Neutral Citation: [2014] IEHC 617

THE HIGH COURT

CIRCUIT APPEAL

[2013 No. 214CA]

EASTERN CIRCUIT

COUNTY OF WICKLOW

BETWEEN

JAMES MADIGAN AND ANN MADIGAN

PLAINTIFFS

AND

KATHLEEN MAUREEN RUETER, MARIAN RUETER AND SEAN RUETER

DEFENDANTS/APPELLANTS

JUDGMENT of Kearns P. delivered on the 12th day of December, 2014

This case concerns a bitter dispute between neighbours about a hedge which separates their properties at a seaside location south of Arklow, Co. Wicklow. It is almost impossible to understand how such a dispute could have taken seven days of court time in the Circuit Court and a similar amount of time in this Court. All efforts to encourage or broker a compromise between the parties have failed at every turn. As a result, this Court was obliged to consider not only the evidence of the plaintiffs and defendants and their various lay witnesses called in support, but also evidence from multiple experts, including a chartered engineer retained on behalf of the plaintiffs along with evidence from a surveyor, an arborist, a Land Commission solicitor and a historian as to title retained by the defendants. Some ten different maps were placed before the Court together with several pages of aerial photographs and at least seven sets of photographs taken at ground level. If the events of this case had featured in the plot of "The Field", audiences might have regarded them as too implausible to be credible. In John B. Keane's play there was a field at stake between the protagonists. In this case it is no more than a few feet of hedge. The row over alleged damage to a portion of hedgerow separating the plaintiffs' land from the defendants' laneway has now raged between the parties for 10 years.

The Court will deal with each of the issues in turn.

OWNERSHIP OF THE LANEWAY

A detailed and exhaustive analysis of the title to both plots of land establishes beyond any doubt that the laneway is fully owned by the defendants.

The instrument of severance between the defendants' property and the plaintiffs' property was an Irish Land Commission sale agreement of the 25th March, 1904 between the Earl of Carysfort and Catherine Byrne. Under that agreement Catherine Byrne agreed to purchase 34 acres in a holding which includes the laneway the subject of these proceedings. The land on either side of the holding was retained by the Earl of Carysfort. The defendant is the successor in title of Catherine Byrne and the plaintiffs are the successors in title of Lord Carysfort as the owners of the lands on the western side of the laneway.

Catherine Byrne was registered as the owner of her holding in Folio 10949. The accuracy of the sale map of 1904 is confirmed by an affidavit sworn by a Mr. Tailyour, a fellow of the Surveyors Institute and the Earl of Carysfort's land agent who enjoyed that status for 22 years. He avers that he surveyed the lands on the 23rd February, 1904 and on the days that followed and checked the boundaries of all the holdings shown on the maps and confirmed their accuracy in every particular.

It is interesting to note that the need for the laneway arose from the fact that access to the Byrne holding from a different point had become eroded and had fallen into the sea. Thus the lane is not shown in the ordnance survey map of 1887, but appears for the first time in the ordnance survey map of 1909. It leads only to the Byrne holding and no other holding.

The plaintiffs for their part assert a claim that the laneway should be no more than 11 ft in width based on the proposition that this conclusion can be derived from the map attached to a deed of the 23rd January, 1938 between James Deathe and Joseph F. Doherty. On that map a measurement of the laneway is given as 11 feet and the plaintiffs extrapolate from this map the proposition that the entire width of the laneway must be seen as so limited. They assert that the defendants were not entitled to widen and heighten the laneway (something the defendants admit to having done) beyond what appears on that deed. While the chain of title was not recited, I am satisfied to make the presumption that Mr. Deathe was the successor in title of Lord Carysfort. Lord Carysfort, according to a memorial in the Registry of Deeds, sold the lands to Mr. Deathe in 1924. The map annexed to the deed of 1938 gives an indicative sketch with the Deathe property shown bordered by the laneway.

However, I am satisfied from the evidence, and in particular that offered by Mr. Corrigan, the defendants' surveyor, a Fellow and former President of the Irish Institute of Surveyors, that the map annexed to the deed of 1938 is not a reliable guide either to the width of the laneway, its ownership or indeed ownership of the hedgerow.

The deed of 1938 is not the instrument of severance between the plaintiffs' lands and the defendants' lands, but is rather a deed generated for the purposes of conveying the plaintiffs' lands. The map attached to the deed was not prepared by a surveyor and is clearly schematic rather than geometrically correct. The map is materially different to the ordnance survey map of 1909 as is apparent by reference to the shape of the road and the shape of the river, both of which were mapped in 1909 and remain as they are today. Furthermore, any measurement of the lane taken to be no more than 11 feet cannot be reconciled with the current

position of the root system of the hedge and the position of the hedge as shown in the ordnance survey of 1909.

In fairness, the plaintiffs' do not claim any ownership rights over the laneway. Mr. Madigan seemed to believe that he enjoyed a public right of way over the laneway, albeit one confined to the user of such right for the purpose of trimming the hedge on the laneway side.

Accordingly, I am satisfied that no issue arises as to the ownership of the laneway and I am further satisfied that the plaintiffs have failed to produce any evidence to support any claim of any sort over the laneway. More particularly, I am satisfied that the plaintiffs have failed to establish, by way of prescription, through the rule in *Wheeldon v. Burrows* (1879) LR 12 Ch D 31, any right of way along the laneway for that purpose.

OWNERSHIP OF THE HEDGE

The laneway to the defendants' lands is separated from the plaintiffs' property by a border hedge which is over 100 years old. In other words, the same was planted and put in place long before the plaintiffs acquired any interest in their present lands and long before their dwelling house was constructed and long before any need for privacy arose. The root system of the hedgerows remains in the same position as was mapped by Mr. Tailyour in 1904 and by the ordnance survey in 1909. The hedge line quite obviously did not move and it defines the western side of the boundary. It could not have changed to a different location in 1938.

The defendant appellants argue that this evidence raises an inference that the hedge was laid within the boundaries of the laneway created on the sale to them of their holding in 1904. In other words, the hedge marked the boundaries between the laneway and the surrounding land retained by Lord Carysfort. The practical purpose of the hedgerow, consisting largely of blackthorn and whitethorn, was to provide an enclosure which would allow stock to be driven to and from the Byrne holding. It is argued that the presence of a depression on the Madigan side of the hedge suggests, by virtue of the application of the legal "hedge and ditch rule", that ownership of the hedge vests in the Rueters.

Even without the benefit of a legal presumption to that effect in their favour, the proposition that the hedgerow was planted to enclose the laneway, rather than to enclose the lands to the west now owned by the plaintiff, seems irresistible for the following reasons:

> (a) The hedgerow was planted prior to 1909, the date of its first appearance on an ordnance survey map. The house on the plaintiffs' property was erected several decades later. There were therefore no considerations of privacy that would cause the hedge to have been planted to enclose the plaintiffs' side of the laneway prior to 1909.
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> (b) The ordnance survey maps of 1887 and 1909 suggest that the hedgerow on the Mulligan side of the laneway (i.e. the other side) was an existing field boundary and that the hedgerow on the Madigan side was planted for the purpose of enclosing the laneway by the owner of the laneway.

Without delving excessively into the history of hedgerows in Ireland, the primary use of hedgerows in the Irish countryside was generally acknowledged as being to serve as a long term stock proof barrier. This contention was advanced by counsel on behalf of the defendants without demur during the course of the appeal.

Mr Bland, senior counsel on behalf of the defendants, argued that the existence of a depression on the Madigan side of the hedge raised a presumption that the owner of the laneway planted the hedge. Putting it another way, counsel suggested it was simply not plausible to suggest that Lord Carysfort planted the hedgerow at the side of the laneway to enclose his retained lands given that no evidence has ever been put forward that these lands were tenanted in 1904. If not tenanted, they were unlikely to have been stocked. Further, the ordnance survey map of 1887 indicates that the laneway is marked as being closed and gated, a feature suggestive of assertion of ownership.

The "hedge and ditch rule" was described by Hamilton J. in *Walsh v. McGauran* (Unreported, High Court, Hamilton J., 14th June, 1977) as follows:-

> "It is well settled law that when two estates are separated by a hedge on a single ditch the presumption is, in default of evidence, that both ditch and hedge belonged to the owner of the land on which the hedge is planted."

The rationale for so holding was elaborated in the following manner by Hamilton J.:-

> "It would appear to me that a person erecting a bank on which a hedge was to be planted for the purpose of establishing a boundary between the two properties would dig the ditch of gripe at the extremity of his land and shovel the earth therefrom onto his land."

At one point during the evidence in this case I believed that the "ditch" consisted of that space between the road surface of the laneway and the commencement of the hedge.

I was, however, mistaken in that view because the evidence as a whole indicates that on two occasions - once in the 1970s and later in 2003 - the level of the laneway, particularly in the vicinity of the bridge, was heightened to a significant degree. This in turn required a supporting "embankment" (as so described by Mr. Corrigan in his evidence) which is plain to be seen in many of the photographs. It is not 'the ditch' and it was not, in fact, suggested on behalf of the plaintiffs that any predecessor of theirs had created this area as a "ditch" excavated for the purpose of creating the bank out of which the hedgerow grew.

I found the evidence of Mr. Corrigan, the defendants' surveyor, extremely persuasive. He has spent half of his life crawling through hedges in boundary disputes of this nature. He is satisfied that the ditch lies on the Madigan side thereof and I prefer his evidence on this point to that of any other witness called on behalf of the plaintiffs.

It is also consistent with the inferences that can reasonably be drawn from the history of the severance of the properties in 1904.

I am therefore of the view at the end of the day and having considered all of the evidence that the hedge to the western side of the laneway belongs entirely to the defendants, subject of course to the rights of the plaintiffs to cut and trim their side of that hedge insofar as the same extends beyond the line of the ditch into their garden.

ALLEGED WIDENING AT THE MOUTH OF THE LANEWAY

It is the evidence of the defendants and of various users of the caravan park that there has been no widening of any significance at

the entrance to the laneway.

There has undoubtedly been a degree of widening, which in my view is confined entirely to the eastern side of the mouth of the laneway, that is to say, on Mr. Mulligan's side of the laneway.

Mr. Mulligan was a most impressive witness in this case. His only complaint with the defendants was their failure to consult and communicate more fully with him as one might expect of a neighbour. He was however prepared to "donate" to the public in the interests of traffic safety the apex of a corner of his property as seen outside the railway sleepers in photograph No. 3 in Mr. Power's book of photographs.

The laneway turns to the left on the Madigan side as it joins the public roadway, but it always did so. I do not believe that there has been any significant widening of the actual mouth of the roadway on this side. The only widening is on the other side, brought about by Mr Mulligan's praiseworthy abandonment of a tiny portion of land at the mouth of the laneway on his side.

Every photographic impression of the mouth of the laneway, aerial or at ground level, shows the western side of the laneway to be the same post March 2005 as it was prior thereto. This may best be seen by comparing photograph No. 3 in Mr. Power's book of photographs with photograph No. 7 in the defendants' book of photographs.

Having heard all the witnesses as to the history of what occurred, I prefer the evidence of those witnesses called on behalf of the defence on this particular issue.

This does not mean that the laneway itself was not widened further back towards the bridge. Indeed it was accepted in evidence by the second named defendant that the width of the laneway was extended to about 15 feet over the years. Further, I am satisfied that any widening or heightening of the laneway was entirely a matter for the defendants and was not a matter to which the plaintiffs could legitimately object.

DAMAGE TO THE HEDGEROW

The plaintiffs' case is to the effect that the defendants have repeatedly cut back and removed a portion of the hedge and boundary so as to damage the hedge and reduce the plaintiff's privacy and enjoyment of their property.

In one sense, findings I have already made in this case would be dispositive *per se* of these contentions, but nonetheless I propose to consider this issue quite separately from the findings I have already made.

It is in this context that the personal animosities in this case came to the surface.

I find it difficult to escape the belief that the plaintiffs have never been happy with the presence of a caravan park to the seaward side of their property. In fact they wrote objecting to any further development of the defendants' lands as a caravan park in January 1997. I do not and would not criticise the plaintiffs for taking such a stand, given the increased nature of the traffic accessing the mobile home park at a point adjacent to their property and what was referred to in Mr. Madigan's letter as the "extreme noise, screaming of children and loud music emanating from the park" during summer months (at least at the time when he wrote that letter). Mr. Madigan and his wife had other objections also, related to waste disposal and issues of that nature, which are also very understandable.

Any feelings of resentment which they harboured were muted or sublimated during the lifetime of the husband of the first named defendant, but relations between the neighbours became increasingly strained thereafter. The plaintiffs claim that as the years progressed, and as the size of mobile homes increased, the defendants took to chopping back the hedge on the laneway side to an ever greater degree causing gaps to open up in the hedge and causing serious damage to the hedge. In fact it was alleged that approximately 50% of the hedge had been killed off as a result of the defendants' activities over the years, brought about almost entirely by excessive application of a hedge cutter on the laneway side of the hedgerow.

Most of the damage was said to have occurred at a point where it joined a new griselinia hedge planted by the plaintiffs during the 1990s. This large gap was opened up, according to Mr. Madigan, in the context of an incident which occurred on the 6th March, 2005 when the third named defendant pushed a mound of soil from the westward corner of the laneway into the side of the hedge causing it to collapse and suffer severe damage.

This ugly incident occurred as follows. Mr. Madigan had arranged for several tons of soil to be dumped on the western side of the entrance to the laneway at a point where the griselinia hedge joins the laneway hedge. This was done without any consultation with the defendants. All three defendants came on the scene, whereupon Mr. Sean Rueter went off to get a tractor and bucket and returned to the scene to push this soil off the roadway. Mr. Madigan was adamant it was this incident which caused the main damage to the hedge. The whole incident was also witnessed by a friend of the Madigans, a Mr. Nolan, who allegedly suffered injury during the course of angry exchanges which occurred at the scene.

Having regard to the intensity of feeling between the parties, the Court was surprised to say the least that Mr. Nolan was not called as a witness to corroborate the Madigans' account of this incident. However, of far greater significance is the presence in a book of photographs prepared on behalf of the Madigans of a photograph which shows Mrs. Madigan standing at the mouthway of the laneway in February 2005 where precisely the same gap in the hedge may be seen. It can not have been caused by the incident in March, 2005. Had a huge mound of earth been pushed through the hedge into the plaintiffs' garden at this point it defies belief that such damage would not have been photographed and recorded.

At the end of the case the Court permitted the recall of Mr. Madigan to clarify for certain when he alleged the dumping incident had occurred and he asserted he was quite sure of the date by reference to the fact that the incident occurred on his son's birthday. However, this account is not consistent with the photograph to which I have alluded. Mr Madigan then said the photograph must be "wrong". But it is his photograph and is in one of his books of photographs.

There was evidence before the Court that the damage caused to the hedge may have occurred as a result of excavation works undertaken by the Madigans back in the 1990s when they were planting their griselinia hedge along the public roadway. It is quite clear from some of the photographs that extensive excavations took place in the Madigans' garden adjoining the public roadway. That garden is significantly below roadway level. Evidence that the griselinia hedge was constructed outside the line of the existing hedgerow along the public roadway was not contradicted, though Mr. Madigan stated that the excavations which had taken place during the 1990s did not extend as far as the corner of the laneway and thus he did not believe that those excavations could have caused the gap in the hedge at that point. The Court prefers the defendants' account of this incident and does not find that the

alleged assault on Mr. Nolan has been proven to any degree.

Contradictory evidence to that offered by the plaintiffs was offered by both Mr. Corrigan and Mr. Phelim Sheridan, the expert arborist retained by the defendants who inspected the hedgerow in 2011. Mr. Corrigan had also visited the *locus in quo* on numerous occasions. In June 2003, a survey carried out by him revealed an indigenous hedgerow with no signs of recent damage. He returned to survey the laneway in 2009 and found that it had not been damaged or altered since his first survey. He made similar findings on inspection in 2013 and 2014. He inspected aerial photographs of the hedgerow dating back to the 1950s, together with photographs downloaded from Google Earth. All of these materials confirmed that the hedgerow and laneway remained unaltered over the decades.

On the balance of probabilities, I am satisfied that the actions of the third named defendant in removing the soil from the mouth of the laneway (which the defendants asserted in court prevented their ability to pass or exit from their property) did not cause the damage to the hedgerow at that point.

At worst, I believe the defendants may have been guilty of over-enthusiastic cutting back of the hedge on the laneway side over a number of years to facilitate the ingress and egress of mobile homes both along its length and at a point where the griselinia hedge joins the laneway hedge

Accordingly, I find against the plaintiffs on this issue also.

CONCLUSION
For the reasons outlined above, I am satisfied that all of the plaintiffs' claims in these proceedings must fail.

I will also grant a declaration on the defendants' counter claim that the defendants are entitled to exclusive ownership and possession and/or occupation of the laneway, including the hedge and the land thereunder. That ownership will not extend beyond the ditch on the Madigan side of the hedgerow adjoining the laneway.