Neutral Citation: [2014] IEHC 528

THE HIGH COURT

[2013 No. 671SP]

BETWEEN/

CYRIL DOOLEY AND ORLA CULLINAN

PLAINTIFFS

AND

MICHAEL FLAHERTY

DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 18th November 2014

Part I - Introduction

1. In these proceedings the plaintiffs seek a declaration that they are entitled to vacant possession of the property known as No. 25 Henry Street, Galway. The plaintiffs agreed to purchase the property at auction in May 2012 having been led to believe by the title description offered prior to the auction that the property was vacant, subject only to a life tenancy at a peppercorn rent in favour of one Paddy Flaherty. It appears that Mr. Paddy Flaherty died some time in or about December 1995. At that point his brother, Michael Flaherty (senior) took over the tenancy. Mr. Michael Flaherty (senior) died in June 1998 and his son (and present defendant), Michael, took over the tenancy in turn.

2. While the plaintiffs' paper title to the property is not now disputed, they are nonetheless met with the defence of adverse possession on the part of the defendant, Michael Flaherty.

3. The case, in essence, turns on the defendant's claim that he had twelve years' uninterrupted possession of the property from September 1998 which he says he occupied without ever paying rent to the plaintiffs' immediate predecessor in title, Paul Fitzgerald, from that point onwards.

4. Before considering the legal questions, it is first necessary to summarise the evidence.

Part II – The Evidence

5. The plaintiffs called two witness, Paul Fitzgerald and Orla Cullinan, while Michael Flaherty was the sole witness called by the defence. The following is a short summary of the evidence they gave relevant to the issue of adverse possession.

Paul Fitzgerald

6. Paul Fitzgerald gave evidence that he and his family were property developers who had purchased the property from the previous owners in 1990. He said that he knew Mr. Michael Flaherty (*i.e.*, the present defendant) and that he had received rent from him in September 1998 after the death of his father who was also called Michael Flaherty

7. He said that he collected rent from him in 2004. He also said that he had called to the property in 2008 for this purpose but that he did not meet Mr. Flaherty.

8. Mr. Fitzgerald said that at some stage – he thought that it was around 2007 - his employees gained access to the property by going through a neighbour's attic to repair an area which had been damaged by dampness. There is correspondence before the Court showing that the adjoining property owners had written to him on October 13th, 2008 to complain that "the state of the roof on your property has [had] consequences for our house." Sometime thereafter he arranged with one of his own employees for the slates on the roof to be repaired.. He acknowledged that the house was not in good condition, but this was because the property was not a priority for him. He had also insured the property.

Orla Cullinan

9. Ms. Cullinan said that she was a solicitor of long standing. She said that Mr. Dooley (the first named plaintiff) and herself decided to purchase the property having learned that it was to be sold at an auction along with other distressed properties. As far as she was aware the property was uninhabited and, immediately following the auction and having paid a deposit, Ms. Cullinan, Mr. Dooley and a locksmith picked the lock and went into the house. She said as they were touring the property Mr. Michael Flaherty came "out of nowhere". She said that Mr. Flaherty originally claimed that he was Patrick Flaherty before Mr. Dooley recognised him as Michael Flaherty because he had acted for him at an earlier stage. Mr. Flaherty said that he would leave the property for the sum of €5,000.

10. A few days later Mr. Dooley had the locks changed. He ultimately arranged to give Mr. Flaherty a copy of the key for the property on condition that he signed a receipt as caretaker for property.

11. Ejectment proceedings were commenced against the present defendant in the Circuit Court in Galway in July 2012. No appearance was entered to those proceedings. It appears that as the purchasers did not at that stage have full legal title to the property, doubts emerged regarding their standing to seek such relief. They proceedings were, at any rate, shortly thereafter discontinued.

12. The purchasers had, however, contracted to purchase subject only to a life tenancy in favour of a life tenant now deceased, they commenced vendor and purchaser proceedings seeking a declaration that they were entitled to vacant proceedings. That relief was refused by this Court, but the purchasers appealed to the Supreme Court. The matter was then resolved by the parties, with a small reduction in the price. The sale of the property ultimately closed in October 2013.

Michael Flaherty

13. Mr. Flaherty said is he now 59 years of age and he had spent all his life at 25 Henry Street. He had worked for Bus Éireann for the

last 39 years. His family previously paid rent to a Ms. O'Beirne, a pharmacist, who was the previous owner of the property. Mr. Flaherty said his father had died in June 1998 and by this stage Mr. Fitzgerald had acquired the ownership of the property.

14. Mr. Flaherty acknowledged paying Mr. Fitzgerald the sum of IR£5 in September 1998 and said that this was the only rent he had ever paid. He denied ever seeking €5,000 payment in return for vacating the property. Mr. Fitzgerald also gave evidence of his modest and frugal life style and how he lived in the property.

15. A long time later in February 2010 he received two letters from Mr. Fitzgerald concerning the property. The first letter was dated 4th February 2010 and it asked him to call to sign the rent books in respect of the rents received from him. The second letter was also addressed to Mr. Flaherty and was dated 12th February 2010 and it was marked "Urgent – Re Rent Book." It stated:

> "Our accountants have informed me that I must get you to sign a rent book for the rents we have received from you. Please contact Caroline Gallagher of my office [at a particular telephone number] to arrange a suitable time that I can call to you and get this rent book signed.
>
> We have made numerous attempts to contact you – we urgently need you to call the office so as to arrange a time to get the rent book signed."

16. Mr. Flaherty was then contacted by Ms. Caroline Gallagher who asked him to sign a document acknowledging that rent was due, but he refused to do so.

17. Mr. Flaherty also said that if the roof was indeed repaired by Mr. Fitzgerald or by one of his employees, he was personally unaware of this.

18. Mr. Flaherty described the events of May 2012. He happened to be asleep on a bank holiday afternoon and was disturbed by the presence of voices. He denied ever asserting that he was Patrick Flaherty. He claimed that he challenged the right of Mr. Dooley and Ms. Cullinan to be present, although he acknowledged that he did not object to them touring the premises.

19. Mr. Flaherty stated that he was unaware that no "for sale" sign was placed on the property and he confirmed that he had no advance knowledge that any auction was to take place and . While this was disputed, I think it clear that this was so, as the photographs of the property in the auction brochure did not show any sign on the premises.

Part III: Whether the plaintiffs' claim is statute-barred?

20. In view of these conflict of facts, I will endeavour to decide this case by reference to the established facts, avoiding, where possible, the necessity to resolve the factual disputes between the parties, not least where, in many cases – such as whether rent was demanded or paid in 2004 or at other points during the currency of the 12 year period – the available evidence simply pits one person's word against another.

21. So far as the claim for adverse possession is concerned, there can be little doubt but that by paying rent in September 1998 to the plaintiff's predecessor in title, Paul Fitzgerald, the defendant had thereby acknowledged the title of the true owner. Accordingly, therefore, time did not run against the plaintiffs (or their predecessors in title) before that point. It follows, therefore, that to establish adverse possession the defendant must show continuous uninterrupted possession for a period of not less than 12 years from that date. It follows that the earliest at which time might have expired for the purposes of an adverse possession claim was September 2010.

22. If, however, adverse possession has been established at the expiration of the 12 statutory period prescribed by s. 13(2) of the Statute of Limitations 1957, then the subsequent course of conduct on the part of the claimant is largely irrelevant, save that in certain unusual circumstances evidence in relation to such subsequent conduct may possibly negate the existence of any prior *animus possessendi* on the part of the claimant. It might be, for example, that the conduct of a claimant immediately after the expiry of any putative 12 year period would be inconsistent with the argument that he or she had always intended to possess the land adversely to the owner during that period. Given the facts of the present case, it is not, however, necessary to express any concluded view on this question.

23. The plaintiffs placed much store on the fact that when they called to the premises in May 2012 and introduced themselves as the new owners they say that defendant made no objection. Nor did he object to the fact that the locks were thereafter changed by the plaintiffs.

24. As it happens, I think that the evidence does not go quite as far in that direction as the plaintiffs have submitted. When the plaintiffs entered the property in May 2012, they disturbed Mr. Flaherty and he naturally challenged them as to their entitlement to be present on the property. But even if the plaintiffs are correct in submitting that the defendant raised no effective protest at their sudden entry into the property, this is irrelevant as a matter of law if the defendant by this point had already acquired title by adverse possession. It is clear that once title is extinguished in that manner then "no subsequent act of possession…would be sufficient to re-instate it" *Dunne v. Iarnród Éireann* [2007] IEHC 314, per Clarke J.

25. The condition of the premises is likewise largely irrelevant to these issues. There is no doubt but that for the entirety of the period in question (i.e., between 1998 and 2010) the property was in a total state of disrepair and virtual dereliction. It appears that the windows and external doors were decayed and decrepit. There was no internal flush toilet and the external toilet did not work properly. There was no hot water supply within the property. The state of the premises is, however, at most relevant to show that the squatter had no real intention of adversely acquiring possession on the basis that if he or she did, more care would have been taken of the property during the running of the limitation period.

26. If the decrepit state of the premises serves to create a presumption that there was no real *animus possessendi* on the part of the squatter, such a presumption is, at best, a slight one which can be disproved on the facts of a particular case. Such is the position here. It is clear that Mr. Flaherty is a man of extremely modest and frugal tastes. It is also clear from his evidence that he is content with his work and his own company and that he cares little for that which the modern world seems to regards as essential or necessary. One may surmise that Mr. Flaherty would be quite content to live in this accommodation, irrespective of whether he owned it or not. In the present case, therefore, the state of the property has no relevance to the question of whether Mr. Flaherty's possession was adverse to the true owner.

27. Nor can I accept that this property is not capable of enjoyment. The plaintiffs submitted that, for the purposes of the law on

adverse possession, the land must be capable of enjoyment and that as the property was not really suitable for human habitation, it did not meet this criterion. The fact is, however, that Mr. Flaherty did derive enjoyment from the property: it has been, after all, his home all his life.

28. In any event, I cannot help thinking but that the plaintiffs' submission involves the use of the term "enjoyment" in a slightly different sense than that which appertains to land law in general and to the law of adverse possession in particular. Of course, the homeowner who enjoys a splendid view from his or her house in summer or whose family can huddle around a blazing fire in a well appointed sitting room on a cold winter's evening can be said to be deriving "enjoyment" from the property. This, however, is not quite the sense in which the term is used in this legal context. "Enjoyment" in this sense refers to the use of and obtaining benefit from the property and not simply to the act of deriving pleasure or satisfaction from ownership.

29. If, moreover, the plaintiffs' submission were correct, it would mean that the courts might be required into inquire into the subjective tastes and feelings of landowners for the purposes of assessing whether the law on adverse possession applied to that particular property, thus adding needless complexity to an area of the law which is already beset with its own difficulties. Just as importantly, this would also unfairly weaken the legal rights of landowners. The owner of an ugly office block in a desolate industrial estate is nonetheless entitled to have her legal entitlements safeguarded by the law, even if she actually detested the place and derived no personal pleasure or satisfaction from that ownership

30. The real question, therefore, remains that of whether Mr. Flaherty established uninterrupted possession for twelve years in a manner which is adverse to the true owner. At this juncture, the precise nature of the tenancy is hard to determine. It was certainly a parol tenancy, as there was no lease in writing. Viewing the evidence as a whole, the payment of rent by Mr. Flaherty in September 1998 was probably consistent with the existence of a weekly tenancy.

31. If that were so, then by virtue of s. 17(2) of the 1957 Act the tenancy must be deemed to be determined at the end of that week once Mr. Flaherty ceased to pay rent: This sub-section provides:

> "(2) (a) A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period.
>
> (b) The right of action of a person entitled to land subject to a tenancy from year to year or other period, without a lease in writing, shall be deemed to have accrued at the date of the determination of the tenancy, unless any rent or other periodic payment has subsequently been received in respect of the tenancy, in which case the right of action shall be deemed to have accrued on the date of the last receipt of rent or other periodic payment."

32. On this basis, therefore, having regard to the provisions of s. 17(2) time began to run in favour of Mr. Flaherty from September 1998 onwards. But was the running of time ever thereafter interrupted?

33. In this respect, the decision of Clarke J. in *Dunne* is most instructive. In that case the plaintiff had claimed title by adverse possession of a triangular section of land adjacent to Clondalkin railway station. There was no doubt but that the plaintiff was in continuous occupation over a long period, but for Clarke J. the issue was whether CIE as owner of the paper title to the lands could point to acts of possession which negatived any adverse possession by the claimant.

34. What is of particular importance is that Clarke J. approved earlier comments of Slade L.J. in *Powell v. McFarlane* (1979) 38 P & CR 452, 472 where the latter had stated that:

> "…an owner or other person with the right to possession of land will readily be 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 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."

35. Clarke J. went on to add:

> "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 akin 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."

36. Having reviewed the evidence, Clarke J. was satisfied there were such acts of possession in that, first, at least a portion of the lands had been occupied during this period for the purposes of renovating Clondalkin station and, second, fences had been erected on the lands in response to complaints from neighbouring landowners:

> "The first such question concerns work carried out in renovating Clondalkin Station, which continued for a period of approximately a year and a half in 1993 to 1995. It is clear on all of the evidence that the renovation and modernisation of the station involved taking back what was, admittedly, a small portion of the land in dispute and its incorporation onto the railway platform. The work also involved the building of new fences and the like. I am satisfied from the relevant maps and photographs that it must necessarily have been the case that, at that time, at least a portion of the lands which were part of the triangular area must have been occupied and used by CIE for the purposes of the station works. Mr. Dunne accepted in evidence that workers on behalf of CIE were in the field at that time and up to 1995.
>
> Secondly there was evidence concerning complaints made by a neighbouring land owner, Mr. Kavanagh, who was concerned with the adequacy of the fencing between his lands and the disputed lands. At times those complaints were raised by solicitors acting on behalf of Mr. Kavanagh. As a result of one of those complaints made to CIE in 2001, it is common case that CIE sent out a contractor who repaired the fences between Mr. Kavanagh's lands and the disputed lands in or around that time. Having regard to the very low threshold which, on the authorities, I am required to apply to

> acts of possession by the paper title owner, I have come to the view that both of the matters to which I have referred, amount to a sufficient act of possession on the part of CIE of the lands in question to negative adverse possession at the relevant times.
>
> I am mindful, of course, that the acts concerned did not involve the entirety of the lands. The station works were at one end of the lands, the fencing to Mr. Kavanagh's property on the other. However the lands were not divided in any way so that one could meaningfully state that a party was in possession of some but not all of them. Therefore, it seems to me that, though minimal, the acts of possession by CIE must be taken to relate to all of the lands at the relevant times. On that basis it seems to me clear that no adverse possession claim can be maintained in respect of any period subsequent to a time in or about 1993 for there is not a continuous twelve year period subsequent to that time during which it can be said that CIE were entirely out of possession."

37. In the light of the test posited by Clarke J. in *Dunne*, it is clear that the owner did perform an act of possession at some stage after the complaints from the neighbours by thereafter effecting repairs to the roof and to the slates. While Mr. Fitzgerald suggested that this was done around 2007, I think it more likely that these repairs were effected at some stage shortly after the receipt of the letter of complaint from the adjoining landowners in October 2008, i.e., after that point but before the expiration of the 12 year limitation period in September 1998. There is no doubt at all but that this is a sufficient act of possession on the part of the owner such as would arrest the running of time, even if this also obviously fits into the category of a minimal act of possession in the manner envisaged in *Dunne*.

38. I accept that Mr. Flaherty was unware of these works, but I am also satisfied that such repair work was actually done. It is unnecessary to address the question as to whether the owner who claims an act of possession by entering his own lands by stealth could satisfy the Dunne test: where, for instance, certain farmland has been occupied adversely by a squatter, would it suffice to arrest the running of time if, for example, the owner could show that he had once walked the lands at night during the running of the 12 year period? In any event, in the present case, the repair work on the roof was done openly for the world at large to see and observe and this, in my view, constitutes a sufficient act of possession.

39. I also accept the evidence of Mr. Fitzgerald that he insured the property for all of this period. This also amounts to an act of possession which would satisfy the *Dunne* test.

40. In the light of these findings, it is unnecessary to dwell on the question of the February 2010 correspondence. It must be recalled that if, indeed, no rent had been paid since September 1998, then the weekly tenancy would have been determined by operation of law, namely, s. 17(2) of the 1957 Act, so that time would have been running in Mr. Flaherty's favour from the point he ceased paying rent. In those circumstances, it is doubtful if the correspondence from February 2010 seeking an acknowledgment of rent paid can be regarded as amounting to a positive act of possession. If, on the other hand, there had been a written lease then the situation might well have been otherwise, because in those circumstances the lease would not have been terminated by operation of law *simply* by reason of non-payment of rent, as s. 17(2) of the 1957 Act does not apply where there is a lease in writing. It is in that latter type of case that the February 2010 correspondence might have been regarded as amounting to an implied assertion that the relationship of landlord and tenant still existed between the parties.

41. This, I think, is the true explanation of the judgment of Henchy J. in *Sauerzweig v. Feeney* [1986] I.R. 227 on which the plaintiffs so heavily relied. In that case the tenant held residential property by virtue of a lease in writing. For various reasons no rent was paid after 1950 and from 1960 the tenant paid the ground rent and the rates. The landlord later demanded rent in 1977, 1978 and 1981, but the defendant did not reply to this correspondence. The landlord then commenced ejectment proceedings by serving a notice to quit, but the tenant claimed title by adverse possession. The Supreme Court rejected this latter claim, with Henchy J. observing ([1986] I.R. 224, 227):

> "The landlord showed that she had not determined or abandoned the tenancy when she made formal demands in writing for the payment of rent in August 1977, in August 1978 and again in February 1981. To none of those demands did the defendant reply that the tenancy had no application to him.
>
> The only proper conclusion in those circumstances is that the tenancy was not determined until the service of the notice to quit in the present proceedings What the plaintiff, as landlord, has lost is not her title to the property but her right to recover rent after the expiration of six years from the date when the arrears became due (see s. 28n of the Act of 1957)."

42. Viewed thus, *Sauerzweig* is really a case about whether the tenancy had been determined. Henchy J. found that it had not been determined, in part, at least, because as he noted, this type of case (*i.e.*, where there was a written lease) was not governed by what he described as "the artificial determination of tenancy" rule provided for in s. 17(2) of the 1957 Act. As the tenancy in that case had not yet been determined, no time could run in the tenant's favour by reason only of the non-payment of rent and the only action which was barred was the owner's right to recover the rent.

43. This reasoning cannot apply to the present case given s. 17(2) of the 1957 Act does sharply distinguish between those cases where there is a lease in writing and those cases in which there is not so far as the running of time is concerned. As there was no lease in writing, time began to run as the weekly tenancy was artificially determined by s. 17(2) once Mr. Flaherty ceased to pay rent.

Part IV - Conclusions

44. While the present case undoubtedly presents certain unusual features, I think it clear that the case for adverse possession has not been made out. For the reasons just stated, I think that there were acts of possession on the part of the plaintiffs' predecessor in title, Mr. Fitzgerald in the course of the period from September 1998 to September 2010, even if those acts of possession can also fairly be described as minimal.

45. I will now await further submissions from counsel as to what further orders (if any) would now be appropriate in the light of this judgment.