Neutral Citation Number: [2006] IEHC 205

HIGH COURT ON CIRCUIT
EASTERN CIRCUIT COUNTY OF WICKLOW

[2006 No. 24 CA]

BETWEEN

PETER NEIL COLLEN

Plaintiff

And by Order
THE ATTORNEY GENERAL AT THE RELATION OF THE SECOND NAMED DEFENDANT

Defendant

Judgment of O'Leary J delivered on 19th day of June 2006 at Wicklow Courthouse

1. This action commenced by Civil Bill of 9th September 2004. In the action the plaintiff claim a declaration concerning the status of a property of which he is the owner in the context of a claim by the defendants and others that a public right-of-way existed over the plaintiff property at folio 7072 Co Wicklow.

2. Various affidavits and motions not relevant to the issue to be herein decided passed between the parties and in due course the proceedings against the first and third named defendants were terminated leaving only the second named defendant as the sole remaining defendant. This defendant took issue with the plaintiff over the existence of a public right-of-way over the plaintiff's property and filed a defence and counterclaim seeking the court's ruling on his right-of-way claim. As the matter had now in effect resolved itself into the one issue i.e. of the existence or not of a public right-of-way the Circuit court had previously ordered the notification of the Attorney General in accordance with normal practice. As is usual in such cases the Attorney General did not seek representation and the matter falls to be decided by the court on the pleadings and evidence of the parties.

3. Despite the complicated nature of the pleadings and the multiplicity of the parties the issue resolved itself before the Circuit Court as to whether a public right-of-way existed. That Court decided that a right-of-way had existed and made consequential orders (by agreement moving the right-of-way from its traditional route, as found, to a more practical nearby existing route) including cost orders against the plaintiff. Against these findings the plaintiff (now if effect the defendant to the counterclaim) appeals.

Claim

4. The right-of-way claimed needs to be identified with some precision in view of the nature of the decision to be made herein. In that regard reference is made to a map of the area produced and entered into evidence by the plaintiff's cartographer Michael Flynn (identified by plot reference no 346907 1 2) a copy of which has been placed on the court file. The right-of-way claimed is part of a pathway marked out therein. From point A (at the entrance to the path known as Lambe's Lane) the way proceeds to point B passing over the property of a Mr Clear and Mr Gantly (both of whom though not parties to the action gave evidence at the hearing). It then proceeds to point C using a long-established route (herein referred to later as the 'old road'). This 'old road' includes all the way between A and C through B. At point C (or at a point immediately to the west of C) the 'old road' goes in a north-westerly direction and diverges from the right-of-way claimed that continues westward to the site of an old footbridge at point D (now no longer in existence though substituted by a different structure by agreement of the relevant parties). The claim is for the declaration of a public right-of-way from B to C to D. While C to D is no longer in use (having been moved from C to E by agreement) all parties agree and the court accepts that the right-of-way west of C stands or falls on the status of the original C to D route and not on the C to E substitute route.

5. There is no claim or concession of a right-of-way between A and B nor is there any claim or concession of a right-of-way from Point D westwards. The effect of these limitations will be further considered later in this judgment.

Evidence

6. Evidence can be divided into a number of categories. First there was the evidence of the cartographers secondly the evidence of the users, many of whom were long-term local residents. Lastly the plaintiff and the second named defendant also gave evidence.

7. Mr Andrew Bonar Law produced a number of maps which were of considerable assistance to the Court. These included an 1838 Ordnance Survey map of the area and a further similar map of 1888 both to the scale of 6 inches to the mile. He also produced and proved a composite map from 1909/1910 survey at a scale of 25.344 inches to the mile. Finally he produced from the old estate maps of the Powerscourt Estate a number of maps showing the road structure in the relevant area in 1816.

8. The evidence of Mr Michael Flynn cartographer did not in any material way contradict Mr Bonar Law.

9. From the evidence of both cartographers the court concludes as follows.

> 1. The Lambe's Lane entrance and pathway is the same pathway as shown in the maps as produced and was in the earliest of these maps described as the 'Old Road'.
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> 2. It is clear this 'Old Road' commenced at a public right-of-way. What is not clear from either the estate maps or the Ordnance maps is whether it joined another public right-of-way at the other extremity. A number of the estate maps produced do not cover the relevant area while the earliest Ordnance map has the road noted as unfenced at its north-western extremity. In later maps the area previously indicated as 'unfenced road' appears to have been incorporated in the surrounding land. One Estate map dated 1816 shows the 'Old Road' ending at 'rocky heathy pasture' which rough area in turn appears to stretch to the public road.
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> 3. There is no evidence of the existence of any track (not to mention a private or public right-of-way) from point C to point D though this area is covered in some of the maps and in particular in the 1816 estate map.

10. The Court also heard evidence from a number of witnesses with particular knowledge (mostly as users) of the area. The following is a summary of some of the relevant evidence. The fact that an individual's evidence is not mentioned in this judgment does not mean that it has not been given appropriate weight

11. Ms Dorothy O'Rourke (nee Barradell) lived in the area for some 54 years. She used Lamb's Lane to go to school. She crossed the land now occupied by Coillte by using a path also used by others in the valley. She crossed the river at point D using a bridge which consisted of 3 to 4 timber logs. She saw visitors use the way the 'odd time'. The bridge was repaired from time to time by locals. The bridge was missing for about a year in 1980/1 and was re-erected in its present position by Coillte. A gate was erected at point D in

1967/8 by the plaintiff's predecessor in title (Mr Collen's father) and no objection was made to its erection.

12. Mr M. Tinsley was secretary of the Glencree Society in 1980. In that capacity he wrote to Mr Collen Snr the then land owner protesting at the removal of the old bridge and demanding its restoration. Two other pieces of information were included in that letter, the description of the pathway as a public right-of-way and the suggestion that it had been placed there by 'the forestry'. It is clear that the second suggestion was incorrect as other evidence established that the three logged bridge was put there and maintained by local people. When questioned, Mr Tinsley was unable to enlighten the court as to the basis of his description of the bridge as part of a public right-of-way. Mr Tinsley's letter prompted a flurry of activity culminating in a letter dated 16th December 1980 from Mr Collen to the Forestry and Wildlife Service (which was the predecessor of Coillte). The legal consequences of this correspondence will be explored later in this judgment. Mr Tinsley, in evidence, confirmed that to his knowledge boys under the aegis of his body staying in a hostel across the valley used the route in question in the early years to access the hostel from the main road and later as part of a walking pattern during their weekend stay. Of some significance was his evidence that the Glencree society which owned some of the land between Coillte and the public road itself erected a locked gate at its entrance forcing those who wished to use the alleged right-of-way from one public road to another (part of which is the way the subject of this application) to use an alternative entrance by which Coillte exited and entered its property.

13. Mr Aeneas Higgins Forestry Manager Coillte has worked in the forest to the west of the area in question on and off for many years. This forest lies immediately west of Mr Collen's land. Any person exiting the land in question (at point D) and wishing to reach the public road on the far side of the valley from Lambe's Lane must first enter Coillte land immediately adjacent to the footbridge at point D.

> *The following is a conclusion by the court from other evidence. [Having entered the Coillte land the walker could then choose to exit to that public road without ever using the land of any other landowner but the more normal route did exit from the Coillte land onto land originally owned by a Major Thunder which is now owned by the Glencree Society]*

14. Mr Higgins also gave evidence that over the past 18 years he has visited the forest 190 times. He stated that he had met people using the forest on a 'few occasions'. As some of these people were availing of the open access policy of Coillte (about which evidence was given later by Mr Tim O'Regan) the Court concludes that on the balance of probability some at least but not necessarily all of these people had originated in Lambe's Lane or had their destination there. Mr Higgins was of the view that there was a public right of way as the path was used from time to time by the families in the valley. Neither Mr Higgins nor any other witness confirmed that Coillte were of the view that the right-of-way now claimed over the bridge met a similar and connecting right-of-way through the Coillte property.

15. Mr Herbert Barradell said he saw many using the right-of-way. He saw non-locals there the very odd time. Nobody objected to the erection of gates at point B in the 1960's or at Mr Gantley's property later. Though restricted by these gates access was still possible on foot. The old Bridge consisted of three logs and had been erected by local people in 1947 after an earlier structure was washed away.

16. Mrs Peggy Baradell was familiar with the area since 1953. She used the path and met other local people and the 'odd stranger'. She thought that in her time walkers from Enniskerry would use the cross-valley shortcut as access to the tea-rooms on the far side of the valley.

17. The second named defendant and counterclaimant said he was a walker in the area since 1981. His mother-in-law told him there was a public right-of-way on Lambe's Lane and the area in question. He had been on the pathway once a year since 1987. He had been alerted to the issue when a 2002 publication had made assertions of rights-of-way in the vicinity. The authors of this publication had withdrawn the claim under treat of litigation. The Court notes that the areas in question in that publication were areas contiguous but not identical to the way now claimed. Therefore the court places little value on the claim or the retraction arising there from.

18. Other witnesses gave similar fact evidence.

19. The Plaintiff gave evidence of his father's ownership of the land and its transfer to him. He said he only saw local people using the way in the past and accepted that the boys in the hostel used it in the past. He said that now there was no great traffic over the way. He never saw a group of walkers in the time he was there. He never saw anyone use the foot-bridge itself. He had no objections, in the past or now, to any local using the way as a short cut and gladly would give permission if asked. When Mr Gantley erected a gate in 1992 his family was offered a key. As he had constructed an independent access to the north he no longer used Lambe's Lane though he had the right to so do.

20. Mr Patrick Quinn lived in the area from 1948 to 2 years ago. He had lived in Lambe's house on the lane during his youth to assist some elderly members of that family. He said that the people in the valley as a matter of convenience and in practice walked in a straight line from one point to another. For example in the case of the Baradell family they did not walk two sides of a triangle to get to the footbridge, (at least until the area was disturbed by Coillte) as alleged by Mrs Dorothy O'Rourke but used a separate path direct from their house to the footbridge. To his knowledge only saw two categories of people used the path, locals and the children using the hostel. He never saw a stranger use the way. He never saw hikers or hill-walkers.

21. Mr Patrick Smith used the way to go to school. The local use he saw was a straight line use not confined to defined paths.

22. Mr Kenneth Clear a property owner of part of Lambe's lane saw some use over the years since 1967 but met 'very very few people' using the way.

23. Mr Thomas Gantley the owner of the entrance to Lambe's Lane for 17 years gave evidence that he erected a gate at the entrance but left a stile for pedestrian access He 'very occasionally' saw walkers but in all met 'very few people' on the way.

24. A map of walks in the area produced by the Evening Herald in the 1950 was also introduced in evidence. This showed the way from Lambe's Lane to the westerly public road as suitable for a walk.

25. Of particular interest to the court was correspondence in 1980 relating to the removal of the old footbridge and its replacement. Reference has already been made to the letter of 19th September 1980 claiming a public right of way. The basis on which claim was made appears to owe something to a lack of appreciation of the meaning of a public right-of-way. Of greater interest is the letter from the owner Mr Collen to the Forestry and Wildlife Service (now Coillte) dated 16th December 1980, which owned the far side of the river on which the new bridge would partly rest. This stated as follows

Dear Sir

> *I am the owner of some land on the north side of the Glencree River at Old Boleys/Aurora. There was an old bridge across the river and I would like to replace it downstream and would welcome you permission to do so. The main purpose is to be a convenience to the boys at the Aurora Club. I have checked with my insurance co. and my Public Liability Policy will cover any claims made against me. I will put a small notice on the bridge say that one must use it at ones own risk. The bridge consisted of three strong logs.*

Yours Sincerely

26. In the opinion of the court Mr Patrick Quinn was the most impressive witness of any of the witnesses as to local use.

27. The following are factual conclusions from the evidence with regard to user

> 1. The way known as Lambe's lane is most likely part of the remains of an old road-way serving those living in the valley in particular those living along the North-western corridor which peters out in the old maps. That road may (or may not) have stretched as far as rejoining the now main Glencree to Enniskerry public road.
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> 2. From point C on this way certain use was made of a short-cut over a crude log bridge at point D until this crossing was moved to point E in the early 1980's
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> 3. The pathway between C and D was used for many years by persons living in the valley to access the main Glencree to Enniskerry public road. This use decreased to almost zero as transport made other access points more suitable. Very little use for work or school was made of the pathway from the 1970's on. Other than locals (included in that description is those who stayed in the hostel) a minute number of recreational walkers used the way.
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> 4. At point D going westwards those using the shortcut went directly to their destination so that there was more than one feeder path into that point coming from the west. The preponderance of the users approached from the hostel (Major Thunder's) direction.
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> 5. The letter of 16th December 1980 from Mr Collen is clear evidence that he still believed that he was the owner and occupier of the land between C and D. He was so concerned about his personal exposure that he notified his insurance company of the proposed structure. It refutes any suggestion that he had dedicated the way to the public at large.

The Law

28. The law in this area is very clear. It is set out by Costello P in *Smeltzer v Fingal County Council* [1998]1 I.R. 279 at p 287 as follows

> *The law relating to highways and the creation of public rights of way is a very ancient one and the relevant principles are well established. A distinction is made between a permission granted by the owner of land to members of the public to walk on pathways on his land and the dedication of these pathways to the public. To establish a public right of way what has to be proved is an intent on the part of an owner to dedicate his land to the public, an actual dedication, and the acceptance by the public of the dedication.*

29. In this case there is no evidence that any owner starting with the Powerscourt family, any intervening owner including Mr Collen Senior and ending with the plaintiff actually dedicated the area between A to B, or B to C or C and D to the public.

30. If the law as stated was the full story then that would be the end of this case. However, the law has developed additional tenets to cater for cases where dedication is to be presumed. In theory the presumption requires continuous use by the public since 'legal memory' commenced in the 12th century. In practice this is not applied strictly.

31. In the case of *Connell v Porter* unreported 18th December 1972 O'Dalaigh An Priomh Breitheamh stated the law as follows

> *When there is no direct evidence as to the intention of the owner, an animus dedicandi may be presumed either, from the fact of the public user without interruption, or from the fact that the way has been maintained and repaired by the local authority.*

32. Obviously in this case the maintenance by the local authority does not arise so the public user without interruption is the only method open for a decision in favour of the counter-claimant. The history of the use by the local people is interesting. This court has held as a fact that the reason for its use was ease of access to the public road at its most convenient points. That use became obsolete with the arrival of the motor car which necessitated the bringing of the car to a point nearest to the dwelling notwithstanding the longer journey on the public road as the shorter walk to the house made the longer car journey irrelevant. The various paths from the houses to the public road converged at point D as a matter convenience for the purpose of crossing the small river when in flood but to characterise this use as having any thing in common with a public right of way is to retrospectively convert a local convenience into a right for the public at large. Before this court not one local person used the expression a 'public right of way' to describe their use of the pathways across the valley. In the opinion of the court Mr Patrick Quinn was the most impressive witness of any of the witnesses as to local use. This court finds that the use of this pathway in the early to middle 20th century was characteristic of a neighbourly convenience probably not even amounting to a private right-of-way. It is clear that by 1980 the (temporarily resident) boys of the Aurora Club were considered the main users. Their use was occasional and sporadic. The evidence of use by other walkers and hikers was so small as to amount to no more than the kind of use on an unofficial basis of fields throughout the country by town's people for Sunday picnics.

33. The Court is satisfied that the route from C to D or any alternative route going westward across the Glencree river in that area has not now and never had the benefit of a public right-of-way.

34. For reasons which the court will later explain the court will make no such determination in the case of A to B to C along the route of the 'old road'.

35. The court has made the foregoing determination in the interest of certainty even though, as it will now be set out, there were

other reasons why a decision favourable to the counter-claimant could not be made.

36. There is a long line of cases dealing with the necessity for a public right-of-way to commence at a public place and/or terminate at another public place (*terminus a quo* and *terminus ad quem*) except where there is an express dedication. The traditional view was that for a presumption of a public right-of-way public termini were necessary at both ends and examples such as *O'Connor v Sligo Corporation* (1901) I NIJR 116 and Re *the Estate of Thomas Connolly* (1871) 5 ILTR 28 support this proposition. It is clear however the strict application of that legal principle was disturbed in *Giants Causeway Co Ltd v AG* (1898) 5 NILJ 301 and now *terminus ad quem* does not apply where the claim is based on presumed dedication where the destination is a place of natural beauty requiring access and probably by extension in other exceptional circumstances.

37. The counter-claimant in this case appears to be seeking to establish a completely new principle of law that a public right-of-way can be found to exist without express dedication in the absence of both *termini*. Such a proposition could have not prospect of success.

38. If the court had held that the circumstances existed which merited a declaration the pathway the subject of the claim was potentially a public right of way (which the court had not so found) it would also have to be satisfied that the potential public right-of-way had a *terminus a quo* and a *terminus ad quem* in other words started and finished in a place to which the public had access to as a right. Alternatively access from a public place might suffice in certain limited circumstances. The court considered the availability of access from the area the subject of the claim to the public roadways which in this case are the relevant access points.

39. The court has no evidence that the easterly extension (A to B) of the area over which the claim is made is a public right-of-way. It is possible that if all the relevant parties were notified and the issue litigated that such a finding could be made. It is also possible, of course, that the court would decide that no public right-of-way exists over A to B and/or A to C. At the present time (in the absence of all the relevant parties) the court could not presume that such a public right exists over A to B.

40. The westerly extension to the area under review is similarly land-locked. In order to reach the public road it would be necessary to go through land owned by Coillte and other land owned by the Glencree Society. While the Glencree Society appear to support this application they seem to have acted in a manner which denied the existence of a public right-of-way through their own property as they erected a gate at the entrance to the public road thereby preventing people accessing the way though their property. The object of this obstruction was to restrict unauthorised access as the property was being damaged. While the objective was understandable, the actions of the society in restricting all access (even pedestrian access) are wholly inconsistent with the existence of a right-of-way. Alternative access became available when Coillte opened an entrance for the extraction of timber and other works but this was not part of any agreement to substitute this entrance for the closed Glencree Society access point. Further in so far as this new entrance allows access from the public road to point D the evidence to the court was that this was the result of the 'open access' policy of Coillte. 'Open access' is a policy which is commendable from this public body but is not equivalent a public right of way. Evidence was not given *viva voce* nor was any document produced confirming that there existed a public right-of-way though Coillte land. In the absence of such evidence the court could not presume its existence.

41. Both the easterly and westerly connectors to the public roads have not been proved to the court as being public rights-of-way. There are no alternative public accesses to the right-of-way claimed.

42. This foregoing leads to a second reason why the counter-claimant cannot succeed. Any declaration of a public right-of-way in the area claimed would have such a pathway surrounded by private land over which no such public right-of-way existed. It would be a public right of way consisting of an inaccessible island in a sea of private property.

Orders

43. The court dismisses the counter-claim and will hear the parties as to the nature of the order appropriate to the plaintiff's claim (if any) and will hear submissions on costs. Any positive orders the court may make will not be such as to compromise the rights of adjacent property owners.

Conclusion

44. This has been a very interesting case focusing the courts attention on the, sometimes, competing rights of property owners and walkers. It is open to the legislature within the limits of Bunreacht Na hÉireann to address how to provide facilities for walkers while respecting the rights of property owners. What should be clear from this action is that the use of the concept of public rights-of-way as a mechanism for creating new or reviving old rights for walkers is unlikely to lead to a satisfactory overall solution.