Neutral Citation No. [2014] NICA 12 | *Ref:* **MOR9166**

Judgment: approved by the Court for handing down | *Delivered:* **07/02/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ROBERTA ANN YOUNG

Appellant;

-and-

DAVID RUSSELL, THOMASINA PHYLISS ALEAXANDRA RUSELL AND DAVID BOYD

Respondents.

Before: Morgan LCJ, Coghlin LJ and Stephens J

MORGAN LCJ (delivering the judgment of the Court)

[1] This is an appeal by Mrs Young against the dismissal of her claim for an injunction against David Russell, Thomasina Phyllis Russell and David Boyd by Mr Justice Deeny on 27 February 2013. The appellant's claim was originally heard by Treacy J and also included a claim by her as purchaser of lands at Carrowdore Road, Greyabbey for damages against the vendors of the site and against the solicitors acting on her behalf in the sale. Although she succeeded in establishing liability in the damages claims Treacy J dismissed her claims against the respondents. This court concluded that the learned trial judge had not advanced sufficient reasons to explain his findings as a result of which the claim against the respondents was heard afresh by Deeny J who again dismissed it.

Background

[2] In September 2000 the appellant and her husband entered into an agreement to purchase a building site with outline planning permission for a single storey dwelling at Carrowdore Road, Greyabbey. This agreement included a right of way

along the lower portion of a laneway which provided access to the site. At the upper end of this laneway, beyond the site entrance, lay the property of the first and second respondents, who, it transpired, asserted exclusive ownership of the laneway. The third respondent is a nephew of the Russells who took a part in asserting the claims of his family over the laneway.

[3] The appellant purchased this property as a joint tenant with her husband Mr William James Young. Her husband subsequently became bankrupt and was dismissed from the action. The appellant's case is that she and her husband visited the site one Sunday in November 2000 shortly after they had bought it. She said that they met Mrs Russell who told them that she hoped they were not buying the site because she, Mrs Russell, owned the entire laneway. The appellant said that this encounter in November 2000 was the first time she became aware of any dispute affecting the lower laneway or the right of way to her site.

[4] In December 2000 they applied for full planning permission for a house on the site. The appellant said that from the outset she and her husband were subjected to negative and hostile conduct by the Russells and their nephew Mr Boyd which was designed to discourage them from using the laneway and/or developing their site. This conduct became so upsetting that they decided to sell the site in the spring of 2001. The site was put up for sale and a number of persons expressed an interest in buying it. The appellant's case is that no sale was effected because of the interference of the respondents.

[5] In September 2001 the vendors issued a Civil Bill against the Russells in order to have the ownership of the lane clarified, and to enable them to deliver good title to the appellant and her husband as required under the contract of sale. While their site was on the market for sale and while the vendors' County Court proceedings against the Russells were under way, the appellant and her husband were also actively pursuing planning permission for a house on their site. Full planning permission was granted in March 2002.

[6] The County Court proceedings between the vendors and the Russells concluded in February 2003 with a decree that the vendors owned the lower laneway. That decision was appealed later in the same month. The appeal was determined in November 2004 by the issue of a Tomlin Order confirming that the vendors did indeed have good title to the disputed section of the laneway.

[7] The appellant's case was set out in the transcripts of evidence given by her and her husband. After the first encounter set out in paragraph 3 above the appellant stated that Mrs Russell approached them and expressed annoyance about the use of the laneway which she maintained belonged to the Russells. The first particularised incident upon which the appellant relied occurred in May 2001. Her husband attended the site at about 11 am to carry out some work. He found Mr Russell's car blocking his access. The appellant's husband parked his car on the public road and

then walked past Mr Russell's car carrying his chainsaw and petrol. There was an exchange between them when Mr Russell indicated in an ill-tempered way that the appellant's husband had no right to be in the laneway. The vehicle was in the same position at 5 PM and then moved. Shortly thereafter a van driven by the third named respondent took up the same broad position blocking the laneway. The van remained in that position for somewhere between 20 minutes and 1 hour.

[8] The appellant stated that there was continuing verbal confrontation subsequently but the next series of complaints concerned a period after April 2003 when the builders commenced building the dwelling house now the site. Both the appellant and her husband said that they were told by the builders that they were being constantly photographed by the Russells and verbally abused. It was also contended that the Russells blocked the lane to prevent supplies getting up to the site. No evidence from any builder was called to support this allegation. The police were informed on one occasion when the Russells contacted them to complain that the builders were interfering with the laneway. At that time it appears that the builders were attempting to connect the water supply but there was no evidence as to precisely how they were doing it.

[9] After the resolution of the appeal in November 2004 the appellants maintained that there was a period of calm for some months. It was contended, however, that in January 2005 there was further blockage of the laneway by the Russells. The only specific incident of which evidence was given was an incident where the appellant's husband maintained that a car belonging to the Russells blocked his path for between 10 and 15 minutes. The appellant also complained that the Russells took photographs of the appellant and her husband on occasion.

[10] The appellant's husband maintained that there was one occasion in 2006 and one occasion in 2007 where Mr Russell blocked the laneway with his vehicle and refused to move for a matter of minutes. The appellant maintained that the Russells would occasionally stop their car in the laneway and look up at the appellant's house and that on occasions they were abusive. No detail in relation to these occasions was provided. The appellant and her husband indicated that there were other occasions when the laneway was blocked but again no details of these occasions were given. The appellant also referred to an incident of 27 January 2009 when it appears that Mrs Russell came to her property at night and shone a torch. She stated that she was relieved that it was Mrs Russell and nothing more sinister.

[11] The appellant also maintained that the Russells approached prospective purchasers when the property was placed on the market in spring 2001. It was also indicated that Mr Boyd approached an estate agent in May 2001 maintaining that the Russells owned the laneway and that the appellant had no rights in relation to it. The purchasers who expressed an interest did so in or about 2001. The property was taken off the market in 2003 when the appellant and her husband started to build.

The proceedings

[12] The Writ of Summons was issued on 9 June 2006 and asserted a claim against the first and second respondents for wrongful interference with the appellant's right of way along a laneway adjoining her property and trespass on that laneway and unlawful interference with the appellant's use and enjoyment of the lands by the said respondents. The injunction claim was made against those respondents and against the third respondent both in his own name and as servant and agent of the first and second respondents.

[13] The final amended statement of claim made a case against the respondents based on unlawful interference with the right of way, trespass and nuisance and breach of Articles 3 and 5 of the Protection from Harassment (Northern Ireland) Order 1997 ("the 1997 Order"). The latter cause of action was allowed by way of amendment at the start of the trial by Treacy J.

[14] At paragraph 16 of the statement of claim it was alleged that the third respondent represented to estate agents and prospective purchasers of the site that the appellant did not enjoy entitlement to a right of way over or ownership of the laneway. It was contended in the particulars that the first two respondents did likewise. These facts might have formed the basis for a cause of action in slander of title. No such cause of action was pleaded in either the Writ or the Statement of Claim. The appellant maintained that Deeny J was in error in not dealing with her claim in slander of title at the hearing before him.

[15] This matter first came before the Court of Appeal in February 2012. The appellant was applying to extend time for lodging and serving her notice of appeal against the decision of Treacy J. Among the points she made were that the allegations in the Statement of Claim supported the case in slander of title. No transcripts of the earlier hearing were available at that stage although counsel for the respondent indicated that the appellant's counsel at trial had not amended the proceedings to include such a claim.

[16] The transcript of parts of the original hearing are now available. On 25 March 2009 the issue arose in the course of questioning of the appellant's husband by her senior counsel Mr Kennedy QC. He referred to a possible application to amend the cause of action to include slander of trespass (sic) and malicious falsehood but then went on to explain that because the dispute about the ownership of the laneway would have had to be disclosed to any prospective purchaser no such application was being made. It was clear, therefore, that no case of slander of title was made in the original trial.

[17] Mr Kennedy QC appeared again in the hearing before Deeny J on 27 February 2013. The learned trial judge pointed out to Mr Kennedy that slander of title was not pleaded. Mr Kennedy indicated that he accepted that it was not before the court.

There was no application to amend the pleadings before Deeny J. We consider that slander of title was not, therefore, before either judge at first instance and there was no basis upon which we could properly have permitted an amendment of the Writ after the hearing of this action.

[18] The next issue concerned the position of the first respondent, David Russell. Unhappily Mr Russell died on 2 May 2009 after Treacy J had heard the liability evidence in the case but before the quantum hearing and delivery of judgment. The court was informed by counsel on behalf of Mrs Russell that the only material asset held by them was the property in which they lived which was subject to a joint tenancy. Consequently Mrs Russell was now the sole legal and beneficial owner of the property. Because Mr Russell's estate was so small no grant of representation had been taken out despite Mr Justice Deeny's request to the solicitors originally acting for Mr Russell that they do so.

[19] This circumstance is catered for by Order 15 Rule 15 of the Rules of the Court of Judicature. The Rule provides that the court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purpose of the proceedings. In either event the estate would then be bound. Unfortunately it does not appear that any application was made on behalf of the appellant to take advantage of this Rule nor was the Rule drawn to the attention of the learned trial judge. The consequence was that in the absence of an order under Order 15 Rule 15 the estate of Mr Russell could not have been bound by any determination against him.

The judge's decision

[20] The learned trial judge identified the two matters before him as being whether the respondents were guilty of either harassment or an interference with the right of way. He noted that the claim for slander of title might have been made but was alert to the limitation period of one year for that cause of action. In relation to David Russell Mr Kennedy invited the judge to allow the action to continue against the personal representatives of the deceased when appointed. There was no basis for such an approach and the learned trial judge rightly rejected it. He dismissed the claim against David Russell.

[21] At the commencement of the retrial before Mr Justice Deeny Mr Humphreys on behalf of the second and third named respondents offered undertakings in precisely the same terms as the injunctions claimed in the statement of claim. By this stage the second respondent was 84 years old and living in sheltered accommodation away from the site. The prospect of interference was, therefore, minimal. The appellant rejected the offer of undertakings as a result of which the Legal Services Commission declined to support the case further. Despite that Mr

Kennedy properly decided not to withdraw from the case and made further submissions on behalf of the appellant.

[22] The learned trial judge noted that the third respondent accepted that he blocked the laneway in May 2001 for a period that he said was 20 minutes. He also agreed that he took the appellant's husband's jacket from a hedge and then subsequently threw it out of his car some relatively short time later to return it on the same occasion. The learned trial judge concluded that these were two incidents of incivility but did not amount to tortious conduct. There was no substantial interference with the appellant's rights and there was no course of conduct which would amount to harassment.

[23] Deeny J noted that there was a lack of particulars in relation to the allegations against Mrs Russell. He noted the claim that the builders were blocked in carrying out their work but declined to give any weight to that hearsay allegation because no builder was identified nor was any builder called. He quoted from a passage of Mr Young's evidence which in his view demonstrated confusion in relation to both the number of occasions when any interference occurred and the length of time for which it had occurred. In particular he noted that the January 2005 incident lasted for 10 or 15 minutes only. In all the circumstances he concluded that there was no substantial interference with the appellant's property rights. He accepted that there may have been uncivil language used by the Russells but considered that it did not amount to harassment. Accordingly he dismissed the appellant's claims.

The appellant's submissions

[24] The appellant complained that the learned trial judge did not deal with her claim in slander of title. We have dealt with this point at paragraph 15 - 17 above. No claim on slander of title was pursued and there was no basis upon which we could have entertained it on appeal. In her submissions in this appeal the appellant has introduced evidence that was not before the learned trial judge of specific occasions upon which the respondents notified planning service in particular of their claim to ownership of the entire laneway. It appeared that this may have been in support of a cause of action on slander of title. For the reasons given that cause of action was not before us. We reject, therefore, the submission that the learned trial judge was confused about the issues which were to be dealt with by him.

[25] The second issue concerned the dismissal of the claim against David Russell. We have set out the circumstances in which this issue arose at paragraphs 18 - 19 above. If the parties had considered the relevant Rule at or prior to the hearing date it may have been possible to devise a mechanism allowing the action to proceed in a way which would have bound Mr Russell's estate. In the absence of any application to the learned trial judge the estate would not have been bound and there was no point in allowing the proceedings to continue against Mr Russell.

[26] Thirdly, the appellant complained that she was prejudiced as a result of the open offer by the second and third respondents at the commencement of the retrial to provide undertakings in the terms of the injunctions sought in the Statement of Claim. It is clear that the learned trial judge considered that this offer should be considered very carefully by the appellant since it would effectively give her the entire remedy which she claimed. Senior counsel for the appellant explained that she was concerned that any acceptance of the undertakings might bind her in relation to the remainder of the case. He was unable, however, to explain how she might be prejudiced.

[27] This offer was correctly notified to the Legal Services Commission ("the Commission") by the appellant's legal team. The Commission decided that it was unreasonable to expend public monies in the further pursuit of the action and withdrew legal aid support. To his credit, despite the withdrawal of funding, Mr Kennedy continued in the action to represent the interests of the appellant and we consider that this was an entirely proper course for him to take in accordance with the highest standards of professional commitment of the Bar of Northern Ireland.

[28] In this appeal the appellant maintained that an injunction was required because the respondents continued to claim ownership of the laneway even after the resolution of the proceedings in November 2004. The appellant may not have understood that if an undertaking was given to the court, as was proposed, any breach of the undertaking would bring the case back to the court in broadly the same way as would arise if there was a breach of an injunction. Far from prejudicing the appellant's case the fact that the undertaking was offered would normally be seen as giving rise to prejudice to the respondents' case since the offer might be construed as some form of admission. The suggestion that in recommending consideration of the offer of undertaking the learned trial judge undermined the appellant's case is entirely without merit.

[29] The appellant maintained that the judge's approach to the claim in slander of title, the dismissal of the action against the first respondent and his encouragement to consider seriously the offer of undertakings all indicated bias or unfair prejudice on his part against the appellant. The test for a finding of bias, established in Porter v Magill [2002] 2 AC 357, is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In Lawal v Northern Spirit Ltd [2003] UKHL 35 Lord Steyn explained that the fair-minded observer would adopt a balanced approach, that he would consider the real possibility of subconscious bias and that the test was not necessity but likelihood of bias.

[30] We do not accept that the circumstances set out raised a plausible case on bias. The judge was bound to deal with the slander of title point as he did in the absence of any attempt to pursue it at the hearing before him. There was no application to find a way of binding the estate of Mr Russell and his encouragement

to consider undertakings as a resolution of the action could not in any way have prejudiced the appellant in other proceedings.

Consideration

[31] The substantive issue in this appeal is whether the learned trial judge was entitled to conclude on the evidence before him that the interference with the right of way was not substantial and that there was no course of conduct amounting to harassment.

[32] Interference with private rights of way is considered in chapter 13 of Gale on Easements (19th edition). Although any obstruction of a public right of way is a legal wrong if appreciable, an obstruction of a private right of way is not actionable unless substantial (see Celsteel Ltd v Alton House Holdings [1985] 1 WLR 204). The test is sometimes defined as whether practically and substantially the right of way could be exercised as conveniently as before. In determining that issue it needs to be borne in mind that the grant of a private right of way confers only the right to a reasonable use of the way in common with others.

[33] In CP Holdings Ltd v Dugdale [1998] NPC 97 British Rail had granted a right at all times to pass and re-pass across the bed of a disused railway line. The way granted formed part of the access road to a business park. A successor to British Rail wished to reopen the line and run a small number of trains each day, building a level crossing at the point where the access road crossed the line. The court held that the temporary obstruction of the way would amount to an actionable interference with the easement. In the circumstances of that case the insistence by the owners of the right of way that they should not be held up was reasonable.

[34] There was, therefore, an area of judgment for the judge in determining what constituted reasonable user of the right of way and what constituted substantial interference. In this case the evidence spanned the period from 2001 until 2007. The learned trial judge accepted the evidence of the events of May 2001 set out at paragraph 7 above. He did not give weight to the hearsay allegations about interference with access by builders to the site which were hearsay and uncorroborated. The appellant did not even provide the name of the builder. The judge was entitled to take that view of the evidence. The judge accepted the evidence that there was a 10 to 15 min delay in January 2005 but his reference to the passage of Mr Young's evidence indicates that he did not give weight to the unparticularised further allegations. The references to hold-ups in 2006 and 2007 appear to be little more than reflections of the fact that the right of way had to be used in common with others.

[35] We accept that the appellant also introduced generalised statements asserting interferences with the right of way. The judge was entitled to treat those with caution. Where particularised events had been recounted the evidence tended to

show that any interference was very modest. We consider that the learned trial judge applied the correct legal test in determining whether there was an actionable interference with the right of way and that he was entitled on the basis of the evidence adduced before him to come to the conclusion that there was no substantial interference.

[36] Harassment is prohibited by Article 3 of the Protection from Harassment (Northern Ireland) Order 1997 ("the 1997 Order").

> "3. - (1) A person shall not pursue a course of conduct-
>
> (a) which amounts to harassment of another; and
>
> (b) which he knows or ought to know amounts to harassment of the other."

Article 4 of the 1997 Order makes a breach of Article 3 a criminal offence and Article 5 establishes civil liability.

> "5. - (1) An actual or apprehended breach of Article 3 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
>
> (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment."

[37] There is no definition of harassment in the Order. What conduct can amount to harassment was considered by the House of Lords in Majrowski v Guy's and St Thomas's NHS Trust [2007] 1 AC 224. Lord Nicholls dealt with the nature of the required conduct at paragraph 30:

> "Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so…Where ... the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive

> and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability."

[38] The learned trial judge examined the case on the basis that Mrs Russell used uncivil language on occasions which ought not to have been used. He concluded that such behaviour did not amount to harassment. That is not to condone the behaviour but to recognise that the law requires the conduct to reach a level of seriousness before an actionable remedy can be provided. In this case the particularised incidents involving the Russells were intermittent and comparatively modest over the period from 2001. The generalised accusations inevitably added very little.

[39] One of the issues raised in the appeal was the conduct of Mr Boyd in approaching an estate agent in May 2001 to challenge the entitlement of the appellant to a right of way along the laneway. It was also contended that Mrs Russell also approached intending purchasers to alert them to her claim that she had exclusive ownership the lane. All of this pre-dated the court proceedings in which the vendors established their title. As counsel for the appellant indicated to Treacy J it would have been incumbent on the appellant's solicitors to disclose the dispute in the event that a purchaser was interested in completing a sale.

[40] We accept that the learned trial judge did not examine this as an aspect of harassment. We also accept that harassment can take many forms and we do not exclude the possibility that a course of conduct in relation to a title claim might along with other matters ground such a claim. We also accept that the appellant was entitled to rely on the evidence of photographing. The evidence adduced, however, demonstrated the existence of an unresolved dispute which in our view was not misconduct of sufficient gravity to add to the claim in harassment against any of the respondents.

Conclusion

[41] For the reasons given we do not consider that any of the arguments on appeal are made out and we dismiss the appeal.