

**THE HIGH COURT
DUBLIN**

2007 No. 5046P

BETWEEN

JAMES HARDEN

PLAINTIFF

**AND
LIMERICK COUNTY COUNCIL
AND
DERMOT LAMBE**

DEFENDANTS

Approved Judgment delivered by Mr. Justice T. C. Smyth on Tuesday, 4th December, 2007.

1. The plaintiff seeks an interim injunction to restrain the defendants from cutting or attempting to cut a hedge along the gable end side of his house and along a side wall of his garage and garden at a small side road off the main Tralee Road in the village of Adare and to prohibit them in future in using a tractor-mounted hedge cutting apparatus on the hedge.

2. The matter came before Laffoy J on 19th, 26th and 31st July 2007, thereafter before Clarke J, then before Hanna J on 30th August, 2007, who it appears directed that the defendants be put on notice of the application. The matter was listed, it seems on 30th September, and again for mention on 4th October, 2007 before Laffoy J.

3. When the matter appeared before me on 8th November, 2007 it was listed for mention only. On this occasion the plaintiff, who is a litigant in person, indicated to me that he had sought assistance of the Legal Aid Board in July and only received a response on or about 10th September, 2007 which was to the effect that an adjournment should be sought to await consideration of the Legal Aid Board. The defendants were represented by counsel who explained their position (later referred to in this judgment) as over three months had elapsed in an injunction application, for the deferment where a private right and a public safety issue were in conflict seemed wholly inappropriate and I adjourned the matter peremptorily to enable the plaintiff to take such steps as he considered necessary to process the matter further. On this occasion the plaintiff indicated that he required an engineer's report, which he may require for the trial in the action, but seemed to me unnecessary for dealing with an application for an interim or interlocutory injunction. It was intimated to me by the plaintiff that his success in obtaining legal aid would in some way be dependent on producing to the Legal Aid Board an engineer's report: the plaintiff wished to have the matter deferred until after Christmas 2007, i.e. over five months from its first being before the Court. In my opinion this betokened a lack of urgency and if what was submitted by the defendant's counsel, that a public safety issue continued and the plaintiff had a legal remedy in the District Court, it seemed to me the matter should be dealt with without delay.

4. When the matter came before me on 22nd November, 2007 the plaintiff stated that despite his best endeavours he had been unable to obtain an engineer's report and that he would require to present an inducement of about €500 to an engineer to secure a report and he produced letters of 7th and 14th November from the Legal Aid Board. He requested an adjournment until early 2008. This application was strenuously opposed by the defendants. The plaintiff produced photographs of the scene and said an inspection of the scene would put his point of view beyond doubt. I enquired at length as to why the matter was in the High Court when the amount of the damages for events in 2006 was €1,000 and both the costs and inconvenience to the parties - the plaintiff (a man of military bearing of some 75-77 years of age) in particular. The plaintiff indicated that he had a bad experience with the local District Court office and had no desire to have the case remitted to either the District Court or the Circuit Court and he required cross-examination of the second-named defendant who was the area engineer of the County Council. It was made clear to me that the plaintiff would require a period of time to produce the €500 as an inducement to an engineer and this suggested to me that perhaps out of social welfare entitlements over the Christmas period he would have to devote such funds to such purpose.

5. The possible disadvantage in that regard and also to the plaintiff being unrepresented, his age, the inconvenience of travel, his passionate pleading of the case (he had complaints of unanswered letters to settle the issue with the County Council and a failure to be able to meet the defendants, the second defendant in particular) and the assertion that the site of the scene would be convincing, I determined, bearing in mind Kavanagh's poem Epic, in his ease to visit the scene. For completeness I quote Epic in its entirety:-

"I have lived in important places, times when great events were decided, who owned that half a rood of rock, a no-man's land surrounded by our pitchfork-armed claims. I heard the Duffys shouting 'Damn your soul' and old McCabe stripped to the waist, seen step the plot defying blue cast-steel - 'Here is the march along these iron stones' That was the year of the Munich bother. Which was more important? I inclined to lose my faith in Ballyrush and Gortin till Homer's ghost came whispering to my mind: He said: I made the Iliad from such a local row. Gods make their own importance."

6. On Monday, 26th November, 2007, in the presence of a Court Registrar, I met the parties at the scene in Adare and I made it clear my function was as a judge and not a broker, and having examined the scene and noted that the avenue led to an entrance to the Adare Manor Estate, which at one stage had been widened (the plaintiff had informed me to permit buses to enter) but was no longer in use for that purpose. I noted the bottleneck entrance to the avenue where the hedge of elder, bramble, ivy and general undergrowth covering some old stones or stone wall could, in the event of emergency services encountering traffic at the scene, cause a serious problem of public safety. I left the parties to talk to each other for an interval of time of approximately some 20 minutes or thereabouts. I was then informed by the parties that they could not settle the differences and I informed them that I would give my decision in Court on this date.

7. In July, 2006 the first-named defendant, under the powers granted by s. 70(9) of the Roads Act, 1993, cut back hedges that had overgrown in the vicinity of the plaintiff's property. This was done (and it is so averred) as the said hedge had encroached onto the public roadway and had thereby created an "immediate and serious" hazard to pedestrian and vehicular traffic.

8. In March, 2007 the plaintiff wrote to the first defendant claiming a total of €200 damages stated to be caused by the hedge cutting. The amount subsequently demanded increased to €742 and ultimately to €1,000. The County Council denied that any damage had been caused to Mr. Harden's property as a result of the hedge cutting on 24 July 2006.

9. The first-named defendant is the authority responsible for the construction, maintenance, upkeep, supervision and control of the public roadway adjacent to the Plaintiff's property. Under s. 70(2)(a) of the Roads Act 1993 the plaintiff has a duty as an owner/occupier of his land (and the nature of the property right remains to be ultimately established at trial) to make sure that any

hedge on his land does not create a hazard to persons using the public roadway. Resulting from this duty under s. 70(2)(b) of this Act where such a hazard is being created, the road authority has the power to serve notice on the owner/occupier, detailing steps to be taken to remove the hazard. Under s. 70(3) of the same Act any owner/occupier who feels aggrieved by receipt of the aforementioned notice has an avenue of appeal to the District Court. Any appeals acts as an automatic stay on the implementation of the statutory notice. In addition to these powers the road authority has an additional power by virtue of s. 70(9) of the Act which allows them to remove or reduce any hazard that presents an immediate and serious hazard to users of the public roadway.

10. The first defendant wrote to the plaintiff on 26th June, 2007 asking him to contact them with regard to making arrangements for the further cutting of the hedge. The plaintiff refused or failed to contact the first-named defendant and instead issued these proceedings. The evidence on affidavit is to the effect that the first-named defendant normally attempts to reach agreement with an owner/occupier with regard to any action to be taken before issuing the statutory notice provided for in the Act. The letter of 26th June, 2007 did not constitute the statutory notice. The defendant's position is that until such time as the plaintiff is issued with the statutory notice the current proceedings are premature. In the event that a statutory notice is served on the plaintiff any grievances can be pursued by way of appeal in the District Court and accordingly the current proceedings are entirely unnecessary and create a disproportionate expense.

11. The second-named defendant avers that he inspected the plaintiff's property on 23rd July, 2007 and that the situation as it stands is that the hedge from the plaintiff's property are creating a hazard to road users and will, therefore, have to be cut back. This position is clearly unacceptable to Mr. Harden who is concerned that in the past for many years he had by hand cut back the hedge and that the events of 2006 clearly caused him great distress and disturbance. The position of the first-named defendant is that the situation is unacceptable as it stands at the moment and exhibits documentation in that regard.

12. I am satisfied that insofar as the evidence is before me on affidavit that the first defendant has acted in accordance with its statutory duties. However, I make no final determination in that regard and specifically do not do so in regard to events in 2006.

13. In my judgment there is no injunctable material before the Court in that the first-named defendant has not committed any unlawful act in the course of its dealings with the plaintiff in the calendar year 2007, nor is there any reason to suppose that they will not adhere to their statutory obligations if and when they undertake them. I am likewise satisfied that any property damage caused to Mr. Harden's property, if it be his, is compensatable in damages.

14. Insofar as there is a dispute between the parties as to the facts in the matter then in the absence of a case established on the basis of probability I am unable at this stage to grant the plaintiff an injunction such as he seeks. The question to be tried may very well be a serious question in the eyes of the plaintiff and while it cannot be ignored as giving rise to a public safety issue it could be so regarded by the defendant.

15. Damages for such adverse effect, if any, as may result from the defendant carrying out their statutory duty seems to me to be compensatable in damages. I am not at all convinced having been to the scene and examined the matter, to the extent that a person in the person of a judge visiting the scene with the maps furnished by the parties can do so, should grant an injunction to the plaintiff. In my judgment if a defendant acts in pursuit of a statutory duty I am not to assume they will do so in such a manner as will give rise to a nuisance or actionable interference with the claimant's or plaintiff's rights. The measurements given in the plaintiff's affidavits which are generally, on a visual inspection, approximately correct the Court might view the matter as *de minimis*. However, given the proximity of the plaintiff's premises to the public roadway I would not wish to rest my decision on such a basis.

16. In my judgment the public safety issue must take precedence to having the plaintiff's hedge remain extant as it is. Clearly the defendants if they proceed to issue a notice and act upon it act with due circumspection.

17. The plaintiff, though in his 70s, is articulate and alert. He made it quite clear on the occasion of the visit to Adare that there may very well be a dispute as to the boundaries. In such circumstances it may be necessary that the estate maps of the Dunraven Estate and/or the County Council at the time they took over the maintenance of the avenue or the drawings or plans for the development that has occurred off the avenue in more recent years would be necessary for presentation at the trial. At that stage an engineer may very well be necessary for the assistance of the plaintiff, but at this stage of the proceedings it is unnecessary to have that information. What is clear on the ground is that the rambling, ragged, overgrown fencing creates the type of problem envisaged by the County Council and it would be inappropriate at this stage to prohibit them from exercising whatever statutory rights they have under the Roads Act. Accordingly, I refuse the injunction application only.

18. So that matters be proceed in a more orderly fashion, I direct the delivery of Statement of Claim within 21 days with 21 days to the defendant to file a defence.