

THE HIGH COURT

[2003 No.6598P]

BETWEEN

KEELGROVE PROPERTIES LIMITED

PLAINTIFF

AND

SHELBOURNE DEVELOPMENT LIMITED

DEFENDANTS

Judgment of Mr. Justice Gilligan delivered the 8th day of July, 2005.

1. These proceedings were commenced by way of a plenary summons as issued on 30th May, 2003 and relate to a plot of ground which formerly was the site of No.30 Moore Street Dublin 1. Both parties to these proceedings are property developers and it is not disputed that by an indenture of assignment made 30th July, 1997 between A. Brazil Limited of the one part and the plaintiff of the other part the property No.30 Moore Street in the City of Dublin was assigned to the plaintiff for the unexpired residue of the term of the lease which said interest was an interest in possession.
2. The issue that arises in this matter is that the defendant maintains that it and its predecessors in title have for upwards of 12 years prior to the commencement of these proceedings been in undisturbed possession of the lands and premises known as No.30 Moore Street in the City of Dublin to the exclusion of the plaintiff and have continuously over a period in excess of 12 years exercised all the rights of an owner over the lands and accordingly the plaintiff's title to the lands was by virtue of the statute of the Limitations Act, 1957 (as amended) barred and extinguished prior to the commencement of these proceedings and/or prior to the acts complained of in these proceedings and claim a declaration that it is and was at all material times the owner of the lands and has acquired title thereto by adverse possession and that the plaintiff has no estate title right or interest in the lands in question.
3. The background to these proceedings relates to lands at the junction of Parnell Street with Moore Street in the City of Dublin. The Sullivan family originally owned No.59 Parnell Street which ran through to O'Rahilly Parade and was a butchers with an abattoir at the rear with access from 16 O'Rahilly Parade. No.58 Parnell Street was run as a shoe shop and a bed and breakfast and 30A Moore Street was a shop which dealt in leather goods. No.30 Moore Street was originally O'Connors Poultry Shop and No.29 adjacent thereto was a pork butchers.
4. At some time in the 1970s Dublin Corporation intimated that they wished to widen Parnell Street and in or about 1983 agreements were entered into in respect of certain buildings at 30A Moore Street and 58 and 59 Parnell Street, which was the subject matter of compulsory purchase orders. Subsequently the houses on these sites were demolished in or around 1983. In or about 1986 No.30 Moore Street was demolished by the Dangerous Buildings Section of Dublin Corporation. Mr. Daniel Sullivan began operating a car park on what was initially 58/59 Parnell Street and 30A Moore Street being in effect the corner between the two streets and subsequent to the demolition of No.30 also began to use the levelled site as part of his car park. Dublin Corporation also were using sites along side No.59 stretching back up Parnell Street for car parking purposes and Irish car parks had an arrangement with Dublin Corporation whereby they ran the car park. The ongoing situation from approximately 1986 was that Mr. Sullivan was using what was left of the sites of 58 and 59 Parnell Street and 30A and 30 Moore Street for parking approximately 14 cars and Irish Car Parks by arrangement with Dublin Corporation had an extensive car park adjacent thereto. In or about 1985/86 a timber fence was erected by Dublin Corporation and apparently the fencing went all the way down Parnell Street and round and down Moore Street leaving an entrance to the car parking facilities at or about what had formerly been the site of No.30A Moore Street. Subsequently when this fence was falling apart it was replaced in or about November of 1996 by Dublin Corporation. By November of 1989 Mr. Sullivan had a number of lads working in the car park for him. He was not paying any rent for the property and he paid the rates when they came due and also public liability insurance to cover everyone's property. In essence Mr. Sullivan ran a car park on the site as referred to through until 1997 and he had the key to the gate of the car park. Mr. Sullivan sold his interest in the rear of 59 Parnell Street to Shelbourne Developments on 30th June, 1997 and handed over the key to his own solicitor to be passed over to the purchasers and after June 1997 he had no further involvement, with the area in question.
5. Mr. Tom Brazil though a Company A. Brazil Limited had previously purchased the interest of the former owner in No.30 Moore Street and he was well known to Mr. Sullivan and in the late 1980s there was already considerable interest with relation to the development of the area and Mr. Sullivan wrote on 17th May, 1989 to Dublin Corporation Per Pro inter alia Mr. Tom Brazil showing the extent of Mr. Sullivan's interest in what was left of No.59 Parnell Street and inter alia Mr. Tom Brazil's interest in No.30 and indicating that if agreement could be reached with Mr. Tom Brazil and Dublin Corporation various properties could be put up as one unit for sale. As Mr. Sullivan was using the site of No.30 for his car park arrangements at this stage he wrote to Mr. Tom Brazil that he acknowledged that he had no claim over his property at 30 Moore Street formerly known as O'Connors which acknowledgement he signed and dated 8th June, 1989.
6. Mr. Sullivan confirms there was a yellow hut which was operated by Irish Car Parks and each played along with the other in circumstances where he was parking approximately 14 cars and Irish Car Parks were taking the rest of the cars on the ground beyond No.59 Parnell Street. Dublin Corporation gave Mr. Sullivan permission to pass over what had been 30A Moore Street for the purpose of utilising his car park and this was also the entrance to the ICP Car Park. Mr. Sullivan asked the owners of No.60, Sepia, for permission, which was granted, to use their ground. He also asked Dublin Corporation for permission to utilise their property which would have included at that stage some portion of what previously had been No.58 Parnell Street. Mr. Sullivan confirmed that he never had any claim against the owners of the property that he was using for the car park and that in particular in respect of No.30 he says that he was never objecting or never standing in Mr. Brazil's way and the same went with all the other properties. Mr. Sullivan accepts that he asked for and was granted Mr. Brazil's permission to go on to his property and specifically stated "well I would not go on to another person's property without him giving me permission". Mr. Sullivan accepted that if Mr. Brazil wanted to sell his property he would not be standing in his way and there would be no point in him trying to block the sale because they were all friends and together they were negotiating with anyone who was interested. Mr. Sullivan agrees that whatever car parking was going on there was no question of him dispossessing Mr. Brazil no more than he was attempting to dispossess any of the adjoining owners whose lands he was using as a car park. Mr. Sullivan accepts that the purpose of his writing to Mr. Brazil to confirm that he had no claim over his property was so that they would not end up in court against each other in ten years time and he states that they would not have gone on like that in any event. Mr. Sullivan accepted that in 1989 they were all trying to put together a block of property on a smaller scale than was eventually achieved by the defendant and they were all agreeable in those days to sell. He accepts that they were trying if anyone was interested to sell as many properties together. Mr. Sullivan remembered meeting Mr. Cunningham of the plaintiff company and at the time he was attempting to put together a block of properties and he had a number of provisional deals around the block and the property Mr. Sullivan had for sale was No.59 backing to O'Rahilly Parade and there was no question of Mr. Sullivan selling 30A as that belonged to Dublin Corporation, No.60 which belonged to Sepia, or No.30 that belonged to Mr. Brazil. Mr. Sullivan accepted that is the

situation which continued on through until Mr.Sullivan sold his property in 1997.During the period 1989 – 1997 there were a series of meetings between the local neighbours including Mr.Sullivan and Mr.Brazil in the Royal Dublin Hotel and the Gresham Hotel and these meetings were amongst themselves as the owners of property at the junction of Parnell Street and Moore Street and were conducted with a number of agents of property developers.Mr.Sullivan accepts that Mr.Brazil was going to get whatever his land was sold for and that was the whole purpose of the various meetings and that it was to their advantage as a group to get something done on the site.Mr.Sullivan confirmed that there never any question but that Mr.Brazil was going to get whatever money was going for No.30 and no doubt about that at all.Around 1997 Mr.Sullivan accepted that all the owners were individually negotiating and that the two potential buyers were Mr.Cunningham on behalf of the plaintiff company and Mr.Kelleher on behalf of the defendant company.Mr.Sullivan recalled Mr.Brazil coming onto the site in or about 1988/89 and putting down a series of pegs to mark out the site of No.30 for the purpose of marking a boundary fence and Mr.Sullivan accepts that the pegs were there for a good while until Mr.Brazil gave Mr.Sullivan permission to move them.Mr.Sullivan accepts that he never had any right or title to the ground on which No.30 had stood and when he sold his own property in 1997 he closed the gate of the car park on the Corporation on Sepia and on Mr.Brazils so whatever happened after he went he does not know.After Mr.Sullivan left the area in 1997 a company called Kekerberry Ltd.took over the management of the car park on behalf of the defendant company and remained there until January 2003 when the defendant company began to develop the very substantial site which they had put together bounded by Parnell Street, Moore Street, and O'Rahilly Parade save for that plot of ground upon which No.30 Moore Street had stood and which now represents what can only be described as 'a missing front tooth' on the Moore St side of a very substantial development.Mr.Frank Kinsella was the main operator of Kekerberry and he says he was the only one who had keys to the car park which included No.30 Moore Street and he never saw Mr.Brazil on site nor Mr.Cunningham of the plaintiff company and there was no way of accessing the site other than through the Shelbourne entrances on Moore Street and O'Rahilly Parade.Mr.Kinsella does not dispute that on an occasion in the summer of 1997 Mr.Cunningham came along one day and asked that a trailer which had been situated on the site of No.30 be moved and this request was acceded to.Mr.Kinsella does not dispute that Mr.Cunningham may well have walked on the site every now and again.Mr.Kinsella accepts that he was told that there was an area to be cordoned off for a short period of time just inside the gate and that this was in a similar area to where No.30 was situate.He referred to the fact that this area was cordoned off a couple of times on behalf of the defendant company and he was told not to park cars on it and he complied with the instruction.He accepts that this probably is the "tooth area" where No.30 had previously stood.

7. Mr.Kinsella's interest in this matter on behalf of Kekeberry being the management company who operated the car park from 1997 onwards extends to approximately a six year period prior to the institution of these proceedings.Accordingly in order to assess whether or not Mr.Kinsella's involvement in this matter plays any meaningful role the court would have to be satisfied that Mr.Sullivan had adversely possessed the site of No.30, Moore Street from the date of his acknowledgement that he had no claim over the site on 8th June, 1989, through until the sale of his land in 1997 to the defendant when he departed the area.

Statutory Provisions

8. Section 13(2) of the Statute of Limitations, 1957;

"The following provisions shall apply to an action by a person (other than a State authority) to recover land –

(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person."

9. Section 14(1) of the Statute of Limitations, 1957;

"Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

10. Section 18 of the Statute of Limitations, 1957;

"(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.

(2) Where –

(a) under the foregoing provisions of this Act a right of action to recover land is deemed to accrue on a certain date, and

(b) no person is in adverse possession of the land on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land."

11. Section 24 of the Statute of Limitations, 1957;

"Subject to section 25 of this Act and to section 52 of the Act of 1891, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

12. Section 50 of the Statute of Limitations, 1957:

"In this Chapter, "acknowledgement" means an acknowledgement, under section 51, 52, 53, 54, 55, 56 or 57 of this Act, made in accordance with section 58 of this Act."

13. Section 51(1) of the Statute of Limitations, 1957;

"Where –

(a) there has accrued to any person (other than a mortgagee) any right of action to recover land, and

(b) the person in possession of the land acknowledges the title of the person to whom the right of action has accrued,

14. In the right of action shall be deemed to have accrued on and not before the date of the acknowledgement."

15. Section 58 of the Statute of Limitations, 1957;

"(1) Every acknowledgement shall be in writing and signed by the person making the acknowledgment.

(2) An acknowledgement under section 51, 52, 53, 54, 55, 56 or 57 of this Act-

(a) may be made by the agent of the person by whom it is required to be made under whichever of those sections is applicable, and

(b) shall be made to the person or the agent of the person whose title, right, equity of redemption or claim (as the case maybe) is being acknowledged."

16. In *Murphy v. Murphy* [1980] I.R.183 Costello J.at p.193 addresses the issue of "possession". "The first question of fact to be determined is whether the defendant was ever "in possession" of the widow's lands. In a passage which was quoted with approval in *Treloar v. Nute*, Lord O'Hagan in *The Lord Advocate v. Lord Lovat* said at p.288 of the report:-

"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 with 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."

17. Later in his judgment at p.195 Costello J.deals with the meaning of the words "adverse possession" wherein he states:-

"Notwithstanding that, the words 'adverse possession' have crept back into the statute of 1939; but there they only mean that a person is in adverse possession in whose favour time can run. Nevertheless it does seem to me that 'adverse possession' means to some extent at least that which it says. Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession ... The question here, therefore, is: what was the nature of the testator's possession in and from 1951, when he conveyed the property away?"

18. Turning then, to the nature of the defendant's possession, I think the test I should apply is this. Was the defendant's possession inconsistent with and in denial of the widow's rights as legal owner of the land? – See *Moses v. Landgrove* at p.538 of the report. If it was, then the defendant would be "a person in whose favour the period of limitation could run" within the meaning of s.18 of the Act of 1957 and his possession would be adverse. In considering a problem of this sort, the relationship between the owner of the land and the person in possession and the nature of the lands in controversy are highly relevant matters to be taken into account. If a person is in possession of lands with the consent of licence of the owner, then his possession is not adverse: see *Hughes v. Griffin*".

19. Kenny J.in the Supreme Court judgment states at p.202

"In s.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 servant or caretaker or a beneficiary under a trust: *Hughes v. Griffin*".

20. In the later case of *Doyle v. O'Neill* (Unreported, High Court, 13th January, 1995) O'Hanlon J.at p.20 of his judgment deals very succinctly with adverse possession in the following terms.

"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 alert to his rights that occupation adverse to his title was taking place. This is particularly the case where the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner.

In *Leigh v. Jack*, (1879) 5 Ex.D.264, Cockburn CJ said (p.271):

"I do not think that any of the Defendant's acts were done with the view of defeating the purpose of the parties to the conveyance; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The Defendant simply used the land until the time should come for carrying out the object originally contemplated by the Plaintiff)".

21. Lord Denning MR, in *Wallis v. Shell-Mex*, stated the law as follows (at p.103 of the report):

"Possession by itself is not enough to give a title. It must be **adverse** possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor.

When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for even seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years or more ... The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reasons behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission".

22. That decision was followed by Goulding J.in *Gray v. Wykeham-Martin*, (Unreported, 17 January, 1977) when he said:

"Let me try to apply that principle to the facts of the present case. What do I find? A small piece, certainly not more than half an acre, on a farm of about 140 acres, useless in its existing condition, except as a shelter for stock in bad weather and as a covert for game. The use of the disputed land by the Plaintiff as a poultry run and other things she did on it in no way interfered with the present utility of the disputed land or with the possible future improvement of the farm by throwing the disputed lands into the larger adjoining fields. Thus, consistently with the reasoning in the *Wallis* case, as I understand it, I ought in my judgment to dismiss the action, and so I do".

23. His decision and his interpretation and application of the *Wallis* case was later upheld by the Court of Appeal.

24. Slade J. said, in *Powell v. McFarlane*, (1979) P & C.R. 452:

"In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him".

25. I am quite satisfied in the factual circumstances of this case that Mr. Sullivan never intended in anyway to dispossess Mr. Brazil of his rights in respect of the land upon which No. 30 Moore Street was previously situated. He asked him for his permission to use the lands following the demolition of No. 30 Moore Street in or about 1986 for the purposes of a car park as he asked other adjoining owners. In a letter of 17th May, 1989 signed by Mr. Sullivan and written per pro *inter alia* Mr. Tom Brazil Mr. Sullivan specifically acknowledged Mr. Brazil's ownership of the property No. 30 Moore St. and specifically referred to that property on a map attached to his letter which identified the property as owned by Mr. Tom Brazil and further on 8th June, 1989 in a written acknowledgement addressed specifically to Mr. Tom Brazil and as signed by Mr. Sullivan on 8th June, 1989 he acknowledged that he had no claim over Mr. Brazil's property at 30 Moore St. Mr. Sullivan's relationship with Mr. Brazil is of considerable significance because between 1989 and 1997 when Mr. Sullivan sold what remained of No. 59 to the defendants he was attending a variety of meetings with Mr. Brazil for the purpose of the adjoining owners coming together to effect a sale and as Mr. Sullivan stated in evidence it was to their collective advantage to get something done to the site and there was never any doubt at all but that Mr. Brazil was going to get whatever money was going for No. 30. Nothing in my view could be more consistent with the fact that Mr. Sullivan was simply using the site of No. 30 with Mr. Brazil's permission until such time as either collectively or individually the various sites were sold off and he had no intention whatsoever to adversely affect Mr. Brazil's ownership and further as he says himself when he sold out in 1997 he closed the gate "on Mr. Brazil's".

26. In my view on the evidence adduced there is no question of Mr. Sullivan's usage of No. 30 Moore St. having been adverse possession and nothing remotely that could come anywhere near the criteria of O'Hanlon J. as set out in *Doyle v. O'Neill* whereby "the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place", or the criteria as expressed by Kenny J. in *Murphy v. Murphy* "that the inconsistency with the title of the true owner necessarily involves an intention to exclude the true owner and all other persons from enjoyment of the estate or interest which has been acquired".

27. It follows that in my view there was no adverse possession by Mr. Sullivan of the site in question from the 8th day of June, 1989 through until his departure from the area in 1997 on the sale of his interest in what was left of No. 59 Parnell Street to the defendant.

28. For the sake of completeness neither would I be satisfied that there was any adverse possession in respect of the site between 1997 and the date of the institution of these proceedings. Mr. Kinsella on behalf of Kekerberry Ltd. was simply a management agent, retained by the defendant to run a car park on the site and he accepts that Mr. Cunningham did come on the site on an occasion and asked for a trailer to be removed from the area of No. 30 Moore Street which request was complied with and furthermore it appears that on a number of occasions he was requested by the defendant company to cordon off the area of the site of No. 30 and quite clearly his involvement was simply to manage the car park that was being operated thereon and no sufficient evidence has been adduced on the defendant's behalf which would satisfy me that in some way this occupation could have left no doubt in the mind of the owner of the lands that occupation adverse to his title was taking place. In any event the occupation by Kekerberry is only of some six years duration.

29. In these circumstances I will hear counsel's submissions as to the form the order of the court should take.