

THE HIGH COURT
APPEAL FROM THE CIRCUIT COURT TO THE HIGH COURT

[2004 No. 318 C.A.]

BETWEEN

SEAMUS SCANLON

PLAINTIFF

AND

GERALD LARKIN, JAMES LARKIN, LARKIN QUARRIES LIMITED, GALWAY COUNTY COUNCIL

DEFENDANTS

Judgment of Mr. Justice O'Keeffe delivered on the 27th day of January, 2011

The Proceedings

1. The plaintiff issued an Equity Civil Bill on 28th January, 2002, seeking interlocutory and final relief restraining the defendants from quarrying on lands in respect of which the plaintiff was a registered owner of a commonage interest. The Equity Civil Bill states that the plaintiff is the registered owner of lands situate at Bovroughaun, Co. Galway and registered in Folio 13531F, Co. Galway. The lands constitute a 1/87 portion of a commonage comprising in all of 1,592.819 acres statute measure. It is claimed that for the four years prior to the commencement of the proceedings that the defendants unlawfully had entered into the lands and had commenced quarrying operations.

2. A full defence was filed by the first, second and third named defendants. It is contended in the defence that the first and second named defendants and their predecessors in title had enjoyed full use and possession of the lands edged in green on the plan annexed to the defence (that is, filed in the Circuit Court with the defence) for in excess of 50 years and had enjoyed all the rents and profits therefrom to the exclusion of any other person. It is also claimed that the plaintiff and/or his wife, Mary Scanlon, had by representations and acquiescence encouraged the first and second named defendants to develop and use the lands and spend monies and act to their detriment. It is claimed the plaintiffs claim is statute barred pursuant to the permissions of s. 13 of the Statute of Limitations 1957. The defendant's claim is to ownership of lands comprising up to 200 acres.

3. The case was heard by the Circuit Court judge of the Western Circuit in July 2004. Judgment was given in favour of the plaintiff.

4. The court was informed that the Circuit Court file does not now disclose any map attached to the defence and counterclaim. Evidence was given as to the maps the defendants relied on in the Circuit Court.

5. The case proceeded as against the first and third named defendants, an application having been made to have the claim against the second named defendant removed by agreement. The fourth named defendant was not a party to the appeal.

The Evidence

6. The plaintiff, now 70 years of age, gave evidence as being the owner of 1/87th share in the commonage at Bovroughaun which comprised some 1,592 acres. He had acquired a second interest in the commonage some four to five years ago. His wife and himself were registered as the owners of the 1/87th share, being registered in November 1996. Prior to that his aunt, Margaret Scanlon owned the interest and she passed her interest to him. He described how the lands were situated some four to five miles from Rossaveal on the Rossaveal/Oughterard Road. The lakes known as the Schoolhouse lakes did not form part of the commonage and were at short but varying distances from the commonage. The Mannion family had owned the lands before they became commonage. He recalled in the 1950s going up to the lands tending sheep with his uncle. As part of the commonage rights, he also enjoyed turbery rights. Each owner had a plot. He had rights to some 3 acres of bog. He said that his uncle kept sheep on the lands and that there were no fences on the land. He never put cattle on the lands. His aunt did not use it very much. He would cut turf on the land in March and take it from the land in July - August in each year. He lived some two and a half miles from Rossaveal down towards the sea.

7. He first remembers the Larkins, the defendants starting their quarrying activity in 1995 and noticed an increase in activity in 1996. This was taking place in the commonage area. The blasting, he said, started in 1995 - 1996.

8. He saw the defendant putting up a fence in 2000/2001 or later on each side of the quarry. It comprised posts and wires. He walked the lands with his engineer and surveyor, Brendan Arrigan. He was part of the Repts Scheme for the lands. The area concerned was a special area of conservation.

9. He described how on one occasion he assisted a neighbour who was homeless by paying the Larkins for stone from the quarry ordered by a neighbour.

10. He said that in 2007, Patrick Joseph Larkin, the father of the first named defendant applied to the Land Registry claiming 53 acres of land comprising the quarry and that he, the plaintiff, consulted his solicitor about it at the time.

11. It was put to him in cross examination that the first named defendant's father, Patrick Joseph Larkin and his father Laurence Larkin, put up a fence on the commonage in 1958 and that there were old posts to evidence this. He denied that there was ever any fence put up at that time or that there were posts erected.

12. He stated that he went to the United Kingdom for about six months when he was about 17 and around 1963 went to the United States for eleven years. When he returned in 1974 he worked for a local co-op for three years. In 1989, he bought a truck and had a

small haulage business.

13. He denied that there was any entry to the quarry in 1989/1990. It was put to him that there was a gate at the entrance similar to the gate that was erected in 1990. He denied this. He said there was no quarry behind the gate and if there was he would have seen it. The fence the Larkins put up in 2000/2001 was put up for health and safety reasons.

14. He could recall donkeys, cattle and sheep around 1958 and they could be the property of any person. There was also a children's burial place within the area claimed by the defendant. The only fencing that was erected was that erected in the quarry area around 2000.

15. Mr. Brendan Arrigan, Surveyor, gave evidence that he was engaged by James Larkin in 2001, for the purposes of a s. 49 application to the Land Registry which comprised part of the commonage and represented an area of some 1,612 acres. From an examination of the Ordnance Survey photographs of the area in 1973, he said there was no evidence of quarrying on any part. From the 1995 photographs, he said that the quarry area was small and there was very little evidence of operation. In the 1999 photographs, the quarry area was much bigger.

16. Mr. Arrigan gave evidence in relation to the various maps which had been presented on behalf of the defendants in the Circuit Court. There was a map which set out the route of the old fence allegedly erected in 1958 by the defendants' predecessors in title. This map was produced in the Circuit Court by the defendants. Mr. Arrigan stated that when he surveyed the area there was evidence of some old posts along the boundary but many were 20- 30ft apart. There was no wire or rail between the posts. Some of the posts were well weathered. It was agreed by the engineers that the internal distance around the site shown by this map excluding the road was 2,787m and that the road distance was 698m. The area comprised in this map was 176 acres.

17. Mr. Arrigan produced a map which he said was produced in the Circuit Court by the defendants and which he believed was the map (or a copy of the map) originally on the Circuit Court file in connection with the counterclaim. The rectangular area comprised in this map comprised 118.6 acres. The internal distance around the site on this map excluding the road was 2,271m and the road frontage distance was 494m.

18. He produced a further map which he said was tendered in evidence by the defendants at the Circuit Court and which comprised 200 acres. The internal distance around this site was 2,756m and the road distance was 762m.

19. Mr. Arrigan gave evidence of the variation in the areas claimed in respect of each of the maps and the particular places on the commonage where such differences impacted.

20. Mr. Arrigan also gave evidence in relation to the s. 49 application made on behalf of the first named defendant's father in 2007 which was subsequently withdrawn. This area excluded the area where the quarry was operating and its immediate surrounds. It comprised 53.2 acres.

21. The posts which Mr. Arrigan saw on the commonage in 2004 were old posts which appeared to him to have been newly inserted into the ground. There were fresh marks on top of these posts which indicated that they had been recently tampered with.

22. He accepted that the safety fence had been erected in 2000/2001 for health and safety reasons around the quarry was a different fence to that alleged to have been constructed in 1958.

23. It was accepted by the parties that following the Circuit Court hearing such evidence of poles or bits of fencing as there had been on the lands had been removed by persons unknown. Such acts of destroying potential evidence do a disservice to the task of this Court to determine the true facts in relation to these proceedings by whosoever done.

24. Mr. O'Loughlin gave evidence about being contacted by the defendant in 1994 to break boulders on way into the quarry. There was no gate at the entrance in 1990 and there was no entrance into the quarry in 1994. There was no fence, it was commonage.

25. Evidence was given by Michael Landy (39). His father was a shareholder in the commonage. He came back from England in 1977. His family grazed some of the lands with cattle for a few months in the summer until 1993. They were also cutting turf on the commonage. He was familiar with the area since the early 1990s. This was the route he travelled as a postman. He did not see any gate at the entrance to the quarry around 1990 nor did he see any quarrying activity at that time. A gate was installed around 1997/1998. He had never seen fencing on the land and did not see any old posts. However, in 2004, he did see posts on the land which were the posts subsequently cut down.

26. Raymond Folan (50) lives in Rosavael and owns a share in the commonage which he got from his uncle some 30 years ago. He recalled his uncle cutting turf. He himself cut turf. He did not see any quarrying activity until 1995/1996. He did not see a wooden gate in 1990 and the first time he saw a gate was in 1997/1998. When the quarrying started he did not know who was carrying it out.

27. He said that he had been approached by Michael Flaherty to sign a document in support of the Larkin quarry as the Larkins were trying to resist competition from another quarry owner. When he was asked to sign, it was a blank sheet and did not contain the words which were subsequently inserted as follows:-

"We the undersigned being registered commonage title owners at Bó Bhrocháin, Casta, Cór na Gaillimhe, hereby acknowledge and confirm the possession and usage of 200 acres of land at B6 Bhrochain for farming and quarrying by the Michael Larkin and his two grandsons, Jimí and Gearóid Larkin for over 50 years."

28. The document containing his signature (and that of others) with the above content was produced in the discovery of the defendants in relation to a Land Registry application subsequently withdrawn by the defendant.

29. He said that at the time he gave his signature, he did not know that the Larkins were claiming some 200 acres of land.

30. Seán Landy (70) was an owner of an interest in the commonage. Since 1977, he had cattle on the commonage for more than 10 years. He did not see the Larkins grazing any horses. There were no posts around the quarry until it started up in 1995/1996. He never saw a wooden gate. He also was asked to sign his name in support of the Larkins and when he did so, there was no statements as set out above on the sheet he signed. He stated that Gerard Larkin came to his house and told him that a competitor was trying to get them out of the quarry and would he get a few names in support (of the Larkins). He was handed a clean piece of paper in order to get the signatures of support. In relation to fences he did not see any fencing around the quarry area until such a time as

the fence for health and safety reasons was erected. He had not seen any poles earlier on the lands. He did not see any quarrying from 1977 when he came home.

31. He would not accept that the defendant's father put up the fence in 1958. He gave his signature of support to the quarry but not to the Larkins' claim for commonage. He did not see Michael Larkin, the grandfather of the defendant quarrying on the lands.

32. Martin O'Flaherty, plant hire contractor (whose daughter is married to one of the plaintiffs sons) stated that he worked for the defendant and drew materials from the Larkins' sand and gravel pit at Seanafeistin which is a few kilometres from the quarry and commonage lands on the road to Oughterard. He never saw a gate at the entrance before 1990. The quarry was first opened in 1995/1996. He also was asked on behalf of the defendant to sign a blank sheet of paper in support of the quarry.

33. Cyril Flaherty (68) stated that he became an owner of an interest in the commonage in 1980. He used to cut turf in March, bringing it home in September. He never saw quarrying by the defendant before 1995. There was no wooden gate before 1990. The quarry began in the mid 1990s, he recalled it well as he passed it frequently. The defendant did not graze horses or sheep in his time and he never saw the defendant on the land. He also signed his name in order to support the Larkins' quarrying and nothing else. In the document he signed there was no narrative written such as that stated above.

34. Thomas McDonagh (53) saw the quarry being operated in the mid 1990s. He did not see a wooden gate and never saw horses on the land. He saw the fence that had been erected for health and safety reasons. He never saw the fence represented by the old posts. He was approached to give his support to the Larkins operating the quarry by appending his signature to a blank sheet of paper. This paper subsequently had the words set out earlier included in it. He only saw sheep on the lands and he did not see any fences.

The Defendant's Evidence

35. Mr. Aidan Bracken, Engineer, said the approximate size of the commonage was 2 miles by 1.5 miles. The frontage on the road was 1 mile approximately. A lot of the lands comprised undulating terrain. The lakes were excluded from the commonage and the boundary ran inside the lakes. The main bog was near the plaintiffs bog. When he inspected the lands, he did not see the old fence. In relation to wooden posts he said that over the years they would change in colour and would harmonise with the environment with moss growth. He said it was very difficult terrain with hills and streams and machinery could get bogged down. The lakes were linked by streams.

36. The evidence of Patrick McDonagh was taken on commission. He was born in August 1928. He cut turf some distance away from where the Larkins were digging stones and putting them aside. He left in 1948 and returned from England in 1967. The Larkins used to cut turf around the area and used to get loads of stones if someone wanted them. The Larkins took cows in from Sheanaphaistin that was near them. He said there was an old fence on the lands. The quarry expanded when he was in the United Kingdom. He heard explosives from the site.

37. Retired Garda Brian Mongan (68) gave evidence of joining the gardaí in 1964 and becoming a member of the Galway West Division. He was attached to the Crime Unit in Galway City. In 1971, he was stationed in Oughterard. In 1971, the entrance was blocked off by a bog. The quarry was south facing. The supervision of explosives was part of his remit. He said that the entrance to the quarry became wider and there was a wooden gate and the wooden gate was changed to two large tubular gates were installed. He recalled in 1988, his duty was to escort and supervise explosives being delivered and used at quarries. A permit would be issued to a shot firer by a superintendent. In his opinion, between 1974 and 1988, the quarry trebled in size. The face of the quarry was opposite to where it is now. During the period of 1988 to 1994, he escorted explosives to the quarry. There were not any available records before 1994. It was incorrect to say the quarry started in 1994. There was machinery on the quarry and also a CIE container which was used as an office prior to 1994. He said that between 1988 and 1994, the quarry was half its present size. He had no interest in the case. He had, however, approached the plaintiff's solicitor on behalf of the Larkins to try and negotiate a settlement amongst neighbours as he saw it. He agreed the records showed very substantial amounts of explosives being used at the quarry in 1997 - 2000.

38. Noel McDonough (63), a cousin of the defendant's father stated the Larkins gathered stones there from the late 1950s and that his father was there to assist. He would not be sure as to what extent there was development in the quarry in the period of 1966-1969. He went to the United States in 1972 and returned in 1974. He moved back in 1978. He was familiar with the location as he had driven up and down the road in the summer and once or two a week in winter. In the period from 1978 to 1988, he was aware of activity in the quarry, saw lorries with stones and people working in the quarry. He did not see the new fence (health and safety fence) that was erected in the 1990s. He saw bits of wire hanging here and there from old posts. The entrance to the quarry had originally been smaller.

39. Patrick Joseph Larkin (71), father of the defendant and son of Michael Larkin who died on 29th December, 1988, aged 76 gave evidence. His brother was Michael who lives in the United Kingdom. He, himself, had experienced bad health with a broken neck, cancer and diabetes. He was on treatment for his cancer condition. His memory was not great as the treatment was affecting him. His father left the home property to his brother Michael and himself. He had worked in the quarry in 1958 and before. He said that in 1958, they put a fence up. It comprised wooden poles, a bit of wire and it was different from today's fencing. They put poles outside the quarry. The fencing went to the front of the quarry and by the lake. The poles were some distances apart from one another. He did not know how many poles may be. There may be more than 150 poles. The fencing was there to keep the people out and to secure the place. Whilst, some of the poles rotted away there was still some evidence of wire if one looked for it. In 1955, they had a truck for hauling stone. They also had a driller. He left school around 1952 and went forward and back to the United Kingdom. At the end of 1958, he went to London and stayed for under a year. When he came back, he worked with his father. In the early days, he used explosives which he got in Galway. There was no difficulty in obtaining the same. He got married in 1962 and came home from London in the early 1970s. When he came back they got another couple of trucks. In the 1950s and 1960s, they used to work all over the quarry securing loose stone and dragging the stone out with a horse and trolley. In the 1970s and 1980s, they started putting a face on the quarry and commenced blasting. In relation to blasting in the period 1970-1980 (in a ten year period) the face of the quarry would have gone back some 20 to 30 yards as a result of blasting.

40. In the mid 1990s, he suffered extensive injuries when he fell down the stairs and he did not work since.

41. He produced a copy of an application for a grant made in 1984 to Údará na Gaeltachta. The application was for a machinery grant so that he could acquire a new delivery lorry to expand his business. The application stated that he was working in his business for five years and there was a need for additional investments in his business to address the requirements of the various potential customers of the business including the County Council for roads, the building of houses and the improvement of playgrounds, car parks etc. He did not get the grant. He also dealt with the circumstances in which he made an application to the Land Registry under Section 49. In relation to the fence he put up in 1958 around the quarry, it was also put up behind the lakes. His father, he said,

worked on the quarry until 1984 and died in December 1988. Besides taking stone, they used the lands for grazing cattle, horses and a donkey. They had nine to ten cattle and four horses. Stone was taken out by using horses. He went to the United Kingdom first when he was 14 years. He returned from the United Kingdom in 1971 having come back home on and off until that time. His sons Gerard and James were born in the United Kingdom. He did not give evidence in the Circuit Court hearing. He stated that his father put up the fence in 1958 and that he was with him. It was put to him that the posts that were recently pulled down were freshly cut posts (which had been inserted in the ground) which he denied.

42. Mr. Coleman Keady (72) was born in 1938. He stated that he lived some ten minutes walk from the quarry. His house was up on an elevated site and he has had a clear view of the lands beneath him. He remembers going to school when he was five or six years old. He remembers the plaintiffs father when he bought his first truck around 1955. He used the truck to supply turf for himself and for persons in the village. The Larkins used to take odds bits out of the quarry as there was not much activity going on at that time. He said the wooden posts were not put up until 10- 12 years ago. He saw the posts being put up in 1957/1958. Michael and Joseph Larkin were involved. The posts put up had rotted since 1958. There was a fence along the road and along the lake. The Larkins had cattle, ponies and perhaps a few sheep there. He had never checked the poles on the land and had never seen anybody on the land since 1958. He had seen people going into the quarry. The quarrying activity was all over the quarry. When it first started there were wheelbarrows and horses involved in drawing the stone. His son had got a few trailers out of the quarry of stone for foundations for a shed. He used to cross the fields on his way to fishing in the lakes. The entrance to the quarry was through a gate from the roadway. There was no gate until 12- 14 years ago. Prior to that there had been wooden posts at the entrance. The lorry could go in. He had helped the Larkins with turf for himself and others. He had given a hand loading stones in the quarry.

43. Anthony McDonagh got a contract to build council houses around 1958. He got some stone from the Larkins' quarry. He remembered the blasting. Before 1988, the use of explosives was not as strict as subsequently. The old fence was along the road behind the lake and around the land. The wire on the fence rusted and fell to the ground.

44. Michael Moore Walsh (60) bought a hydraulic track machine in the early 1970s. Its function was to scraw rock and if the rock was loose it could be dug by bucket and if not it had to be blasted. He was asked by the Larkins to use this machine as there was no other machines like his.

45. Colm McKeon (60 born 1950) had an interest in the commonage. He saw the quarry being worked in 1975 by the Larkins in 1965 when he was 14/15 years old. The degree of activity was small and it involved taking loose stone from the top of the quarry. There was some fencing of posts and wire around it. It went past the lake and back beyond the lake. He remembers cattle and a few donkeys on the lands some 45 years ago. He bought stones from Larkin in 1968 from the quarry to build the foundations of a shed. He had bought cattle from Larkins in 1967/1968.

46. Michael Keady (35 son of Coleman Keady) stated that his earliest memory was around 1989/1990. He took stone from the quarry with his own trailer. In 1990 there were some posts on the land with barbed wire in places and the fence was gone in other places. He had not given evidence in the Circuit Court. In relation to the fence, he said there were poles here and there. He did not know if the fence came down. There were some rotten poles. There were other poles put in place in 2001 (a reference to the fence for health and safety reasons).

47. The plaintiff gave evidence of being born in the United Kingdom in 1967 (43). He returned home in 1972 when he was 5 years old. He resided with his grandfather at Sheanaphaistin. He left school aged 15 years approximately. He remembers going to the quarry at that time and driving a digger. There was a fence with wire on the posts. The fencing would be old at that stage. The fence started at the road and went down by the lake. It was continuous, it fell down. It was an old established fence. Grass was growing on it and it mixed in with the landscape. He identified the fence marked on the map. Any stone that was loose was collected. In 2000/2001, the fence around the operational area of the quarry had to be put up for health and safety reasons. In 1989, a steel gate was put in place at the entrance, replacing timber posts attached to the rock. The fencing that was there prior to the Circuit Court hearing was pulled up by people after the Circuit Court hearing.

48. From 1981 onwards, they started removing the stone that was loose on the top. In the mid 1980s, blasting started. He was running the business in the 1990s, his father had been injured in 1993. His customers were the Department of the Marine, Galway County Council and local business. He got the contract for supplying stone to Rossaveal Harbour in 2000/2001. There was strong competition provided by a competitor company. In relation to the documents that had been prepared by his former solicitor, he said it was the solicitor who prepared the wording that the Larkins and their predecessors had worked the land since the 1950s. He said that some of the neighbours went around trying to get signatures of support. His former solicitor prepared a s. 49 application to the Land Registry. He eventually had to terminate his instructions. The manner in which the former solicitor had prepared the papers and submissions to the Land Registry was wrong, he stated. As a result he changed solicitors.

49. He produced documentation showing that in December 1990, he was paying leasing charges to Woodchester in respect of a vehicle for drawing stones from the quarry. He also produced a form from the Revenue dated April 1992 seeking PAYE and health contribution returns. No documentation of returns to the Revenue was produced. The defendant company was incorporated in 1999/2000. He gave evidence of a meeting at Rossaveal in December 2001 which was seeking support for his quarry in supplying stone for the development of Rossaveal Harbour. The commonage owners were at that meeting.

50. In relation to the s. 49 application he made, the map was prepared by Michael McInerney. The map was given to the former solicitor. He told the former solicitor to claim some 200 acres. He stated that the fence had become broken down over the years. He said some of the wire was still there. In relation to the poles put in place in 1958, he could not say for how long they remained in place. The differences in the area comprised in the various maps which he had produced to the Circuit Court were put to him. In relation to his father's s. 49 application, he said that this was for an area of 53 acres. He said cattle would not have strayed onto the land because of the fence. He had an accountant who prepared accounts for the quarry. No accounts were produced and no evidence was given by the accountant. The Sheanaphaistin is a sand quarry and is about three miles away from the quarry and was operated by himself and his father.

Submissions

51. Both sides relied on the judgment of Clarke J. (7th December, 2007) in *Dunne v. Ianróid Éireann*. On p. 7 he referred to the dicta of Barron J. in *Durack Manufacturing Limited v. Considine* [1987] I.R. 677 (which in turn derived from the judgment of Kenny J. in *Murphy v. Murphy* [1980] I.R. 183, where he stated:-

"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."

52. He also referred to the decision of *O'Hanlon J. in Doyle v. O'Neill* (Unreported, High Court, 13th January, 1995) in which the following was stated:-

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

53. The judge at p. 8 referred to the decision 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. "

54. At p. 10, Clarke J. said:-

"It is, therefore, important to emphasize 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...

On the other hand it is common case that once title is extinguished it cannot be reactivated or reinstated by means of a minimal act of possession. The real question which I need to ask, therefore, is as to whether Mr. Dunne can establish a single continuous twelve year period during the last 30 years in which he was in exclusive possession of the lands in question to such a degree as would be reasonable having regard to the standard of an owner making normal and usual use of lands of the type in question and during which twelve year period no act of possession, however slight, occurred by or on behalf of CIE. If Mr. Dunne can do that, then at the end of that twelve year period CIE 's title will have been extinguished and no subsequent act of possession on the part of CIE would be sufficient to reinstate it."

55. Counsel on behalf of the defendants/appellants, Mr. George Brady, S.C., submitted that the claim by the Larkins was to have extinguished under and by virtue of s. 13(2) of the Statute of Limitations 1957, the title of the plaintiff/respondent to that part of the commonage that was fenced off in the year 1958 by Patrick Joseph Larkin, the father of the first named defendant and his father, Mike Larry Larkin. It is not a case, he submitted, in which the defendants/appellants were claiming a profite-a-prendre out of or over the commonage or any part thereof.

56. Mr. Colm Smyth, S.C., contended that the claim of the defendants/appellants had not been made out and referred to the decisions in the *Dunne* case, *Durack Manufacturing v. Considine and Tracey Enterprises Limited v. Drury* [2006] IEHC 381.

Decision

57. The commonage in this case covers a most extensive area. I had the benefit of inspecting the lands and quarry the subject matter of the commonage. I also received in evidence extensive photographs. It is both a beautiful and barren area. The commonage area comprises a terrain which is not level, is undulating in parts. A view of the commonage in its entirety is not obtained from any one spot. In particular, it is to be noted that whilst those who are exercising their rights to cut turf and who have passed the quarry and its entrance cannot see the activities within the quarry area from the extensive bog area some distance away.

58. The area, the subject matter of the defendant's claim (irrespective of the quantum of such a claim) is an area where there is extensive undulation and variation in height levels. There are extensive outcrops of stone and in other areas there are substantial boulders. At the back of this commonage area are some of the Schoolhouse lakes. Whichever area is claimed by the defendant, the area has an extensive road frontage which has varying levels of accessibility and visibility onto the claimed lands.

59. This claim is founded on the defendant establishing as a matter of probability that his father and grandfather erected a fence over the lands in 1958 in such a manner and of such quality and length that it excluded, the plaintiffs predecessors in title, together with the other owners of the commonage from enjoying the lands so allegedly fenced, for a period of 12 years.

60. In 1958, the defendant's father would be aged some 19/20 years. Mr. Coleman Keady would be of a similar age, as is the plaintiff.

61. As a matter of probability, I am not satisfied that in 1958 the defendant's father and grandfather erected this extensive fencing which extended not alone along and from the roadway but much further inland in certain instances from the roadway or indeed from the working face of the working quarry as it is now. The face of the quarry now reflects the extensive quarrying that occurred since 1995. Notwithstanding this, the area claimed stretches inland for some considerable distance from this point.

62. Even allowing for the fact that some of the boundary may have been accounted for by the lakes, no satisfactory evidence was produced by Mr. Larkin senior as to why the particular and precise line of the fencing as claimed (and as set out in one of the maps) was taken in 1958 to be the line of the fencing.

63. I find as a fact that in 1958 there was little or no stones taken by the defendants from the claimed lands. There was no quarrying activity as such carried out around 1958, even making an allowance for the nature of quarrying some 50 years ago. It may well be that the defendant's father and grandfather took some loose stones from the lands but this was of a small amount.

64. I am not satisfied that lands were fenced in 1958 for the purpose of grazing cattle and having horses or donkeys on the lands as claimed.

65. The erection of a secure fence over such an extensive area both bounding the roadway and the rest of the claimed lands would in 1958 have required a very significant construction exercise. I am not satisfied that such a secure fence, able not alone to withstand the elements (which are considerable in that area) but also to withstand entry by animals or indeed persons took place.

66. If the fencing had been erected, not alone would such fencing have to be visible from the extensive roadway area but in certain parts, the fence would have been visible as the fence made its way inland towards the alleged terminal points. I am satisfied that there was no such visible extensive fencing bounding the roadway or from the roadway inwards to the extent and such would have been visible if the fence as alleged had been constructed. In this regard, it is noteworthy the varying levels of opinion that were expressed by different witnesses in relation to the type, quality and extent of fencing. I am not prepared to accept such evidence as establishing that the 1958 fencing was there.

67. There is no satisfactory evidence as to the condition of the fence around 1970/1971 or before when the construction would have occurred. There was evidence of serious weathering of timber posts in the area and gaps occurring in the fencing when a post fell or rotted. But no evidence was given when this occurred and its frequency. There was no evidence as to the fence's ability at such time to keep out animals and persons. Throughout the hearing, there was no evidence of maintenance or indeed supervision of this extensive fencing whether on the perimeter of the road or in depth towards the inland termini of the claimed lands.

68. I am also satisfied that the first named defendant was behind the exercise whereby he procured certain persons to approach other persons including those who gave evidence on behalf of the plaintiff to support his quarrying activities in particular for the Rossaveal Harbour and that such persons signed a blank sheet of paper that did not contain the statement which I have already set out whereby such persons were incorrectly being represented as supporting the defendant's claim to ownership of some 200 acres for an extensive period of time. I also find that the defendant knew that the wording on the support sheets of paper indicated his family's claim to possession and usage of the lands for 50 years.

69. In relation to the quarrying activities, I am not satisfied that such activity took place within any confined or defined area within the claimed lands until the early 1990s and I think that 1995 is a likely time for this intensive activity to date from. I accept that there may have been in the 1980s, the use in isolated areas of explosives and also the collection of stone.

70. It is significant that whilst the defendant had accounts prepared by an accountant that no evidence was given in relation to such accounts which may have demonstrated the level of activity within the quarry. There was no evidence of completed tax returns. Such documentary evidence as was produced to support the defendant's quarrying operations was scant.

71. I am not satisfied that the defendant's father has shown that in 1958 he and his father had the necessary intention to possess all the lands the subject matter of this claim. Nor am I satisfied that the defendant and his father have established a sufficient degree of exclusive physical control of the lands which they are claiming for the requisite period from 1958.

72. I accept the evidence of Mr. Arrigan in relation to the maps produced by him at this hearing. I also accept his evidence of the variation in the amount of land claimed by the defendants as evidenced firstly in the map which he said was originally before the Circuit Court, together with the additional map that was produced at the hearing in the Circuit Court and also the map which purported to show the outline of the fence erected in 1958. His analysis of the variation established by the differences in each of these maps is, in my opinion, a telling one against the defendants upon whom there is an onus to establish the factual elements of the claim. In particular, it is evident that the map presented as setting out the line of the fence comprises a significantly greater area at the southern and eastern side, then the map originally submitted to the Circuit Court with the counterclaim. This variation in the area claimed in respect of the maps produced by the defendants indicates that the defendants and his witnesses do not have a precise and convincing recollection of the precise location and nature of the fence which they claim was erected in 1958. The recollection of evidence by Messrs Larkin and Keady in relation to events 50 years ago is understandably incomplete and lacking in detail of events which occurred when they were very young men.

73. In conclusion, I find that the defendants have not established the claim to adverse possession of the plaintiff's interest in the commonage lands. I will hear the parties as to whether I should consider making a restricted order in favour of the defendant along the lines of the Circuit Order.

74. Finally, I should say I accept the bona fides of evidence given by Mr. Keane, Solicitor and retired Garda Mongan.