

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JOHN AGNEW

Plaintiff;

v

PETER McCARTNEY AND MAIREAD DOHERTY

First Defendants;

and

EUGENE McGLADE AND JUDITH MARGARET McGLADE

Second Defendants.

DEENY I

[1] Mr Gerry Granger appeared for the plaintiff appellant and respondent to the appeals in the counter claims in these proceedings. Mr Michael Cahalan appeared for Peter McCartney and Mairead Doherty to whom I will refer as the first defendants. Mr Kevin Denvir appeared for Eugene McGlade and Judith Margaret McGlade who are also respondents to the plaintiff's appeal and counter claimants themselves and appealed in that regard. I received helpful submissions from them at the close of the appeal.

[2] These proceedings, which have taken up three days in the County Court and four in the High Court, relate to a dispute about the boundary of a property known as Rathlure, also described as Rathlury on some maps. This is a substantial dwelling house with over an acre of grounds on the edge of Maghera, Co.Londonderry. It was acquired from the Clark family by Patrick Agnew, Solicitor, in 1909. Both his conveyance and the ordnance survey map

of 1905 indicate that there was no stream, sheugh, ditch or water course on the relevant northern part of this property at that time. However by the ordnance survey map of 1933 such a small stream is to be found. Mr Vincent McBride, engineer for the plaintiff, therefore concluded that the water course had been man-made, probably to link a spring on one side of the property with a stream on the other, some time between 1909 and 1933. I accept that contention.

[3] The townland boundary ran along this boundary of Rathlure. It is likely that it followed the hedge or other field boundary which bounded this property up to the stream being cut out between 1909 and 1933. That is not inevitable or conclusive. A considerable number of maps were examined in the course of this case but these seem to indicate that the townland boundary was moved or varied. A cartographer does not have the authority to do this. It seems to me the importance of the townland boundary should not be over estimated.

[4] A normal thing when digging a small stream of this kind would be to dig it in one's own property and then throw the earth also on one's own property but probably on the outer side of it. See Lawrence J in Fowles v Miller [1810] 3 Taunt 137. That would be consistent with the existence of a bank, which is very steep in places, on the Rathlure side of the property. On it there was a thorn hedge. The plaintiff contended it was a uniform hedge. Mr Boylan disputed that it was like that when he came there in 1981 but I am not sure that much turns on this. I find that the boundary of the property was the bank and hedge subsequently described by Mr Kevin Agnew as the "march" ditch.

[5] In or about 1975 a family of brothers called Young developed a residential estate at Craigadick Park. Numbers 25 to 31 backed onto the Rathlure property. The Youngs erected a concrete post and wire fence at the rear of the rear gardens of these four properties. As Mr Kevin Agnew subsequently wrote it was built one or two feet in from the march ditch, by which he meant the bank with a hedge on it. No dispute has arisen between the owners of numbers 25 and 27 and the owner of Rathlure. That part of the builders' fence, indeed, is still in existence, according to the plaintiff.

The difficulty has arisen between the owners of 29 and 31 Craigadick Park and the plaintiff Mr John Agnew.

[6] Mr Patrick J. Agnew died in 1951. The property was lived in by an apparently unmarried son of his and was then lived in by Mr Kevin Agnew from about 1961. He also was a well known solicitor. He died in 1988. The present plaintiff, who is a recently retired financial adviser, is his son. Mr John Agnew's mother is also still living in the house.

[7] Mr Gerard Donnelly was living in number 29 Craigadick Park in 1982 with his wife. Next door, number 31, was Mr Edward Boylan, a school teacher, and his wife. These gentlemen felt that rats were coming on to their property from the uncovered and neglected ditch on Mr Agnew's property. Although this was disputed by Mr John Agnew it does not seem to me material to the point at issue. Messrs Donnelly and Boylan of their own initiative and without the permission of Mr Kevin Agnew, then resident in Rathlure, not only removed the builder's fence at the rear of their property but went on and removed the march ditch and put a pipe down the stream and covered it over. In this way they hoped to discourage rats. Mr Boylan received an indignant letter from Mr Kevin Agnew dated 9 November 1982 which I attach to this judgment. It is of great significance in this case. He did not complain about them removing the builder's fence. This is a factor against the contention of Mr John Agnew that at that time his father was running a title up to the builder's fence and beyond the original hedge. That contention seems to be untenable in any event as there is no evidence of the Agnews actually exercising any ownership of the very narrow strip of ground between the hedge and the fence. What would one do with it? The hedge was growing into and did grow into the fence in question as time passed. I reject that contention.

[8] However the letter does make it clear that Mr Agnew did regard the march ditch as his boundary and was offended at it being removed by the neighbouring house owners. He demanded that they remove the stone from the sheugh and the pile of earth and "erect a proper fence of concrete posts and ry-link wire along the line of the "march" ditch, which I hope can still be identified." A similar letter was written to Mr Donnelly. I heard evidence from both men. Master Boylan, to accord him his traditional title, which seems to me appropriate in this particular case, seems to me a wholly convincing witness whose evidence I accept in full. He did not deny that his conduct in 1982 may have been a little excessive. He partly complied with Mr Agnew's demand in his letter of November 1982 and erected a post and green wire fence along the line of the former march ditch. This is clearly visible behind a photograph of his children in the early 1980's. Furthermore a recent photograph, "P McC 4", taken by Mr Peter McCartney, confirms Master Boylan's evidence that the end post with green wire still attached to it is to be found at the edge of the property. Master Boylan was emphatic that Mr Agnew had seen this at some stage after it was erected and had made no complaint or criticism of it. As time went on Master Boylan's children damaged this fence and he then erected a wooden ranch type fence which seems to have been about a foot inside the previous fence. Happily for all concerned part of that is still in existence. Although Mr Agnew sought to say that fences moved back and forward from time to time I am satisfied that Master Boylan did not move fences around to establish some kind of title. I find that the wooden ranch fence is the one erected by Master Boylan and I

accept his evidence that at least one of these fences would have been seen and approbated by the late Mr Kevin Agnew, who died in 1988.

[9] The significance of this seems to me to be three-fold. Firstly, it is the best evidence that Mr Agnew regarded the fences which Mr Doherty and Master Boylan had erected as in fact demarcating the proper boundary between the two properties. He was brought up in this house as a boy and he came to live in it for a quarter of a century in his maturity and he was the person best able to judge that matter. It may be that the fences differed by some tiny amount from the precise line of the old ditch. If so, no doubt Mr Agnew thought that that was not of any material consequence. So far as the court is concerned I find that any variation from the former ditch line was *de minimis*.

[10] Counsel for the defendants also contended that the evidence was such as to amount to an agreement between the three then owners of the properties regarding the boundary between them. They argued that verbal agreements between adjoining owners as to the line of the boundary are valid in law. They referred me to Sara, on Boundaries and Easements, 3rd Ed. para. 3.07. It in turn refers to a decision of Mr Justice Megarry in Neilson v Poole [1969] 20 PCr. 909 and a decision of the Court of Appeal in England in Burns v Morton [1999] 3 All ER 646. I note also that the Court of Appeal in England in Colchester Borough Council v Smith [1992] Ch.42, [1999] 2 All ER 561, on estoppel case, endorsed the view that compromise agreements as to the ownership of land should be upheld, if possible. There must be an issue as to whether an oral agreement relating to land is entirely consistent with the Statute of Frauds. Therefore, without having to resolve that matter, I note the assistance of these authorities in approbating agreements. However as I have indicated the significance of the agreement here is pointing to the best evidence of what the boundary line was.

[11] It seems to me that a valid alternative so far as the owners of number 31 were concerned, Master Boylan, and now Mr McCartney and Ms Doherty, is that they ran a possessory title successfully against the owner of Rathlure. They have exercised ownership of the land on their side of, first of all the post and wire fence and then the ranch fence. The former would not have run for 12 years but the latter has, in my view. Clearly the combined period runs from 1982 to 1999 without being disputed. The owners of 29 are in a weaker position. Either through neglect or deliberately they have let the fence behind the trees at the rear of their property disappear, save for a few fence posts. In those circumstances it is hard to see that they have demonstrated an intention, as required, to oust the ownership of Mr Agnew. Indeed their counsel expressly argued that they have not done so over the tiny strip of ground on the far side of the cypress trees. Therefore I would not make such a finding in their favour. However it is not necessary for these purposes to so resolve for the reasons set out in para. 9 above.

[12] As indicated Mr Gerard Donnelly also gave evidence in the High Court. He said that he erected a wooden panel fence between his property and Mr Boylan's at number 31 and between him and Rathlure. He also believed that Mr Kevin Agnew was happy with that fence.

[13] That fence has almost entirely disappeared but a number of important factors remain. Firstly, a line of cypress trees were planted by Mrs Donnelly, said Mr Donnelly, which were inside that fence. He was able to point to these on the photograph of himself with two small children taken in the 1980s. Mr John Agnew sought to argue that the panel fence had been inside that line of cypress trees which are still present but I reject that contention. Mr Donnelly and both McGlade's deny that there was ever a fence inside the cypress trees. Furthermore there are three posts which were located by two engineers and an architect and which are extremely likely to have been posts used in this fence. They continue the line of the wooden ranch fence erected next door by Master Boylan. I accept the oral and photographic evidence to that effect and find that the fence was in position for a number of years in the lifetime of Mr Kevin Agnew. Mr John Agnew sought to argue, as his father was then 71 but still busy as a solicitor, he had not troubled to take proceedings to object to these fences. However I feel sure that if Mr Agnew senior had concluded that there had been any significant incursion on his property he would, at least, have written a solicitor's letter protecting his position and objecting to the location of the fences, if not more. No such letter was written after 1982.

[14] Mr John Agnew wrote on 3 May 1989 to Master Boylan in his capacity as his father's personal representative. He was partly complaining about some rubble being thrown onto his land which Master Boylan in evidence fully accepted but blamed on a child's misguided attempt to help. He said the reference to the removal of a fence was to the removal of the first fence prior to its replacement with a wooden ranch fence. He did not object to the location of the former wood and green wire fence, nor, subsequently, did he object to the erection of their wooden ranch fence. This is fatal to his claim. There was a letter from Mr Agnew to Mr P. McMath, the then owner of 31 Craigadick Park, on 2 June 1993, about trees. But there is no reference in that complaining about the location of the wooden ranch fence and this is obviously of very considerable significance.

[15] The dispute between the parties really arose because Mr Peter McCartney, the present owner of number 31, decided to build a utility room at the rear of his property. He is a builder and began to do this himself with the assistance of the son of his neighbours, the McGlades. Mr John Agnew came and protested at this and asserted that both Mr McCartney and the McGlades were mistaken in their belief as to their boundaries. It was disputed about the precise dates of these matters but this seems to me of no

consequence. Mr McCartney and his partner did produce a land registry receipt which indicated that they had been there on 14 July 1999 ie earlier than Mr Agnew's assertion. He may well be wrong in his recollection about it.

[16] He took a number of photographs on 9 August and subsequently. I accept that these are all genuine photographs. It seems to me therefore likely that at some point afterwards but before 2001 some person erected two more posts behind number 29 Craigadick Park, possibly with a view to reinforcing their claim to ownership of the very small area in which the cypress's were planted. I observe that the whole argument here is, of course, only about a yard or two depths of land. However, as the posts described as 1, 4 and 5 by Mr McBride clearly had been there at the time of Mr Agnew's photographs, 2 and 3 were clearly consistent with the earlier fence. The re-erection of numbers 2 and 3 makes no material difference. The argument on that day lead the owners of 29 and 31 Craigadick Park to commit trespass by putting posts into what they thought was the sheugh in the belief, which they have persisted in for a long while, that this represented their boundary rather than the line of the old ditch. This was largely based on the fact that the townland boundary at one stage ran along the sheugh and they presumed that was their boundary.

[17] Judge Rodgers, after a careful hearing of this matter and two site visits, concluded that a line A to B representing the fence line behind numbers 25 and 27 should be extended to point C on a map prepared by Mr Flanagan and then moved two feet to the Rathlure side. This seems to have been rejected by all parties. In any event Mr McBride and Mr McGirr, the defendant's architect, were dubious as to how authoritative such a projection and measurement could be. However it should be noted that on the ground the line found by Judge Rodgers is very close to the boundary line which I have now found. There is very little difference in practice.

[18] It does not seem necessary or appropriate to me to go into the minutiae of the plotting of various points on the maps which were dealt with in evidence. The salient points as far as I can see, and as I find, are that the boundary between the properties was established by the building of Master Boylan's two fences and Mr Donnelly's wooden panel fence following Mr Kevin Agnew's letters of 1982. The boundary therefore lies along the wooden ranch fence to the two posts which made up the end of Mr Donnelly's fence which are at the corner of the new building constructed by Mr McCartney. Mr and Mrs McGlade's boundary runs from those two wooden posts at the corner of Mr McCartney's new utility room to a post, marked D on drawing number 7B, prepared by Mr Flanagan, which marks the end of a low dividing fence between number 27 and number 29 Craigadick Road.

[19] Mr Donnelly rejected Mr Agnew's contention that the cypress trees were erected "in restitution" for the hedge which he had torn up. That contention is inconsistent with the express request in Mr Kevin Agnew's letter that these men would build a post and wire fence along the line of the ditch to differentiate the two properties. The fact that the Donnelly's concrete driveway ended at the line of the old builder's fence does not seem to me decisive here. I accept that Mr Gerard Donnelly sought to give his evidence honestly. Understandably his recollection was not exact after the passage of 20 years.

[20] Mr Agnew admitted in evidence that he had not made his way onto this space, approximately two feet in his contention, between the hedge and the builder's fence. There was no reason for him to have done so and no opportunity to run a title over this tiny strip. His father's reference in his letter of 9 November 1982 to Mr Boylan not interfering with the ditch "other than to trim it on your side if necessary" is entirely consistent with the boundary being along the middle of the hedge.

[21] It is implicit in my findings that the reality is that the owners of number 29 and 31 have successfully run a prescriptive title not against the Agnews but against the Youngs who owned a tiny strip of ground between the builders fence they erected and the march hedge which was the former boundary between Rathlure and the adjoining land.

[22] This use would have been relatively modest but effected by the planting of the cypresses, at number 29, its use, largely by children, and the fact that Mr McGlade did once cut the top of the cypress's clearly indicating his ownership of them. Mr Agnew never claimed that he had done this. The use by the owners of number 31 is clearly proven.

[23] In cross-examining the plaintiff and his witness Mr Denvir sought to say that his clients' the McGlades, had not enclosed the land and had not kept the plaintiff out of these lands. That did appear to me to be inconsistent with their otherwise not unreasonable claim of a prescriptive title. However it does not seem to me fatal to their counter claim as the existence of the fence in Mr Kevin Agnew's lifetime remains the best evidence that it was an acceptable approximation to the former boundary hedge.

[24] For the avoidance of doubt I have found the evidence of Mr Vincent McBride very helpful. It did satisfy me that although two of the timber posts found behind number 29 may have been erected at a later stage there was, nevertheless, clear evidence that there had been a fence behind the cypress trees at an earlier date. This was reinforced by the photographs of Mr Flanagan which were also available. He had earlier acted for Mr Agnew until ill health prevented his further involvement.

Pleadings

[25] I now turn to the pleadings, in the light of my findings above as to the boundary between the properties.

Agnew v McCartney and Doherty

[26] Mr Agnew sought a declaration that the defendant's boundary was the line of the old builder's fence but I have found that it was a little further towards the Rathlure property and I reject that declaration. I reject his application to pull down the defendant's garage.

[27] He has, however, it seems to me established that there was some trespass here by McCartney. The setting of the poles and strings to try and establish a claim along the sheugh might be neither here nor there but as Mr McCartney admitted in evidence, he had to use Mr Agnew's land to some degree to build the utility room concerned. No doubt if he had courteously asked this in advance a reasonable neighbour would have agreed to it but this did not happen. I propose to award Mr Agnew the sum of £400 in the circumstances. This is appropriate as he has not proven on the balance of probabilities that these defendants were responsible for the cutting of the laurel bushes. Furthermore I find that there is no restitution of property required nor has there been a reduction in the value of the land. There has been some interference with Mr Agnew's enjoyment of the land but that has been partly brought upon him by his own adherence to an incorrect boundary line.

[28] I have considered Mr Agnew's application for an injunction. While it is right to say there was at least some interference with his rights of ownership, I do not consider, in the exercise of my discretion, that it would justify an ongoing injunction.

[29] Mr Agnew sought a declaration that "the boundary between the plaintiff's property at Rathlure, Maghera, County Derry and the defendant's property at 31 Craigadick Park, Maghera, County Derry, is defined in accordance with the red line marked between the points A to B on the map attached hereto." I refuse to grant a declaration on those terms sought as the red line represents the original builder's fence which in my finding is not in fact the boundary. I also therefore reject his claim at para. 5 of his civil bill and the claim for interest at para. 6 does not seem appropriate in the circumstances. Although Mr McCartney and Ms Doherty are referred to in their notice of appeal as bringing a counter claim this document was not amongst my papers, nor was it referred to by their counsel in his written submissions. I should say that Judge Rodgers in his judgment concluded that these first defendants were arguing for a line through three trees just below point 9 to point 7 on map 5B. I am against them on that. They therefore have failed to that extent ie that they were arguing in the alternative for a line

different from the one which I have chosen as well as the one which I have settled upon.

John Agnew v Eugene McGlade and Judith Margaret McGlade

[30] Mr Agnew sought £5,000 damages by reason of trespass and damage to his property. There was little or no evidence of trespass against the McGlades except that they attached a piece of wood to a tree and tied a string between them to try and establish the true boundary after Mr Agnew raised this issue. McGregor on Damages, 17th Ed., says that the measure of damages is the amount of the diminution of the value of the land, or in the alternative, the measure of the cost of replacement or repair. Neither of these were to be found here. However, Sara on Boundaries and Easements does show clear authority for damages being awarded for technical trespass or for inconvenience accorded to the plaintiff. It is also right to say that these defendants contended until the third day of the appeal that their boundary, in the alternative, ran along the line of the old stream and not where I have placed it. In those circumstances they contributed to the fact that Mr Agnew was advised to stay out of this area of his grounds over the years of this litigation. Nevertheless it seems to me that, particularly as Mr Agnew had invited them to establish where their boundary was, that an award of £200 would be appropriate in the circumstances. I observe, for completeness, that if they had maintained the fence which Mr Donnelly had erected at Mr Kevin Agnew's request, it is likely that this whole dispute would not have arisen. However having looked at Mr Kevin Agnew's letter of 1982 it does not seem to me that I could properly, in law, conclude that there was an implied term that the owners of 29 Craigadick Park were obliged to keep up and maintain the said fence.

[31] I refuse, in the exercise of my discretion, Mr Agnew's application for an injunction and also his application that these defendants do pull down, demolish and remove a fence constructed by themselves. I do not consider that interest or any other relief is appropriate in the circumstances. The McGlades had a counter claim although it is not referred to in counsel's closing submissions. It was dated 20 June 2000. I reject their claim for trespass on foot of that.

[32] They seek a declaration that the boundary between the properties is defined in accordance with the red line marked between the points A and B and the map marked 1 attached to it. This seems to me a continuation of Master Boylan's wooden ranch fence and this fence in turn was just inside the timberpost with the green wire attached visible on one of Mr McCartney's photographs which Master Boylan said, entirely convincingly, he had erected after Mr Agnew's letter of November 1982. I have accepted that evidence. I accept that Mr Kevin Agnew regarded that as expressing the march ditch boundary between the parties. As A and B is a continuation of that and as it

is inside the single tree but just outside the line of cypress trees and it appears to end at point D on map 7B, it seems to me that it is indeed the correct boundary between the parties and I will grant a declaration in those terms. The alternative was the red line of C, D which ran along the middle of the stream or sheugh slightly further into the Rathlure property. I reject that contention.

[33] I do not consider an injunction is necessary. Either the McGlades may rebuild a fence or Mr Agnew may do so on his property.

[34] I will hear counsel on the subject of costs.

9th November, '82.

Dear Mr and Mrs Boylan,

On Sunday evening last I had occasion to go to the far end of my garden, which, as you will know, is convenient to your property. I was astonished to see that you have completely cut down the thorn hedge, which is "the march" between the property purchased some years ago by Messrs Young (which they have since developed) and myself. Also, I found that a quantity of large stones have been deposited in the open sheugh, which is my private property, being on my side of "the march" ditch mentioned. And I also saw that quite a large pile of earth has been deposited on my property just outside my garden hedge. All this without my knowledge or consent. Candidly, I am disappointed, to say the least, as I would have thought you would have known better. I know that your plot of ground, upon which your bungalow has been erected, was bounded at the rear by a few concrete posts and a ry-link wire fence, on your side. I do not complain about the wire fence having been removed, as this did not concern me, so long as you did not interfere with the "march" ditch, other than to trim it on your side, if necessary. Clearly, you have no right at all to do what you have done, and I hereby give you notice that I require you, forthwith, to remove the stones from the sheugh, also to remove the pile of earth, and leave the area as it was, making good any damage caused, and then erect a proper fence of concrete posts and ry-link wire along the line of the "march" which I hope can still be identified.

I assume you can get an official map of your property from the Land Registry Office, Belfast, if you think you need one.

I require you to have all the necessary work done within the next two weeks, failing which I will have no alternative but to institute proceedings against you without further notice.

Yours truly,

Mr William Edward Boylan
and Mrs Patricia Boylan,
31, Craigadick Park,
Maghera.

