Neutral Citation Number: [2008] IEHC 417

THE HIGH COURT

2007 155 CA

ANTHONY KELLEHER

PLAINTIFF

AND

BOTANY WEAVING MILLS LIMITED

DEFENDANT

Judgment of Ms. Justice Maureen H. Clark delivered on the 10th day of December 2008.

1. This action comes before the court as an appeal from the Circuit Court and concerns the ownership of a small plot of leasehold land in the heart of the City of Dublin. The plot of land is adjacent to 33 Emerald Square in the Coombe in Dublin 8 and measures 31 feet in length and 11 feet in width. It comprises a lock up garage to the front part with an open area of 12 to 13 feet in length to the rear. There is no discernible boundary between the land at the rear of the garage and a large area of open ground attached to a factory owned by the Defendant. The dispute between the parties came about in September, 2005 when the Plaintiff, Anthony Kelleher who had purchased an assignment of the plot of land, sought to extend the garage by knocking out the rear wall so as to provide the length necessary to park his truck and trailer. He was prevented from carrying out these works by the Defendants who claimed that he was trespassing on their property. The original application to the Court was brought by the Plaintiff for injunctive relief but at the close of pleadings the case effectively became a claim for adverse possession.

2. The Defendant denies the Plaintiff's title and claims that it has been in exclusive occupation of the lands for a period in excess of 12 years and has extinguished the title of the Plaintiff to the lands by adverse possession.

3. Where a person with good title brings an action for the recovery of land and the Statute of Limitations is pleaded as a defence, the defendant must prove that the title holder has been dispossessed or has continued his possession of the lands in question for the statutory period. This is the principle to be applied to the evidence called.

The evidence

4. Mr. Peter Lawlor a son of the late John Lawlor was born and brought up in Emerald Square next door to where his father was reared and where his grandmother lived. His grandmother's back garden was adjacent to and overlapped to some degree the yard attached to the garage used by his father. When the garage was used the family had no reason to go into the yard at the back of the garage apart from rare occasions when repairs were carried out to the galvanised sheeting of the garage roof. This usually happened when children in the neighbourhood had climbed up on to the roof and jumped on it or tried to gain entry or if the galvanised sheets had lifted in a storm. Peter Lawlor particularly remembered that his mother died in 1998 and his father died in 2002 and between that period, he and his brother Frank, carried out repairs to the roof. In order to do this they had to first climb up onto the front portion of the roof using a ladder, carry the ladder across the roof and then lean it on the ground in the back yard which is the subject of these proceedings. He had no reason to take much notice of the yard but on each occasion when he was there, he noticed that it was in its usual bad unkempt condition. He moved out of Emerald Square in 1986 to get married but before that he used the garage every day to store his motorbike. During the period that he lived at home in Emerald Square, his mother had always paid rates on the premises. The back yard was not visible from his parents' house or from the garage and the only way he could see it was from the roof of the garage. He believed that the window at the back of the garage had long ago been blocked up to prevent break ins. While he used the garage on a regular basis when living in Emerald Square, he had no reason to go into the back yard.

5. Frank Lawlor, brother of Peter Lawlor was also raised in Emerald Square and left when he married in 1986. He described himself as the DIY person in the family and recalled how his father was able to buy the lock up garage from a neighbour Mr. McLoughlin who suffered a stroke. As he had no further use for the garage he sold it to his father. He recalled several occasions when the roof had to be repaired because of kids jumping on the corrugated iron. On each occasion, he climbed onto the roof from the front and put down a ladder at the back where the roof was lower. His understanding was that the land behind was attached to the garage and formed part of the plot purchased from Mr. McLoughlin and that he had a right to be there. It never occurred to him to seek the permission of anyone to gain access to the roof or to place his ladder on the land behind. On the last occasions when he was on the roof he noted nothing different about the land at the back of the garage; it was neglected as it always was. He too recalled fixing the roof between the dates of his mother's and his father's deaths. He always carried out the repairs when notified by neighbours of its condition as his understanding was that if anybody fell through the roof that they would be liable and he saw it as his responsibility to keep the roof in repair. His impression was that there was no lawn in the yard at the back when he saw it between 1998 and 2002 and he particularly noted that when they were putting down the ladder the place was thoroughly unpleasant, being strewn with rubbish including human excrement. His recollection is that the roof was fixed on two to four occasions. He denied that landscaping had extended into this area when he last was on the roof. He identified the map attached to the assignment from Dublin Corporation to Thomas McLoughlin and the assignment from Mary McLoughlin as administratrix of the estate of Thomas McLoughlin to his father John Lawlor. The maps attached to the assignment show that land at the back of the garage is part of the plot of land originally assigned.

6. Anthony Kelleher, the assignee and Plaintiff explained that he bought the garage in September 2005 for €18,000 so that he could safely park his long truck and trailer close to where he lived in The Coombe and that his only interest in buying the property was the length of the plot on the map. He never inspected the plot at the back as he was told that it was included in the take and he relied on the map attached to the title deeds. In September 2005, he broke down the wall of the back of the garage with the intention of extending the structure to facilitate the storage of his truck and trailer but was immediately challenged by Botany Weaving. A skip was then placed by the Defendant on the plot of land to prevent him from carrying out building works and his trailer was pushed back into the garage. He has been unable to use the garage and plot for the purpose for which he purchased the property.

7. Jonathan Hackett on behalf of the Defendant gave evidence that he was a director of the company Botany Weaving Mill Ltd. that bought the lands in 1988 identified on a map handed into court. At the time of purchase, the factory was in a derelict condition, the roof had caved in and the surrounding lands were full of boulders and rubbish and constituted a dumping ground. The map of the defendant property indicates a very extensive ground area on two sides of the factory with the plot in question in the extreme south western corner. Following the purchase he restored the buildings and refurbished the grounds by having the rubble and rubbish cleared, bringing in topsoil and landscaping part of the area for parking. The entire area was laid in grass within a year of the sale in or about 1989. He had always assumed that the company owned the entire yard up to the wall at the back of Emerald Square. He had never seen the Lawlor leasehold agreement or the deed of assignment with the map attached to it and was unaware that the plot was attached to the garage. When he purchased approximately 45,000 square feet from the liquidator of Malboro Menswear, the owners of the former factory premises, he did not at any time consider the ownership of the miniscule area comprising the disputed plot. He understood that he owned everything within the boundaries of the factory and he rejected the idea that there was ever any discernable difference between the appearance of the parcel of land over which Mr. Kelleher lays claim and the area which the factory maintained. In particular, he rejected any suggestion that damp marks rising several feet on the boundary walls were left by recently removed earth and rubbish. He said that the area had been cleaned up long ago as the staff looked out on it at lunch time

and had objected to its derelict state. He first became aware of the claim by Mr. Kelleher in September 2005 as prior to the attempted building works he had no idea that anyone claimed ownership to that land or that anyone had carried out any repairs to the roof. He had never seen or been made aware that any persons had been on the plot of land or had placed ladders there.

8. Photographs were produced by Mr. Hackett showing the current state of the premises with well maintained landscaping around an extensive parking area to the front of the factory grounds. The area in dispute is at the very end of an area laid in mowed rough lawn which is outside the landscaped parking area. There was evidence of some graffiti on the boundary walls with the garage. There were large areas of dark staining on the boundary wall with one of the Emerald Square houses and to a lesser extent at the bottom end of the wall at the back of the garage. There was also an area of rough mortar plastering at the foot of the boundary wall. No evidence was called as to who cleared the rubbish from the plot in dispute and when this work was carried out apart from the testimony of Jonathan Hackett that the lands were cleared and seeded in or around 1989.

Findings
9. On the evidence called, there is clearly a dispute as to when the plot of land at the back of the garage was cleared of rubble then seeded with grass and incorporated into the curtilage of the factory premises. The staining on the walls could be consistent with relatively recently removed earth. The rough mortar could be consistent with efforts to strengthen the base of the wall following removal of a bank of earth. No explanation was provided for this staining or of when the concrete was applied.

10. Maps produced in court by both parties show the area in dispute as forming the natural contours of the plot on which the garage was built and which is contiguous to the garden walls of 32 and 33 of Emerald Square. In other words, the area squares up with the Emerald Square back gardens. However, an ordinance survey urban place map of Emerald Square noted to have been surveyed in 1973 and revised in 1999, depicts the garage as a structure but does not delineate the yard or exclude it from the factory premises confirming that there was never a boundary wall between the garage and the factory.

11. On the basis of this evidence I make the following findings: on the day in September 2005 when Anthony Kelleher attempted to extend the garage at the side of 33 Emerald Square, Botany Weaving Mill Ltd was in occupation of all the land at the front of their factory including the plot in question. It is clear that the only use Mr. Kelleher's predecessors in title ever made of the plot in question was for necessary access to maintain the garage and that this did not occur frequently the last times being on two to four occasions between 1998 and 2002. It was also clear that unless they were carrying out repairs, they had no view of the plot of land.

12. The issues which I have to decide is whether the acts of Botany Weaving in clearing the rubbish from the disputed plot and maintaining it in grass amounted to exclusive occupation, adverse to the owners of the land and if so, can adverse possession occur in circumstances where they were unaware that the lands belonged to someone else. In other words was Botany Weaving's erroneous belief that the lands were theirs sufficient to amount to an *animus possidendi* or intention to possess to establish adverse possession bearing in mind that the burden is on the person claiming such title? If *animus possidendi* is established have they established 12 years continuous exclusive occupation such as to defeat the title of Peter and Frank Lawlor and thus the Plaintiff?

The law
13 The parties furnished the court with a quantity of recent law on the issue of adverse possession being *Durack Manufacturing v. Considine* 27/05/1987 Unreported Barron J., *Gleeson v. Feehan* 2000 IEHR 118 29/05/2000 Finnegan P., *Tracey Enterprises Macadam Ltd. V. Drury* Unreported 24/11/2006 Laffoy J., *Dunne v. Iarnrod Eireann* IEHC 7/9/2007 Clarke J.

14. The law in relation to possessory title and the extinguishment of paper title by the operation of the provisions of the Statute of Limitations, 1957 has been extensively explored in two of the cases furnished. The pertinent sections of the Statute of Limitations Act 1957 to this type of action are sections 13(2), 18(1) and 24:

> S.13(2) which provides that no action to recover land shall be brought by any person, other than a State authority, after the expiration of twelve years from the date on which the right of action accrued to that person.
>
> Section 18(1) which deals with when the right of action to recover land accrues and provides that no right of action to recover land shall be deemed to accrue unless the land is in the adverse possession of some person in whose favour the period of limitation can run.
>
> Section 24 which provides that at the expiration of the period fixed for a person to bring an action to recover land, the title of that person to the land shall be extinguished.

15. Laffoy J. examined all relevant judgments on these provisions in *Tracey Enterprises Ltd Macadam v. Drury* and I adopt her analysis in quoting from her examination of the existing law.

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

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

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

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

> *"Adverse possession depends on the existence of animus possidendi and it is the presence or absence of this state of*

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

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

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

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

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

17. It is quite clear from this analysis of the authorities going back over 120 years that in every case where adverse possession is in issue, the fact of possession requires an examination of the nature of the land and the nature of the occupation before possessory title can be established. Application of the same legal principles can lead to differing outcomes as occurred for example, in *Doyle v. O'Neill* 13.01.95 and in *Griffin v. Bleithin* [1999] 2 ILRM 182 where similar types of occupation brought differing results depending on their own special facts.

18. The authorities relating to adverse possession were again examined and applied by Clarke J in *Dunne v. Iarnrod Eireann* IEHC 7/9/2007 where he found that the general principles were best summed up in a passage from the judgment of Slade L.J. in *Powell v McFarlane* [1979] 38 P&CR 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 to a 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 both 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."

19. Clarke J in *Dunne v. Iarnrod Eireann* concluded that the authorities indicate that "*the nature of the possession which must be established is one which must be objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to*" and that the correct approach should be on the basis that the onus is on the person asserting possessory title "*to establish a sufficient degree of possession of the land with the requisite intent*".

20. He accepted the following as a correct statement of the law the dictum of Slade LJ in *Power v. McFarlane* at p472 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 judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession.*"

21. The recent decision in *Gleeson v. Feehan* (29/05/2001 unreported) Finnegan P. confirms that quite minimal acts of possession by the owner of the paper title will be sufficient to establish that he was not dispossessed.

22. Coming then to the facts of this case where the managing director of the Defendant company was firmly of the belief that his company was the paper title owner of the plot in question and whether this misplaced belief affected *animus possidendi*. There is a paucity of Irish law on relevant law regarding such mistaken belief and the proposition that a person can be in adverse possession while believing that that he is the owner. In *Williams and Anor. V. Usherwood* Court of Appeal 1983. Cumming-Bruce LJ stated that:

"Enclosure has always been regarded as strong evidence supporting animus possidendi, and the fact that the adverse possessor's belief of ownership is founded on a mistaken premise does not help the paper owner."

Halsbury's Laws of England quotes this decision as an authority that adverse possession can occur even though the possessor was the legal owner. However, an examination of the details of *Williams v. Usherwood* exposes facts quite different to those in this current case and raises doubt as to the validity of the proposition. In that case both the original owners who were neighbours and their successors in title acted on the mistaken belief that one neighbour owned all of what in their title deeds was a shared driveway to their respective houses in a residential estate. Each party erroneously believed that the adjoining property owner merely enjoyed a right of access over the driveway to maintain and repair their residence, gutters, eaves and drains. The first neighbour had built a garage on the shared driveway, caused it to be expensively paved, had parked two or three family cars there for upwards of forty years and most important, had enclosed the driveway. The issue of the mistaken belief paled into insignificance when viewed against these acts and the abandonment by the other parties of any use of the once shared entrance. It is interesting that the law lords of the Appeal Chamber relied on the dictum of Lord O'Hagan in the decision of *Lord Advocate v. Lord Lovat* in deciding on the special facts of the case in favour of the neighbour who had enclosed the driveway and in refusing relief to the Plaintiff who had relied on the Defendant's erroneous belief. I do not believe therefore that *Williams v. Usherwood* is any authority for the principle that *animus possidendi* can coexist with a belief in ownership. Logically, if a person in occupation believes that he is rightfully there, he cannot have the intent to dispossess.

Conclusion
23. On the basis of these authorities and applying the principles to the facts of this case, I am not persuaded that the use of the disputed plot by the defendant company when viewed objectively, constituted adverse possession or possession which was inconsistent with the title of the true owner. The clearing and tidying up which was carried out by the Defendant Company was without doubt for its own visual benefit in providing continuity to the lawned area and to abate and minimise the dumping nuisance to their own land. I do not accept that the works were carried out to defeat the title of the true owners any more than the mowing and maintaining of common areas or roadside verges is carried out with intent to acquire title. In my view the grassing and tidying was not of such a nature as could leave "*no doubt in the mind of a landowner alerted to his rights that occupation adverse to his title was taking place.*" *Doyle v. O'Neill*

24. On the particular facts of this case, the tiny plot of land had never been marked off from the rest of the factory premises. There was no wall or other boundary to demarcate the plot from the other open ground. Thus, when the derelict factory premises were purchased in 1988 with grounds described as a "*dump*", that state also extended to the plot. The plot itself had not been used other than to provide necessary access for repairs to the garage. The nature of the particular urban area with its risks of vandalism and theft meant that the garage was built with minimal access. It was however possible to develop the plot by extending the garage without encroaching onto the defendant lands as the walls of any extended structure would form a new boundary. I have therefore asked myself if the acts relied on by the defendant as acts of exclusive possession, were in all the circumstances inconsistent with the enjoyment of the land by the plaintiff's predecessors in title. If the area had been cleared of urban detritus, flattened and sown in grass during the period 1998 and 2002, would the Lawlor brothers standing on the plot while repairing the roof necessarily conclude that the improved state of the plot indicated that some person was in adverse occupation of their plot? I am not convinced that they would. In any event, I am not satisfied that the Defendant has established continuous exclusive occupation for a period in excess of 12 years as during that time the Plaintiff's predecessors continued with their normal sporadic use of the plot to service the repairs to the garage.

25. I will make an order that the Plaintiff is the lawful owner of the plot at the rear of the garage at 33 Emerald Square in the terms of the Plaintiff's Civil Bill. The Plaintiff is entitled to his costs.