Neutral Citation No. [2014] NICty 7

Ref:

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

Delivered: **19/12/2014**

IN THE COUNTY COURT FOR THE DIVISION OF FERMANAGH & TYRONE

Between

BRIAN KEENAN

Plaintiff

-and-

DAMIAN CURRAN

Defendant

Her Honour Judge McReynolds

BACKGROUND

[1] By Civil Bill dated 5 July 2012 the Plaintiff sought an Injunction and damages in respect of an alleged blockage by the Defendant of what the Plaintiff claims is his Right of Way over land in the ownership and occupation of the Defendant. I heard oral evidence in respect of this Civil Bill at Dungannon on 8 October 2014 and have received affidavits and perused documents and photographs. I am obliged to Counsel for their skeleton arguments.

[2] The Plaintiff is the owner of 3 parcels of land comprising in total 23 acres in Folio TY65049 County Tyrone. The land is situated near to the Fingrean Road, Loughmacrory, Co Tyrone. These parcels have been referred to as Fields C, B (1&2) and A. Field C is closest to the Fingrean Road , Field A is farthest from the road. The

Defendant also owns three parcels of land at the same location, which alternate with those of the Plaintiff.

[3] The families of the Plaintiff and Defendant have lived alongside each other and been neighbours for generations, notwithstanding that the surnames of title holders have changed as the history of inheritance and sibling interest purchase has developed. This is relatively mixed to poor quality land and the history is of subsistence farming, supplemented by work at trades and professions so there were children leaving for employment and returning home. The Defendant was one of eleven siblings. The Plaintiff's mother, Rose Keenan (nee Kelly) was one of sixteen. In such situations, historically, the sibling who could afford to buy out the interests of others has, on occasion, become an absentee owner. The Plaintiff, for example, lives and works in Belfast.

[4] Both families acquired the land when it had been released originally by the Irish Land Commission, which had acquired it from the Stewart Estate. The Keenan/Kelly family and the Curran family acquired alternative parcels. The predecessors in title of the Plaintiff held field A (high lying poor mountain land from which turf was cut) adjoining Fields 20 ,21,22 which belonged to the predecessors of the Defendant ,Mr Curran. This parcel adjoins the Plaintiff's field B. In Field B parallel ditches are visible running through some old photographs and maps, possibly marking an historic track. The track appears to lead to a group of fields belonging to the Defendant Curran family. These small fields (13,14, 15,16,17,18,19) were quarried out by the Defendant in 2004 when he built his new home adjacent to Kelly/Keenan homestead which, in turn, sits alongside the old Curran house. Mr Damien Curran used these fields to quarry out hard core for the construction site and used hard core to either make or to make good the most vehemently disputed path over what collectively became known as 'The Quarry Field'.

[5] The Quarry Field (as 13-19 are collectively known) abuts the Plaintiff's lower field, Field C which is the best agricultural quality field, with some arable potential. It is the Plaintiff's field which lies closest to the Fingrean Road. The Defendant does not dispute that the Plaintiff has a right of way over his lands from the Fingrean Road as far as Field C. The major point of dispute is at Point X, the point where the Quarry Field of the Defendant meets Field B of the Plaintiff and where the Defendant placed a gate which gave rise to the proceedings and to the application of the Plaintiff for Injunctive Relief. This was resolved on an Interim 'Without Prejudice 'basis in 2012 when the mother of the Plaintiff was given a key to this gate.

[6] Neither party has within his respective title any express Right of Way over the land of the other. The Plaintiff received his holding from his mother, Rose Keenan (nee Kelly) in June 2011. Rose Keenan still lives at Pomeroy, near to this holding

which she purchased the lands in 2002 from her brother Paul Kelly, who still lives in the old family home. The Defendant, Declan Curran's mother died in 1974 and his father, who died ten years later in 1984, had re-married in1980 so the land fell into the ownership of Mr Curran's stepsisters, from whom he bought it in 2004 and he commenced the construction of a home thereafter. It was in this context that the track over the "Quarry Field" was either re-made or made good.

[7] The Defendant believes that he has a Right of Way over the Plaintiff's Field B between the Quarry Field and his next Field 20 or 'Upper Field' (presumably by prescription) but he considers that the Plaintiff does not have a right to traverse field 20 between the Keenan fields A and B nor to pass over his fresh path over the Quarry field into B from C. The Defendant has no counterclaim and is not open to the possibility that there is any mutuality of entitlement. He received no practical or financial contribution from the family of the Plaintiff to the works on the track in the Quarry Field.

THE ISSUES

[8] Counsel for Defendant has formulated the issues as follows:-

a. Does the Plaintiff enjoy a right of way by prescription across the Defendant's land known as the Quarry Field?

b. Does the Plaintiff enjoy a right of way by prescription across the Defendant's land known as the Defendant's upper Field?

c. If either of the above is in the affirmative, is the Plaintiff entitled to damages for the alleged loss of conacre and/or inconvenience?

d. Should any Order for costs be made?

The court has not been asked to adjudicate on the question whether the Defendant enjoys a right of way over the Plaintiff's Field B, or has a revocable licence to traverse it. There is no request for factual adjudication on the issue of whether his user is nec precario. The Plaintiff claims he and his predecessors in title have used the laneway continuously, openly and as of right for a period in excess of 40 years. The Defendant asserts that the Plaintiff can access the top field A from a 'town path.'

THE EVIDENCE

[9] It appears the Grandfather of the Plaintiff bought out the lands in 1943 and built a house in which the witness, Rose Keenan, was born around 1950 and grew up with her fifteen siblings before marrying the Plaintiff's father. Her own father died in

1990, having been ill since 1980. In 2002 she purchased this part of the family holding and she took little to do with it as her husband handled such matters. He died in 2008, following illness. The witness gave evidence of user of a complete track between all three parcels of family land during her childhood. In particular she gave evidence that the family fetched water from a pumped well in Field B and in her affidavit she alluded to the lands being in use for potatoes, hay and turf. There was little evidence of user after her father became ill in 1980, although there is some reference to a land surveyor using a hard core track in 1986.

[10] In his affidavit the Defendant avers that he has no memory of seeing the Kelly or Keenan Family seeking access over any track or using one. He states the lands were not farmed and were neglected by the Kelly Family until after the death of the Plaintiff's father. He states there is a laneway which comes up to a gate allowing the Kelly/Keenan family access to Field C. In paragraph 3 of his affidavit he asserts that he has worked the entirety of his lands as a farmer all his life, having been born in 1968. In his evidence, however, it emerged that between 1984 and 2004 his stepmother and/or stepsisters had control of the lands. The lands might have some potential for wind farming, according to the Defendant.

[11] It is common case that in 2006 the Plaintiff's father approached the Defendant seeking permission to remove a march ditch at the rear of the Defendant's new house and this was declined. Following the death of Mr Keenan Senior, ill feeling escalated between the Plaintiff's mother and the Defendant when she and her brother burned gorse. This was especially irritating as a mountain fire occurred and the Defendant is someone who takes environmental protection seriously. In 2012 Rose Keenan contacted the Defendant indicating that his horses were on her land. At that time funding was available for fencing of the Plaintiff's fields but a gate had been erected and access to Field B was blocked. Injunctive proceedings were issued and the gate arrangement agreed. The Plaintiff seeks damages for loss of potential conacre income, on the basis that the key dispute is discouraging tenants from taking the land.

[12] In the various maps and photographs which have been produced there is evidence of a trace of path visible, even as recently as 1997. In one photograph there is evidence of turf cutting in Field A, which Rose Keenan believed had been authorised by her father. It was contended that this was accessed by the authorised family passing over the 'Townpath' route from the upper road through a Glen. Mrs Keenan said this route might have been convenient for the family cutting the turf, but was not reasonably viable for the Plaintiff's family as it involved a half hour journey.

FACTUAL CONCLUSIONS

[13] Having heard and read the evidence and perused all documents, maps and photographs placed before the court, I have reached a number of factual conclusions. I am satisfied on the balance of probabilities that from before the Second World War the families of both the Plaintiff and Defendant used what was a continuous track through these unfenced fields from Field A. The track is clearest where there were (and to an extent remain) parallel march ditches, as in Field B.

[14] I am further satisfied that, given their limited quality as farmland, when a more prosperous era emerged in the 1960s the lands were put to little practical use. I am satisfied to the appropriate evidential standard that were occasional jaunts, even by pony and trap, as described by Rose Keenan to take spring water from the pumped well in Field B.

[15] I am further satisfied that there was a virtually parallel infrequency of use by both families of track from the 1980s until 2004. In the case of the Curran family the death of Mr Curran's father, followed by the succession of his stepsisters (from whom he had to buy back his father's land in 2004) was the main reason for such infrequency. In the case of the Kelly/Keenan family this extended through the illness of Rose Keenan's father into the illness of her husband, albeit he had approached the Defendant in 2006 about the march ditch. From 2004 the Defendant has been constantly present. I am satisfied that he alone made good and in part re-located the original path through the Quarry Field. He has respect for the countryside and I have no doubt that since 2004 he has been very active in upgrading the holding in an environmentally sympathetic fashion. The family of the Plaintiff was encouraged by grant aid to consider fencing and beyond initiating some preparations for this work, it has taken little interest in the lands, even indulging in very un-neighbourly gorse burning.

[16] Having established that the predecessors in title of each party had exercised unchallenged user of the path over the lands of the other for a period in excess of over forty years prior to the 1980s, I have addressed the issue of evidence of abandonment. I am satisfied on the balance of probabilities that the infrequency of user by both parties over the period from the 1980s until Rose Keenan and the Defendant took over control was not sufficient to amount to abandonment, albeit that the user was, as I have described, subject to a virtually parallel infrequency. The track is still visible as a change in vegetation in the 1997 photograph. There is evidence in respect of the land surveyor using the hardcore path in 1986 and Rose

Kelly's brother remains on site. I am satisfied that the path was regularly but infrequently in use.

[17] I am further satisfied that the track was a necessity in the years when the land was actively farmed and accept the evidence of Rose Keenan that the use of the 'Town Path' through the Glen was at no time viable. Without the track and mutuality of use, part of the holdings of both Plaintiff and Defendant would be landlocked.

[18] I similarly reject the notion of the Plaintiff having suffered a loss in respect of conacre letting potential. Given the quality of the land, the total lack of history of letting and the austerity of these times it is impossible for the court to be satisfied to the civil standard of proof that such a loss has been incurred. I am equally satisfied that the Plaintiff has not suffered distress as a result of interaction between his mother and the Defendant. Rose Keenan is clearly a robust personality. The Defendant no doubt expressed irritation at, for example, the gorse cutting but his demeanour is polite and appropriate.

THE LAW

[19] Neither party in this case has the benefit of an express grant. The Plaintiff asserts that he and his predecessors in title have acquired a prescriptive right of way over the Defendant's land. This is partly acknowledged by the Defendant. However, he concedes no rights beyond point X.

[20] Prescriptive rights may arise in three ways, namely; either at common law, under the Doctrine of Lost Modern Grant or pursuant to the Prescription Acts 1832. All three methods require evidence that the right was exercised by the owner of the dominant tenement over the servient tenement as of right, and the user must be *nec vi nec clam nec precario* (without force, without stealth and without permission).

[21] At common law a claim for a prescriptive easement can be defeated by any evidence that the right was not enjoyed since 1169 which is stated to be the period of legal memory. Easements can only be acquired by one fee simple estate for the benefit of another. As the dominant and servient tenement were in common ownership until the assignment by the Stewart Estate to the Irish Land Commission, and thereafter to the parties' predecessors in title, the common law rule on prescription cannot apply.

[22] A claim pursuant to the doctrine of Lost Modern Grant is based on an inference that by virtue of long user there must have been a more recent grant than from time immemorial which has since been lost. Gale on Easements 18th Ed. states (paragraph

409), "the gist of the principle upon which a modern grant is presumed is that the state of affairs is otherwise unexplained." Gale then cites Farwell J in Attorney-General v Simpson [1901] 2 Ch 671, "Where the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, omnia presumunter rite esse acta, and the court will, if reasonably possible, find a lawful origin for the right in question".

[23] The English Court of Appeal confirmed in **Tehidy Minerals v Norman [1971] 2 QB 528 CA** that where there has been more than 20 years user with all the necessary qualities (nec vi, nec clam, nec precario) then "the law will adopt the legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made".

[24] Even if original user was by amicable agreement, the courts have demonstrated a willingness to adopt a simple approach, namely that if one party has been using someone else's land without force, secrecy or permission for a period of 20 years that party can acquire a right of way by prescription . In the English Court of Appeal case of *London Tara Hotel Ltd. v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356 the Kensington Close Hotel's owners established that they and their predecessors had acquired a right of way by prescription through the doctrine of lost modern grant over the private road between their hotel and the Tara Hotel owing to the fact that the present owners and their predecessors had used the road for over 20 years *nec vi, nec clam, nec precario.* In 1973, the Tara Hotel granted the previous owners of the Kensington Close Hotel (KCL) a personal licence to use the private road from year to year, so long as it was not used for coaches. In 1978, the ownership of the Kensington Close Hotel changed hands and a new owner took charge. Despite this, the new owners of the Hotel continued to use the private road as before and, as the licence had been personal to KCL, without permission. In the Divisional Court it was found that the Tara Hotel's management was unlikely to have been aware of the fact that there had been a change of ownership in 1978, but would have been put on notice of a subsequent change of ownership in 1996, when the hotel was re-branded following a hostile takeover from the Granada group. However, as the licence was personal to KCL it lapsed in 1978 when the hotel changed ownership. In the absence of an implied licence (which the facts did not support as the Tara Hotel had not committed a positive act capable of being construed as giving permission) the Court of Appeal determined that it followed that the road had been used openly and without force and without the permission of the Tara Hotel from 1978, a period in excess 20 years.

[25] The Plaintiff seeks to establish a prescriptive right of way either pursuant to the Doctrine of Lost Grant or the Prescription Acts. The Prescription Act 1832 set out a statutory method for making a prescription claim. The 1832 Act requires proof of

user for at least 20 years prior to the action. If at least 40 years can be shown then the right is absolute and indefeasible

THE APPROPRIATE ORDERS

[26] I have given consideration to the nature of the user and its benefit to the Plaintiff and Defendant. I am satisfied that the duration, nature, benefit, quality, lack of interruption, openness and other elements are such to establish entitlement to a declaration on the basis of lost modern grant. I do not therefore have to consider the other bases on which the right might have been declared.

[27] I have referred above to the prolonged period of less frequent use of the entire track. The issue of extinction of an established easement was addressed in some detail in the judgment in Mulville-v-Fallon 1872 IR6 Eq 458 :

" extinguishment of easements, however created, may be by actual or implied release; the latter will be sufficiently proved by a cessation of user, coupled with any act clearly indicative of an intention to abandon the right; and if such intention be thus shown, the duration of the cesser need not be for 20 years over any other defined period".

Given that I have found there was regular but infrequent use I do not consider that either party has conducted himself in such a way as to effect extinction of the easement.

[28] In respect of Injunctive Relief I consider an order requiring the removal of any obstacle to the exercise of the Plaintiff's declared Right of Way to be appropriate and proportionate.

[29] I have answered the questions formulated by Defence Counsel as follows:-

(a)Affirmative;

(b) Affirmative;

(c) Negative .

I shall hear Counsel in respect of costs and draft order.