

BETWEEN

TRACEY ENTERPRISES MACADAM LIMITED

PLAINTIFF

AND
THOMAS DRURY

DEFENDANT

Judgment of Miss Justice Laffoy dated 24th November, 2006.**The dispute**

1. The dispute between the plaintiff and the defendant in these proceedings relates to the title to, and entitlement of possession of, a plot of land comprising an area just over half an acre which is situated on the left hand side of the road from Tallaght to Brittas in South County Dublin, which I will refer to as "the disputed plot". While I believe that the disputed plot is situated in the townland of Crookslin, the postal address is Mount Seskin, Brittas, County Dublin. The plaintiff claims to be the owner in fee simple of the disputed plot. The defendant disputes that the plaintiff ever acquired title to the disputed plot and, in the alternative, asserts that he has acquired title by adverse possession thereto.

The plaintiff's paper title

2. The plaintiff claims to have acquired title in fee simple to the disputed plot by virtue of a conveyance dated 30th September, 2004 from an associated company, Tracey Enterprises Dundrum Limited (Dundrum). There is no issue between the parties as to the devolution of title from Dundrum to the plaintiff. The issue is whether Dundrum ever acquired title to the disputed plot, and, if it did, whether it has been extinguished by reason of the defendant being in adverse possession for the limitation period.

3. The plaintiff claims that Dundrum acquired title by virtue of a conveyance dated 4th July, 1990 made between Lock Heed Builders Limited of the one part and Dundrum of the other part (the 1990 Conveyance). By virtue of that conveyance, Dundrum acquired the lands described in the first schedule thereto as follows:

"... part of the lands of Mount Seskin situate in the Parish of Tallaght, Barony of Upper Cross and County of Dublin being the hereditaments and premises delineated on the map annexed hereto and thereon surrounded by a red verge line and comprising an area of 140.022 hectares or thereabouts being part of the property comprised in the Deed of Conveyance made on 5th day of April, 1979 ..."

4. The map on the 1990 Conveyance was drawn in September, 1989 by J.P. Behan, Associates. It was drawn on a scale of 1:10560 and it did not depict the features which would have appeared on the ordnance survey map, except the road from Tallaght to Brittas. On the basis of a superficial assessment of the map, it would seem to include the disputed plot.

5. The 1990 Conveyance gave effect to an agreement for sale dated 20th March, 1990 between Lock Heed Builders Limited of the one part and Dundrum of the other part (the 1990 Contract). Some interesting features of the 1990 Contract were highlighted by counsel for the defendant. The purchase price was IR£205,000. The deposit paid on execution of the agreement was IR£50,000. The closing date was to be 28 days from the date of the contract. The special conditions provided that Dundrum was deemed to have made all relevant pre-contract enquiries regarding the title of the vendor and to have seen and inspected the physical boundaries and to have been satisfied that the physical boundaries corresponded with the title offered. On that basis, Dundrum agreed that the deposit, which was almost 25% of the purchase price, should be forfeited if it failed to complete on the closing date, even if it alleged that a person was in adverse possession of a portion of the property, or that the boundaries did not match the boundaries set out on the map attached to the contract, which was the same map as eventually was annexed to the 1990 Conveyance, or that the vendor had not furnished title to all of the property in sale. One of the witnesses, Ms. Alison Crawford, a solicitor in the firm of Joynt and Crawford which acted for Dundrum in the purchase, described the sale as a "forced sale", which I understand to mean that the vendor was being forced by its bankers to sell. The provisions of the agreement highlighted by counsel for the defendant were definitely unusual and harsh on Dundrum. While the fact that they were included is highly suggestive of Dundrum being prepared, for whatever reason, to acquire the property, to use a colloquial expression, "warts and all", to infer that whatever, if any, blemishes affected the title related to the disputed plot would be pure conjecture.

6. The conveyance dated 5th April, 1979 (the 1979 Conveyance) referred to in the 1990 Conveyance was made between John Lynham of the first part, James Lynham of the second part, Joseph Nestor of the third part, Barra J. Flynn of the fourth part and Lock Heed Buildings Limited of the fifth part (the 1979 Conveyance). The 1979 Conveyance gave effect to a very substantial transaction: the consideration was £900,000, a very substantial price at that time. The property conveyed was described therein as:

"... part of the lands of Mount Seskin situate in the Parish of Tallaght, Barony of Upper Cross and County of Dublin being the hereditaments and premises delineated on the map or plan annexed to these presents and thereon surrounded by a red verge line including the hereditaments and premises coloured in orange and the hereditaments and premises hatched in blue and yellow."

7. The areas described as being "hatched in blue and yellow" in the 1979 Conveyance correspond to property adjoining the disputed plot to which the defendant has title and the disputed plot. Neither the evidence adduced, nor the documents put in evidence, explain satisfactorily why these areas were distinguished in the 1979 Conveyance. I would surmise that the explanation is to be found in the application lodged in the Land Registry on foot of which the area hatched in blue, i.e. the defendant's property, was subsequently registered. However, I am satisfied that the disputed plot is within the area intended to be conveyed by the 1979 Conveyance.

8. In 1985, probably in the context of the raising of money on the security of the property the subject of the 1979 Conveyance, the identity of the property the subject of the 1979 Conveyance required to be clarified. This was done by Peter Ging, architect, who, in a statutory declaration made on 11th July, 1985, declared that the lands shown coloured red and referred to at "A" on the map annexed to the statutory declaration formed portion of and were wholly comprised within the lands conveyed by the 1979 Conveyance. The parcels in the 1979 Conveyance were quoted in part, excluding the reference therein to the inclusion of the areas coloured orange and hatched in blue and yellow. On the basis of a superficial assessment of that map, it would appear to include the disputed plot. That map, prepared by Mr. Ging in July, 1985, was also annexed to a statutory declaration made on 22nd December, 1986 by Roderick J. Tierney, solicitor, whose firm had acted as solicitors for the executors of Francis Lynham deceased. Mr. Tierney

declared that at the date of his death Francis Lynham had been in sole and exclusive possession of the lands of Mount Seskin as depicted on that map.

9. The recitals in the 1979 Conveyance disclosed that under the will of Francis Lynham, his children, James Lynham, John Lynham, Mary Lynham, and Patricia Bridget Lynham became entitled in equal shares as tenants in common to the lands at Mount Seskin, that he died on 12th January, 1947 and that his will was proved on 8th August, 1947. The recitals also disclosed that Joseph Nestor and Barra J. Flynn, two of the vendors in the 1979 conveyance, acquired the respective one-quarter shares of Mary Lynham and Patricia Bridge Lynham by virtue of a conveyance dated 19th March, 1974. By the time of the sale to Dundrum in 1990 that conveyance had been lost, as was disclosed in a special condition in the contract dated 20th March, 1990.

10. Leaving aside speculation about the prescriptive special conditions in the 1990 Contract, and about the reasons for the hatching in yellow and blue on the map on the 1979 Conveyance, the documentary evidence of title adduced by the plaintiff, read on its own, certainly indicates that the plaintiff is the owner in fee simple of the disputed plot.

The defendant's paper title

11. The defendant's evidence was that he acquired property adjoining the disputed plot by purchase in 1983. The vendor was Mrs. Mary Mansfield, but the defendant negotiated the purchase with her son, Mr. Jim Mansfield, whom the evidence suggests was a director of, and had a controlling interest in, Lock Heed Builders Limited. The defendant did not instruct a solicitor in relation to the purchase at the time and, on the evidence, it would appear that it was some considerable years later that he regularised his title. It is common case, however, that the defendant has been in possession of land contiguous with the disputed plot on the north side of the disputed plot. The plaintiff does not dispute the defendant's ownership of this land. However, the defendant put in evidence documentary title to portion only of it: the portion immediately adjoining the disputed plot on which a large workshop stood in 1983 and still stands. The defendant did not produce documentary evidence of his title to the remainder, on which the defendant built the bungalow in which he resides after he acquired the property in the mid-1980s. I assume the title to the bungalow is registered on folio 124842F, which, in 1998, was carved out of folio 17796F referred to below.

12. The documentary title which the defendant has to the workshop plot is folio 17796F, County Dublin. That folio relates to part of the townland of Crookslin shown as Plan 36 on the Land Registry map. The folio was opened on 9th September, 1980 on foot of an application for first registration, which the Land Registry reference number would suggest was lodged in the Land Registry in 1974. The first registered owner was Mary Mansfield and she was registered as full owner on 9th September, 1980. The defendant was registered as full owner on 28th April, 1998. The title registered is absolute title.

13. Before comparing the Land Registry map in relation to folio 17796F with the maps on the plaintiff's unregistered title, I propose considering the evidence of the lie of the land both historically and in the recent past from the ordnance survey maps put in evidence.

The ordnance survey maps

14. The earliest ordnance survey map put in evidence is the historic 25-inch map which was surveyed and revised in 1909. At that time, the eastern boundary of the disputed plot and the defendant's workshop plot and bungalow plot was the Union and Rural District boundary, which I assume coincides with the townland boundary. On the evidence, I am satisfied that there was an old stone wall, 200 to 300 years old, along the boundary, the remains of which are still visible. I would surmise that it was part of the demesne wall of Mount Seskin. The three plots, and also a strip to the south of the disputed plot which now gives access to the plaintiff's lands at Mount Seskin, which I will refer to as "the Mount Seskin access", comprised one field containing 2.319 acres. The only feature of interest which appears on the ordnance survey map is a path or track (depicted by broken lines), which I will refer to as "the track", which ran diagonally across the field from the public road and gave access to a building, which the evidence suggests was an old stone cottage, which was located outside and to the east of the eastern boundary of the field. The track is still discernible, as is the remains of the cottage.

15. Chronologically the next ordnance survey map put in evidence was a map of the revision which occurred in 1968/69. Very little had changed since 1909. The Mount Seskin access and the three plots still comprised one field, the area of which was given as 2.320 acres. The track still crossed the field. A building is still depicted at the location of the cottage remains but the configuration of the land around the cottage was slightly different. However, the old stone wall which separated the cottage from the field to the west was still in situ because the boundary is shown on the map as "CW" (centre of wall). The major difference, which is only of marginal significance in the context of the issues in this case, is that a pump is depicted in the field, located on the Mount Seskin access near the public road.

16. The ordnance survey map was revised again in 2001 on the basis of a survey in 1996. By then a lot of changes had occurred. That map depicts the current position. The bungalow plot with the bungalow erected on it is depicted. The Mount Seskin access has been formed. Between the Mount Seskin access and the bungalow plot two defined areas are shown. That nearer to the Mount Seskin access is roughly rectangular in shape and includes the disputed plot and a triangular area which is part of the lands now registered on folio 17796F. The division between the disputed plot and the triangular area is along the line of the track, which is no longer depicted. The other area is the remainder of the lands registered on folio 17796F with the workshop depicted thereon. The boundary between the two, which is depicted by a straight line, represents a line of conifers, which are now thirty feet high, which the defendant planted in 1983.

Comparison of the plaintiff's unregistered title and the defendant's registered title

17. Having regard to the scale to which the maps on the plaintiff's unregistered title were drawn and the lack of detail shown and, in particular, the lack of depiction of physical features, any comparison of the maps on the plaintiff's unregistered title and the map in relation to folio 17796F is of necessity superficial. Bearing that in mind, both the Ging map and the Behan map suggest that Dundrum acquired title in fee simple in 1990 not only to the disputed plot, but also to the lands now registered on folio 17796F other than the triangular area. Both maps suggest that the triangular area was excluded from the Mount Seskin lands conveyed by the 1979 conveyance and the 1990 conveyance. The plaintiff acknowledges that the defendant has title to the triangular area and, on the basis of its own paper title, could hardly suggest otherwise. There is no issue, nor could there be, but that the defendant is the owner of all of the lands registered on folio 17796F. However, the inconsistency between the plaintiff's unregistered title and the defendant's registered title as regards the lands registered on folio 17796F excluding the triangular area has not been explained.

18. Notwithstanding that inconsistency, I am satisfied on the evidence that Dundrum acquired title in fee simple to the disputed plot by virtue of the 1990 conveyance. The issue which remains is whether the evidence establishes, as he contends, that the defendant was in adverse possession of the disputed plot in 1990 against Dundrum's predecessor in title and continued in adverse possession thereof subsequently so as to have acquired a title by adverse possession by the time these proceedings were commenced by plenary summons which issued on 3rd October, 2005.

Evidence of possession/use

19. On analysis of the evidence chronologically, it can conveniently be divided into periods as follows:

Prior to 1983

20. As I have stated, the defendant purchased his property in 1983 from Mrs. Mansfield and he negotiated the purchase with Mr. Jim Mansfield. Mrs. Mansfield and her family lived a short distance to the north of the disputed plot, on the far side of the road. Her son, Mr. Joseph Mansfield, who was called by the defendant, testified that from the 1950s onwards until the sale to the defendant in 1983 his mother grazed a couple of cows on the land where the defendant's property is now located and the disputed plot. He pointed to the pump as the southern extremity of the land used for grazing. At the time, there was a strand of wire along the front roadside to keep the cows from going out on the road.

21. Mr. Michael Quinn, who has been a tenant of the Mount Seskin lands for upwards of thirty years, who was also called by the defendant, testified that he never farmed beyond, that is to say, to the west of, the old stone wall. His evidence was that he never used the disputed plot.

22. In my view, the evidence of the use of the disputed plot prior to 1983 does not advance the defendant's claim to have acquired title by adverse possession. Whatever, if any, rights Mrs. Mansfield had acquired over the disputed plot prior to 1980, the position is that when she registered her title in 1980 the southern extremity of her title was the track and the disputed plot was excluded. The defendant did not make the case on the pleadings that he had acquired title to the disputed plot by purchase from Mrs. Mansfield and that case was not made in the closing submissions on his behalf at the hearing. Despite that, the defendant testified that when he was negotiating the purchase with Mr. Jim Mansfield in 1983 they "stepped" Mrs. Mansfield's land which he was purchasing and that area included the disputed plot. Insofar as it is necessary to do so, I find that that evidence cannot correct. Everything which happened subsequently is inconsistent with it.

1983/1993

23. After he acquired the property he purchased from Mrs. Mansfield the defendant planted the line of conifers to physically separate the workshop plot from the triangular area and the disputed plot. Some time after he planted the trees, the defendant augmented them by erecting a substantial concrete post and wire-mesh fence with two strands of barbed wire at the top to the south and along the line of the conifers. I think it is reasonable to infer that at the time the defendant believed that the southern extremity of the property he acquired from Mrs. Mansfield was the line of the conifers and fence. I also think it probable that this was the view of Lockheed Builders Limited and its successor, Dundrum. Of course, the defendant did acquire, and he now has title to, the triangular area.

24. The defendant's evidence was that when he moved to the property it was a dumping ground for all types of waste; household waste, burnt out cars and vans. Over the years he has cleared the disputed plot of waste. He put in evidence an invoice from August, 1989 "for clearing of cars and rubble from site and levelling of site adjacent to work shop and dwelling of [the defendant]". He testified that when he moved up to the property he put up a small fence to keep people out and that fence ran along the Mount Seskin access and down the main road. It was a continuous job to repair the fence and he had to put a better fence up. The defendant's evidence on this point and, indeed, on many points was vague and imprecise, which I think is understandable because of the passage of time. In any event, if he did put a fence along the Mount Seskin access between 1983 and 1993, I find that he did not do so with the intention of taking possession of the disputed plot.

25. The defendant has carried on the business of repairing, servicing and maintaining machinery, mainly Volvo dump trucks, in the workshop. The defendant's evidence, which was corroborated by that of his employee, Thomas Holmes, was that since 1983 he has used the disputed plot to test machinery which is being repaired in the workshop. As to the frequency of that use, the defendant's evidence was that one machine per week might be tested but it could be one machine per month. It could take a month to overhaul a machine and when it was overhauled it would be taken out from the workshop plot and a day might be spent testing it there. In cross-examination the defendant acknowledged that the testing operations could be as infrequent as once every six months, as it could take that long to repair the machine. There was a slight conflict between the defendant and Mr. Holmes as to whether machinery was left outside the workshop area overnight; the defendant's evidence was that, for security reasons, machinery was never left on the disputed plot overnight, whereas Mr. Holmes testified that if a machine had broken down on the disputed plot it would be left there overnight.

26. There was also a conflict on the evidence as to how the defendant accessed the disputed plot with machinery from the workshop between 1983 and 2000. The defendant's evidence was that when he was planting the conifers he left a gap adjacent to the rear of the workshop and that when he put in the fence it was left in such a way that it could be rolled back. The plaintiff's witnesses' evidence was that in September, 2000 the only access to the disputed plot and the triangular area was through what was described as a "wire gate" at the public road frontage. The defendant's evidence was that it was too dangerous to use that access, that it was never used and that he always used the access at the back, adjacent to the workshop. I accept the defendant's evidence on this point.

1993/1994

27. The evidence indicates that, although Dundrum acquired the Mount Seskin property in 1990, no acts of ownership were exercised in relation to the disputed plot until some time in 1993. It is not possible to form any view on the evidence as to why Dundrum acquired the property. Mr. Quinn continued to take a letting of the land for farming purposes. Mr. Patsy Monaghan, who was the manager of a quarry owned by Dundrum in the vicinity, suggested that the intention may have been to acquire a piece of land behind the quarry and to extend quarrying on to the Mount Seskin lands. At any rate, there was a meeting between Mr. Jack Tracey, who was the proprietor of Dundrum, who was accompanied by Mr. Monaghan, with the defendant at some time in 1993. As a result of that meeting, the defendant wrote a letter on 17th November, 1993 to Mr. Tracey which was headed "Re Adjoining Site in Common Ownership". This letter is of sufficient importance to merit being quoted in full. It stated:

"When we met some time ago to discuss the matter of flooding from your land, which is affecting my property, both you and Patsy [Monaghan] said that it was your intention to fence in a site adjoining my property between your existing lands and the public roadway, which I am told, is and has been for some considerable time in common use.

My understanding is that the ground in question is known as commonage and having looked into the matter I can find no record of ownership having been registered in your name.

I have in the past, together with others in the area, on occasion used this ground. I would expect to be able to do so for the foreseeable future."

28. While the defendant testified that he did not think he had the benefit of legal advice when he wrote that letter, I am very sceptical as to whether his recollection on that point is correct. I think what the letter was meant to convey is what is to be deduced from a plain reading of it, and that reflected the defendant's state of mind at the time. In particular, what the letter conveyed was that the defendant was not accepting that Dundrum had ownership of the disputed plot. However, he was not asserting ownership on his part or even possession. The point he made was that the disputed land was commonage, by which he meant used in common by persons including himself. I do not accept the defendant's evidence that when he referred to the disputed plot being commonage and in common use he was referring to the fact that it was used for dumping, in effect for illegal dumping. The message the defendant was conveying was that, as Dundrum was not the owner of the disputed plot and as it was commonage, Dundrum was not entitled to fence it in and obstruct access over it.

29. It was not until May, 1994 that Dundrum followed through on its intention to erect fencing around the disputed plot. A wooden post and wire fence was erected along the public road frontage and along the boundary with the Mount Seskin access of the disputed property. I think it probable that it was because of the belief that the conifers coupled with the fence erected by the defendant to the south of them represented the boundary with the defendant's lands that the track was not fenced off from the triangular area.

30. The evidence established that in 1994 Dundrum laid a pipe under the disputed plot to drain the Mount Seskin lands following complaints of flooding both from Dublin County Council and the defendant.

May 1994 to July 2001

31. After the fencing went up in May, 1994, there was no further objection from the defendant, although he did testify that at the meeting he had with Mr. Tracey in 1993 Mr. Tracey threatened that if the defendant prevented him from fencing he would "send the travellers round". No other acts of ownership were exercised by Dundrum until September, 2000. Mr. Tracey died in April, 1996. Ms. Crawford, who was an executor of his will, and another executor became directors of Dundrum. In September 2000 Mr. Monaghan brought it to the attention of Ms. Crawford and her co-director that the defendant had constructed fencing on the disputed plot. The fencing was substantial concrete post and wire-mesh fence, referred to as a chain-link fence by the defendant, which bounded the disputed plot on three sides: the public road frontage; the Mount Seskin access; and the eastern side inside the old stone wall. As a result of that action, Ms. Crawford and her co-director inspected the Mount Seskin property and they called on the defendant. Ms. Crawford's evidence was that on that occasion the defendant asserted that he was entitled to put up the fence, that it was commonage, and that he had put up the fence to stop Mr. Quinn's cattle straying.

32. There followed correspondence between the solicitors for the parties. The opening sally was a letter of 15th September, 2000 from Joynt and Crawford to the defendant with which there was enclosed a copy of the 1990 Conveyance, because, as was stated in the letter, the defendant appeared to be under a misunderstanding regarding Dundrum's boundaries. It was further stated that the defendant's complaints regarding straying cattle would be taken up with Mr. Quinn, with a view to rectifying the situation. The defendant was called upon to remove the fence, failing which Dundrum would remove it and deliver the posts and wire to the defendant in the best condition possible. The response to that letter was a letter of 20th September, 2000 from the defendant's solicitors, Cullen & Co., to Joynt and Crawford. The tenor of that letter was that there was a conflict between the Land Registry map relating to the defendant's registered title and the Map annexed to the 1990 Conveyance. It was suggested, sensibly, that the matter required to be resolved as between the solicitors. An application for an injunction was threatened if Dundrum attempted to remove the fence. After that, it was agreed between the solicitors that the clients' respective engineers or architects should meet with a view to agreeing the boundary between the two holdings. Due to no fault on the part of the solicitors, that process never came to fruition. In July, 2001, following a change of ownership and management, a restructuring and disposal of the Tracey group of companies was commenced. The boundary issue between Dundrum and the defendant was put on the back-burner. Joynt and Crawford ceased to act for Dundrum on the change of management.

33. During this period, the defendant continued to use the disputed plot for testing machinery under repair as he had done previously.

July, 2001 to date

34. Apart from an inspection of the Mount Seskin lands and the disputed plot in September, 2003 by the new Chief Executive of the Tracey group of companies, Eanna Daibhis, in September, 2003, Dundrum appears to have taken no interest in the disputed plot until it received a letter of 17th June, 2004 from the defendant's solicitors to its former solicitors. At the time of the 2003 inspection Mr. Daibhis observed that the disputed plot was overgrown, there was a container on it and a piece of equipment. He also observed the concrete and wire fence which had been erected by the defendant. Because of more pressing issues, he had no further involvement with the issue of the disputed plot until he received the 2004 letter.

35. In that letter, the defendant's solicitors referred to the correspondence in late 2000 and early 2001 and the on-site meeting between the architects for Dundrum and the defendant. They informed the plaintiff's former solicitors that the defendant intended offering the property itemised in the letter for sale. As well as the property comprised in folios 17796F and 124842F, the letter itemised the disputed property as property "which our Client claims he has been in possession of through all his estate and title, if any". I assume that the word "through" was a mistype for "for" and that the title the defendant intended to offer was "all his estate and title, if any", so that he did not intend giving a prospective purchaser any warranty as to his title.

36. That letter was the catalyst for acrimonious correspondence between the solicitors for the parties, which ultimately led to these proceedings.

37. I am satisfied on the evidence that since September, 2000 the defendant has intensified his user of, and activity on, the disputed plot. For instance, he erected two new gates, one on the public road frontage, which provoked a warning letter dated 21st June, 2006 from South Dublin County Council pursuant to s. 152 of the Planning and Development Act, 2000, and the other on the rear boundary where the track exits the disputed plot. Apart from that, I find on the evidence that the defendant's practice of putting containers on the disputed plot commenced in this period.

The relief claimed by the plaintiff

38. Against the foregoing background the plaintiff claims a declaration that the disputed plot was at all material times and so remains in the ownership of the plaintiff. The defendant also seeks injunctive relief and damages. Damages are sought in lieu of or in addition to the other reliefs under various headings: slander/defamation as to title or injurious falsehood; and negligence and breach of duty.

39. As I have already found, Dundrum acquired title to the disputed plot by virtue of the 1990 Conveyance. It remains to consider whether that title has been extinguished by the defendant having acquired title by adverse possession.

The law

40. Although the plaintiff has not sought an order for possession, in essence, this action concerns entitlement to possession of the

disputed plot which goes hand in hand with title and ownership. The defendant's defence is that he has acquired a possessory title to the disputed plot. In determining whether he has, the provisions of the Statute of Limitations, 1957 (the Act of 1957) come in to play. Section 13(2) provides that no action to recover land shall be brought by any person, other than a State authority, after the expiration of twelve years from the date on which the right of action accrued to that person. Section 18(1) deals with when the right of action to recover land accrues and provides that no right of action to recover land shall be deemed to accrue unless the land is in the adverse possession of some person in whose favour the period of limitation can run. Section 24 provides that at the expiration of the period fixed for a person to bring an action to recover land the title of that person to the land shall be extinguished.

41. The meaning of "adverse possession" in s. 18 of the Act of 1957 was explained by the Supreme Court in *Murphy v. Murphy* [1980] I.R. 183 in the following passage at p. 202 of the judgment of Kenny J.:

"Before the year 1833 the common law had engrafted the doctrine of non-adverse possession on to the earlier Statute of Limitations so that the title of the true owner was not endangered until there was possession clearly inconsistent with recognition of his title, i.e., adverse possession, and so there had to be an ouster. The doctrine of non-adverse possession was abolished by the Real Property Limitation Act, 1833, in which the words 'adverse possession' were not used The use of the words 'adverse possession' in the Act of 1957 does not revive the doctrine of non-adverse possession which existed before 1833. In section 18 of the Act of 1957 adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired. Adverse possession requires that there should be a person in possession in whose favour time can run. Thus it cannot run in favour of a licensee or a person in possession as a servant or caretaker or a beneficiary under a trust ..."

42. Later in his judgment Kenny J. referred to the decisions of the English Court of Appeal in *Wallis's Holiday Camp v. Shell-Mex* [1975] Q.B. 94 and *Treloar v. Nute* [1976] 1 W.L.R. 1295, commenting that in each of those cases the question was whether the person in possession of lands had been in adverse possession. He then observed that this is ultimately a question of fact.

43. In *Seamus Durack Manufacturing Limited v. Considine* [1987] I.R. 677 Barron J., having referred to the judgment of Kenny J. in *Murphy v. Murphy*, stated that each case must be decided on its own facts and continued (at p. 683):

"Adverse possession depends on the existence of *animus possidendi* and it is the presence or absence of this state of mind which must be determined. Where no use is being made of the land and the claimant knows that the owner intends to use it for a specific purpose in the future, this is a factor to be taken into account. The principle has relevance only insofar as that when this factor is present it is easier to hold an absence of *animus possidendi*."

44. In relation to the type of acts of use and enjoyment which will amount to possession, the following passage from the judgment of Lord O'Hagan in *The Lord Advocate v. Lord Lovat* (1880) 5 App. Cas. 273 at p. 288 has been cited frequently by this Court with approval in recent years (for example, by Costello J. at first instance in *Murphy v. Murphy*, at p. 193, and by Gilligan J. in *Keelgrove Properties Limited v. Shelbourne Development Limited* in his unreported judgment delivered on 8th July, 2005):

"As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession."

45. The practical application of the principle stated in that quotation may be observed in *Doyle v. O'Neill* (the High Court, Unreported, 13th January, 1995) in which O'Hanlon J. stated:

"In order to defeat the title of the original landowner, I am of opinion that the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alerted to his rights that occupation adverse to his title was taking place. This is particularly the case when the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner."

46. On the facts, O'Hanlon J. held that the acts of user relied on in that case, which he described as being very casual, sporadic and of an inconclusive nature, were inconclusive to found a claim to a possessory title.

47. On the other hand, in an authority relied on by the defendant, *Griffin v. Bleithin* [1999] 2 I.L.R.M. 182, the application of the principle that in every case possession must be considered by reference to the peculiar circumstances, resulted in a different outcome. There Quirke J., found on the facts that the defendant's use of a yard for the purpose of parking vehicles and his use of a shed for storing equipment and for other purposes connected with his various activities between 1974 and 1994 constituted possession in circumstances where the yard and shed were located in Rathgar in Dublin and the defendant had overhauled on the determination of his tenancy of the yard and shed by notice to quit in 1974 and that the possession was adverse.

Application of the law to the facts

48. On the basis of the authorities, the two key questions which fall for consideration here are, first, whether the use of the disputed plot by the defendant constituted possession and, secondly, if it did, whether it was adverse possession in the sense of being possession inconsistent with the title of the true owner.

49. In relation to the first question, in my view, the evidence does not establish that in the period from 1983 to 2000 the defendant's use of the disputed plot constituted possession. Apart from clearing waste from the disputed plot in a manner akin to abating a nuisance, the defendant's use was limited to sporadic incursions for the purpose of testing machinery following repair or service in the adjoining workshop. This is borne out by the defendant's reference in the letter of 17th November, 1993 to the fact that in the past, in common with others, he had used the disputed plot "on occasion". Having regard to the nature of the disputed plot, the manner in which it was used by the defendant between 1983 and 2000, which covers most of the crucial period between 1993 and 2005, would not have sent out a signal that the defendant was occupying the disputed plot to the exclusion of the true owner and all others.

50. If, contrary to the view which I have expressed, the use by the defendant of the disputed plot prior to the year 2000 did constitute possession, the evidence strongly suggests that prior to 2000 the plaintiff did not have the necessary *animus possidendi* to justify an inference that the possession was adverse. The state of mind evinced in the letter of 17th November, 1993, which I have analysed earlier, was not consistent with an intention to exclude all persons other than himself from the disputed plot. Even by September, 2001 that position had not changed. The defendant was not asserting a right of exclusive possession to the disputed

plot. His justification for erecting the fences he erected at that time was to keep Mr. Quinn's straying cattle off land which he still regarded as commonage and away from the property he owned. After the solicitors acting for Dundrum formally objected to the erection of the fences by the defendant in September, 2001, the correspondence which passed between the solicitors indicates that on both sides the issue between the parties was seen as a paper title boundary dispute. It seems to me to be of particular significance that the plaintiff was not even at that stage asserting that he had established a possessory title to the disputed plot. The first time such assertion was made on his behalf was in 2004. Accordingly, I reject the defendant's assertion that he has acquired title by adverse possession to the disputed plot.

The Order

51. There will be a declaration that the disputed plot was at all material times and remains in the ownership of the plaintiff. A perpetual injunction has not been sought and none is necessary having regard to the terms of the declaration.

52. No evidence has been adduced as to any loss or damage incurred by the plaintiff and, accordingly, the plaintiff is not entitled to any damages.