

THE HIGH COURT**2004 292 CA****BETWEEN****BRIAN MAHON****PLAINTIFF****AND****EDWARD O'REILLY AND THERESA O'REILLY****DEFENDANTS****JUDGMENT of Ms. Justice Dunne delivered on the 26th day of March, 2010.**

These proceedings come before the court by way of Circuit Appeal by the plaintiff herein, who failed before the Circuit Court to establish a claim by way of adverse possession to certain property at the rear of his premises. The plaintiff is the owner of premises at 19A Bangor Drive, Crumlin, Dublin 12 and the defendants reside at Bangor Drive, Crumlin, Dublin 12. The plaintiff in the Endorsement of Claim on the Civil Bill complained that the defendants have encroached and trespassed upon his property since the month of January 2002, and have placed a clothesline upon the property and a trailer and have refused to vacate the plaintiff's property. The defendants have claimed that they are the legal and beneficial owners of the premises at No. 19 Bangor Drive and that their premises include an area which is to the rear of the premises owned by the plaintiff at 19A.

In order to understand the issues between the parties it would be helpful to describe the layout of the two premises. 19A is a shop premises with a forecourt at the front and alongside the left hand side of the premises runs a laneway. On the right hand side of the shop is the premises No. 19 Bangor Drive. It is a dwelling house and is the home of the defendants. If one looks at the two properties together and in particular if one looks at the footprint of the two properties one could describe them as occupying an area that is wedge shaped with the wider end of the wedge to the front and with the narrower end of the property to the rear.

There is no dispute whatsoever that the defendants have a paper title to the entire of the premises. For ease of reference I propose to refer to the portion of the property in dispute as the "shop yard".

Two booklets of title were handed in to court relating to the premises at 19A and No. 19 Bangor Drive respectively. Each property shares a common route of title. The original title is derived from a lease of the 30th September, 1935 for 900 years. Ultimately there was an assignment of that lease in 1975 and it appears that a sublease was created on the 17th April, 1979, in respect of that part of the premises which comprises 19A Bangor Drive. The sublease was between Stephen O'Driscoll of the one part and Sean Dowd and Daniel Farrell in respect of "All That and Those the shop premises situate at and known as 19A Bangor Drive, Crumlin in the City of Dublin. The defendants acquired their interest in the property under an indenture of lease dated the 25th July, 1979, between Stephen O'Driscoll of the one part and the defendants and one Isabella V. Owens of the other part. As mentioned before there is no dispute between the parties that the defendants acquired a paper title to the property at issue in these proceedings. There was no reference to the sublease in the assignment to them. A number of other transactions took place over the years in respect of the premises known as 19A Bangor Drive. The defendants continue to reside in the premises at No. 19 Bangor Drive.

The plaintiff in these proceedings gave evidence that he purchased No. 19A in 1998 from Stephen Perry. There was a forecourt, the shop premises and from the shop premises there was a door at the rear which exited into the shop yard. The yard was narrow up close to the shop and widened out at the back. There were two means of access to the shop yard – one through the shop and the second through the laneway to the left hand side of the premises. On the right hand side of the shop yard was a brick wall of approximately 6ft. in height dividing 19 and 19A. That wall started at the rear of the shop and went all the way down the site. It was constructed of 4in. blocks. In the yard there was an outside toilet. The door between the shop and the yard was a wooden door like a hall door. There were two bolts on the inside of the door. Access from the laneway to the yard was by means of an up and over garage door. It could not be opened from the lane but only from the yard. He described how the yard was used by him. He stored a trailer and other bits and pieces there. He described how he was present on the premises every day. His business is a heating and plumbing business and from time to time he would store old boilers and pipes in the yard. He kept his trailer up at the wider end of the yard. Between 1998 and 2002 there only be his employee and himself in the yard. Now he has no access whatsoever to the yard.

Having been in the premises for some time he received an enforcement notice from the local authority requiring him to remove the wall dividing 19 and 19A as it was unsafe. He did so some time around Christmas 2001 and when he returned to work after Christmas the area at the rear of the shop where the door was, was blocked up. In addition the gates to the yard were also blocked.

In cross-examination, he confirmed that he took possession of the premises in 1998 and was asked whether he had any conversation with Mr. O'Reilly at that stage. He was also asked about letters which were said to have been written to him by Mr. O'Reilly on an annual basis from the time that the plaintiff took possession of the premises in which Mr. O'Reilly asserted his ownership of the yard. The plaintiff denied receipt of any of those letters. The plaintiff was asked about whether a portion of the wall had fallen down and he responded to the effect that some three to four blocks had fallen down but ultimately he confirmed that in fact a more significant portion of the wall had fallen down and it was necessary then to take down the remainder the wall on foot of the order of the local authority. He also confirmed that in addition to the up and over garage door he had described, there was a small door in the wall as well. Asked was there access through that smaller door he indicated that it had been bolted from the inside and that he never used it. He denied that the defendants freely used the shop yard for the purpose of parking bicycles there or leaving a small trailer in the yard. He also denied that there had been a clothesline in the yard prior to January 2002, when he was excluded from the yard or that the defendants had stored anthracite in the lower part of the yard. He disagreed that he had not enjoyed exclusive possession of the yard.

Vincent Glavin, an auctioneer in Crumlin gave evidence describing the yard. He confirmed that there were double doors going on to the laneway and that he was involved in a sale of the property at 19A at one stage and understood that he was selling the shop and the yard.

Christine Gaynor then gave evidence. Her son had had an interest in the property at 19A at one stage. He was running a business in the premises and she was present in the premises almost every day over a seven or eight year period. Her son had obtained a Deed of Assignment of the lease on the 21st of December, 1987 and remained in the premises until approximately 1994 when the property was transferred to Stephen Perry. She was aware that the property had been sub divided by Stephen O'Driscoll in 1979. She also described the structures built in the yard and confirmed that there were a number of ways to access the yard, namely through the shop, the double door and the little door in the wall with access via the lane. She stated that the little door was never used. There were two bolts on that door on the inside of the door. The double door could only be opened from the inside. She said that the yard was used for storage. She added that no one else used the yard. She was asked whether her son had received any letters from the O'Reilly's and said that her son did not get any such letters. She was not aware of any visit by her son and Mr. O'Driscoll to the O'Reilly's. She was adamant that there was no clothesline in the yard and that the yard was not used by anyone else.

Stephen Perry gave evidence that he acquired the interest of No. 19A Bangor Drive. He obtained his assignment from Mr. Gaynor the witness's son. He sold on the premises in 1988 to the plaintiff in these proceedings. When he went into occupation of the premises he also had access to the shop yard. Again he described the means of access. He said that the small door to the left of the yard was never opened. He said that there was a toilet in the yard and then there was a double door which was constructed out of wood. He too confirmed that the doors leading from the yard onto the lane were bolted from the inside. He was the only person who had access to the yard. He said that he had little use for the yard.

In cross examination he denied the receipt of any letters which were supposed to have been sent to him.

Mr. Perry confirmed that he did have some discussions with Mr. O'Reilly, but he denied asking for a lease of the yard from Mr. O'Reilly. He denied that there were items such as a clothesline or bicycles or coal stored in the yard by the O'Reilly's. He stated that the O'Reilly's were never on the premises.

Mr. Anthony Gallagher gave evidence. He is an architect and he gave evidence in relation to certain maps that had been prepared. He also gave evidence into an approximate costing of restoring the shop yard having regard to the work that has been done to the yard by the O'Reilly's since January 2002.

Edward O'Reilly, the first named defendant, then gave evidence. It appears that the O'Reilly's moved into the premises in May 1979, although the indenture of assignment is dated the 25th July, 1979. Nothing turns on that point. He acquired the premises from Stephen O'Driscoll having first commenced negotiations with Mr. O'Driscoll in late October, 1978. At the time that he was in negotiation for the purchase of the premises, he visited the premises at No. 19 Bangor Drive on a number of occasions. There was nothing in the yard and there was no wall between 19A and No. 19 at the time. He moved into the premises late at night on the 4th May, 1979 and discovered the following morning that 90% of what he described as his back garden had been covered by a shed. The shed was visible in one of a number of photographs which had been handed into court during the course of the hearing. Mr. O'Reilly explained that he had a row with Mr. O'Driscoll in relation to this state of affairs and that he got no satisfaction from Mr. O'Driscoll. He went to a solicitor but he explained that he did not have money to go to court. He did apparently receive some advice in relation to the writing of a letter and it is as a result of that advice that he wrote letters to the various occupiers in possession of No. 19A, in the following terms:-

"We are the owners of the garden at the rear of the house and shop, 19 and 19A Bangor Drive, Crumlin, Dublin 12. We purchased it together with the house, from Stephen O'Driscoll and hold title to it by Deed of Assignment dated 25th July, 1979."

The purpose of the letters was to inform the occupants of 19A Bangor Drive that the defendants were the owners of the rear of the premises.

The shed that covered the rear of the premises was removed on foot of an enforcement order from the local authority some time in the early '80s. The roof and timbers were removed. However the wall between 19 and 19A that had supported the roof and timbers was left as it was. Mr. O'Reilly described in evidence that he and his wife and family made use of the shop yard by erecting a clothesline in it. There was also a small trailer stored there, it was used for the purpose of storing anthracite in a bin which was located in that area and from time to time deliveries of oil were made to No. 19 Bangor Drive by means of a pipe brought in over the shop yard.

Subsequently towards the end of 2001 a section of the wall fell down into the rear of No. 19 Bangor Drive. The plaintiff took the remainder of the wall down and after the wall had been taken down, Mr. O'Reilly said that he and his son removed the remains of the wall. He then extended a shed at the rear of his property and the shop yard and sealed off the door from the rear of the shop into the shop yard. He described how the premises has been used since the wall came down. In cross examination, Mr. O'Reilly described having to gain access to the part of the premises in dispute by going out of the rear of his premises and around into the laneway. It was stated by him that it was possible to go in through the small door which was rotten and he denied that there were any bolts on the door. He stated that he never saw anyone in the shop yard and that there was never anybody there. Prior to the plaintiff becoming entitled to possession of the premises at 19A his predecessors in title never objected to the use of the premises by Mr. O'Reilly. Letters were sent to them, just as letters were sent to the original owner of the whole of the property and subsequent owners of 19A. He denied ever seeing either Mr. Gaynor or his mother Mrs. Gaynor in the premises. He gave evidence that he told Mr. Perry who purchased the property in 1994 and who was there until 1998 that there was a problem with their use of the yard. According to Mr. O'Reilly, Mr. Perry just left and did nothing else in relation to the matter. Subsequently when the wall came down he erected new doors on the premises. He was never excluded from the premises.

Mrs. Theresa O'Reilly then gave evidence. Her evidence was similar to that of her husband. She confirmed that the roof was taken off the shed in 1983. It was only at that stage that the O'Reilly's put in a washing line. She said that she used the washing line on an almost daily basis and that nobody bothered her in doing so. Asked how it was possible to gain access to the site she said that the doors onto the laneway from the site were rotten. She explained that her children used to play in the area of the yard and they stored their bikes there.

In cross examination she confirmed that she and her husband were annoyed at not having the use of the yard area. As a result of the way in which the premises had been divided by Mr. O'Driscoll, there was little space to the rear of their own property. Asked about other people using the shop yard, she indicated that she did not see Mr. Gaynor or Mr. Perry when they were in occupation. She said that she was in and out of the premises all the time and never saw anyone there. She described the yard area as being a place that was wide open because the doors were rotten.

Aidan O'Reilly, the son of the defendants also gave evidence. He described moving into the premises and how there was a shed

erected over the area of the back garden when they moved into the premises. He said that he was the person who put the washing line up in 1982 and no one stopped him. He described storing his bicycle in the rear of the shop yard. He said that he was on the premises every day. He was also aware of the letters being sent by his father and went on to say that it was he who posted the letters. In the period around Christmas 2001 or early 2002, some 20ft or so of the wall came down in one piece and approximately two thirds of the wall remained. It was taken down subsequently by the plaintiff. He said that no one had ever complained about the use of the yard by the O'Reilly family. He stated that the small door opening on to lane from the shop yard was never bolted. Finally he claimed that the WC which was in the back yard was disconnected in 1982. The structure which had contained that WC was removed after the wall came down in 2002.

Legal submissions

As I mentioned at the outset, there is no dispute between the parties that the defendants have a paper title to the entire of the yard to the rear of 19A. It is the plaintiff's case that between 1979 and 2002 the yard to the rear of the shop was included in the premises of No. 19A. The evidence given on behalf of the plaintiff is that the occupiers of 19A always had exclusive use and possession of the yard. It is clear from the evidence that there was a wall dividing the shop yard to the rear of 19A from rear of No. 19. Although it had been suggested in the course of the evidence that Mr. Perry had sought to purchase an interest in the shop yard area from the O'Reilly's area from the O'Reilly's, Mr. Perry denied this.

In the course of the helpful written submissions furnished by the plaintiff, reference is made to the decision of the High Court in the case of *Tracy Enterprises McAdam Limited v. Drury* [2006] I.E.H.C. 381, which examined the jurisprudence in relation to the relevant provisions of the Statute of Limitations 1957. I propose to quote one passage from that judgment at p. 18 thereof where it was stated:-

"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 s. 18 of the Act of 1957 adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired. Adverse possession requires that there should be a person in possession in whose favour time can run. Thus it cannot run in favour of a licensee or a person in possession as a servant or caretaker or a beneficiary under a trust . . .'"

This was further commented on by Laffoy J. in that judgment in a further reference at p. 20 of her judgment:-

"The practical application of the principle . . . may be observed in *Doyle v. O'Neill* (Unreported, High Court, 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.'"

It seems to me that at the heart of this case is the fundamental question as to whether the use of the shop yard by the plaintiff and his predecessors in title constituted possession and if so, was it adverse possession in the sense of being possession inconsistent with the title of the true owner.

Nothing in the evidence of the defendants suggests that they enjoyed any use of the shop yard between 1979 and 1982. The evidence on behalf of the defendants is to the effect that a clothesline was erected in the shop yard in 1982 in respect of which they had continuous access and use. It goes without saying that when one talks of occupation adverse to the defendants' title, one is talking of exclusive occupation by the plaintiff and his predecessors in title. In other words, if it is plainly the case that the defendants were using the premises throughout the period at issue from 1982 onwards then the plaintiff and his predecessors in title could not have had exclusive use of the premises and in those circumstances, the plaintiff could not have obtained a title to the shop yard by means of adverse possession.

There is a conflict of evidence as to the issue of exclusive use. Mrs. Gaynor, Mr. Perry and the plaintiff have all given evidence that the defendants did not have access to the shop yard. They have described the doors giving access to the premises as having been bolted. Those bolts could only be opened from the inside of the yard. It has never been suggested by the defendants that they gained access other than through the doors opening onto the laneway. Mrs. Gaynor was, as mentioned, present during the time that her son was in occupation of the shop premises. She described how she was regularly at the premises. Mr. Gaynor went into occupation of the premises pursuant to a Deed of Assignment dated the 21st December, 1987. Mr. Perry has described how he went into occupation of the premises following a Deed of Assignment dated the 19th October, 1994. The plaintiff went into occupation of the premises pursuant to a Deed of Assignment dated the 22nd May, 1998. Mrs. Gaynor and Mr. Perry in the course of their evidence denied any use of the shop yard by the defendants. They denied the existence of a clothesline in the yard and in truth it is difficult to understand how that could be missed if, as Mrs. O'Reilly stated, she was in and out of the yard on a daily basis for the purpose of using a clothesline.

There is no doubt that following the removal of the wall over the period around Christmas 2001, the O'Reillys had access to the yard from their own property and further there is no doubt that they used that access to block up the rear access to the yard from the shop premises and they used that access to change the doors leading on to the laneway so that in January 2002, when the plaintiff returned to the property, he was excluded from the shop yard. I cannot understand why, if the defendants always had access to the premises as they have claimed in evidence and always made use of their access to the premises in the manner they described, they waited until the wall came down to exclude the plaintiff. According to Mr. O'Reilly and indeed all of the defendants, the defendants always asserted their right to their ownership of the yard and did so by using the yard, but also by writing letters on an annual basis to the occupiers of 19A. It is very difficult to understand, given the strength of feeling, why the O'Reillys did not exclude the occupiers of the shop premises from the yard when they always had access to the yard as is claimed. This seems to me to be very strange, to say the least.

As I have said before, the evidence of Mrs. Gaynor and Mr. Perry contradicts the evidence of the defendants. Given the situation that I have described and in particular, the fact that it was only when the wall between 19 and 19A Bangor Drive came down that the O'Reillys took steps to exclude the plaintiff, I find it very difficult to accept the evidence of the defendants that they were at all times from 1982 up to 2001 exercising any rights of access to the shop yard. I prefer the evidence of Mrs. Gaynor, Mr. Perry and the plaintiff to the effect that the O'Reillys never made use of the yard during their occupation of the shop premises.

I can understand that the O'Reillys felt a sense of grievance when they became aware of the fact that the original conveyance of the property to them contained a map which showed their entitlement to the shop yard. However, from the date that they moved into the premises until 2002, it is clear from the evidence that the owners and occupiers of 19A Bangor Drive were the ones who had exclusive use of the shop yard. I have little doubt that the O'Reillys complained to Mr. O'Driscoll about the erection of the shed in the yard in 1979 and that they got little satisfaction from them. I find it difficult to understand how, if the position was as contended for by the defendants, they would have taken no steps whatsoever to attempt to recover possession of the shop yard by legal proceedings. I know that in evidence Mr. O'Reilly said that this was not possible in 1979 because of a lack of funds. That does not explain inaction throughout the period since then.

Mr. O'Reilly described writing letters on a regular basis to the occupiers of No. 19A. There is a dispute as to the receipt of those letters. Even if those letters had been received by the occupiers for the time being of the premises, those letters are not of themselves sufficient to prevent the statute of limitations from running against the O'Reillys.

Finally, I should add that it is interesting to note that the Enforcement Notices referred to in the course of the evidence relating to the removal of the shed in 1982 and the removal of the wall in 2001/2 were sent to the occupier of 19A. This is consistent with the evidence that the owner of 19A at the relevant time was viewed as the occupier of the shop yard by the local authority.

In all the circumstances of this case I have come to the conclusion that although the defendants clearly have a paper title to the premises comprised in the shop yard at the rear of 19A Bangor Drive, the plaintiff through his occupation and the occupation of his predecessors in title has obtained a title to the shop yard by adverse possession. I will hear the parties further as to the consequences of this decision.