

Neutral Citation No: [2024] NICH 5

Ref: HUD12504

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 20/83181

Delivered: 14/05/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

HEMEL LTD

Plaintiff;

v

MOY FURNITURE LTD

Defendant.

HUDDLESTON J

Introduction

[1] The dispute between the parties relates to the nature and extent of a right of way which the property (“the Property”) at 37 Charlemont Street, Moy, County Tyrone enjoys over a laneway (“the laneway”). That laneway is owned by the plaintiff whose title is registered in Folio TY103341 and Folio TY9291 County Tyrone. During the course of the trial it became clear that a further small triangle of land at the mouth of the entrance to the laneway consists of unregistered land, but I am satisfied that it also is owned by the plaintiff.

[2] The parties during the pleadings have accepted that the Property enjoys a prescriptive right of way which has arisen pursuant to the doctrine of the lost modern grant – see *Finlay v Cullen* [2014] NICH 17. For reasons, therefore, that I need not go into the other methods by which prescriptive easements can be acquired do not figure in this case.

[3] The points, however, that are in dispute are:

- (i) The nature and extent of the prescriptive right of way that the parties accept exists for the benefit of the Property; and
- (ii) whether the prescriptive right of way can be used for a commercial purpose – specifically to access a proposed warehouse development which the defendant proposes to construct on the Property.

[4] The plaintiff contends, in summary, that the prescriptive right of way which exists is limited to a right to provide access to the dwelling on the Property and that therefore it cannot be used to access a warehouse development which is proposed by the defendant.

[5] The defendant has attempted to adduce evidence confirming the prescriptive nature of the right of way but also to advance its case that the Property itself has been historically used for a commercial purpose – a use upon which it then builds its case for the greater commercial user now proposed.

[6] In terms of the relevant background, the Property was formerly owned by Mr William Watson. The title would suggest that Mr Watson was granted a long lease of the Property in 1955 and purchased the freehold in 1982. The unregistered title subsequently became registered in Folio TY92917 County Tyrone. In neither the unregistered or the registered title is there reference to a right of way benefitting the Property. The former farm dwelling on the Property, which is described in the folio as ‘Dunloe Cottage,’ was improved in or around 1978 to form the dwelling which now exists on the Property. It is serviced by “two separate outbuildings both ... of poor quality.” The probate valuation from which that quotation is taken and obtained on Mr Watson’s death (in 2013) placed a value on the entirety of the Property ie consisting of the dwelling (which is described as a “renovated former cottage”), the surrounding paddock and garden together with the outbuildings at £125,000. The total site is given as 2.39a. Within the Report the access is described as ‘via a shared laneway through a commercial facility.’ The outbuildings are described as ‘old and of poor quality with little or no current economic use.’ The valuer whilst noting that the Property fell within the development limit also noted the existence of a ‘ransom strip’ between the Property and an adjacent (unrelated) development and that ‘access through the car wash....would not render the site capable of development in a meaningful and integrated way.’ The court was shown historic photographs from 2008 showing the original entrance to the property (where it abuts the laneway). This was helpful because it shows the width of the laneway. That is corroborated by an OS Map from 1972 both in terms of the width where the entrance abuts the laneway and then length of it – connecting to Charlemont Street/the A29. I was also shown an aerial photograph from 1995 which shows a car and a number of tractors in the immediate vicinity the dwelling. The defendant placed reliance on this to support the case to establish an historic commercial user.

[7] In other relevant documentary evidence, Mr Watson is described in his penultimate (2004) Will as a “retired driver.” He is recorded on his death certificate as a “factory worker.” Under his last Will, he left the Property to two nieces and one nephew to whom the title was transferred before an eventual onward sale to the defendant for a total of £120,000 (as recorded on the folios).

[8] The plaintiff for its part acquired land on the east of the laneway in 2015. This only contains a small sliver of the laneway. The land itself falls within the folio

boundaries of TY99463. The lands in that folio are now integrated into the plaintiff's development and connect to the (now improved) laneway (see below).

[9] In 2016 the plaintiff acquired the property at 29-37 Charlemont Street, Moy which included title to the balance of the laneway. This is now registered in Folio TY103341.

[10] In 2018 the plaintiff undertook a development related to its petrol filling station with allied retail provision – a Eurospar. As part of that development, it widened the laneway into a three-lane configuration – one lane for traffic entering and two lanes for traffic leaving its site. The evidence given on behalf of the plaintiff is that it largely operates a one-way system, and the creation of the two exit lanes was so that the laneway could be used as a rear exit from his Eurospar facility and to facilitate traffic turning both left and right onto Charlemont Street. This is best shown by reference to the map attached marked 'A.'

[11] Having bought the Property in June 2020 the defendant applied for outline planning permission for the construction of a 7,394 sq ft warehouse facility for its furniture business – that facility to cater for lorry deliveries, with a lorry parking area and approximately 10 carparking spaces.

[12] Correspondence between the parties began in October 2020 when the defendant started to carry out works whereupon the plaintiff's solicitors wrote to the defendant's solicitors pointing out that the defendant only enjoyed a right of way for residential purposes. Proceedings followed on the back of that exchange.

Evidence

[13] The court heard from many witnesses who gave evidence as to Mr Watson's use of the laneway. Most had a long association with the area. It also had expert evidence from Mr Agus, a Roads Engineer, and planning evidence on the nature and prospects of planning permission for the warehouse development. Contention surrounds some of this because some of it was lodged after the hearing.

Edward Toner

[14] Mr Toner, of the plaintiff company, gave evidence that he moved to Moy in 1993 whereupon he became friendly with Mr Watson. He said that Mr Watson had told him about working at Moygashel, Moy Park, Moy Shirt Factory and Ulster Weavers. It was Mr Toner's evidence that he kept an old Mini at the Property and that Mr Watson allowed Mr Toner's nephews and nieces to drive around the Property.

[15] Mr Toner said that Mr Watson would have sold "the odd tractor" and that he indeed had purchased a tractor from him. Beyond that he said Mr Watson liked "tinkering at machinery." Mr Toner said he was not aware of Mr Watson having

sold cars as a business but that over the years he had seen two Hondas and a couple of Ford Focuses but it was his evidence to the court that these were cars which Mr Watson himself drove.

[16] Mr Toner had provided a statutory declaration in relation to an earlier sale of the property. In that declaration he refers to the “dwelling” and talks about the right of way. He is not specific in the statutory declaration that the right of way was limited for residential purposes which the defence raised, in cross-examination, against him. They say that within that statutory declaration there was “no attempt made to restrict the user to a certain class.”

Ivor Cowan

[17] Mr Cowan gave evidence that he had lived in Moy since 1972 save for a short three-year period when he lived elsewhere. He had worked with Mr Watson in Moygashel in the 1960s where the two became friends. After Mr Watson left Moygashel Mr Cowan says that he worked at Ulster Weavers, Moy Park and then had a job driving for social services from which he retired in his 70s.

[18] Mr Cowan grazed a horse in the fields on the Property and moored a boat on the adjacent river. From that he said he was very familiar with the Property. His evidence was that Mr Watson was not running a business – he did not see Mr Watson selling cars or tractors or tractor parts and he never saw a lorry coming in or out of the Property. He did say that Mr Watson was a hoarder and that the outbuildings were full of mechanical miscellany.

Michael Millar

[19] Mr Millar indicated that he was born in 1944 and spent his youth in Moy leaving in and around the 1960s. In his youth he ran messages for Mr Watson. He gave evidence that Mr Watson kept turkeys (which he sold) and one or two cars which he described as a “hobby.”

[20] Mr Millar himself purchased a car (a Morris Minor) from Mr Watson when he was 22 or 23 and another car (a Hillman Minx) 4-5 years later.

Frederick Emerson

[21] Mr Emerson was born in Moy in 1950 and moved away in 1970. He also described Mr Watson as keeping turkeys and said that he “sold the odd car.”

Gerald Derry

[22] Mr Derry previously owned the property at 29-37 Charlemont Street (which included the laneway) which he had purchased as an investment opportunity. He sold the property (undeveloped) to the plaintiff. His evidence was that he had never

stopped anyone using the right of way or sought to limit its use and that traffic regularly used the laneway.

Robert Wilkinson

[23] Mr Wilkinson, who was 78 years old, also had lived in Moy for most of his life apart from a 10-year period 1976 to 1986. He also worked as a driver and gave evidence that he bought a Wolseley car from Mr Watson in 1972 for £75. He said that Mr Watson “fixed at cars.” He also gave evidence that in 1992 he approached Mr Watson to buy a silver Honda Accord which Mr Watson was driving at that time and which the latter agreed to do. He accepted under cross-examination that Mr Watson worked in Moygashel, for Moy Park, for Ulster Carpets and ultimately as a driver for social services.

Kevin Millar

[24] Mr Millar is also 73 years old and had lived in Charlemont until he was 10 before moving to Moy. He gave evidence that he had purchased a Riley car from Mr Watson in 1972 and that Mr Watson changed the brakes on that car about 5/6 months after the purchase and replaced the exhaust about 12 months later.

Thomas Harvey

[25] Mr Harvey is a director of the defendant. He gave evidence that he had lived in Moy all his life and that he had purchased an Austin 1100 from Mr Watson in the early 1970s which, because of various faults, was exchanged subsequently with a Hillman Minx which in turn, again because of mechanical problems, had to be swapped for a Vauxhall Victor. All of this, he said, happened in the 1970s.

[26] In his evidence he suggested that the outbuildings evidenced a car workshop.

The defendant's case

[27] The defendant argues that, in essence, the evidence establishes a commercial use and argues where the user is already established as including a commercial user, then any corresponding increase ie going from a ‘small’ commercial to ‘large’ commercial use “cannot constitute a radical change in character unless the change is so manifestly different that it changes the very essence of what is already there.” It argues that ‘the change from a residential property plus outbuildings (which had commercial use) into one single outbuilding for a similar use can, in no way, constitute a radical change in character.’

[28] In support of this it relies, inter alia, upon the dicta of Harmon LJ in *British Railways Board v Glass* where he indicated, by way of example of what might amount to a radical change of use, a small dwelling house being changed to a large hotel. It is argued, based on the evidence, that the present case does not involve a radical

change of use nor indeed a substantial burden or indeed an increase of the burden upon the servient land. They say that this is not a case of a change from 'a small outbuilding to an Amazon Prime warehouse or a car factory...' and that 'holistically...[the proposed use] will result in little or no alteration of the burden on the servient [land].'

The plaintiff's case

[29] The plaintiff argues that, simply put, the prescriptive right from which the Property benefits is limited to a right to use the laneway to access a dwelling ie a residential use.

[30] The essence of the pleaded case is that Mr Watson was in full-time employment through most of his life and that the height of the defence evidence is that Mr Watson may have engaged in the sale of a few cars in the 1970s together with the undertaking of bits and pieces of repair work. After 1975 they say that there is only evidence of the sale of one car and that Mr Toner purchased an old tractor from Mr Watson. In their closing submissions they categorise the evidence as thus:

"The plaintiff submits that the evidence from the witnesses establish that Mr Watson was a man who liked, on occasion, to tinker at cars and tractors. In the 1970s he sold the odd car to persons to whom he had a personal connection. He did the odd repair. He sold a tractor that he had repaired to Mr Toner shortly before his death. All the while Mr Watson was in full-time employment or retired ... The use of the Property ... was incidental to the main use ... as Mr Watson's home."

They say that however one looks at it this does not equate to a commercial use and that the proposals advanced by the defendant do amount to a 'radical change' and therefore exceed the prescriptive right that the Property enjoys - to the plaintiff's detriment.

Consideration

Issue 1 - Is there a right of way? What is its nature?

[31] As both parties have reached consensus that there is a prescriptive right of way based on the doctrine of lost modern grant there is little upon which the court is asked to rule. For my part, and applying the guidance set out by Deeny J in *Finlay v Cullen*, I am satisfied on the evidence that the Property did enjoy a right of way over the laneway and that the right was one which was continuously exercised. I come to that based on a review of the documentary evidence but also there was clearly no other route of access/egress to/from the Property throughout Mr Watson's lifetime,

and it is clear from the oral evidence that this was the route he (and his invitees) used. I deal separately with the question of the nature of that easement below.

Issue 2 - Can the laneway be used for access to a commercial development?

[33] This really is the issue that divides the parties and requires, in turn, an analysis of the nature of the right of way which the Property enjoys and, secondly, ancillary to that, a determination whether it can extend to provide access/egress to the proposed warehouse development on the Property.

[34] From the planning documentation which the court has seen the defendant proposes to construct reasonably large development - namely, a 7,394 sq ft warehouse on the Property with facility for a HGV turning circle, lorry parking area and 10 carparking spaces. The consultation with Roads Service supports the likely use of the access 'by 8.2m Rigid HGV two collections per day a 16.5m Artic HGV delivery per month' based on the Service Management Plan supplied by the defendant. Mr Agus, Roads Engineer, on behalf the plaintiff explained that Charlemont Street (the A29) is a protected route. His evidence was that, pointing to the Trip Rate Information Computer System ("TRICS") used by road consultants that a warehouse of the size and type proposed would create, in his expert opinion, 77 vehicle journeys per day of which 10 would be by HGVs. Mr Nugent of McKeown & Shields who penned a letter (submitted after the case closed) giving a view on the prospects of planning permission being granted was not called, nor was anyone else, to address those points. Mr Harvey, of the defendant, in his evidence (and in support of the Planning Submission) said that he anticipated four deliveries per month with a single delivery from a 40ft HGV every 12 weeks. In terms of outgoing deliveries, he said that his business had two "white vans" but typically only one was in use at any given time. The plaintiff says that Mr Harvey's evidence should be treated with scepticism and that Mr Agus' evidence on the likely range of use it was, in effect, unchallenged. Whilst there is a dispute on this aspect of the evidence, it is not one, I feel I need to resolve.

[35] The defendant relies on *Giles v County Building Constructors (Hertford) Ltd* [1971] 22 P&CR 978. In that case the defendants had received planning permission for the redevelopment of land through the demolition of two attached dwelling houses and, in their place, erecting a three-storey block of six flats, a bungalow, a house and eight garages. The development proposed to make use of a vehicle-wide access into the road which the court held did not involve a radical change in character and therefore did not involve excessive use of the right of way.

[36] In essence the defendant says that this case is on all fours with that approach.

[37] Both parties cited Gale on Easements (21st ed) paragraph 4-161:

"Where a right of way is acquired by a user, since the user is not continuous and may vary, there **may be**

difficulty in determining the scope of the right acquired. The general rule is that, where a right of way is acquired by a user, the extent may be measured by the extent of the user." [Emphasis added]

[38] That, in cases such as this, is a truism. I heard a great deal of evidence concerning Mr Watson's use of the laneway. Fundamentally, however, when one stands back and looks at that evidence it demonstrates a man who had external employment throughout his working life, lived in a cottage on the property for virtually the entirety of that life and that he improved an old farm dwelling into a more modern 2 bed bungalow in 1978.

[39] Both parties accept that he enjoyed a prescriptive right. In terms of its scope, however, I find it was entirely appurtenant to the use of his dwelling – as a dwelling. That was clearly the dominant purpose throughout the entire period and, whilst I heard a good number of witnesses, in my view they all very clearly pointed to that as the character of the use which Mr Watson adopted. There are several supporting pieces of evidence. In his Will he is described as a 'retired driver' which one can take is how he described himself. Likewise, on his death certificate he is described as a factory worker – which one can take is how his family and others described him. On my inquiry it was confirmed that the Property has a residential rating as opposed to a commercial one. The aerial photograph of the Property, whilst it may show a few tractors or other vehicles in the process of repair, fundamentally confirms fundamentally its character as a dwelling, glasshouse, garden, and adjacent paddocks. The probate valuation to which I have referred above confirms the use of the Property as a dwelling and highlights the uneconomic value of the adjacent outbuildings themselves. Indeed, it highlights the challenges over the access in terms of future development potential – notwithstanding its existence within the development zone.

[40] In *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214 Neuberger LJ indicated that a right of way could not be used for the alteration of the dominant tenement where it would result in a radical change in its character and a substantial increase in the burden on the servient tenement.

[41] The *McAdams* case was applied by Mr Justice Weatherup in *Hearty v Finnegan* [2009] NIQB 21 where a property had a prescriptive right of way for agricultural purposes. In that case the plaintiff had the benefit of planning permission for the development of a single house on the field and sought a declaration that he could use the lane to access the house. Mr Justice Weatherup held that this would also constitute a radical change in the character of the field and a substantial increase in the burden on the servient tenement, thus, dismissing the plaintiff's claim.

[42] To my mind both cases are directly analogous to the situation here. I think it is fanciful to suggest that Mr Watson adopted a "commercial" user in respect of either the Property or, by extension, the laneway providing access to it. When one

analyses it, there is sufficient evidence to suggest that he may have had a hobby fixing and/or selling cars (and indeed turkeys) but that is a far stretch from establishing a commercial user. The evidence I heard depicted a gentleman who enjoyed tinkering with machines and cars and, on occasion, may have sold them to people of his acquaintance. There was absolutely no evidence of him actively pursuing a commercial enterprise to give those words their natural meaning. What is depicted is a hobby. The sale of a few cars over a 40-year period does not, in my view a business make. Objectively when one puts the evidence (even at its height) against the development of the site as proposed by the defendant I think it is quite clear that any reasonable observer would interpret that as a “radical change” in both the use of the Property and, correspondingly, the laneway.

[43] In addition, as matters transpired at the trial it became patently obvious that the prescriptive user was limited to the original width of the laneway which was put at 3.7 metres as opposed to the extended access/egress as had been created by the plaintiff during the course of his own redevelopment which now spans 12.4m increasing to 16.6m at its junction with Charlemont Street. That distinction in width is also highlighted on Plan A. The purported use by the defendant would, on any reading, in any event have involved trespass onto lands owned by the plaintiff and over which the prescriptive right simply did not exist and, therefore, would constitute a trespass giving the defendant a further obstacle to its proposals.

[44] For all those reasons I find in favour of the plaintiff.

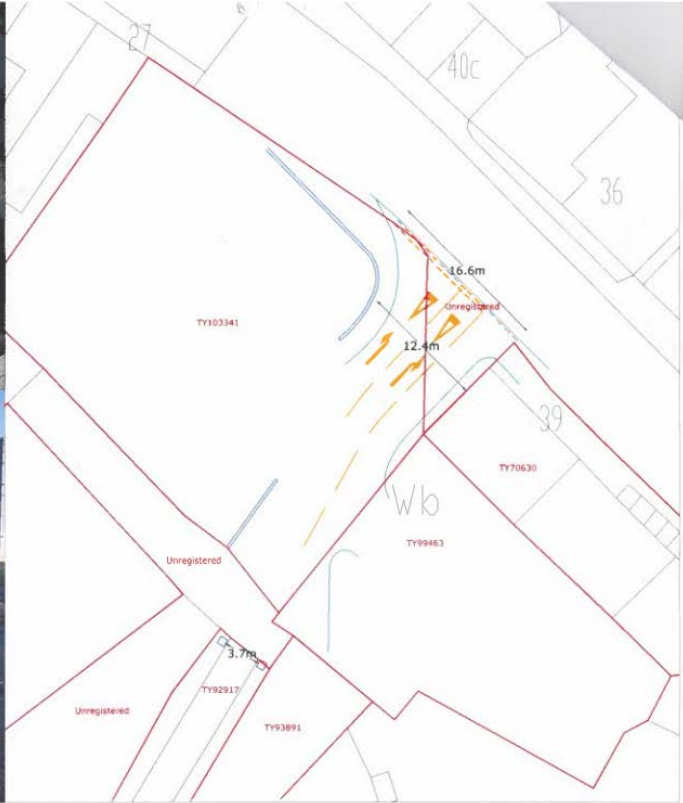
[45] If necessary, I will hear the parties in respect of the question of costs or any ancillary matters arising.

PLAN A



Map 5
 Entrance Layout Plan - Current Layout
 (showing Adjacent Land Registrar Folios)
 Plan Scale: 1:200 @ A2
 (Photograph not to scale)

- Line of Wall
- Foot-Path
- OS Boundary
- Line of Road



Summary Report	
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Date & Time	07/05/2024 15:27:08
Comparison Time	18.10 seconds
compareDocs version	v5.1.900.2

Sources	
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