

THE HIGH COURT**2006 2340 P****BETWEEN****GERARD GANNON****PLAINTIFF****AND****TREASA NI GHRUAGAIN****DEFENDANT****Judgment of Miss Justice Laffoy delivered on the 2nd day of March, 2010.****The history of the proceedings**

1. These proceedings have a long history. They were initiated by an equity civil bill which issued on 11th November, 2002 in the Circuit Court, Dublin Circuit. In the endorsement of claim on the equity civil bill the plaintiff pleaded that he is, and has at all material times been, the owner of the lands registered on Folio 100731F, County Dublin, which adjoin the defendant's dwelling house. The plaintiff alleged that in or about the year 1997 the defendant, without the consent or permission of the plaintiff, had taken down and removed part of the then existing boundary comprising trees, hedging and fencing between her property and the plaintiff's lands and encroached on the plaintiff's lands. It was further pleaded that the defendant had enclosed the plaintiff's lands with post and wire mesh fencing. The kernel of the plaintiff's claim is that, by her actions, the defendant has trespassed on the plaintiff's lands and is continuing to do so, despite having been requested in writing to remove the posts and wire mesh fencing and to yield up possession to the plaintiff.

2. The reliefs claimed in the equity civil bill include:

- (1) an order for possession of one parcel of the lands registered on Folio 100731F, which is outlined in red on the map annexed to the equity civil bill, which I will refer to as the "disputed lands";
- (2) an injunction restraining the defendant from trespassing on the disputed lands;
- (3) an injunction requiring the defendant to remove the post and wire mesh fencing and to restore the disputed lands to their former condition; and
- (4) damages for trespass and nuisance.

3. By order of the Circuit Court made on 16th July, 2003 the plaintiff was granted judgment in default of appearance and an order for possession was granted to the plaintiff together with certain injunctive relief. That order was set aside by a further order of the Circuit Court dated 15th December, 2005. On the same day, by order of the Circuit Court, it was ordered that the proceedings be transferred to the High Court.

4. By order of the Master of the High Court dated 25th May, 2006 it was ordered, by consent, that the proceedings be adopted and proceeded with in this Court as if the action had been commenced in this Court. It was at that stage that the proceedings were assigned Record No. 2006/2340P.

5. The defendant, who is a personal litigant, delivered her defence in these proceedings on 27th November, 2006. In her defence she referred to other proceedings dating from 1996 which are pending in this Court, to which I will refer later. In her defence she pleaded that she is not trespassing on any lands owned by the plaintiff. Specifically she pleaded as follows:

"The defendant purchased her property in 1992, and at the purchase it was surrounded on the South from the Road (Jugback Lane) beside and behind the house by a heavily coppiced section of very mature trees for some 140 feet or so. This continued to a heavy hedgerow of 17-25 feet in width and some 30-40 feet in height on the South, across to a mid-point on the West and down to a corner, continuing on the North by the road (Jugback Lane), the hedgerow surrounded on the outside by a broad ditch on all sides."

The defendant also denied that she had changed the position of any fencing. She also asserted that the plaintiff was not entitled to the relief claimed or any relief.

6. The position, accordingly, when these proceedings came on for hearing on 23rd February, 2010, was that they had been in existence for seven and a quarter years.

The 1996 proceedings

7. The 1996 proceedings referred to in the defendant's defence are proceedings originally entitled "The High Court, between Treasa Ni Ghrugain, plaintiff and Sapporo Woods Ltd., Liffey Developments Ltd., Gannon Homes Ltd., Matthew Duff, Joseph Duff and Alicia Duff, defendants (Record No. 1996/3633P) (the 1996 proceedings). Subsequently, in 2001, the 1996 proceedings were dismissed as against the fourth, fifth and sixth defendants.

8. On 23rd November, 2009, the defendant brought a motion before this Court seeking to consolidate the 1996 proceedings with these proceedings. The Court refused that application on the basis that these proceedings deal with the discrete issue as to the ownership and possession of a narrow strip of land, the disputed lands. The Court held that the issues in these proceedings are unrelated to the issues raised in the 1996 proceedings. It was also considered that consolidation would only serve to increase costs all round to consolidate the two actions.

The paper title

9. The disputed lands comprise a narrow sliver of land measuring approximately 4.2 metres in width and approximately 40 metres in length stretching westward from Jugback Lane, with the defendant's property lying to the north thereof. At the hearing of the action an official of the Land Registry appeared on foot of a subpoena issued by the plaintiff and produced the following documentation:

(1) a certified copy of Folio 100731F of the Register of Freeholders County Dublin with the Property Registration Authority (PRA) map relevant to that folio created on 22nd February, 2010 attached; and

(2) a certified copy of Folio 12141 of the Register of Freeholders County Dublin, with the relevant PRA map created on 22nd February, 2010 attached.

10. The lands registered on Folio 100731F comprise various parcels of lands at Broadmeadow near Swords, County Dublin. The disputed lands, which are at a distance from the balance of the lands registered on the folio, are designated A2DXE on the PRA map. The area thereof is not stated. The plaintiff was registered as full owner with absolute title of the disputed lands on Folio 100731F on 27th June, 1994. The PRA map is based on the Ordnance Survey map and is drawn on the scale of 1:2500.

11. Folio 12141 relates to part of the townland of Broadmeadow. The defendant is the registered owner of all of the lands registered on Folio 12141, the area of which is not stated either on the folio or on the map, which the defendant believes to be approximately half an acre. The lands comprise her home with a garden in front to Jugback Lane and a field at the rear. She was registered on the folio on 7th May, 1993 as full owner with absolute title in succession to James Ennis. The house was originally a vested cottage, which would appear to have been vested under the Labourers Act 1936 in her predecessor, Mr. Ennis. The PRA map is based on the Ordnance Survey map and is drawn on a scale of 1:1000.

12. Even though the map attached to Folio 100731F is drawn on a different scale to the map attached to Folio 12141, what is quite clear is that, on a visual assessment of both maps, the disputed lands, i.e. plot A2DXE, of which the plaintiff claims to be, and is registered as, owner, are to the south of and contiguous with the lands registered on Folio 12141, of which the defendant is owner. The entirety of the southern boundary of the defendant's property from east to west (including its boundary with the disputed lands which extends roughly half of the length of the boundary) forms a straight line on the maps.

13. Therefore, purely on the basis of the comparison of the two PRA maps, nobody would doubt that the plaintiff is the owner of the disputed lands.

The position on the ground

14. The current position on the ground is depicted on a drawing prepared by Paul Corcoran & Associates, designated "Boundary Check Applewood" and dated 19th June, 2008 (the boundary drawing), which was put in evidence by Patrick Moran, the surveyor who drew it. It shows the disputed lands outlined in red as per the PRA map in relation to Folio 100731F. It also shows the outline of the defendant's adjoining property as per a land survey carried out in July/August 1995 by Land Surveys. Thomas Nesbitt, a surveyor with Land Surveys, also testified and he put in evidence a drawing (the survey drawing) showing the portion of the topographical survey carried out by Land Surveys in 1995 of a large area at Broadmeadow which depicted, inter alia, the disputed lands and the defendant's property. The outline of the defendant's property, as depicted by blue lines, was digitally reproduced from the Ordnance Survey map. Two physical features, which on the defence were of significance, were surveyed on the ground in 1995 and are depicted on the survey drawing. The first is a ditch, represented by a dashed line, surrounding the defendant's property on three sides, excluding the road side, which ditch is entirely outside the boundary of the defendant's property as depicted by the blue lines and which Mr. Nesbitt estimated would have been about three metres in width. The second is a hedge, represented by shorter dashed lines, which surrounds the defendant's property on four sides and largely coincides with the boundaries of the defendant's property as outlined in blue.

15. The boundary drawing also depicts more recently created physical features as follows:

(a) the line of a post and wire fence designated "Fence March 00", which I will refer to as "the 2000 fence";

(b) the line of a post and wire fence designated "Fence Oct 01", which I will refer to as the "2001 fence" ; and

(c) a timber wall designated "Wall Sept 07".

It also depicts on the southern boundary of the defendant's property to the west of the disputed lands a hedge designated "Centre Line of Hedge 00", which demonstrates that the line of the hedge in that area in 2000 was, insofar as one can tell on the basis of a visual assessment, remarkably similar to the line of the hedge at that location, when surveyed in 1995.

16. Despite the criticism of the boundary drawing by Cathal Boylan, the chartered civil engineer who testified on behalf of the defendant, I am satisfied that it is adequate for the purposes of assisting the Court in determining who is now entitled to ownership and possession of the disputed lands and identifying the southern boundary of the defendant's property.

17. The picture which emerges from the evidence is that the defendant's property, which fronts onto, and is accessed from, Jugback Lane, is surrounded on the other three sides by land, which was originally farmland but which has been developed in recent years. Accordingly, the defendant's property is now surrounded by a residential housing estate.

18. The plaintiff, or a company controlled by the plaintiff, sold the lands surrounding the defendant's property to Heritage Properties Ltd. (Heritage) around 2000. The reason why the sliver of land, which comprises the disputed land, was not included in that sale was because of the encroachment thereon of the defendant in the late 1990s. Counsel for the plaintiff characterised the disputed lands as a *cordon sanitaire*, which was isolated from the lands sold to Heritage until the title to it would be clarified. The evidence of the plaintiff was that his purpose in prosecuting these proceedings is to retrieve the disputed lands and to give possession and convey title to the purchasers of houses from Heritage whose back gardens would have extended over the disputed lands, if the defendant had not encroached on them. There are seven completed houses, in what I understand to be now known as Thornleigh Terrace, whose back gardens would have extended to the southern boundary of the defendant's property as shown on the PRA map in relation to Folio 12141 if the plaintiff had not reserved the disputed lands on the sale to Heritage. Additionally, there is an end house, being the house in Thornleigh Terrace nearest to Jugback Lane, which has not been completed, because, apparently, of difficulties created by the defendant's encroachment on the disputed lands, although there may also be other reasons for non-completion.

Encroachment by defendant?

19. On the basis of the evidence, I am satisfied that the defendant has encroached on the disputed lands by –

- (a) widening the entrance to her property from Jugback Lane southwards,
- (b) laying the foundations for an extension to her house partly on the disputed lands, which was apparent to Mr. Moran in 2000 and 2001 ;
- (c) erecting the 2000 fence, which the survey carried out in March 2000 establishes was then on the ground and had physically extended the southern boundary of the defendant's property by taking in most of the disputed lands; and
- (d) erecting later the 2001 fence, which was obvious on the ground in a survey conducted in October 2001 and which further physically extended the southern boundary of the defendant's property at its widest point by about 1 metre, thus taking in most of the rest of the disputed lands.

The foregoing activities were facilitated by, or involved, the cutting down of trees and the removal of part of the hedgerow which had previously straddled the boundary between the defendant's property and the disputed lands. The widening of the entrance involved excavating the ditch to the south of the defendant's property.

20. The 2001 fence, erected in October 2001, was approximately on a line with a timber wall, which replaced it and was erected by Heritage at the rear of the seven houses in Thornleigh Terrace referred to earlier, the gardens of which have been attenuated because of the plaintiff's reservation of the title to the disputed land on account of the defendant's encroachment. At a very facile level it can be observed that, if either the 2001 fence or the timber wall constitutes the southern boundary of the defendant's property, the entirety of that boundary from east to west is inconsistent with the corresponding boundary as depicted on the PRA map – a straight line from Jugback Lane to the most western extremity. The most easterly half approximately of the boundary would extrude by 4.2 metres beyond the boundary as depicted on the PRA map, if either the 2001 fence or the timber wall marks the boundary.

Status of PRA maps

21. The status of PRA maps is governed by the Registration of Title Act 1964 (the Act of 1964). Section 85 provides:

"Registered land shall be described by the names of the denominations on the Ordnance Survey maps in which the lands are included, or by reference to such maps, in such manner as the Registrar thinks best calculated to secure accuracy, but, except as provided by this Act, the description of the land in the register or on such maps shall not be conclusive as to the boundaries or extent of the land."

None of the succeeding sections in relation to the entry of boundaries on the register as conclusive has any application to the disputed lands or the defendant's property.

22. Counsel for the plaintiff referred the Court to the commentary in McAllister on *Registration of Title* (at p. 59), where it is stated that it should not be taken that the provisions in the Act of 1964, as to the extended boundaries of registered land not being conclusive, extend to substantial discrepancies in areas and that the provision is only intended to cover minor errors in calculation, citing *Gillespie v. Hogg* [1947] Ir. Jur. Rep. 51. In that case the building on which the plaintiffs alleged the defendant had trespassed stood at a place where two townlands met, Clooneybrien and Knockroe. On all the Land Commission maps the building appeared in the townland of Knockroe. In 1928, when the Land Commission by *fiat* vested Knockroe in the defendant's predecessors, the Land Registry map followed the townland boundary and included the building on the Folio of the defendant's predecessor. The defendant subsequently became full owner of the lands at Knockroe free from equities. In delivering judgment, Murnaghan J. stated that, if maps only were looked at, the defendant's holding included the area on which the building was situate. The plaintiffs' claim in trespass was based on title, in that they asserted that their predecessor had purchased the building many years previously, but had not obtained a conveyance. They argued that the provision of the Local Registration of Title (Ireland) Act 1891 corresponding to s. 85 did not apply. On this argument, Murnaghan J. observed:

"Where the boundaries are not defined on the land s. 55 applies. But this section would not allow me to ignore the fact that the map includes the building in question. I must hold that the folio includes the building."

23. Adopting that reasoning, even though the boundary between the defendant's property and the disputed lands is not entered on the register in accordance with the Act of 1964, I cannot ignore the fact that the southern boundary of the defendant's property as shown on the PRA map extends eastwards from Jugback Lane to the western limit of the property in a straight line and patently does not show the disputed lands as being part of the land registered on Folio 12141. Unless the defendant has established that she has title to the disputed lands and that the boundary as shown on the PRA map is incorrect, I must assume that it is correct. Therefore, it is necessary to consider whether the defendant has established title to the disputed lands.

The basis of the defendant's claim to the disputed lands

24. Even though, as I understand it, the defendant has studied law, as a personal litigant she has not stated the basis of her claim to title to the disputed lands with clarity either in her defence or in her submissions. Having said that, I believe that her claim is based on a misunderstanding of the proper application of a common law presumption.

25. In the course of her submissions the defendant stated that she had read two books relating to boundaries or fences, one by Mr. Bland and another book the name of which she could not recall. She stated that Mr. Bland's book stated that, if someone gets a piece of land and puts a drain on it and the earth is brought back in and, on that ground, the person plants a hedge and allows this to grow and so on, the drain and the hedge forms part of the person's land.

26. Paragraph 6 of the defence, which I have quoted, refers to the hedgerow being surrounded on the outside by a broad ditch on all sides. The case made by the defendant at the hearing, as I understand it, although it was not made in the defence, was that she is the owner of the land on the south side of her property which comprises the hedgerow and the ditch, and that the southern boundary of her property is the southern boundary of the ditch, which she contended coincides with the southern boundary of the disputed plot.

27. I think it is in the interest of both parties that I express a view on what I understand to be the thrust of the defendant's case, even though it is not properly pleaded. I do so in the hope that it will assist the defendant in understanding the extent of her title.

28. What is referred to as the "hedge and ditch" rule is considered in Bland on Easements (2nd Ed., Thompson Round Hall, 2009) in the context of consideration of party walls at common law in s. 2 of Chapter 5 on party structures. The rule is explained as follows:

"When a ditch is being dug at a boundary, a hedge is typically planted on the excavated soil. It is reasonable to expect that the owner who digs the ditch will do so at the extremity of his land and place the soil back on his own land, rather [than] on that of his neighbour. A rebuttable presumption (the 'hedge and ditch' rule) exists that the hedge and ditch are owned by the adjacent owner of the hedge side of the ditch Against this it is highly likely on the subdivision of land that the ownership boundary will straddle the boundary feature in which case the presumption can be rebutted The practice of the Ordnance Survey is to place the boundary in the centre of the hedge, and thus the presumption can be rebutted when an Ordnance Survey map is used in the deed."

The authority cited for the last proposition is *Fisher v. Winch* [1939] 1 KB 666.

29. I think it is likely that the other book, the name of which she could not remember, which the defendant consulted was *Gale on Easements*. In dealing with party walls, banks, boundary trees and suchlike, the editors of the 16th edition of *Gale* state (at para. 11 – 53):

"In the case of banks or hedges separating fields, the ownership is thus determined: If two fields are separated by an artificial ditch and a bank or hedge, the bank or hedge and the ditch, *prima facie* and in the absence of proof to the contrary ..., are presumed to belong to the owner of the field immediately adjoining the bank or hedge ..., but if there be a bank with the ditches at each side of it, then there is no presumption as to the ownership of the bank, and the question must be determined by acts of ownership

Where parcels on the Ordnance Survey map are bounded by a hedge, it is the invariable practice of the Ordnance Survey Office, of which the court will take judicial notice, ... to run the boundary through the centre of the hedge. Consequently, if parcels so bounded are conveyed by reference to the Ordnance Survey map, their boundary will be in the centre of the hedge, and any presumption to the contrary will be rebutted [*Fisher v. Winch*]"

30. In her cross-examination of Mr. Nesbitt, the defendant raised the issue of a customary right on her part. As is made quite clear in the judgment of Goddard L.J. in *Fisher v. Winch*, the concept or doctrine which the defendant seems to be invoking has no basis in custom. Goddard L.J. stated (at p. 673):

"This matter of the respective positions of the fence and the ditch as affording evidence of the boundary was referred to in the defence and referred to throughout the trial ... as a custom. It is not a custom at all when rightly understood, but a mere presumption. It is a very different thing from a custom. This presumption is very often decisive where there is no evidence at all as to what the boundaries are, but like any other presumption it is rebuttable, and very often it can easily be rebutted by production of title deeds. In this case, when the title deeds are examined, there is no room for the operation of the presumption at all."

31. What emerged from the evidence was that the defendant bought the property in 1992 from the successor of Mr. Ennis, who had been registered as owner of the property on 7th March, 1959, apparently, on foot of a vesting order under the Labourers Act 1936. The defendant produced a copy of the map relating to the vesting certificate, which on a visual comparison was compatible with the PRA map. What that map indicates is that what was vested in Mr. Ennis and what the defendant acquired from Mr. Ennis was the property within the boundaries as depicted on that map, which boundaries, in accordance with the usual practice, would have represented the centre line of the hedge, to the extent that the hedge surrounded the property. In short, the land vested in Mr. Ennis with the vested cottage, which was acquired by the defendant, was the land within the boundaries as shown on the map of the vesting certificate, and as now shown on the PRA map.

32. The presumption, which Sir Wilfred Greene MR referred to as "a very convenient rule of commonsense which applies in proper cases in regard to agricultural land where there is no boundary otherwise ascertainable" in *Fisher v. Winch* (at p. 669) has no application to the vesting of a vested cottage with land surrounding it by reference to a map which shows the boundaries of the lands.

Accordingly, in my view, the defendant has not established that she has any title to the disputed lands or any entitlement to possession thereof.

Order

33. Being satisfied that the plaintiff is the owner of the disputed lands, there will be an order that the defendant deliver up possession of the disputed lands to the plaintiff, coupled with a permanent injunction restraining the defendant from trespassing on the disputed lands.

34. I think the prudent course is to leave it to the plaintiff to reinstate the disputed lands to their former condition and to take measures to physically define the boundary on the northern side of the disputed lands. There will be liberty to apply in the event that the plaintiff encounters any difficulty in creating the physical boundary on the ground.