Neutral Citation No. [2014] NICA 70 | *Ref:* **MOR9412**

Judgment: approved by the Court for handing down | *Delivered:* **14/10/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERT JAMES SHAW AND DEIDRE KATHLEEN SHAW

Applicants;

-and-

LAWRENCE PATTERSON

Respondent

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an application for leave to appeal from a decision of Deeny J on 16 January 2014 when he dismissed the applicants' appeal against the order of Master Kelly made on 4 October 2013 dismissing an application to set aside a statutory demand and giving the respondent leave to proceed to petition for bankruptcy. Deeny J refused leave to appeal on the same date. By virtue of Order 59 Rule 14 the applicants were required to renew their application for leave to appeal within seven days of the refusal by the lower court. They did so by lodging an application for leave to appeal to the Court of Appeal on 21 January 2014.

Background

[2] The background to this application for leave was set out by this court in Shaw v James J Macauley [2012] NICA 49 when an application by the applicants to extend time to appeal a refusal to set aside a statutory demand in that case was dismissed. Although we intend in this judgment to look at the facts and circumstances in more detail the background set out in that judgment is still informative and we repeat it here.

[3] On 14 May 2007 Lawrence Patterson who is a neighbour of the applicants obtained an ex parte injunction preventing the applicants from placing any obstacles, constructing any walls or otherwise interfering with Mr Patterson's enjoyment over a portion of land over which he claimed a right-of-way leading to the County road. The Order recorded that the judge had read the affidavit of Peter Hill and the report of Wayne Story Associates dated May 2007. The Order also recorded that the right-of-way was coloured red on the map annexed to the order.

[4] This right-of-way had been the subject of previous litigation. Mr Patterson's predecessor in title Elizabeth Meadows had taken proceedings against Mr McConnell who was the then owner of the site on which the applicants have now built their home. By a consent Order made in the County Court division for South Down on 10 October 1998 Ms Meadows established a right of way both with vehicle and on foot at all times for all purposes over that portion of land leading from her dwelling to the County road and which was coloured red on the map attached to the Civil Bill. It is common case that the map attached to the Civil Bill was a copy ordnance survey map on which was marked in a red line diagrammatically the route from the County road to the property then occupied by Ms Meadows.

[5] The litigation leading to the ex parte injunction on 14 May 2007 was apparently prompted by work carried out by or on behalf of the applicants preparatory to the construction of a wall. It was contended on behalf of Mr Patterson that this encroached onto the right-of-way and two maps were attached to the Wayne Storey Associates report purporting to demonstrate the encroachment. In the course of this application it was asserted by the applicants that the judge could not have concluded that there was any encroachment if the 1988 map had been available to her. In fact that map being diagrammatic does not purport to establish the precise dimensions or extent of the right-of-way.

[6] In 1997 the right-of-way had also been the subject of litigation. This arose from a claim by Mr Patterson that Mr McConnell had placed flowerpots at the corner of the laneway as a result of which Mr Patterson's vehicles could not negotiate it. The matter was resolved by agreement and the agreement and the map attached were made an order of the court. The applicants claimed that this map was at some stage, early in the proceedings, substituted for the 1988 map and then formed the basis of a report by engineers instructed on behalf of the applicants and Mr Patterson in about June 2007. The applicants claimed that the use of the wrong map prejudiced their position.

[7] The 2007 proceedings came on initially before District Judge Brownlie. She decided to recuse herself in the course of the hearing. The applicants were still represented by James J Macauley at that stage but their services were dispensed with shortly thereafter. The case came on for a full hearing before Judge Mc Reynolds in May 2008. She heard the matter over four days and subsequently carried out a site inspection. She delivered a corrected judgment in January 2009. She found that the

placement of the foundations by the applicants was in excess of the action which they were at liberty to take. She found as a fact that the applicants' original intention was to build something considerably more substantial than that for which detailed plans were ultimately produced at the hearing. She considered that it was appropriate and proportionate to grant the interim injunction and then granted a full injunction restraining the defendants from constructing a wall which interfered with reasonable vehicular use of the laneway which she then defined. She awarded the applicants £150 damages on their counterclaim.

[8] The applicants appealed this decision and their appeal was struck out on 15 March 2010. The principal issue which the applicants wished to pursue was the fact that the wrong map had been used for the purpose of the interlocutory proceedings. Deeny J, who struck out the proceedings, noted that the learned County Court judge had correctly recognised that the starting point was the 1988 Order and had proceeded to make a determination of the extent of the right-of-way flowing from that Order. The 1988 map was diagrammatic and showed the general positioning of the right of way but this case was concerned with the detail of whether there had been interference. The applicant subsequently sought to reopen the May 2008 hearing but this attempt was dismissed on 4 May 2011.

[9] The statutory demand arose as a result of two orders for costs made by Deeny J on 15 March 2010 and McCloskey J on 30 March 2011 arising out of proceedings connected to this background. The costs were taxed by the Taxing Master in the sums of £8,150.65 and £11,577.63 respectively. The applicants' application to set aside the statutory demand was refused by the Master and also by Deeny J. It is not contended that there was anything irregular about the obtaining of the Orders but the applicants continue to take issue with the outcome in January 2009 contending that it arose as a result of fraud. The applicants complain particularly about the circumstances in which the initial ex parte application for an interim injunction was pursued. We considered that we should allow the applicants to bring forward the material upon which they relied for this assertion.

The applicants' case

[10] At the beginning of 1997 the applicants purchased a building site and adjoining lands from Mr McConnell. Access to the property was by the laneway from the County road over which the appellants and the respondent had a right of way. The 1988 dispute was resolved as result of which a map was prepared based on an Ordnance Survey (OS) map showing the line of the right-of-way up to the respondent's property from the County road. That map did not show the applicants' entrance to their building site and indeed the building works commenced long after the resolution of the right-of-way dispute.

[11] In 1997 a second dispute in connection with the right-of-way arose between Mr McConnell and the respondent. The issue concerned access for the respondent at

a portion of the right-of-way (the flower pot dispute) which was not directly involved in the present dispute. Engineers were retained by each side. A written settlement was achieved on or about 5 September 1997 and as part of those terms the engineers were to agree a map showing the extent of the right-of-way. A map was prepared by Mr McConnell's engineer which was agreed by Mr Patterson's solicitors and apparently submitted to the court for attachment to the Order. The applicants make the point that the OS maps on which these maps were based all show straight line boundaries at the stretch of the right-of-way in dispute. The Land Registry maps which are also based on the OS maps similarly show straight line boundaries. None of these maps show the entrance to the applicants' property which was located at one end of the portion of the right-of-way in dispute in the proceedings in 2007.

[12] In or around April 2007 the applicants dug foundations and partially poured concrete and built a retaining wall which they said was to support the laneway. In order to do so they removed portions of hedge and rock on the boundary of their site. The respondent claimed that this work interfered with the right of way and sought and was granted an ex parte interim injunction on 14 May 2007. The respondent relied on the affidavit of his solicitor who stated at paragraph 3 that he was exhibiting the 1988 decree, the terms of settlement in September 1997 and a map/drawing relating thereto. It was proposed that the map should be exhibited to the interim injunction Order being sought by the respondent.

[13] By correspondence dated 2 July 2009 the solicitors acting for Mr Patterson accepted that the application as presented to the court did not have the map referred to in the affidavit attached to it. They explained that the solicitor who had carriage of the file was out of the jurisdiction on the date of the hearing and one of his colleagues put together the documents. By oversight the map was not attached to the Order. They maintain that the purpose of attaching the map to the Interim Order was merely to identify the location of the laneway and not to state the extent of the right-of-way.

[14] The solicitor's affidavit did, however, exhibit a report from Wayne Storey Associates which contended that the proposed construction of the wall would considerably alter and reduce the extent of the right-of-way as plotted in the 1997 map. The applicants have consistently maintained that the conclusions of this report do not accurately describe the conditions on the ground. There is at least an arguable case that they are correct in that assertion.

[15] The admission that the appropriate map was not attached to the original proceedings and to the interim injunction Order was not made until just over two years after the application. That fact, together with the belief of the applicants that the Wayne Storey Associates report misrepresented the position on the ground led the applicants to conclude that the interim injunction had been obtained by fraud. We do not accept that conclusion. There is a perfectly straightforward explanation for the failure to exhibit the map and we have no reason to doubt that the Wayne

Storey Associates report was made in good faith. The fact that it may be wrong is not an indicator of fraud. Any errors in the plotting of the 1997 map do not invalidate the grant of the interim injunction having regard to the dispute at that time.

[16] Subsequent to the interim injunction a meeting of the engineers on each side was convened for 21 June 2007. Mr Wilson for the applicants suggested that the boundary line should be a straight line in accordance with his client's title deeds. Mr Storey disagreed and said that the boundary should be a curved line following the previous hedge. Both sides agreed that the hedge line shown on the OS map was unlikely to be correct. We note that OS does not warrant the accuracy of its maps nor does the Land Registry. It is unsurprising to find that there is a dispute about a detail such as this. In so far as the applicants were relying on the accuracy of the OS map in order to sustain their case about the extent of the right-of-way we consider that only modest weight can be accorded to that.

[17] There was a dispute between the engineers about the cause of the curvature in the boundary of the laneway. Mr Wilson for the applicants contended that this was the result of the respondent driving large heavy goods vehicles that collided with and over-ran the verge. Mr Storey accepted this as a possibility but suggested that the respondent had established a right of passage over the disputed area. There remained a dispute between the engineers about the width of the right-of-way in the vicinity of the proposed wall. The applicants now maintain that Mr Wilson made inappropriate concessions upon which the court relied.

The hearing

[18] The case was heard by Judge McReynolds over four days in May 2008 and in January 2009 she issued a corrected judgement after a site visit. There is no complaint that she misunderstood or mis-applied the law. She concluded on the engineering evidence that the curvature in the laneway resulted from the underlying rock structure and that the naturally occurring curvature had been conducive to maximising the vehicular access. The construction of the proposed wall by the applicants would inhibit vehicular access by limiting the angle to swing the vehicle in preparation for the next bend.

[19] The judge concluded on the basis of the evidence of Miss McConnell who had first lived in this area 60 years beforehand that the foundations placed by the applicants were within the limits of the root line of the removed hedge. The applicants maintain that Miss McConnell was not an impartial witness but the learned trial judge had the advantage of hearing her evidence and having it tested in cross-examination. There is no proper basis for us to interfere with her conclusion.

Conclusion

[20] We conclude, therefore, that there is no arguable case that the interim injunction was obtained by fraud. The applicants had the opportunity to instruct an engineer to represent their interests and District Judge Brownlie sensibly encouraged a site meeting. The decision of the learned trial judge did not depend upon the granting of the interim injunction. She had the advantage both of the engineering evidence and the witness evidence to assist her in coming to her conclusion. The assessment of witnesses and the finding of facts should not be interfered with by an appellate court unless it can be said that they are plainly wrong. There is nothing in our view to indicate that such a test is met in this case.

[21] We have carefully considered the detailed background leading to the institution of these proceedings. The burden of proving that the statutory demand should be set aside is on the applicants (see Moore v The Commissioners of Inland Revenue [2002] NI 26). There must be some substantial or genuine grounds of dispute (see Allen v Burke Construction Ltd [2011] NIJB 62). Although we recognise that the applicants are dissatisfied with the outcome of the underlying proceedings we do not consider, for the reasons given above, that there remain substantial or genuine grounds of dispute.

[22] Finally, shortly before the issue of this judgment the applicants wrote to the court to indicate that they believed that the respondent had exceeded the lawful use of the right-of-way as found by the learned trial judge. We cannot in these proceedings deal with any such claim which may have to be resolved by agreement, mediation or fresh proceedings.

[23] We dismiss the application for leave to appeal.