

**THE HIGH COURT****2007 5591 P****BETWEEN****GREG KAVANAGH, FRED DALY AND THOMAS GODKIN****PLAINTIFFS****AND****CÓRAS IOMPAIR ÉIREANN****DEFENDANT****Judgment of Miss Justice Laffoy delivered on the 9th day of October, 2009.****The proceedings**

In these proceedings, which were initiated by a plenary summons which issued on 25th July, 2007, the plaintiffs seek the following reliefs:

- (a) a declaration that the plaintiffs have a right of way over the defendant's railway line which dissects their lands comprised in Folio 30552F, County Wicklow at and by way of a level crossing, which is commonly known as "Flights Level Crossing" but which the defendant denominates as level crossing XR062, and which I will hereafter refer to as "the Level Crossing";
- (b) a declaration that the defendant is obliged to keep available for the benefit of the plaintiffs the use of the Level Crossing, subject only to all necessary safety precautions;
- (c) an injunction restraining the defendant from obstructing the plaintiffs' use of the Level Crossing;
- (d) an injunction compelling the defendant to restore the Level Crossing or update it or both in line with other level crossings; and
- (e) damages for nuisance, trespass to land, negligence and breach of statutory duty.

Contemporaneously with the plenary summons the plaintiffs issued a notice of motion seeking interlocutory injunctive relief to enable the plaintiffs to use the Level Crossing pending the trial of the action. While a very considerable number of affidavits were filed by the parties in support of and in answer to the application for an interlocutory injunction, the plaintiffs' application was not determined at the interlocutory stage but was adjourned to the trial of the action.

Before considering the plaintiffs' case and the defendant's defence as pleaded, I propose outlining the location and early history of the Level Crossing, the location of the plaintiffs' lands in respect of which the right to use the Level Crossing is claimed and how the plaintiffs acquired title to those lands.

**The location and history of the Level Crossing**

The Level Crossing is located on the Dublin to Wexford railway line on the Dublin side of Arklow. The history of the Level Crossing, which is not in dispute, was averred to in an affidavit sworn by Colin Hedderly, who is an Assistant Divisional Engineer (Track and Structures) of the defendant, on 30th July, 2007 on the interlocutory application. The Level Crossing was originally constructed at the time of the construction of the railway line. The Act under which the railway line was constructed was the Dublin Wicklow and Wexford Railway Act, which received Royal Assent on 15th May, 1860. The section of the line from Avoca to Enniscorthy was opened on 16th November, 1863. In these proceedings, the defendant has accepted that the origin of the Level Crossing is traceable to the laying down of the railway line and the fulfilment of the railway undertakers' obligations under s. 68 of the Railway Clauses Consolidation Act 1845 (the Act of 1845). Accordingly, the defendant has accepted that the Level Crossing came into existence as an accommodation way as provided by s. 68.

**The location of the plaintiffs' lands and their title**

In 2006 and 2007 the plaintiffs acquired lands in the townland of Ballyraine Lower, Arklow, on foot of two separate acquisitions. The two acquisitions are now consolidated on Folio 30552F, on which the plaintiffs are now registered as full owners.

The Dublin to Wexford railway line passes through Ballyraine Lower in a south easterly direction. It is bounded on one side, which for simplicity, if not accurately, I will refer as the east side, by unbuilt-on land, which I will refer to as the "River Land". The River Land is bounded on the east in semi-circular fashion by the Avoca River. The railway line is bounded on the other side, which I will refer to as the west side, by land which is partly unbuilt-on, which I will refer to the "Vale Road Land", which in turn is bounded on its west by a public road known as Vale Road.

The plaintiffs' first acquisition comprised parts of the land registered on Folio 2275 of the Register of Freeholders, County Wicklow, being the land now registered at entry No. 1 on Folio 30552F. It is clear from the documentation put in evidence that the lands registered on Folio 2275 were originally part of the estate of the Earl of Carysfort, which was the subject of a vesting by the Land

Commission under the Land Purchase Acts in 1908. In 1944 the lands registered on Folio 2275 were acquired by, and registered in the names of, James Flight and Susan Flight. James Flight died in 1986 having been predeceased by Susan Flight. The acquisition by the plaintiffs of portion of the lands registered on Folio 2275 was effected by a transfer dated 8th November, 2006 from John Kershaw and Elsie Kershaw, as legal personal representatives of James Flight deceased (the Flight Estate), to the second plaintiff, who purchased in trust for all of the plaintiffs and who ultimately vested the lands he so acquired in all of the plaintiffs. It is clear from the documents put in evidence that portions of the lands registered on Folio 2275 had been disposed of both prior to the death of James Flight and subsequent to his death, and also that part of the lands had been compulsorily acquired by Wicklow County Council in connection with the construction of the Arklow Bypass after his death.

At the time of the acquisition by the plaintiffs in 2006, the remainder of the lands registered on Folio 2275 which was still vested in the Flight Estate comprised a portion of the River Land and a portion of the Vale Road Land and straddled both sides of the railway line. The Vale Road Land portion had a frontage to and was accessed directly from Vale Road. The only access to the River Land portion was from Vale Road over the Vale Road Land portion, then across the Level Crossing and through a portion of land which was part of the second acquisition, which I will call "Plot 15". Although, as regards the plaintiffs' current title, it is immaterial because of the second acquisition, on the evidence, I am satisfied that James Flight and his successors had a right of way over Plot 15 from the Level Crossing to the River Land portion of the lands registered on Folio 2275, which, as a matter of probability, was a right created by prescription and was protected by s. 72 of the Registration of Title Act 1964. On the basis of the evidence of Daphne Casey, a daughter of James Flight and one of the beneficiaries of his estate, and of John Cussen, the solicitor who acted for the Flight Estate in the sale to the plaintiffs, I am satisfied that the intention of the vendors on that sale was that the benefit of both the right of way over Plot 15 and the accommodation way over the Level Crossing was included in the sale. I am satisfied that whatever rights the Flight Estate had did pass to the plaintiffs.

The significant point for present purposes is that without access to and from Vale Road over the Level Crossing, the River Land portion, with the railway to the west and the Avoca River to the east, was effectively landlocked. The existence of an accommodation way over the railway line at the Level Crossing in favour of the Flight Estate was recognised by the defendant just over two years before the sale to the plaintiffs, as is evidenced by a letter of 29th January, 2004 from the defendant to Robert Cussen and Son, the solicitors acting for the Flight Estate, in which it was confirmed that "level crossing XR062 has now been restored" and the estate was invited to enter into negotiations "regarding the possible closure". When read in the context of the line of correspondence between the solicitors for the Flight Estate and the defendant, that letter is properly construed as an unequivocal acknowledgement of the entitlement to the estate to the accommodation way, not merely a representation as to the condition of the Level Crossing.

In 2006 the plaintiffs acquired from the estate of James Flight all of the River Land portion registered on Folio 2275. They acquired a small portion only of the Vale Road Land portion registered on Folio 2275, which was a strip of land (the Strip) which extended more than half way between the Level Crossing and Vale Road, and was intended to be wide enough to accommodate a bridge which might be constructed by the plaintiffs over the railway line. The Flight Estate retained the remainder of the Vale Road Land portion, comprising a number of fields with road frontage, but granted a right of way to the plaintiffs, of similar width to the Strip, to afford the plaintiffs access to and from the Strip from and to Vale Road. That right of way, which was expressed to be "for all purposes at all times with or without vehicles laden or unladen" is registered as a burden on Folio 2275 in favour of the owners of Folio 30552F.

The position, accordingly, when the first acquisition was completed was that the plaintiffs' access to the River Land portion was via the right of way granted by the Flight Estate, then over the Strip, across the Level Crossing, over the right of way through Plot 15 and into the River Land portion at what was known as "the Beehive Field".

The second acquisition was completed early in 2007 and was a purchase from SAFC Arklow Ltd. (SAFC) of two parcels of the River Land, one being Plot 15 and the other being Plot 1, which had been registered on Folio 8321F County Wicklow. That acquisition also included a narrow parcel of the Vale Road Land which had been registered on Folio 13334F County Wicklow. That parcel on the west side of the railway extended from the railway line to Vale Road and it was contiguous with the Strip acquired from the Flight Estate on that side and the adjoining land traversed by the right of way granted by the Flight Estate to the plaintiffs. It appears to have had no intrinsic value other than as a means of accessing the railway line from Vale Road at a point adjacent to the Level Crossing.

The current position is that the plaintiffs are now registered as full owners on Folio 30552F of the following lands:

- (1) The River Land portion (Plot 9 and Plot A5174) acquired from the Flight Estate, which is landlocked between the railway and the river;
- (2) Plot 15 and Plot 1 on the east side of the railway acquired from SAFC, which are also landlocked between the railway and the river;
- (3) the Strip on the west side of the railway (Plot BGC8D), together with the right of way acquired from the Flight Estate; and
- (4) the adjoining narrow parcel (Plot 21) on the west side of the railway acquired from SAFC.

It is acknowledged by the plaintiffs that there is a limited pedestrian access via an underbridge to the River Land.

### **The claim and the defence on the pleadings**

In their statement of claim delivered on 4th December, 2007 the plaintiffs alleged that they and their predecessors in title, the Flight Estate, were at all material times, and they are, entitled to exercise a right of way by foot and by vehicles and for animals and machinery over the Level Crossing to gain access to and from the lands registered on Folio 30552F County Wicklow "and for the purposes of using/exploiting the said lands". In response to the defendant's notice for particulars, the plaintiffs clarified that the said right of way was established by statute and by accommodation way and by continuous use over many years and of necessity. The plaintiffs pleaded that from in or about the year 2007 the defendant has wrongfully claimed that the plaintiffs are not entitled to use the Level Crossing and has wrongfully and repeatedly prevented their use of the Level Crossing. Specifically the plaintiffs have pleaded that, while there is gate access now through the palisade fencing erected by the defendant along the railway line, the defendant has withheld the keys to the gate which is padlocked. They have also alleged that the defendant has failed to upgrade and maintain the Level Crossing.

The defendant, in its defence delivered on 20th December, 2007, traversed all of the allegations made by the plaintiffs and asserted

that the plaintiffs were not at any material time, and are not now, entitled to exercise over the Level Crossing the right claimed or for the purpose claimed. It was also pleaded that, if contrary to the contention of the defendant, the plaintiffs have any right to use the Level Crossing, the same "is limited to use for the accommodation of farming activities by the plaintiffs, their tenants, or licensees, on both sides of the railway simultaneously". The defendant also pleaded reliance on the Railway Safety Act 2005 and the Safety Health and Welfare at Work (Construction) Regulations 2006.

Subsequently, in their written submissions, the defendant fleshed out the plea in relation to "use for the accommodation of farming activities ... on both sides of the railway simultaneously". It was contended that one of the effects of the transfer by the Flight Estate to the plaintiffs was to end the right of the owner of the River Land portion of the lands sold to use the crossing, as it would no longer be capable of being used for the purpose for which it was made, namely, to make good the interruption caused by the railway to the use of the lands lately owned by the Flight Estate through which long ago the railway was made. It was also asserted that the Strip on the far (west) side of the railway acquired from the Flight Estate was merely for access purposes, not for agricultural purposes as part of a greater holding on both sides of the railway. Accordingly, the transaction, it was asserted, was tantamount to an unsuccessful attempt to assign in gross the right to use the Level Crossing, the reality being that the right was lost.

### **Court's function**

When the plaintiffs' case was being opened, there was consensus between the parties that the Court should address the declaratory relief being sought by the plaintiffs and determine whether the plaintiffs have a right to use the Level Crossing and, if so, the nature of the right and the restrictions on its use. Both sides agreed that, if the existence of a right in favour of the plaintiffs is established, the parties would enter into discussions to deal with safety issues and suchlike in relation to future use by the plaintiffs of the Level Crossing. The defendant's position was that there is no existing right.

If the defendant's contention that the effect of the transfer dated the 8th November, 2006 from the Flight Estate to the second named plaintiff was to terminate the right, whatever its nature and extent, of the Flight Estate and its successors to use the Level Crossing to access the River Land, the existence of which, in my view, was unequivocally recognised in the letter of 29th January, 2004 referred to earlier, that is a conclusive answer to the plaintiffs' claim and the defendant is entitled to have the plaintiffs' claim dismissed, as was asserted on its behalf. Accordingly, I consider it appropriate to consider that issue first. However, before doing so, I propose outlining the relevant provisions of the Act of 1845.

### **The Act of 1845**

Section 68 is the first of a number of sections in the Act of 1845 which deal with works for the protection and accommodation of lands adjoining a railway. Section 68, insofar as it is material for present purposes, provides as follows:

"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say,)

Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof:

...

Provided always, that the company shall not be required to make such accommodation works in such manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

The important aspect of s. 68 for present purposes is that a railway undertaker is obligated not only to make necessary accommodation works but also to maintain them at all times thereafter for the owners and occupiers of the lands adjoining the railway.

The succeeding sections of the Act of 1845, ss. 69 to 79 inclusive, further regulate the obligations of the railway undertaker and the rights of the owners and occupiers, by providing mechanisms for resolving differences and for addressing default by the company which were generally applicable within five years of the opening of the railway. I consider that it is not necessary to outline those provisions, save to note that s. 75 imposes a penalty for omitting "to shut and fasten" any gate set up at either side of the railway for the accommodation of adjoining lands.

### **Termination of rights enjoyed by the estate of James Flight?**

The authority on which counsel for the defendant relied in support of their contention that such right as the estate of James Flight enjoyed in relation to the level crossing terminated on the transfer to the second plaintiff is the decision of the Court of Appeal in *Midland Railway Company v. Gribble* [1895] 2 Ch. 827. The decision of Wright J. at first instance is reported at [1895] 2 Ch. 127, where the relevant facts and, in particular, the factual features which distinguish it from this case, are set out.

In that case, Raynsford, whose lands had been severed by a railway, had the benefit of an accommodation way provided for the severed lands under s. 68 of the Act of 1845. Raynsford and his successors in title continued to be the owners of both parts of the severed lands for thirty years after the construction of the relevant crossing and the crossing was duly maintained by the plaintiffs. In 1885 all of the lands was put up for sale in separate lots. The lands on the west of the railway were sold to one Plowman, no reference being made to the crossing at the time of the sale or conveyance. In 1888 the lands on the east side were sold by a mortgagee of Raynsford to one Thompson, under whom the defendant, Gribble, claimed. In 1893 Plowman, the owner of the lands on the west side, released to the plaintiff railway company all his right to the use or maintenance of the crossing in question, whereupon the plaintiff erected fences on their own land across the approach to the crossing. However, the defendant, asserting a continuing right, removed the obstruction, which led to the proceedings in which the plaintiff sought to restrain the defendant from interfering with the fence and from coming on to the railway line.

In considering what the obligation of the plaintiff was under s. 68, Wright J. stated as follows (at p. 134):

"It is that they shall make and at all times maintain and permit to be used for the accommodation of the adjoining owners and occupiers such crossings as shall be necessary – for what purpose? – for the purpose of making good any interruption caused by the railway to the use of the intersected lands. If there cannot be any such use, if its possibility is destroyed either permanently, as by the erection under statutory powers of a prison, or a cemetery, or church, or railway station on the other side of the railway, or indefinitely, as by severance of ownership without reservation of a right of way, the purpose which alone the company are obliged to provide for is extinguished or suspended, and the fence which they then erect on their own land does not interfere with the performance of an obligation which is not then operative. ...

It may well be that severance of ownership will not suspend or destroy the obligation or right, if any occasion for inter-communication remains or occurs, whether by reservation or covenant at the time of severance or even by subsequent grant from one owner to the other; but in the absence of any such occasion it seems unreasonable to hold, e.g., that the company must maintain or rebuild a bridge of which the severed owner can make no use."

Wright J. made an order declaring that the defendant had not the right to use the crossing or to abate the obstruction. He left alive the possibility that the obligation of the plaintiff might be revived in the case of the revival of the necessity for communication.

In the Court of Appeal, Lindley L.J. considered the effect on the plaintiff's obligations of the conveyance of the land on one side by Raynsford to Plowman in 1885 and the retention of the land on the other side in the following passage (at p. 831):

"He conveyed the land to Mr. Plowman without granting him a right of way over the retained land, and without reserving to himself any right of way over the land conveyed to Mr. Plowman – that is to say, he severed his land in such a way as to shew conclusively that this occupation way over the railway was no longer any use to him and to shew conclusively that he never intended to use it thereafter. That appears to me to be a clear and distinct abandonment of his right of way over the railway. It was no longer of any use to him; and when he severed the land without any reservation of any right of way there was an end to the right of way over the railway – he abandoned his easement. It was perfectly competent to him to do so in point of law. ... To my mind, upon the conveyance to Mr. Plowman without any express reservation, there was an end to the statutory right."

Lopes L.J. agreed with Lindley L.J. In his judgment (at p. 832) he obliquely adverted to what is the crucial factual difference between the position of the plaintiffs in this case and the position of the defendant, Mr. Gribble, stating:

"For what possible reason Mr. Gribble wants to preserve this right of way I cannot understand. If he wants to exercise the privilege of walking backwards and forwards across the line he will do it at imminent risk from the trains passing by; and if he wants it for the purpose of going across to look over and see how the crops on the other side are growing, I can only say that that was not the object originally contemplated."

In the judgment of Rigby L.J., who was of the same opinion, the factual distinction is more clearly highlighted in the following passage (at p. 834):

"In 1885 there was a conveyance of the land on one side of the line to Mr. Plowman. Whether because of the crossing becoming absolutely useless on the severance of the lands – and, looking at the map, I should be disposed to think it was so, because the land on each side has a perfectly good access to a good road – or from forgetfulness, it does not matter which, there was then a deliberate act done by which the whole of the land on the opposite side of the railway was sold to Mr. Plowman without the reservation of any right over it, or the grant of any corresponding right to him of passing over the railway to come onto his land. I consider that an absolute abandonment." (Emphasis added)

The factual distinction between the position of Mr. Gribble, as highlighted in the passages to which emphasis has been added in the last quotation, and the plaintiffs' position is that an accommodation way over the railway was in no way necessary for the use of Mr. Gribble's land, whereas in this case an accommodation way over the Dublin to Wexford line is absolutely essential for the use and enjoyment of the River Land portion acquired by the plaintiffs from the estate of James Flight, because, without access across the railway line to the Strip on the west side of the line and thence over the right of way to Vale Road, the River Land portion would have been inaccessible by its new owners following the acquisition by the plaintiffs from the Flight Estate and effectively landlocked.

The *ratio decidendi* of the decision of the Court of Appeal in the *Gribble* case was that the right to the crossing was abandoned on the conveyance to Plowman. As a consequence, Plowman had nothing to release to the plaintiff. The Court of Appeal differed from Wright J. in that it excluded any possibility of a revival of the right in the event of the severed lands being re-united in one owner or inter-communication coming into being.

The starting point in considering the relevance of the decision in the *Gribble* case to the issue with which this Court is concerned, in my view, is the fact that the defendant in the letter of 29th January, 2004 unequivocally recognised the existence of a right to an accommodation way over the Level Crossing for the benefit of the Flight Estate. Incidentally, that letter was furnished by the plaintiffs' solicitors to the plaintiffs' lender, ACC Bank plc., which is now the registered owner of a charge on Folio 30552F, as evidence that the plaintiffs are entitled to a right of way over the Level Crossing. The core issue is whether the right of the Flight Estate, which it is accepted was a right to an accommodation way under s. 68, was extinguished by the manner in which the plaintiffs acquired the parts of the lands now registered on Folio 30552F formerly owned by the Flight Estate.

There was no abandonment of the accommodation way on the execution of the transfer dated 8th November, 2006. On the contrary, the transaction between the estate of James Flight and the plaintiffs was deliberately and prudently structured in such a way to ensure that the plaintiffs acquired the Strip on the west side of the railway line coupled with the right of way between the Strip and Vale Road for the purpose of giving them access to the River Land portion from Vale Road. In the circumstances, given the necessity that existed and the clear intention of the parties that the River Land portion would be accessed from Vale Road via the right of way and the Strip and over the railway line, there could be no implication of an abandonment of the accommodation way.

While it is clear that the purpose of including the Strip on the west side in the transfer by the Flight Estate was for the purpose of providing access for the River Land portion, rather than for the purpose of farming it, I reject the argument advanced on behalf of the defendant that the purpose for which the accommodation way was made no longer pertains and is impossible to fulfil. I also reject the argument made on behalf of the defendant that, in applying s. 68, the expression "the use of the lands" does not include use as a passageway. On the evidence before the Court, including a copy of Folio 2275 which shows the transactions on the Folio from the time it was opened in 1908 to 1993, it is clear that the use of the lands registered on the Folio through which the railway line passes

was agricultural on both sides but, in the case of the Vale Road Land, was also of necessity used for the purposes of providing access from the River Land portion to the public road at Vale Road. I think it is reasonable to infer that that was the position from the time the railway was constructed and it has continued to be the position to this day. Applying s. 68, on a literal interpretation of the phrase "use of the lands" to include use for the provision of necessary access to the public road, the accommodation way over the level crossing is still necessary "for the purpose of making good ... interruptions caused by the railway to the use of the lands".

Having found that the accommodation way over the Level Crossing still exists for the benefit of the River Land portion, it is now necessary to consider the nature and extent of the right which the plaintiffs enjoy in relation to the Level Crossing.

### **Nature and extent of plaintiffs' right: the law**

The only basis on which the plaintiffs asserted at the hearing an entitlement to use the Level Crossing to access the River Land is that, as successors in title to the Flight Estate, they have the benefit of an accommodation way by virtue of s. 68 of the Act of 1845. They did not pursue an entitlement based on prescription at common law. As I have stated, the defendant accepted that the provenance of the Level Crossing was the laying down of the Dublin to Wexford railway line and that it is an accommodation crossing provided by s. 68. Therefore, the rights of the plaintiffs fall to be determined in accordance with the proper construction of s. 68.

As has already been adverted to, at its commencement, s. 68 makes it absolutely clear that, in addition to being under statutory obligation to make accommodation works of the type stipulated, the obligation extends to maintaining the accommodation works "at all times thereafter". The work in issue in this case is the Level Crossing which provides a passage over the railway. It must be inferred that when the Level Crossing was created it was considered that it was "necessary for the purpose of making good ... interruptions caused by the railway to the use of the lands" through which the railway passed. It was accepted by counsel for the plaintiffs that the use of the lands which is accommodated by the Level Crossing is the type of use which was in existence when the Level Crossing was created. In other words, the continuing statutory duty of the defendant to maintain the Level Crossing is founded on the necessity to provide a means of access from the River Land portion of the plaintiffs' property to the other side of the line and from there to the public road at Vale Road but the defendant's obligation is limited by reference to the use of the plaintiffs' land at the time of creation of the Level Crossing, which it is common case was agricultural use. Indeed, the first plaintiff, in his testimony, explicitly accepted that the River Land portion of the plaintiffs' land is only entitled to be to the benefit of an accommodation way over the railway line when in use for agricultural purposes, which was also the position adopted on behalf of the plaintiffs in the affidavits grounding the application for an interlocutory injunction.

Notwithstanding the position adopted by the plaintiffs, a considerable amount of time during the course of the five day hearing of this case was taken up with the defendant's attempt to establish that the use of the Level Crossing by James Flight during his lifetime was minimal and that it was questionable whether, after his death in 1986, it was used at all. It is necessary, therefore, to consider the authorities on the proper construction and application of s. 68 to ascertain what, if any, relevance those assertions on the part of the defendant, insofar as they are factually correct, have to the proper application of s. 68.

The level crossing the subject of *Great Northern Railway Company v. M'Alister* [1897] 1 I.R. 587, as the head note in the report discloses, intersected lands used as an ordinary farm, a farm of about 100 acres. It was rarely used, and then only for farming purposes. Approximately fifty years after the railway was laid, the defendant sought to draw stones by means of a traction engine and wagon from a quarry which he had opened on his land over the level crossing. The engine was nearly as broad as the gates of the crossing, and the evidence was that, by reason of the situation of the railway and the nature of the road approaching the level crossing, the latter was unsuitable for a traction engine and that the use contemplated would involve danger to passing trains. On appeal, it was held that the defendant was not entitled to use the level crossing in the manner contemplated and he was enjoined from so doing.

In his judgment, Holmes L.J. explained how the ascertainment of a landowner's right pursuant to a statutory accommodation way should be ascertained. In the circumstances which prevailed in that case, and which prevail in this case, where the accommodation way was not made in obedience to the order of magistrates or presented by an award, it was treated as being the subject of an agreement or an arrangement between the parties, that is to say, the railway undertaker and the landowner. Where, as happened in that case and arises here, there is no evidence as to the agreement or arrangement, Holmes L. J. pointed out that the nature of the arrangement can only be known inferentially, and he set out the approach to be adopted (at p. 607) as follows:

"In the absence of contemporaneous record or evidence, there are three tests which may be applied with a view of ascertaining the defendant's right – First, the purpose for which the accommodation was required; second, the character of the way itself, having regard especially to the fact that it crosses a line of railway; and, third, the mode in which it has been used."

In applying those tests, Holmes L.J. identified the purpose for which the accommodation way was required in the *M'Alister* case as "to enable the occupants of the farm, their cattle, and the vehicles used in working it to pass from one part of the lands to another". In dealing with the character of the way itself, he described it as approaching the railway in a curve by a steep descent on one side and, after crossing the line on the level, rising from it by a steep ascent on the other and concluded, stating that it did not require the distinct evidence given at the trial to that effect to conclude that it was most unsuitable for a traction engine with one or two heavily laden wagons behind it. Holmes L. J. stressed that the fact that traction engines may not have been invented at the time the way was made was of little importance; the material point was that the way was unsuited for the first for vehicles of the traction engine type. In relation to the mode of user, Holmes L.J. stated that the accommodation way had never been used except for "trifling agricultural purposes" and for more than twenty years appeared not to have been used at all. Holmes L. J. rhetorically asked whether, if the defendant were permitted to do what he claimed, a burden would be imposed upon the servient tenement far in excess of what was arranged from when the accommodation was given and the way made, and he implicitly answered that question in the affirmative.

On that last point, it seems to me that the user of the accommodation way post-creation is of relevance insofar as it may indicate the nature and extent of the obligation undertaken by the railway undertaker, and the corresponding right conferred on the landowner originally at the time of creation, not that such obligation and right may be mitigated or diminished by nature of the user after creation. The test as to the continuing extent of the obligation and right implicit in the judgment of Holmes L.J. – whether the burden on the railway operator was increased after creation – has been reiterated in later cases. In my view, it is consistent with the obligation expressly imposed by s. 68 to maintain the accommodation works "at all times thereafter" so long as is necessary to offset the consequences of the interruption of the use of the land affected by the railway line for the purposes for which it was used when the railway line was laid.

The decision of the Court of Appeal in Ireland in the *M'Alister* case has been followed consistently. In *Great Western Railway Company v. Talbot* [1902] 2 Ch. 759, the Court of Appeal in England cited with approval and adopted the following passage from the judgment of Fitzgibbon L. J. in the *M'Alister* case (at p. 605), in which he succinctly summarised the entitlement conferred by s. 68 on the landowner:

"The owner of the adjoining lands was entitled, when the railway was made, to a convenient passage over the railway sufficient to make good, so far as possible, any interruption with the construction of the railway caused by severance in the working of his farm, including, I should say, any alteration or extension of that working which could or ought to have been contemplated by the parties when the accommodation works were made and were accepted."

In the *Talbot* case there existed a deed of covenant between the plaintiff, railway undertaker and the defendant's predecessor in title which was entered into in consequence of the acquisition by the plaintiff of land from the defendant's predecessor. The Court interpreted the plaintiff's obligations under the deed of covenant as relating to works of the kind contemplated by ss. 68 to 76 of the Act of 1845. In identifying the extent of the plaintiff's obligation and the defendant's entitlement to use the level crossing, the Court focused on whether a particular use would substantially increase the burden of the easement by altering or enlarging its character, nature or extent beyond what was enjoyed at or previously to the date of the deed of covenant. The Court also took account of the fact that subsequent enjoyment which increased or intensified the user might have become binding on the plaintiff, due to the acquiescence or otherwise. No such consideration arises in this case because of the position adopted by the plaintiffs.

The *M'Alister* case was also followed in *Taff Vale Railway v. Gordon Canning* [1909] 2 Ch. 48. As counsel for the plaintiffs pointed out, there is one striking similarity between the facts of that case and the facts here. In that case the construction of the railway line cut off what was referred to as plot A, a triangular plot comprising two acres, from the rest of the landowner's farm. Plot A was completely surrounded by a river and the railway line. The only access to plot A, apart from the level crossing, was over stepping stones in the river when the river was low. By the early 1900s the farmland on the far side of the land from plot A, which had been purely agricultural, was largely built over and formed a village and on that side the level crossing by then opened onto a public road. It is interesting to note that the plaintiff did not argue that, because that side of the line was no longer used for agricultural purposes, the accommodation way had come to an end, as was argued on behalf of the defendant in this case. The whole thrust of the decision was that the accommodation way via the level crossing continued to exist for the purposes of accessing the public road on the far side, notwithstanding that the land on the far side had been developed. That is consistent with my finding that, notwithstanding the severance of the ownership of the Vale Road Land by reason of the plaintiffs only acquiring the Strip, and the fact that the Strip is intended for access purposes only, the accommodation way over the Level Crossing continues to exist for the benefit of the plaintiffs.

The dispute in the *Taff Vale* case arose by reason of the fact that in 1904 the defendant had let plot A to a tennis club, whose members and their friends habitually used the level crossing, as a rule climbing over the gates, but sometimes lifting them off their hinges for the convenience of the older members. It was held that the user of the level crossing by the tennis club was unlawful and would, if necessary, be restrained by injunction. Having quoted from the judgment of Lord Ashbourne C. in the *M'Alister* case to illustrate that the user was calculated to lead to a very serious accident, and having described the user as "a growing user", Swinfen Eady J. continued (at p. 57):

"User of this kind is, in my opinion, quite outside the purpose for which the land was used at the date when the plaintiffs acquired it, and does very substantially increase the burden upon the plaintiffs. The user of the land does enlarge and alter the nature, character, and extent of the right previously enjoyed, and, in my opinion, it would be a far greater burden upon the servient tenement, and would subject the plaintiffs to much greater strain and burden in the management of their traffic, which is a difficult traffic to manage at this spot."

That echoes the terminology of the decision and declaration granted in the *Talbot* case. In the *Taff Vale* case, as in the *Talbot* case, the focus was on the increase in the burden of the easement. Swinfen Eady J. held that the plaintiffs were not entitled to the wide declaration they sought, restricting the user of the crossing to agricultural purposes. The declaration he actually made partially echoed the declaration made in the *Talbot* case. There was a declaration that the defendants were not entitled to use the level crossing as a means of access to the ground for the tennis club, or otherwise so as to substantially increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the construction of the railway. It is implicit in that declaration that use as a means of access to the tennis club increased the level of the burden on the plaintiff to an unacceptable degree. However there is also implicit in the approach adopted that accessing plot A over the level crossing, if it was used for purposes other than agricultural purposes, would be permissible provided it did not increase the burden of the easement to an unacceptable level. The form of declaration made reflects the question which Swinfen Eady J. set out to determine (as he set out at p. 55) – whether what the defendants were claiming the right to do was such as substantially to increase the burden of the easement, which he stated was a question of fact.

While s. 68 of the Act of 1845 was in issue in *West v. Great Northern Railway (Ireland)* [1945] N.I. 55, the context was different to the previous cases in that the plaintiff landowner was seeking damages for breach of statutory duty on the part of the defendant railway company for failure of the latter to maintain the level crossing which resulted in the plaintiff's motor tractor and rake getting caught in the rails as they were passing over the level crossing and being run into by a train and destroyed. MacDermott J., having referred to the *M'Alister* case, the *Talbot* case and the *Taff Vale* case, and while acknowledging that none of those authorities dealt directly with the obligation to maintain imposed by s. 68, stated (at p. 60) that they had an obvious bearing on the obligation as, on the wording of s. 68, "the obligation to maintain must be construed as commensurate with the obligation to make". In considering whether the plaintiff, at the time of the accident, was using the level crossing in a manner which increased the burden of the easement and in concluding that he was not, MacDermott J. stated (at p. 61):

"He was using the crossing for the purposes of his farm and there is nothing to distinguish those purposes from the purposes for which the land was used when the railway was made. It is of course true that the burden of an easement may be increased by more than a change of purpose. The same purpose may be pursued more intensively or the vehicles or implements used in the enjoyment of the easement may have so altered as to increase the burden by their physical effect or presence on the servient tenement.

On the evidence here, however, I see nothing to justify the view that the burden was increased to any appreciable degree in any such manner. No doubt petrol driven tractors were not thought of in connection with agriculture when this railway was made and it may also be as true to say that the plaintiff's side delivery hay rake has little in common with the implements used for the same purpose sixty or seventy years ago. But I can find nothing in the evidence to show or even suggest that the use of modern methods in the operation of haymaking, as exemplified by the employment of the machinery to which this claim relates, added at all to the burden of the easement. ... This whole question does not turn

on new methods, but on the results of new methods, and looking to these I see no reason for thinking that what occurred on the occasion of this accident could not also have occurred during the passage of, say, a horse drawn wagon or reaping machine."

The plaintiff succeeded and was awarded damages.

The most recent authority to which the Court has been referred, the decision of the Court of Appeal of England and Wales in *British Railways Board v. Glass* [1964] 3 All E.R. 418, in my view, is of limited assistance in addressing the issues in this case. The right on which the defendant in that case relied was a right of crossing the railway line provided for in a conveyance of 1847, which the majority, Lord Denning M.R. dissenting, construed as conferring a general right of way and not one that was limited to user contemplated when the grant was made. Lord Denning construed the conveyance as giving the owner of the severed land a right of way over the crossing in the nature of a right to use it as an "accommodation work" and he followed the *M'Alister* case and the *Talbot* case in defining the extent of the right. On that basis, he stated (at p. 421):

"The owner and his successors could, therefore, use the level crossing in those days with his men, his horses and carts, and his cattle; and he could use it so as to get from the farm and the fields on the one side of the railway to the road and the village on the other side. He would not suffer from the severance at all. In these days he can use the crossing for farm purposes with his tractor and his lorries, and for getting from his farm to the road and the village, but he is not entitled to turn his land into a different kind of use altogether, as, for example, a caravan site, and thereby increase the burden on the crossing beyond anything that could reasonably have been contemplated when the railway was built."

Harman L. J. expressed a similar view of the modern application of s. 68, if, contrary to what he had found, the right created by the conveyance was simply an accommodation way as envisaged in s. 68. He stated (at p. 426):

"... such a way would be confined, I think, to what may be called farm purposes, that is to say, such agricultural purposes as might be in the contemplation of the parties. This would include the substitution of the hay wain by the tractor and the passage I suppose of a combine harvester instead of men with hooks and scythes, but it would not include a totally different form of user, namely, the user of the blue land as a caravan site."

Harman L.J. cited the *M'Alister* case and the *Talbot* case in support of those propositions.

One point which the *Glass* case illustrates is the difference between an accommodation way provided and maintained under s. 68 of the Act of 1845 and a right of way established by prescription at common law. In the *Glass* case it had been admitted that the blue land used as a caravan site had acquired by prescription a right of way. The majority held that a mere increase in the number of the caravans using the site (as distinct from a radical change in the character of the dominant tenement) would not constitute excessive user of the right established by prescription. That, in my view, is not consistent with what has been laid down in the earlier authorities in relation to an accommodation way created under s. 68 of the Act of 1845. Accordingly, I consider that the decision of Harman J. in *R.P.C. Holdings Ltd. v. Rogers* [1953] 1 All E.R. 1029, which was cited by counsel for the defendant and which was concerned with the identification of the extent of a right of way established by prescription at common law, is of no relevance in determining the issues in this case.

#### **Nature and extent of the plaintiffs' rights: application of the law to the facts**

In summary, the authorities support the plaintiffs' case which, in my view, was put forward on a measured and reasonable basis, that, as the successors in title of James Flight and the Flight Estate, they are entitled to the benefit of an accommodation way, which was created in or around 1863, to access the River Land portion when it is in use for the purposes for which it was used when the accommodation way was created. It is common case that at the time of the creation of the accommodation way the River Land portion was used for agricultural purposes. While the authorities establish that the plaintiffs are not entitled to use the Level Crossing in such a manner as to increase the burden on the defendant beyond what could have been in contemplation by the relevant parties, the railway undertaker and the landowner, in 1863, it is clear that the authorities reflect what I consider to be a common sense approach and recognise that the owner of the River Land portion should not be limited to farming in a manner which might have been depicted in a Constable painting but are entitled to use the accommodation way in a manner which facilitates the use of their land for agricultural purposes as one would expect in this day and age with modern vehicles, farm equipment and farm machinery.

A variety of matters arose at the hearing which clouded the real issue in this case, which is one of title and of the obligations and the benefits arising from such title.

First, for over a decade from 1992 Wicklow County Council, and its contractor, Ascon Limited, was entitled to use the Level Crossing under special arrangements with the defendant to access the River Land with construction machinery and equipment in connection with the construction of the Arklow Bypass. There were complementary arrangements between Wicklow County Council and the Flight Estate under which part of the River Land was made available to Wicklow County Council for the purposes of the construction work. In my view, counsel for the plaintiffs was correct in the assertion that the outcome of these special arrangements was to suspend the entitlement of the Flight Estate to its normal use of the Level Crossing while these special arrangements were in place. The evidence suggests that the construction work took longer than had been envisaged. However, from January 2001 onwards the Flight Estate was insisting that the defendant confirm that their former right be recognised. Having considered the correspondence which passed between the defendant and the solicitors for the Flight Estate, as I have already stated, I am satisfied that in January 2004 the defendant unequivocally recognised the right of the Flight Estate to the continuance of their use of the Level Crossing.

On the basis of the evidence of Mrs. Casey I am satisfied, that for more than three decades, her father, James Flight, farmed the River Land portion of his property and in his later years he let the property for farming purposes to tenants. Letting of the property continued for a year or two after his death. I am satisfied on the evidence that the portion of the property known as the Beehive Field was arable and was used for tillage purposes for growing grain crops, vegetables and sugar beet. The remainder of the land, which was at a lower level, was rough pasture and was used for grazing purposes. Mrs. Casey's evidence, which I accept, was that her father accessed the River Land property over the Level Crossing with vehicles and machinery, including tractors and, as necessary, a combine harvester. He also brought stock into and out of that property over the Level Crossing. While there was a diminution in the intensity of the agricultural enterprise during Mr. Flight's later years, which diminution continued after his death, in my view, that in no way diminished his entitlement or the entitlement of his estate to facilitate the agricultural use of the River Land portion for tillage and grazing purposes and to resume the type of traffic over the Level Crossing necessary for such use currently, including tractors and combine harvesters.

In summary, on the basis of the evidence, I am satisfied that the plaintiffs are entitled to an accommodation way over the Level Crossing to access the River Land portion acquired from the Flight Estate for the purpose of its use for agricultural purposes, whether

tillage or grazing. The plaintiffs' right extends to access over the Level Crossing on foot, with vehicles and farm machinery and equipment, including machinery necessary to drain the land in connection with its use for agricultural purposes. The width of the span of the railway line over which such right exists is the original width of the Level Crossing sufficient to accommodate such traffic; it is not the extended width which was allowed to accommodate Wicklow County Council and Ascon Limited in connection with the construction of the Arklow Bypass. The physical condition of the Level Crossing must be such as to accommodate the type of traffic permitted. There was a factual dispute at the hearing in relation to the removal of and the failure to reinstate sleepers. Insofar as necessary, in my view, the Level Crossing must be upgraded to a state which will accommodate the type of traffic permitted. However, I can see no basis for holding that there is an obligation on the defendant to bring the Level Crossing into line with other level crossings such as the level crossing at Sydney Parade Avenue in Dublin 4.

The focus of the evidence as to the user of the Level Crossing at the hearing was on its use by James Flight and the Flight Estate. That user related to portion only of the lands registered on Folio 30552F, Plot 9 and Plot A5174. In relation to the remainder of the lands on the east side of the railway, Plots 15 and 1, which were acquired from SAFC, the position as to user is unclear, because no direct evidence was adduced as to the use by SAFC or its predecessors, although it emerged on the documents put in evidence that Honeywell plc. (or more correctly, Honeywell Iropharm plc., which was a former corporate incarnation of the company which in July 2006 was re-registered as a private limited company under the name SAFC Arklow Ltd.), which operated a pharmaceutical facility in the vicinity, was claiming a right to use the Level Crossing in the year 2000. Furthermore it was an express term of the contract for sale under which the second plaintiff purchased the lands from the Flight Estate that the purchaser was aware of "Honeywell's" right of way over the Level Crossing. In relation to the portion of the land now registered on Folio 30552F acquired from SAFC, it is not possible, on the evidence, to make the type of determination in relation to the entitlement of the plaintiffs to use the Level Crossing to access that land which I have made in relation to the land acquired from the Flight Estate. Notwithstanding the dearth of evidence, it is patently clear that the predecessors in title of the plaintiffs as the owners of Plot 15 and Plot 1 must have had an accommodation way to access those plots over the Level Crossing, which presumably explains why they owned the narrow parcel, Plot 21, formerly registered on Folio 13334F. As a matter of practicality it would seem sensible to treat all the lands on the east side of the railway line on the same basis.

Despite the agreement of the parties that the Court should only be concerned with determining whether the plaintiffs have a right to use the Level Crossing and the nature of the right, evidence was adduced on behalf of the defendant in relation to safety issues, and in particular, Mr. Hedderly's evidence was that "sighting" was extremely poor at the Level Crossing, stating that it was the "worst in the whole network". Obviously, safety must be of prime concern to both sides in these proceedings. It is trite to say that both sides must obey the law and, in particular, the provisions of the Railway Safety Act 2005 and, where relevant, the requirements of the Railway Safety Commission. However, the fact is that the plaintiffs have the right to use the Level Crossing and the safety issues must be addressed in that context. Given that the Level Crossing, albeit under special arrangements with the defendant, was in the recent past traversed by construction plant, machinery and equipment in connection with the development of the Arklow Bypass, it is reasonable to infer that the geography and topography of the Level Crossing is not unsuitable for the passage of farm machinery and equipment. Therefore the safety concerns, presumably, primarily center on monitoring the use of the Level Crossing by adjoining landowners and ensuring that it is clear at all times when trains are passing.

As it was an issue of fact at the hearing, I find that, during his lifetime, James Flight was provided with a key to the gates on the Level Crossing and, when the Level Crossing was reinstated in 2004, eventually, the agent of the Flight Estate was provided with a key to the gates prior to the sale to the plaintiffs. I have made that finding against the background that the position of the defendant was that, if the Court were to find that the plaintiffs are entitled to use the Level Crossing, and the plaintiffs accepted the limitations and restrictions that are incident to the right, the defendant would co-operate with the plaintiffs, but at all times would require to retain control of access to the crossing to ensure safety. The nature of the arrangements to be put in place ideally should be a matter of agreement between the parties and both sides must approach negotiating such agreement having regard to their respective rights and liabilities and the law and, in particular, current legal requirements in relation to safety.

### **Orders of the Court**

I propose postponing making declaratory orders or granting injunctions until such time as the parties have had an opportunity to consider this judgment and to endeavour to come to an arrangement in relation to the use of the Level Crossing. In due course, both sides will have an opportunity to make submissions on the form of order.

The only other outstanding matter is the question of damages. As was acknowledged by counsel for the plaintiffs in closing, no evidence of special damage was adduced at the hearing. Although, since the acquisition of the lands from the Flight Estate, the plaintiffs' rights were denied by the defendant, I see no basis, on the evidence, for awarding general damages to the plaintiffs.