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Judgment: approved by the Court for handing down | *Delivered:* **27.5.2010**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

KARL ARMSTRONG AND MARGARET ELAINE ARMSTRONG

Plaintiffs;

and

PHELIM BERNARD SHIELDS AND ROSALEEN SHIELDS

Defendants.

GIRVAN LJ

[1] This litigation began in 1992 by a writ issued in June of that year and those proceedings have continued since 1992 and therefore over a very protracted period. The proceedings have been much amended and additional matters have happened since the writ was issued. That led to the issue of a fresh writ in 2006. But it seems to have been accepted that the overall dispute is the subject now of one set of proceedings before this court.

[2] The case came on for hearing yesterday and an application was made by Mr Lavery QC on behalf of the defendants to take the matter out of the list. In addition to that there was an application that I should recuse myself as the trial judge. For the reasons I gave yesterday I declined to recuse myself and I do not need to repeat the points that I made on that occasion.

[3] It became clear that the issues raised by the protracted factual disputes between the parties in relation to various matters including cattle trespass, trespass and harassment were not ready for trial yesterday or, apparently today. When I have given my judgment on the right of way aspect of the case I will give further directions in relation to ensuring that those remaining issues will be litigated in the near future and brought to finality. These

proceedings have gone on too long and it is in the interests of the parties and the wider public interest to bring this litigation to finality.

[4] What did emerge yesterday was that both Mr Maxwell and Mr Lavery considered that the position was sufficiently clear for the court to be asked to rule on one aspect of the litigation, that relating to the dispute in respect of the right of way affecting the property. The matter has been argued yesterday and today in relation to that right of way dispute and am now in a position to come to certain conclusions in relation to it.

[5] By way of factual background to the matter it should be noted that the right of way lies over a strip of ground which is in the nature of a laneway which is located on the driveway up to Murlough House which is now occupied and owned by the plaintiffs. Murlough House and the area around it formed part of a larger Folio which was in the common ownership of the defendants and it was decided a number of years ago that Murlough House should be sold off with some of the surrounding ground attached to it but leaving the rest of the farmland in the control of the Shields. The original purchasers of the house were with the Ansleys. They took the property on foot of a deed of transfer which was then the subject of a registration. There was a new Folio created in relation to it. The deed of transfer was dated 30 September 1988 and it give effect to an earlier contract. The deed of transfer has been much debated in the course of the submissions and it is necessary to refer to its terms. It is entitled by reference to Folio DN 4894. In consideration of the sum of £90,000 Mr & Mrs Shields transferred the portion of the lands in the Folio to Mr & Mrs Ansley as joint tenants and it then excepted and reserved to the Shields and their successors in title the right of way at all times and for all purposes over and along that part of the lands transferred and coloured yellow on the map attached to the points marked X and Y thereof. The map attached to the deed of transfer contained markings of X and Y which were somewhat differently located from the X and Y shown on the contract document. Mr Lavery sought to draw certain conclusions from the realignment of the X and Y points but I do not consider that it really affects the position one way or the other.

[6] What is clear is that the deed of transfer purported to reserve a right of way over the laneway which is marked yellow on the map and just to confuse us is marked blue on some of the maps which have been the subject of the argument. The area in question is not really in dispute. What is in dispute is what land represented the dominant tenement for the purposes of the right of way because the laneway over which part of the right of way runs lies between two large fields. One has been described as the "paddock field". One has been called the "house-field". The paddock field formed part of Folio 4894 but the "house-field" formed part of another folio, Folio 12734, which had, as I said earlier, been part and parcel of the bigger land holding of the Shields which included the paddock field, the house-field and other fields

surrounding Murlough House. The real dispute between the parties is in relation to the proper interpretation of the Land Registry transfer and related to the question of whether the dominant tenement for the purposes of the right way was the paddock field or whether it also included the house-field. The matter became contentious because at a point the Shields were carrying out construction work on the house-field on foot of a planning permission which they had sought before the transfer was effected, planning permission being granted subsequent to the transfer. The construction of the farm house involved bringing in and out lorries and material in connection with the construction. A dispute arose as to whether the right of way which was granted by the deed of transfer was indeed intended to permit the bringing in and out of building materials on to the house-field.

[7] It seems implicit from the way in which the case was pleaded initially and in relation to the original approach of the plaintiffs to the point that they would not have disputed a right for the Shields to use the laneway for agricultural purposes in connection with Folio 12734, that is to say the house-field, but the dispute arose because it had been used for non agricultural purposes. As the litigation proceeded the Armstrongs moved from the position of accepting the proposition that there was an agricultural right of way to the point where they argued that, in fact, there is no right of way at all in relation to the house field, Folio 12734, although they do accept that there is a right of way for all purposes (which could include building purposes) in relation to the paddock field.

[8] What is clear from the terms of the deed of transfer is that the draftsman has not defined the dominant tenement in terms and it has been said consistently throughout the authorities and indeed accepted by counsel in the present case that good draftsmanship would necessitate the naming of the dominant tenant to avoid future dispute as to what land was intended to benefited by the right of way. But as unfortunately happens on occasions good draftsmanship did not occur and one is left with trying to determine what rights in fact were created by the deed of transfer.

[9] The question of determining the right of way is determined in accordance with the authorities, for example Johnston v. Holdway which looked at the question of how one defines a dominant tenement where the wording is unclear. What emerges from that case and indeed other cases to which Mr Lavery referred is that the court must have regard to the known facts at the time of the conveyance and as the held note in Johnston v. Holdway states:

> "A legal easement by deed the dominant tenement need not be specified in the deed and if not so specified extrinsic evidence is admissible to identify it".

[10] In that particular case the court had regard to the surrounding circumstances and it came to the conclusion that the intention was the dominant tenement should be the quarry to which the right of way led. I do not think it is necessary to set out much of the court's reasoning in Johnston v. Holdway other than to refer to it as clear authority for the proposition that one must have regard to the surrounding circumstances to determine what was the intention of the parties in creating the right of way.

[11] In this instance Mr Maxwell on behalf of the plaintiffs argues that when one looks at the deed of transfer itself by necessary implication the dominant tenement must be what is retained in Folio 4894. He says the Land Registry document and the deed of transfer are so entitled and there is no reference to any other land apart from the Folio and the words "at all times and for all purposes" could not be considered to be so wide as to allow the right to be used for any land for which the Shields might want to use it. One had to find within the confines of the deed of transfer the intent of the parties in relation to the designation of the dominant tenement.

[12] What appears clear from the agreed factual situation is that there was at the time of the transfer and reservation there was in existence a gateway from the laneway into the house-field but it also is clear that there was another gate at point 2 on the agreed map handed in which gave access to the field out on to a strip of ground, the property of the National Trust, which led on to a laneway, again apparently in the ownership of the National Trust, but over which vehicles passed. The National Trust has asserted that the rights of passage over it as far the Shields' property is concerned is limited to agricultural purposes. That is a matter between the National Trust and the Shields and certainly there is a judgment from Lord Justice Campbell which, from the way it has been opened to the court appears to state that that is the correct legal position. That in itself does not determine what may have been the intent of the present at the time when the reservation of the right of way was effected.

[13] Looking at it from a commonsense point of view one would have thought that it made sense to treat the house field and paddock field as areas to which the Shields needed access and it was part and parcel of an overall holding although it was split into separate folios. That does support the view that from a commonsense point of view the intention of the reservation was to allow the Shields to gain access to the paddock field and to the house field.

[14] The matter does not rest there because this is registered land. The next issue that one has to deal with is the effect of the way in which the right of way was registered. Where a right of way is the subject of a grant or reservation by deed then it is a registerable burden under Schedule 6 of the Land Registration Act. Schedule 6 provides in para (11):

> "An easement or profit `a prendre affecting the land created by express grant or reservation after first registration of the land is registerable under Section 6 and Section 39".

[15] That is to be compared with a Schedule 5 burden in relation to easements and profits that are not created by deed, for example acquired by prescription. They do not require registration and they affect the registered land without registration.

[16] Inasmuch as the burden created by the reservation in Folio 4894 was an interest created by express reservation it required registration. Section 39 is expressed in permissive terms. It provides that the burdens referred to in Schedule 6 may be registered. Any of the matters specified in Part I of Schedule 6 may (subject to Part X which is not material) be entered as burdens on the appropriate register. The main question which then arises is what happens if the grant which is registerable under Section 39 and Schedule 6 is not registered or is registered in a way which is more limited than the actual intended reservation. That is where we have to face up to the problems created by the effect of registration and the protections that the register purports to give to successors in title.

[17] Section 11 of the Land Registration Act provides that:

> "Save as is otherwise provided by or under this Act each registration shall be conclusive evidence of the titles shown on that register and of any right, privilege, appurtenance or burden as shown thereon and the title of any person shown thereon shall not in the absence of actual fraud, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

[18] Section 11 of the 1970 Act is part and parcel of the scheme of registration which is intended to make the register conclusive evidence so that it contains the appropriate evidence which binds successors in title. Registration differs from unregistered land in creating a registration system which is intended to simplify investigation of title and give successors in title protections arising out of the simplified registration system.

[19] One also has to have regard to Section 34 of the 1970 Act which in subsection (4) provides that on registration of a transferee of any land as full owner of the land the document of transfer shall operate as a conveyance by deed within the meaning of the conveyancing Acts and there shall be vested in the registered transferee the land transferred subject (a) to all registered

burdens and to all other matters appearing from the register to affect the land, (b) to any Schedule 5 burdens affecting the land, (c) if the transfer is made without value of the consideration to subsection (5) and (d) if the transferee holds the land as a trustee to his liabilities and duties as such but subject to Section 11(2) and (3) free from all other rights including rights of the Crown.

[20] It is clear that the Armstrongs, the plaintiffs in the action, were purchasers for value who bought the land subject to registered burdens but freed from other burdens apart from the Schedule 5 burdens and the matters in (c) and (d) (which are not material). In as much as the burden in this instance is not a Schedule 5 burden but is a registerable Schedule 6 burden the Armstrongs as purchasers for value acquired the land subject to the registered burden but freed from other burdens. That then brings one to the question what was the registered burden that one finds on the register in relation to the right of way. Here we come to the terms of registration effected on 26 January 1989 and I read the description of the burden thus:

> "Part of the land herein shown brown on the registry map is subject to the right of way specified in the transfer dated 30 September 1988 made between Phelim Bernard Shields and Rosaleen Shields and William Richard Ansley and Thelma Ann Ansley for the owners the time being of the land in Folio DN 4894."

[21] Now those words "for the owner the time being of the land in Folio DN 4894" do not appear as such on the face of the deed of transfer of 30 September 1988 and they do to my mind qualify the right of way and make it clear that on the face of the registered burden it was right of way for the benefit of the owners and successors in title of Folio 4894 therefore was not available for the successors in title of the folio which comprises the house field, Folio 12734 and it seems to me to be a clear inference from the terms of the registered burden that it was creating a burden to benefit the lands in the paddock field and thus the dominant tenement on the face of the registered burden was the paddock field folio.

[22] That then raises the question whether the Armstrongs should be deemed to be subject to a greater right of way assuming that the deed of transfer is to be given a wider interpretation so as to cover as the part of the common tenement the house field and that is where we go back to Section 11 which says that:

> "The register is conclusive evidence and the title of any person shown therein shall not be affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

[23] This makes it clear that what was contained in the deed of transfer is no longer of relevance to a successor in title buying for value. The party acquiring after the registration is bound by what the register shows and is not to be affected by anything contained in the deed of transfer. It is fair to say that it is not immediately obvious from that document what the intended dominant tenement was. The arguments that have been presented by Mr Lavery and Mr Maxwell on either side are quite persuasive and sufficient to give rise to a serious argument as to what the true intent and extent of the right of way was but assuming for the sake of argument that Mr Lavery's argument were to prevail had this been unregistered land, the fact is that the way that it has been registered means that the Armstrongs are entitled to rely on what is apparent in the face of the register.

[24] That may mean that the Shields have a cause for complaint that the register did not reflect what the true intent of the deed of transfer was and they may seek to raise arguments about rectification under the terms of the Act. One has to bear in mind that the rules relating to rectification are quite strict and under Section 69(3) a register shall not be rectified so as to affect the title of a registered owner unless rectification can be made without loss or damages to any person claiming for valuable consideration and in good faith through the registered owner. That would cover the Armstrongs because they were purchasers for valuable consideration and in good faith. In the case of an error made before such registered owner was so registered if he was in fact aware of the error at the time of his registration as owner. If it were shown that the Armstrongs when they acquired the property were aware that the register was erroneous in restricting the benefit of the right of way to the paddock field then rectification could be ordered but there is no evidence before the court that they were aware when they acquired the property that the register erroneously set out the position in relation to the right of way.

[25] It may well be that the Shields may seek to set up a claim for compensation on the basis that the register erroneously reflected what their entitlement was. If they were to set up such a case they would have to persuade the registrar that in fact the legal position was clearly in their favour and they would have to establish that the burden registered erroneously reflected of their true rights and they would also have to show that they were not in any way a party to or privy to the mistake that was made in the registration. There may also be problems in relation to the timing within which an application for compensation can be made. Those are all issues for another day and it is unnecessary in this case to come to any conclusions about that since the court is simply dealing with the question as to what is the extent of the right of way that the Shields have as against these plaintiffs. For the reasons I have given I conclude, having regard to the way in which the burden was registered the right was limited to a right of way for the benefit of Folio 4894 which therefore excludes Folio 12734 and in consequence on this aspect of

the case the plaintiffs are successful in their contentions as to definition of what the dominant tenement was that was served by the right of way.