THE COURT OF APPEAL
CIVIL

APPROVED
NO REDACTION NEEDED
Record Number: 2022/265
High Court Record Number: 2016/11428P
Neutral Citation Number: [2023] IECA 313

Donnelly J.

Haughton J.

Allen J.

BETWEEN/

THOMAS RYAN

PLAINTIFF/RESPONDENT

-AND-

FERGAL FLATTERY, CITADEL HOMES LIMITED AND MULBERRY PROPERTIES LIMITED

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 15th day of December, 2023

Introduction

1. This is an appeal against the judgment of the High Court (Stewart J.) delivered on 25 April 2022, and her consequential orders perfected on 22 November 2022.

2. The action sounds in trespass and nuisance and relates to the respondent's lands at Bawnogues, Straffan, County Kildare ("the Ryan land", which term I shall use to include

certain segments of the Ryan lands which I refer to as "the disputed lands"). The respondent was successful in the High Court in obtaining –

i. A declaration of ownership of the Ryan lands as shown on a map ("the 1974 Deed map") annexed to an Indenture of Conveyance made the 26 October 1974 between James Patrick O'Hagan as grantor and Thomas Ryan (the respondent) as grantee ("the 1974 Deed") and thereon marked with dimensions 190 feet by 190 feet;

ii. A declaration that the respondent enjoys an easement over portion of the appellant's neighbouring land as shown on a survey map prepared by Edward Nyhof bearing date January 2017 for soakaway for the respondents septic tank;

iii. Permanent injunctions restraining trespass/nuisance by the appellants on the Ryan lands;

iv. An order that the appellants remove "*the post block wall and any and all other impediments from [the respondent's] land forthwith*";

v. An order "*that [the appellants] pay the [respondent] the cost including VAT of reinstatement of the [respondent's] lands and property (i.e. in the sum of €118,400.00) to the condition they were in prior to 2nd December 2016 (to include removal of the block wall and the safe removal and replacement of the line of 64 leylandii cypress trees, the cost of which is to be assessed in accordance with the evidence of Mr. Stephen Buchanan as being €350 to remove and €1500 to replace per tree*";

vi. Damages for trespass and nuisance in the sum of €125,000;

vii. Costs.

The appellants were granted a stay, on certain terms, in event of an appeal.

3. By Agreement for Sale dated 15 September 2016 the appellants purchased from members of the O'Hagan family Lot 1 at Bawnogues comprising 5.24 hectares, and Lot 2 at Bawnogues being part of the lands described in Folio 3130 of the Register County Kildare and comprising 2.06 hectares, comprising in total some 7.3 hectares. I will refer to this, as did the trial judge, as "the Citadel land" as, pursuant to the contract for sale, it was conveyed to the second named appellant Citadel Homes Limited, on 10 November 2016.

4. The Ryan land on the northern and eastern sides has a common boundary with Lot 1 of the Citadel land. Soon after the 2016 sale was completed a boundary dispute arose between the parties in relation to overlapping segments of the Ryan land and Lot 1 of the Citadel land, which I shall refer to as "the disputed land". The essence of this appeal is that the appellants assert that the trial judge erred in failing to find the respondent's claim to have been statute barred in relation to the disputed land insofar as it lies outside fencing erected by the appellants, along with planting of trees, in the mid-1970's and within, they say, the land sold to them.

5. The action was heard over some twenty-four days between 9 May 2018 and 12 April 2019, and during the hearing the trial judge visited and inspected the disputed lands. A significant part of the evidence in the High Court related to (alleged) trespass damage, specifically tree damage, and is only marginally relevant to this appeal. While some of the evidence was disputed much of the background to the action is not in dispute.

Further background

6. Under an Indenture of Conveyance made on 13 August 1956 James Patrick O'Hagan ("J.P. O'Hagan") acquired lands at Bawnogues, Straffan, County Kildare which included Lot 1 of the Citadel lands and the Ryan land. J.P. O'Hagan farmed these lands along with the lands in Lot 2 which he acquired in 1981, all of which lands were accessed along a public

lane. The lands in Lot 2 are appurtenant to those in Lot 1 but have no relevance to these proceedings other than that they form part of the Citadel lands.

7. The respondent married Mary O'Hagan, daughter of J.P. O'Hagan, and in 1974 J.P. O'Hagan granted to the respondent a plot of land carved out of the land comprised in Lot 1 on which to build their house. Accordingly by the 1974 Deed J.P. O'Hagan in consideration of natural love and affection granted to the respondent:

> "*ALL THAT AND THOSE part of the townland of Bawnoges in the barony of North Salt in the County of Kildare comprising 2 roods or thereabouts Statute Measure and being more particularly described and delineated in red on the map annexed hereto TO HOLD the same unto and to the use of the 'Grantee' his heirs and assigns in fee simple …*"

8. The critical 1974 Deed map shows this plot with dimensions of 190 feet x 190 feet, fronting onto the public lane. While it is roughly square, it is in fact a parallelogram, bounded on the south by the public lane, on the west by third party lands (later owned by James Hayde, an important witness in the High Court), and on the north and east by land retained by J.P. O'Hagan. On the north side, the retained land is part of a narrow field several hundred metres in length, at times described in the evidence in the High Court as "the long field" or "the lawn field" (the description adopted in this judgment), running back from the Ryan land to a boundary with the K Club. On the east a strip of retained land was used by J.P. O'Hagan to access his retained farmland along a mud lane/track that was only surfaced with tarmacadam in 2006.

9. The 1974 Deed map was drawn up by the respondent, himself an engineer, with J.P. O'Hagan, in the office of Mr. Cairbre Finan of Wilkinson & Price Solicitors, and annexed to the 1974 Deed. The evidence was that the north eastern corner of the Ryan land was

marked on the ground by a concrete post erected by the respondent and J.P. O'Hagan together.

10. The consent of the Land Commission pursuant to s. 12 of the Land Act, 1965 to the transfer of the plot to the respondent was required, and this was granted in October 1974 in respect of the holding "*marked B on the enclosed map and comprising an area of two roods Statute measure.*" Over the course of the trial it became common case that the reference in the parcels clause of the deed to two roods was an error, and that what the 1974 Deed conveyed was what was shown on the 1974 Deed map *viz.* a plot 190 feet x 190 feet.

11. On 13 December 1975 the respondent obtained planning permission for a home to be constructed on the plot. As the planning regulations in force at the time required the septic tank to be constructed a minimum of 75ft from the residence it was, by agreement between the respondent and J.P. O'Hagan, placed partially over the boundary line, and the percolation/soakaway area associated with the septic tank also ran over the boundary line in the vicinity of the northeast corner of the plot. It was the respondent's evidence that J.P. O'Hagan granted him a 10ft wayleave over the retained lands to accommodate the septic tank and soakaway.

12. In or about 1976 the respondent erected a fence near the northern side of the Ryan land ("the northern fence"). It was not placed on the Ryan land boundary line, but rather some 15 feet inside and roughly parallel to the boundary line. Around the same time the respondent erected a fence and planted a line of Leylandii trees inside the eastern boundary. Again this fence/line of planted trees ("the eastern fence") does not run along the Ryan land boundary line. It also does not run parallel to the boundary line. Rather it runs inside the boundary in a line on a northeast/southwest axis leaving a triangular portion – wider to the south (abutting the public lane), narrowing to the north east corner (where, according to the

respondent's evidence, the concrete post was erected) – lying to the east of the tree line. "The disputed land" is that land lying within the 190 foot x 190 foot plot but outside of the northern fence and eastern fence. It is these segments that the appellants assert were acquired by adverse possession by their predecessors in title.

13. The respondent and his wife lived in the Ryan house from 1976 to 1981, when the respondent moved with his family to South Africa for work. His brother-in-law, Joseph O'Hagan resided in the property rent free with the respondent's permission from approximately 1983 to 1991. Thereafter the respondent's nephew Shane Heffernan resided in the house until 1996, with the respondent's permission. Then the respondent's daughter Susan Ryan lived there until 2001 and thereafter his daughter Katherine Ryan (a witness in the High Court) lived in the property with her family. During the period 1982 until 2016 the respondent visited the house from time to time, and in an affidavit which he swore on 23rd January, 2017 he indicated his intention to return to Ireland and live in the house in retirement. He is now retired from his work as an engineer.

14. By Conveyance and Transfer made on 14 June 1996 between J.P. O'Hagan of the one part and James O'Hagan, John O'Hagan and Joseph O'Hagan of the other part J.P. O'Hagan transferred the Citadel lands to his three sons James, John and Joseph. J.P. O'Hagan died in 1999. By the time the appellants came to acquire the Citadel land, John O'Hagan and James O'Hagan were deceased, and the sole surviving son of J.P. O'Hagan was Joseph O'Hagan, who was the key witness called by the appellants in the High Court.

15. The use and occupation of the disputed land during the period 1974 to November 2016 was the focus of evidence and some controversy and will be addressed more fully later in this judgment.

16. In 2016 the Citadel lands were advertised for sale by public auction and described as "*c. 17.6 acres/ c. 7.11 hectares of prime lands located opposite the back entrance to the world renowned K Club (venue for the 2006 Ryder Cup) and c. 1km West of Straffan Village*", with a guide price of €225,000, and naming Mr. Cairbre Finan, of Wilkinson and Price, as the solicitors acting for the vendors.

17. The brochure for the sale had a small-scale map attached showing the Citadel lands, and appearing to show the boundaries with the Ryan lands as being those represented on the ground by the northern fence and the eastern fence – that is to say, as including the disputed land. Annexed to the draft Contract of Sale was a "*Land Registry Compliant Map*" prepared by D.C. Turley & Associates, Consulting Engineers, and bearing date 6 September 2016. This purported to mark the boundaries of the lands in sale as being up to the northern fence and the eastern fence.

18. The Citadel lands were purchased after auction, and the Agreement for Sale dated 15 September 2016 shows that they were purchased by Brian Beirne in trust (for the appellants, although not so stated) for €250,000 with a deposit of €25,000 and a closing date of 7 October 2016. The Documents Schedule refers at item 6 to a "*Declaration of Identity – Robert Turley*", and Special Condition 4 reads:

> "*<u>Identity</u>*
>
> *The property herein is believed and shall be taken to be correctly described and any error, mis-statement or omission in this Contract shall not annul the Contract or be a ground or basis for any abatement or compensation on either side. No further evidence of identity as to the property in sale, the boundaries thereof or as to the property in sale as comprised in the Documents of Title set forth in the Documents Schedule shall be furnished. The Purchaser shall be deemed to have satisfied himself*

as to the identity of the property in sale and shall be deemed to have satisfied himself that the boundaries of the property on the ground are correctly set forth and substantively in accordance with the particulars as furnished herein. No further requisition, query or objection shall be raised regarding same."

19. In addition the Contract for Sale incorporated the Law Society General Conditions of Sale, and General Condition 14 provided:

"*IDENTITY*

14. The Purchaser shall accept such evidence of identity as may be gathered from the descriptions in the documents of title plus (if circumstances require) a statutory declaration to be made by a competent person, at the Purchaser's expense, that the Subject Property has been held and enjoyed for at least 12 years in accordance with the title shown. The Vendor shall be obliged to furnish such information as is in his possession relative to the identity and extent of the Subject Property, but shall not be required to define exact boundaries, fences, ditches, hedges or walls or to specify which (if any) of the same are of a party nature, nor shall the Vendor be required to identify parts of the Subject Property held under different titles."

Annexed to the Agreement was the *"Land Registry Compliant Map"* of the property in sale prepared by Mr. Turley. This map have included the disputed lands.

20. The first named appellant Mr. Fergal Flattery, who is a director and equal shareholder with his brother Mr. Martin Flattery in the second and third named appellant companies, gave evidence that he holds a degree in Quantity Surveying and Construction Economics, but that he is not a member of the Society of Chartered Surveyors. He walked the lands in sale on some three occasions prior to the auction, having to hand *inter alia* the sales brochure

and Mr. Turley's contract map. Prior to purchase he was satisfied that the lands in sale extended up to the northern fence and eastern fence/treeline.

21. Mr. Edward Timmins of L.C. O'Reilly Timmins Solicitors acted on behalf of the appellants in the purchase of the lands. He undertook various searches, including a Registry of Deeds Search, dated 10 November 2016. This disclosed various acts, but in particular reference No. 1974161090 of 19 December 1974 disclosed the 1974 Deed and in the right column headed *"Vacate Satisfactions"* there are handwritten comments marked up by Mr. Caibre Finan, the solicitor acting for the vendors, prior to closing. Opposite the entry for the 1974 Deed the handwritten words *"not affect"* appear to have been written by Mr. Finan. Mr. Timmins appears to have accepted this at face value and did not request or insist on inspecting a copy of the 1974 Deed before closing.

22. Mr. Finan had organised for Mr. Turley to carry out a survey for the purposes of preparing the map for the sale, and a declaration of identity. He provided Mr. Turley with the O.S. map and the 1956 Deed map, and the declarations certified that the site being sold came entirely within the lands conveyed under the 1956 Deed. With regard to the 1974 documentation Mr. Finan gave evidence in the High Court that the file held by his firm contained the first three pages of the 1974 Deed, but not the 1974 Deed map. Mr. Finan said he was live to the fact that the land within the Ryan fences was much larger than two roods, which meant that the Ryans were occupying more land than the Land Commission consent suggested had been conveyed, resulting in a possible query about the boundary.

23. Mr. Fergal Flattery met with Ms. Katherine Ryan, the respondent's daughter, in the days preceding the completion of the sale, and subsequent to closing there were a number of meetings and exchanges. These included negotiations over a possible sale by the appellants of 1.5 acres of the Citadel lands located behind the northern fence to the respondent in

exchange for €60,000 and a portion of the Ryan land located by the trees. This offer was rejected, and the respondent made a counter proposal that he might purchase the 1.5 acres for €22,000 and the appellants pay for re-routing the septic tank and percolation area. This was rejected by Mr. Flattery. Further negotiations, which are not germane to this appeal, ensued but did not result in any agreement.

24. However these negotiations gave rise to meetings on site between Mr. Flattery and Ms. Ryan (representing the respondent as he was abroad), and various communications, in the period 7 - 24 November 2016. It is a matter of controversy as to when in this period Mr. Flattery first became aware of or was furnished with a copy of the 1974 Deed map. Ms. Ryan's evidence was that she showed him a copy of the 1974 Deed map on 9 November, and brought a copy of the map to their meeting on 22 November. Mr. Flattery in his evidence said that he was shown a "*block plan*", at the meeting on 22 November 2016, that he was never actually shown the Deed map until presented with a copy when attending Mr. Timmins' office on 16 December 2016.

25. For present purposes it is sufficient to record that it is clear from the evidence that by 22 November 2016 Mr. Flattery/the appellants knew that the respondent was claiming title to lands that went well beyond the northern fence and eastern fence. While initially Ms. Ryan was claiming the respondent's title ran to a plot of 200 feet x 200 feet in size, by the time the appellants obtained a copy of the 1974 Deed map in mid-December 2016 it was clear that the claim was to 190 feet x 190 feet. It is also clear that despite Mr. Flattery's awareness of the claim at least from 22 November 2016 there were significant acts undertaken after that date which the appellants knew would potentially constitute trespass on the Ryan land.

26. From 24 November 2016 the appellants their servants or agents carried out various acts on the Ryan land, and these alleged acts of trespass continued into January 2017. It is not

necessary to describe these in any great detail because, shortly before the hearing of this appeal, the parties notified the court of an agreement on the quantum of (general) damages (*viz.* in respect of the award of €125,000) in the event that the appeal is unsuccessful, but I will summarise them briefly.

27. On 24 November 2016 a mini-digger began cutting away the hedgerows and putting up concrete posts immediately outside the northern fence. Works resumed on 2 December with cutting of hedgerows and the cutting of larger branches on the eastern fence treeline. On 3 December 2016 an engineer acting on behalf of the respondent marked out the Ryan land boundary with tape. On 5 December these boundary markers and tape were removed by a JCB, and the concrete post claimed by the respondent to mark the north-east corner of the Ryan land (as erected by the respondent with J.P. O'Hagan) was removed. Further works of cutting hedgerows occurred between 6 and 20 December. Gibson and Associates, solicitors acting on behalf of the respondent, wrote a letter of protest on 14 December 2016. A reply from the appellants' solicitors dated 15 December 2016 asserted that the works were within the boundaries of the Citadel land. The respondent's solicitors replied by letter dated 16 December 2016 enclosing a copy of the 1974 Deed, including the 1974 Deed map, and called on the appellants to furnish an undertaking by close of business on 19 December 2016 to cease all works. By letter of 21 December 2016 the appellants refused to give such an undertaking. This led to the issue of the Plenary Summons on 22 December 2016, which was served on the second named appellant Citadel Homes Limited by registered post on that day, and served on the first named appellant Fergal Flattery on 5 January 2016.

28. On 23 December 2016 all markings laid out by the respondent's consulting engineer were removed. The appellants' works resumed in early January, and on 3 and 4 January a JCB was used to dig a large deep trench on the disputed land on the northern side. This was

filled with bricks on 5 January and on 6 January the appellants began construction of a wall, work on which continued on 9 and 11 January. The wall was built to two metres high. The appellants also began to dig out land on the northwest corner of the disputed land, and carried out further works on the treeline and on 19 January 2017 a fence was erected beside the line of trees on the eastern side – referred to by the trial judge as "*the new Eastern fence*".

29. The respondent sought interim relief and by order of the High Court (O'Connor J.) dated 20 January 2017 it was ordered that the appellants be restrained until Wednesday 25 January 2017 from carrying out works on any trees located along the Eastern fence. A notice of motion seeking interlocutory injunctive relief issued on 24 January 2017 returnable to the following day. Thereafter a number of affidavits were exchanged and the interlocutory application was listed for hearing on 23 February 2017. It did not proceed as undertakings were given that no further acts of (alleged) trespass would be undertaken by the appellants pending the trial of the action, and the interim order made on 20 January 2017 was vacated, an agreed schedule of directions in relation to pleadings was agreed, and the costs of the injunction application were reserved.

The course of pleading

30. The manner in which the appellants came to plead adverse possession, and certain other defences that were raised and pursued without success at trial, is deserving of some comment.

31. By order of the High Court (Gilligan J.) made on 23 February 2017 the third named appellant was joined as a co-defendant. The amended Plenary Summons sought declarations that the appellant was the owner of the Ryan land (including the disputed land) and that he enjoyed an easement over the Citadel land in respect of the septic tank/percolation area,

injunctions restraining trespass, orders for reinstatement of the appellant's lands and damages.

32. The Statement of Claim was delivered on 9 March 2017, and does not require much comment. It pleads the respondent's ownership of the Ryan lands under the 1974 Deed, and that the parcel of land conveyed measured 190 feet from the road and 190 feet across to a (private) laneway by which the late J.P. O'Hagan could access the remainder of his property (paragraph 5). Paragraphs 6 and 7 plead:

> "6. *On or about 13th December 1975 the Plaintiff obtained planning permission for a home to be constructed on the site. Planning regulations in force at the time required the septic tank to be constructed a minimum of seventy five feet from the residence. As a result, the septic tank and percolation area was placed partially over the boundary line, by express oral agreement with James Patrick O'Hagan, who granted the plaintiff a ten foot wayleave over the necessary land.*
>
> *7. In or around the time of the construction of the house the Plaintiff erected a fence towards the rear of his property, which lies to the North. This fence was not placed on the boundary line but rather some fifteen feet inside the boundary of the Plaintiff's property. The purpose of the fence was to contain livestock owned by the said James Patrick O'Hagan rather than to mark out the boundary of his property. In and around the same time the Plaintiff planted a line of trees near the Eastern boundary of his property. Similarly, this line of planted trees did not run along the boundary line of the property, nor parallel to it, but rather inside the boundary, running in a line on a north-east south-west axis so that a triangular portion of the Plaintiff's property lies to the east of the trees.*"

33. The Statement of Claim then pleads the purchase by the appellants and the closing of that sale on 11 November 2016. It then refers to negotiations from 8 November 2016 until 23 November 2016, and thereafter pleads acts of alleged trespass, particulars of which are given. Paragraphs 20 - 23 give particulars of damage to the rear hedgerow, trees and fencing. The reliefs claimed are similar to those in the plenary summons.

34. A Defence was delivered on 25 April 2017 which pleaded the purchase as having closed on 10 November 2016, and that the works undertaken thereafter were carried out on the appellants' lands. Accordingly the appellants denied trespass, nuisance or interference with the appellant's lawful use and enjoyment of the property (paragraph 11). It was then pleaded:

> "*12. In the alternative, the Plaintiff is estopped from claiming such trespass and/or nuisance in light of the boundaries marked by the plaintiff over 40 years ago which said boundaries are in conformity with the physical boundaries on the land, the freehold of the Second Defendant's processor [sic] in title and the title map obtained by the Second Named Defendant herein at the date of sale in 2016.*
>
> *13. Without prejudice to the foregoing, in the alternative, the Second Named Defendant purchased the lands adjoining the plaintiff's lands in 2016, as a bona fide purchaser without notice of any alleged boundary issue in respect of same and at all material times acted in good faith and upon the particulars of sale furnished by the Vendor of the said property, consequently if the Plaintiff suffered damages, loss or expense (which is denied), same were not caused or occasioned, owing to any acts of trespass or nuisance on the part of the Defendants, their servants or agents, but were caused wholly by the negligence, and/or breach of contract on the part of the Vendors of the land sold to the Second Named Defendant on 10th November 2016.*"

There was no plea of acquisition of the disputed lands by adverse possession, and no counterclaim for title by adverse possession.

35. By Notice of Motion issued on 7 November 2017 the appellants applied to amend the Defence to include a plea of adverse possession, by the insertion of the following new paragraph immediately after the existing paragraph relating to estoppel:

> "*13. As a result thereof the Second Named Defendant claims adverse possession to the said lands, the physical boundaries for which were marked by the Plaintiff over 40 years ago and since then occupied by the Defendant and/or the Defendant's predecessor in title.*"

Liberty to amend in this regard was granted by order of O'Connor J. made on 23 November 2017. It is relevant to note that no application was made at that time to raise a counterclaim claiming title to the disputed lands by adverse possession.

36. By Notice for Particulars delivered on 24 November 2017 the respondents raised particulars related to the new plea, and replies were delivered by the appellant's solicitors on 20 December 2017. The particulars sought and the replies, given below in italics, are relevant:

> "1. Please state which of the Defendant's predecessors in title allegedly first used the Plaintiff's lands in a manner to oust the plaintiff's title to his lands. Please identify all such parties whether living or dead;
>
> > *1. This is a matter for legal argument at the date of the action herein, without prejudice to same, the Defendants will rely on the fact that the Plaintiff admits to erecting a physical fence to the rear of his property to the north and a line of trees to the Eastern side of his property in circa 1975. The defendants will*

further rely on the fact that in circa 2005 a planning permission was granted on the neighbouring property, using the said fence and tree line as a physical boundary and the plaintiff did not object to same.

2. Please state when the Defendant or the Defendant's predecessors in title began using the Plaintiff's land in a manner inconsistent with the Plaintiff's title;

2. As pleaded above in or about 1975.

3. Please describe the acts of the Defendant or the Defendant's predecessors in title by which they sought to oust the title of the plaintiff;

3. As pleaded above the parties have acted in a manner consistent with the above referenced physical boundary since circa 1975.

4. Please deliver particulars of all facts relied upon by the Defendants to allege a claim of adverse possession, including but not limited to: period of use; and knowledge of the 2nd Named Defendant and its predecessors in title relevant to the plea.

4. As pleaded above the physical boundary has been in place and in use since 1975."

37. In a letter dated 18 January 2018 sent by the respondent's solicitors to the appellants' solicitors protest was made at the lack of detail in the particulars furnished, and it was stated:

"*It is clear that you have not advanced any factual basis as required in law for a claim of adverse possession. As a consequence your client's actions will prolong these proceedings on a wholly unnecessary basis and increase costs. This letter will be brought to the attention of the Court at the conclusion of the hearing in support*

of our client's application for costs. However, we note the facts upon which you intend to rely to make that case and that you are confined to same."

38. There matters rested in relation to the pleadings - until the trial commenced. Over the first couple of days the appellant gave evidence, and under cross-examination a point was raised as to his status as a British citizen – in the context of the Land Act, 1965 and the then restrictions on the transfer of land to non-Irish citizens, and the fact that the 1974 Deed refers to the appellant as an Irish citizen. The appellant had confirmed in evidence that he was born in the United Kingdom and that he held a British passport and never held an Irish passport, and that he had married his wife in Ireland but had always considered himself an Irish citizen, and that he had lived and worked in this jurisdiction for a long time and intended to see out his final years in Ireland (see paragraph 25 of the Judgment). Also, although the 1974 Deed referred only to consideration of "*natural love and affection*" the respondent stated during direct examination that he had paid IR£1,000 for the land, at his insistence, as J.P. O'Hagan was willing to transfer the land for no (monetary) consideration. The divergence between the reference in the parcels clause of the 1974 Deed to two roods or thereabouts Statute measure, which was an area of land considerably smaller than the 190 feet x 190 feet shown in the 1974 Deed map, was also raised.

39. Arising from this counsel for the appellants wished to allege that the 1974 Deed was invalid –

(a) under ss. 12 and 45 of the Land Act, 1965 on the basis that the Land Commission consent was invalid; and

(b) that the 1974 Deed misstated the consideration and as s. 5 of the Stamp Act, 1891 applied the Deed was unenforceable on grounds of illegality.

40. Of course neither of these matters had been raised in the Defence, or Amended Defence. The trial judge permitted a further amended Defence to be delivered raising these matters, and this was delivered on 16 May 2018 and included a lengthy new plea at paragraph 13. The essence of the plea was that the 1974 Deed map area of 190 feet x 190 feet equated to three roods or thereabouts Statute measure and the defendants contended that the default provisions of subs. (3) of s. 12 of the Land Act, 1965 applied to the shortfall, or that the Land Commission consent only applied to an area of two roods. New paragraphs 17 - 19 related to the consideration point, and sought to rely on the respondent's evidence given to the trial judge on 10 May 2018 that he paid IR£1,000 to the grantor. As this payment was not reflected in the 1974 Deed it was contended that the instrument did not comply with s. 5 of the Stamp Act, 1891 and the transaction was therefore unenforceable for illegality, and void and unenforceable as against the appellant purchasers of the Citadel lands.

41. Not content with these amendments, a new paragraph 20 introduced an extensive new plea based on the erection by the respondent of the fences and his absence from the land for "*upwards of 40 years*", and permitting the disputed lands to be sold at public auction without any warning or notice to the vendors or interested purchasers, and asserting that the respondent:

> "*... is estopped by conduct, silence and acquiescence from contending that [Citadel Homes Limited], being a bona fide purchaser for value without notice, has not acquired a good title to the said strip of land outside the fences, which the Plaintiff now contends is his property*".

Paragraph 21 also suggested a further estoppel by reason of the respondent's "*own negligence*".

42. In a further departure from what was permitted by the trial judge, the further amended Defence purported to include a counterclaim. This sought declarations that the respondent's title to the disputed lands was statute barred, or alternatively that the respondent had "*abandoned title to the said lands*" or was "*estopped … from asserting a legal title to the said strip of land which lies outside the said fences erected by him in or about the year 1976*" or estopped "*by silence and acquiescence*" from asserting good title to the disputed lands.

43. In a Reply and Defence to Counterclaim delivered on 23 May 2017 the respondent rebutted all pleas in the Further Amended Defence, denied the appellants' claim to adverse possession of any of the respondent's lands, and denied that the appellants could avail of the Land Act, 1965 or Stamp Act, 1891. It was also denied that the respondent was estopped by reason of negligence, conduct, silence or acquiescence or otherwise from asserting ownership of the lands including the disputed lands, and it was expressly pleaded that the appellants had not obtained leave from the court to file any counterclaim.

44. The trial resumed on 30 May 2018, and the trial judge notes at paragraph 18 of her judgment the objection that leave of the court had not been secured for the pleading of a counterclaim. She states:

> "*A ruling on this issue was sought on 30th May, 2018 and the court was satisfied to accept the pleaded counterclaim de bene esse subject to a final ruling on the matter at the conclusion of the hearing.*"

Then at paragraph 166 of the judgment the trial judge states the following:

> "*166. … On the 30th May, 2018 the Court ruled that the counterclaim would be dealt with on a de bene esse basis for the duration of the hearing. The counterclaim would then be the subject of a final ruling on the determination of the proceedings.*

> *In my view the counterclaim is not properly before the court as it was brought without any prior leave of the court and considerably out of time for so doing. The Court is unwilling to afford further consideration to the counterclaim as part of this judgment as leave was not sought in the proper manner. However, with hindsight, it would have been preferable if I had ruled on the matter when it was raised during the course of the hearing. The defendants were clearly not granted leave at any stage to file a counterclaim, nor was leave to file such a counterclaim ever sought. The counterclaim was not properly before the court and no relief can be pursued thereon. However, for the avoidance of any doubt, even if I was persuaded to admit the counterclaim, I would not be satisfied it had been made out. ...*"

The trial judge then proceeded to give reasons why, in any event, she would not have regarded the counterclaim for title by adverse possession to the disputed land as made out, and I will return to these later.

45. The judgment at paragraph 27 onwards, records that when the hearing recommenced on 30 May 2017 written and oral submissions were made in relation to the Land Act, 1965 pleading, and the new s. 5 Stamp Act, 1891 point. At paragraph 29 the trial judge notes that the issue of a voluntary conveyance was raised in solicitors' correspondence just days prior to the hearing. She proceeds:

> "*29. Clearly, had the plaintiff's legal team been informed of this challenge to the 1974 deed for lack of consideration in a more timely fashion, perhaps Mr. Ryan's account of having paid valuable consideration would have revealed itself at an earlier juncture. As for Mr. Ryan's nationality, once again, information related to Mr. Ryan's citizenship could have been ascertained from the plaintiff's legal team, had they asked for it.*

30. During oral submissions, counsel for the defendants sought to argue that, as a matter of practice, the parties plead as to the facts and not as to the law. In the Court's view, there are factual issues which engage the legal provisions relied on by the defendants that could have been adverted to by way of pleadings. Such issues include an allegation of fraud, if not with regard to the consideration issue, then certainly in respect of Mr. Ryan's nationality. Overlooking the pleadings for a moment, there are also many forms of modern communication through which the defendants could have notified plaintiff's legal team of these new points being advanced. There are numerous complications which arise from these facts, not least of which are Mr. Ryan's status as the spouse of an Irish citizen and the impact that Ireland's EEC (now EU) membership had on the operation of the 1965 Act during the 1970s. In my view, it was unfair to allow Mr. Ryan's examination-in-chief to conclude before making the plaintiff's legal team aware of these issues.

31. In November 2017, an already assigned hearing date for this case was vacated so that the defendants could amend their defence and plead adverse possession. At no point during that application, or indeed following that application, was the plaintiff ever informed that the defendants intended to challenge the validity of the 1974 deed. In the circumstances, the court reluctantly refused the plaintiff's application to prevent the defendants from advancing these un-pleaded points. In the alternative, the court adjourned the hearing and directed that a further amended defence be filed, with one week thereafter for any proposed reply. Those further pleadings are summarised above, at paras. 17 and 18 above."

46. The trial judge then goes on to record the fresh evidence given by the respondent on 30 May 2018 dealing with these issues. It emerged in evidence that he married into the

O'Hagan family in 1969 and that on one of his regular visits with his wife to Ireland in 1972 it came to his attention that J.P. O'Hagan was in financial difficulty and as a result in July 1972 he wrote a cheque in his favour for £1,000. J.P. O'Hagan was initially reluctant to take the money but was eventually convinced to do so. As the trial judge records the respondent produced at trial financial documentation including bank statements evidencing this sequence of events. Ultimately it is clear from the judgment that the trial judge accepted the respondent's evidence in this regard, and any claim that the 1974 Deed was for valuable consideration fell away.

Issues That Do Not Arise on This Appeal

47. Before addressing those parts of the judgment, and particular findings of fact, that are relevant to the issue of adverse possession, it is appropriate to identify issues that were not pursued or otherwise no longer arise on this appeal –

(1) *Section 5 Stamp Act, 1891.*

The trial judge was clearly satisfied that the 1974 Indenture was a voluntary conveyance made for natural love and affection and did not attract *ad valorem* stamp duty, and no ground of appeal asserts that the 1974 Indenture was void.

(2) *Consent of the Land Commission pursuant to s. 12 of the Land Act, 1965.*

As the trial judge records at paragraph 33 of the judgment, by the time the hearing resumed on 30 May 2018 Katherine Ryan had located the s. 12 Land Commission Consent, which had been kept in a bank for safekeeping, and that showed that the Land Commission consented to a sub-division of the land measuring 190 feet x 190 feet. Accordingly the subdivision had the requisite

consent under s. 12(1) of the 1965 Act, and any argument that the sub-division was void under s. 12(3) could not be sustained.

(3) *1974 Deed effecting transfer of Ryan lands (including disputed lands) to the respondent.*

This concerns the argument pursued in the High Court that the 1974 Deed did not have the effect of transferring the Ryan lands (including the disputed lands) to the respondent. The trial judge at paragraphs 160 - 163 of her judgment identifies as the first issue "*whether the [respondent] has good title to the lands the subject of the dispute between the parties*". She applied the dicta of Hedigan J. in *McCoy v. McGill* [2010] 2 IR 417 where at paragraph 19 he stated:

> "*In this case the plaintiffs owned their leasehold property pursuant to the 1873 lease exhibited herein. This lease defines the boundary of the leasehold interest. The interest is described as "delineated" on a map which I consider means it is intended to be precisely defined thereby.*"

In paragraph 161 of her judgment she states:

> "*Once the 1974 Deed Map is clear, and it is in my view, there can be no difficulties in determining the boundaries in the present case. The 1974 Deed Map referenced the clear carve out of the 190 ft. x 190 ft. site, which comprises the Ryan holding.*"

Following authorities that confirmed that boundaries shown on Land Registry maps are not conclusive (*Abraham v. Oakley Park Developments Ltd* [2019] IECA 87 (Costello J, at paragraph 29), approving the text in Deeney, *Registration of Deeds and Title in Ireland* (Bloomsbury Professional, 2014)), the trial judge held that in the

present case the boundary is clearly delineated and therefore no confusion or doubt arises, and she concluded:

> "*163. Based on the legal principles set out above, I am satisfied that there is no lack of clarity in the terms of the 1974 Deed itself as the parcels clause in the 1974 Deed states 'more particularly delineated in the map annexed hereto' and the map outlines numbers 190 ft. x 190 ft.*"

She further held that as there was no lack of clarity in the 1974 Deed map there was no need to seek out extrinsic evidence to clarify the boundaries.

These findings were not the subject of any ground of appeal.

(4) *Appellants as bona fide purchasers for value.*

This concerns the argument in the High Court that the appellants were *bona fide* purchasers for value without notice of the boundaries delineated in the 1974 Deed map.

While Ground 7 in the Notice of Appeal raised this, it was not pursued on the appeal, and with good reason.

I have earlier in this judgment quoted Special Condition 4 and General Condition 14 from the Agreement for Sale dated 15 September 2016 under which the appellants purchased the Citadel lands. The O'Hagan family as vendors expressly excluded any remedy for any error or misstatement in the description of the property in sale and placed the obligation on the purchasers to satisfy themselves as to the identity of the property in sale and the boundaries of the property, and expressly excluded further requisition query or objection.

As the trial judge found at paragraph 165 the *caveat emptor* rule applied, such that if the purchasers failed to satisfy themselves as to the boundaries of the lands in sale they did so at their own peril. The Registry of Deeds search as seen by the appellants/their solicitors prior to closing disclosed the existence of the 1974 Deed. Accordingly the appellants were thereby on notice of the 1974 Deed map even though they and their solicitors did not actually obtain or consider that map until later in November or in December 2016, but in any event *after* the sale had closed. While the appellants in the High Court complained about the failure of the respondent and his daughter Katherine to bring to their attention the 1974 Deed map, and the respondent's claim to ownership of land outside of the fencing, there was no legal obligation on them to do so, and under the express contractual provisions just mentioned the appellants were fixed with notice of the 1974 Deed map, and they had the obligation to check the boundaries of the property in sale. As the trial judge puts it, correctly in my view:

> "*186. Before the sale closed searches were conducted in the registry of deeds and an entry for the 1974 Deed Map was returned. Mr. Cairbre Finan, solicitor for the Vendors marked the Deed Map as not affecting the site which was to be sold. It is of note that Mr. Finan had been the O'Hagan family solicitor for many decades and indeed had dealt with the 1974 transfer from JP O'Hagan to Thomas Ryan. It was clear that the auction brochure conditions of sale all placed responsibility on the purchasers solicitor with regard to the extent of the property to be purchased. Fergal Flattery took it upon himself to survey the lands. It seems to me that it is an inescapable conclusion that the defendants purchased the Citadel lands without properly*

ascertaining the extent of the lands which they were intending to purchase. ...".

(5) *Estoppel*

This concerns the plea of estoppel, in paragraph 12 of the Defence, asserting that the respondent was estopped from claiming trespass or nuisance in light of the boundaries marked by him "*... over 40 years ago which said boundaries are in conformity with the physical boundaries on the land, the freehold of the Second Named Defendant's [predecessor] in title and the title map obtained by the Second Named Defendant herein at the date of sale in 2016*".

As we have seen, this plea was made in a more extended way in paragraph 20 of the second Amended Defence (although it is far from clear that a further elaboration of this plea was permitted by the trial judge) in which *inter alia* it is pleaded that the respondent "*... is estopped by conduct, silence and acquiescence from contending that the Second Named Defendant, being a bona fide purchaser for value without notice, has not acquired a good title to the said strip of land outside the fences, which the plaintiff now contends is his property.*"

Although there was a considerable overlap between the arguments made by counsel for the appellants on this appeal to support a claim of adverse possession, and the arguments that might have been made to support a claim for estoppel, at the close of his primary oral submission counsel expressly accepted that the appellants could not advance a case based on estoppel and that their defence was in reality one of adverse possession. It was however part of his argument in support of the adverse possession defence that it was "*just extraordinary that*

nothing was done", and that the appellant did not assert his title at various points in time.

Accordingly it is not necessary for this court to further consider the estoppel defence *per se*.

(6) *The general damages awarded by the trial judge, of €125,000.*

This was the subject of Ground 9 in the Notice of Appeal, but the court was advised by the appellants' solicitors Crowley Millar by letter dated 31 May 2023, shortly in advance of the appeal hearing, that:

> "*One of the principal issues in the appeal was the level of general damages which were awarded by the High Court in the sum of €125,000. That aspect of the appeal has now been resolved between the parties and will not trouble the Court. Each party will bear its own costs with relation to this aspect of the appeal.*"

This does indeed seem to have been a principal issue in the appeal, taking up some six pages of the appellants' written submission. However the settlement did not extend to the further sum of €118,400 awarded by the trial judge for reinstatement, and I will address that later in this judgment.

(7) *The counterclaim for trespass*

As we have seen in the course of the hearing, the respondent objected that the appellants had not obtained leave to plead a counterclaim to the effect that the respondent's title to the disputed land was statute barred, and on 30 May 2018 the trial judge ruled that the counterclaim would be dealt with on a *de bene esse* basis for

the duration of the hearing, and would then be the subject of a final ruling on determination of the proceedings. She concluded, at paragraph 166:

> "*166. ... In my view the counterclaim is not properly before the court as it was brought without any prior leave of the court and considerably out of time for so doing. The Court is unwilling to afford further consideration to the counterclaim as part of this judgment as leave was not sought in the proper manner. However, with hindsight, it would've been preferable if I had ruled on the matter when it was raised during the course of the hearing. The defendants were clearly not granted leave at any stage to file a counterclaim, nor was leave to file such a counterclaim ever sought. The counterclaim was not properly before the before the court and no relief can be pursued thereon. However, for the avoidance of any doubt, even if I was persuaded to admit the counterclaim, I would not be satisfied it had been made out. ...*"

No ground of appeal addresses this ruling in the judgment, and in fairness to the appellants they did not seek to pursue a counterclaim in their written or oral submissions.

Of course such a counterclaim is the *"other side of the coin"* of the defence that was raised that the respondent was statute barred in relation to the disputed lands by the time the appellants purchased in 2016. Such defence was the subject of much evidence, and was considered by the trial judge and was the subject of findings of fact. It is in my view expressly clear from the passage just quoted that, notwithstanding that the counterclaim was rule out by the trial judge, she *did for the avoidance of doubt* also consider the pleaded counterclaim, and gave reasons why she considered it had not been made out. This includes further findings of fact set

out in paragraph 166, and further findings of fact later in her judgment, all of which are equally relevant to the adverse possession defence.

Judgment in the High Court – Findings in relation to adverse possession

48. Given that the appellants challenge the conclusion that the appellants' predecessors in title were not in adverse possession of the disputed lands at the time of the purchase in 2016, it was a surprising feature of the appeal that at no point were the trial judge's findings of fact opened to the court. In the earlier part of the judgment the trial judge reprises the evidence that was before her, and from paragraph 150 onwards under the heading "*Decision*" she sets out her findings of fact relevant to the issue of ownership/adverse possession. What follows recites or summarises her key findings.

49. The trial judge commences with findings in relation to the origins of 190 feet x 190 feet in the 1974 Deed map, the wayleave in respect of the septic tank/percolation area, and the northern and eastern fences erected and trees planted by the respondent:

> "*150. Mr. James O'Hagan Senior conveyed the Ryan land to his son-in-law, the plaintiff in the instant case on 26th October 1974. In evidence, the plaintiff used a pen to trace out the dimensions of his land on an aerial map to give an idea of its shape of the site he had purchased. He outlined the site was roughly in the shape of a trapezium measuring 190ft x 190ft. He had obtained planning permission to construct the Ryan house on the land on 13th December 1975. Planning regulations in force at the time, required that a septic tank be positioned at least 75 ft. away from a related dwelling. To facilitate this Mr. James O'Hagan Senior consented to the construction of the septic tank and percolation area for the Ryan house encroaching over the delineated boundary. Mr. James O'Hagan Senior also granted the plaintiff*

a ten foot wayleave over his lands to enable the proper maintenance of the septic tank and percolation area.

151. Around the time of construction of the Ryan house and about fifteen feet inside the northern end of his legal boundary the plaintiff, installed a post and wire fence. That fence was intended to prevent his father-in-law livestock interfering with the Ryan house and its residents. The plaintiff planted a line of 64 leylandii trees towards the east of his property. The trees were set back inside the legal boundary and meant a triangular portion of his land lay to the east of the treeline and yet remained within the plaintiffs legal boundary. That long triangular portion outside the treeline along the northeast – southeast boundary became central to the dispute between the parties.

152. …

153. …

154. The plaintiff had given evidence to the effect that he had installed the posts and wire fence in the manner in which he had for the purposes of keeping his father in-law's cattle out, as he was concerned the cattle could otherwise have damaged the treeline. The plaintiff had seen a bush of leylandii cypress cut neat and square at Kildare Stud which he had admired. Having spoken with the head gardener there and having received advice on how to plant leylandii cypress, he decided to purchase a number of trees to create a hedge between the O'Hagan farm and his residence. The plaintiff explained that the trees were between a metre and a metre and a half in height at the time of planting. Over the course of the next twenty years and by the mid-1990s they had grown to the 15 to 18 metres they are today.

155. The plaintiff gave evidence that he planted the leylandii cypress trees back from his existing boundary in order to facilitate their growth and anticipated large span upon maturity. Having planted the treeline, the remaining trees were planted in a spoke formation between the house and tree line. Apart from being pollarded some 25 years prior to the hearing, the trees had remained untouched. They had grown tall and multi–stemmed and it was noted that they were very large and overgrown. The plaintiff described them as majestic and as holding particular value to him. The plaintiff indicated that the lane was not straight to the site entrance. In effect, the site had a trapezoid shape. The ground at the time of planting was damp and this dried out over the intervening years. French drains over the years had absorbed the excess water.

156. The Court is of the view, that the plaintiff never wavered with regard to the extent and boundary of his lands. The Court considered him to have a clear recall and as being precise in his evidence. The Court found him to be a wholly reliable and accurate witness. The plaintiffs daughter, Ms. Katherine Ryan resided at Bawnogues with her son. ..."

50. The trial judge then, in paragraphs 156 and 157 addresses Ms. Katherine Ryan's role in the negotiations that took place after the sale in 2016, and the acts of (alleged) trespass that took place in November/December 2016 and January 2017, observing that these acts occurred "*... at a time when the defendants were aware ownership of the land was disputed and this had been drawn to their attention*" and referring to the block wall built by the defendants "*as high as they could have in the absence of planning permission… It could be best described as a spite wall.*" (paragraph 157). The trial judge then proceeded:

"*158. For their part, the defendants enquired as to why someone would plant a concrete posts and wire fence inside their own boundary. The plaintiff provided a convincing and compelling answer as to why the concrete post and wire fence had been set where it had. The plaintiff also provided a convincing explanation as to why the leylandii cypress trees had been planted inside his legal boundary in the manner they had. The Court is also of the view that the only reasonable interpretation of what could have occurred in relation to the apple trees was that Mr Martin Flattery trespassed onto the Ryan land and cut that tree as was outlined in evidence.*

159. The Court considers that what was referred to as the barrel bridge in the proceedings as being very relevant in determining the respective rights of the parties. If the Ryan property had ended where the defendants claim, the barrel bridge would have been constructed well into the western side of the lawn field on the property of Mr. James O'Hagan Senior. From the description of Mr James O'Hagan Senior given in evidence, it seems highly improbable to this court that he would have allowed the construction of the barrel bridge on his land. This impression was re-enforced by the Court visit to the lands on the 20th of June 2018 between days 13 and 14 of the hearing and my viewing of barrel bridge. Given the view from the rear of the house down the length of the lawn field it is entirely understandable why the plaintiff, Mr. Thomas Ryan never erected a high hedge, wall or fence that would have obstructed his view."

51. In paragraphs 160 - 166 the trial judge sets out why she reached the conclusion that the respondent obtained good title to the Ryan lands, including the disputed lands, by virtue of the 1974 Deed, and why *caveat emptor* applied insofar as the appellants failed to satisfy themselves as to the boundaries of the lands in sale. Having ruled, on further consideration,

that the counterclaim was not properly before the court, the trial judge nevertheless addressed it, and in so doing made further relevant findings of fact:

> "*166. ...However, for the avoidance of any doubt, even if I was persuaded to admit the counterclaim, I would not be satisfied it had been made out. Thomas Ryan gave very clear cogent evidence in relation to the manner in which the trees were planted along the left hand side of the laneway through the O'Hagan land. It was only in later years that members of the O'Hagan family asked Thomas Ryan with regard to the storage of tyres, which he acceded to, thereby in my view acknowledging his title to that land. I do not find the evidence of the O'Hagan witnesses compelling in this regard. Equally, with regard to the storage of skips, on the left hand side of the laneway, it seems to me highly improbable that extensive storage of skips could have taken place as described by the O'Hagans without doing extensive damage to the treeline. The O'Hagans sold the lands to the Defendants. The note document signed by Joseph O'Hagan is relevant. While when giving evidence Mr. O'Hagan tried to say that he did not fully comprehend or indeed see what the document contained, I am satisfied that it represents a true account of the factual situation. I also am of the view that the witness was apprehensive when giving evidence due to actual or perceived pressure from the Defendants. Any dispute that may arise between the Defendants and O'Hagans and/or their professional advisers is not a matter that this court should/ could comment upon. I am not satisfied that there was any extensive use of the disputed land was made for that purpose.*"

52. The "*note document signed by Joseph O'Hagan*" relates to a typed-up document that reads:

> "*To Whom It May Concern*

> *The Vendor acknowledges that the land subject of the proceedings belongs to Thomas Ryan and was always accepted as such. No attempt was made by any of the predecessors to deprive Thomas Ryan of same.*
>
> *Yours Sincerely*
>
> *Joseph O'Hagan [Signed Joseph O'Hagan]*"

The evidence relating to how this document came into existence was recounted by the trial judge at paragraph 43 where she stated:

> "*43. Following the issuance of these proceedings, Mr. Ryan spoke with Mr. Joseph O'Hagan. As a result of that discussion, a statement was drawn up which acknowledges Mr. Ryan as the full, legal and uncontested owner of the Ryan land, including the disputed land. The statement also stipulates that no attempt was ever made to interfere with Mr. Ryan's claim to the said land. Mr. Joseph O'Hagan signed this disclaimer. Under cross examination, Mr. Ryan confirmed that Ms. Ryan drafted the disclaimer following advices on wording from Ms. Walsh and Mr. Ryan. It was signed before the first hearing commenced, but was not referred to when Mr. Ryan initially gave his direct evidence. When asked why he produced this document at such a late juncture, Mr. Ryan stated that he did not know he was obliged to produce the document during his direct evidence. He also indicated that the document had been prepared in order to nullify the need for Mr. Joseph O'Hagan to attend court; it was his understanding that Mr. Joseph O'Hagan is an elderly relative with a heart condition who is being accused of theft and threatened with legal proceedings by the defendants. There is some dispute between the parties as to the circumstances in which the disclaimer was signed. For their part, Mr. and Ms. Ryan say that it was signed following meeting between themselves and Mr. Joseph*

O'Hagan, during which they walked the land together. Mr. Joseph O'Hagan did not take legal advice before signing the statement."

53. In paragraph 172 the trial judge finds:

"*172. The defendants pleas of adverse possession and estoppel have not been established. The Court is therefore of the view that the plaintiff has succeeded in demonstrating acts of trespass and nuisance by the defendants upon his lands.*"

54. In paragraphs 179 - 184 the trial judge repeats certain findings of facts made earlier in paragraphs 154 - 159, which I have quoted earlier. The trial judge makes further findings of fact in paragraph 186 where she states:

"*186. ... It seems to me that it is an inescapable conclusion that the defendants purchased the Citadel lands without properly ascertaining the extent of the lands which they were intending to purchase. In my view Thomas Ryan enjoyed exclusive possession of all lands marked in the Deed Map 1974. With regard to the Ryder Cup event which occurred in around 2005 it is clear that the crown span of the trees was not reduced in anyway for that event, since based on the expert evidence the trees do not produce regrowth once cut back or pruned. The original path after the carving out of the Ryan holding in 1974 was described by the plaintiff as a rutted mud path and it was not until in around 2006 that it was covered with tarmacadam. So the pathway is a mud/dirt track to the O'Hagan land by which access could be had up to the lawn field and only appeared to gain significance in latter years through the move away from purely agricultural farming to the waste management operation by the O'Hagan brothers, the sons of JP O'Hagan. Mr. Fergal Flattery admitted in evidence that if the 190 x 190 measurement is found to be the correct measurement*

of the Ryan lands then the defendants carried out works on the Ryan land and this would amount to a trespass."

55. The reference to the Ryder Cup event is the Ryder Cup which took place in the K Club from 22-24 September 2006, and a temporary planning permission obtained with the permission of the O'Hagans for the use of the Citadel land for the following temporary development:

"*The development will consist of the construction of a temporary bus park (approx. 70 coach spaces) involving temporary hard-surfacing of the site with hard core material, car parking on remaining grassed area and temporary access from the R403 Regional Road and the Bohereen Road. Permission is also sought for erection of temporary mobile lighting and other associated facilities (including moveable temporary structures for administration, toilets and security facilities). Reinstatement of the lands to their existing condition is proposed following completion of the Ryder Cup.*"

The application was in fact made by Bessilton Holdings Limited (Company Directors Michael Smurfit and Gerry Gannon), with the consent of the O'Hagan family.

56. Earlier in her judgment at paragraph 39 the trial judge addressed the cross-examination of the respondent in relation to this planning permission, stating:

"*39. A copy of the planning permission for the Ryder Cup works on the Citadel land was then handed in. The Inspector's Report, which was drawn up for the purposes of attaining said permission, was of particular interest. At para. 1.1, the Northern edge of the Ryan land is referred to as '... unplanted with a simple 1.5m post-and-wire fence along the boundary'. Further comment also referred to the Ryan*

land as having an open rear boundary. When asked to comment on this, Mr. Ryan repeated that the hedgerow had been cut back for the Ryder Cup. At the plaintiff's request, counsel for the defendants opened para. 5.3 of the planning documentation, which refers to the Ryan land as having '...existing substantial tree and hedgerow site boundaries to the North and West...', which could be treated to mitigate impact on residential amenity for those occupying the Ryan house (it was accepted during cross-examination that this should refer to East, rather than West). Mr. Ryan was also asked to comment on the paragraphs titled 'Preparatory Works', where it is stated that 200mm of topsoil was to be stripped from the Citadel land. Mr. Ryan replied that said stripping did not take place on the laneway, so the tree roots would not have been impacted. Mr. Ryan was then taken through the photographic survey annexed to the planning permission, which purported to depict the site as it was before any works were carried out. Mr. Ryan was asked to explain how the contents of this survey relate to his evidence given thus far. Following a well-reasoned objection on the plaintiffs behalf (based upon the fact that the defendants were aware of this 140-page document on Day 1 of the hearing but did not produce it until Day 13, the document's content had not been put to Ms. Ryan when she gave evidence and there was no indication that the defendants intended to call the document's author in order to prove its content), this line of questioning was dis-continued."

57. I also note that the Inspector's Report at page 2 stated that:

"*The use of this site will be confined mainly to the week of the Ryder Cup competition. It is intended that the site will be completed by July/August 2006 and it is intended that the lands will be reinstated to their existing condition within 4 months of the Ryder Cup competition.*"

There also appears to have been a condition attached to this planning permission that "*The existing hedgerows, trees and shrubs on site shall be retained, preserved and maintained.*", notwithstanding which the respondent's evidence was that the hedgerow had been cut back to the northern fence. Also of note from the plan of the Preparatory Works lodged with the application is that there is a strip of land adjacent to the northern fence, which is in the area of the disputed land on that side, upon which no development is shown.

58. At paragraph 188 the trial judge records the consequences of her findings of fact as follows:

> "*188. As a result of the court's findings in relation to the boundary issue both on the eastern side and on the northern side there was a clear trespass by the defendants and in particular Mr Martin Flattery onto the Ryan lands. This is visible from the photographs of and the location of the apple tree and the evidence of Martin Flattery which stated that he felt he had a genuine entitlement to enter the Plaintiff's property on the eastern boundary. However, in light of the courts findings on the size of the Ryan holding based on the 1974 Deed Map this entry clearly amounted to a trespass onto the Ryan Lands. There can be in my view no valid explanation for the clear trespass onto the back garden to the rear of the Ryan household and the cutting of the apple tree which tree which grew there. Mr Fergal Flattery accepted in evidence that if the Ryan lands were found to be 190 by 190 as per the 1974 Deed Map, then the defendants had indeed trespassed onto the Ryan lands. In assessing damages for trespass the courts must bear in mind that the Plaintiff was not present on the premise at the time of the incident. The trespass clearly caused huge upset and distress to Katherine Ryan who is resident in the house at the time. The defendants should apologise to Katherine Ryan for their behaviour which was inexcusable and*

bordering on abusive at times. But in terms of damages arising as result of the trespass onto the Ryan land and in assessing the amount damages accruing to the plaintiff, I assess damages with regard to the trespass and the nuisance arising therefrom at the sum of €125,000. The court takes a dim view of the behaviour of the defendant but nevertheless, the question of imposing punitive damages does not, in my opinion, arise."

59. Although no longer relevant to this appeal (as the figure for general damages, in the event that the appeal is unsuccessful, has been agreed), the trial judge recounts in paragraphs 47 - 52 the evidence of Ms. Ryan as to the events that occurred in late 2016 and early 2017, including a video of acts of trespass by Martin Flattery. Also before the court was the transcript of a recording, exhibited by Ms. Ryan, of a confrontation with Fergal Flattery on site on 14 December 2016 while heavy machinery was operating, when Ms. Ryan asserted the extent of the legal boundaries and protested vigorously at the (alleged) trespass and in no uncertain terms demanded that it cease. Mr. Flattery's response is recorded as twice laughing at Ms. Ryan, and could best be described as brushing off the protests and the effect of the trespass on her and the respondent. This evidence indicated reckless and deliberate trespass, and explains why the trial judge, having found that there was trespass, decided to award substantial general damages.

Notice of Appeal

60. The grounds in the Notice of Appeal that could be said to be related to the adverse possession defence are the following:

"*1. The Learned Judge erred in law and failed to take account of the fact that while the 1974 Deed was not contested, the action of the Plaintiff/Respondent in constructing a post/wire fence and Leylandii trees inside his legal boundary and*

thereafter taking no steps to assert title to the lands outside the post/wire fence on Leylandii trees was in issue.

3. The Learned Judge failed to take account of the uncontroverted evidence in relation to the inaction of the Plaintiff in relation to the lands outside the post/wire fence and Leylandii trees.

4. The Learned Judge failed to take into account the preponderance of evidence showing the Plaintiff failed to take any steps in the intervening 40 years to assert title to the property at issue.

6. The Learned Judge erred in law and in fact in failing to take account of the Plaintiff's evidence that he took no steps to assert title.

8. The Learned Judge erred in law and in fact in holding that the plea of adverse possession failed."

Appellants' submissions

61. Counsel for the appellants made in essence two submissions. The first was that the respondent never entered into possession of the entirety of the 190 feet x 190 feet plot transferred to him by the 1974 Deed, staying entirely inside the northern fence which he built, and inside the eastern fence/line of planted Leylandii trees on the eastern side. It was argued that the respondent gave no evidence of occupation of the disputed land or of its use by the O'Hagans by permission.

62. Secondly, it was argued that the appellants' predecessors in title were in sole and exclusive possession of the disputed lands, without acknowledgment of the Ryan title and without any consent from the O'Hagans, from the date of transfer in 1974. It was therefore

submitted that the respondent became statute barred in respect of the disputed lands by 1986 by reason of the use and occupation of J.P. O'Hagan who farmed the retained lands up to the northern fence and occupied the land on the outer side of the eastern fence without permission from the respondent. Counsel argued that there was no requirement in law for there to be extensive user of the disputed lands for it to amount to possession/adverse possession.

63. With regard to the note signed by Joseph O'Hagan acknowledging that the disputed lands belonged to the respondent and that this was always accepted as such, and that no attempt had been made by any predecessors to deprive him of same, counsel argued that a written acknowledgment as a matter of law cannot revive a statute barred claim. This of course is correct, but it was put to him by the court that Joseph O'Hagan's evidence undermined the claim that the respondent's title had ever become statute barred. Counsel's response was that at the time he was asked to sign same Joseph O'Hagan was "*not in the best of health*", and that the document itself was undated.

64. At paragraphs 33 - 34 of their written submissions the appellants also deal with this evidence, referring to the trial judge's comment in paragraph 166 that:

> "*I am also of the view that the witness [Joseph O'Hagan] was apprehensive when giving evidence due to actual or perceived pressure from the Defendants.*"

It was submitted that there was no basis on the transcript or otherwise for the trial judge to draw such a conclusion, and that she did not make any attempt to elicit that information. It was also submitted that the trial judge ignored Joseph O'Hagan's direct evidence in support of the appellants' contention that the respondent's title to the disputed lands is statute barred, and failed to explain how the note which he had signed could in any way bind his co-owners/co-vendors who were the several children of his predeceased brothers. In paragraph

35 of the submission it was contended that the trial judge gave "*undue weight*" to the existence of the note of acknowledgment signed by Joseph O'Hagan.

65. Counsel also rejected the suggestion from the court that the disputed land on the northern side was not capable of being grazed up to the fence. Reliance was placed on the evidence of Joseph O'Hagan that the O'Hagans had grazed cattle on the lawn field at least until the hedgerow and wild briars grew out from the fence, and his evidence that they also grazed a few horses, and subsequently used the lawn field for haymaking, and on the occasion of the Ryder Cup in association with the K Club.

66. With regard to the eastern boundary counsel also relied on the evidence of Joseph O'Hagan and his son Shay O'Hagan that skips, and latterly tyres, were stored underneath the Leylandii trees on the O'Hagan side on the disputed triangle; and on the evidence that this was used as part of the entrance to the temporary parking for the Ryder Cup following the granting of planning permission in that regard in 2004.

67. Counsel also relied on the transfer by J.P. O'Hagan to his three sons in 1996 of the Citadel land including the disputed lands. It was submitted that there was no evidence of user by the respondent after 1984, and that he only visited from time to time, and that the *de facto* boundary demarcated by the fencing and the trees remained in place. Counsel relied on the transfer by J.P. O'Hagan to his sons in 1996, which purported to include the disputed lands, as evidencing his intention to dispossess the respondent of the disputed lands. Counsel submitted that the respondent's title became statute barred either by 1986, or alternatively on the occasion of the transfer in 1996, or alternatively had become statute barred by the time of the sale in 2016. A central submission at all times was that the respondent failed to assert his title and *"sat on his hands and did nothing"*, and did not even claim title prior to the 2016 sale. Had he done so, it was submitted, the O'Hagans could have challenged his

claims. No explanation for not asserting his title was ever provided by the respondent. If the respondent *bona fide* believed that he was the owner of the disputed land it was "*inconceivable*" that he did not assert it.

68. Counsel submitted that as the appellants' predecessors in title had acquired title to the disputed lands by adverse possession the appellants were entitled to cut the overhanging parts of the trees, right up to the fence on the eastern side, even if to do so could cause them irreparable damage.

69. In the appellants' written submissions there is an argument developed at paragraphs 29 - 32 that the trial judge was confused as to whether the claim in respect of adverse possession was included in the first-amended Defence (pursuant to order of O'Connor J. made on 23 November 2017) – which it was – or whether it was included for the first time in the Defence and Counterclaim as further amended by leave of the trial judge on 16 May 2018. It is suggested that the trial judge misdirected herself in this regard and appeared to reject the right of the appellants to assert that the respondent's title was statute barred.

70. It is notable that this argument was not followed up in oral submissions, and in my view rightly so. The trial judge in her lengthy judgment (and this is no criticism) carefully reprises the evidence given on both sides in relation to the issue of adverse possession, and clearly makes findings in relation to that issue, whether in the context of a defence of adverse possession or in the context of an alternative counterclaim for title by adverse possession had she decided that the counterclaim was properly pleaded. Reading her judgment as a whole, I cannot discern any real basis for the suggestion that the trial judge was confused as to the issue that she had to consider and decide; she clearly did consider the evidence in relation to adverse possession and reached conclusions and a decision on the basis that it was

an issue raised by the defence which she was required to decide. Accordingly I do not intend to address this submission further in this judgment.

Respondent's Submissions

71. At the outset, counsel noted that the appellants' submission accepted that the principles which applied to the review of evidence on an appeal are those set out in *Hay v. O'Grady* [1992] 1 IR 210 and developed in subsequent caselaw. It was submitted that very little reference was made to the judgment in the High Court, and in the main the appellants failed to identify where it is said the trial judge got it wrong in relation to her primary findings and the inferences to be drawn therefrom in relation to the issue of adverse possession.

72. Contrary to what had been submitted on behalf of the appellants – it was submitted – it was not the case that the respondent sat back and did nothing after acquiring the Ryan lands under the 1974 Deed. In 1975 planning permission for the development of the house was sought and obtained, and construction of the house, including the northern and eastern fences and the planting on the eastern side took place in 1976. A key submission was that the respondent did go into actual possession, and was in possession from October 1974 for a period of some two years before the fencing was erected and the planting took place.

73. Counsel relied on the law regarding adverse possession as reviewed by the Supreme Court in *Dunne v. Irish Rail* [2016] 3 IR 167. The limitation period for recovery of land is 12 years. In *Dunne* Charleton J. at paragraph 35 confirmed that the time did not begin to run until adverse possession had been taken of the land. Counsel relied on a passage from the judgment of Slade J. in *Powell v. McFarlane* [1979] 38 P. & C.R. 452, at pages 470 – 472 – that had been cited with approval by Clarke J. in the High Court in Dunne and approved by Laffoy J. in her concurring judgment in the Supreme Court, which I will recite more fully

later in this judgment – for a number of general propositions in relation to what constitutes adverse possession –

(1) that the owner with paper title is the person with the *prima facie* right to possession;

(2) that a party without paper title claiming possession must show both factual possession and *animus possidendi*; and

(3) that such party must show a sufficient degree of exclusive physical control.

74. Counsel submitted that the appellants had failed to show that their predecessors in title had a "*sufficient degree of exclusive physical control*" over the disputed lands, and that the trial judge was correct to conclude as she did in paragraph 172 of the judgment that "*The defendant's pleas of adverse possession and estoppel have not been established.*" This was on the basis of her findings in particular in paragraphs 158, 159 and 166 of the judgment. Thus for example in paragraph 158 the trial judge found that the respondent had "*provided a convincing and compelling answer as to why the concrete post and wire fence had been set where it had*" and "*… as to why the Leylandii Cypress trees had been planted inside his legal boundary in the manner they had.*" Further, in paragraph 159 of her judgment the trial judge considered the "*barrel bridge*" to be relevant because if the Ryan property had ended where the appellants claimed, the "*barrel bridge would have been constructed well into the western side of the lawn field on the property of Mr. James O'Hagan Senior.*" and she considered it "*highly improbable … that he would have allowed the construction of the barrel bridge on his land.*"

75. In reference to paragraph 166 of the judgment, counsel submitted that, while ruling out the counterclaim insofar as it claimed title by adverse possession, the trial judge

nevertheless dealt with it, and found that it was not made out, and explained why. In particular in that paragraph the trial judge found that she did not find the O'Hagan evidence to be compelling in relation to the storage of skips on the left hand side of the laneway or the storage of tyres, and this led to her finding, at the end of paragraph 166, that she was "... *not satisfied that there was any extensive use of the disputed land*" made for that purpose.

76. Counsel opened to the court various parts of the transcripts which, it was argued, contained evidence from which the trial judge was entitled to make the findings of fact that she did, and to have come to the conclusion that the defence of adverse possession was not made out. I will refer to some of these passages later in this judgment. Counsel pointed out that the more extensive particulars of acts of adverse possession were only furnished mid-hearing on 13 June 2018 after certain matters had been put to the respondent at the initial cross examination, and that they were "*entirely new*". He also submitted that the trial judge was entitled to give weight to the note signed by Joseph O'Hagan.

Reply submissions

77. In reply, counsel for the appellants sought to emphasise evidence that supported the argument that the respondent did not go into possession or failed to assert his title to the disputed lands since the mid-1970's, and seldom visited. He referred to the direct examination of the respondent on Day 1 where, at page 82, it is recorded that the northern fence was installed about 15 or 20 ft inside the 1974 Deed map boundary, and that he was assisted in putting the fence in by John and James, the elder sons of J.P. O'Hagan. In response to a question as to whether it was known to the family at the time that the fence was inside the boundary line he responded:

> *"It was of no consequence to us at the time for either party" (Day 1, page 82)*

In reference to how often the respondent visited his property since the early 1990's, he responded "*probably fifteen times*" (Day 1, page 113).

78. As to the eastern boundary counsel submitted that there was clear and cogent evidence of the storage of tyres to the left of the private entrance mud lane/track. As to the planning objection lodged by the respondent in respect of the application by the O'Hagans in respect of their waste disposal business on the Citadel lands in 2005, in which the respondent asserted title to the Ryan lands, Counsel pointed out that it indicated that "*our actual boundary extends beyond these trees by* ***several feet***." Counsel submitted that "*several feet"* did not reflect the extent of the disputed land on the eastern boundary, and suggested that the position of the boundary was "*not of much import*".

79. Counsel emphasised that the nature of their possession must be *"objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to*" (Lord O'Hagan in *Lord Advocate v. Lord Lovat* [1880] 5 App. Cas. 273 at page 288, quoted with approval by Charleton J. and Laffoy J. in *Dunne*). Counsel urged that the O'Hagans used the disputed lands in 1974, 1975 and 1976, and then the wire fence was put up and the treeline grew, and thereafter they used the lands up to the fence line and treeline on the northern and eastern sides respectively. The evidence that cattle broke through the fence showed that they were able to graze up to the fence and go through it.

80. It was submitted that in paragraph 166 of her judgment, the trial judge failed to deal with adverse possession properly or consistently, and indeed stated that "*In my view the counterclaim is not properly before the court as it was not brought without any prior leave of the court and considerably at a time for so doing.*" Counsel contended that the trial judge had failed to reconcile contradictions in the evidence. He argued that the barrel bridge was

of no relevance. What was uncontroverted was that the northern fence was not put in as a boundary in 1974, but was put in later to keep cattle out – and it remained in place thereafter.

81. Counsel at this point suggested that the twelve-year period commenced running from the erection of the fence in 1976, and that the respondent was statute barred from asserting his title to the disputed lands twelve years thereafter. The objection to planning permission in 2005 – and it was said – was too late, as a written acknowledgment beyond the twelve-year period cannot revive his title. The northern fence was some 4.8 metres in from the 1974 Deed map boundary. The disputed triangle on the eastern side was at its widest as 8.47 metres, and it narrowed down to 1.3 metres at the north eastern corner. J.P. O'Hagan remained in possession of the disputed lands. Counsel did however accept that the evidence was that the northern fence had been installed in 1976 with the assistance of J.P. O'Hagan's sons. Counsel argued that *animus possidendi* existed or was to be inferred from the date of erection of the northern fence, and remained unchanged until the sale in 2016.

Review Principles

82. In this appeal the appellants ask the court to review the findings of fact and made and inferences drawn by the trial judge. The principles which apply to review of evidence on appeal were established by the Supreme Court in *Hay v. O'Grady* [1992] 1 IR 210, and were not in dispute, but bear repeating. McCarthy J. at page 217 stated:

> "*... The role of this Court, in my view, may be stated as follows: -*
>
> *1. An appellate Court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*

2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "Gairloch," The S.S. Aberdeen Glenline Steamship Co. v. Macken [1899] 2 I.R. 1, cited by O'Higgins C.J. in the People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

83. These principles were restated by Ryan P. in this court in *Emerald Isle Assurances and Investments Limited v. Dorgan* [2016] IECA 12 – a decision in respect of which the Supreme Court refused an application for leave to further appeal ([2016] IESC DET 67). At paragraph 31 Ryan P. expressed the matter as follows:

> "*(a) Were the findings of fact made by the trial judge supported by credible evidence? If so, the appellate court is bound by the findings, however voluminous and apparently weighty the testimony against them.*

> *(b) Did the inferences of fact depend on oral evidence of recollection of fact? If so, the appeal court should be slow to substitute its own different inference.*
>
> *(c) In regard to inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge in that regard. Did the judge draw erroneous inferences?*
>
> *(d) Was the conclusion of law drawn by the trial judge from a combination of primary fact and proper inference erroneous? If so, the appeal should be allowed.*
>
> *(e) If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.*"

Adverse Possession – the Legal Principles

84. I also did not take there to be any dispute between the parties as to the legal principles applicable to the appellants' defence based on the Statute of Limitations, as opposed to their application to the evidence. It is first appropriate to set out relevant provisions of the Statute of Limitations, 1957 ("the Statute").

85. Section 2(1) of the Statute defines an "*action to recover land*" as including "*(a) an action claiming a declaration of title to land*". The present proceedings seek declarations of title and are therefore an "*action to recover land*".

Section 13 governs the limitation of actions to recover land, and s. 13(2)(a) provides that:

"*... No such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;*"

Section 14(1) then reads:

"*(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.*"

Accordingly the onus was on the appellants to prove *dispossession or discontinuance of possession* of the respondent of the disputed land.

Section 18(1) provides:

"*No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.*"

Thus the appellants were required to show not only that their predecessors were in *possession* of the disputed land for the requisite twelve years, but also that such possession was *adverse* to the respondent. What is required to show *adverse possession* has been the subject of recent consideration in the Supreme Court in the *Dunne* case and I will refer to that shortly.

Section 24 provides:

"*24. Subject to s. 25 of this Act and to s. 52 of the Act of 1891, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.*"

Neither s. 25 nor s. 52 of the 1891 Act have any relevance to this appeal.

86. As indicated earlier the Supreme Court recently reviewed the law regarding adverse possession in *Dunne v. Irish Rail* [2016] 3 IR 169, which upheld the decision of Clarke J. (as he then was) in the High Court, reported at [2007] IEHC 314. Both Laffoy and Charleton JJ. broadly accepted the principles enunciated by Slade J. in *Powell v. McFarlane* [1979] 38 P. & C.R. 452. Laffoy J. stated:

> "*7. The trial judge ([2007] IEHC 314) at para. 4.3, p 8, stated that the general principles seemed to him to be well summed up in a passage from the judgment of Slade J. in Powell v. McFarlane [1979] 38 P & CR 452 at pp. 470 - 472. The trial judge then quoted three of the four principles outlined by Slade J. when delivering judgment in the Chancery Division of the English High Court, which were in the following terms:-*
>
> > *"(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."*

The trial judge then quoted, at pp. 8 and 9, and suggested as being to like effect, the passage from the judgment of Lord O'Hagan in Lord Advocate v. Lord Lovat (1880) 5 App. Cas. 273 at p. 288 quoted by Charleton J. in his judgment at para. 33, infra. He then summarised the position [at para. 4.5] as follows at p. 9:

> *"4.5 It seems to me, therefore, that the nature of the possession which must be established is one which must be objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to."*

In my view, that statement is indisputable.

8. Having addressed a controversy arising from a conflict between two authorities in this jurisdiction dating from the 1980s, to which I will return, Clarke J. stated at para. 4.9, p. 11, that it was common case on the proceedings before him that, in order for adverse possession entitlements to accrue, a continuous possession of the land for a period of 12 years must be established. He then quoted at p. 10 the following passage from the judgment of Slade J. in Powell v. McFarlane [1979] 38 P. & C.R. 452 at p. 472, which was addressing the concept of animus possidendi. Slade J. stated:-

> *'An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on*

> *behalf of an owner in possession will be found to negative discontinuance of possession.'*

Although not quoted by the trial judge, Slade J. went on to state at p. 472 that such position is 'quite different from a case where the question is whether a trespasser has acquired possession'.

9. Substituting the expression 'minimal acts' for 'slightest acts' used by Slade J., the trial judge continued at pp. 10 and 11:-

> *'4.9 ... It is, therefore, important to emphasise that minimal acts of possession by the owner of the paper title will be sufficient to establish that he was not, at least at the relevant time of those acts, dispossessed. The assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will be taken to continue in possession with even minimal acts. A dispossessor will need to establish possession akin to that which an owner making full but ordinary use of the property concerned, having regard to its characteristics, could be expected to make. It is not, therefore, a question of weighing up and balancing the extent of the possession of an owner and a person claiming adverse possession. Provided that there are any acts of possession by the owner, then adverse possession cannot run at the relevant time.'"*

87. In his judgment Charleton J. broadly agreed, but had some further comments on the principles which have application to the present appeal. As to the character of possession required in order to establish adverse possession he stated:

> "***[34]*** *... What is required is possession of an unequivocal character that there is a person occupying adversely to the title holder. As Slade J. put the matter at p. 470 in [Powell], and as Clarke J. accepted in his judgment, what is necessary to show adverse possession is "an appropriate degree of physical control". O'Hanlon J. put the matter thus at p. 20 in in Doyle v. O'Neill (Unreported, High Court, O'Hanlon J., 13 January 1995), cited by the trial judge, at para. 4.2, p. 7: -*
>
> > *"In order to defeat the title of the original landowner, I am of opinion that the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place. This is particularly the case when the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner.'"*"

Charleton J. continued:

> "***[36]*** *Intention to possess may be proven by direct testimony but, given the tendency towards mistakes of memory and exaggeration in such cases, is perhaps more reliably established as an inference from the particular circumstances of a given case; in other words, intention to exclude the owner is best judged from the facts on the ground. That will be a matter for the trial judge. Where no, or minimal, use is made of land, it may be a simple matter not to draw an inference that there was an intention to exclude the title holder; an instance being Seamus Durack Manufacturing Ltd. v. Considine [1987] I.R. 677. An example of the absence of an intention to possess is Feehan v. Leamy (Unreported, High Court, Finnegan J., 29 May 2000) where the claimant had asserted that a farm, of which he later claimed occupation, was in fact owned by someone in America. The circumstances*

constituting possession will inevitably be various, but fundamental is that the new possessor takes occupation of the land or premises, or a defined portion thereof, with a view to the exclusion of all others. Such possession must not be by force, deception or with the permission of the owner of the legal title; nec vi, nec clam, nec precario. Hence, lands that are overheld but where there is a mortgage of the land to another party are a particular circumstance; Ulster Investment Bank Ltd. v. Rockrohan Estate Ltd. [2015] IESC 17, (Unreported, Supreme Court, 26 February 2015). Licensees are another special case. Thus, permission to occupy removes the adverse element from the use of land; Murphy v. Murphy [1980] I.R. 183 at p. 195.

[37] *As between the person claiming to adversely possess land and the original owner, the balance tends towards the latter in that any action demonstrative of the assertion of the original title will stop time running. Such acts may be minimal.*"

88. In paragraph 39 of his judgment Charleton J. addresses equivocal acts of occupation in the following terms:

"***[39]*** *Convey v. Regan [1952] I.R. 56 is authority for the proposition that where the actions of the new occupier are equivocal as to the dispossession of the title holder, as for instance where a bare grazing right is exercised instead of an occupation of the land, circumstances may suggest a failure to achieve adverse possession. In that case, the principle was put by Black J. thus at p. 59:-*

'… The basis of the principle seems to be that when a trespasser seeks to oust the true owner by proving acts of unauthorised and long continued user of the owners land, he must show that those acts were done with animus possidendi, and he must show this unequivocally. It is not, in my view, enough that, the acts may have been done with the intention of asserting a claim to the soil, if they may equally have

> *been done merely in the assertion of a right to an easement or to a profit à prendre. When the acts are equivocal–when they may have been done equally with either intention–who should get the benefit of the doubt, the rightful owner or the trespasser? I think it should be given to the rightful owner."*'

89. I have quoted extensively from *Dunne* because it is a recent authoritative decision from the Supreme Court, and because it emphasises the onus on the party seeking to defeat a good paper title by adverse possession over the twelve-year period is a significant one. Thus, the onus was on the appellants to satisfy the trial judge that –

- their predecessors in title had both factual possession and the requisite intention to possess over the relevant period;
- that the possession objectively viewed demonstrated an appropriate degree of physical control;
- that such possession was of an *unequivocal character* or of such a definite and positive character as could leave no doubt in the mind of the landowner alert to his rights that occupation adverse to his title was taking place;
- that where no or minimal use is made of land it may be a simple matter not to draw an inference that there was an intention to exclude the title holder;
- that such possession must not be by force, deception or with permission of the owner of the legal title;
- that where the actions of the new occupier are equivocal, the circumstances may suggest a failure to achieve adverse possession;
- and that the trespasser seeking to oust the true owner must show that the acts of occupation relied upon were done with *animus possidendi*, which must be shown unequivocally.

Application to the Appeal

90. Before going through some of evidence that was before the trial judge, including some as recounted by the trial judge in a manner not criticised by the appellants, I should state my conclusion. I am satisfied that there was ample and credible evidence from which the trial judge could make the findings of fact and inferences of fact that she did. I am also satisfied that these findings were such that as a matter of law she was entitled to conclude that the defence of adverse possession was not made out.

91. Pleadings and particulars establish the parameters of a case, and at the outset it is appropriate to make an observation about the particulars of adverse possession delivered mid-trial in June 2018, and to compare these with the Particulars of Adverse Possession originally delivered on behalf of the appellants on 20 December 2017. The earlier particulars were exceedingly brief, and relied only on the erection of the northern fence and the line of trees on the eastern side in circa 1975, and the 2005 planning permission granted to the O'Hagans, using the said fence and treeline as a physical boundary to which "*the plaintiff did not object*". Nothing at all was pleaded about occupation or user of the disputed lands. It wasn't until 13 June 2018 that these particulars were expanded – in respect of the northern boundary to include "*farming up to the post and wire fence to include cattle grazing from in or about 1976 to in or about 2000*" and "*from in or about 2000 to 2016 for grass cutting and hay*"; and in respect of the eastern boundary, the storage of "*skips, trucks, trailers and tyres in association with waste business*", the user being mainly skips "*since before 2000 on the side of the lane closest to the trees*", of "*tyres … stored from circa 2000 onwards on the side of the lane closest to the trees*" and "*trailers and trucks … stored less frequently in the same period on the side of the laneway closest to the trees*". These late claims first arose from the initial cross examination of the respondent and his daughter Ms. Katherine Ryan. Such was

the extended nature of the claim that the trial judge acceded to the suggestion that Joseph O'Hagan be called on Day 10, and having heard his evidence the trial judge directed that a letter containing further particulars be sent, and this was done on the 13 June 2018. I agree with counsel for the respondent that the particulars given in the letter of the 13 June 2018 were entirely "*new parameters as to the user claimed*". In the new particulars the user in respect of the eastern boundary now starts circa. 2000, not 1976, and it is significant that in his evidence Joseph O'Hagan referred only to occasional use on the eastern side in the 1990's at a time when the Leylandii trees would have been in the order of 24 years old.

92. The appellants criticised the reliance placed by the trial judge on the note signed by Joseph O'Hagan, and suggested she gave it *excessive weight*. The court was informed that Joseph O'Hagan had attended the High Court on the first and second days of the hearing under *subpoena* served on him by the appellants. At paragraph 56 the trial judge recounts Joseph O'Hagan's evidence on this:

> *"56. The contents of the statement referred to at para. [43] above were then put to the witness. He confirmed that the signature on the document was his. On his version of events, Ms. Ryan called him one evening in January/February 2018 and asked him for a meeting. He called over to the Ryan house and was presented with the statement. He did not have his glasses with him and he could not read it, as the lighting was poor on that particular evening. He asked if he could take the document home with him to review it, but Ms. Ryan insisted that she needed the document for court the next morning. She read the document over to him and explained that it referred to alleged interferences by him with land within the Ryan fences. She also indicated that it would clear the O'Hagans' name and spare the witness the ordeal of attending court. In his view, the O'Hagans had never interfered with any land*

> *within the Ryan fences. On that understanding of the document's content, he signed the statement. During cross examination, it was put to the witness that he had a direct interest in the outcome of this case, as the defendants have threatened to sue him if this Court finds against them. The witness denied having any interest in the outcome of these proceedings and denied that his evidence was coloured by such an interest.*"

93. The note was admissible and important evidence, and the trial judge was entitled to give it weight as an acknowledgment that the disputed land belonged to the respondent and was always accepted as such, and that no attempt was made by any of his predecessors to deprive the respondent of same. When the court suggested to the respondent's counsel that Joseph O'Hagan was not authorised to make this acknowledgment on behalf of other members of the family counsel responded that other members of the family could have been called, but only Joseph O'Hagan and Shay O'Hagan were called. I agree with that observation, and it is notable that no other witnesses were called to support a suggestion that Joseph O'Hagan did not know or understand the contents of the note.

94. Further in paragraphs 56 - 58 of the judgment the trial judge recounts Joseph O'Hagan's evidence in relation to the circumstances in which he was presented with the note by Katherine Ryan who read it over to him and asked him to sign it. In paragraph 57 the trial judge records that he admitted "*after some time*" that his sister-in-law Liz O'Hagan advised him to consult a solicitor, and that he consulted Mr. Finan and "*eventually confirmed*" that he had spoken to him the day prior to giving evidence. In paragraph 58 where the trial judge notes that under cross-examination Joseph O'Hagan was taken through various pieces of documentation related to the case and it was put to him that "*he had no difficulty reading and understanding those documents, notwithstanding the fact that he was not wearing his glasses*". The trial judge then records:

> "*The witness replied that he did not need his glasses, as it was day time and the courtroom was well-lit. The size of the writing would also appear to be a factor, as the witness could not read captions to some of the photographs that were put to him when he returned to give evidence the following day.*"

95. In my view there was evidence and circumstance, including the manner in which Joseph O'Hagan gave his evidence, from which the trial judge could infer that Joseph O'Hagan was "*apprehensive when giving evidence due to actual or perceived pressure from the appellants*", and I see no basis for the court to substitute a different inference.

96. The note, combined with the evidence given earlier by the respondent and his daughter Katherine and their neighbour James Hayde, to which I shall refer shortly, clearly formed a basis for the trial judge's findings in paragraph 166 in relation to the note, and in particular that it represented "*a true account of the factual situation*". It was a matter entirely for the trial judge, who had the advantage of observing the demeanour of the witnesses as they gave evidence, as to what weight she would give to the contents of the note.

97. More broadly there was ample evidence from which the trial judge could reach the conclusions that she did in preferring the credibility and reliability of the respondent over Joseph O'Hagan, and the limited evidence of user given by Shay O'Hagan who was only born in 1982. She found that the respondent's evidence with regard to the extent and boundary of his lands never wavered, and that he had a clear recall, and she found him to be a wholly reliable and accurate witness. By comparison she made no such findings in respect of Joseph O'Hagan, and had concerns in relation to his evidence.

98. Of note in this respect is that there was evidence given in relation to the character of J.P. O'Hagan, in particular the evidence of James Hayde, the immediate neighbour on the western side of the Ryan land. His uncontroverted evidence was that he bought his property

in 1978 and built his house on it, and that the barrel bridge went in at that time – evidence reprised by the trial judge at paragraph 107 of the judgment. He said in evidence that he was a "*close acquaintance*" of J.P. O'Hagan who was "*a very smart man*" and a "*very honourable*" man, and he agreed that J.P. O'Hagan would have been:

> "*very aware of what the boundaries of the land were, and … he's not a person who would attempt to steal land from his son in law and daughter*" (Transcript Day 13, pages 7 - 8).

99. When James Hayde was questioned about the construction of the barrel bridge, which linked his land to the disputed land at the northwest corner, he was asked (Transcript Day 7, Q. 34) whether anyone else was aware that he was constructing the barrel bridge, to which he answered:

> "*A. Well, Tom's father in law who actually owned the long field there, we called it the 'long field" at the back of Tom's, he was aware of it and I remember saying to Tom … He obviously comes from a generation where one foot beyond what you owned was a problem for him; he was from that generation. So he came out and he had to carry out his inspection of the bridge more than … but he definitely gave it its blessing, yeah.*"

In his further evidence on Day 13 the following exchange took place with Mr. Hayde:

> "*Q Okay, so [J.P.O'Hagan] was absolutely certain regarding what lands had been conveyed to his son-in-law and his daughter?*
>
> *A. For instance, he would certainly when we were putting the bridge in, he would have told us we had it in the wrong location or where we needed to move it to very, very quickly."* (Transcript Day 13, page 7).

100. Both the respondent and more particularly Joseph O'Hagan agreed with this assessment of the late James P. O'Hagan (who died in 1999) as being an "*honourable man*". The trial judge accepted this evidence, and it is evidence that contradicts the claim that during his lifetime the late J.P. O'Hagan had any *animus possidendi* in relation to the disputed land, even if he made some use of it.

101. In addition to the evidence of James Hayde in relation to the barrel bridge the trial judge was also entitled to take into account her impression of that feature on her site visit. This occurred on 20 June 2018 (between Days 13 and 14 of the hearing) in the company of the parties' solicitors when the disputed lands and laneway and barrel bridge were inspected, which visit the trial judge records in paragraph 159 of the judgment as reinforcing her impression of the significance of the barrel bridge, and further rendering it "... *understandable why the plaintiff, Mr. Thomas Ryan never erected a high hedge, wall or fence that would have obstructed his view*" on the northern side.

102. The trial judge also had the evidence of Katherine Ryan and recounts in paragraph 46 of the judgment Ms. Ryan's evidence in relation to the barrel bridge and the hedgerow that grew on the north side of the northern fence:

> "*As for the hedgerow along the Northern boundary of the Ryan land, Ms. Ryan stated that it was a full, thick hedgerow that was 12-13 feet deep, reached a maximum height of 3-4 feet and tapered off from there. There is a ditch running along the Western boundary of the Ryan land. Ms. Ryan described a barrel bridge being located by the North-Western comer of the Ryan land, through which a person could enter the ditch and access either the Citadel land or the property next door. Ms. Ryan stated that, other than passage over this barrel bridge, there was no access between the Ryan and Citadel lands because the hedgerow was too deep. Ms. Ryan stated that the*

> *true legal Northern boundary of the Ryan land is a direct continuation of the physical and legal Northern boundary of the property next door; the two boundaries form one continuous line. Ms. Ryan was then taken through the booklet of photographs. She identified the concrete post used to mark the width of the laneway. She also confirmed that some of the Ryan fence posts were removed by the defendants, along with the concrete post, before the new Eastern fence was erected.*"

103. I must therefore reject that the appellants' submission that the barrel bridge was not relevant. The trial judge was entitled to regard its existence and position as evidence that rebutted the claim of adverse possession to the disputed land on the northern side.

104. There was also undisputed evidence from the respondent that the concrete post was erected by him and J.P. O'Hagan at the north eastern corner of the Ryan land (this is recorded by the trial judge at paragraph 22 of the judgment).

105. The judgment also sets out key evidence relating to the construction of the northern fence, and the respondent's explanation that it was only intended to be a temporary structure to keep livestock out and to protect the trees which he had planted, and his explanation that it was "*most convenient to construct the fences and extension of the pre-existing bull paddock (which was already situated on the O'Hagans property at the time but has since been taken down), rather than establishing an entirely new structural line along the actual legal boundary*" (paragraph 24 of the judgment). Of importance was the respondent's evidence that there was "*no real discussion between himself and the O'Hagans about the location of this fence in relation to the legal boundary, as they were all one family and such discussions weren't necessary*" (also recorded in paragraph 24 of the judgment). This was faithful to the detailed evidence given by the respondent as recorded in the transcript Day 1,

pages 80 - 82, and his consistent evidence under cross-examination recorded in the Transcript Day 3, page 70. It is a remarkable fact that the respondent had the assistance of Joseph O'Hagan and one of his brothers in erecting this fence.

106. The evidence given by the respondent in relation to user of the land outside the northern fence is recorded by trial judge at paragraph 34 where she states:

> "*34. ... In terms of user over the disputed land, Mr. Ryan stated that no one was using the Northern segment of the disputed land covered by the hedgerow, save for agricultural grazing on the hedge itself, which was carried out by farm animals owned by the O'Hagan family and by Mr. Ryan's wife. The Eastern segment was useless in 1974, due to the level of saturation in the soil.*"

The respondent's evidence was indeed that the animals that grazed after 1974 were owned by both parties – the O'Hagans (more particularly J.P. O'Hagan), and the respondent's wife – see for example the Transcript for Day 3, pages 53 - 54 and 70 - 71 which records his evidence that his wife had a goat or goats that she milked and that were kept in the lawn field, and that up until in or about 1981 there were cattle/calves that his wife owned, which also grazed the lawn field up to the hedgerow.

107. Further the transcript for Day 12 records the respondent giving direct evidence of the assistance that he and his wife Mary gave to J.P. O'Hagan in milking his cows up to 1981 when they left for some two or three years, and a fire in the cowshed that brought an end to the milking, and following which J.P. O'Hagan appears to have relinquished his milk quota. On Day 12 at page 7 of the transcript the respondent described the "*lawn field*" as being about three quarters of a kilometre in length, and he stated that "... *rather than let the cattle just run the whole length, [J.P. O'Hagan] put ropes and sometimes electric wires across to limit where the cattle moved to.*" (Lines 16 - 18). The respondent described how J.P.

O'Hagan had only six or seven cows milking at the end, and that he had dry cattle for one year thereafter (Day 12, page 13). He gave further evidence of the "*quite smelly*" cattle being kept away from their house by tape that J.P. O'Hagan put across the field (Day 12, page 15), and he was asked about a photograph which showed what the respondent believed to be rope across the field (Day 12, page 16). The respondent said "*no*" to the suggestion that the rope/tape/electric wire was ever on the Ryan land/disputed land (Day 12, page 16). His counsel put to him that the O'Hagans were going to say that they were farming up to the post and wire fence on the northern side, including cattle grazing for about 25 years, to which his response was:

> "*No, I am sure there was times when the horses or cattle got out and before the hedgerow had got big enough ... Maybe some of them came up to the fence then once or twice or ten times, I don't know... But, generally, they didn't come up to graze at old fence ... Then when the hedgerow grew, they became brambles and little trees, bushes, thorns and then you didn't want the cattle to be going in there and they didn't want to be going in anyway. Then when he did the ... then he maybe just used the field for hay and when he came around with the hay, he kept away ... he'd leave a headland outside the back of the house. So if you look at the old global Google map, you will see where they always kept about 15 or 20 foot away from the ... you know, it damaged the machine if you cut the bushes and things like that so they kept about 15 to 20 foot away from my fence.*" (Day 12, pages 17 - 18).

The respondent's evidence was also that cattle grazing had ceased in or about 1984, and thereafter there were a few horses, but the lawn field was primarily used for haymaking, but this did not encroach on the wild hedgerow which is on the disputed land beyond the northern fence.

108. The only evidence called by the appellants on this issue was that of Joseph O'Hagan. This is recounted at length and in detail in paragraphs 53 - 55 of the judgment, and on any reading of this it is clear that the trial judge paid close attention to what he said and took it into account when she made findings of fact and reached her conclusions.

109. Even Joseph O'Hagan's direct evidence was characterised by vagueness of recollection. For example, when asked about the transition from dairy to dry cattle (which occurred in or about 1982) and period that dry cattle grazed the lawn field he answered:

> "*I can't actually remember now, but it was hay then after that for a few year and silage and that. It was just let grow for hay and silage and that*" (Day 13, page 82 lines 13-15).

The follow up question was "*how much grazing occurred on that field and to what point in the field did the grazing occur?*", to which Joseph O'Hagan responded:

> "*I can't really say, like, the grazing. They would have been grazed. I know earlier on when I was a child the first half was grazed, there was another bit of it up half ways, my father used to have potatoes and turnips on it. And then the far side of that he used to have a bit of corn.*" (Day 13, page 82 lines 21-26).

He went on to agree to a leading question from his counsel that "*there would have been*" strip grazing "*up close to the Plaintiff's property*" (Day 13, page 83 lines 10-13), and to give evidence that the northern fence was only "*bull wire*" and that about 30 years ago:

> "*There was an electric fence put up one time across at the paling because the wire the paling was gone loose.*" (Day 13, page 83 lines 22-23).

Asked further about when the hay/silage cutting took place he responded:

> "*Well years some of it would have been shut off for hay. That was mostly the bottom end of it, it was shut off for hay earlier on in the year. And then when the hay be cut the cattle would be let back into after.*" (Day 13, page 84 lines 26-29).

Which end was "the bottom end" of the lawn field was never clarified.

As to horses on the lawn field he was equally vague, stating:

> "*There was horses on it as well, my brother had horses on it as well. And then after the Ryder Cup we sowed corn in it. I think that would be two year after.*" (Day 13, page 84 lines 12-14).

110. Counsel for the respondent submitted that such grazing as occurred was so curtailed by the hedgerow, brambles and blackthorn that it could not have amounted to a "*sufficient degree of exclusive physical control*" (the test approved by Laffoy J. in *Dunne).* Counsel submitted that on the evidence heard and accepted by the trial judge the haymaking did not encroach on the disputed land on the northern side, and occurred no more than once a year, and counsel noted at paragraph 54 of the judgment the trial judge's acceptance of Joseph O'Hagan's further evidence that the O'Hagans ceased grazing on the lawn field in the mid-1990's. It was submitted that the appellants could not show *animus possidendi.*

111. I agree with these submissions, but the important point is that, in my view, there was evidence from which the trial judge could conclude that such grazing or cutting of hay or silage as did occur did not reach threshold required to amount to adverse possession.

112. A further submission made by counsel for the respondent deserves mention at this point. Counsel argued that even if there was evidence of user of the disputed land it was, at most, consistent with the acquisition of a *profit à prendre* rather than full ownership. This was addressed in principle by Charleton J. and Laffoy J. in *Dunne* where the latter judge stated:

> "***[12]*** *The final legal principle considered by the trial judge was addressed by reference to the passage from the judgement of Black J. in Convey v. Regan [1952] I.R. 56, which, as the trial judge noted, was followed by the Chancery Division of the English High Court in Powell v. McFarlane [1979] 38 P. & C.R. 452, at p. 478, and*

> *which is quoted by Charleton J. in his judgment at para. 39. The trial judge went on to state at p. 12:-*
>
> > *"4.11… I am, therefore, satisfied that, where the extent of use of lands in respect of which adverse possession is claimed are consistent equally with establishing an easement or profit à prendre as with full ownership, then it is appropriate to infer the lesser rather than the greater entitlement.'"*"

113. This submission is well made. The acquisition of "appurtenant rights" is now governed by Part 8 of the Land and Conveyancing Law Reform Act, 2009 (as amended). *If* the evidence of Joseph O'Hagan in relation to user of the lawn field was to have been accepted and was continuous for the requisite twelve-year period up to the commencement of action, and exercised *nec vi nec clam nec precario,* it would have given an entitlement by prescription to a grazing or cutting of grass *profit à prendre,* but not ownership. But any such fall-back claim (and none was suggested in this court) founders for many reasons: there was no defence plea or counterclaim in the alternative for a *profit à prendre;* the trial judge for good reason refused to allow such counterclaim as was pleaded and in any event would have dismissed it; as a result evidence and argument were not directed at this issue; the use of that part of the lawn field that encompassed the disputed land by J.P. O'Hagan was arguably by permission (*precario)*, express or implied (although this was an issue that was not fully explored); in any event as time progressed such user of the disputed land ceased to be possible due to the growth of briars/hedgerow, or at best was partial and intermittent; there was no evidence of how long such user was continuous; nor was there evidence that it continued up to the date of issue of the proceedings.

114. With regard to the disputed land on the eastern boundary it was uncontroverted that fence was erected and the treeline planted in 1976, and the trees were therefore some 24

years old by the year 2000 – and hence had roots and branches extending well into if not across the disputed land. Counsel for the respondent submitted that there was no evidence worth speaking of in relation to "*user*" prior to 2000, and no photographs from the year 2000 or any time prior to that were put in evidence demonstrating the storage of tyres, or skips, or the parking of trucks. This is so, but again the important point is that there was no evidence of any significant user of this segment prior to 2000.

115. Further it could not be contested that when the planning application was submitted by "*O'Hagan Waste Limited*" on 16 December 2004 in respect of the use of the O'Hagan lands for their waste operation, the respondent filed an objection, dated 21 January 2005 and signed by Thomas Ryan as "*owner*", in which he asserted the following:

> *"**OBJECTIONS TO PROPOSED DEVELOPMENT***
>
> ***(1) Infringement / Damage to our property***
>
> *The trees reflected on the West of their property in the drawings belong to our property. These trees do not represent the end of our property and our actual boundary extends beyond these trees by several feet. The site plans will therefore infringe on our property.*
>
> *The area underneath the area marked 'Storm water soak away' (Ref: Site Layout Plan with details of proposed Infrastructure Drawing No. 6) in their drawings contains our French Drains, which were installed with the permission of James Patrick O'Hagan in 1992. These French Drains assist the drainage of our septic tank, which lies on the boundary of our two properties. Damage will be caused to these drains should the development go ahead causing us future problems with our septic tank and sewage.*

(2) ***Access to our Septic Tank***

An agreement has been in place between James Patrick O'Hagan and ourselves for the past 30 years, which grants us access to our septic tank though the backfield though what was a 'cattle gate'. This development would prevent such access and as the high water table means regular draining of our tank this would create havoc with our sewage." [Emphasis added]

The respondent also objected to the height of the building which the O'Hagans proposed to develop:

"***(12)*** ***Visual Assessment***

The proposed building is 12.5m high and will not be hidden by the 2.5m hedgerow that currently exists as presented by O'Hagan Waste Ltd. This building will obliterate our country view and will be a complete eyesore to us."

116. Counsel for the respondent characterised this planning objection as a "*public declaration of title*", and one to which no objection was made by the O'Hagans who must have been aware of it. This was borne out by the evidence. Furthermore, it was not in controversy that the waste business user stopped in or about 2007 with the death of James O'Hagan in a tragic accident onsite. Counsel submitted that if, (which was never accepted by or on behalf of the respondent) adverse possession of the eastern strip commenced in or about 2000, the planning objection and assertion of title by the respondent occurred in 2005; twelve years starting from that time would bring us to the year 2017, but the sale took place in 2016 and the Plenary Summons was issued on 22 December 2016, and would therefore, have stopped time running against the respondent before the lapse of 12 years.

117. As mentioned earlier, counsel for the appellants sought to downplay the significance of this objection by reference to the words "*several feet*" when in fact there were, at least at the southernmost end of the eastern segment, up to eight metres from the fence to the 1974 Deed map boundary. While this is true in part (the width of disputed land narrowed to a point at the north eastern corner), the broader point made in the objection is that the respondent asserts title to the disputed land and does not claim to set out precise measurements. Further the trial judge was entitled to and did accept the respondent's evidence in relation to how the fence line was never intended to demarcate the title boundary and was chosen to avoid wet ground thus creating a triangular segment outside the fence.

118. In paragraph 166 of the judgment the trial judge finds:

> "*It was only in later years that members of the O'Hagan family asked Thomas Ryan with regard to the storage of tyres, which he acceded to, thereby in my view acknowledging his title to the land. I do not find the evidence of the O'Hagan witnesses compelling in this regard. Equally, with regard to the storage of skips, on the left hand side of the laneway, it seems to me highly improbable that extensive storage of skips could have taken place as described by the O'Hagans without doing extensive damage to the treeline. ... I am not satisfied that there was any extensive use of the disputed land was made for that purpose (sic).*"

Counsel for the respondent therefore submitted that such use as was made of the strip of land beside the treeline was by permission, and not as extensive as the appellant's witnesses suggested. Counsel also pointed out that the laneway into the O'Hagan lands was a mud lane or track until 2006, and only tarmacadamed over one year before the business ended in 2007.

119. These submissions were borne out by the transcript for Day 4, where the respondent, in the course of being re-examined, was asked whether O'Hagan Waste Limited or anyone on its behalf had written to Kildare County Council taking issue with the assertion of title in the respondent's objection to the application. He said "*... nobody wrote, I would have known*" (page 41, line 20 - 26). It appears that the planning application was refused, but no point was taken in the High Court in relation to the legality or otherwise of the user relied upon by the O'Hagans.

120. Joseph O'Hagan in his evidence was asked about the respondent's planning objection, and the trial judge at paragraph 55 records that:

> "*After some thought, he did recall Mr. Ryan making an objection to the O'Hagans 2004 planning application, but he was unaware of the contents of same.*"

However there was evidence on which the trial judge could have taken a more critical view of Joseph O'Hagan's evidence on this issue having regard to his answers under cross-examination on Day 13. Joseph O'Hagan said that a consultant was engaged to put in the planning application, and the following exchange with counsel is recorded at page 155 of the transcript:

> "*829 Q. Now, do you remember him telling you that Mr. Ryan had made an objection in relation to the boundary. Do you recall that?*
>
> *A. No, I don't remember that. I remember the objections that came from 21, actually, 21 different people.*
>
> *830 Q. All right. You weren't a popular business by the sounds of things then if there were 21 objections?*

A. Well, there was only about five of the names we knew.

831 *Q. All right, all right. But do you remember that Mr. Ryan, your brother-in-law, made an objection?*

A. Mmm.

832 *Q. I thought you said a minute ago you didn't remember that. Do you remember that. Do you remember what he said in his objection?*

A. No, not at the minute now.

833 *Q. You don't. So Mr. Ryan objected, he objected on a number of grounds. One of the grounds related to the boundaries. Did you ever take it upon yourself to go and discuss it with him afterwards?*

A. Discuss what?

834 *Q. The boundary?*

A. No.

835 *Q. So even though he had made an objection saying that you were looking for a business to be intensified on your land, to be increased in size on your land, but it was actually his land in part, you didn't go to him afterwards to say "what's this all about? I don't know anything about this."*

A. No.

836 *Q. All right.*"

Having regard to Joseph O'Hagan's shifting evidence on this issue the trial judge's assessment in paragraph 55 was clearly open to her, and it could also have fed into her wider decision to prefer the evidence of the respondent over that of Joseph O'Hagan.

121. The trial judge's findings in relation to the eastern boundary were supported by the evidence of the respondent which she records at paragraphs 22 and 23, and paragraphs 41 and 42 of her judgment:

> "*22. Mr. Ryan was then asked to explain how the legal boundary between the Ryan land and the laneway was marked in 1974. Mr. Ryan stated that the Western boundary of the laneway, and therefore the Eastern boundary of the Ryan land, was marked by reference to a concrete post that he and Mr. JP O'Hagan had erected together in the North-Eastern comer of the Ryan land. There was some general confusion in Mr. Ryan's evidence as to which of the two 190 ft. measurements was marked by the concrete post. Mr. Ryan was unequivocal in stating that the laneway was 55ft. wide and the legal boundaries matched those on the Deed map precisely. Mr Ryan described the land as forming a trapezium in shape.*
>
> *23. Mr. Ryan states that the treeline and the old Eastern fence did not follow the legal boundary line from the post to the roadside because Leyland Cypress trees have a broad root and branch structure, which necessitated planting the saplings approximately 10 ft inside the Ryan land, so that they wouldn't encroach on the laneway as they grew. There were some saplings left over after the treeline was planted, which were then planted as the spoke trees. When asked why the treeline runs at an angle to the legal boundary, Mr. Ryan indicated that the Eastern segment of the disputed land was extremely wet in the 1970s, which made planting impossible.*

The erection of a fence in such conditions was also unfeasible. Mr. Ryan planted the trees on firm ground, whilst also observing the 10ft. increment required to accommodate the tree canopy. As the trees grew, they absorbed water from the ground and the Eastern segment of the disputed land became firm as well. Mr. Ryan stated that there was never any dispute between himself and the O'Hagans regarding his approach to planting. Mr. Ryan also said that this segment of the disputed land was never put to any use.

…

41. In respect of the Eastern segment, the defendants claim that the O'Hagans used the left-hand side of the laneway for the purposes of storage and depositing equipment connected to their waste disposal business. Mr. Ryan stated that such use was only on a temporary basis, as a matter of convenience, and that the O'Hagans never availed of that land as of right. He also stated that, if the O'Hagans did use the left-hand side of the laneway on a routine, permanent basis, they did so without his knowledge or permission. In any event, a significant chunk of that land was covered in branches from the treeline, which rendered it unusable for storage purposes. As far as Mr. Ryan could recall, the O'Hagans had a minor waste disposal business for some time, but it only developed in earnest around 2003, before tapering off again in the late-2000s. He totally denies that significant skip usage occurred on the left hand side of the lane; the space is too small and such activity would damage the trees. He says that he told the O'Hagans they could put the laneway to any use they liked, provided the trees were not damaged. Such use would have occurred primarily at the Southern end of the Eastern segment, as this was the only open space that wasn't covered by branches.

42. As for the tyres, Mr. Ryan confirmed that they had been dumped near the percolation area by the O'Hagans and he had no objection to them doing so, provided that no damage was done to the septic tank. Mr. Ryan recalled some informal conversations with Mr Joseph O'Hagan regarding the tyres and the legal boundary of the Ryan land. Although he noted that, discussions of such matters took place primarily with Mr. James O'Hagan, another of Mr. JP O'Hagan's sons. Mr James O'Hagan ran the waste business with his brother, Joseph at that time. Based on the evidence provided from various witnesses, it would seem that James had a more primary role in the management of the business; discussions regarding the running of the business were normally had with James, rather than with Joseph. James O'Hagan died in 2007. However, Mr. Ryan maintains that all the O'Hagans were aware of the true legal boundary. In his view, his formal objection to their 2004 planning application, which the O'Hagans must have received as part of the planning process, left no doubt that the legal boundary differed from the physical boundary."

122. The trial judge's findings in relation to the fences were also supported by the evidence of Mr. Hayde, the neighbour on the western side of the Ryan lands, whose evidence she recounts at paragraph 108 of the judgment:

"*108. Along with Mr. Ryan, Mr. Hayde was also recalled on day 13 of the hearing. He regularly works abroad but he primarily resided at his house in Bawnogues from 1984 - 2008. He states that he was a close acquaintance of Mr. JP O'Hagan. In his estimation, Mr. JP O'Hagan would have been highly familiar with the lands at Bawnogues, and would have been well aware what plot had been conveyed to Mr. Ryan. He confirmed that rope boundaries were used by the O'Hagans, which kept*

the farm animals some distance away from the Northern fence and its outer hedgerow. As he identified in the photographs, this hedgerow was wild and would regress in the Winter months. During this time of low growth, animals could graze up to the fence, if there was nothing to impede their access. As the years passed, the boundary was upgraded with electric tape. He also confirmed that the O'Hagans engaged in the practice of strip-grazing. Mr. Hayde recalled the centre and right-hand side of the laneway being put to significant use as part of the O'Hagans' waste disposal business. He did not recall the left-hand side being put to significant, sustained use, due to the extensive coverage of the treeline branches. Any use that was made occurred just beyond the crown of the treeline."

It is notable that Mr. Hayde's evidence emphasised the use by the O'Hagans of the centre and right-hand side of the laneway as being "*significant*", unlike the use of the left-hand side (*viz.* the disputed land on the eastern boundary) due to the extensive coverage of the treeline branches.

123. There was also evidence of a gap in the eastern tree boundary that was left by the respondent in order to give access for himself and his family to the O'Hagan lands. Katherine Ryan gave evidence of this gap under re-examination on Day 12 (page 97):

"*579 Q. So there is a gap in the fence, was there?*

A. No, we called it the gap.

580 Q. What was the gap then? Tell us about that?

A. Basically it's to -- when Daddy put the trees in he left like a space for us because we were constantly going between -- so we didn't have to

go on the road. So all of us little ones would run what we called "the gap".

581 Q. So the children would be safe going back and forth?

A. Yeah, I have a picture that might explain it a bit better.

582 Q. Well just -- we will hold off with the photographs.

A. Okay.

583 Q. I was to just have the narrative first and then we will go with the photographs?

A. Okay

584 Q. But I presume it was your cousins were coming into your house and you were going into your grandparents?

A. Yes, both. Both.

585 Q. Both ways. And what about the fence that your father built, did that .... (INTERJECTION)

A. Yeah, that was much later, but there was also -- Daddy".

Katherine Ryan was born in 1970 and was therefore in a position to recollect the 1980's and 1990's.

Mr. Fergal Flattery who made some three visits to the lands in sale prior to purchase was cross-examined in relation to the gap on Day 22, and the following exchange took place:

"*688 Q. Why didn't you go in and walk along every foot of that post and wire fence until the tyres prevented you from going any further?*

A. *There was no need, I could see it and it was consistent with the map.*

689 Q. *But by doing that, didn't you miss the gap in the post and wire fence, that Ms. Ryan and Mr. Ryan gave evidence of in relation to the entrance and exit created for the children, didn't you miss that?*

A. *As we removed tyres, there were gaps in the hedges.*

690 Q. *No, this was halfway up that post and wire fence and you know it.*

A. *I don't see how you know I --*

691 Q. *How did you miss that, you are the surveyor?*

A. *I walked the lands. What was what of primary concern to me was that the physical boundaries which was the concrete posts and the wire fence, that they were consistent with the maps and that they were there for long enough to.*"

The evidence of this gap in the eastern fence is not mentioned in the judgment. While it is not necessary for a judge to deal with every piece of evidence this evidence in relation to a gap in the treeline was given, and was part of the broader picture that saw the respondent and members of his family and other members of the O'Hagan family passing the eastern fence/trees to and fro between the Ryan land and the lands retained by J.P. O'Hagan.

124. The trial judge recounted the evidence given by Katherine Ryan at paragraphs 44 and 45 of the judgment:

"*44. Ms. Ryan gave a detailed history of the Ryan and Citadel lands, and the use to which they were put over the years while she resided in the Ryan house. She stated*

that the O'Hagans began diversifying their waste disposal business over the course of the 2000s. This business was operated by her uncles. Vehicles related to this business often used the laneway to access the O'Hagan's property. Ms. Ryan stated that these vehicles would sometimes deposit skips onto the right-hand side of the laneway, opposite the treeline. Occasionally, some skips would be placed on the left-hand side, by the treeline, but this was rare because the branches prevented access. Ms. Ryan believes her uncles were aware that the left-hand side of the laneway belonged to the Ryans, and they treated it as such. On occasions where skips were deposited on the left-hand side, Ms. Ryan would enquire with her uncles about it, and they clarified that they were only using that space temporarily while they moved products around. Mr. Ryan had informed her that the O'Hagans were free to use the laneway as they wished, provided that the treeline wasn't damaged. The waste business began to decline after James O'Hagan died in 2007.

45. Ms. Ryan confirmed that vehicles were sometimes parked in the Eastern segment of the disputed land on a temporary basis, but that the land did not have a permanent use for parking. Regarding the O'Hagans' 2004 planning application, Ms. Ryan stated that both she and her father had spoken to the O'Hagans about the boundary recorded in the map submitted with the application, arguing that it did not reflect the true legal boundary. As for the tyres situated on the left-hand side of the laneway, Ms. Ryan said tyres were stored on the laneway on a recurring basis from 2009 onward. Allegedly, the Ryans had granted permission for some of these tyres to be left on the disputed land. A larger batch of tyres came on site in 2016, not long before the Citadel land was sold. When the tyres were placed on the left-hand side of the laneway, as shown in the photos, Ms. Ryan spoke with Mr. Ryan, who indicated that he had no objection so long as the trees and septic tank went unharmed."

125. At paragraph 59 of the judgment the trial judge then recounts the evidence of Shay O'Hagan, the son of Joseph O'Hagan, who was born in 1982:

> "*59. This witness is Joseph O'Hagan's son. He was born in 1982. At a young age, his family resided in the Ryan house, before they moved into a house situated further down the road. Growing up, he would have assisted the rest of the O'Hagan family as they worked the Citadel land. This included assisting with the waste disposal business from the mid-1990s to the mid-2000s. He recalled that skips were placed on both sides of the laneway during this time. When cross-examined as to how skips could have possibly been pushed under such a low tree canopy, the witness stated that the O'Hagans had always kept skips in this area, which had prevented the treeline's branches from growing in the first 4-5 feet from the ground. He did confirm that, if a stack contained ten or more skips, it might be necessary to push some of the branches out of the way to fit the stack in. He also recalled occasions where the cattle broke through the Northern fence and entered onto the Ryan land. When this occurred, the O'Hagans would drive the cattle back onto the Citadel land and set up the electric boundary to stop them from breaking out. He confirmed that the O'Hagans did practice strip-grazing on the Citadel land. Reference was also made to a pet lamb and some other animals grazing by the Northern fence for a time. He said that tyres were first placed near the soakaway around 2000.*"

126. These passages demonstrate that the trial judge was careful to listen to and record the evidence adduced by both parties in relation to the alleged user of the disputed land. The trial judge also had evidence in relation to the treeline, and in particular that of Mr. Morgan. In paragraph 166 of her judgment she rejects Shay O'Hagan's evidence in relation to the storage of skips on the left hand side of the laneway in the mid-1990's - mid-2000's finding:

> "*... it seems to me highly improbable that extensive storage of skips could have taken place as described by the O'Hagans without doing extensive damage to the treeline.*"

In my view this was an inference she was entitled to reach having heard and assessed the evidence.

127. The uncontroverted evidence also supported the trial judge's conclusion in paragraph 186 that the appellants failed to ascertain in advance of the purchase that the disputed lands were owned by the respondent. The 1974 Deed map was key to the respondent's title, and hence the title to the Citadel lands that could be granted to the appellants, yet was it was not obtained or considered before the sale closed. Mr. Fergal Flattery was an experienced developer, but did not appear to have bought agricultural land previously. The evidence was that he was advised by his solicitor Mr. Timmins to go and get a survey, but instead relied on his own undergraduate qualification in surveying. Although visiting the lands in sale on three occasions he failed to observe the barrel bridge, and failed to observe any gap in the Eastern treeline. He should have been aware that the sales brochure could not be regarded as accurate, and that the Land Registry map could not be treated as conclusive in relation to boundaries, and that he could not rely on boundaries observed from Google Earth. In observing the physical boundaries, Mr. Flattery failed to raise or pursue appropriate enquiries with the vendors or with the Ryans, and the purchasers/solicitors failed to obtain and consider a copy of the 1974 Deed map in advance of completion. Had the appellants gone about matters differently they might have decided not to purchase.

Conclusions on Adverse Possession

128. It is a feature of this appeal that while the appellants have sought to challenge the findings of fact made by the trial judge, and inferences of fact drawn by the trial judge from the evidence, at no point were the relevant findings opened to the court, and, save in the

broadest way, the appellants have failed to identity what findings of fact or inferences they say were reached in error. They have signally failed to identify any findings of fact that were not based on credible evidence, or inferences which could not have been drawn from the evidence (including the trial judge's site visit) and the trial judge's observation of the witnesses and their demeanour.

129. To a considerable degree this has meant that the court has had to "*rummage around in the undergrowth*" (to adopt the words of Clarke J.) and cross-check the trial judge's findings with the evidence highlighted by the respondent from the limited book of transcript extracts furnished to the court and the further extracts provided to us in the course of the hearing of the appeal. Responsibility for this unsatisfactory state of affairs rests squarely with the appellants' side.

130. The appellants' submissions were confined for the most part to suggesting – generally – that the trial judge ignored the evidence adduced on their behalf, or failed to give it sufficient weight. It has therefore been necessary to look in some detail at the core evidence, and the recounting of evidence by the trial judge, and her findings, to ascertain whether these claims can be sustained.

131. The appellants now accept that the respondent obtained a good paper title to the Ryan land, including the disputed lands, by the 1974 Deed under which the Ryan land was transferred by J.P. O'Hagan to the respondent in consideration of natural love and affection. That being the case it is not disputed by the appellants that the onus was on them to prove to the satisfaction of the court that their predecessors in title had acquired title to the disputed land by adverse possession.

132. The first contention that the appellants advanced to support their appeal was that the respondent never went into possession of the disputed land at all.

This is easily disposed of for two reasons.

133. Firstly, as Slade J. stated in *Powell* in the passage quoted earlier which was approved by Laffoy J. in *Dunne:*

> "*(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 claiming through the paper owner.*"

Accordingly the respondent was deemed to be in possession upon and after execution of the 1974 Deed. No *evidence to the contrary* seems to have been before the trial judge or brought to the attention of this court.

134. Secondly, and lest it be suggested that there was *evidence to the contrary,* actual entry into possession by the respondent is evident from or can be inferred from the early sequence of events which, at least by the close of the hearing in this court, was not in dispute. On 1 October 1974 the Land Commission consented for the purposes of s. 12 of the Land Act, 1965 to transfer to the respondent of the Ryan land – *viz.* "*the holding marked B on the enclosed map*", which showed a plot 190 feet x 190 feet (even though the text in the letter – reflecting the parcels clause in the 1974 Deed – refers erroneously to a much smaller area "*comprising of 2 roods Statute measure*"). The 1974 Deed was executed on 26 October 1974 and had the effect of transferring legal title to the entirety of the Ryan land to the respondent. Then in 1975 the respondent sought planning permission to build his house on Ryan land, and having obtained it he actually entered onto the Ryan land and constructed his house, which was completed in 1976. Significantly the evidence relating to the construction of the northern fence and eastern fence and the planting on the eastern side all dated to 1976, *after* the respondent had made actual entry on the Ryan land.

135. It is trite law that in order to enter into actual possession of land – and in 1974 this was open agricultural land – it is not necessary to physically enter and occupy or make use of every corner or constituent piece of ground. It is sufficient to enter on part into order to enter into possession of the whole. In any event the respondent's planning application showed his intention to occupy the entire plot and build his house on it. Accordingly the contention that the respondent never entered into possession of the Ryan land, and that time commenced to run against the respondent in 1974, must be rejected.

136. A further and repeated submission was that the respondent over 40 years *failed to assert his title* to the disputed lands. However this is fundamentally at odds with the legal position. There is no general obligation in law on a title owner to assert their title by pro-actively undertaking acts of possession in order to sustain their title over time. In fact s. 20 of the Statute expressly provides that:

> "*For the purposes of this Act –(a) no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, ...*".

It is perfectly open to a land owner to leave their property unused and unoccupied, and as Slade J. observed in *Powell* possession is ascribed to the paper owner as the person with the *prima facie* right to possession. Furthermore, as counsel for appellant agreed in the course of the hearing, the appellants cannot succeed on the basis of a defence of estoppel by silence or acquiescence – either the appellants have a defence based on adverse possession or they have no defence.

137. I have earlier addressed the question whether the trial judge was entitled to make the findings of fact that led her to conclude that the defence of adverse possession was not made out to her satisfaction. I am driven to conclude that there was ample credible evidence to support her findings, her preference for the evidence adduced on behalf of the respondent, and her conclusions.

138. There was undoubtedly contradictory evidence given by respondent, Katherine Ryan and James Hayde, on the one hand, and Joseph O'Hagan and Shay O'Hagan, on the other, as to the extent of the use and occupation of the disputed land from 1974 until 2016. It was necessary for the trial judge to resolve this dispute, because if the evidence of Joseph O'Hagan and Shay O'Hagan was taken at its height it demonstrated such use and occupation as might have amounted to possession of the disputed land adverse to the respondent for more than 12 years prior to the institution of these proceedings. The edifice upon which the adverse possession claim was built was Joseph O'Hagan's evidence which, if accepted, meant that the respondent might have been statute barred by 1997 when J.P. O'Hagan transferred the Citadel lands to his sons.

139. Of course the trial judge had the opportunity of seeing and hearing the witnesses, and was therefore best placed to consider the manner in which their evidence was delivered, and their demeanour. This led her to make two key and related findings in paragraph 156. Firstly, she found that the respondent never wavered as to the extent and boundary of his land, that he had clear recall and was precise in his evidence, and he was a "*wholly reliable and accurate witness*". Secondly, she did not find the O'Hagan's evidence "*compelling*", and found certain evidence "*highly improbable*". These were matters that she was entitled to take into account in resolving the conflict of evidence.

140. Under the review principles set out earlier this court is bound by those findings, even though there was testimony against them. Indeed, as Ryan P. said in this court in the *Emerald Isle* case, the appellate court is bound the findings of fact "*however voluminous and apparently weighty the evidence against them*".

141. This is especially so when the trial judge made two further key findings of fact that were firmly based on the evidence and fed into her preference for the evidence adduced by the respondent over the evidence of Joseph O'Hagan. Firstly she finds in paragraph 166 that

the Note/acknowledgment signed by Joseph O'Hagan was relevant and represented "*a true account of the factual situation*".

142. It is important to observe that the trial judge did not treat the Note as an acknowledgment in writing for the purposes of s. 51(1) of the Statute such that "*…the right of action shall be deemed to have accrued on and not before the date of acknowledgment*". Had she done so she might have fallen into an error of law as a written acknowledgment cannot revive title to land that is statute barred. Rather she treated it as reflecting the fact that the O'Hagans had always accepted the respondent's title and that "*no attempt was made by any of the predecessors to deprive Thomas Ryan of same*" – in other words she regarded it as reflecting the true *animus* of the O'Hagans to the Ryan land over the period in question.

143. Secondly she found that:

> "*159. ...From the description of Mr. James O'Hagan Senior given in evidence, it seems highly improbable to this court that he would have allowed the construction of the barrel bridge on his land. This impression was re-enforced by the Court visit to the lands on the 20th June 2018…*".

As I indicated earlier it was James Hayde, the neighbour of the western side and a close acquaintance of J.P. O'Hagan, who described him as "*a very, very smart man*", "*an honourable man*" and "*absolutely not*" a person who would attempt to steal land from his son-in-law. He also said that "*He obviously comes from a generation where one foot beyond what you owned was a problem for him*". The trial judge was entitled to factor this into her assessment of the credibility of Joseph O'Hagan's evidence of user, and the supposed *animus possidendi* of J.P. O'Hagan, in the period 1976 up to 1996 when he transferred the Citadel land to his sons, and indeed thereafter until his death in 1999.

144. In particular, following on her review of the evidence and her findings of fact, it was within the scope of her judgment to conclude whether, as a matter of law, such use of the

lawn field for grazing or cutting hay/silage as occurred, and such use of the eastern segment for skip or tyre storage as occurred, "*constitute[d] a sufficient degree of exclusive physical control*" to amount to adverse possession. From a reading of her judgment as a whole I am satisfied that she did take into account Joseph O'Hagan and Shay O'Hagan's evidence of user, which she summarises in paragraphs 53 - 58 and 59 respectively, and I reject the submission that this was not adequately taken into account.

145. In stating in paragraph 156 that she found the respondent to be reliable, accurate and precise in his evidence the trial judge was implicitly accepting as correct the account of his evidence given earlier in her judgment at paragraphs 20 - 24 and 32 – 43. This includes, for example –

- the respondent's account as to why the northern fence and the eastern fence and treeline were put in where they were, rather than on boundaries as marked on the 1974 Deed map;
- his evidence of the grazing of livestock some of which belonged to his wife Mary in the period up to 1982, and the help they gave to J.P. O'Hagan in the farming/milking operation;
- his evidence (along with that of Katherine Ryan and James Hayde) of the extended growth over the years after 1976 of the brambles/hedgerow beyond the northern fence that limited the extent to which the disputed land on that side could be used for grazing or hay/silage cutting;
- the evidence of the placing by J.P. O'Hagan/the O'Hagans of rope or tape or electric fencing that kept horses away from the northern fence and disputed land;
- his evidence of raising the question of ownership in his objection to the O'Hagan waste business planning application in 2005;
- the giving of permission to put skips/tyres on the eastern segment;

- the limited extent to which that storage of skips occurred, and the limited period of time which ended in or about 2007 when the waste business ceased; and
- the evidence that the storage of tyres was by permission and occurred only in later years.

146. As to the requisite intention to possess to the exclusion of the legal owner, all the evidence from the respondent and James Hayde pointed to J.P. O'Hagan not having any *animus possidendi* in so far as he continued after 1974 to make any use of the disputed land up to the date he transferred it to his sons in 1996. The claim for adverse possession up to that point in time cannot succeed.

147. Counsel for the appellants made much of the fact that in 1996 J.P. O'Hagan transferred the disputed lands to his sons, as part of the Citadel lands. The argument was that at least from that date the O'Hagan's were in adverse possession of the lands.

148. I have already found that there was evidence to support the trial judge's conclusion that the O'Hagan family's use of disputed land was not sufficiently extensive to give rise to adverse possession, or that the use was by permission. Apart from that the appellants failed to answer the point that the respondent asserted his title to the disputed land in his objection to the 2005 planning application. That objection, which was a public document considered by the planners and available for inspection, elicited no response from the O'Hagans. When it was put to Joseph O'Hagan his initial response was that he was unaware of it, but pressed on cross examination he agreed that that there were some five local objectors and he appeared to agree or at any rate did not disagree ("*Mm*" – Transcript, Day 1, page 155, set out extensively earlier) that one of these was the respondent. It is not credible that Joseph O'Hagan and/or other members of the O'Hagan family involved in the waste business, who had a "consultant" making the planning application on behalf of their company, would not have been made aware of the detailed objection from their immediate neighbour and brother-

in-law, and the nature of that objection. The fact that none of the O'Hagans countered that assertion of title undermines any claim that they individually or collectively held the requisite *animus possidendi* at any relevant time.

149. The period after 2005 is marked by the undisputed fact that the waste disposal business ceased in or about 2007. The trial judge on the evidence rejected the belated June 2018 plea of user on the eastern side for skip storage that was "*mainly…since before 2000*", but in any event this must have ceased in or about 2007; and the new plea in respect of "*tyres …stored from circa 2000*" was entirely undermined by the trial judge's finding of fact that this was by permission, and evidence such as that of Katherine Ryan that such storage was after 2011 and the main occasion of tyre storage was 2016. The late plea in respect of the use of the lawn field beyond the northern fence "*from in or about 2000 to 2016 grass cutting and hay*" was clearly considered by the trial judge but rejected because of the extent to which the brambles/hedgerow had grown into the lawn field and prevented any or any extensive cutting of grass or hay on the disputed strip of land outside the northern fence.

150. The raising of these new pleas of user, which were very short on detail, in the middle of the trial, was in itself unsatisfactory. While the trial judge was fully entitled to allow/direct such pleading having regard to the direction that the cross examination of the respondent was taking, it is hard to escape the impression that the late pleas were the product of afterthought and hindsight. It is not surprising that the trial judge found an absence of any real evidence to support meaningful acts of adverse possession, and while she does not say so expressly it is implicit that the appellants failed to establish the requisite *animus possidendi* on the part of the O'Hagan family.

151. For these reasons the trial judge was fully entitled to reject the appellants' defence of adverse possession and the appeal from that finding must fail.

Reinstatement and Quantum

152. As indicated earlier there were two elements to the quantum. The court was advised that the sum of €125,000 assessed by the trial judge in respect of general damages for trespass and nuisance had been settled in the event, which has happened, that the appeal was unsuccessful. Unless the parties have agreed some other order the court will substitute for that figure such sum as may have been agreed between the parties.

153. The other element, which the parties' solicitors advised had not been settled, relates to the sum of €118,400 awarded by the trial judge for "reinstatement" of the Ryan land. As the order makes clear, the trial judge assessed this figure in accordance with the evidence of Mr. Stephen Buchanan as being €350 to remove and €1500 to replace each of 64 leylandii trees. Of this sum, €58,000 plus VAT at 13.5% was to be paid out within 28 days as a condition of the grant of stay pending this appeal.

154. Ground 10 of the Notice of Appeal asserts that the trial judge erred in holding that the respondent was entitled "*to an injunction requiring the reinstatement of the Plaintiff's lands prior to the 2nd December 2016 and/or awarding payment to the Plaintiff of the costs of the said works in the amount of €118,400*". However it is not said why the trial judge erred, or whether there was any dispute as to the cost of replacement if the appellants were liable and if the trees had been damaged.

155. While the appellant's written submissions say much about the general damages award, little is said about the €118,000 award. Paragraph 13 notes that the €58,000 plus VAT was paid on 11 July 2022, well before the order was perfected on 22 November 2022, but that the (damaged) trees were not removed until 16 February 2023. This can have no relevance to the issue of whether the award was right or wrong. In paragraph 16 complaint is made that the trial judge disregarded the evidence of Felim Sheridan "*the agreed expert*" and preferred instead the evidence of Conor Morgan, an arborist retained by the respondent. It

is submitted that if Mr. Sheridan's evidence had been accepted there would be no justification for the award in relation to damage to the existing trees.

156. The difficulty with this submission is twofold. Firstly several arborists or tree surgeons gave evidence, but the court was not furnished with all the experts reports – it had certain extracts of evidence in the book of transcripts, and one report from Mr. Morgan dated 24 January 2017 – which, incidentally is emphatic as to the extensive damage done to the trees and tree roots, and the risk that they could now fall in high winds – but that was all. This court therefore is not in a position to review the trial judge's assessment of their evidence.

157. Secondly in the course of his oral submissions to this court counsel for the appellants accepted that under *Hay v O'Grady* principles the trial judge was best placed to decide what expert evidence she preferred, and she did in fact give clear reasons for preferring the evidence of Mr. Morgan over that of Mr. Sheridan. She does so in paragraph 185 where she states:

> "*185. Felim Sheridan was agreed as an independent expert by both parties. Mr. Morgan, an arborist, explained the tree root system pertaining to the Cyrus Leylandii trees. Based on his evidence as set out in paragraph 78-79 above, I am satisfied that he of all the experts was best placed to comment on the status of the trees. He was first on site to view the trees and the damage caused and subsequent visits allowed him to review and comment on their ongoing decline. Mr. Lennon accepted that he was the least qualified of all the above experts and agreed with Ms Swan that the tree lines should be removed due to its age, poor structure and proximity to the Ryan household.*"

158. No further submissions on this issue were made, and there was no challenge to or comment on the costings of Mr. Buchanan, which were accepted by the trial judge.

159. In my view this court is left with no alternative but to affirm the trial judge's order that the appellants pay €118,400 (inclusive of VAT) to the respondent as damages for reinstatement.

Orders and Costs

160. I would therefore dismiss this appeal and affirm the order of the learned trial judge save that I would substitute for the sum of €125,000 awarded for (general) damages for trespass and nuisance such sum as the parties have agreed (unless the parties have agreed some other order that implements their settlement of that issue). The respondent's solicitors should advise the court of the agreed substitute sum, or any agreed alternative order, within 14 days of the delivery of this judgment.

161. As this judgment is being delivered electronically it is appropriate that I would indicate what orders I would propose to make in respect of the costs of the appeal.

162. Firstly the parties have agreed that they will bear their own costs in relation to the costs of the appeal related to the general damages award that has been compromised by agreement, and in the interests of clarity that should be expressly stated in the order.

163. In relation to all other costs of the appeal as the respondent has been entirely successful there should be an order that the appellants do pay the respondents costs, such costs to be adjudicated by a legal costs adjudicator in default of agreement. Should either party seek a different costs order they should so notify the Court of Appeal Office within 14 days of the electronic delivery of this judgment and a short costs hearing will be arranged, and in default of any such notification the proposed orders in relation to costs will be made. If any party seeking such a hearing does not succeed in obtaining a different order they will also be at risk of bearing the costs of such further hearing.

Donnelly and Allen JJ. have read this judgment and indicated their agreement with same and the orders proposed to be made.