

Neutral Citation: [2019] NICH 2

Ref: KEE10910

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

Delivered: 02/04/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
ON APPEAL FROM THE COUNTY COURT FOR THE
DIVISION OF FERMANAGH AND TYRONE

BETWEEN

JOHN JOSEPH TONER AND CARMEL ROSE TONER

Plaintiffs/Respondents

and

PAULINE McCAUGHEY

Defendant/Appellant

KEEGAN J

[1] This is an appeal against a decree made by the County Court against the defendant/appellant in the sum of £4,397.80 plus costs. This decree was the final order made after a lengthy series of hearings before the County Court. The decision of the County Court was that the plaintiffs/respondents had the benefit of the easement to facilitate a pipe running through the defendant/appellant's lands in order to allow for discharge of sewage effluent. The Court also found that this pipe was damaged by the appellant and her daughter. This fact was proven by CCTV footage and accepted in evidence. The County Court therefore made injunctions to ensure repair work took place. The appellant was represented by solicitors and counsel through most of the County Court proceedings before they then came off record.

[2] The decree was made up as follows:

- (i) An invoice from Bio-Friendly Ltd dated 3 December 2015 for €425. This was to fix the slurry tank system. At the exchange rate applied at the County Court the sum amounted to £372.80 which is largely the same rate as today.
- (ii) An invoice from Hamilton Contracts dated 4 December 2017 in the sum of £2,610 for the remedial work over the appellant's lands after the damage to the pipe.

- (iii) An invoice from Northern Ireland Water dated 19 December 2016 in the sum of £95.
- (iv) A quotation from Hamilton Contracts dated 30 November 2017 in the sum of £570 including VAT to cover grass seeding which was then required to the land disturbed by the repair works and which was to be carried out in spring 2018. This additional work was put on hold as the appellant lodged an appeal and there is an issue as to whether it is now necessary which I will discuss later in this judgment.
- (v) General damages. The County Court awarded £750 to reflect the distress, inconvenience, trespass and interference inflicted upon the respondents in their family home for almost 12 months during which period the pipework in respect of the easement was damaged and the appellant sought to interfere with that system.

[3] In these proceedings the appellant Mrs McCaughey appeared as a litigant in person. Mr McNamee BL appeared for the respondents. Both Mrs McCaughey and the respondents filed bundles of evidence which I have considered. I heard evidence from Mr Toner, the plaintiff, his engineer Mr Shields, representatives of the Northern Ireland Environment Agency (“NIEA”), and Mr Hamilton the contractor. I also heard from Mrs McCaughey and her daughter Louise and I received written submissions from both parties.

Brief history of proceedings

[4] During the course of the County Court proceedings both parties filed affidavits which I have referenced in examining the history of this case. The parties in this case have an interest in neighbouring land. The land owned by the respondents is contained in folios 36747 and 35943. They obtained this land in 1979 and shortly thereafter they built their family home there at 50 Sessiagh Scott Road, Rock, Dungannon. It appears that the respondents lived on this land without much issue until 2005/2006 when they obtained planning permission to sell a site adjacent to their home. In order to complete the sale they had to address the issue of discharging sewage effluent from the new site which was to have a postal address of 50A Sessiagh Scott Road, Rock, Dungannon.

[5] For many years prior to the site being created at 50A Sessiagh Road the respondents used a discharge pipe over the lands in folio 26087 then owned by Leo Fox and Peter Fox. This was by agreement with the neighbouring landowners who were the uncles of the appellant. Initially discharge flowed into a sheough and then in 1990 a pipe was used to bring the discharge through the Foxes land down to the river. In February 2006 the appellant became one of the registered owners of folio 26087, Peter Fox having died. Leo Fox subsequently died in 2013 having been in a nursing home for some years.

[6] In order to deal with the discharge of effluent for the new site the respondents instructed Wilson Nesbitt to act on their behalf and the appellant engaged Mallon & Anderson Solicitors to act on her behalf along with her uncle. The respondents also engaged Lissan Design to prepare maps for the creation of an easement and also the transfer of the portion out of their existing folios which was to form the site at 50A.

[7] Consent for the discharge of effluent was obtained for the site dated 3 January 2006. An easement was then agreed and signed by both parties on 22 June 2006. The terms of this express grant are as follows:

“Land Registry
Folio no: 26087
Registered owner Leo Fox and Pauline McCaughey
Subject folio nos: 36747 and 35943 County Tyrone
Registered owner: Joseph John Toner and Carmel Rose
Toner

We Leo Fox and Pauline McCaughey the above registered owners of the land comprised in 26087 County Tyrone in consideration of £500 (receipt acknowledged) do hereby grant unto John Joseph Toner and Carmel Rose Toner their heirs, executors and assigns the owners and occupiers for the time being of the lands comprised in 36747 and 35943 County Tyrone the following right:

(1) The right to install, connect into, maintain, use and when necessary replace the pipe which is shown coloured red on the map attached and the free running of water in and through the said pipe.

(2) The right to enter folio 26087 County Tyrone at all reasonable times with or without servants, agents or workman and all necessary machinery for the purposes of inspecting, maintaining, repairing, cleaning and renewing the said pipe provided always that the said John Joseph Toner and Carmel Rose Toner their heirs, executors, administrators, successors and assigns the owners for the time being of folios 36747 and 35943 County Tyrone shall maintain the said pipe in good repair and condition and in the inspection maintaining, repairing, cleaning and renewing thereof to do as little damage as may be practicable to the lands contained in folio 26087 County Tyrone and restore the surface of the said lands without reasonable delay.”

[8] The easement was lodged in the Land Registry as 2007/209115/A. The following day on 23 June 2006 the transfer of 50A by the respondents to the then purchaser was executed. 50A was registered in the Land Registry with a new folio no TY81740 with the benefit of the easement. The easement was also registered as an appurtenance on both folios 36747 and 35943 belonging to the Toners and as a burden on folio 26087 belonging to Mrs McCaughey. These are the dominant and servient tenements respectively. Since then the properties at 50 and 50A have both used the sewage effluent pipe which runs through the lands of the appellant to the river.

[9] The respondents use a modern small treatment plant which connects with the discharge pipe. I heard evidence that this was an efficient and effective treatment system. In 2015 the pipe was blocked with soil and cement requiring the respondents to have to undertake maintenance and repair works. There also appear to have been numerous complaints made to the NIEA by the appellant about alleged pollution. I pause to observe that the Toners obtained consent to discharge of effluent in 2008, after that obtained for the site at 50A.

[10] Matters escalated when on 1 and 2 December 2016 the defendant and her daughter Louise went to the boundary between the parties' respective folios and dug up the discharge pipe and they put cement into the pipe to block any discharge from the respondents' septic tank. After this court proceedings began.

[11] On 21 December 2016 the respondents obtained an ex parte interim injunction prohibiting the defendant, her servants and agents from blocking, trespassing or otherwise interfering with the use of an easement relating to the pipe. On 10 February 2017 the respondents' sewage system was inspected by Aiden Shields, Engineer instructed on behalf of them. Mr Shields concluded that the pipe was blocked on the appellant's land adjacent to the boundary fence with the respondents' land and that the physical damage evident to the pipework facilitating the easement had been caused by human intervention.

[12] On 30 May 2017 after a contested hearing during which the appellant was represented by solicitors and counsel the interim injunction was confirmed. After that contempt proceedings were brought given that the appellant did not comply with the injunction. On 12 October 2017 the Civil Bill proceedings were heard in full by the judge. No counterclaim has ever been brought by the appellant and no applications have been made to Land Registry. At the hearing in the County Court the appellant was represented by a solicitor and counsel. Having heard all of the evidence the judge found for the respondents and the matter was adjourned to 20 December 2017 to allow for implementation of the remedial works in the intervening period.

[13] The appellant again refused access for the remedial works to take place and so the matter was reviewed before the judge on 6 and 15 November 2017 at which stage the judge made further directions and scheduled the hearing for 20 December

2017. The case was adjourned that day due to pressure of court time and ultimately heard on 12 January 2018 when the decree was made. An appeal was lodged on 30 January 2018. This appeal was initially struck out for non-attendance and then reinstated.

Conclusions

[14] I have decided this case having heard all of the evidence on the balance of probabilities. I bear in mind that the appellant is a personal litigant. However, it is important to note that she has had the benefit of legal advice previously. I understand that she is pursuing some complaints against her advisor however that is a separate matter. The appellant was well versed on the facts of the case. She has also had extensive contact with the Land Registry and the NIEA. After the evidence I afforded her the opportunity to make further written submissions which I have also considered.

[15] Having heard all of the evidence and considered the papers in this case my conclusions are as follows:

- (i) The evidence of the first named respondent and his witnesses was wholly more compelling than that of the appellant and her daughter. I accept that the respondents have endured extreme difficulties due to the behaviour of the appellant. I also accept that Mr Toner was on good terms with the Fox brothers and not in dispute with them as suggested by the appellant. I accept that the builders, Hamilton Contracts, had to do the remedial work. This was supported by the evidence of the engineer Mr Shields.
- (ii) I accept the evidence of the NIEA witnesses that there was no evidence of harmful pollution despite the constant complaints of the appellant and her daughter. This position was clearly established in the oral evidence and verified by the detailed correspondence sent by NIEA to Mrs McCaughey which makes the position plain.
- (iii) By contrast the appellant did not present as reliable or convincing to me in any respect. It was clear to me that she and her daughter harbour an animosity towards the Toners. They have therefore embarked upon a campaign against them illustrated by the many complaints made to NIEA and the blocking of the pipe.
- (iv) When the express grant was signed the Toners owned the relevant lands. The grant attaches to the land in folios 36747, 35943 and against the servient tenement 26087. The agreement was made with the Toners and their heirs' executors and assigns. The terms of the grant at (1) specifically covers the respondents connecting into the pipe which runs over the appellant's lands. Part of the land was then hived off the

dominant tenement into a new folio comprising the site. Therefore, the site had the benefit of the easements which attach to the dominant tenement. It is clear from the correspondence that Mrs McCaughey and Mr Fox knew about the site and so there can be no valid argument made about change of user. The Land Registry documents signed by PA Duffy formalise the position of the site and do not substantiate the defendant's claim that there is no easement in favour of the Toners.

- (v) I find the appellant's evidence totally incredible in relation to her having received money from the new site owner Mr Bloomer for an easement and not having received the £500 from the Toners. There is no evidence of this and the assertion is contradicted by the correspondence I have seen, the grant itself which refers to receipt, and Mrs McCaughey's own affidavit.
- (vi) The behaviour of the appellant and her daughter blocking the pipe with cement was absolutely reprehensible. Even if the appellant had some valid point this was not the way to resolve it. Neither the appellant nor her daughter displayed any insight into their actions. The daughter of the appellant also presented in a highly aggressive manner when giving evidence.
- (vii) I accept that some issues were raised about the map but these have been clarified to my satisfaction during these proceedings. In particular I note correspondence to Mrs McCaughey from Land Registry stating that a map was provided. Mr McNamee was also able to confirm the position after contact was made with the Land Registry. I am satisfied that a map was attached. I am also satisfied that the route of this easement over the appellant's land is clear. I therefore reject the appellant's case on this point.
- (viii) I am satisfied that the respondents are entitled to the benefit of this positive easement over the neighbouring land. That has been the position for many years, formalised in the grant of 22 June 2006. Mrs McCaughey did not dispute that she signed the grant with the Toners. After that the two properties used the discharge pipe for around 9 years without issue. I therefore cannot accept the implication that the express grant was intended to cut off the Toners discharge route and replace it with a discharge route for the site alone.
- (ix) The easement is registered in relation to 50A Sessiagh Scott Road and also 50 Sessiagh Scott Road as that property is contained in folios 36747 and 35943. It is also registered as a burden on Mrs McCaughey's lands contained in folio 26087.

[16] I have considered the legal basis for an easement namely the need for a dominant and servient tenement, the need for an easement to accommodate the dominant tenement, that the dominant and servient owners must be different persons and that the right is capable of forming the subject matter of a grant. In my view these requirements are satisfied. Also, on the facts of this case I am satisfied that the respondents' case is established.

[17] Accordingly, I am of the view that the County Court judge was entitled to make the decree that he did. In terms of the amount I will allow the €425 invoice, I also allow the £2,610 invoice, and the £95 invoice. Given the evidence it does not seem appropriate to proceed with allowing the invoice quotation for £570. However, I increase the general damages to a sum of £1,320. This in effect means that the decree in full is affirmed in this court. The respondents are entitled to costs of these proceedings and also costs of the proceedings below.

[18] The appeal is therefore dismissed.