Monks in respect of the lands including McCabe's field and the agreement ran from 22nd December, 1992, for eighteen months up to 21st June, 1994. The agreement provided that Mr. James Monks would enter into possession "...solely as such caretaker...and not under any contract of tenancy".

8. £34,000.00, being 10% of the purchase price, was placed on joint deposit on 24th December, 1992, in the joint names of the parties' solicitors to be released when vacant possession of the lands was obtained by Aer Rianta.

9. On 13th May, 1994, Mr. James Monks sought to extend the agreement in respect of the parcels of land from 1st July, 1994. At this time, McCabe's field was excluded from any new arrangement because of its location. The field is adjacent to the airfield entrance at the Dublin Airport and is close to the IAA Air Traffic Control Tower and associated car park, the fire station and some hangars all contained within the airport complex. Due to its proximity, the lands could be directly incorporated into Aer Rianta's lands for use and it was envisaged that they would inevitably form part of the development and/or expansion of the airport and its facilities in a way in which the other lands would not.

10. On 13th May, 1994, Mr. Brian Vaughan, Corporate Property Manager, accompanied by Mr. Paul Pugh visited Mr. James Monks at his request. Mr. James Monks explained that he was still waiting to receive the sale monies from his solicitor and had been unable to make plans to buy a new house. He explained that he was interested in renting the house, outhouses and land at a fair rent from 1st July, 1994. It was agreed that McCabe's field would be excluded from the new letting and that the old cottage known as McCabe's Cottage would be vacated and Mr. James Monks would remove any item stored in the cottage so it could be knocked down. They agreed that Mr. James Monks could remain on the land until there was agreement on the rent. Contemporaneous notes of this meeting and subsequent meetings were made by Mr. Vaughan and he gave evidence to the court confirming the discussions that took place. On 28th July, 1994, Mr. Vaughan and Mr. Pugh again met with Mr. James Monks and discussed a figure of £4,500.00 for the lease of the dwelling house across the road from McCabe's field and the other lands which were collectively referred to as the "Conacre lands".

11. On 27th September, 1994, Mr. Noel Maher, a solicitor acting for Mr. James Monks said that he would advise his client to negotiate a rental of the dwelling house and the Conacre lands and to surrender vacant possession of McCabe's Cottage. On 27th September, 1994, Mr. James Monks telephoned Mr. Vaughan informing him that he would vacate McCabe's Cottage as soon as he got alternative storage space which he expected to arrange shortly. On 23rd November, 1994, Mr. Pugh and Mr. Vaughan visited Mr. James Monks and discussed a letting agreement with him whereby Aer Rianta would let him the Conacre lands and dwelling house from 1st July, 1994, for rents of £2,800.00 per annum and £1,200.00 per annum respectively. It seems the discussion eventually led to an agreement that there would be a letting in respect of the dwelling house and a licence agreement in respect of the Conacre lands. The lands did not include McCabe's field. At that meeting, Mr. James Monks agreed that McCabe's Cottage would be cleared shortly. The period of the rental agreement was to be from 1st July, 1994 to 30th June, 1995. Mr. Vaughan recorded a contemporaneous note of that meeting.

12. On 31st January, 1995, Mr. Vaughan sent Mr. James Monks a formal letting agreement in duplicate in respect of the dwelling house and a licence in duplicate in respect of the Conacre lands reflecting what had been orally discussed. A reminder letter was sent to Mr. James Monks on 15th May, 1995, but no letting agreement or licence were signed or returned.

13. A licence agreement dated 15th July, 1996, outlining the Conacre lands to be licensed to Mr. James Monks was left with Mrs. Ella Monks on 15th July, 1996. This agreement did not include McCabe's field. The agreement was not returned.

14. Mr. James Monks died on 27th August, 1996.

15. In August 1997, Aer Rianta agreed to grant a licence to the defendant in respect of the Conacre lands from 1st August, 1997 to 30th June, 1998. These lands did not include McCabe's field. There was a further agreement to let the dwelling house to Mrs. Monks. By that time there were arrears of rent and licence fees owing by the estate of Mr. James Monks in the sum of £12,202.31. Aer Rianta proposed that this be addressed by deduction from the deposit of £34,000.00 still being held on joint deposit with the solicitors for Aer Rianta and the late Mr. James Monks.

16. By letter dated 6th February, 1998, Messrs. Maher McAlinden Gallagher Solicitors wrote on behalf of the defendant referring to McCabe's Cottage and McCabe's field stating that the land was mistakenly transferred to Aer Rianta over fifty years previously and that their client had been in possession of the property since the 1950s. This claim came out of the blue and at a time when Aer Rianta was actively trying to address the arrears due on foot of the rental agreement for the house and the licence agreement for the Conacre lands.

17. On 27th February, 1998, Aer Rianta's solicitors wrote to Messrs Maher McAlinden Gallagher informing them that they had purchased the lands from Mr. James Monks in 1992 and had paid full consideration for the lands including McCabe's field. The letter pointed out that at the time of the sale it was acknowledged that Mr. James Monks had a claim in relation to McCabe's field and that he had made an application to the land registry to register a possessory title but that, as part of the completion of the purchase of the lands, the dealing in relation to the application for possessory title was withdrawn from the land registry.

18. In the face of compelling evidence that Mr. James Monks had sold lands to Aer Rianta in 1992 and that these lands included McCabe's field, the defendant continued to assert a claim on those lands. He maintained that he used the lands for storage purposes. He also claimed that his father had no legal title to sell the relevant lands. On 20th September, 1999, Mr. Vaughan wrote to the defendant formally calling upon him to remove his items from McCabe's field. On 21st January, 2000, Mr. Vaughan wrote to the defendant referring to the oral Conacre agreement which expired on 31st December, 1999, informing him that Aer Rianta would not be renewing the agreement and that they intended to recover possession of those lands. The letter also stated that, while it was understood that he may have been using McCabe's field to store property, there was no consent for that or any other use and he was asked to remove any property from both sites not later than 31st January, 2000.

19. Mr. Vaughan gave evidence that, on 24th January, 2000, the defendant telephoned him to say that he was contesting the original sale of the land by his father, Mr. James Monks, on the basis that he was not of sound mind at the time and that his solicitor should not have allowed him proceed with the sale. This was the first time such a suggestion was made. It was not supported by any medical evidence or by any of the defendant's siblings who gave evidence.

20. Various forms of interaction took place between Aer Rianta and the defendant culminating in High Court proceedings bearing record number [2000 No. 10996 P.]. In those proceedings, Aer Rianta sought injunctions restraining the defendant from occupying the lands including McCabe's field and ordering him to deliver up possession of those lands.

21. Over a very protracted period of time, the defendant in those proceedings failed to deliver a defence and the matter came before the High Court on a number of occasions by way of motions for judgment in default of defence which were adjourned from time to time. On 10th November, 2003, Kearns J. (as he then was) ordered that the defendant deliver up possession of three parcels of land including McCabe's field and discharge arrears of rent in the sum of €37,729.00 to Aer Rianta.

22. Mr. Jerome Gallagher of Maher McAlinden Gallagher Solicitors, previously retained by the defendant, gave evidence that he informed the defendant of the outcome of those proceedings. He confirmed that he never received instructions to appeal or set aside the order of Kearns J. When invited to comment as to why this was so, he informed the court that there were no papers to enable him to do so. From his evidence, I inferred that he meant there was no documentary evidence to rebut Aer Rianta's claim of ownership to McCabe's field and the other lands.

23. I found Mr. Jerome Gallagher to be a credible witness. He attended court on foot of a subpoena and was clearly uncomfortable having to give evidence which was unfavourable to a former client. One of the features of this case is that the defendant was unable to produce any written documents establishing his claim to McCabe's field or the other lands sold by his father.

24. On 20th February, 2004, the defendant entered into a settlement agreement with Aer Rianta in respect of the High Court proceedings in which an adjudication had been made against him. His mother, Mrs. Monks, was also a party to the settlement agreement because part of it concerned Circuit Court proceedings involving the dwelling house and lands at Folio 105077F of the Register, County of Dublin. Of relevance to these proceedings is para. 2 of the agreement. It reads as follows:-

"2. In High Court proceedings entitled *Aer Rianta Cuideachta Phoiblí Theoranta and Mark Monks* bearing record No. 2000/10996 P., the parties have agreed the following:-

(a) An Order for Possession of the Lands and Premises situate at Huntstown, Cloghran in the County of Dublin and comprised in Folios 105077F, 329 and 2591 of the Register, County of Dublin together with a stay on the said order until 31st December, 2003. (b) The sum of £35,000 (sic) (€44,440.83) together with interest thereon, currently being held in a joint account between BCM Hanby Wallace, Solicitors, and McAlinden & Gallagher, Solicitors to remain on deposit pending the delivery up of vacant possession of the lands and premises situate at Huntstown, Cloghran in the County of Dublin comprised in Folios 105077F, 329 and 2591 of the Register, County of Dublin.

(c) On the delivery of vacant possession of the lands hereinbefore referred to on or before 30th June, 2004, the sum of €23,000 to be paid out of the said account to Aer Rianta in full and final settlement of arrears due and owing, the balance to be released to the estate of the late James Monks, deceased.

(d) On the immediate delivery of vacant possession of the lands known as 'McCabe's field' being part of the lands contained in Folio 2591 of the Register, County of Dublin and of the outbuildings and the yard adjacent to the Huntstown House, contained in Folio 329 of the Registrar (sic) Co. Dublin.

(e) The defendants agree to allow the plaintiff access to and inspection/survey facilities in relation to the lands, the subject matter of the proceedings herein, if necessary, during the period up to and including 30th June, 2004..."

The agreement was signed by the defendant and his mother.

25. Following the order of Kearns J. on 10th November, 2003, the defendant could not have been in any doubt that Aer Rianta was entitled to possession of McCabe's field. The settlement agreement of 20th February, 2004, copper-fastened the legal position. It even referred to "McCabe's field" quite specifically.

26. On 28th June, 2004, the defendant's solicitor, now named McAlinden & Gallagher wrote to the solicitors for Aer Rianta referring to those proceedings in the following terms:-

"Dear Sirs

Further to our letter of 11th May last our client has contacted us with reference to the following matters (bearing in mind that there is a High Court Order).

All of the lands, the yard and 'McCabe's field' are available to Aer Rianta to take over on 30th June. He asked us to obtain permission from Aer Rianta to allow his mother to stay in the house for six weeks as he is currently endeavouring to arrange to have her re-housed. His own house and lands consisting of six acres or thereabout situate at Naul, Co. Dublin, is currently on the market. The six week period is required with a view to obtaining accommodation for her as an interim measuring pending the sale of his own property and of course to provide vacant possession to Aer Rianta as per the terms of settlement. With that in mind he has requested us to ask for the release of the monies on joint deposit or alternatively the sum of €10,000 to be released directly to himself in order to effect the letting of a residential dwelling for his mother and to furnish vacant possession of the dwelling to Aer Rianta..."

27. On 11th August, 2004, Aer Rianta's solicitors wrote to McAlinden & Gallagher referring to their letter of 28th June and to subsequent telephone conversations between the solicitors. The letter records that the defendant has confirmed that he has vacated the lands at Huntstown, Co. Meath and asked for confirmation that Mrs. Monks has also vacated their client's property at Huntstown. It appears that the reference to "Co. Meath" was an error and should have been Co. Dublin because that is how the property at Huntstown is described in the settlement agreement, the contract for sale and in Folio 2591.

28. The balance of the deposit was paid out in accordance with the terms of the agreement and this was confirmed by Mr. Gallagher, the defendant's former solicitor, who agreed that the release of the monies was on the basis of the confirmation by him that all of the lands including McCabe's field would be available to Aer Rianta to take over from 30th June, 2004.

29. Although planning permission for the new Air Traffic Visual Control Tower was granted on 12th February, 2010, the project did not proceed until August 2015, due to the economic downturn in the State.

30. BAM Civil Limited was the successful tenderer and commenced enabling works on site on 13th December, 2016. These works were to include the clearance of the relevant lands including McCabe's field and the demolition of the derelict cottage and removal of all scrub and overgrowth. It was anticipated that these preliminary enabling works would be completed by the end of May 2017.

31. This work was disrupted by the defendant who, on 14th December, 2016, placed signs on trees at the site claiming ownership and drove his car onto McCabe's field making it difficult for works to continue. He threatened to escalate matters further by placing containers and trailers on the land. As a result, BAM Civil Limited ceased work and removed the machinery from McCabe's field until an interlocutory injunction was obtained on 2nd February, 2017. BAM Civil Limited have given formal notice, by letter dated 16th December, 2016, of an event causing delay to them and there may be financial consequences for the plaintiffs. These consequences have yet to be ascertained.

## Discussion

32. The defendant maintains that he is the owner of McCabe's field notwithstanding the extensive documentary evidence to the contrary which has been referred to earlier in this judgment. Section 31 of the Registration of Title Act 1964, provides that:-

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land..."

33. The land registry folio which has been produced to the court records that, following the cancellation of ownership of the Minister of Industry and Commerce on 14th February, 2007, Dublin Airport Authority is the full owner of the lands contained in Folio 2591 including McCabe's field.

34. The defendant has made varying claims as to the period for which he has been in possession of the property. In his statement of evidence, he asserted that in 1969, his father handed him the keys of the house and told him it was his. He was referring to McCabe's Cottage and field. At other times, he said he was in possession of it since 1990. He claims that in February 1990 at a meeting of his family, his father Mr. James Monks stated that he wished to leave McCabe's field to the defendant. The defendant is supported in this evidence by his brother, Mr. Alan Monks, and his sister, Mrs. Katherine McGuirk.

35. It is not necessary for me to decide whether or not such a meeting took place and whether Mr. James Monks expressed such an intention. There is no evidence that Mr. James Monks ever transferred McCabe's field to the defendant. The fact is that in November 1992, Mr. James Monks sold certain properties including McCabe's field to Aer Rianta for a sum of £340,000.00. At the time of sale he made a declaration that he was the full owner of McCabe's field. There is a High Court order in proceedings bearing record No. [2000 No. 10996 P.] in which the defendant was restrained from occupying McCabe's field and was ordered to deliver up possession of it. There is a further settlement agreement on 20th February, 2004, whereby the defendant agreed to give up possession of McCabe's field. The defendant was legally represented when he entered into that settlement. Mr. Conor Wyse, Head of Commercial Legal Affairs with the second named plaintiff, gave evidence that the balance of the deposit monies retained from the sale by Mr. James Monks were released to the defendant in 2015 when vacant possession was obtained of the dwelling house which had been occupied by the late Mrs. Monks and McCabe's field had been delivered up by the defendant.

36. Evidence was given by the defendant and a number of other witnesses, including his siblings, that he carried on various activities on McCabe's field for the past twenty-five or thirty years. The defendant himself concedes that he was not carrying on business there but certain activities were carried out by way of a hobby. These included selling car parts, logs and Christmas trees. In a reply to a notice for particulars in these proceedings, the defendant stated that these activities were "...concealed from the view of passersby for security reasons". Evidence was called on behalf of the plaintiffs in which various employees who regularly passed McCabe's field said they never saw any activity being carried out there. I found those witnesses to be credible.

37. Having considered the evidence on this point, I am satisfied that the defendant did carry out some sporadic activity on McCabe's field over a period of years but that it was not a business, was very intermittent and was not readily noticeable to passersby. It was, in fact, concealed.

38. This evidence is supported by a series of aerial and other photographs which were produced to the court by both the plaintiffs and the defendant. The photographs were taken in 2003, 2004, 2005, 2009, 2011 and 2013. They show a field which was largely overgrown with the remains of a derelict cottage on the site. A few cars could be seen on the site in some of the aerial photographs but the overall appearance of the site was one which was quite overgrown and little used. The defendant also produced some photographs of the entrance to the field which presented a similar picture.

39. The legal principles applicable to claims of adverse possession are to be found in the Statute of Limitations Act 1957 (as amended) and in *Dunne v. Iarnród Éireann* [2016] IESC 47, where Laffoy J. adopted general principles from the judgment of Slade J., as he then was, in *Powell v. McFarland* [1979] 38 P & CR 452, in the High Court of England and Wales stating:-

"(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."

40. There can be no doubt, and I hold, that the owner of the land with the paper title is Dublin Airport Authority and no evidence has been put before the court to suggest otherwise. I am also satisfied that the plaintiffs have performed acts of possession including entering into a caretaker's agreement with Mr. James Monks, making arrangements for the hedges of McCabe's field to be cut routinely, carrying out a geophysical survey in 2009, and in facilitating the inspection of the lands for the purpose of a building survey in 2014. Furthermore, the plaintiffs or their predecessors in title have taken active steps to prevent the defendant from using McCabe's field or asserting ownership over it including in the earlier High Court proceedings. Not only is there no evidence that would tend to suggest that the owner of the paper title had an intention to relinquish possession of McCabe's field but, on the contrary, there is ample evidence to establish that the second named plaintiff, as registered owner of the land, had always challenged the defendant's entitlement to ownership of the lands or the use thereof. It entered into a caretaker's agreement with Mr. James Monks and subsequently a lease and licence agreement in respect of the dwelling house and Conacre lands specifically excluding from such agreement McCabe's field; it has authorised the carrying out of preliminary works on the land in advance of the construction of a new control tower; and, has made a planning application which includes those lands. All these are ample evidence of an intention on the part of the second named plaintiff not to abandon its title. (See *Mulhern v. Brady* (Unreported, High Court, 14th February, 2001))

41. None of the activities carried out by the defendant were such that they could displace the true owner of the lands. In carrying out minimal and intermittent activity on the land in a concealed manner, the defendant has not displayed the requisite intention to possess the lands.

42. I am satisfied that the defendant has failed to establish the requisite possession and intention to possess the lands and has not displaced the owner of the land with paper title for any period. Accordingly, it is not necessary to consider what, if any, significance could be attributed to the purported duration of possession as alleged by the defendant.

43. In the light of the clearest possible evidence of the sale of the lands to Aer Rianta by Mr. James Monks, the subsequent court order of Kearns J. made on 10th November, 2003, in High Court proceedings record No. [2000 No. 10996 P.] and the subsequent settlement of those proceedings by the defendant his persistence in claiming an entitlement to McCabe's field can only be described as extraordinary and audacious.

**Conclusion**

44. The plaintiffs are entitled to an order in the terms of relief No. 1, 2, 3 and 5 in the statement of claim.

45. So far as relief No. 4 is concerned, I will hear the parties on the appropriate order to be made having regard to the settlement agreement of 20th February, 2004.

46. As counsel for the plaintiffs have informed the court that it is not possible at this stage to quantify the damages for trespass, I will hear the parties to how and when that issue should be dealt with.