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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF SIR JAMES DENNIS COMPTON FAULKNER

BETWEEN:

JULIE ELIZABETH BROWN AND ELIZABETH BROWN

Appellants;

-and-

SIR JAMES DENNIS COMPTON FAULKNER

Respondent.

HIGGINS J

[1] This is an appeal from the decision of Coghlin J whereby he allowed the respondent's appeal from a decision of the Deputy Registrar of Titles, who dismissed the respondent's application under Section 53 of the Land Registration Act (Northern Ireland) 1970, to be registered as owner of lands contained within Folio 1568 County Down. Folio 1568 is situated at Ringhaddy in the townland of Islandbane near Killinchy in County Down and lies to the west of Ringhaddy Sound on Strangford Lough. On the east side of Ringhaddy Sound there are several relevant islands running north/south that mark the outer limit of the east side of the Sound. In 1943 the registered owner of Folio 1568 was Thomas Marshall. Folios 1567 and 1569 were registered to Thomas Farrell. On 12 January 1943 Thomas Marshall transferred part of the island of Islandmore and Rock, from Folio 1568 to the respondent's brother Brian, later Lord Faulkner. On the same date Thomas Farrell transferred part of Islandmore together with the islands of Dunsy, Dunsy Rock, Gull Rock, Greenisland and Greenisland Rock from Folios 1567 and 1569 to the respondent. After the death of Thomas Marshall the residue of Folio 1568 was transmitted to Thomas Farrell and the transmission registered in February 1959. In December 1973 Thomas Farrell transferred approximately one acre of land out of Folio 1568 to Noel John Garfield Brown (known as Garfield Brown). On 4 January 1974 this land was registered as

Folio 37553. It is situated on the western shore of Strangford Lough and today lies between Ringhaddy Quay, which forms part of Folio 1568, and Ringhaddy Cruising Club to the south. On 24 June 1976 Thomas Farrell transferred the residue of Folio 1568 to Nancy Green in consideration of natural love and affection. On 19 December 1978 Nancy Green transferred a portion of land from Folio 1568 to trustees, (the Northern Bank), acting on behalf of the respondent which was registered as Folio 42295 on 2 June 1980. In 1980 Nancy Green sold the residue of Folio 1568 to Garfield Brown. On 4 March 1993 Julie Elizabeth Brown was registered as owner of the residue of Folio 1568. The first appellant, Julie Elizabeth Brown, is the daughter of Garfield Brown and the second appellant, Elizabeth Brown, is his widow. Garfield Brown died in 1994. A bungalow was constructed on Folio 37553 and is the current residence of the second appellant. In 1991 a bungalow was erected on Folio 1568 and is the current residence of the first appellant. Folio 37553 is a large square area of land which lies along the foreshore and runs approximately northeast/southwest. On its north eastern boundary lies Folio 42295 which is rectangular in shape and also has a boundary on the foreshore. The residue of Folio 1568 lies to the northeast of Folio 42295 and borders the foreshore. To the north east of Folio 42295 lies the disputed land. According to the Land Registry map it is very roughly triangular in shape with the base of the triangle running along the foreshore and the apex ending at a pathway that runs from the county road to the second appellant's residence. The base portion of the disputed land forms a rough rhomboid-shaped rectangle with a very narrow and tapering triangle of land running northwest to the apex. The north side of the disputed land is straight, whereas the south side contains a dogleg turn, in line with the commencement of the very narrow triangular section referred to above. A gate is located at the northwest side of this rectangular portion of land and separates the rhomboid rectangular area from the long tapering portion which runs to the pathway. Thus the strip of land is both irregular in shape and small in size and lies between Folio 42295 and the first appellant's bungalow. The issue in the court below was whether that strip of land remained part of Folio 1568 (the paper title) or whether the respondent had acquired adverse possession of it. The issue on appeal to this court is whether having regard to the findings of the learned trial judge there was sufficient foundation in law for the conclusion that the respondent had acquired adverse possession of the disputed land.

[2] On 21 September 1999 the respondent applied under Section 53 of the Land Registration Act (NI) 1970 to be registered as owner in fee simple of "that part of the land in the above mentioned Folio [ie Folio 1568] shown on the map accompanying this application and thereon edged red together with a right of way at all times and for all purposes along the road shown yellow.." The roadway marked yellow is the pathway referred to above which runs from the county road. The accompanying ordnance survey map [copyright 1999] shows two areas marked in red, one corresponding roughly with the strip of land referred to above and the other to the southwest of Folio 42295

with a boundary touching the end of the laneway. The apex of the triangular strip of land as shown on this map falls short of the laneway.

[3] In his affidavit submitted in support of the application the respondent identified the disputed land as part of lands situated at and known as the Boat Park, Ringhaddy Quay. Accompanying the affidavit was a second map. Paragraph 3 of the respondent's affidavit states –

> "3. … a portion of the lands known as the Boat Park was acquired by my father James Alexander Faulkner from Thomas Farrell and Thomas Marshall along with other lands comprising the islands of Islandmore, Dunsey, Greenisland, Little Minnis, Great Minnis and Drummond in or around 1941. This portion of land is shown coloured blue on the second map annexed hereto. This land was acquired to obtain access to the islands from the county road. The land was fenced when it was acquired and again refenced in or around 1960".

[4] The area coloured blue on the second map is wholly rectangular in shape and falls well short of the laneway. In paragraph 4 of his affidavit the respondent stated –

> "I and my predecessors in title have been in sole and exclusive beneficial occupation and possession of this parcel of land for upwards of fifty years past".

In paragraphs 7 and 8 he stated –

> "7. During the time when these lands have been within the ownership of my family a number of works have been carried out. During the 1960s I stoned the access way down to the foreshore. The shore was cleared around this time for boat and barge operations. The entire areas of the lands the subject of this application have been used for storage of boats, and access to the foreshore.
>
> 8. From time to time I have been requested by Mrs Garfield Brown to cut and maintain all the lands known as the Boat Park, portion (*sic*) of which are the subject of this application. In or around 1978 I obtained planning permission to erect net stores. This planning permission related to the lands now

comprised in Folio 42295 and also to the lands which are the subject of this application."

[5] The parties and various witnesses gave evidence before the learned trial judge over several days. Numerous photographs and maps were adduced in evidence providing an attractive record of the history and development of this secluded but much admired area of Strangford Lough. Early photographs show the entire area as farm fields down to the Lough shore, with the county road ending at Ringhaddy Quay. Close to the Quay was a dwelling known as 'Bob Dougal's cottage'. On the land immediately to the south of the cottage (and within Folio 1568) a boatyard developed which became known as 'Bob Dougal's Boat Yard' where boats were repaired and/or stored. The strip of land in dispute was to the south of the boatyard and other boats were kept there. The lough shore at Ringhaddy Quay and the area to the south of it wereused by boat owners for access to Ringhaddy Sound and Strangford Lough. Nowadays there are several residences along the lough shore as well as Ringhaddy Cruising Club situated further to the south of Folio 37553.

[6] In 1943 at the time of the transfer of the ownership of Islandmore and the other islands to the respondent and his brother, the appellant was at school in Dublin. At that time the Faulkner family lived at Tullynakill House about five miles to the north and beyond Whiterock Bay and engaged in farming the land there and the islands. The appellant left school in 1944 and until 1947/8 was engaged in running the farm at Tullynakill and the islands. The appellant maintained in evidence that when the islands were transferred in 1943 he and his brother or possibly the 'family' had also acquired the disputed land for the purpose of travelling to and from the islands. However the learned trial judge found 'his evidence was far from clear as to how this acquisition had actually been achieved'. It seems that the most common means of access to the islands was by way of Ringhaddy House, then owned by the Farrells, or by a large barge that was kept alongside Ringhaddy Quay for the purposes of transporting labour and machinery. It was conceded by the appellant that after the farming operations ceased in 1948/50 he had not used the disputed lands for sailing purposes during the 1950s, 1960s or the early 1970s. During this period the appellant sailed elsewhere and if sailing from Ringhaddy used Farrell's land for access to the lough. The appellant's evidence in relation to his user of the land between 1949 and 1973 was that he occasionally walked his dog over it, sporadically assisted his brother and gave permission for others to use it. The respondent maintained that a disused railway container was placed on the land by his family and used for storage purposes. A photograph taken in 1964 shows such a small shed. The learned trial judge made no finding that the appellant had acquired adverse possession in 1943, nor subsequently between 1943 and 1973. He accepted that members of the Faulkner family did use the disputed land from time to time but that such use was in common with a number of other persons using

the area of Bob Dougal's Boat Yard for various boating purposes. In respect of the period 1943 to 1973 the learned trial judge stated at page 15 –

> "I also bear in mind that possession exercised at different times by several members of one family cannot grow into a possessory title for one of those family members alone – Morris v Pinches 1969 212 EG 1141."

[7] The respondent's case was that the land was fenced shortly after the transfer of the islands in 1943 and according to his affidavit it was refenced in 1960. His evidence was that the disused railway container was placed by his family on the disputed land and the land fenced off so as to keep cattle away shortly after the transfer of the islands and refenced with a five-bar gate in 1972/3 when relations between his family and the Farrells cooled. The learned trial judge found that the disputed land was fenced and accessed by a gate and that the fence remains in position today though it is now dilapidated. There is no finding as to when this fence and gate were erected. The gate is located half way down the strip of land and near the rectangular area where small boats were kept. The judge found that it was rarely secured. The judge found support for the existence of the fence and gate in the evidence of Mr Henderson, a friend of David Faulkner, the appellant's nephew. He frequented the disputed land every summer weekend from the early 1970s until 1983/4 in order to sail. This came to an end when David Faulkner joined Ringhaddy Cruising Club and commenced to use the facilities there for the launching and storage of boats. Mr Henderson recalled the presence of a gate and a post and wire fence to which the painters of dinghies could be attached. His evidence was that one or two dinghies were present on the disputed land and occasionally a boat, but the only person he recalled using the land was a Mr Ronnie Campbell, though Mr Henderson was acquainted with the respondent. . The respondent accepted that from 1980, when he purchased Ringhaddy House, he had not used the disputed lands personally. However James Hunsdale, who worked for the respondent's father, and later his nephew Ronnie Campbell, both kept dinghies on the disputed land with the permission of the Faulkners. Mr Campbell built a dinghy for the respondent in return for the respondent's agreement not to charge him rent for that use of the land. When Miss Brown's bungalow was being constructed Mr Campbell moved his boat to the respondent's land in order to facilitate the use of machinery to lay the foundations. The judge found it significant that it was the respondentwho had asked Mr Campbell to keep his boat on the moorings for a longer period of time to enable the contractor to use the disputed land as a means of working on the foundations.

[8] According to Mr Hunsdale the disputed land was used by the respondent and his brother and by "anyone going to the islands". The learned

trial judge found that the evidence of most of the witnesses confirmed that over the years the disputed land had been used by a variety of people as access to and from the shore or from boats. These included the respondent's brother's family, in particular his children.

[9] The respondent's brother, Lord Faulkner, died in March 1977. The learned trial judge found that after his death his family continued to use the disputed land, as did Mr Hunsdale and Mr Campbell. The respondent gave evidence that in 1977/8 he arranged for the contractor who was then engaged in the construction of the Cruising Club to clear a portion of the foreshore and to cut a channel from the disputed land into the Lough. In his judgment the learned trial judge stated that a Mr McGall confirmed that he arranged for this work to be done by two men and that an excavator was used to bring fine stone to the foreshore and to cut the channel. He was unable to identify from the photographs any area of stone that had been laid though he was 'pretty sure' the work had been done. The learned trial judge found that this channel was clearly shown in an aerial photograph taken in 1996, running roughly parallel to Ringhaddy Quay and Mr Brown's slipway. Earlier photographs show rails running from Bob Dougal's Boat Yard and into the lough. Their location in those photographs appears to suggest that what is visible in the 1996 aerial photographs corresponds with those rails which were probably removed at the time of the construction of Miss Brown's bungalow.

[10] In support of his case the respondent relied upon an application for planning permission to erect a 'net store' on the disputed land in October 1977 to which there were no objections. However, the then registered owner, Nancy Green, had no knowledge of the application and the learned trial judge noted that ownership of the land was not necessary for the application to be made . When the bungalow, now occupied by the first appellant, was constructed by her father in 1990/1, the foundations were raised above the level of the disputed land and the site surrounded by a white wooden fence. The first appellant did not accept that in doing so her father had effectively created a dividing line between the bungalow site and the disputed land.

[11] On 19 December 1978 Mrs Nancy Green, the then owner of Folio 1568, transferred part of that land to the Northern Bank Executor and Trustee Company Limited acting on behalf of the respondent's family. This was registered subsequently as Folio 42295. The plan attached to the transfer shows the area of land that was sold and the surrounding land. It also shows an area corresponding to the disputed lands with the words 'boat park' and a straight line running northwest/southeast from the land to the foreshore with the word 'fence' alongside. There is another similar line running across the foreshore from the northwest/southeast line. Mrs Green accepted that this plan showed the disputed land separated by a fence from what was then 'Bob Dougal's Boat Yard'. The Land Registry map of Folio 1568 extracted by the appellants also shows this line though it does not extend as far as the lane.

The learned trial judge found that the foreshore was not fenced. If the disputed land was fenced to keep off cattle in or after 1943 the line of the fence would have been to the south of the disputed land as that was where the farm fields were and would have extended the full width of the field from the foreshore. If this same area was refenced in 1972/3 it should have been along the same line. There would have been no reason to fence on Bob Dougal's side then or later. Therefore the disputed land should lie to the north of the fence. The fence which appears in the Land Registry map and the map associated with the transfer to the Northern Bank shows the disputed land to the south of the fence. There is nothing in either to show another fence.

[12] It was Mrs Green's evidence, supported by the second appellant, that when Folio 1568 was sold to Garfield Brown in 1980 it contained the cottages, the barn, Ringhaddy Quay, the boat yard and the disputed land as shown by the Land Registry map.

[13] At page 18 of his judgment the learned trial judge expressed his conclusions in these terms –

> "I am satisfied, on the balance of probabilities, that, apart from the Faulkners and those who had the appellant's permission, other members of the public did, from time to time, use the disputed land as a means of access between the foreshore and the public road. It is difficult to be certain as to the extent of such use although it probably lies somewhere between the claims made by the witnesses called on behalf of each party. However, given the rural location of the disputed land and the general goodwill that exists between those concerned in the recreation of sailing and boating, I do not consider that such use significantly undermines the appellant's case. There was no evidence that, apart from the appellant, anyone else dealt with the disputed land as an occupying owner.
>
> The appellant's actual use of the disputed land from 1973 onwards has caused me rather more concern since, in my view, the evidence established that, in practical terms, it was his brother the late Lord Faulkner and his family who were the primary users. However, taking into account the installation of the fencing and gate and the construction of the channel, I have come to the conclusion that this was a single possession exercised on behalf of the appellant and

> his brother jointly – see Slade LJ in Powell v McFarland at page 470.
>
> The appellant's brother died in March 1977 and, in cross-examination, the appellant agreed that he did not personally use the disputed land for his own purposes after he acquired Ringhaddy House in 1980. However, I am satisfied that, after his death, the family of the appellant's brother continued to use the disputed land as did Mr Hunsdale and Mr Campbell. Mr Hunsdale and, after 1979, Mr Campbell did so with the appellant's permission and I consider that it is significant that it was the appellant and not Mr Garfield Brown who asked Mr Campbell to keep his boat on the moorings for a longer period so as to enable the contractor to use the disputed land as a means of working on the foundations for Julie Brown's bungalow.
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> Accordingly, in the circumstances, I am satisfied that the applicant has established on the balance of probabilities both the factual possession and the intention to possess necessary for adverse possession for a period in excess of twelve years from 1973 and, accordingly I propose to allow the appeal."

[14] The submissions of Mr McCloskey QC who with Mr Good appeared on behalf of the appellant may be summarised as follows –

i. the acts found by the learned trial judge were insufficient to found a finding of adverse possession;

ii. the finding that Lord Faulkner and his family were the primary users and the absence of a clear finding of personal user by the respondent between 1973 and 1977 could not sustain the conclusion that this was a single possession exercised on behalf of the respondent and his brother jointly;

iii. the judge should have identified a twelve year period.

[15] In addition he highlighted those parts of the respondent's case which the learned trial judge did not accept.

[16] Mr M Orr QC who appeared on behalf of the respondent submitted –

i. that a period in excess of twelve years was identified from 1973;

ii. that the three acts relied on by the learned trial judge and which were not in dispute were sufficient to ground adverse possession;

iii. that as an alternative to the judge's conclusion this Court could find that there was a joint tenancy between the respondent and his brother and that Lord Faulkner's benefit of it passed to the respondent on Lord Faulkner's death.

[17] The expression 'adverse possession' has become the shorthand for what is in reality a limitation on the right of a paper owner to take action to recover land. The current legislation in Northern Ireland on limitation of actions is contained in the Limitation (NI) Order 1989. Article 21 prescribes the period beyond which actions may not be taken in these terms.

> "21.-(1) Subject to paragraph (2), no action may be brought by any person (other than the Crown) to recover any land after the expiration of twelve years from the date on which the right of action accrued –
>
> (a) to him, or
>
> (b) if it first accrued to some person through whom he claims, to that person."

[18] Thus the period of time beyond which recovery of land is not permitted is twelve years and runs from the date on which the right of action to recover the land accrues. The accrual of a right of action is dealt with in Schedule 1 Paragraphs 1 and 8 of the Order –

> "1. Where the person bringing an action to recover land, or some person through whom he claims –
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> (a) has been in possession of the land; and
>
> (b) has, while entitled to possession of the land, been dispossessed or discontinued his possession,
>
> the right of action is to be treated as having accrued on the date of the dispossession or discontinuance.
>
> 8.-(1) No right of action to recover land is to be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (in this paragraph referred to as 'adverse possession').

(2) Where –

(a) under paragraphs 1 to 7 a right of action to recover land is treated as accruing on a certain date; and

(b) no person is in adverse possession of the land on that date,

the right of action is not to be treated as accruing unless and until adverse possession is taken of the land.

(3) Where –

(a) a right of action to recover land has accrued; and

(b) after the accrual, before the right of action is barred, the land ceases to be in adverse possession,

the right of action is no longer to be treated as having accrued and no fresh right of action is to be treated as accruing unless and until the land is again taken into adverse possession."

It is noteworthy that paragraph 1 of Schedule 1 provides that the right of action accrues on the date of dispossession or discontinuance.

[19] Article 26 deals with the extinction of title after the expiration of the time limit.

> "26 Subject to Article 27 and to section 53 of the Land Registration Act (Northern Ireland) 1970, at the expiration of the time limit fixed by this Order for any person to bring an action to recover land, the title of that person to the land is extinguished."

[20] By section 53 of the Land Registration Act, as amended, the Limitation Order 1989 applies to registered land as well as to unregistered land. Article 27 is not relevant for present purposes. Thus the date on which the right of action accrues to the paper owner is of some significance. In order to rely on the Limitation Order the person claiming adverse possession must show either a dispossession or ouster of the paper owner – that is where the

claimant comes in and drives out the true or paper owner from possession of the land – or a discontinuance or abandonment by the paper owner followed by the taking of possession by the person claiming adverse possession. The respondent did not make the case that the paper owner of this land ever abandoned or discontinued his ownership of it, therefore the respondent required to prove dispossession of the paper owner from a certain date, on which date a right of action to recover the land accrued to the paper owner. The learned trial judge made no finding as to the date when the paper owner was dispossessed nor when the respondent or any person from whom he claimed title, entered into possession other than a finding that the respondent had established adverse possession for a period in excess of twelve years from 1973, at which date the respondent's brother Lord Faulkner was still alive.

[21] As the learned trial judge stated there was no dispute between the parties as to the relevant law and principles to be applied in a case in which a claim of adverse possession is made. These were to be found in the decision of Slade J in Powell v McFarlane 1988 38 P & CR 452 as confirmed in the Court of Appeal in Buckinghamshire County Council v Moran [1990] Ch 623 and [1989] 2 AER 225 in which case Slade LJ (as he then was) gave the leading decision. These may be summarised as -

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi').
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and

the manner in which land of that nature is commonly used or enjoyed.

….

Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.

….

Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley MR in Littledale v Liverpool College (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as it is reasonably practicable and so far as the processes of the law will allow.

(5) …….It is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had

> the requisite *animus possidendi* in any case where his use of the land was equivocal, in the sense that it did not necessarily by itself, betoken an intention on his part to claim the land as his own and exclude the true owner. The status of possession, after all, confers on the possessor valuable privileges *vis a vis* not only the world at large, but also the owner of the land concerned. It entitles him to maintain an action in trespass against anyone who enters the land without his consent, save only against a person having a better title than himself

[22] These principles have been approved and confirmed by the House of Lords in J Pye (Oxford) Ltd and Others v Graham and Another [2002] UKHL 30 as yet unreported. The opinions were delivered on 4 July 2002. Lord Browne-Wilkinson who delivered the main opinion observed that apart from one or two minor points the principles set out by Slade J in Powell's case and subsequently approved in Moran could not be improved upon.

[23] In Powell v McFarlane Slade J began by observing that possession and dispossession were not defined in the Limitation Act 1939 which for present purposes was in the same terms as the Limitation (NI) Order 1989, He then went on to consider the concept of 'possession' as understood in the Common Law and at page 469 stated –

> "Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession. In the absence of authority, therefore, I would for my own part have regarded the word 'possession' in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's license or consent; likewise I would have regarded a person who has 'dispossessed'

> another in the sense just stated as being in 'adverse possession' for the purposes of the Act."

[24] In the case of J Pye, supra, Lord Browne-Wilkinson, after quoting this passage, made clear that the concept of adverse possession no longer required a claimant to act adversely or confrontationally towards the paper owner, which, in earlier times, the use of the words 'adverse' and 'ouster' had implied. He stated at paragraph 38 –

> "There will be a "dispossession" of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word."

[25] Lord Browne–Wilkinson then went on to say that in Pye's case the question for the court could be narrowed down to asking whether the Grahams (the claimants) were in possession of the disputed land without the consent of Pye (the paper owner) before 30 April 1986. The action had been brought by the paper owner on 30 April 1998 and the question was whether, prior to that date, there was a twelve year period during which the claimants were in possession of the disputed land to the exclusion of the paper owner. Lord Browne-Wilkinson continued at paragraph 39 –

> "39. What then constitutes "possession" in the ordinary sense of the word?
>
> Possession
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> 40. In Powell's case Slade J said, at 38 P & CR 452, 470:
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> > '(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
> >
> > (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to

> have both factual possession and the requisite intention to possess ("animus possidendi").'

Counsel for both parties criticised this definition as being unhelpful since it used the word being defined— possession— in the definition itself. This is true: but Slade J was only adopting a definition used by Roman Law and by all judges and writers in the past. To be pedantic the problem could be avoided by saying there are two elements necessary for legal possession:

> 1. a sufficient degree of physical custody and control ("factual possession");
>
> 2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").

What is crucial is to understand that, without the requisite intention, in law there can be no possession. Remarks made by Clarke LJ in Lambeth London Borough Council v Blackburn (2001) 82 P & CR 494, 499 ("it is not perhaps immediately obvious why the authorities have required a trespasser to establish an intention to possess as well as actual possession in order to prove the relevant adverse possession") provided the starting point for a submission by Mr Lewison QC for the Grahams that there was no need, in order to show possession in law, to show separately an intention to possess. I do not think that Clarke LJ was under any misapprehension. But in any event there has always, both in Roman Law and in Common Law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a

squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.

Factual possession

41. In Powell Slade J, at pp 470-471, said this:

> '(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. …. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.'

I agree with this statement of the law which is all that is necessary in the present case. The Grahams were in

> occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. The Grahams farmed it in conjunction with Manor Farm and in exactly the same way. They were plainly in factual possession before 30 April 1986.

[26] On the question of intention to possess he stated at paragraph 42 -

> "42. There are cases in which judges have apparently treated it as being necessary that the squatter should have an intention to own the land in order to be in possession. In Littledale v Liverpool College [1900] 1 Ch 19, 24 Lindley MR referred to the plaintiff relying on "acts of ownership": see also George Wimpey & Co Ltd v Sohn [1967] Ch 487 at 510. Even Slade J in Powell, at pp 476 and 478, referred to the necessary intention as being an "intention to own". In the Moran case [1988] 56 P & CR 372 at 378/9 the trial judge (Hoffmann J) had pointed out that what is required is "not an intention to own or even an intention to acquire ownership but an intention to possess". The Court of Appeal in that case [1990] Ch 623, 643 adopted this proposition which in my judgment is manifestly correct. Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title.

[27] Lord Hutton who was in agreement with Lord Browne-Wilkinson added a few words of his own to which it is useful to refer –

> "76. I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the

> person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.
>
> 77. The conclusion to be drawn from such acts by an occupier is recognised by Slade J in Powell v Macfarlane, at p 472:
>
> > 'If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner'."

And, at page 476:

> "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."

[28] In another passage of his judgment at pp 471-472 Slade J explains what is meant by "an intention on his part to …. exclude the true owner:

> "What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's

> own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

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[29] At paragraph 70 Lord Hope who also agreed with the opinion of Lord Browne-Wilkinson said –

> "70. …The acquisition of possession requires both an intention to take or occupy the land ("animus") and some act of the body ("corpus") which give effect to that intention. Occupation of the land alone is not enough, nor is an intention to occupy which is not put into effect by action . both aspects must be examined , and each is bound up with the other. But acts of the mind can be, and sometimes can only be, demonstrated by acts of the body. In practice, the best evidence of intention is frequently found in the acts which have taken place."

[30] Whether a claimant has proved that he is in possession of land when another is the paper owner of that land, will in all cases depend on the facts of the particular case. The onus of proof rests on the claimant and the standard of proof is the balance of probabilities, always remembering the serious nature of the consequences for the paper owner, of a finding of adverse possession. While each case will turn on its facts it is helpful to revisit the facts in Pye's case to see what the House of Lords considered sufficient to demonstrate that the Grahams were clearly in possession for the twelve year period. The disputed land consisted of four fields amounting to 25 hectares of agricultural land that the Grahams farmed with Pye's permission until 1984, when Grahams' occupation of the land ceased to be with Pye's permission. The boundaries of all the fields were separated from adjoining land by hedges and access to the fields was by way of gates that were padlocked and the Grahams held the keys. Throughout the twelve year period in question the Grahams farmed the lands – they used the fields for grazing cattle, and harrowed, rolled, fertilised and seeded it for that purpose. On these facts, as Lord Hope put it, the only conclusion that could reasonably be drawn was that the Grahams occupied and used the disputed land as their own for twelve years before the actions had been brought – see paragraph 72.

[31] A person who seeks to be registered as the owner of land by way of adverse possession requires to prove a sufficient degree of occupation or physical custody and control of the land over a twelve year period and that the occupation or custody and control was exercised on his own behalf and

for his own benefit with an intention to possess the land in question. Where the only conclusion reasonably to be drawn from the use made of the land is that he treated it as his own, then, an intention to possess the land may be inferred from such use. Where the use made of the land or acts relied on by the person claiming title by adverse possession are equivocal and open to more than one interpretation then the user or acts in themselves will be insufficient to establish the necessary intention and other evidence will be required. No issue arises in this appeal as to occupation of the land. The custody and control required is a physical custody and control and implies a 'hands on ' user of the land. Often that is seen in the farming of a piece of land. Equally it must be a single, exclusive and continuous user.

[32] Therefore the relevant question in this appeal is whether at some time between 1973 and September 1987 the appellant or her predecessors were dispossessed of the disputed land so that a right of action accrued to them, which right of action had, after the period of twelve years from 21 September 1987, lapsed under the Limitation Order 1989. It was the respondent's case, not that the land was occupied but that the user of it was sufficient to constitute the necessary possession.

[33] The learned trial judge found that it was the respondent's brother and his family who were the primary users. What use did they make of the land or what custody and control did they have over it? The findings related to this are limited. They appear to be no more than storing boats on part of the land for use either recreationally or for access to the islands, and using the land for access to the foreshore and at some time placing a disused railway container on it to be used as a shed. According to Mr Henderson the use made of the land by Lord Faulkner's son appears to have been seasonal (and probably recreational) and ceased when the Cruising Club was opened in 1983/4. None of those acts amount to the degree of physical custody or control of the land sufficient to constitute possession nor do they demonstrate an intention to possess the land. The learned trial judge found that taking into account the installation of the fencing and the gate and the construction of the channel, the user by the Faulkner family constituted possession of the disputed land. Enclosure of all or a significant part of the disputed land can be cogent evidence of possession by the claimant and dispossession of the paper owner. Such enclosure is not conclusive and has to be considered in the light of all the other evidence, in particular the nature and character of the land, together with the user, if any, of the land and the extent of it. Enclosure is usually associated with significant physical user of the disputed land, for example as shown in the Pye case, *supra.* It will be more cogent where it controls all access to and from the disputed land throughout the necessary period and where all other persons are clearly excluded. The evidence does not suggest that true enclosure was created by the erection of the fencing and the gate. The gate was located near to where the boats were stored and did not control access to the land but to that part where the boats were stored.

The construction of the channel was outside the disputed land and for the purpose of facilitating the launching and beaching of small boats. While the boats which used it were probably stored on the disputed land, the construction and use of the channel does not, to my mind, advance to any significant degree, if at all, a claim that the constructor or user of the channel possessed the land or intended so to possess it. I do not consider that any of the acts found by the learned trial judge either singly or in combination amount to a taking of physical custody and control of the land so as to amount to possession of it or to the requisite degree nor to my mind do they demonstrate an intention to possess the disputed land.

[34] The learned trial judge found that these acts amounted to a single possession exercised on behalf of the appellant and his brother jointly. In Powell's case, *supra,* Slade J stated at page 470 that "Factual possession signifies an appropriate degree of physical control. It must be single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly". It is recognised in many cases that the word 'conclusive' should read 'exclusive'. In the second sentence in that passage Slade J. recognised there could be a single possession exercised by several persons jointly, or a single possession exercised on behalf of several persons jointly. Thus he envisaged two entirely different situations. The single possession contemplated on behalf of several persons jointly would require possession by a legal entity capable of acquiring possession, exhibiting the necessary animus possidendi. and of attaining title to the land. I do not think that a wider family circle comprising two distinct families with no common focal point other than the ownership of separate islands in the Lough qualifies as such an entity.

[35] The learned trial judge found that the primary users were Lord Faulkner and his family. That begs the question - who exercised the single possession of the disputed land on behalf of the respondent and his brother ? There is no finding that Lord Faulkner exercised personally any physical custody or control of the disputed land or made use of the land in any way. There was a finding that his son used the land for seasonal boating purposes, but for a limited period. The respondent did not use the land in any way other than in the erection of the fence and the gate. There is evidence that Mr Hunsdalel and Mr Campbell stored boats on the land, with the respondent's permission. Where a claim to title by adverse possession depends upon a single possession exercised on behalf of others, clear evidence as to who exercised that possession, and the nature of it, would be necessary. There is no evidence that the brothers did any act jointly with an intention to possess the disputed land or from which an intention to possess the disputed land jointly could be inferred. There are findings of independent acts by the respondent and Lord Faulkner's son. Single possession on behalf of others presumes a prior agreement or arrangement that the possession is exercised on behalf of another. There is no evidence of any agreement that someone

would take physical custody and control of the land on their behalf nor that such be done with an intention on their part to possess the land. Equally there is no evidence of any agreement between the brothers to exercise physical custody and control of the land on each other's behalf nor, and perhaps more critically, a finding of an intention on the part of each of them to possess the disputed land jointly and on each other's behalf.

[36] The period during which the respondent might have acquired title by adverse possession ranged from 1973 to April 1999. The respondent accepted that he had not used the land after he purchased Ringhaddy House in 1980 and David Faulkner ceased his association with it in 1982/3. In the absence of evidence of continuous user throughout that period, findings as to the date when the paper owner was dispossessed and/or the date when the right to take action to recover the land accrued, are necessary.

[37] There is no evidence that the appellant or her predecessors in title used the land in question. Before this area became 'an extension' of Bob Dougal's Boat Yard, it was part of a large field used as farmland. As time passed the area available for farming reduced as the character of the area changed. The absence of use by the paper owner of such a parcel of land is of no great significance. A paper owner is under no obligation to make use of his land – see Ironmonger v Bernard International (Estate Division) (Court of Appeal) Millet LJ unreported 9 February 1996.

[38] Slade J stated that it must be shown that an alleged possessor has been dealing with the land as an occupying owner might have been expected to deal with it and that no-one else has done so. The only use made of the disputed land appears to have been the storage of boats and the enclosure seems more to prevent the incursion of cattle or to secure the boats, than for any other purpose. At best these acts are equivocal and would require further compelling evidence that they were done with an intention to possess. That compelling evidence is absent.

[39] The evidence adduced is to my mind insufficient to prove a case of adverse possession. The respondent's association with the land ceased in 1980 at which date no twelve year period had accumulated. The acts thereafter that are relied upon are insufficient to prove factual possession or an intention to possess. They are consistent with a continued user by Lord Faulkner's family and the respondent, as a former user of the lands and the senior surviving member of the family being approached for permission to make use of the lands. They do not to my mind signify a continuing dominion over the lands sufficient to prove factual possession of that land or an intention to possess it. The fact another person assumes one has dominion over land is no substitute for the degree of physical custody and control required for adverse possession. I do not think the acts by the Faulkner family were sufficient to

constitute adverse possession.. This user ended in 1983/4 and no twelve year period had been acquired by that time.

[40] Significant question arise with the death of Lord Faulkner in March 1977.The judge did not find that the respondent acquired adverse possession on his own behalf from 1977. He found that a single possession existed from 1973 which was exercised on behalf of the brothers jointly. After Lord Faulkner's death his family continued to use the disputed land but only until 1983/4. There is no evidence that this was with the agreement of the respondent. After 1983/4 only Mr Hunsdale and Mr Campbell used the land. The judge found that the respondent was entitled to adverse possession for a period in excess of twelve years from 1973 as the sole title holder. However, from 1973 to 1977 the possession was exercised on behalf of each brother jointly. The respondent would not be entitled to sole adverse possession from 1973. Even after 1977 and until 1983/4 Lord Faulkner's family used the land. The evidence suggests that this user was primarily by David Faulkner. Therefore it might be said that the respondent's user was not exclusive during this period, unless it was jointly with members of Lord Faulkner's family as it had been with Lord Faulkner. Therefore the respondent's sole possession (if such) or user could not begin until 1983/4. However, the respondent conceded he had not used the land from 1980. The user of the land thereafter by Mr Hunsdale and Mr Campbell was not, in my view, sufficient to enable the respondent to claim sole adverse possession, at a time when he was making no use of the land whatsoever. The judge appears to have recognised this when he said that the respondent's actual use of the land caused him more concern. Therefore the only way the respondent could claim adverse possession from 1973 was jointly with his brother. In order to do so he would have to acquire his brother's interest by the application of the rule of survivorship. For survivorship to apply the brothers required to hold their possession as joint tenants. The learned trial judge made no finding that a joint tenancy existed. Indeed the evidence as to user does not suggest a joint tenancy did exist. The respondent's user commenced in 1973 but the findings suggest that his brother and family were using the land prior to that date. The existence of a joint tenancy would require that both brothers acquired an interest in the land at the same time – one of the four unities necessary for a joint tenancy. In the absence of a specific finding by the learned trial judge, based on considered evidence, that a joint tenancy existed, I do not consider an inference can be drawn that a joint tenancy did in fact exist between the two brothers. Thus no inference could be drawn that the respondent acquired his brother's interest (whatever it was) by survivorship. It is doubtful if the judge relied on survivorship. At page 18 he found that this was a single possession exercised on behalf of the appellant and his brother jointly. He then referred to the respondent's evidence that he did not personally use the land for his own purposes after 1980. However, he was satisfied that Lord Faulkner's family did continue to use the land as well as Mr Hunsdale and Mr Campbell. This user appears to have advanced the single possession exercised

on behalf of the brothers jointly to the point where the judge was satisfied that the respondent was entitled to adverse possession. What is not clear is how that situation translates into a finding that the respondent was entitled to be registered as sole owner of the disputed land.

[41] Whatever possession the respondent had acquired from 1973 ceased on his purchase of Ringhaddy House in 1980. As I have already observed, the use relied on thereafter by others was not sufficient to enable the respondent to establish adverse possession. In effect the respondent abandoned whatever possession he had in 1980 and by then had not established the necessary statutory period of twelve years. Where an intruder without title holds possession of land for less than the statutory period and then goes out of possession, the period of adverse possession lapses (unless someone else without title enters into possession) and the paper owner is in the same position as if there had been no intrusion – see Halsburys Laws of England Vol 28 4th edition Reissue para. 989.

[42] A person in possession without title, but before the statutory period has elapsed, has a transmissible interest in the land (good against all the world except the paper owner). If he leaves the land and is followed by another claimant without title, the period when the paper owner is without possession, due to the first claimant's possession, may inure to the benefit of the second claimant. The merger of the two (or more) periods of possession may defeat the paper owner. Such a situation was contemplated in the judgment of Nicholls LJ (as he then was) in Mount Carmel Investments v Peter Thurlow Ltd [1988] 3 AER 129 when at p.135H he said

> "If squatter A is dispossessed by squatter B, squatter A can recover possession from squatter B and he has 12 years to do so, time running from his dispossession. But squatter B may permit squatter A to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A sells or gives his interest in the property, insecure as it may be, to B."

Thus if Lord Faulkner was in possession from 1973 until 1977 and the respondent was in possession from then until 1985, having acquired Lord Faulkner's interest in the land, the paper owner's title might have been extinguished and the respondent in a position to claim adverse possession of the disputed land. The respondent did not claim adverse possession in this way nor did the learned trial judge find so. Such a claim would depend upon sufficient acts of possession from the time the respondent purchased Ringhaddy House in 1980 until at least 1985. The acts relied on from 1980 to 1985 are insufficient to establish the necessary factual possession and/or the

necessary *animus possidendi.* In addition, it would require evidence that the respondent acquired Lord Faulkner's interest, applying the ordinary principles of law, for example by agreement, sale, gift or inheritance. There is no such evidence. Nor did the appellants go to court to meet such a claim. If such an approach had been suggested before the learned trial judge it is not difficult to contemplate the type of questions that the appellants would have raised.

[43] Whichever way one approaches the issues identified in this case, the evidence was insufficient to establish the necessary factual possession and intention to possess for the statutory period of twelve years. Therefore I would allow the appeal and restore the order of the Deputy Registrar of Titles.