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Judgment: approved by the Court for handing down | *Delivered:* **20/12/12**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

NORBROOK LABORATORIES LIMITED

Plaintiff;

-and-

PETER MAGUIRE

Defendant.

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BETWEEN:

NORBROOK LABORATORIES LIMITED

Plaintiff;

-and-

GERARD TRAINOR

Defendant.

_____

DEENY J

[1] In these actions Norbrook Laboratories Limited has sued two of its neighbours in respect of small pieces of land adjoining the plaintiff's factory premises at Station Road, Newry. Station Road runs off Camlough Road, Newry up to the Northern Ireland Railway Station. The road itself runs below the railway embankment in parallel with the Newry dual carriageway.

[2] I directed that the two actions be tried together as they were from 22-26 October 2012. Mr Stephen Shaw QC led Mr Bernard Brady for the plaintiff. Mr Brett

Lockhart QC appeared for both defendants instructed by Messrs Elliott Trainor but with Mr Rodger Dowd as junior for Dr Peter Maguire and Mr Peter Hopkins as junior for Mr Trainor.

[3] The proceedings against Dr Peter Maguire were commenced by writ of 14 June 2006 in which the plaintiff sought a declaration in relation to two pieces of land. The first piece in dispute is a narrow wedge of land, 2.96 metres at its widest tapering to nothing which lies on the defendant's side of the northern wall to his and Mr Trainor's properties. The second piece in contention only involves Dr Maguire. It is a strip of land running from the same wall where it joins a wall on Station Road down to the point where that wall meets the front wall of Dr Maguire's property. It is convenient to deal with the wedge and the strip separately and I shall do so in due course. Mr Trainor is involved only in connection with the wedge, proceedings having been issued against him on 12 June 2007. I propose to address the legal considerations applicable in this situation followed by an assessment of the history leading up to these proceedings and the evidence therein as it applies to the wedge along the northern wall and the strip beside Station Road.

The law

[4] I had occasion to address this topic in Northern Ireland Housing Executive v Noel Gallagher [2009] NI Ch. 2. For convenience I set out paragraph [3] of that judgment:

> "[3] It is convenient in this case to refer to the law relating to such a claim before considering the facts as found by the court. The topic has been the subject of recent consideration by the Court of Appeal in Re Faulkner [2003] NICA 5. The relevant law is summarised by Carswell LCJ at paragraphs [12] to [14] of his judgment and I gratefully adopt that for the purposes of this judgment.
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> > **'[12]** Limitation of actions to recover land is now dealt with by the Limitation (Northern Ireland) Order 1989. The period is prescribed by Article 21(1) as twelve years:
> >
> > > "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."

By Article 26 the title of the true owner (sometimes called for convenience the "paper owner") is extinguished at the expiration of the time limit fixed by the Order for the recovery of land, viz twelve years after his right of action accrued. The accrual of rights of action to recover land is dealt with in Schedule 1 to the Order. Paragraph 1 provides:

> "1. Where the person bringing an action to recover land, or some person through whom he claims –
>
> (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."

The House of Lords has stated in *J A Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865 that the search for ouster

in which courts were wont to engage is unnecessary, and that the question is simply whether the squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner (per Lord Browne-Wilkinson at paras 36-38).

[13] Paragraph 8 of Schedule 1 goes on to make further provision in respect of adverse possession. The material portions are contained in sub-paragraphs (1) to (3):

> '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."

Sub-paragraph (4) deals with rent charges and sub-paragraphs (5) and (6) abrogate the doctrine of implied licence which the courts had developed, but which is not material to the present case.

[14] The principles evolved by the common law governing the establishment of sufficient adverse possession were summarised by Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 at 470-2 in terms whose correctness was subsequently confirmed by the Court of Appeal in *Buckinghamshire County Council v Moran* [1990] Ch 623 and by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; [2002] 3 All ER 865:

> '(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 reasonably practicable and so far as the processes of the law will allow."

The matter is summarised by Lord Browne- Wilkinson in Pye. At paragraph 40 he pointed out that "there are two elements necessary for legal possession:

> (i) A sufficient degree of physical custody and control ("factual possession");
>
> (ii) 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."

[5] My decision, in favour of the legal owner, was upheld on appeal to the Court of Appeal NI in Noel Gallagher v NIHE [2009] NICA 50; see the summary of relevant legal principles at paragraph [14] in the judgment of Girvan LJ. In addition Mr Lockhart QC in closing and in written argument asked this court to take into account Jourdan and Radley-Gardner: Adverse Possession, 2nd Edition, 2011, at [7-17] and following, and certain other cases which he submitted were of particular relevance. The first of those upon which he relied is Red House Farms (Thorndon) Limited v Catchpole [1977] 2 EGLR 125; C.A. This related to a small area of land of about a one acre which had been cut off before the Second World War from the estate of which it was a part. A bridge to give access to the land had disappeared by the end of the Second World War. The evidence of Mrs Catchpole, who defended an action for possession brought by the estate owners was that either she, or a syndicate invited by her, had shot over the land for several decades after the war. Cairns LJ at page 3 of his judgment said as follows:

> "If the defendant is to succeed here it must, I think, be on the basis of shooting by herself and the shooting organised or permitted by her. It is contended that such shooting could not amount to possession. The authorities make it clear that what constitutes possession of any particular piece of land must depend upon the nature of the land and what it is

> capable of use for: see, for example Tecbild Ltd v Chamberlain (1969) 20 P&CR 633, at 641. I am quite satisfied that between 1945 and 1964 the only profitable use of this land was for shooting. Our attention was drawn by Mr Cullen, on behalf of the defendant, to the Privy Council case of Cadija Umma v S Don Mans Appu [1939] AC 136, where, as appears at 140, cutting the grass was treated as possession in relation to the particular piece of land. So here I think that the learned judge was quite right to treat the shooting activity as constituting possession."

His Lordship went on to deal with discontinuance by non-user and at page 4 one finds the following:

> "Great reliance is placed by Mr Browne-Wilkinson [for the legal owner] on the case of Tecbild, to which I referred earlier. It is, I think, only necessary to read the holdings in the headnote there to see how greatly that case differs from the present one:
>
> > 'Held, dismissing the appeal,
> >
> > (i) That an owner of land did not necessarily discontinue possession of it, ie, abandon it, merely by not using it, but that each case depended on the nature of the land or property in question and the circumstances under which it was held; that in the present case, lack of user was of itself no evidence to warrant a finding of discontinuance and there was no evidence on which discontinuance could be found.'
>
> Here, as I have said more than once, it is not non-user by itself; it is the non-user together with the actual cutting off of this piece of the land from the adjoining land."

[6] Mr Lockhart relies on this in relation not only to the northern wall but the admitted evidence from the plaintiff itself that it also built a wall which separated the strip along the Station Road from the rest of the factory premises. The decision of the County Court Judge in favour of Mrs Catchpole was upheld by Cairns LJ with

whom Orr LJ and Waller LJ agreed. Counsel relies on this passage from the judgment of the latter at page 5 of the report, as copied to me:

> "The evidence of the change of the nature of this land, was in my view most important. While it had been used for agricultural purposes, first of all, before the cut was made, and secondly, after the cut was made, but finishing sometime during the war, there was no question but that from the end of the war onwards the land was of an entirely different character and could only be used for shooting. There was clear evidence given by Mrs Catchpole that considerable use for shooting had been made of the land either by her or by a syndicate for which she was responsible, and that that had gone on throughout the years from 1947 up to and including 1964, though in the latter years she had not personally shot so much. Mr Browne-Wilkinson submitted that that was equivocal and that mere shooting could not be sufficient to amount to taking possession but, in my view, it is clear from the authorities that when considering what is required to amount to possession the court should look at the nature of the land which is being considered, and as I see it, if the only purpose for which the land can be used is for shooting, and that is the actual case made in this case by the defendant, then that is an act of possession which is quite sufficient for the judge to draw the inferences which he did."

Again Mr Lockhart relies on this with regard to the user by his clients of the land in dispute.

[7] He also drew to the court's attention London Borough of Hounslow v Minchinton [1997] 74 P.& C.R. 221; CA. This was relevant as relating to a strip of rough land at the bottom of the appellant's garden. The Court of Appeal found that the County Court Judge had misled himself by relying on Leigh v Jack [1879] 5 Ex D. 264, which was no longer good law in the light of Buckinghamshire County Council v Moran [1990] 1 Ch. 623. Mr Lockhart relied on several passages from the judgment of Millett LJ, as he then was. At page 230 of the report he said the following:

> "Returning to the present case, I start with the fact that it was the plaintiff's predecessor in title which erected the fence in such a position as to exclude access by the Council [i.e. the plaintiff] and its

> predecessors entitled to the hedgerow and the disputed strip. Since that was not an act of the defendant or the defendant's predecessor in title, by itself it cannot be relied upon as an act of dispossession. But, to my mind, it is strong evidence of discontinuance of possession by the true owner. "

[8] The plaintiff there was in the position of Norbrook here with regard to the northern wall. The defendant there succeeded on appeal in showing that she enjoyed the strip of land at the end of her garden on her side of the fence erected by the Council which excluded themselves from access to the strip.

[9] Millett LJ went on at page 232 as follows:

> "It is perfectly comprehensible that in the case of a field or agricultural land the mere building of a boundary within one's own land and cutting off access to land on the other side may not constitute a discontinuance of possession, but I doubt very much whether that is a sensible inference to draw in the case of suburban land where the exact boundary between adjoining gardens is of much greater importance. Be that as it may, it seems to me clear and indeed was conceded that if the defendant or her predecessors in title [i.e. the squatters] had erected the fence and no objection had been made to it by the Council that would have constituted a dispossession and would have been strong evidence of adverse possession. Since it was not erected by the defendant or her predecessors in title it could not constitute in itself an act of dispossession nor could it be in itself an act of adverse possession. But in my judgment the fact that the Council's predecessor in title erected the fence and thereby denied itself access to the land lying beyond it was capable of constituting a discontinuance of possession."

Later the Lord Justice referred to the acts of possession by the defendant claiming adverse possession and the predecessor in title as maintaining a compost heap and weeding and trimming the hedge and so on. But he concluded that was the only sensible use of the land. Thorpe LJ who agreed with him quoted the works of the predecessor in title son-in-law as "the cutting of the hedge and weeding at the very end of the garden, the compost heap and the growing of strawberries." Butler-Sloss LJ agreed with both judgments. I observe for convenience that this authority is of assistance to Mr Lockhart in regard to the wedge of ground within the northern wall and also in regard to the strip of land beside the Station Road. There the wall is

only erected, by Norbrook in 1998 but it is extended to the footpath cutting them off from the strip. In the view of Millet LJ that is capable of constituting a discontinuance of possession.

[10] Counsel also asked the court to take account of the judgment of Briggs J in Hicks Developments Limited v Chaplin [2007] EWHC 141 (CH). This was an appeal from an adjudication in the Land Registry and relates to a strip of land running alongside a driveway. I did not find it of any real assistance here.

[11] Finally counsel asked the court to consider Chapman v Godinn Properties Limited [2005] EWCA Civ. 941. I think it sufficient if I quote two short passages from the judgment of Chadwick LJ. At paragraph 22 of his judgment he said the following:

> "As I have said, the strip comprises the two entrances, some worn grass verge and banks leading up to the close boarded fence which are densely covered with self-sewn and some planted shrubs. It is not land in relation to which the owner, or the person in possession, could be expected to do more than tidy up and to maintain the two entrances. Keeping the land tidy involves mowing the grass and cutting back the shrubs from time to time. Maintaining the entrances no doubt involves filling in the holes and some maintenance work."

At paragraph 28 his Lordship said:

> "The judge held that these claimants, Mr and Mrs Chapman, were doing all that they could be expected to do, in relation to this land, to make their intentions unambiguously clear to the world at large.
>
> I bear all these submissions in mind. Clearly a decision of this kind is fact specific. The court must take into account the nature of the land in contention and the precise acts of the parties which could constitute acts of possession or indeed dispossession. But at the end of the day the onus is on the party claiming a title by adverse possession."

He then cites a dictum quoted above. The intention required is not to run a title but to possession of the land, to treat it as one's own and use it in the way appropriate to that particular piece of ground. Bearing these matters in mind I then turn to the facts of these particular cases.

Wedge of land at northern wall of properties of the defendants

[12] The parties to these actions retained experts to advise them. Mr Conor McCumiskey and Mr Chris Callan are to be congratulated on agreeing a considerable amount of factual matters and committing those to a master plan, which they signed on 19 October 2012. I shall attach to this judgment a copy of the said master plan on which certain further measurements were added by a Mr Felix Magee, chartered structural engineer, called on behalf of the defendants. He helpfully confirmed that these additional measurements which relate to the strip rather than the wedge had been agreed with his opposite number, Mr Savage.

[13] The history of the title of the property, as represented in the master plan, is not without complexity. As, however, the outcome of the adjudication is as plain as a pikestaff I can confine myself to the salient features, so far as possible.

[14] On 9 November 1956 Bernard O'Hare, the grandfather of Peter Maguire, purchased Folio 23596 on which No. 23 Camlough Road, sometimes known as No. 21 I was told, was built. On 8 September 1964 Geraldine O'Hare, Bernard's daughter and the mother of Peter Maguire purchased Folio 21289. This was a triangle of ground stretching behind Nos. 23-27 Camlough Road. On 5 June 1967 she transferred part of Folio 21289 (2 roods and 25 perches) to Bessbrook Products Limited, the predecessor in title of the plaintiff. This part was created and registered as Folio 25421. The part of Folio 21289 remaining to her was a smaller triangle of ground running behind nos. 23 to 27 Camlough Road with its base a little distance behind Station Road. The plaintiff company acquired Folio 25421 on 27 July 1978.

[15] On 29 January 1996 Peter Maguire was registered as owner of Folio 23596. This was his mother's childhood home in which he spent a considerable part of his childhood not only because it was the home of his grandfather but because his mother and he lived there for part of his childhood as his father was a merchant seaman serving overseas. On 5 August 1996 Mr Maguire, as I think he then still was, was registered as owner of Folio 21289.

[16] On 8 April 2002 Dr Maguire, as he had become, transferred part of Folio 21289 to Mr Gerard Trainor. This was the narrower part of the triangle referred to above and lay behind 25 and 27 Camlough Road, Folios 23490 and 22029 respectively, which were both in the ownership of Mr Trainor. Therefore this was one neighbour selling the ground behind his other neighbour's house to that neighbour. In fact the earlier deeds had given Mr Trainor a right of way over this ground to a lane which runs to the west of No. 27 Camlough Road. The boundary line between the two folios, possibly reflecting a physical boundary on site, to some degree, does not extend directly backwards from the boundary between Nos. 23 and 25 on Camlough Road. What is clearly intended is that Dr Maguire would retain an area of ground constituting his rear garden. At that stage I think one would be using a garden in a fairly broad sense.

[17] In 2003 Dr Maguire sought and obtained planning permission to replace the smallish house which his grandfather had bought in 1956 with a larger dwelling. For the purposes of the discussion of the wedge at the northern wall this is of no great moment. It is right to say that in 2003 Mr Trainor applied for and obtained planning permission to build a garage on Folio AR89497 which is very close to the northern wall of what are now the properties but as it happens not apparently physically encroaching, although subsequent evidence showed that the oil tank behind the garage is outside the folio line of AR89497.

[18] It does not appear that either gentleman checked the consistency of the folio line with the boundaries on the ground before the transfers of 2002, and importantly, before Dr Maguire built his house in 2003/2004. He subsequently brought a Section 53 application to register the wedge in question as his property. As indicated above it is a narrow triangle, 2.96 metres at its widest at the eastern end narrowing to 1.59 metres where it meets folio AR89497 and tapering away to nothing at the wall behind Mr Trainor's property. However Mr Matthew Forde, solicitor, at that time objected to these proceedings on behalf of the plaintiff which, as I said above, subsequently issued proceedings. The issue therefore is who owns this narrow wedge or triangle of ground between the northern folio lines of 21289 and AR89497 and the northern wall to the properties to which I must now turn.

[19] It is common case that the only things to be found on the wedge in contention are plants, save for the oil tank behind Mr Trainor's garage. It is also agreed that the wall currently in place was built in 1997/1998 by the plaintiff and along the line of a pre-existing fence, erected soon after 1967.

[20] Dr Peter Maguire gave evidence on his own behalf. As indicated above 23(21) Camlough Road was purchased by his grandfather Barney O'Hare in 1956, having been built in 1954. It was the childhood home of Dr Maguire and his current home. This defendant is a consultant anaesthetist at Daisyhill Hospital. I found him a careful, candid and wholly reliable witness. I have drawn on some of his evidence above.

[21] With regard to the wedge at the northern wall there was in his childhood a post and wire fence. This was the back boundary of his grandfather's garden. Garden again should be used and was made clear by him to be used in a broad sense of the word. Indeed he put in a photograph showing three children with his grandfather and a certain amount of rubble behind them and then rough grass can be seen behind the figures in the forefront and the post and wire fence to which I have referred. This photograph corroborates his evidence that there was no hedge on the folio line short of the fence. The use of the last piece of the ground would have been slight but he did tie his dog there at night to the fence and played there. I accept his evidence that the O'Hare/Maguire family used the whole ground up to the fence, which it is agreed is the line of the present wall.

[22] He put in a series of photographs which are of importance mostly in relation to the eastern strip which I will leave for now. The fence at the rear remained until replaced by the Norbrook wall in 1998. The rough grass in the larger triangle of land but behind 23, 25 and 27 Camlough Road was largely cut by Dr Maguire's bachelor great uncle using a ride-on mower. Later a man would come in to do that. He himself did not take any interest in the gardening. He was told by an agent of Norbrook that they would be building this wall and that to enable them to do so they would have to encroach on his ground to some extent. Subsequently during the building of the wall vehicles encroached on his ground to an extent that he felt objectionable and he called the police. The matter was dealt with at the time. I shall return to this later. His grandfather acted as a wholesale draper and both Dr Maguire's oral evidence and some photographic evidence points to a number of containers being kept on the ground behind their house to which travelling salesmen would come to buy materials for sale to the public. I find that the containers themselves did not go on to the little strip in contention but that is not necessary for Dr Maguire's case.

[23] Mr Shaw confirmed in cross-examination to Mr Maguire that the north wall was where the fence previously stood. Dr Maguire confirmed that the main activities on the actual wedge were the tying up of the dogs and the strimming or rough cutting of the grass up to the fence. Dr Maguire also accepted that he was told about the building of the north wall rather than his permission being sought for it. The permission was only to the extent of JCBs coming onto his ground to assist in building the wall. His complaint was that they were well within his fence rather than just a short distance. He thought they were some 10 metres or more on to his land and nor had he anticipated vehicles. He did complain of the damage they were causing and indeed refers to that in a letter to Gabriel O'Hare of the plaintiff of 12 June 1998.

[24] The second defendant Mr Gerard Trainor is a partner in the firm of Elliott Trainor, solicitors, of Newry. His uncle lived at 25 Camlough Road from 1954, a house which his parents bought in 1973. That house can be seen in Dr Maguire's photograph No. 1; it is still there. Mr Trainor now lives at No. 27 and therefore has lived at this location for almost 40 years. He too remembers the fence subsequently replaced with the Norbrook wall in 1998. He corroborated other aspects of Dr Maguire's evidence. Again I considered him an honest, precise and reliable witness. At one point Dr Edward Haughey, Chairman of the Plaintiff, encountered Mr Trainor in Dunnes Stores in Newry and asked him to thank his father for his co-operation about the northern wall. He, Mr Trainor, built a house at No. 27 but his father declined to move and they remained at No. 25 until his demise. Mr Trainor therefore owns Folios 22029, 23490 and AR89497. He has an oil tank behind the garage which he built on AR89497 and it would encroach on the wedge but it has not been there 12 years. Mr Shaw put to him at the end of the cross-examination that builders for Norbrook would say there was vegetative structure behind the northern wall, but Mr Trainor firmly denied that.

[25] Mrs Geraldine Maguire, the mother of Dr Peter Maguire was then called. This was her childhood home at No. 23, where she continued to live for some time because her husband was at sea abroad. In fact for some time she took over her father's business, after his death, importing clothes and blankets etc. for travelling salesmen to sell. The aluminium containers for these blankets, quilts etc. therefore remained even after her grandfather's death. She was emphatic that there was no hedge or line of trees or vegetation between their house and the post and wire fence later replaced by the northern wall save some small hedging close to No. 23. The ground was maintained by her Uncle Frank or her husband when at home or by another man called Martin.

[26] Mr Donal F Murdoch was called by the plaintiff as a witness. He had an MSc from Queen's University and was a co-director of Hardwood Developments with his brother who is a quantity surveyor. Mr Murdoch is a civil engineer. It was his firm that replaced the fence with the northern wall, as I have called it. The foundations of the wall were where the fence was. It had been about 8 feet high with 10 feet posts leaning in at the top with strands of barbed wire; this accords with the defendant's descriptions. He denied that his vehicles had been driving hither and thither but agreed that in the course of their work they would certainly have to go some metres on to Dr Maguire's undisputed land as well as on to the wedge. He acknowledged that he was told that they could use the land but was never told that there was a legal boundary just inside of the line of the fence.

[27] I pause there to say that it seems clear that Norbrook did not check the legal boundary at the time of rebuilding this wall in 1998. An interesting point might have arisen if they had sought to move the wall a couple of metres nearer to the house onto the land registry boundary. It seems very probable that a title had already been run before on the wedge of land but it is possible the Maguires would not have asserted it. But in any event that was not done. It was an acknowledgment in effect of the existing boundary as established by the previous fence and a further act of discontinuance of possession. Mr Murdoch denied that they had been approached by police in March 1998. He was the foreman on the site. He thought there could have been a hedge behind the fence but it seems to me, and I so find that he must mean the fence close to the then dwelling house at No. 23. He agreed that the documentation showed that Norbrook was referring to this as a perimeter wall (pages 134, 135, 139) or as "the boundary wall" (page 127). His recollection was that behind the then fence was fairly rough grass for some 5 or 6 metres and then cut more like a lawn, more "kempt" towards the house but his memory was limited. I shall have to return to the evidence of Mr Gabriel O'Hare in more detail in due course but suffice it to say that I have taken it into account here.

[28] It seems entirely clear to me that the fence was built, more than four decades ago, separating what is now the Norbrook premises from what was then the property of Mrs Maguire and her family at 23 Camlough Road. Thereafter the predecessor in title of Norbrook and Norbrook itself made no use of the land. Mrs Maguire, and subsequently Mr Trainor, used the land in a way that an owner

would have. In the case of the Maguires that was not extensive use but some keeping of the grass and vegetation under control and keeping a dog there. It had also been a place where Dr Maguire would run around to some degree as a child. These are modest acts of possession, Mr Shaw says, but I find that they are the acts of possession that are appropriate to the land in question. They were taking place behind a fence which clearly had on the ground established the use of the land between the parties. The building of the fence and subsequently of the wall are acts of discontinuance of possession by Norbrook and its predecessor in title. They were matched by acts of possession by Dr Maguire and his predecessors in title. While the Defendant's grandfather probably knew the precise boundaries of the land he had bought, I find that this knowledge did not survive him and that Dr Maguire and his mother had the necessary intention to possess the whole plot to the extent of its physical boundaries i.e. the fence to the north and the rocky face to the east. I am entirely satisfied that a good prescriptive title has been run by Dr Maguire and his predecessors in title and that he is entitled to have the boundary rectified in his favour. Norbrook's action against him with regard to the northern wall fails.

[29] Mr Lockhart, who appeared for both Dr Maguire and Mr Trainor, did not address me on the precise ownership of the tiny strip of land ranging from 1.59 metres wide to nothing now part of Folio AR89497. I imagine that Dr Maguire accepts that he intended to convey that to Mr Trainor in 2002 and that he is now the lawful owner. But I will hear counsel on that point.

The eastern strip along Station Road

[30] The legal title to this strip of land is quite different from that of that the tiny wedge at the northern wall. By deed of conveyance, to be found at page 54 and following in the trial bundle, the Department of Economic Development in Northern Ireland, on 22 May 1995 conveyed to Norbrook Laboratories Limited its title to a plot of land which appears to make up part of the plaintiff's factory premises with Station Road running down to its junction with Camlough Road. This includes, on foot apparently of a conveyance from Mary Kinney to the Ministry of Commerce on 25 October 1956, the strip of land which runs to the east of Dr Maguire's two folios behind the footpath on Station Road from the Camlough Road up to what is now the continuation of the northern wall of the property. It is delineated in the master plan. It appears from that that it is 5.87 metres as at its widest southern end and 3.17 metres at its narrower northern end. The issue before me is whether part or all of that strip remains in the ownership of the plaintiff or whether Dr Maguire and/or his predecessors in title have successfully acquired ownership of part or all of it by adverse possession.

[31] The documents in this case run to more than 450 pages although not all have been drawn specifically to the attention of the court. The evidence was given over some 3½ days. In the circumstances therefore it is clearly appropriate that I should not attempt to set this all out in full but to confine myself to my own findings of fact in the light of the evidence.

[32] As already indicated I heard the evidence of Dr Maguire, Mr Gerard Trainor and Mrs Mary Geraldine Maguire all of whom I rely on as candid and honest witnesses. I form the same view of Mr Paul Madden who built a wall for Dr Maguire at the time of the construction of the new house at 23/21 Camlough Road in 2003. He denied, as Dr Maguire had done, bringing infill on to the site but he did level the whole site in a way that seems to me consistent with what Mr Savage found in his investigation of the bank behind the wall to the east. It was he who put a timber fence on top of the Norbrook wall, to which I will turn to in a moment. He put a new front wall along the Camlough Road frontage at Dr Maguire's site but on the site of the previous wall of 1954. In order to put up this wall which is taller than the old wall and which sought to match the Norbrook wall he did some excavation with a rock hammer.

[33] I have taken into account the evidence on behalf of the plaintiff including that of Messrs Savage and Black who are civil and highway engineers respectively. The evidence of the latter was designed to show that further development of the Norbrook factory site with land behind recently acquired by the plaintiff may well require the widening of the Station Road at Camlough Road. I observe that that gives a reason why the eastern strip, at least, may be important to the plaintiff but it does not really assist the court otherwise.

[34] I have indicated the evidence of Mr Murdock which relates really to the northern wall only. A more important witness for the plaintiff was Mr Gabriel O'Hare. A significant part of his evidence is not in contention. He spoke to neighbours of Norbrook on behalf of Norbrook prior to the building of the wall to the north of the property. He was then a foreman with Moss Construction and worked with Norbrook from 1994 until 2003. It was also he who arrived on the scene when the police attended at Dr Maguire's request when a machine on behalf of Norbrook went further onto his property then he thought either reasonable or previously agreed by him. There is a sharp difference between the evidence of Gabriel O'Hara and Dr Maguire in one other respect. Dr Maguire said that Mr O'Hare came to his house when he was asleep after being on night duty at the hospital. He sought his permission to build the wall along the eastern border of his property behind the footpath where at that stage no wall existed. Dr Maguire says he gave his permission for that. It was clear that he was not being asked to pay for it. Furthermore he said that Mr O'Hare came back to him during the construction of the wall to ascertain whether he was content with the on-going works. Dr Maguire had been a bit bothered by the noise of machinery at some stage but did not otherwise object.

[35] Mr O'Hare denies this version. He says he had nothing to do with the eastern wall at all. He agrees he woke Dr Maguire from his sleep and spoke to him at his door with Dr Maguire in a dressing gown but he says this was in connection with the northern wall only. Dr Maguire says there was such a conversation but there were also two conversations about the eastern wall.

[36] I observe that there is nothing unlikely about Mr O Hare having had such a conversation. He was working at and, on his own evidence, for Norbrook at the time in question. Furthermore it might be thought a little surprising if Norbrook had said nothing to the adjoining landowner before starting to build the wall. Indeed one might have been surprised if the adjoining landowner had not raised some query with Norbrook when he saw the works commencing so close to his house. To these factors must be added the fact that in cross-examination Mr O'Hare acknowledged that he had only been asked about these matters in 2005 about 7 or 8 years after they took place. As Dr Maguire lived in the house throughout the period it may be that his recollection of it would be more likely to be correct.

[37] In fact I find that his recollection is correct having heard both men give evidence. Mr O'Hare gave his evidence with great self-confidence. He was not afraid to speak robustly about Dr Maguire calling the police and to contend that the doctor, when he spoke to him on that day was shy and nearly apologetic at having called the police. He said with equal confidence that he had never asked permission on behalf of Norbrook to build the eastern wall or had any conversation about it. But he then went on with equal confidence to say that when he did speak to Dr Maguire on 12 June having attended at his house at the request of Norbrook, and he stated this firmly in his answer to his own counsel, that the issue of the earlier trespass in March did not come up. Mr Shaw, without objection from Mr Lockhart to what was in effect leading, then expressly drew his attention to his own letter of 12 June to Dr Maguire. He read to him the sentence in the third paragraph of that letter as follows:

> "I understand you mentioned to Dr Haughey's secretary on the telephone that the matter of the alleged damage caused by the trespass had not been remedied but when I spoke to you you confirmed to me that this was not so and you were completely happy with the present position."

For completeness the remaining sentence of that paragraph reads as follows:

> "I have spoken to Miss McAnuff, the lady concerned and corrected any misunderstanding that may have existed and advised her of your satisfaction with your garden."

Despite that he reiterated to his own counsel that there was no discussion about trespass with Dr Maguire on that occasion. He had made two visits to Dr Maguire but about the northern wall and the discussion on the day the police came was the third, there was nothing to do with the eastern wall. (Why have two visits about the northern wall and none about the eastern wall?) Subsequently in cross-examination from Mr Lockhart he said that if the trespass came up in the conversation it was very

trivial and very understated. He then amended that to say yes sorry he talked to him about trespass. Subsequently he said the conversation was not about trespass but noise. These statements are clearly inconsistent but they were all said with equal confidence by Mr O'Hare. I have concluded that the evidence of Dr Maguire is to be preferred to that of Mr O'Hare. The latter does not seem to me a reliable witness of these events in 1997 and 1998. I conclude that he did go and speak to Dr Maguire about the eastern wall, contrary to Mr O'Hare's assertion. Whatever way he phrased it conveyed to Dr Maguire that he was seeking permission to build the wall. I observe this is consistent with the fact of the plaintiff not calling any solicitor or member of management to say that they were well aware that they did own the strip at this time and that this was an assertion of their ownership.

[38] The contrary is in fact true. When the north wall was concluded they built a further small piece of wall from the end of the north wall to the roadway cutting off from the Norbrook property the very strip of land to which they now claim possession. This might be viewed as an act of discontinuance but of course that is not to be equated with the legal title passing to another party. The fact of Mr O'Hare asking Dr Maguire was it all right to build the wall, which I suspect was the nature of the conversation, is not to be overstated. It is not like a written waiver on behalf of the plaintiff. I will return to these two points briefly in due course.

[39] Mr Felix J Magee gave evidence. He is a Chartered Engineer, a Chartered Structural Engineer and a member of the Institute of Structural Engineers. I found him a reliable and helpful witness. I noted his comment to Mr Shaw that modern digitised maps are only as reliable as the maps they are currently representing. Inspection on the ground is still required for absolute precision.

[40] I am satisfied from his evidence that the defendants and Dr Maguire are correct in saying there was a rock face on their side of Station Road. I take into account the clear indication of that on the 1963 ordnance survey map at page 77 of the papers and a similar representation at Mr Magee's map drawing on three older ordnance survey maps to be found at page 291 of the papers with a reference card at 291A. That is important with regard to the next witness, Mr John Magee. I note and accept Felix Magee's evidence about his trial pits.

[41] I note and accept Mr Felix Magee's evidence about the wall built by Norbrook. It was not designed by an engineer as a retaining wall and nor would he have so certified it. But it is in fact serving that purpose. It lacks suitable interior facing but there are joints at every pillar which allow drainage away of water. The wall is to a degree porous. Much of the material behind the wall is gravel and sand which is relatively free draining. While the wooden fence on top of the wall may act as a sale potentially he did not think that was happening at present. Again there was the potential for a build-up of water but that did not seem to be happening at present.

[42] I take a different view of the plaintiff's witness John J Magee. He was a bricklayer or a builder he said. He built the eastern wall behind the footpath in 1997. He did it in two stages from the security gate at the Norbrook factory visible in the photographs to the corner of the Norbrook site and then on down to the white wall that had been built in 1950s. He contended that past the Norbrook site there was at the time of his works a pre-existing stone wall which continued down to and abutted the white wall. He removed that to make the new wall. He did not accept there was a rock face but said behind this older wall there was an embankment at a height. He conceded that he did not put drainage or other features into the eastern wall which he built. No one objected to him building it or complained about it. In cross-examination he conceded that the first time he would have been asked about this would have been in 2005 when he came to swear an affidavit. He had no cause to think about it before. The 1963 map at page 77 was put to him to contradict him. He was shown two photos and he conceded that the short piece of red brick wall extending the across the northern top of the eastern strip was erected by him. He said that he faced it on both sides. The earth was now more filled in behind his eastern wall than at the time he erected it. Indeed, he said that all of the block work was exposed when he completed it. He accepted that there was a gap behind the top of his wall and that the embankment was up to some lower level of the wall he built. He was shown more aerial photographs of 1962 and 1991. He tried to say that these were not great photographs but it was clear from them there was no sign of the wall that he claimed was there. He acknowledged that he could not see it. He was re-examined although his assertion that he had no doubt about the stone wall was clearly contrary to photograph 9 in particular. He claimed in answer to a question from the court that this wall which he believed to be there was many decades old. He had no written records from this time. He said to me that he worked full time as a bricklayer builder for Norbrook and then corrected that by saying he worked mostly for that Company.

[43] I reject the evidence of Mr John J Magee about an alleged wall along the footpath at Station Road. I prefer the mapping and photographic evidence and that of the defendant's witnesses. They are clearly to be preferred. I found the defendant's witnesses' demeanour much preferable to and more persuasive than that of Mr John Magee.

Conclusions on eastern strip

[44] The case was contested between the parties on the basis that the eastern strip as described above was a single piece of ground that either was or was not in the possession of Dr Maguire. At one stage it occurred to me that that strip might have been divided. In support of such a possibility Mr Felix Magee marked on the key plan an area at the Camlough Road end of the strip where indisputably the defendant's witnesses had run a title for adverse possession. For many years it had been part of their neatly trimmed lawn. But this proposition had not emanated from the parties and I think the parties are right in that regard. The rest of the bank above and behind the rock face which I find to have existed was not suitable for use as a

neatly mown lawn. But it was used by Dr Maguire and his predecessors in title. This may not have happened so much at first. It is probable that the late Mr O Hare knew his own boundaries but that this lore did not survive him. Geraldine Maguire moved out about 1980 but moved back after her husband's death. Her mother lived on there to the 1990s. No one else ventured on to the top of the bank. The low wall that they referred to as Nana's wall does appear to mark the folio line, although it does not seem to have ever, to judge by the 1983 map at Page 77, extended right down to the Camlough Road. It seems that that at some stage part of that wall may have been actively removed by Mr O'Hare senior or the Maguires. The rest of it seems to have crumbled over the years. It always seems to have been a low wall, over which a child could climb. As a child he would venture over that wall from time to time if only to pick berries. His mother confirmed that and also spoke of picking rhubarb although she did not clarify whether she had planted the rhubarb or whether this was wild rhubarb. But in addition there was clear evidence which I accept that one or other of the men about the place, mentioned above, did keep down the trees along this whole strip so they did not interfere with the Railway Company's lines running up from Camlough Road. Furthermore, there is other evidence, the honesty of which I accept, that there were some ornamental trees and bushes in the strip north of the neatly mown lawn at the front and that these were also kept in order. I also have to take into account the important photographic evidence. I am not sure that an attempt to divide off the most used part of the eastern strip at the Camlough Road would be fair to Dr Maguire and his predecessors in title or would accord with the photographic evidence; for example, in photographs 1 and 2 one can see the lawn turns into bushes but there is no fence or wall at that point. Somebody can have quite dense shrubbery in their garden which they rarely venture into but it is still their garden. Bearing in mind the authorities above I find that the user in the ways described by the Maguires was the only reasonable user by an owner of the ground to the north of the mown lawn at the Camlough Road end of the strip, unless and until the wholesale landscaping by Dr Maguire in 2002/2003..

[45] As discussed above although there is some uncertainty as to whether the older fence extended beyond Nana's wall, and I therefore make no finding adverse to the paper owner in that regard, it is certainly clear that Norbrook itself extended the wall to exclude the eastern strip from the rest of its site in or about 1997. Twelve years had not run before it then challenged Dr Maguire's title to the eastern strip but the fact of building the wall can still be evidence that is relevant to the intention of the parties and the previous user of the ground. This is apparent from the decision of the Privy Council in Cadija Umma v S Don Manis Appu [1939] AC136. It seems clear that Mr Magee would not have built this without instructions. The clear inference must be that those running Norbrook at the time did not believe this strip belonged to them. Nobody on behalf of the Norbrook management gave evidence to contradict that. It seems to me that that was an act of discontinuance of possession, as contemplated in the legislation, which although not of 12 years duration does assist the court in forming the view that a title had run against Norbrook. I cannot see that they, who now vigorously assert their title, would not have done so if they

thought that Dr Maguire had encroached on land in their ownership. It seems that the matter was overlooked on the part of the plaintiff, not unlikely given the actual user and non-user on the ground.

[46] It is also right to bear in mind the finding I have made that Mr O'Hare did ask Dr Maguire for permission to build the wall. I also bear in mind that Dr Maguire in 2002/2003 clearly believed that he owned the land by building up to and indeed erecting fencing on the wall. Again that had not run for 12 years but it is evidence of what he believed to be the ownership of the property. I note the provisions of Paragraph 1 Schedule 1 of the Limitation Northern Ireland Order 1989 with regard to a proprietor who has "been dispossessed or discontinued his possession". It seems to me that there has clearly been evidence of the former and evidence of the latter although not running for the whole statutory period. While some of the use of the strip is indeed relatively modest it still seems to me pursuant to the authorities to constitute "dealing with the land in question as an occupying owner might have been expected to deal with it". It is also quite clear that the legal owner, whether government department or Norbrook did nothing. As I have said above I am satisfied that the Maguires had the necessary animus possidendi.

[47] My conclusion therefore is that Dr Maguire's predecessors in title had successfully run a title by way of adverse possession to the eastern strip years before 1994. The actions and inaction of the defendant and the plaintiff since then are confirmatory of that. Rather less than the whole of the matters set out herein would be enough for such a conclusion.

[48] One has to be precise here as to what constitutes the eastern strip; the evidence of the defendants is that it ran to a rock face. The evidence of Mr John Magee is that there was an embankment behind the wall which he removed. I have found that his memory of that wall is wrong but taking all the evidence together it does seem to me, on the balance of probabilities, that he built in front of an embankment which was largely rocky rather than having removed the whole rock face. Because the matter was not examined by an engineer at the time, for either side, it is not a matter on which anyone can speak with certainty. But my conclusion is that the wall built by Norbrook itself is most likely built on the land previously owned by the Ministry of Commerce and not on land on which the Maguires had run a title. I find that the wall is indeed Norbrook's and is built on its land.

[49] Given that Dr Maguire gave permission for the wall to be built it may follow that he might have to give access to it from his side for necessary work. His wooden fence would appear to be a technical trespass which would have to be removed if the plaintiff so desires. The parties asked me not to rule on estoppel. That may not now arise. Nor did they want me to rule on remedies. I shall give them time to resolve any outstanding matters by agreement. Therefore, in summary, the Defendants succeed in their claim for adverse possession up to but not including the northern and eastern walls to their property.