

**Neutral Citation No: [2018] NICH 5**

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

**Ref: McB10644**

**Delivered: 15/05/2018**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

**2017/113289**

**IN THE MATTER OF LAND SITUATE AT ST MARTIN'S LANE, CARNAGAT,  
NEWRY, COUNTY ARMAGH**

**BETWEEN:**

**ST PATRICK'S ARCHDIOCESAN TRUST LIMITED**

**Plaintiff;**

**-and-**

**PATRICK WARD**

**First-named Defendant;**

**MARGARET WARD**

**Second-named Defendant.**

**McBRIDE J**

**Introduction**

[1] The plaintiff, by originating summons seeks an order for possession of lands situate at St Martin's Lane, Carnagat, Newry, County Armagh ("the lands") pursuant to Order 113 of the Rules of the Court of Judicature (Northern Ireland) 1980, on the ground that it is entitled to possession and the defendants are in occupation without a licence or consent.

[2] Mr Sands of counsel appeared on behalf of the plaintiff. Mr Heaney of counsel appeared on behalf of the second named respondent ("Mrs Ward"). The

first named defendant (“Mr Ward”) appeared as a litigant in person. I am grateful to counsel for the time and energy expended by each of them in the preparation of detailed skeleton arguments which were of invaluable assistance to the court.

### **Evidence before the court**

[3] The application is grounded on the affidavits of Liam McKinney sworn on 3 November 2017, Mary Creegan sworn on 3 November 2017 and Paul Campbell sworn on 20 November 2017 and 21 November 2017. Mrs Ward filed a replying affidavit sworn on 6 February 2018. In addition she filed a corroborating affidavit by Mr Anthony Coyle sworn on 6 February 2018. Thereafter the applicant filed rejoinder affidavits by Paul Campbell sworn on 12 March 2018, Mary Creegan sworn on 12 March 2018, Liam McKinney sworn on 12 March 2018 and Michael McKnight sworn on 12 March 2018.

[4] Mr Ward took no active part in the proceedings. He did not file any affidavit evidence. When he attended before the court on the day of hearing he was not legally represented. He indicated to the court that he was not in occupation of the lands and was not therefore making any claim in respect of the lands. He then informed the court that Mrs Ward was in occupation of the lands.

### **Background**

[5] As appears from the affidavits the lands are registered in the name of the plaintiff and are contained within Folio 8353 County Armagh. The lands comprise St Malachy’s Nursery School, St Malachy’s Primary School, (“the schools”), Parochial House and grounds and a 7½ acre field (“the field”). The area of the lands occupied by the two schools and the Parochial House are separated from the field by physical boundaries. The only land in dispute is the 7½ acre field. The field at its Northern boundary adjoins a housing development known as Altnaveigh Park. Number 53 Altnaveigh Park lies immediately adjacent to the Northern boundary of the field. The only entrance to the field is via Martin’s Lane, which is on its Southern boundary. To the West the field is bounded by the schools and the Parochial House. To the East it is bounded by a public road.

[6] Mrs Ward resides at 53 Altnaveigh Park which is a Northern Ireland Housing Executive property. She claims title to the field on the basis that she has been in adverse possession of the land for a period in excess of 12 years.

[7] The plaintiff seeks an order for summary possession of the field on the basis that it is the legal owner of the field and the defendants have no legal or beneficial or other interest in the field.

## Issues to be determined

[8] In determining whether to make an order for possession pursuant to Order 113 it is necessary for the court to consider the following matters:

- (a) The test for making an order pursuant to Order 113
- (b) The law relating to adverse possession
- (c) Whether, on the evidence, the test for making an Order for possession under Order 113 is met.

## Order 113 test

[9] Order 113 is a procedure which enables a person to obtain an extremely summary remedy in a case where he asserts that someone is wrongfully in occupation of his land. Originally this procedure was introduced to deal with the problem of squatters entering onto land in respect of which they had no rights. This procedure was therefore intended to be used in clear and straightforward cases.

[10] Staunton LJ in *Eyles v Wells* [1991] WL 11780021 stated:

“There should be judgment for the plaintiff, if there is not a triable issue or some other reason why there ought to be a trial.”

Similarly in *Her Majesty's Principal Secretary of State for Communities and Local Government v Praxis Care* [2015] NI Chancery 5 Deeny J held at paragraph [10]:

“The defendant must show an arguable case ... that it has a right to remain on the land ... It must be a genuine claim for possession and not a mere quibble.”

[11] Whilst an arguable case is generally a low hurdle to surmount, as Sir Robert Megarry VC noted in *The Lady Anne Tennant v Associated Newspapers Group Limited* [1979] FSR 298:

“A desire to investigate alleged obscurities in the hope something will turn up on the investigation cannot separately or together amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and micawberism.”

The court therefore only needs to be satisfied there is an arguable case. Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396 in respect of the question whether there was a “serious question to be tried” stated as follows at page 407:

“...it is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which calls for detailed argument and mature consideration”.

[13] However, notwithstanding that this is a summary procedure, the court can still at this stage, determine pure matters of law which are straightforward and do not call for detailed argument.

[14] To establish an arguable case a defendant must therefore show that his defence has substance and reality. Whilst this is a low hurdle to surmount, the burden on the defendant is to present sufficient evidence to the court to establish all the necessary factual and legal elements of the claim he is making. Bald assertions alone, without a shred of evidence in support, will rarely, if ever be sufficient to establish an arguable case.

### **Adverse possession – relevant legal principles**

[15] The doctrine of adverse possession arises from the provisions of the Limitation (Northern Ireland) Order 1989. The relevant statutory provisions are set out in Article 21(1), Article 26, and paragraphs 1 and 8(1), (2) and (3) of Schedule 1 to the Limitation (Northern Ireland) Order 1989. The limitation period, subject to certain exceptions, (none of which applies in this case) is 12 years.

[16] The principles evolved by common law governing the establishment of sufficient adverse possession summarised in Slade J’s judgment in *Powell v McFarlane* [1977] 38 P&CR 452 at 470 to 472 were confirmed in the House of Lords decision in *J A Pye (Oxford) Limited v Graham* [2002] 1 AC 419. Slade J held at page 470 to 471 as follows:

"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi').

(3) Factual possession signifies an appropriate degree of physical control. ... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The animus possidendi, which is also necessary to constitute possession, ... 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 ... where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence of the trespasser, claiming that he has acquired possession, not only had the requisite intention to possession, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently in not having dispossessed the owner. A number of cases illustrate the principle just stated and show how heavy an onus of proof falls on the person whose alleged possession originated in a trespass."

Further at page 476 he stated:

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

[17] The burden of proof rests on the person claiming adverse possession and the standard of proof is on the balance of probabilities.

### **The evidence of the Plaintiff**

[18] The plaintiff's case is that it is the registered owner of the field and the defendants entered into occupation of part of the field in and around the summer of 2017 without consent. In particular the defendants removed the fence to the rear of 53 Altnaveigh Park, Newry so that it encroached into the field. The area encroached and fenced off has been filled with hard core and quarry dust and used to store commercial utility vehicles. Margaret Creegan, school principal of St Malachy's Primary School and Michael McKnight, school caretaker both state that this encroachment first occurred in the summer of 2017. Google maps dated January 2010, 22 May 2010 and 23 June 2015 do not show any encroachment of 53 Altnaveigh Park into the field. The affidavit evidence also avers that CCTV footage indicates that the fence at the rear of 53 Altnaveigh Park, Newry was moved from its original position and a new fence was erected which enclosed part of the field as part of Mrs Ward's garden between 5 and 9 August 2017.

[19] A letter of claim was sent on 19 September 2017 to Mr Ward. His solicitors replied by e-mail dated 27 September 2017 indicating that their client had been in occupation since 2004 and was claiming ownership by virtue of adverse possession.

[20] When a representative of the plaintiff inspected the lands on 18 September 2017 he noted that the defendants had erected a makeshift fence using plastic posts and ropes joined to existing hedges to fence off part of the field internally. CCTV records are also stated to show that this internal fencing was erected on 14 October 2017. When a representative of the plaintiff re-inspected the area on 1 November 2017 he noted rubbish had been removed from the field but also noted that additional rubbish had been deposited in the field.

## **The defendant's evidence**

[21] Mrs Ward filed an affidavit sworn on 6 February 2018. No affidavit evidence was filed by Mr Ward.

[22] In her affidavit Mrs Ward avers that she is a Northern Ireland Housing Executive tenant residing at 53 Altnaveigh Park in Newry. She avers that she has lived at this address from 16 March 2004 to date. Her husband, Mr Ward is not a tenant and she denies that he lives with her but states that he is a frequent visitor to the premises.

[23] She alleges that she has been in possession of the lands for a period in excess of 12 years. She relies upon the following acts of possession, to establish adverse possession:

- (a) She made a run for her dogs measuring 5 metres x 27 metres in the field shortly after she moved into her present home. This area was then subsequently enclosed when she moved the original rear fence and enclosed this area with a new fence.
- (b) After she made a complaint, trees were removed from the field by a third party and she filled the holes left with hard core.
- (c) She kept ponies in the field from before 2004 to date.
- (d) She and Mr Ward carried out repairs to fences along the boundary of the field from 2004.
- (e) She replaced a metal gate at the entrance to the lands at Martin's Lane. She also put a lock and chain on this gate.
- (f) She erected temporary internal fencing consisting of plastic poles and rope to align up hedges from 2004.
- (g) She cleared rubbish from the field since 2004.

[24] To corroborate these acts of possession she exhibited photographs dated 14.04.04 which she stated showed her and Mr Ward carrying out repairs to the boundary fences. In addition photographs dated 29.03.2004 were exhibited which she submitted showed her and Mr Ward clearing the area immediately behind her house for a dog run. She then exhibited an undated photograph of hard core, undated photographs of a gate and chain, an undated photograph taken on an iPhone of a padlock attached to a gate and undated photographs showing rubbish, internal fencing and a pony in a field.

[25] Mrs Ward further avers that there was originally a gate in the fence at the rear of her property. As she had difficulty opening this she and Mr Ward decided, at an undisclosed date, to remove the fence and erect a new fence which encroached into the field.

[26] Mr Coyle, former chairperson of Derrybeg Community Association in his affidavit states that he has known the Wards for 25 years and that Mrs Ward kept ponies in a large field at the rear of Altnaveigh Park. He avers that he would have, at her request, repaired gaps in the hedges surrounding the field to ensure her ponies did not escape. He also states that he picked up litter in the field.

### **Rejoinder evidence of the plaintiff**

[27] In rejoinder affidavits, the plaintiff avers that CCTV footage dated 13 January 2008 shows the defendant placing a gate in the fence to the rear of her property to permit access into the field. Ms Creegan denies ever seeing a dog run in the field and avers that the fence erected by the Wards in August 2017 had no gate in it to allow access to the field. She further avers that the field was used by young people in the summer to race quad bikes. Father McKinney, the Parish Priest states that on 21 September 2017 the Wards informed him that a former priest had allowed them to use the field.

[28] Mr McKnight, the caretaker, in his affidavit sworn on 12 March 2018 exhibits various parish records. The parish record dated 27 October 2004 records that, as a result of travellers camping in the field and members of the public using it for motorbikes and quads, the Committee agreed to fence the field and to let the field. An invoice dated 10 March 2005 shows that the Plaintiff paid for fencing posts and a galvanised gate to be erected at the field. In July 2012 parish records show the plaintiff paid for a chain and padlock to secure the field. Mr McKnight avers that he purchased this chain and padlock on behalf of the parish and that he placed it on the gate which formed the access to the lands at Martin's Lane. Parish records also show that the land was let in the years 2005, 2008, 2009, 2015 and 2016.

[29] The parish records include an Invoice from Edmund Murney Plant Hire Ltd dated 5 September 2006 which shows that the parish paid for:

“work done on ground at Altnaveigh behind school.  
Cutting down trees removing scrub and levelling  
ground and reseeding.”

### **Consideration**

[30] In accordance with the jurisprudence the court should grant judgment to the plaintiff unless Mrs Ward establishes an arguable case that she has been in adverse possession of the field.

[31] Mrs Ward submits that she has established an arguable case of adverse possession based on the affidavit evidence before the Court which consists of her affidavit evidence and the affidavit of Mr Coyle.

[32] As appears from my review of the evidence the case put forward by Mrs Ward is strenuously denied by the plaintiff. The plaintiff denies that Mrs Ward has carried out any of the acts alleged. The Plaintiff then refers to a number of documents which it submits show Mrs Ward was not in occupation of the field. In addition the Plaintiff relies on the evidence of a number of witnesses who deny that Mrs Ward carried out any of the acts of possession alleged by her.

[33] It is not the role of the court in Order 113 proceedings to conduct a mini trial of the factual issues in dispute. Rather the court has to decide whether Mrs Ward has established an arguable case that she can defend the claim for possession on the basis she is in adverse possession of the field.

[34] I am satisfied that Mrs Ward has failed to establish an arguable case that she is in adverse possession of the field for the following reasons:

- (i) Taking her case at its height, I find, that she has not shown that she has been in occupation for a period of at least 12 years and
- (ii) Having regard to the evidence, I am not satisfied that the acts carried out by Mrs Ward are sufficient to establish an arguable case that she was in factual possession of the field or that she had the necessary animus possidendi.

### **The 12 year period**

[35] At paragraph 5 of her affidavit Mrs Ward states as follows:

“The above property had a wooden fence which ran parallel with the concrete yard to the boundary of the lands comprised within Folio 8353 ... At the boundary of the property there were a number of large trees growing on the disputed lands whose branches reached over the wooden fence into the property. I was renting from the Northern Ireland Housing Executive. I cannot be certain above (sic) who removed the trees from the disputed lands but the same were removed following a complaint made by me regarding the intrusion caused by the large tree and the branches reaching over the wooden fence.”

[36] Uncontroverted parish records show that the plaintiff paid for works, including the cutting of trees behind the school, which took place on 5 September 2006.

[37] Mrs Ward's affidavit exhibited photographs to corroborate the acts of possession carried out by her. These included photographs of her and Mr Ward carrying out repairs to the boundary fences dated 14.04.2004. She further exhibited photographs dated 29.03.2004 which she submitted showed her and Mr Ward clearing the area immediately behind her house for a dog run. There were also undated photographs of hard core, chain and padlock attached to a gate, rubbish in the field, internal fencing and a pony in a field.

[38] I am satisfied, having carefully considered all the photographs dated 2004, that they do not provide supporting evidence of the assertions made by Mrs Ward in her affidavit that the alleged acts of adverse possession were carried out by her in the field from 2004. When one looks at the photographs there is no evidence of a dog run, there is no cleared area and there is nothing to show the repairs carried out to the fences were in fact the fences of this field.

[39] In addition, Mrs Ward's affidavit is structured in such a way that she sets out all the alleged acts of adverse possession after paragraph 5. This indicates to me that these acts occurred after the events referred to in paragraph 5. Therefore the alleged acts of possession, I find, must have occurred after September 2006.

[40] The originating summons by the plaintiff was issued in November 2017. Given my finding that Mrs Ward did not carry out any acts of possession until after September 2006, I am satisfied that she cannot establish an arguable case of adverse possession because she was not in possession for the requisite period of at least 12 years.

[41] If I am wrong about that, I find that the fact she made a complaint about trees overhanging into her premises which resulted in the true owner removing them is evidence that she lacked animus possidendi. In *Pavledes v Ryesbridge Properties Limited* [1989] 58 P& CR 459 the squatter had asked the true owner to repair the fences around the disputed land and to remove earth from the disputed lands. Knox J held at 481:

“Possession is indivisible we are told. It seems to me that [the squatter] cannot validly claim himself to be in adverse possession as against persons whom he actively requested to shoulder the responsibilities that possession has...”

Far from communicating to the true owner that she wanted to exclude him, Mrs Ward by her request indicated to the plaintiff that she treated the plaintiff as

being in control of the field. I am therefore satisfied that Mrs Ward cannot establish an arguable case of adverse possession as paragraph 5 of her affidavit shows she lacked animus possidendi.

[42] If I am wrong about that I am satisfied that the acts relied upon by Mrs Ward are not sufficient to constitute acts of factual possession.

[43] The various acts of possession Mrs Ward seeks to rely on are set out in her affidavit and summarised at paragraph [22] above. Dealing with each of these I find that they individually and collectively do not constitute sufficient acts of adverse possession. In particular I find that the acts of putting hard core in the holes left by the trees which were cut down by the Plaintiff and lifting rubbish from the field are acts which are trivial and transitory. In respect of the creation of a dog run, I find, that Mrs Ward has only made a bald assertion about this. There is not a shred of evidence to support it. None of the photographs produced showed a dog run. A mere bald assertion without evidence in support, is not usually sufficient to establish an arguable case. In respect of the grazing of animals and repairing boundary fences, I am satisfied that these are not acts of adverse possession as they are equivocal acts. In *Gallagher v NIHE* [2010] NIJB 138 at paragraph [10] Girvan LJ held:

“Grazing of land by itself is equivocal. ... In a number of cases the courts have considered mere grazing without other acts of possession as being insufficient to establish adverse possession. ... In *Powell v. McFarland* the squatter at the start of the limitation period was a teenage boy, used the land to graze the family cow, took a hay crop and made rough and ready if widespread repairs to the boundary fence to make them stock proof and allowed a friend to tether a goat on the land. On occasions he shot pigeons and rabbits on the land. Slade J held that the squatter’s use of the land had simply amounted to the taking of profits from the land:-

‘These activities were equivocal within the meaning of the authorities in the sense that they were not necessarily referable to an intention on the part of the plaintiff to dispossess the paper owner and to occupy the land as his own property’.”

[44] The evidence that Mrs Ward placed a lock on a gate to prevent others entering the field would generally be considered strong evidence of factual possession and

animus possidendi. To make an arguable case however the burden is on Mrs Ward to put materials before the court in support of this case. In support of her case she produced photographs. The photograph of the padlock is on an iPhone and it simply shows a padlock. It is not clear that it is a padlock on the gate to the field. Mrs Ward fails to give any details about when the padlock was purchased. She has produced no receipts to prove when it was purchased or that she purchased it. The other photographs simply show a gate and chain. In contrast the plaintiff produced parish records which show the plaintiff bought the gate and padlock and the date of purchase. Mrs Ward never put in any replying affidavit to deny the assertions made by the plaintiff.

[45] Whilst I accept it is not my role to resolve disputes about the facts I am satisfied taking her case at its height that she has not made out an arguable case. The burden is on Mrs Ward to put material before the court to establish her case. As noted by Slade J, there is a high burden on a trespasser to show by compelling evidence that he is in adverse possession. The evidence presented by Mrs Ward is vague. She has not condescended to give particulars and she has not provided any evidence in support of the bald assertion she makes and the acts of possession claimed are equivocal. Given the high burden on a trespasser to show by compelling evidence that there is adverse possession I am satisfied Mrs Ward has failed to establish an arguable case. I accept that Mrs Ward did enclose part of the land in the field by way of a fence when she extended her back garden. As appears from the CCTV footage, and as her counsel accepted, this was only done very recently and therefore this does not qualify as adverse possession.

[46] I am further satisfied that Mrs Ward has not established an arguable case of intention to exclude the world at large from the field. She produced no supporting evidence, save undated photographs, to establish that she had excluded the world at large by repairing fences and putting a lock on the gate. For the reasons set out above I do not find the photographs support the case she makes. She also failed to rebut the affidavit evidence filed by the plaintiff. She could have sought leave of the court to file such evidence but failed to make such an application. As a result the evidence of the plaintiff, as set out in the parish records, is uncontroverted. This evidence in particular shows that Mrs Ward had no animus possidendi as many third parties used the field. There is uncontroverted evidence in the form of the parish records which state that the field was used by young people to race quad bikes and the field was rented out in conacre to a number of famers in the years 2005, 2008, 2009, 2015 and 2016. All this goes to show that Mrs Ward was not in exclusive possession, and the necessary ingredient of animus possidendi to establish adverse possession, was not present. I am therefore satisfied she has not made out an arguable case of animus possidendi.

[47] In all the circumstances I am satisfied that there is no arguable case that Mrs Ward is entitled to claim adverse possession of the field. I also find that there is no other reason why the matter should proceed to trial.

[48] I make an order in the terms of the summons. I will hear the parties in respect of costs.