Neutral Citation: [2016] IEHC 534

THE HIGH COURT

CHANCERY

[2011 No. 11704P]

BETWEEN

TOM O'REGAN AND DERMOT COFFEY

PLAINTIFF

AND

JOSEPH CAREY, DAN MULVIHILL, RORY O'HANLON, AND DAVID O'HANLON

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 9th day of September 2016

Introduction

1. This is an action in trespass and nuisance, arising from a dispute between the owners of adjacent commercial units in an industrial estate or business park.

2. The plaintiffs plead that the roof of the defendants' property - in particular, the rain gutter attached to it - overhangs their land and, thus, trespasses upon it; that the initial failure to install down pipes in the gutter allowed the water from it to run onto the plaintiffs' property causing a nuisance; that the subsequent installation of down pipes in the gutter constitutes a further trespass, as does the connection of those down pipes to the surface water drainage system constructed by the plaintiffs on the plaintiffs' lands; and that the connection of the defendants' electricity supply to an electricity substation that the plaintiffs had constructed on their lands through a conduit that they has also constructed under those lands is another separate trespass.

3. At the trial of the action, the plaintiffs advanced two additional complaints of trespass or nuisance. These are that the defendants have – unlawfully, the plaintiffs contend – connected to both the water mains system and the foul water or sewage system constructed by the plaintiffs on the plaintiffs' land. The defendants object that these additional claims were never pleaded and, therefore, are not fairly or properly before the Court.

4. Beyond that objection, the defendants delivered a defence in which they deny each of the wrongful acts alleged against them; deny that the plaintiffs have suffered any loss, damage or expense; and deny that any loss, damage or expense the plaintiffs may have incurred is attributable to any wrong on their part. While the defence delivered did not admit that the relevant walls of the plaintiffs' building are party or boundary walls, it was agreed for the purpose of the trial before me that they are.

5. The plaintiffs claim damages for trespass, nuisance, negligence and breach of duty; an injunction restraining the defendants from having access to 'the plaintiffs' storm water services'; and a mandatory injunction requiring the defendants to carry out all necessary works to remove so much of the roof and drains attached to their property as constitute a trespass on the plaintiffs' lands. The defendants deny the plaintiffs' entitlement to any of those reliefs.

Background

6. The plaintiffs and the defendants own adjoining premises in an industrial estate or business park, located in Millfield, off the Mallow Road, on the outskirts of Cork city. Those premises are situated on part of the site of what was once the vast factory complex operated by the textile firm Sunbeam Wolsey Limited, which traded between 1927 and 1990 and was 'a cornerstone' of the city's social and industrial landscape for over half a century; see, for example, Cullinane, *'More than a factory': Sunbeam Wolsey, 1927-1990*, Journal of the Cork Historical and Archaeological Society, Vol. 120 (2015) at p. 66 *et seq*.

7. The Sunbeam Wolsey factory complex comprised a number of industrial buildings large and small, some separate but contiguous and certain others so large that they were divided into smaller units separated by internal party walls. After the business went into receivership in 1990, those buildings and units were sold off piecemeal in the ensuing decade by a company named Sunbeam Properties Limited, which in 1994 changed its named to Walker & Associates Limited.

8. The property that is the subject of the plaintiffs' complaints is Unit 63, Sunbeam Industrial Estate, Commons Road, Cork. It is described in folio CK81489F of the Register of Owners of Freehold Land ("the Register") and in the Registry Map referred to in that folio. From the title documents produced in evidence, it would appear that, in 1995, Walker and Associates Ltd conveyed the property, then part of the lands registered in folio CK35540F, to a company named Trifik Industrial Services Limited. In turn, that company conveyed it to one William Buckley in 1998. It would appear from other evidence given that Mr Buckley sold the property to one Michael O'Regan in or about 2006, who in turn sold it to the defendants in or about 2009. It is certainly clear from the certified copy folio produced in evidence that the defendants were registered as full owners of it on the 22nd June of that year.

9. Unit 63 sits on a landlocked portion of the old Sunbeam Wolsey factory complex and comprises the western end of what was formerly part of, or a unit within, a larger factory building in that complex. Until they were destroyed by fire in either 2000 or 2001, there were also separate factory buildings contiguous to Unit 63 in an L-shape along its longer western and shorter southern sides. After a second and more extensive fire in 2003, the rest of the larger factory building of which Unit 63 had formed a part was destroyed. In consequence of those fires, Unit 63 itself was left as little more than a shell, comprising four walls, the steel roof beams and roof trusses across them, and the badly damaged remains of an asbestos sheet roof.

10. Access to Unit 63 was, and still is, through a main entrance at the northwestern tip of the building, accessible by a private road that runs around the factory complex lands, and through a smaller pedestrian entrance at the southwestern corner of the building, which also emerges onto what were at one time factory complex lands adjacent to another portion of that private roadway. The retained portion of the factory complex lands, onto which each of these entrances opens, is a roughly C-shaped parcel, along which the private roadway runs, curling around the relevant buildings owned by both the plaintiffs and the defendants. That private roadway comes from the southeast and partly circles those buildings by turning north beyond them and then east again above them, thereby allowing access to the northwestern tip and north side of Unit 63. The pedestrian entrance at the southeastern corner of Unit 63 opens onto what is, in effect, the tip of the bottom spur of the C-shaped parcel.

11. The C-shaped parcel just described comprises the lands identified in folio CK159720F of the Register and the plaintiffs were registered as owners of those lands on the 5th December 2013. Previously, that property too had formed part of the larger parcel of lands registered in folio CK35540F. It had been conveyed by Walker & Associates Limited to a company named Keytech Products Limited ("Keytech") by deed of conveyance executed in 2000 and registered in the Registry of Deeds in 2001. Keytech is, or certainly was, a company owned and controlled by the second named plaintiff Dermot Coffey. By indenture of conveyance made on the 21st August 2002, Keytech transferred that parcel of land to the plaintiffs.

12. Mr Coffey separately owns the property known as Units 61 and 62, Sunbeam Industrial Estate, Mallow Road, Cork. That property in its present form was constructed on the site of the eastern portion of the larger factory building of which Unit 63 once formed a part before that portion of the building was destroyed by fire in 2003. It also once formed part of the lands registered in folio CK35540F. Its location is such that it completes a circle around Unit 63 by filling the space between the two tips of the plaintiffs' C-shaped parcel of land already described.

13. Also within that enclosed circle is the property that formerly comprised the l-shaped factory buildings to the west and south of Unit 63 that were known as Units 64 and 65. That property had also previously formed part of the larger parcel of lands registered in folio CK35540F. Walker & Associates Ltd sold it to Keytech by indenture of conveyance made on the 20th September 1996. Keytech manufactured plastic products in the premises there until those premises were destroyed by fire in 2000 or 2001. On the 2nd February 2004, the plaintiffs became registered owners of that property, which was then described as Folio 73610F.

14. In 2003, the plaintiffs received planning permission to construct 10 business or technology units, eight of which were to be on the site of the old Units 64 and 65 and two of which were to replace another structure on the C-shaped parcel of land already described, on the west side of the private road that traverses it. Those units were subsequently constructed. Units 1 to 4 are located in a building to the south of Unit 63, Units 5 to 8 are located in a separate building to the west of it, and Units 9 and 10 comprise a further separate building to the west of the private road. Also in 2003, the plaintiffs received a separate planning permission to demolish an existing ESB electricity substation and to construct a new substation in the northwest corner of their lands.

The defendants' rights and easements

15. As might be expected in relation to the sale of a landlocked property, the deed of conveyance of Unit 63 made on the 19th December 1995 between Walker & Associates Limited and Triffik Industrial Services Limited recites that the vendor was full owner with absolute title of the lands registered in folio CK35540 and that the property comprising Unit 63 was being sold as part of that folio with the benefit of certain scheduled easements, rights, privileges and exceptions over the remaining lands in the folio. The vendor expressly assented to the registration of those easements, rights and privileges as a burden on the lands registered in folio CK35540F. Those scheduled easements were as follows:

> 'Full right and liberty for the Purchaser and as appurtenant to the sold lands and premises in common with the Vendor and all other persons who have or may hereafter have the like right.
>
> 1. At all times by day and by night and for the purpose only of the use of the sold lands and premises with or without motor cars and all other manner of vehicles however propelled to go, pass and repass over and along the roadways and footpaths [identified on an accompanying map] and by foot to pass and repass over and along the roadways and footpaths [so identified] at any time within the perpetuity period.
>
> 2. The free passage and running to and from the sold lands and premises of water, soil, gas, electricity, telephone signals, oil and heating fuels, and other necessary services through all conduits now in, under or over or at any time within twenty one years of the date of this Indenture to be in, under or over the retained property or any part thereof and the right where necessary for the purposes of the reasonable current user of the sold lands and premises to lay such conduits in, through or under the retained land at any time upon giving reasonable notice within twenty one years of the date of this Indenture making good any damage thereby occasioned.
>
> 3. The right to connect up with and clean and repair of (sic) the said conduits and for that purpose to enter the retained property or any part thereof upon giving reasonable notice (save in the event of an emergency) with workmen and others and all necessary equipment making good any damage thereby occasioned but not being responsible for any temporary inconvenience or damage caused by such works.'

16. The said deed includes a definition of 'the conduits' in the following terms:

> '…each of the following and for whatsoever nature all sewers, drains, pipes, gullies, gutters, ducts, mains, water courses, channels, subways, wires, cables, conduits, flues and other conducting media of whatsoever nature or kind.'

17. The relevant instrument was duly registered as burden against the lands registered in folio CK35540F under the reference No. D98CK009788A. At the trial of the action before me, it was not contested that the easements, rights and privileges it contains are effective against the plaintiffs' lands ('the servient lands') for the benefit of the defendants' property ('the dominant lands'). There was no suggestion in evidence or in argument that the plaintiffs, as subsequent purchasers of the various lands and properties surrounding Unit 63, were not bound by that instrument or, indeed, that they were not on notice of those easements, rights and privileges at all material times. The only question, therefore, is whether the defendants' use of the relevant conduits in, under or over the plaintiffs' lands for the free passage to their lands of water and electricity and from their lands of foul water and surface or storm water falls within the express terms of any of the said easements, rights or privileges, properly construed. That is a question to which I will return.

The gutters and downpipes overhanging the party walls

18. When Unit 63 was first sold off as a separate unit within the old factory complex, and was given the benefit of the easements, rights and privileges just described over the neighbouring parts of the said complex for that purpose, it was surrounded on three sides by adjoining buildings. On its western side were Units 61 and 62 as they then stood. On its eastern and southern sides, in an L-shaped configuration, were what were then known as Units 64 and 65. It was common case at the trial of the present action that the walls on the eastern and western sides of Unit 63 were party walls.

19. Unit 63 is a rectangular building. Its eastern and western walls represent its longer sides. It has an A-shaped roof, the peak of which runs parallel to those walls, meaning that rainwater will run off that roof to the eastern and western sides of the building. It was no surprise, therefore, to be told by each of the two expert engineers in the case that a gutter had formerly run along the length of the building on those two sides. Both engineers agreed that, when there had been adjoining buildings on each side, a 'party gutter' would have run along the top of the party wall, gathering the rain water from the roof of each.

20. While those party gutters no longer exist, photographs were produced in evidence that depict the remains of one of them in the aftermath of the fire that occurred in 2003. The expert engineers agreed that, from those photographs, it is clear that the gutter comprised something in the nature of a metal box or tray. That tray ran across the top of a steel 'I-beam' that rests on the top of the party wall to provide support for the roof trusses of each of the adjoining factories. Slanting upwards on each side of the metal tray is an additional metal lining, which would have run under the asbestos roof sheets of both buildings and above the roof trusses on either side of the party wall in a valley shape, to prevent the ingress of any windblown or backed up rainwater from the party gutter.

21. The expert engineer called on behalf of the plaintiffs, Mr Robert Greene, took the view that the metal tray comprising the central gulley would not have exceeded the width of the party wall on either side. He estimated that the party wall – constructed from 'the standard block on the flat' – is approximately 250mm thick. Mr Greene speculated that, prior to the fire, the gutter would have run into a downpipe at both the north and south ends of the building.

22. The expert engineer called by the defendants, Mr Donal O'Donovan, took a different view. He interpreted the relevant photographs as depicting a metal tray that would have over-sailed the party wall on each side. He expressed the opinion that a wide gutter tray is common in large industrial buildings of this type and vintage to facilitate maintenance or cleaning. Mr O'Donovan offered his own speculation that, in addition to downpipes at either end of such a gutter, an industrial building of this size would invariably have had internal downpipes at regular intervals, attached to the gutter by way of a 'swan-neck' connection and running down one or other side of the internal party wall into a surface water drainage network beneath the building or buildings concerned.

23. While, for reasons that will become evident, it does not seem to me that much, if anything, turns on the divergence of views that I have just described, if it were necessary to make a finding on the point, I would be more inclined to accept the evidence of Mr O'Donovan.

24. Whatever the configuration of the relevant party gutters was when Unit 63 formed part of a larger complex of adjoining buildings, the position is now entirely different. The fire that occurred in 2000 or 2001 destroyed the building to the west of Unit 63 and the fire in 2003 destroyed the building to the east. In the aftermath of the second fire, Unit 63 was left as little more than a shell with no remaining structures to the east or the west of it.

25. When the plaintiffs in partnership redeveloped the lands to the west and south of Unit 63, having obtained planning permission to do so in 2003, they made a deliberate decision to construct their new premises a few feet back from the party wall with Unit 63, rather than seeking to reinstate a structure supported by that wall, with or without a party gutter reinstated above it. Similarly, when the second plaintiff redeveloped the lands to the east of Unit 63, having obtained planning permission to do so in 2004, he also made the deliberate decision to construct a new premises some feet back from the extant party wall on that side. The result is that there is now a narrow void between Unit 63 and the new premises that surround it to the west, south and east.

26. Although no evidence was adduced directly on the point, it appeared to be acknowledged on both sides during the course of the trial that the redevelopment of the site benefited from a certain tax designated status and the suggestion was made to certain witnesses without demur that the development of new structures on the site attracted greater (or more obvious) tax breaks or allowances than did the reinstatement of old ones. However, that was not the reason that Mr O'Regan gave in evidence for the plaintiffs' decision to build entirely new structures a very short distance back from Unit 63, rather than reinstated structures incorporating the still extant party walls. Mr O'Regan testified that the reason was that Mr Coffey did not get on with Mr Buckley, who then owned Unit 63, and that the plaintiffs assumed that they weren't going to be able to reach agreement with him on the reinstatement of either party wall as part of any new structure. Mr Coffey did not give evidence at trial.

27. When it was put to Mr O'Regan in cross-examination that the result of this unilateral decision on the part of the plaintiffs was to leave what had formerly been internal party walls exposed to the elements (and, it might have been added, to prevent any possibility of the reinstatement of the party gutter), Mr O'Regan responded that those walls had been exposed to the elements in any event by the fires that had destroyed the buildings on each side of Unit 63 and that the plaintiffs were not aware of any resulting issues for the owners of that building.

28. It was also implicitly the position of the plaintiffs, as disclosed by the evidence adduced and arguments advanced on their behalf, that they consider their failure to provide support for, and consequent permanent exposure of, what were formerly the internal party walls between their various properties and Unit 63 to be the very antithesis of the defendants' installation of fairly typical gutters at the top of what are now the external walls of that building, because they view the former as an innocuous, if not laudable, retreat by them from the property boundary and the latter as an unlawful, indeed inexcusable, trespass beyond it by the defendants.

29. That response and that position, it seems to me, ignore the fact that, even though those party walls were already exposed to the elements and the party gutters above them were already in ruins at the material time, the plaintiffs' unilateral decision to build back from those walls had the inevitable effect of permanently preventing both the reinstatement of those walls as internal walls and the reinstatement of any party gutters above them. They also ignore the obvious issue identified in Bland, *Easements*, 3rd ed. (Dublin, 2015) at p. 295 that '[t]he setting back of structures can create its own problems, with small sterilised strips of land between buildings giving rise to damp and other difficulties.' Finally, they take no account of the nature and scope of the easements that exist in favour of Unit 63, as dominant tenement, against the plaintiffs' lands, as the servient tenement surrounding it, beyond the implicit suggestion that none of those easements permits the installation of such gutters.

30. It is sadly apparent that the plaintiffs' unilateral decision to build back from what they acknowledge, indeed assert, are party walls, is just one of several such unilateral decisions on all sides in this case. Those decisions exemplify what has ultimately emerged as the case's principal theme; a baleful tendency on both sides to take peremptory action in pursuit of their own perceived commercial self-interest without making any attempt at prior negotiation or consultation with any other party as the neighbour affected.

31. A further example of that tendency, this time on the part of the second plaintiff Mr Coffey, was acknowledged in evidence by the first plaintiff Mr O'Regan when he testified that, in the course of the redevelopment of Units 61 and 62 in or about 2004, the builder employed by Mr Coffey demolished the porch at the pedestrian entrance to Unit 63 and also damaged part of the wall of that building. The then owner of Unit 63, Mr Buckley, took proceedings against Mr Coffey in the Circuit Court, which, according to Mr O'Regan, were compromised by the payment of an agreed figure of €8,000 for the necessary remedial works and €10,000 for the associated inconvenience to Mr Buckley. It is instructive, though not edifying, to compare that case, in which a claim arising from significant structural damage to what is now the defendants' building was prosecuted in the Circuit Court and settled on the terms indicated, with the present action in which no evidence of actual loss or damage was adduced but which nevertheless ran before this Court over three days as a claim for both damages and injunctions.

32. It is not in dispute that, at some point after they acquired Unit 63 in 2009, the defendants put a new roof on the building and installed new external gutters overhanging the east and west walls of the building to serve it. The plaintiffs' engineer, Mr Greene, described those gutters as creating an overhang of approximately 200 mm onto the plaintiffs' property. Mr O'Donovan estimated the overhang as one of 7 inches (or 177.8 mm).

33. While the plaintiffs continued to make the case at the conclusion of the evidence that not merely the gutter but also the roof of the defendants' building overhangs their property, I did not understand Mr Greene's testimony to go that far. The photographs adduced in evidence do not definitively establish the position one way or the other and the evidence of Mr O'Donovan was that the roof of the building does not extend beyond the edge of the party wall. Accordingly, the plaintiffs have failed to satisfy me, on the balance of probabilities, that there is any possible trespass involving the roof.

34. Mr Greene expressed the opinion that, in constructing the necessary rainwater gutters for the roof of Unit 63, an alternative approach could have been taken whereby a box gutter could have been installed behind a parapet on top of the party wall, from which the rainwater could have been directed through internal down pipes into an internal waste water drainage system within Unit 63. Mr O'Donovan did not disagree with that view, on the basis that there is an engineering solution to almost any problem, but suggested that the question from an engineering perspective was not so much one of feasibility as one of practicality and cost. He considered the suggestion impractical, because of the substantial cost implications of the required alterations to the existing roof structure of the building.

35. Further illustrating the abiding theme of this case, there is no suggestion that the defendants consulted with the plaintiffs before installing those gutters.

36. The plaintiffs complain that, for some time after their installation in 2009, the gutters were not attached to any downpipes, with the result that the water they gathered simply spouted through the downpipe connection nozzles, 'causing flooding on the plaintiff's property'. However, at the trial of the action no evidence was given of any specific incident of flooding or of any damage caused to the plaintiffs' property by any such incident as may have occurred.

37. The plaintiffs further complain that the subsequent installation of downpipes connecting the gutters to the surface or storm water drainage system on the plaintiffs' lands constitutes a further trespass on their property. There is no suggestion that the defendants consulted with the plaintiffs before installing those downpipes or connecting them to that drainage system.

Connection to, and use of, conduits on the plaintiffs' lands

38. I am satisfied from the evidence that the defendants have secured the supply of electricity to Unit 63 through the installation of a separate meter in the electricity substation that the plaintiffs constructed on that part of their lands described in Folio CK159720F, through a cable the defendants have run along a conduit that the plaintiffs had constructed across those lands to a point close to the northern end of Unit 63 and from there into the building itself.

39. I am also satisfied that the defendants have secured the supply of water to Unit 63 by connecting a pipe from the building to the water main installed on the plaintiffs' lands at a point just to the south west of the building; that the defendants have connected their surface or storm water drains to the surface or storm water drainage system on the plaintiffs' lands; and that, under a foul sewage manhole on the southwestern side of the building, the plaintiffs' have connected their foul water or sewage pipes into the foul water drainage system constructed by the plaintiffs to service their development on the lands described in Folio 73610F.

40. Finally, in this regard, I am satisfied that the defendants did not consult with the plaintiffs before taking any of those steps, a failure in respect of each that, for the reasons I have already given, can only be deprecated.

41. The question, though, is, whether the easements that benefit the plaintiffs' property permit them to act as they have done in relation to the defendants' surrounding property.

Issues raised in evidence

42. In the course of his evidence at trial, the first plaintiff Mr O'Regan laid great emphasis on the cost to the plaintiffs of acquiring and redeveloping the properties on their lands. Mr O'Regan estimated those costs at close to €2.5 million.

43. More specifically, Mr O'Regan gave evidence of the plaintiffs' expenditure on the installation, or reinstallation, of electricity, water and drainage services to serve those properties. As the nearest electricity substation had been damaged in the fire that occurred in or about 2001, the plaintiffs sought and obtained planning permission to demolish it and to construct a new one. As a term of that permission, they were obliged to contribute €18,000 towards the installation of the necessary transformer, in addition to the €20,000 they expended on the construction of the sub-station building in accordance with the specification of the Electricity Supply Board. The plaintiffs constructed a number of underground conduits to run electricity cables from the new sub-station to each of the various units in their new development, as well as a couple of spare or surplus conduits, one of which runs to a point somewhere just north of Unit 63. That conduit was used by the defendants to connect an electricity cable from Unit 63 to an additional meter installed in the meter room at the new substation.

44. Mr O'Regan testified that, as the old water mains had been damaged by fire, the plaintiffs opted to purchase a wayleave to run a new water main to their properties from the public water main on the Mallow Road across another privately owned property just to the north, rather than to reinstate the old water main that ran through the old factory complex to the east. That wayleave cost the plaintiffs in the region of €10,900. Of course, it had to be purchased from the neighbouring landowner to the north because the plaintiffs' properties did not have the benefit of any easement in respect of that privately owned property, which is not surprising because the plaintiffs properties were not otherwise landlocked in that regard, having existing access to the water main serving the old factory complex to the east.

45. The plaintiffs constructed new water mains on their properties, as well as some new foul drains and surface or storm water drains, including what is known as a 'petrol interceptor' to prevent any petroleum products that might get into the surface drains from reaching the outflow point of those drains at the Bride river to the south of the property, thereby causing pollution. Naturally, this was done in accordance with the planning permission that the plaintiffs obtained.

46. Mr O'Regan stated in evidence that he estimates the total cost of the works to provide the plaintiffs' lands with electricity, water and drainage services was approximately €238,000.

47. There is no suggestion that the plaintiffs consulted with the then owner of Unit 63 in relation to any of those plans, much less that they sought to agree some level of contribution towards the cost of those works from the owner of that property, either then or

ever. This may have been just another example of the lamentable history of non-consultation between the owners of the neighbouring properties with which this case is concerned.

48. Alternatively, the explanation for it might be found in Mr O'Regan's repeated statements in evidence that, as he interprets the relevant easements in favour of the defendants' property, they permit that property to avail of the use of *either* the relevant conduits in, under or over the plaintiffs' lands that were in existence when those easements were created, *or* such conduits as may be subsequently laid by the owners of that property in, under or over the plaintiffs' lands at their own expense, *but not* any conduits that have been laid by the plaintiffs since the creation of those easements. Mr O'Regan testified that the plaintiffs believe they are entitled to 'some sort of contribution' from the defendants in respect of any connection made for the benefit of the defendants' property to the services that the plaintiffs have installed on their lands.

49. This position is reflected in the correspondence between the parties. On the 13th March 2009, the first plaintiff Mr O'Regan wrote, in his professional capacity as a solicitor on the plaintiffs' behalf, to the first defendant Mr Carey. In that letter, Mr O'Regan stated that neither the roof nor guttering of Unit 63 should overhang the party wall(s), before referring to correspondence with the previous owner of that building, Mr Michael O'Regan, a copy of which was enclosed. The letter then went on to threaten immediate proceedings, including injunctive proceedings, should any trespass occur, before concluding with a request for confirmation that the defendants' roof works would not interfere with the defendants' property in any way and, in particular, that the completed roof would not overhang the plaintiffs' 'section' of the party wall.

50. In his earlier letter of the 17th October 2006 to Mr Michael O'Regan (no relation), who was then the owner of Unit 63, Mr O'Regan, writing in a private capacity on behalf of the plaintiffs, had stated:

> "We advise that on the fileplan [accompanying Folio CK81489F] we have highlighted the party/party walls in red of Unit 63 which we own in conjunction with you. We will not agree to any alteration or removal of these walls.
>
> We would be obliged if you would revert to us with proposals how you consider to propose to service your unit with the ESB, telecom, storm water and foul sewer. If you propose to connect to the new services which we have put in place with respect to Units 1 to 10 Sunbeam Business Park, you [are] going to require consents and appropriate [w]ayleaves. If you can make do with the existing services we of course have no problem with this."

51. Neither of those letters sought to address the implications of the plaintiffs' prior unilateral decision to withdraw support for the party walls concerned, thereby preventing their reinstatement as internal party walls, permanently exposing them to the elements, and precluding the reinstatement of a party gutter. Nor did either of those letters address the terms of the easements in favour of the plaintiffs' property over the defendants' surrounding lands; rather, the defendants were left to infer that it was, as it still is, the plaintiffs' position that those easements do not permit the free passage of rain water through conduits (in the form of gutters) overhanging, by a distance of no more than 8 inches, the sterile strips of land that the plaintiffs have left abutting the party walls and do not permit the free passage of water and electricity through any conduits that the plaintiffs have installed on the servient tenement.

52. The defendants' solicitors replied by letter dated the 24th March 2009 asserting that the party walls concerned were owned by the parties as tenants in common and that, accordingly, the defendants were entitled to overhang the wall. Neither in that letter nor in any of the limited correspondence that ensued prior to the issue of proceedings over two and a half years later in December 2011, did the defendants address the issue of how services were to be provided to the reinstated Unit 63.

53. A separate and distinct issue to which the plaintiffs devoted a significant portion of their evidence and argument at trial is their contention that the defendants reinstatement of Unit 63 is a development that requires planning permission but for which no planning permission has been obtained. The defendants deny that planning permission is required for the works that they have carried out on their property.

54. When it is was put to Mr O'Regan in cross-examination that the plaintiffs have not made any formal complaint or brought any enforcement proceedings in respect of the breach or breaches of the planning code for which they now contend, Mr O'Regan responded that they are under no duty to do so. Of course, that is correct. But it seems equally correct to state that there is no apparent obstacle or impediment preventing the plaintiffs from raising any such complaint before the proper authority or in the appropriate forum, nor have the plaintiffs identified one.

55. A more fundamental point is that the plaintiffs' case, as pleaded, does not include any claim of breach of the planning code by the defendants. Nor does it include any claim, more generally, of breach of statutory duty against them. While a significant portion of the written legal submission made by the plaintiffs at the conclusion of the trial is given over to argument under the heading 'planning issues', no attempt is made to link the plaintiffs' various assertions in that regard to any aspect of the claims in trespass, nuisance and negligence that form the subject matter of their action.

56. It follows that it would be entirely inappropriate to address, much less purport to determine, any such controversy in the context of the present judgment.

Analysis

57. The easements at issue in these proceedings were acquired by express grant in the deed of conveyance of Unit 63 made on the 19th December 1995.

58. Bland, *Easements*, 3rd ed. (Dublin, 2015) sets out the following helpful summary of the correct approach to the proper construction of such deeds at p. 97:

> "4.17 In construing a particular conveyance to determine the intention of the parties as to the scope of the right created by grant or reservation, there are three guiding principles:
>
> (i) The scope of the right is primarily determined by the wording of the instrument.
>
> (ii) Regard is to be had to the circumstances at the time of the grant.
>
> (iii) Where there is ambiguity, the rule that a grantor may not derogate from his grant is applied, and a grant is in general construed against the grantor.

> The grant may also be construed in appropriate cases to create implied rights that supplement or amplify the express rights."

59. The wording of the deed in this case is clear. The first part of paragraph 2 of the second schedule to the deed grants the dominant tenement (the defendants' property) the right to free passage and running to and from it of water, electricity and other necessary services through all conduits that were in, under or over the servient tenement (the plaintiffs' property) on the 19th December 1995 or that were to be in the servient property at any time within twenty one years of that date. As the plaintiffs' electricity, water and drainage conduits were installed well within 21 years of the 19th December 1995, it follows that the defendants are entitled to free passage of water, electricity and other necessary services through them.

60. The second part of paragraph 2 of the second schedule to the deed grants the dominant tenement the additional right, where necessary for the purposes of the reasonable current user of those lands to lay conduits in, through or under the servient tenement at any time upon giving reasonable notice within twenty one years of the 19th December 1995, making good any damage thereby caused.

61. Paragraph 3 of the second schedule confers a right, for the benefit of the dominant tenement, to connect up with and clean and repair the said conduits and for that purpose to enter onto the servient lands or any part of them upon giving reasonable notice (save in the event of an emergency) with workmen and others and all necessary equipment making good any damage thereby done but not being responsible for any temporary inconvenience or damage caused by those works.

62. The first part of paragraph 2 of the second schedule to the deed entirely undermines the repeated assertion in evidence of the first plaintiff that the defendants did not have the right to avail of any of the service conduits installed on the servient lands by the plaintiffs. Certainly, that assertion or argument was not relied upon in the written legal submission of the plaintiffs at the conclusion of the trial. The first plaintiff is both the developer, in partnership, of the servient lands and a practising solicitor. The easements at issue were a burden on the servient lands when those lands were acquired by the plaintiffs. Whatever the moral arguments may be (and, on the assumption that existing burdens are factored into the market value of development lands, they do not seem to me to be either obvious or compelling), I can find no basis for the assertion that, as a matter of law, the defendants, as owners of the dominant tenement, were required to make a contribution to the plaintiffs, as owners of the servient tenement, in order to avail of the easements benefitting an otherwise landlocked property, whether the plaintiffs chose to install new service conduits (primarily for the benefit of the servient tenement) or not.

63. The plaintiffs contention that the defendants did not have the right to install fairly typical rain gutters on the external side of the party wall under the roof of their building, which gutters overhang the plaintiffs property along those walls by a distance of less than eight inches above a strip of land that the plaintiffs have unilaterally decided to leave sterile, is not consistent – it seems to me – with the express terms of the second part of paragraph 2 of the second schedule to the deed. I draw support for that view from the very broad definition of the term 'the conduits' at paragraph 1 in the body of the deed and the express inclusion within that broad definition of the word 'gutters', among a long list of other types of conduit.

64. Similarly, paragraph 3 of the second schedule clearly permits the defendants to connect up with the conduits on the plaintiffs' lands through which water and electricity are supplied and through which surface water and foul water are removed.

65. The plaintiffs argue that the defendants cannot rely upon the terms of the easements just described because their conduct falls outside them in three material respects.

66. First, the plaintiffs submit that the defendants have failed to establish that the connection of their services to the relevant service conduits on the plaintiffs' lands by laying short additional conduits from their building in order to do so, was 'necessary for the reasonable current user' of the defendants' property.

67. The plaintiffs say that this is so because the defendants did not first investigate, either properly or at all, whether they could connect instead to any pre-existing service conduits that might remain extant on the plaintiffs' lands. I am afraid that this is an argument that, to me, makes no sense in principle and little sense in fact. It is difficult to see how it can be said, in principle, that the laying of conduits to connect to older service conduits on a servient tenement is 'necessary for the reasonable current user' of a dominant tenement but that laying such conduits to connect to newer service conduits on the same lands is not. If anything, it seems to me that 'reasonable current user' might be more readily construed as requiring connection to the newer, rather than the older, conduits running across a servient tenement, should both happen to available.

68. The Court is left to infer that the plaintiffs' argument in this regard must rest on one of two broad propositions. The first is that, where two or more routes are available across a servient tenement for use as an easement 'necessary for the reasonable current user' of a dominant tenement, then the use of no particular one of those routes is strictly necessary for that purpose and the easement is thereby effectively extinguished. The second is that additional words should be read into the terms of the relevant easement in this case to limit its effect in the manner contended for; whether by conferring on the servient tenement an election in relation to the relevant route an easement is to take where more than one is available, or requiring the dominant tenement to use the oldest route available over the servient tenement in exercise of the easement, or by reading into the terms of the easement some other formulation with an equivalent limiting effect. No basis in fact has been established, and no authority in law provided, in support of either proposition and neither is persuasive.

69. Moreover, the term 'necessary for the reasonable current user' is one that is well established in the law of easements. It found its most famous, if not its original, expression in the judgment of Thesiger L.J. in *Wheeldon v Burrows* (1878) 12 Ch D 31. When the rule in that case was expressly abolished by s. 40(1) of the Land and Conveyancing Reform Act 2009, it was replaced by s. 40(2) of that Act, which establishes a statutory test for the creation of an easement by implication of law that also requires that such creation be 'necessary to the reasonable enjoyment of the part disposed of.' For the purpose of that provision, those words are taken to mean that an easement contended for 'must be objectively necessary to the reasonable enjoyment of the dominant tenement'; see Bland, *op. cit*., at p. 114-115. Here, it is the free passage of electricity and water over the servient tenement that must be, and – I am quite satisfied – has been, established as objectively necessary to the reasonable enjoyment of the dominant tenement. I do not accept that the test is instead whether it was strictly necessary to secure the free passage of those things specifically through the most recently constructed conduits in, on or over the servient lands on the basis that no other conduit remains extant on those lands.

70. Even if the latter test were the appropriate one to apply as a matter of principle, and I do not believe it is, it could not avail the plaintiffs on the facts of this case. The first plaintiff Mr O'Regan gave evidence that it was a term of the plaintiffs' planning permission

that, when installing a new water main to service their development, they were to trace any redundant water services back to the public main and have those services blanked off by the local authority at their own expense. Mr O'Regan also gave evidence that the plaintiffs sought and obtained permission to demolish the pre-existing electricity substation on their lands (the servient lands) and to construct a new substation elsewhere on those lands. The very fact that the plaintiffs saw fit to construct a new surface water and foul water system when redeveloping their lands after two extensive fires is sufficient to satisfy me, on the balance of probabilities, that the replaced portions of the pre-existing surface water and foul water drains, if they remain in existence at all, are no longer fit for purpose and were not so when the defendants connected to the new surface water and foul water conduits that the plaintiffs have constructed.

71. The second argument that the plaintiffs advance is that, in laying the necessary conduits to connect up with the conduits on the servient property, the defendants failed to comply with the requirement under both paragraphs 2 and 3 of the second schedule to the deed that such steps were to be taken 'upon giving reasonable notice.' The first plaintiff Mr O'Regan gave evidence that there had been no communication at any time between the defendants and the plaintiffs concerning the relevant works. The defendants made no suggestion to the contrary. Hence, I am satisfied that there was a failure to give the required notice, which provides one more illustration of the abiding theme of this case, namely, the problems caused by neighbours who take precipitate action without prior consultation. The question, though, is what is the consequence of this particular failure?

72. In my view, the consequence is that the works concerned were a trespass on the plaintiffs' property. It follows, for example, that the defendants' could not rely on the express terms of paragraph 3 of the second schedule to the deed whereby, in exercising their right to connect up with conduits on the plaintiffs' property 'upon giving reasonable notice', they were not to be held liable for any temporary inconvenience or damage caused by such works. As it happens, the plaintiffs have adduced no evidence of any loss, damage or inconvenience caused by those works. That is hardly surprising in relation to the connection of the defendants' water and foul water services, since, on the plaintiffs' case, they only became aware that those works had been carried out when their engineer carried out a further inspection of the *locus* in or about July 2014, after proceedings issued. It is, perhaps, surprising in relation to the works that were carried out to install the gutters and connect to the electricity and surface water drainage services, which actions form the subject matter of the plaintiffs' claim, as pleaded in the statement of claim they delivered on the 14th June 2012, but there it is.

73. On the other hand, it does not follow from the trespass constituted by those works that, for example, the defendants' right to 'free passage and running to and from' the plaintiffs' lands of water and electricity through the conduits concerned, expressly conferred under the first part of paragraph 2 of the second schedule to the deed, is in any way affected by the said failure.

74. Differently put, it seems to me that while the conduct of the works necessary to connect the defendants' services to the plaintiffs' conduits on the plaintiffs' property, in the absence of reasonable prior notice, constituted a trespass upon that property, the continuing presence on the plaintiffs' property of the connecting conduits thereby installed does not. No other construction of the relevant paragraph of the deed is sensible. It would be absurd, for example, to hold that the said paragraph, properly construed, was intended to render the continuing presence of those connecting conduits on the plaintiffs' lands to be in itself a trespass, since the only possible practical consequence of the application of such a construction, in the absence of any associated loss or inconvenience giving rise to a claim in damages, would be to require the immediate removal of the said conduits, in circumstances where they could be reinstalled perfectly lawfully shortly afterwards 'upon giving reasonable notice' of the works involved.

75. The third argument put forward by the plaintiffs in support of the contention that the defendants conduct falls outside terms of the relevant easements is that the right thereby conferred to the free passage of water and electricity through conduits on the plaintiffs' lands does not extend to the right to install or avail of a water or an electricity meter on those lands in respect of either utility. More telling than the substance of this argument, it seems to me, is the fact that it is being made at all. I am quite satisfied that any reasonable construction of the express grant of an easement to the free passage of water and electricity services must extend, by necessary implication, to the right to install on the servient tenement any meters required for that purpose, insofar as that may be necessary for the reasonable use of those utilities, since otherwise that express grant would be ineffective; see, for example, the judgments of Laffoy J. in *Conneran v Corbett & Sons Limited* [2004] IEHC 389 and *Geraghty v Quinn & Ors* [2008] IEHC 166.

76. The fact that this argument is being made does tend to offer support for the defendants' contention, upon which I will not otherwise comment, that the plaintiffs' action is less about restraining an alleged trespass or nuisance, than it is about identifying some infirmity or limitation, however technical, in the defendants' existing easements, whereby the plaintiffs' lands become a 'ransom strip' and the defendants are required to negotiate the acquisition or purchase from the plaintiffs of some form of additional wayleave or consent in order to secure, or to maintain, basic services for an otherwise landlocked property.

77. The plaintiffs have advanced a further and separate argument, to what end is not clear, that the use of the water main on the plaintiffs' lands by the defendants is in breach of the plaintiffs' wayleave agreement with the owner of the property to the north across which that water main is permitted to run from the public water main on the Mallow Road to reach the plaintiffs' lands. That argument fails at the outset because no evidence whatsoever was adduced of the terms of that agreement. It would, indeed, be quite extraordinary if, in circumstances where the plaintiffs knew, or ought to have known, of the easements that were a burden on their lands when they acquired them, they subsequently chose to enter into an agreement with a third party inconsistent with the exercise of those easements. If that is what occurred, the resulting problem must be entirely one for the plaintiffs; it is difficult to see how it could form the basis of any argument that the easements benefitting the defendants' property are in any way limited or extinguished as a result.

78. Having thus disposed of each of the arguments raised by the plaintiffs in support of the damages and injunctions that they seek, one final point remains to be addressed. That is the defendants' objection that the plaintiffs' claims concerning the alleged trespass or nuisance constituted by the defendants' connection to both the water mains system and the foul water or sewage system constructed by the plaintiffs on the plaintiffs' land were never pleaded or particularised and, thus, are not properly before the Court.

79. In response to that submission, the plaintiffs have argued that there was an unspecified element of subterfuge or concealment in the circumstances in which that occurred, which somehow deprived them of the opportunity to plead or particularise those matters prior to the trial of the action in March 2015 and which, thus, gives rise to an estoppel preventing the defendants from raising that objection now. While it is undoubtedly correct that there was no communication between the parties concerning the relevant works, and while it is also correct that the relevant connections were made – in the usual way - below ground level, there is no suggestion that the necessary works on the plaintiffs' lands occurred surreptitiously.

80. Moreover, while the evidence of the first plaintiff Mr O'Regan was that, nonetheless, the plaintiffs did not become aware of those works until their engineer carried out his second inspection of the *locus* in or about July 2014, no reason has been given why the said inspection could not have been carried out much earlier, indeed prior to the issue of these proceedings in December 2011. Nor have

the plaintiffs explained why, having become aware of the issue on foot of that inspection in or about July 2014, they took no steps thereafter to amend or further particularise their claim at any time prior to trial in March 2015.

81. While it seems to me to follow that the defendants' objection in this regard has considerable force, it is unnecessary to adjudicate upon it, as, for the reasons already given, I have been unable to identify any merit in the wider claims advanced by the plaintiffs at trial.

Conclusion
82. The plaintiffs are not entitled to the reliefs sought. I will dismiss the action.