



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 127

Record Number: 2016/199

**Peart J.
Hogan J.
Gilligan J.**

BETWEEN:

PATRICK HAMILTON

PLAINTIFF/RESPONDENT

- AND -

**ACC LOAN MANAGEMENT LIMITED,
DECLAN TAITE AND JOHN COULSTON**

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 3RD DAY OF MAY 2018

1. In these proceedings the plaintiff seeks a declaration that he is the person now entitled to be registered as full beneficial owner of certain lands contained in Folio 14587 of the Register of Freeholders County of Monaghan by virtue of his adverse possession thereof since his father died on the 25th June 1992.

2. The High Court (O'Connor J.) granted such a declaration by order dated the 5th April 2016 having heard evidence from the plaintiff, and the parties' legal submissions. The trial judge's reasons for so ordering are contained in his written judgment delivered on the 18th March 2016. However, the defendants have set out in their notice of appeal how they contend that the trial judge made errors of fact and of law in his judgment, and now appeal to this Court against that order. For the reasons appearing, I consider that the trial judge was correct to make the declaration in the plaintiff's favour, and I would dismiss this appeal.

3. The facts and circumstances giving rise to the proceedings are unusual, and certainly demonstrate the importance of promptly attending to legal formalities fully and completely upon the death of a landowner. Had that occurred in the present case much of what has happened would have been avoided, including the incurring of substantial legal costs.

General Background

4. The plaintiff's late father, John Hamilton, was a farmer in Co. Monaghan. He became ill in about 1991 and died intestate on the 25th June 1996, leaving his wife Dymphna Hamilton, and five children (all over age) including the plaintiff who was the eldest son, and the only child who had an interest in farming. They farmed the lands together prior to the date of death, and the plaintiff continued to do so thereafter, including certain lands of his own that he had previously purchased in his own name from an uncle some years previously. His mother, Dymphna Hamilton, had her own income from employment in the mushroom growing industry. It appears that at the date of death two of his brothers worked in Belfast, another brother was an electrician, and his only sister was a student in Dublin.

5. A grant of letters of administration (intestate) of the estate of her late husband was taken out by Mrs Hamilton on the 15th February 1993.

6. At the date of his death John Hamilton was the owner of some 100 acres of farmland, including the c. 31 acres comprised in Folio 14587 Co. Monaghan, some 26 of which are the subject of the present proceedings ("the disputed lands").

7. Since John Hamilton died intestate, his estate fell to be distributed pursuant to the provisions of Part VI of the Succession Act, 1965 ("the 1965 Act"), and in particular s. 67 thereof. Simply put, Mrs Hamilton was entitled to two thirds of her late husband's estate, with the remaining one third being distributed in equal shares between the plaintiff and his four siblings.

8. However, the first curiosity in this case is that even though Mrs Hamilton obtained a grant of administration (intestate) on the 15th February 1993, it was not until some 13 years later on the 25th October 2006 that she executed a deed of assent for the purpose of transferring, as personal representative, the beneficial ownership of the deceased's property to those entitled. During that 13 year interval the persons entitled to the property on intestacy had an equitable interest by virtue of s. 10(3) of the 1965 Act which provides that the personal representative shall hold the deceased's estate as trustee for the persons by law entitled thereto. That equitable interest exists until such time as the legal ownership becomes vested by a deed of assent by the personal representative.

9. The next curiosity is that when she eventually executed a deed of assent, she vested the entire of the deceased's property in herself, rather than to herself and her children in the shares to which each was by law entitled on intestacy, including the "disputed lands". One could speculate that the reason that she felt entitled to do so since by s. 126 of the 1965 Act, s. 45 of the Statute of Limitations Act, 1957 had been amended by substitution, whereby no action or claim to the estate of a deceased person or to any share or interest therein whether under a will or on intestacy, may be brought "after the expiration of 6 years from the date when the right to receive the share or interest accrued". Any claim by any of her children to their share or interest in their father's estate on intestacy was therefore barred after the 25th June 1998. That, of course, would not have prevented her from transferring their respective shares to them should she have chosen to do so.

10. For the purposes of the present case, however, it is clear that while she may have been entitled in 2006 to transfer the property comprising her deceased husband's estate by way of deed of assent to herself, it could only be in respect of property that formed part of the estate when she did so. That raises directly the question whether the plaintiff had by then acquired ownership of the disputed lands by adverse possession against her as personal representative.

11. A claim by a personal representative against a person in adverse possession of land forming part of a deceased's estate is barred only after 12 years under s. 13(2) of the Statute of Limitations Act, 1957 ("the 1957 Act"). Such a claim is not one coming within the types of claim covered by the new s. 45 of the 1957 Act. As stated in *McGuire: Succession Act, 1965, A Commentary* (1986, Incorporated Law Society, 2nd ed. by Pearse) at p. 313 under the heading "Actions by personal representatives":

"The wording of the new section 45 does not make it clear whether the six-year limitation period contained therein, applies to claims by the personal representatives of a deceased to recover property which forms part of his estate

An action by the personal representatives, although a "claim to the estate of a deceased person", is not one arising "under a will or intestacy" (the old section 45) or "under a will, or intestacy, or under section 111 of the Succession Act, 1965" (the new section 45), and therefore, it may be argued, is not within the terms of section 45, see *M.P.D. v. M.D.* [1981] I.L.R.M 179 at 183; Brady and Kerr, *The Limitation of Actions*, p.86."

12. I would respectfully agree with the learned author, though my agreement is necessarily *obiter* since that precise question does not arise, and was not argued in any detail, in the present appeal. I say it does not arise for present purposes because if the occupation of the disputed lands by the plaintiff constitutes adverse possession, that possession has persisted from the date of death of his father on the 25th June 1992, and any action against him in that regard would be barred after the 25th June 2004, being two years before the deed of assent by his mother to herself to which I have referred. It was therefore barred even if a 12 year limitation applies. The real question in these proceedings is not the length of the plaintiff's occupation, but rather whether his occupation of the disputed lands following the death of his father comes within the meaning which the law attributes to "adverse possession".

13. On the 26th October 2006, the day following the execution of the deed of assent of the lands to herself, Mrs Hamilton, then as *beneficial owner*, transferred certain lands, including the "disputed lands" to her son, Sean Hamilton, in consideration of natural love and affection. The reason for this has become clear. By facility letter dated the 21st August 2006 ACC Bank had offered Sean Hamilton a loan of €248,000 the purpose of which was "to assist with the purchase of 6 acres of land located at Drumhannon[sic], Latton, Castleblayney, Co. Monaghan ...". These 6 acres had been sold and Sean Hamilton was keen to buy them back. The security required for those borrowings was, *inter alia*, a first legal mortgage and charge over 31 acres of land located at Drumhannon of which the 6 acres had been part until 1993. In order to put that security in place, clearly those lands had to be in the ownership of Sean Hamilton, hence the transfer by his mother to him for natural love and affection already referred to.

14. The plaintiff was asked in cross-examination what he knew of these transactions in 2006. It appears that he had been aware that his brother was buying back the small area of 6 acres which had been sold to a Mr Connolly back in 1993 as part of the agreement reached by the plaintiff with Bank of Ireland, which I refer to later at para. 17, and which had formed part of the lands in folio 14587 Co. Monaghan, but he did not know the price, and said that he was certainly not aware that the remaining 26 acres of that folio which he was farming on his own account following his father's death, were being offered as security for the loan. He only became aware of that fact in 2013 when out of the blue a "For Sale" sign was erected on the disputed lands. It was only at that stage that he found out that the lands were being sold by the second and third named defendants, who were the bankruptcy receivers appointed over his brother Sean's estate following his being declared a bankrupt in Northern Ireland. In fact the plaintiff had leased from his brother, Sean, the 6 acres that he had bought back from Mr Connolly, since his brother was living in Belfast.

15. Yet another curiosity in this case is that following the transfer to Sean Hamilton by his mother of lands, including the disputed lands, in October 2006, and his drawing down of the loan from ACC Bank, and his execution of the required mortgage and charge over the lands specified in the facility letter referred to, those transactions were not registered on folio 14587 County Monaghan until after Sean Hamilton was declared bankrupt on the 3rd May 2012. The copy folio 14587 County Monaghan that is available to the Court shows the registration of ownership of the disputed lands in the name of Sean Hamilton, and the registration of the charge in favour of ACC Bank as a burden on the folio, was not effected in the Land Registry until the 13th June 2012.

The factual basis for the adverse possession claim

16. I have already, described how the plaintiff farmed with his father prior to his father's death in June 1992. He was the only one of the children who had any interest in farming. Prior to his father's death he had bought some land for himself from an uncle which was adjacent to his father's lands. His siblings pursued their own careers elsewhere. His brother, Sean, went to live in Belfast, as did another brother. His third brother was an electrician, and his sister pursued a course of study in Dublin.

17. When his father died in June 1992 the plaintiff continued farming the disputed lands and his own lands. It appears that his father left a debt of something in the region of €70,000 owing to Bank of Ireland. That debt was not secured on any of the farm lands. But the bank was anxious to get the debt resolved, and the plaintiff and his agricultural adviser had discussions with the bank about what should be done. As a result of these discussions, the plaintiff took over responsibility for the debt, and the bank agreed that if a sum of €50,000 was paid by him in a relatively short timeframe the bank would accept that sum in full discharge of the full amount due and owing by the deceased at the date of death. The bank stipulated that the amount would be raised by the sale of 31 acres (including the disputed lands). As matters transpired however, only the 6 acres already referred to were sold to a Mr Connolly, but the plaintiff managed to raise the balance by another means, and in due course he repaid the agreed sum of €50,000 to the bank. This was paid by him personally, and was not paid by the estate of his father.

18. The plaintiff has stated that his mother had her own income from employment, and she remained in the family home. I should perhaps add that the disputed lands are some five or six miles away from the family home and the other farm land owned by his father adjacent to the family home.

19. After his father's death in 1992, the plaintiff continued to farm his own lands and the disputed lands, treating the latter as his own. For example, he had his own cattle herd number. He also obtained various types of grant assistance from the Department of Agriculture, such as headage payments, REPS grants, single farm payments and so forth, and in all application forms for such payments he declared himself to be the owner of the disputed lands. He was in sole occupation and control of the lands. He was farming the lands openly and transparently, and in a way that was clearly inconsistent with the interest of his mother either as personal representative or as a person entitled to an interest on the intestacy of her late husband, or the interests of any of his siblings. His activities on these lands are described in his statement of claim as follows, and he gave evidence consistent with same:

"11. The plaintiff has used the said lands and premises as his own land without interruption, interference or objection by anyone. His presence on the said lands was not by the consent or sufferance of any other person or party. He annually applied for and was in sole receipt of the rents and profits and all agricultural payments and subsidies payable in respect of the lands, and no acknowledgement has been given by him in favour of any person in respect of the said lands or of any part thereof.

12. At all times since 1991 and without interruption, the plaintiff was using and farming the said lands openly and transparently and in a manner which was adverse to any title or interest claimed by Dymrna Hamilton and/or the said Sean Hamilton. The plaintiff made full and ordinary use of the property and carried on an extensive agricultural business thereon including, *inter alia*, the development and culturing of pasture and grass-lands; breeding and rearing and grazing of cattle thereon and the growing and harvesting [of] silage annually. He carried out extensive enhancements and improvements on the said lands including drainage, reclamation and fertilisation. He erected constructed repaired and maintained all boundary fences, gates and gateways to the property and effectively excluded all other persons from accessing the property except those who were his invitees and contractors."

20. In his evidence he said that when his father died any income from the sale of cattle or the farm went towards paying off Bank of Ireland as well as loans that he got elsewhere, such as AIB Bank. He himself was living in rented accommodation, and his mother was in receipt of her own income from her employment as a mushroom picker, and her widow's pension. There was no other income from the farm that went towards her support.

21. In addition to working the farm after his father died, the plaintiff worked as a contractor as he had his own digger machine. That provided an income for himself and his wife. He farmed his own land and he worked the family farm also. But he stated in cross-examination that his mother would not have been paid any money by way of income from the farm as any profits either went to the bank, or back into the farm by way of improvements and the purchase of machinery. The plaintiff did say, however, that he would do jobs for his mother. Specifically he said that he had developed the garden adjacent to the house because that had not been done when the house was built, and he had also laid tarmac around the house.

22. Part of the lands which he continued to farm is referred to as Mullananal. In due course however, around 2004/2005 he negotiated a sale of that particular piece of land for a wind turbine. He obtained money for that piece of land and put that money in his mother's account because at that stage she was beginning to suffer from Alzheimer's Disease, and was unable to continue with her own employed work. By this time she had ceased being a mushroom picker, and was working as a helper with a car that took disabled children to a school in Cootehill. It was put to him that if he was in adverse possession of that particular piece of land as he was in relation to the disputed land, it was strange that he gave the money for the sale of it to his mother. It was put to him that he knew that it was her land. But he replied that he did not know that, and that the reason he gave the proceeds of the sale to her was that she was not fit for work and was not getting the same income as she had been. He stated again that he was farming the land "as his own", and that as far as he was concerned it was his land. But it was later clarified in re-examination that in fact the wind turbine plot was land that his mother owned in her own right and which had passed to her from her own father's estate back in 1979, so the sale of that piece of land is irrelevant to the present dispute. It also transpired that it was not a sale of a plot for the turbine, but rather a lease. The plaintiff must have been confused about this when being cross-examined the previous day.

23. He was also asked about the fact that in or about 1994 his mother transferred a piece of land to him so that he could build a house for himself and his wife, as they were living in rented accommodation at the time. He built a house and they moved into it in 1996. It was suggested to him that if he already owned the land she would not have to transfer a site to him. He said that it was just agreed that this would be done so that he could apply for a planning permission for a house on the site in his own name. He was the farmer in the family and was farming the land, and his mother was happy that this was the position. It is suggested by the defendants that this transfer by mother to him serves to negate his claim to adverse possession. I will return to that question.

24. He was asked also about a plan in 2006 that his mother would seek a planning permission for a house for his sister, Corina, of whom his mother was apparently very fond. A small piece of land was carved off for that purpose. But again, as with the wind farm, it later transpired that this was from land owned independently by Mrs Hamilton and not relevant to the present dispute. It was not part of his father's estate at all.

25. The plaintiff was asked also about the lands being put into his mother's name by the deed of assent in 2006. As far as the plaintiff was concerned he was told that it was being done for legal reasons so that she could transfer the land. He said that he would not have known any different and that he did not think it was for ownership reasons. He did not talk to the solicitor about any of this apparently. He went on to say that he was never informed that she had been registered as the owner in 2006, and that he did not understand the legal processes involved.

26. The plaintiff was asked also about a letter that his solicitor had written on the 18th August 2014 to G.J. Moloney & Co., solicitors acting for the receivers, in answer to their letter to the plaintiff dated the 12th August 2014. That letter to the plaintiff had stated that the receiver was instructed that he was "grazing livestock on the lands without the consent of the receiver who has taken possession of the lands". He was asked to remove his livestock, failing which the receivers would remove the animals without further notice to him. He was advised to take legal advice, which he did.

27. The plaintiff's solicitor's letter in reply, and about which he was questioned in cross-examination stated, *inter alia*:

"Lest there be any confusion our client is not, nor was he ever, merely grazing livestock on the above lands.

As you are aware, having been directly conveyed to the receiver on numerous occasions, Mr Hamilton by way of long term leasehold agreement has been in sole occupation of the above lands for in excess of 20 years.

Without going into unnecessary detail, your client has effectively failed to acknowledge our clients legal and indeed beneficial entitlement, and for that matter, his occupation and legal rights and entitlements in the above lands."

28. It is the reference to a "leasehold agreement" that led to his being questioned as to the significance of this letter. There was never a leasehold agreement, or any similar document. That reference in the latter was erroneous. The receiver's solicitors in due course responded noting that no lease agreement had ever been produced, and, in any event, Sean Hamilton could not have granted such a lease without the consent of ACC Loan Management under the terms of the charge over the lands, and that any such lease would be void.

29. Before addressing the trial judge's overall conclusions, I refer to his conclusion in relation to the reference to this asserted

leasehold interest. At paras. 13–15 of his judgment, the trial judge stated:-

"13. The plaintiff was pressed about the reference in his solicitor's letter dated 18th August 2014 which referred to his leasehold interest. This leasehold interest was not asserted after that letter. The plaintiff clarified that there was a lot of emotion arising from the confusion caused by the receivers' offer for sale of the relevant lands and of lands which were actually purchased by his brother in the vicinity. It is worth noting at this stage that the plaintiff's brother had purchased a few acres and had allowed the plaintiff to use them his farm. The plaintiff was willing to buy these few acres from the receivers.

14. Suffice to say that the said letter from the plaintiff's solicitor on its face would have helped to defeat the plaintiff's claim were it not for the emotion which flowed from his mother's condition and the very late disclosure to the plaintiff of the somewhat irregular looking transactions in 2006. The plaintiff was faced with an astonishing scenario and his bankrupt brother, suffering from a mental health problem in Northern Ireland, did not assist in explaining matters. The Court accepts that the plaintiff never had a lease of the relevant lands and that he cannot be bound by a letter from his solicitor which does not recount the entire history of the plaintiff's involvement with each portion of the lands mentioned in the two folios identified in the subject line of that letter.

15. There was no evidence to infer any improper motive on the part of the plaintiff for delaying his application to register the relevant lands in his name until after the death of Mrs Hamilton on 21st January 2015. The plaintiff understandably did not feel that his late mother could or should be troubled given her condition and the plaintiff's de facto exclusive occupation, control, and use of the lands as part of his own farm."

30. I would uphold the trial judge's finding that there never was any lease or other form of agreement in the plaintiff's favour, and that he should not be bound by what was stated in his solicitor's letter in that regard.

31. No other witnesses other than the plaintiff gave evidence before the trial judge. I have set forth the plaintiff's evidence in far more detail than did the trial judge in his judgment, simply because it is helpful when considering the conclusions reached by the trial judge.

The judgment

32. In his judgment, the trial judge set out a relatively brief history of dates and events, by reference to what in para. 3 he described as "some relevant facts which are agreed". Those relevant facts are included in what I have already described above. As to the legal issue which he had to decide he stated:

"4. The parties have agreed that the issue for the Court to decide relates to the nature and extent of the plaintiff's possession of the relevant lands. More particularly, did the plaintiff exclude his mother from control of the relevant lands and did he manifest an intention to do so? Animus possidendi is the term which connotes the thrust of these questions."

33. Having referred to the limitation period of 12 years from the date on which the right of action accrued to the person bringing a claim to recover land referred to in s. 13(2) of the 1957 Act, the trial judge went on to state that "another way of approaching the nub of the controversy which arises is to ask whether the plaintiff used the relevant lands for 12 years after the death of his father for himself or in some way with his mother's conditional consent to possession". He then referred to the judgment of Black J. in *Convey v. Regan* [1952] I.R. 56, that of Slade J. in *Powell v. McFarlane* [1977] 38 P&CR 452, and then to the judgment of Clarke J. (as he then was) in *Dunne v. Iarnrod Eireann* [2007] IEHC 314. In the latter case, Clarke J. reviewed a number of the leading authorities on adverse possession, including *Convey v. Regan*, and *Powell v. McFarlane*, and having identified certain principles emerging therefrom, stated at paragraph 4.12:

"Having regard to all of those principles it seems to me that the questions which I must ask on the facts of this case are as follows:-

1. Is there a continuous period of 12 years during which Mr Dunne was in exclusive possession of the lands in question to an extent sufficient to establish an intention to possess the land itself rather than to exercise grazing rights or the like over it.
2. Is any contended for period of possession broken by an act of possession by CIE. If so time will only commence to run again when that act of possession by CIE terminates.

34. By reference to these questions, the trial judge stated that he should therefore rephrase them and ask:-

(i) whether there is a continuous period of 12 years during which the plaintiff was in exclusive possession of the relevant lands to an extent sufficient to establish an intention to possess the land itself rather than to fulfil some joint enterprise or other agreement with Mrs Hamilton?, and

(ii) was the intended period of possession broken by an act of possession by Mrs Hamilton?

35. The trial judge went on to state that he had been impressed by the plaintiff's candour when he gave his evidence, and that the receivers had even assured the plaintiff that they were not alleging that he had misrepresented matters in his affidavit or his evidence.

36. In his judgment under the heading 'Findings of Fact' the trial judge stated:

"9. The plaintiff's account of using the relevant lands for his own farm as opposed to some notional farm for the family or with Mrs Hamilton as contended for by the receivers is accepted by the Court. Despite careful cross-examination based on the transfer of a one-acre plot by Mrs Hamilton to the plaintiff's sister in 2006, the plaintiff maintained that the legal formalities for transferring the relevant lands by deed did not arise for discussion. The evidence established that the transfer of the lands actually registered in Mrs Hamilton's name to the plaintiff's sister was given effect in anticipation of seeking planning permission. The transfer of lands in 1994 to the plaintiff and the plaintiff's wife from Mrs Hamilton was also to get planning permission to build the house in which the plaintiff resides with his wife.

10. It was confirmed by the plaintiff also that he alone was involved in farming the relevant lands seeking grants, and maintaining the herd number.

11. The plaintiff in reply to specific questions stated that he "definitely" was not aware of the deed of transfer to his brother in 2006 until the events leading to these proceedings in 2013. Counsel rightly did not explore what would have happened if he had known, because in effect the plaintiff by his own account – which is not contradicted – was in exclusive possession of the relevant lands from 1992 to 2006 (14 years) in any event.

12. Mrs Hamilton was registered in 1997 as the owner of folio 14955 of Co Monaghan containing 11.2 hectares. The plaintiff explained that those lands were transferred from his grandfather's estate. These are the lands which were released in September 2008 to a company which operates a wind farm. Again, the Court was not persuaded that this in some way undermined the plaintiff's assertion that he was in exclusive possession of the relevant lands for his own farming and aid applications."

37. Following these findings of fact the trial judge dealt with the repayment by the plaintiff of £50,000 to Bank of Ireland to which I have already referred, and the fact that Mrs Hamilton had her own income, albeit small. He then stated that "there is no basis arising from these facts to suggest that the plaintiff's occupation and control of the relevant lands. In excess of 12 years was in some way a joint enterprise with Mrs Hamilton. Mrs Hamilton's passiveness allowed the plaintiff to acquire an adverse possession title as has arisen in other farming families in Ireland". He then concluded:

"12. The Court finds that there was a continuous period in excess of 12 years during which the plaintiff was in exclusive possession and control of the relevant lands, and that that possession was not broken by any act of Mrs Hamilton. The plaintiff's claim for a declaration that he is in adverse possession and is entitled to be registered as owner of the relevant lands contained in folio 14587 of the Register of Freeholders, Co Monaghan may therefore be granted".

The appellants' submissions on appeal

38. The appellants have submitted that while they accept that the plaintiff was in actual occupation of the lands in question for a period of in excess of 12 years from the date of death, they disagree with the conclusion of the trial judge that this occupation amounts to exclusive possession and control, and therefore as a matter of law to adverse possession such that the plaintiff is entitled to be registered as sole beneficial owner thereof. The appellants submit that the evidence showed clearly that Mrs Hamilton remained in occupation of all the lands following the death of her husband, but simply permitted her son to carry on farming all the lands (including the disputed lands) and that there was never any distinction between the disputed lands and the other lands surrounding the family home, either in the mind of Mrs Hamilton or indeed the plaintiff. They have submitted that the plaintiff's evidence was that in fact the income generated from the entire farming operation went towards paying for the upkeep of the farm and towards the bank borrowings of the deceased. It is submitted also that it is clear that in fact the plaintiff was engaged in a joint operation with his mother whereby with her knowledge and consent he farmed all the lands as a single venture and without distinction, and therefore with her consent and knowledge. In all these circumstances they submit that the trial judge erred in his findings and his conclusions, and that the evidence showed only that the plaintiff had farmed all the lands with the consent and permission of his mother, and therefore that his occupation of the lands was not adverse possession as that phrase must be understood, and not inconsistent with her legal title to the lands.

39. I have referred earlier to the two questions that the trial judge considered should be asked in this case by reference to the two questions identified by Clarke J. in *Dunne v. CIE*. Before expressing my overall conclusions, it is worth referring in more detail to the judgment of Clarke J. in that case since he usefully examined in some depth the earlier authorities. Commencing at para. 4.1 he stated the following:

"4.1 In *Tracy Enterprises Macadam Ltd v. Thomas Drury* [2006] IEHC 381 (unreported, High Court, Laffoy J., 24th November 2006) Laffoy J. conducted a recent of the relevant authorities. The dicta of Barron J. in *Seamus Durack Manufacturing Ltd v. Considine* [1987] I.R. 677 (which in turn derived from the judgment of Kenny J. speaking for the Supreme Court in *Murphy v. Murphy* [1980] I.R. 183, was noted to the following effect: –

'Adverse possession depends on the existence of animus possidendi and it is the presence or absence of the 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 principal has relevance only in so far as that when this factor is present it is easier to hold an absence of animus possidendi.'

4.2 In addition, the practical application of the general principles was noted by Laffoy J. as being in accordance with a passage from the judgment of O'Hanlon J. in *Doyle v. O'Neill* (Unreported, High Court, 13th January 1995, O'Hanlon J.) in which the following was 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'.

4.3 The general principles seem to me to be well summed up in a passage from the judgment of Slade L.J. in *Powell v. McFarlane* [1979] 38 P&C.R. 452 at 470 where the following is set out:-

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 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 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.'

4.4. To like effect Costello J., in *Murphy v. Murphy* [1980] I.R. 183 at 193 quoted with approval a passage from the Lord Advocate v. Lord Lovett in which Lord O'Hagan said:-

'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 in 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'.

4.5 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 land is concerned and to the type of use which one might reasonably expect a typical owner to put those lands to."

40. In relation to these questions in the context of the present case I am satisfied that the trial judge was correct to conclude that the plaintiff was in factual possession of the disputed lands, and that he had the necessary *animus possidendi*. First of all, nobody else was in possession of the land or shared possession with him. He alone occupied the land. He had his own cattle on the land and had his own herd number. He alone applied for various grants and payments as stated above. He was the only one of the children of Mr and Mrs Hamilton who had an interest in farming. That much is very clear. He treated them as his own lands, and did so for the requisite period of 12 years, and more. He had the necessary intention to possess the lands to the exclusion of all others. This is not a case where his presence on the lands was sporadic or temporary. It was permanent and exclusive. Viewed objectively by reference to the lands, the plaintiff had the necessary level of physical control spoken of in *Powell v. McFarlane* above.

41. However, it is necessary to look at a further question, and that is whether certain acts done by Mrs Hamilton are such as to negative the discontinuance of possession on the part of the paper title owner, as it is put in *Powell v. McFarlane*. In other words was the *de facto* possession or occupation of the lands in question by the plaintiff interrupted by these acts such that his occupation of the lands was not continuous throughout the 12 year limitation period.

42. In his judgment in *Dunne v. CIE*, Clarke J. addressed this question in the context of that case. I should perhaps add that while this judgment was the subject of a successful appeal, the principle appearing below was not affected. At para. 4.9 of the judgment, Clarke J. stated:

"4.9 Two other legal issues are of relevance. Firstly, it is common case that in order for adverse possession entitlements to accrue, a continuous possession of the land for a period of twelve years must be established. In *Powell v. McFarlane* Slade LJ noted, at p. 472 that 'an owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgement, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession'. It is, therefore, important to emphasise that minimal acts of possession by the owner of the paper title will be sufficient to establish that he was not, at least at the relevant time of those acts, dispossessed. The assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will be taken to continue in possession with even minimal acts. A dispossessor will need to establish possession are keen to that which an owner making full but ordinary use of the property concerned, having regard to its characteristics, could be expected to make. It is not, therefore, a question of weighing up and balancing the extent of the possession of an owner and a person claiming adverse possession. Provided that there are any acts of possession by the owner, then adverse possession cannot run at the relevant time. This is of relevance because there are a number of actions taken by CIE which are said to amount to acts of possession. It will be necessary to assess whether those acts do amount to possession having regard to the low threshold identified in the authorities. If they do, however, those acts will prevent time running during the period at which they occurred."

43. The question to be asked at this point is whether there was any act of possession, however slight, by Mrs Hamilton during the period of twelve years following her husband's death in June 1992 which can be considered to have interrupted the plaintiff's otherwise exclusive and single possession of the land such that there was not continuous possession for the required period.

44. In this regard, the trial judge was satisfied that the acts on the part of Mrs Hamilton asserted by the defendants to negative the plaintiff's exclusive and adverse possession and to indicate that his possession was in fact consistent with her paper title ownership, were insufficient to disentitle the plaintiff to the declaration that he seeks.

45. The trial judge found as a fact that the transfer of the plot of land to the plaintiff's sister was out of land owned independently by Mrs Hamilton, and was not part of the disputed lands. He was satisfied also that the land leased to a wind turbine company was part of land that Mrs Hamilton had inherited from her grandfather, and did not undermine the plaintiff's claim in respect of the disputed lands. I am satisfied that the trial judge was correct in relation to these conclusions. Those particular actions by Mrs Hamilton are irrelevant to the disputed lands

46. However, the defendants also relied on the fact that in 1994 Mrs Hamilton had transferred some land (c. 25 acres) into the name of the plaintiff and his wife, and again this was said to be inconsistent with any claim by him to adverse possession of the disputed lands. The evidence was that this 25 acres comprised land at Carnaveigh. The defendants submit that this transfer must be seen as a satisfaction of his entitlement to a share of his father's estate on intestacy, and that thereafter he had no further claim on the estate, including to the disputed lands. In my view there is no evidence to support such a submission. The trial judge concluded briefly in this regard by stating: "the transfer of lands in 1994 to the plaintiff and the plaintiff's wife from Mrs Hamilton was also to get planning permission to build the house in which the plaintiff resides with his wife". The plaintiff was cross-examined about this transaction in 1994. It was put to him that he had taken those lands in satisfaction of his share of his father's estate. He did not accept that proposition. He stated: "Well, it was just put into my name because I was the farmer and it was really because I wanted to build a house on it and I needed the land in my name to get planning permission". I am not satisfied that this particular transaction in 1994 has any relevance to the question as to whether the plaintiff has demonstrated the necessary *animus possidendi* over the disputed lands, or whether his mother by this action on her part asserted her title to those lands as legal personal representative, such that any exclusive occupation by the plaintiff of the disputed lands adverse to her paper title was interrupted in 1994.

47. I am satisfied that the trial judge applied the correct legal principles to the facts which he found, and by reference to the judgment of Clarke J. in *Dunne v. CIE* asked himself the correct questions for the purpose of determining the issues in this case. I am satisfied that that as a matter of law he was correct to conclude as he did, and on the facts as found. All of this means that the defendant's occupation of the land during the twelve year period was adverse to the title of the true owner and that Mrs. Hamilton

had taken no steps during that period to interrupt that possession.

48. For these reasons I am satisfied that the defendants' appeal should be dismissed.