THE HIGH COURT

[2016 No. 5646 P]

BETWEEN

KILDARE COUNTY COUNCIL

PLAINTIFF

AND

KIERAN MORRIN

DEFENDANT

Judgement of Mr. Justice Mc Dermott delivered on the 31st day of July 2019

1. The plaintiff is the local authority for County Kildare, including the town of Naas. The defendant is the owner of 2 and 3 Dara Court, Corban's Lane, Naas, having acquired Number 2 in 1990 and Number 3 in 2007.

2. These proceedings arise from a notice to treat dated 20th February, 2012, served on the defendant in respect of plots reference numbers. 106a.202 and 106b.201 in respect of the Naas Town Council Compulsory Purchase (Corban's Lane/Friary Road Improvement) Order No. 2 2009.

3. Mr. Michael Neary, FRCSI, FRISC ACI, Arb. Property Arbitrator was nominated to hear and determine the defendant's claim for compensation under the Statutory Compensation Code in respect of the acquired lands described in the two plots. The defendant contends that the acquired lands must be valued on the basis that in order for a developer of third party lands to complete a major town centre development nearby, the developer would have had no choice but to purchase the acquired lands at "ransom value". In the course of the hearing before the arbitrator in January, 2015 and February, 2016, a legal dispute arose between the plaintiff, as the Acquiring Authority and the defendant in respect of the existence or extent of the public road and/or road and/or roadway on the two plots, in the circumstances outlined in the statement of claim at para. 7:-

> "(i) The title documents referred to by the [defendant] do not identify, at the date of Notice to Treat on 20th February, 2012, the extent of the subsoil (known as roadbed, in valuation terminology) in the titled ownership of the defendant, upon which there exists a public road and/or roadway and/or road in common law or under Statute;
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> (ii) The [defendant] appears to accept that part of the subsoil in his titled ownership constitutes roadbed upon which there exists a public road and/or roadway and/or road in common law or under Statute at the date of Notice to Treat at 20th February, 2012. However, the [defendant] disputes the extent of the public road and/or roadway and/or road at common law or under Statute on the date of Notice to Treat, 20th February, 2012. At the Arbitration hearing, the [defendant] referred to drawing 114-A28-PL05-REVB dated 6th February, 2015 as identifying the [defendant's] land boundary shown in red (which drawing is attached to the schedule hereto);
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> (iii) The [defendant] says that the schedule to the Compulsory Purchase Order and Notice to Treat is incorrect in purporting to identify the plot references as "public road" or "road" at the date of the Notice to Treat at 20th February, 2012.
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> (iv) The Council says that there is in existence a public road and/or road and/or roadway on the entirety of plot reference 106a.202 at the date of Notice to Treat at 20th February, 2012;
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> (v) The Council says that the defendant has taken no step to prevent the use of land in his titled ownership as public road/road/roadway over many years on the above plot reference;
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> (vi) The Council says that the defendant does not have, as of the date of Notice to Treat of 20th February, 2012 an unencumbered freehold title in circumstances where there exists a public road and/or road and/or roadway on the subsoil (roadbed) of the entirety of the plot reference 106.a.202 in the titled ownership of the defendant;"

4. The plaintiff claims that the carriageway on Corban's Lane is a roadway and thereby part of the public road, which services and permits vehicular traffic to pass and re-pass over the entirety of the plot reference 106.a.202 referred to in the CPO as of 20th February, 2012 and that the roadway constitutes a public right of passage, a highway and a public road. In evidence some witnesses suggested that a public right of way and public road had been established by 1991 as a matter of fact and by reference to the taking in charge of Corban's Lane sometime before 1978. A boundary wall was removed from the defendant's property in the mid-1970s and a footpath was installed on the northern side of the Lane opposite his property in 1991. This caused traffic to move south and encroach upon his property. It was submitted that the width of the public right of way was thereby expanded to include that area. If that is not so it was submitted that the use of that area by traffic thereafter created a public right of way over the area in the period between 1991 and the date of the issuing of the Notice to Treat on 20th February 2012 or the plenary summons on the 24th June 2016. It was also claimed that the defendant's right of ownership is consistent with the existence of a roadway or public road and/or road in common law or under Statute on the entirety of the plot reference 106.a.202 but that a public right of way exists on the entirety of the plot and that the title vested in the claimant and the subsoil is subject to that right of passage as at the date of the Notice to Treat or the date of commencement of the proceedings.

5. The plaintiff therefore claims a declaration that a public right of way exists in common law on the entirety of plot reference 106.a.202 referred to in the CPO as of the date of Notice to Treat at 20th February, 2012, as referred to in drawing DC-CPO-10 attached to the schedule to the statement of claim and a declaration that the road described as Corban's Lane constitutes a roadway, a public road, within the meaning of the Roads Act, 1993 (as amended) over the entirety of plot 106.a.202 and that the same road encompasses a public road right of passage over the entirety of the plot.

6. The defendant has entered a full defence and counterclaim. It is denied that the area in issue could as a matter of fact or law be described as a roadway, road or public road within the meaning of the Roads Act, 1993 or that the characterisation of the relevant plot is in anyway relevant to these proceedings. The plaintiff claims that he, his servants and/or tenants and licensees parked vehicles on a regular basis perpendicular to the buildings on his lands at Corban's Lane, up to the time of the Compulsory Purchase Order and had thereby asserted ownership of the area of land in dispute and consequently, denies that he has taken no steps to

prevent the use of the land in his "titled ownership" as public road over many years on plot 106.a.202 as alleged. It is also denied that the presence of a road surface or surface similar to that of a road which allows vehicular traffic to pass and re-pass over any part of the defendant's land or not inhibiting such traffic from so passing means that it is part of the public road. The defendant also denies that a public right of way existed over any or the entirety of plot 106.a.202, at any time prior to acquisition under the CPO. The defendant accepts that a certain portion of plot 106.a.202 constituted public road as defined in the Roads Act, 1993, but has not made any claim for compensation in respect of any such admitted portion.

7. By way of counterclaim the defendant claims to be the lawful owner of lands at Corban's Lane comprising buildings at the junction of Corban's Lane and Lough Bui, Naas, prior to the CPO together with sufficient land to accommodate parking for eleven motor vehicles perpendicular to those buildings up to the corner with Lough Bui. The defendant claims that this parking area was used by the defendant and/or his predecessors in title, their servants, agents, tenants, assigns, licensees and/or invitees to park vehicles from in or around 1974 until the date of the CPO. He maintained the surface of the parking area for his and their benefit. He also claims that at no time was there any public right of way over this parking area. It is admitted that when not occupied by lawfully parked vehicles members of the public were not prevented from walking or passing with vehicles over the parking area. No declaration or order was made by or on behalf of the Council or it predecessor in title deeming the parking area of any part thereof to be a public road.

8. In addition, the defendant claims that by asserting and publishing to the public at large that such part of the parking area as was situate in plot 106.a.202 was public road and therefore not in the defendant's possession, the Council slandered the defendant's title and such slander was motivated by malice and/or *mala fide* as the Council well knew the defendant's claim for statutory compensation would be reduced by such an accretion. It also claims that the Council was negligent and in breach of duty in so describing the parking area. The defendant therefore counterclaims for a declaration that the parking area was at all material times prior to its Compulsory Purchase in the ownership and use of the defendant and his predecessors in title and a declaration that the parking area constitutes land for the Compulsory Purchase of which the plaintiff is liable to compensation from the defendant in accordance with the Statutory Scheme. Damages are also claimed for slander of title, negligence and breach of duty.

Corban's Lane as a public road
9. The issue as to whether the area of Corban's Lane in dispute in these proceedings may be regarded as a public road is to be considered by reference to the common law and the provisions of the Roads Act, 1993.

10. Section 2 of the Roads Act, 1993 provides that a "road" includes:-

> "(a) any street, lane, footpath, square, court, alley or passage,"
>
> and
>
> "'roadway" means that portion of a road which is provided primarily for the use of vehicles"'.

A "public road" is a "road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority".

Section 11 provides that a road authority, in this case Kildare County Council, may, by order, declare any road over which a public right of way exists to be a public road, and if so declared, it will be deemed to be a public road the responsibility for the maintenance of which lies, thereafter, on the road authority. Section 11(6) provides:-

> "Every road which, immediately before the repeal of an enactment by this Act, was a public road shall be a public road".

Section 11(7) provides:-

> "Any road constructed or otherwise provided by a road authority after the commencement of this section shall, unless otherwise decided by such road authority, be a public road and it shall not be necessary for the authority to make an order under subs. (1) in relation to any such road."

11. It is common case that Corban's Lane is not the subject of a declaration made by the Plaintiff under section 11. However, it is submitted that it must be deemed to be a road under s.11(6) because Corban's Lane and the area in dispute in these proceedings was a public road prior to the enactment of s.11 and the repeal of other relevant provisions and must therefore, be deemed still to be a "public road".

12. Keane on "Local Government" (2nd Ed.) (p. 81), states:-

> "At common law what we nowadays refer to as the road or roadway, was termed the highway. The highway at common law meant a way over which the public had a right of way. As statute law began to impinge more and more, a distinction was made between highways maintainable at the public expense, formally by the inhabitants at large and highways not so maintainable… A public right of way is a right common to all persons and only the use of the surface of the land passes to the public for the purposes of passing and repassing…
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> Historically in Ireland, a public road came into existence in two ways. The first is by dedication, when the owner of the land dedicates to the public a right of passage over it and the public accepts the right thus offered to them. The second method is by express grant whether by conveyance or transfer.
>
> In practice, positive evidence rarely exists of dedication by the owner of the land in the form of a deed or other instrument. User by the public normally proves dedication and user by the public is also evidence of their acceptance of the dedication. Repair and maintenance by the road authority was also evidence of the dedication and acceptance of the road…"

13. Under the heading "Extent of [a] Public Road" in Keane (*ibid*. pp. 80-85) the learned author states that at common law everything between the fences or structures acting as boundaries to properties adjoining the public road including footpaths, cycling tracks and grass margins constitute the public road unless there is evidence to the contrary. This is the area of ground to which a local authority's obligation extended though the matter was not specifically addressed in the 1993 Act (see also Halsbury's Laws of England 4th Ed. paragraphs 113-115).

14. The concept of "taking in charge" is also relevant to the issues in these proceedings. The concept appears in the Public Bodies Order, 1946 which provides "a road 'in the charge of ' a road authority means a road the construction, repair and improvement of which is the duty of such road authority." Keane attributes the origin of the phrase to rating legislation noting that s.10 of the Local Government Act, 1946 provided that the expenses of a county were required to be charged over the whole of the county and that therefore any matter or thing for which the county had responsibility and gave rise to an expense was to be paid out of rates charged on the county. Thus, the maintenance of a road gave rise to an expense and was a charge on the county and this gave rise to the phrase that the road was "in charge" The Public Bodies Order, 1946 was ultimately repealed by statutory instrument S.I. No. 508/2002, the Local Government (Financial Procedures and Audit) Regulations, 2002 and the term "taking in charge" was not replaced, thereafter (Keane, *ibid*, p. 83). A road that was "taken in charge" was deemed to be a public road "for all purposes" including foot pedestrians under s. 2 of the Local Government Act, 1953. Previously, the definition of public roads was confined to roads which were not less than eleven feet wide "in the clear". The 1953 Act did not limit the delineation of the width required in this way. Since 1993, following the repeal of these enactments, any roadway which was a public road prior to such repeal remains a public road.

15. It is submitted by the plaintiff that the surface of the roadway in issue constitutes a public road and public right of way over which the defendant has no rights other than as an ordinary member of the public. The burden lies on the plaintiff to establish user by the public and a dedication by the defendant of the area in suit as a public right of way and acceptance by the public of that dedication. Although dedication may occur by express grant, this is unusual and does not arise in this case. Repair and maintenance by the road authority may also provide evidence of the dedication and acceptance of the area.

16. In *Holland v. Dublin County Council* (1979) 113 ILTR 1, Kenny J. considered the statutory history of the use of the term "public road" and "highway" and noted that in the statutes of the British Parliament dealing with the widening and construction of roads in Ireland, and in the statutes passed since 1921, the expression 'public road' is used instead of the term 'highway' which is used in Acts of Parliament dealing with roads in England. He stated:-

> "Th[e] public right of passage extends to the whole surface which has been dedicated to the public or which has been constructed as a public road… [W]here a highway has been set out or fenced at each side by metes and bounds, and afterwards, for a length of time, or in the course of time part only of the space so defined has been metalled and used as a road, the public right of passage, *prima facie*, unless it is proved to the contrary, extends to the whole space set out in the absence of clear evidence to the contrary, or with slight evidence of user of the land fringing the actual road, by foot passengers, or for other public purposes connected with the highway, even the owner cannot appropriate or obstruct the more or less waste and useless land adjoining the metalled road…"

17. These propositions are relevant to the proper designation of the area said now to constitute a public roadway having regard to the historical boundaries of the defendant's properties abutting onto Corban's Lane. In particular, the history of the forecourt area in issue and the removal of boundary walls from the perimeter of the defendant's property and its subsequent use are of importance in the determination of this issue.

History of the Defendant's property

18. A number of maps of the defendant's property were produced during the course of the hearing including a map annexed to the title deeds which is said to define the walled boundaries of his property prior to their removal. A number of aerial photographs of the property taken intermittently over the years were also produced indicating to some degree the physical changes to the Lane and adjacent buildings from 1973 to 2013. A number of witnesses to the traffic usage of Lough Bui and Corban's Lane and works said to have been carried out on the area in dispute by the Council gave evidence. Mr. Morrin gave evidence of his use of his property over the relevant period.

19. By Indenture of Conveyance dated 24th November 1975 Ms Maureen Cullen purchased a two-storey dwelling house at Corban's Lane from Daniel Donnelly more particularly delineated in the annexed map. By a subsequent Indenture dated 24th April 1990 Ms Cullen sold that property to Kieran Morrin, the defendant: the particulars of the property were described in that indenture by reference to the same map.

20. By Indenture dated the 24th January 1977 Daniel Donnelly sold a separate property with stores and offices on the corner of Corban's Lane and adjacent to the property sold to Mr. Morrin in 1975, to Radio T.V. Rentals Limited who thereafter sold it to ETV Limited on 27th October 1993. They in turn conveyed it to Mr. Alex Shiels on 12th March 1997, who sold it to Mr Edward Ennis on 25th February 2003. He then sold the property to Kieran Morrin under Indenture dated 19th May 2007. Each conveyance described the property by reference to the map annexed to the Indenture of Conveyance from Mr. Donnelly to Ms Cullen dated 24th November, 1975.

21. Mr. Morrin is the owner of the property at Dara Court and the retail Unit on the corner. When he first purchased the two storey building it was laid out in six bedsit units which he converted to three apartments. The dispute centres of what is in effect a forecourt area in front of these premises and the retail unit which is said to be used for car-parking and part of which is claimed by the Council to be a public road.

22. The title deed map prepared by Mr. Colm Hassett (Chartered Engineer) contains dimensions indicating the distance from the buildings outlined on the first purchased property to the then existing boundary wall of 20 feet or 6.095 metres. Mr. Morrin stated in evidence that he believed that the wall at the western side of his boundary was demolished in 1974. It extended out and formed a boundary wall with the garden wall that ran along the front of his properties. There were a number of applications for planning permission in respect of these properties.

23. Mr. George Willoughby, a chartered engineer employed by Kildare County Council since March, 1982 examined the planning files relating to the development on Corban's Lane and, in particular, the removal of a boundary wall, parking and traffic issues at the properties which are the subject of these proceedings. On 2nd February, 1973, a drawing was submitted by Mr. Donnelly outlining a proposed store and double garage which indicated an existing boundary wall adjacent to Corban's Lane. The application was refused on 26th March, 1973 because the proposed development was deemed to be premature in that the road layout for the area had not yet been determined and the proposed development would prejudice the Council's future plans for public roads in the area.

24. An application was made by Mr. Donnelly in May, 1974 proposing a changed use in the premises from a house to flats and from a garage to a shop. The drawing submitted by him showed an existing boundary wall adjacent to Corban's Lane with bollards and a hanging chain and contained a proposal to remove the existing boundary wall adjacent to Corban's Lane. A Mr. Brendan Ellis lodged an objection to the proposed change of use on 14th May, 1974 on the basis that the lane was narrow and overused by traffic seeking to avoid the main street. It was claimed that if the proposal were approved it would increase parking close to a very dangerous corner

and exacerbate an already serious hazard by siting a shop on a blind corner. In response to his objections and a letter seeking additional information from the UDC town clerk, Mr. Donnelly in a letter of 23rd July, 1974 indicated that he had now renovated the corner at Corban's Lane by removing the existing boundary wall. He noted that motorists were making a speedway out of Corban's Lane and that he had twelve car parking spaces available at his premises. On 23rd July, 1974, Mr. Donnelly submitted a drawing outlining the proposed change of use of the property, the removal of the existing boundary wall adjacent to Corban's Lane and eleven car parking spaces at the front of the property. The UDC notified him of a decision to grant permission for the change of use on 26th August, 1974 subject to conditions.

25. This was appealed to the secretary of the Department of Local Government on 9th September, 1974. In a letter dated 4th October, 1974 to the secretary, Mr. Donnelly stated that with the introduction of new traffic lights on the main street, the junction of Corban's Lane and South Main Street had now been closed to motor vehicles and was open to pedestrians and that a twelve-foot-high boundary wall at the junction of Corban's Lane and Lough Bui had been removed which had improved the sightlines at the corner and that an extensive new car park had been provided at the front of the residential property and the proposed shop. A letter from the complainant, Mr. Ellis to the secretary, dated 4th November, 1974, accepted that the sightline had been improved by the removal of the boundary wall but that the positioning of large stones on the tarmacadam forecourt presented a greater danger. He complained that parking near the corner would be a hazard particularly since, following the erection of traffic lights at South Main Street, the volume of traffic using Corban's Lane as a bypass had increased. In his reply to that objection, Mr Donnelly by letter dated 11th December stated amongst other things, that the stones were placed on the tarmacadam area "merely to denote that it is private property" and "to discourage persons from being in and about the dwelling-house". On 25th August, 1975, the Minister for Local Government confirmed approval of the grant of planning permission for the conversion of a house into flats and the garage into a shop at Corban's Lane. I am satisfied on the balance of probabilities that the existing boundary wall at the edge of Corban's Lane on the properties now owned by Mr. Morrin was removed by Mr. Donnelly between 17th May, 1974 and 23rd July, 1974.

26. Corban's Lane originally provided vehicular access to Naas town centre via a continuation through a narrow carriageway up to Murtagh's Corner. It was closed to motor vehicles and access to the junction with South Main Street via that stretch of Corban's Lane was thereafter restricted to pedestrians and cyclists in or about October 1974. The area of the Lane in the vicinity of Dara Court was not at that time served by footpaths. Traffic flow increased but was never very substantial in the 1970s through Lough Bui which was a somewhat wider carriageway and was accessed from Naas town via a junction about 40 metres down from Murtagh's corner. At the junction of Lough Bui and Corban's Lane there was a sharp corner. There was restricted visibility also caused by a wall prior to its removal. An aerial photograph from 6th June 1973 indicates the corner in an undeveloped state and the wall extending into the junction with Corban's Lane and the sharp angle of the corner caused thereby. A photograph from 1986 appears to show cars parked in front of Nos. 2 and 3.

27. An Ordnance survey map image from before the time the houses were built at Dara Court suggests cottages fronting onto the Lane with no footpaths in the vicinity.

28. An ordnance survey map of Corban's Lane of 2000 does not indicate a physical boundary between the defendant's properties and the roadway. However, it shows a protuberance from the next-door property No.1 into Corban's Lane which caused a pinch effect on the carriageway at that point. That property clearly had a front and side boundary wall.

29. I am satisfied from the planning permissions sought by Mr Donnelly that the walls of the boundary to his properties still existed up to 1974 and that there is no suggestion or evidence that the property which he owned or any part of it was being used or had in any way been dedicated as a public right of way up to that point. It does not appear likely to me that the taking in charge of Corban's Lane, whenever it occurred, before February 1978, encompassed the land which was the subject of those applications and decisions and which in my view, was clearly included in the subsequent conveyances to his successors in title.

30. Mr. Reel, an engineer employed by the council between 2000 and 2014 gave evidence that the schedule of the Road Register of Naas Urban District Council date stamped 2nd February 1978, and sealed on the 21st February 1978, listed Corban's Lane as a road in the charge of the council from the junction of South Main Street Naas to the junction of Blessington Road. It stated its length as 558 metres and its width as 4.57 metres. He was unable to state whether the width given was measured from boundary to boundary and/or included footpaths nor could he say precisely when the Lane was taken in charge. He was satisfied the road as described in the schedule did not include car park spaces in the forecourt of the defendant's properties and that the car parking spaces there had not been taken in charge.

31. I am satisfied that Corban's Lane was taken in charge by the council some time before 1978. I am also satisfied that the area comprising the car-parking spaces in the forecourt of the defendant's properties were not taken in charge nor should they be deemed to be part of the width measurement provided in the schedule having regard to the location of walled boundaries which clearly existed up to the mid-nineteen seventies. The taking in charge as a matter of probability, was confined to the area between the boundary of the properties on either side of the carriageway which were then extant and did not include any element of Mr Donnelly's properties within the walled boundaries which I have described and are clear from the title map. I am not satisfied that the area "taken in charge" was simply extended by the removal of the walled boundary into any part of the defendant's property hitherto defined by the boundary walls.

32. The plaintiff nevertheless claims that the area in issue became a public road because, as Mr. Reel stated in evidence, it was used by the public and became a public right of way over which vehicles and pedestrians had the right to pass and repass and was repaired, maintained and cleaned by the plaintiff in subsequent years. It is submitted that once the boundary walls were removed the whole space between the buildings on the Lane became part of the public road or roadway. In particular, it is claimed that following the construction of a footpath on the northern side of the Lane in or about 1991 the carriageway used by vehicles was pushed towards the other side of the Lane. It is claimed that the footpath therefore gave rise to public use of part of the now un-walled area as a result of which a public right of way was created over that area. If that is so it is claimed that parking by others in that area does not detract from its status as a public road. I am not satisfied that as a matter of law or fact the area in issue was the subject of a right of way before 1991. Therefore, the court has also to consider whether the use made by the public of the disputed area in the years that followed and the facts and circumstances of the case establish as a matter of probability that there was such public use and whether the landowner dedicated any part of his land to such public use so as to constitute a public right of way.

The public right of way

33. In *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279, Costello P. considered whether there had been a dedication of land as a public right of way and stated:-

> "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 an owner of land to members of the public to

> walk on pathways on his land and the dedication to the public of those pathways. To establish a public right of way what has to be proved is an intent on the part of the owner to dedicate his land to the public, an actual dedication, and acceptance by the public of the dedication."

This well-established principle was applied by O'Leary J. in *Collen v. Petters* [2007] 1 I.R. 790 (para. 28). In that case, O'Leary J. noted that the law had developed additional tenets to cater for cases where dedication was to be presumed as stated by the Supreme Court in *Connell v. Porter* [2005] 3 I.R. 601, in which Ó Dálaigh C.J. stated at pp. 605 and 606:-

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

34. In *Bruen & ors v. Murphy & ors* (unreported, High Court, 11th March, 1980), McWilliam J., considering the methods by which a public right of way could be established, stated:-

> "The only methods by which a public right of way can be established are by showing use from time immemorial, by relying on creation by statute or by proving dedication to the use of the public and acceptance of such use by the public. No question of user from time immemorial or creation by statute arises here. Therefore, evidence of dedication is essential to establish this right of way. In this connection it must be emphasised that a public right of way cannot be acquired by prescription although user may provide sufficient evidence to support a presumption of dedication. The user need not be for any particular length of time but it is only evidence of dedication and must be such as to imply the assertion of the right with the knowledge and acquiescence of the owner of the fee. See *Estate of Thomas Connolly* (1871) 5 I.L.T.R. 28; *Folkstone Corporation v. Brockman* (1914) A.C. 338; *O'Connor v. Sligo Corporation* 1. N.I.J.R. 116."

35. In applying these principles in *Walsh and Cassidy v. Sligo County* Council [2014] 4 I.R. 417, the Supreme Court (per Fennelly J.) stated as follows (at p. 424 et seq).:-

> "(3) A public right of way is a highway. The general public has the right to pass and repass at all times across the land over which the way runs….
>
> (5) Even if it is not maintained by the Public Road Authority, a public right of way is in law a highway. It confers the unrestricted right of the general public to pass and repass at all times of the day or night, and at all seasons without notice to, or permission from, the landowner over whose land the way runs…
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> (7) The law of public rights of way is of ancient origin. Except where it can be shown to have existed from time immemorial, or is created by statute, a public right of way is established by proof that the landowner dedicated the way to the public. Dedication may be inferred from a consideration of all the circumstances."

The court stated that a highway is a public road where it is taken in charge by the local authority which was obliged by statute to maintain and repair it. The court summarised the effect of the authorities on the proofs required:-

> "(74) It follows from these authorities that, where there is evidence of long uninterrupted user as of right of a way by the public, the court, depending on the duration, frequency, and intensity, of the user, may infer that the owner dedicated the way to the public and that the public accepted that dedication. Whether there was dedication is a question of fact, though it is never necessary to point to any express act of dedication. The process is one of inference, drawn from the strength of the evidence of user, and the fact that the user was as of right. It is relevant to see whether the landowner took any steps, to use the language of Lord Blackburn, to "*disabuse*" the public of their belief that they had a right to use the way.
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> (75) In many of the cases it is said that dedication will be "presumed", but that does not mean that there is a presumption of law. It is always a question of fact, to be decided in the light of all the evidence. Many of the earlier cases deal with verdicts of juries and the directions given to them. In our courts, these matters are no longer decided by juries. The tribunal of fact will be a judge. Where a judge disregards preponderant evidence tending only in one direction, he or she may well be treated, in case of Appeal, as having erred in law. If there is strong, clear and uncontradicted evidence of user as of right and no evidence or argument to suggest that the landowner could not or did not dedicate, it might be considered perverse of a court to decline to find dedication…
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> (78) Since the inquiry is into whether an intention to dedicate can be inferred, it follows therefore that the quality, duration, frequency, and intensity of the public user will be highly material. So also will the degree of awareness of the landowner and his or her attitude; in short, all the surrounding circumstances.
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> (79) Part of the evidence of dedication, in combination with user, may be the fact that public money has been spent, with the consent of the landowner, on the repair or maintenance of the route."

Indeed, it was noted by Ó Dalaigh C.J. in *Connell v Porter*, at page 606 that where public expenditure in the repair, cleansing or lighting of an area has occurred and that the landowner has permitted the expenditure, he/she could not be heard to say that the roadway on which he had allowed public money to be spent is a private road; such expenditure was strong evidence from which dedication could be inferred. Furthermore, it is clear from the authorities that no particular minimum period of public use is required to establish a right of way.

The Public Use of the Disputed Area

36. I am satisfied on the evidence adduced that between 1974 and 1990 planning permission had been given to Mr. Donnelly to develop his property and that he did so. He provided a number of car-parking spaces broadly in line with drawings which had been submitted during the planning process. I am also satisfied that during this period these parking spaces were used by patrons of his premises or tenants occupying them. I am satisfied that the forecourt was open and unfenced for this period and that vehicles parked regularly in the forecourt area and in front of the shop. It is clear from the evidence, the maps and the photographs that the traffic using Corban's Lane faced a difficult junction where it met Lough Bui and that this was heightened on occasion by the parking of cars outside the defendant's premises: the junction on such occasions would have to be negotiated by reducing speed and with care by those travelling in both directions. It was easier therefore to negotiate the corner when no vehicles were parked there. On occasion I have no doubt that traffic in doing so impinged on that area. The open area could also be traversed by members of the public such as local school children if there were no cars parked there. However, this is a feature of many open forecourt areas in our cities and

towns and does not connote necessarily that the public have a right of way or that the area may be deemed a road or roadway. I am not satisfied on the evidence that the owners of the property intended to dedicate or dedicated any part of the property to a public right of way during this period. The owners continued to exercise control over and permit access to the area by customers and tenants using the two premises. I am not satisfied that their acquiescence to use of the surface by others whether by walking, parking or driving over it gave rise to a public right of way as claimed by the plaintiff up to 1991.

37. In 1991 a footpath was constructed as part of a development on the northern side of the Lane. This encroached on the carriageway for vehicles and pushed it towards the properties now owned by the defendant. It had the effect without any act on the part of the defendant of compelling vehicles travelling along Corban's Lane towards Naas to drive over the tarmacadam area the subject of these proceedings. The footpath was part of the planning permission granted by the local authority to the owner of the property on the opposite side of the road. The planning authority must have granted this permission in the knowledge that this would happen and without any adequate consideration of the effect of the construction of the footpath on the flow of traffic in the vicinity of the corner of Corban's Lane and Lough Bui or the rights of the property owners on the opposite side of the road.

38. Mr. McGearailt, a civil engineer with considerable experience in road traffic works in urban areas, gave evidence on behalf of the plaintiff. In 2013, he undertook an assessment of the road and traffic aspects of the CPO arbitration case on behalf of the plaintiff. He said that the footpath installed in or about July, 1991 on the northern side of Corban's Lane was visible in Aerial Photograph 3 in front of a new development of apartments built at about that time. He believed that the footpath was two metres wide and continued into the pedestrianised section of the lane leading to Murtagh's Corner. He accepted that the western side of the footpath was constructed on what was originally part of the roadway. As a result, the roadway was displaced southwards by two metres.

39. In submissions the plaintiff accepted that the footpath itself is to be regarded as an encroachment on the public right of way then existing for which the council granted planning permission and tolerated in and from 1991. The plaintiff submitted that the right of way, if it did not exist prior to 1991 over the land in issue prior to the installation of the footpath would not have accrued between 1991 and the date of commencement of the 1993 Act and s.11(6) thereof: that time was too short. In those circumstances it must have come into existence between 1991 and the date of commencement of proceedings namely 24th June 2016. However, the plaintiff's core submission was that there was a public right of way and road on Corban's Lane which changed its width after 1991and at common law the changed width must be regarded as incorporated into the public right of way and road thereafter.

40. In an aerial photograph from December, 1996, Mr. McGearailt pointed to a central white line laid on the roadway and running from the Kilcullen Road junction around the length of Lough Bui and then around the right hand bend into Corban's Lane peetering out just before it passed the single storey shop building. He suggested that such marking was not usually inserted on road widths of less than 5.3 metres. He considered that on the Lough Bui side, there was at least a three metre space for a carriageway. He was satisfied that the width was carried around into the lane. He deduced that there was an equivalent width on the opposite side to accommodate traffic coming in the opposite direction and turning left into Lough Bui. This road marking did not appear in an aerial photograph of April, 2007 which he believed suggested resurfacing of the road. While he had some difficulty in accepting that the width as recorded in the schedule for that section of Corban's Lane "taken in charge" of 4.57 metres was accurate, nevertheless he appeared to be satisfied that the original width of the roadway on Corban's Lane before the insertion of the footpath was five metres wide up between the old boundary walls. He was satisfied that if one made an allowance of two metres for the footpath into that area, one would be left with only a three metre surface for two-way traffic on the carriageway. However, he was satisfied that well in excess of that width was available as a carriageway beyond the footpath since 1991. He concluded that since a planning condition for a footpath was imposed by the local authority, it was evident that those concerned believed that the footpath would not cause an obstruction on the carriageway for traffic. He concluded that a public roadway must have evolved by that stage to a point where it included the width of the footpath (two metres) plus the width of a two lane road of approximately six metres. Thus, the road had evolved from a width of approximately five metres to eight metres approximately at least from the time when the footpath was inserted and the centre line drawn. He stated that the line marking was in a similar position to the old garden wall running along Corban's Lane in front of the defendant's properties.

41. On Mr. McGearailt's evidence, it seems to me that there was an adequate carriageway before the insertion of the footpath for the carriage of two lanes of traffic with some difficulty which required caution at the intersection of Corban's Lane and Lough Bui. If, as the defendant claims, parking was taking place at that time which caused some obstruction and what might on occasion be regarded as a hazard along the approach to and at the bend or turn from Corban's Lane into Lough Bui, it is clear those difficulties must have caused motorists further problems when negotiating the corner after the installation of the footpath. However, I am not satisfied that this justifies an assumption by the local authority that it could simply treat this area, which the defendant's tenants and the shops customers used for parking, as a public roadway thereby effectively constituting a new carriageway heading west on the Lane created in effect by the construction of a footpath.

42. I am satisfied that the owners of that area of the property continued to exercise and assert their rights over the parking areas which I am also satisfied extended up to the area of the old boundary wall. It is the case that traffic veered into and over the defendant's property during this period taking advantage of the safer negotiation of the bend or turn when vehicles were not parked there.

43. Mr. McGearailt gave evidence of his observations of double yellow lines laid by way of parking restriction on Lough Bui and the northern end of Corban's Lane in front of the footpath opposite the defendant's property and visible in the aerial photograph from 2007. These restrictive yellow lines were not continued into the area in front of the defendant's property on the corner or in front of number 2 notwithstanding the existence of a potential hazard caused by vehicles parked on the corner. He accepted that parking at the end of the double yellow lines could be just as hazardous as parking where the lines were identified and that on the opposite side of the road the double yellow line continued for some distance on the western and northern side of the laneway. He would normally expect a restriction placed on parking on a bend to be placed on both sides of the road for more or less the same distance. He accepted that it was possible that the authorities had no entitlement to put double yellow lines on Mr. Morrin's property. It seems likely to me that if the authorities believed that the area was a public roadway and/or had been taken in charge, the double yellow line would have been continued into this area.

44. Mr. McGearailt also accepted that it was normal for a local authority when resurfacing an area of roadway to take note of road markings such as centre lines. Following the resurfacing of the area, the centre line observable on the photograph from 1996 was not replaced and he accepted that it was reasonable to assume that a decision had been made not to do so. However, I have no direct evidence to suggest why it was not re-instated.

45. Mr. McGearailt gave evidence that the width of the carriageway between the footpath on the north side of the laneway and the buildings on the defendant's property was approximately 11.2 metres. The measurement of the available carriageway between the kerb of the footpath and the north border of area 201 on map A1001A or the south border of 202 on the same map was measured by

him as seven to eight metres decreasing as one moves eastwards to six to seven metres. This is an area in which it is said a number of car parking spaces were used and available in front of the buildings during the period 1991 to 2007. Mr. Reel claimed that the metalled carriageway measured six metres at the time of trial. Mr. McGearailt opined that it measured seven to eight metres at the bend or junction area of the lane, tapering to six metres when one progressed further along the lane. It is clearly suggested that the width of 4.57 metres as recorded in the schedule of what was said to have been taken in charge must be regarded as an average width for the length of the lane but also as defining a much narrower road than the one now claimed to exist.

Parking

46. Mr. Conor Furey, a chartered engineer submitted a report clarifying the origins of the boundaries that existed on the site. He sought to tie the title deeds into a digital survey mapping of the lane. He was satisfied that the resulting representation of the lane when the hand drawn title deed map was superimposed on the digital map was extremely accurate. He produced a map A005 which he stated contained the exact dimensions of the property and proposed parking spaces as identified in the application for planning permission in 1974 to Naas UDC. These dimensions were superimposed on top of the title deeds and the baseline map that had been agreed between Mr. McGearailt and Mr. Morrin. The car parking spaces in the planning application when superimposed on the map gave rise to a small section of car parking space. Otherwise, he was satisfied with the accuracy of the map produced within 1%. He accepted that the 20 feet of forecourt for use as car parking space was generous but noted that it was the subject of the planning permission applied for and granted and was accommodated within the old boundaries of the wall save for a small section of car park space number 1 which protruded outside the title deeds boundary slightly.

47. Mr. McGearailt also produced a drawing in which he included what he contended was a map of the parking activity observed from inter alia historical photographs. It showed area 202 alongside which he drew a number of cars. It was intended to show the manner in which a number of vehicles might reasonably fit into the forecourt area in front of the buildings. This area was drawn with a width of six metres at the end tapering westwards towards the corner. It showed a variety of sizes of vehicles parked tight to the building, approximately ten to fifteen centimetres clear of the wall. Eight vehicles were shown in all, parked nose into the wall. The last three of these vehicles protruded over the green line into what was described as the carriageway and, therefore, did not fit in the area provided. The final vehicle was shown parked parallel in front of the shop. The length of the vehicles varied from 4 to 4.8 metres in length. Mr. McGearailt was cross-examined about the dimensions of the vehicles. He accepted that the dimensions may differ and some of the vehicles represented protruded into the area in dispute and that persons with longer vehicles might take a risk of their vehicle protruding out into what he described as the carriageway.

48. I am not satisfied that this exercise by the engineers in superimposing maps, one on another, to demonstrate the spaces in which cars were most likely parked or intended to be parked as a result of planning permission or the alternative exercise of producing a drawing said to demonstrate that cars or vehicles parked tightly to the wall are unlikely to protrude into the disputed area, should be regarded as determinative of this matter. Like much of the evidence adduced in the course of the hearing concerning historical photographs and tarmacadam lines, it involves a number of underlying propositions and/or variables which cannot be definitively established or indeed eliminated and are produced on the basis of propositions which are not necessarily or uniformly consistent with the reality of the use of the area for parking as described other credible witnesses.

49. There was very little reliable evidence from the plaintiff's staff as to the works, maintenance and cleansing carried out by it various departments over the area in dispute: no records were produced in that regard. There was no attempt by the plaintiff to impose any parking restrictions in particular, on the corner to address the frequent obstructions or hazard created by vehicle parked there: indeed it seemed to be accepted by Mr. McGearailt that this was because of a possible issue as to the ownership of the area in which such restrictions might be placed. These restrictions were present on the northern side of the Lane. I am satisfied to accept the evidence of the plaintiff and the witnesses called on his behalf concerning the continued use of the area for parking as described by them. I do not accept that the parking was an incidental and unauthorised intrusion by third parties on an established right of way. I am not satisfied that the evidence adduced is sufficient to establish that the local authority accepted responsibility for the maintenance, repair or resurfacing of the area in dispute from which the court should infer a dedication by the defendant of the area as a public right of way: such evidence as was advanced in that regard must be assessed in the context of the entire circumstances and evidence in the case.

50. A number of witnesses gave evidence concerning the user of the area in front of the defendant's properties. Mr. Kirrane worked as a town clerk in Naas for approximately ten years from August, 1995, prior to which he worked at Kildare County Council. He walked the town regularly. He stated that Corban's Lane was subject to Naas Town Council's cleaning and maintenance programmes and that staff would carry out cleaning on a weekly basis. He confirmed that all the areas which were in the Town Council's ownership or control would be cleaned. He said that all of Corban's Lane was cleaned in its entirety without any restriction on cleaning footpaths or roadways. He did not recall car parking spaces being delineated but had a memory of cars parked in the forecourt area of Dara Court. He did not recall any signage indicating private property on Mr. Morrin's property. He considered the forecourt area to be part of the public road on Corban's Lane. He stated that parking in that area was not regulated in any way because it was not causing any obstruction to the free flow of traffic.

51. Mr. Cleere was a volunteer with Naas Tidy Towns and lived in Naas since 1996. He recalled the footpath on the lane opposite Mr. Morrin's property. He and other volunteers would pick up litter in the forecourt area of the defendant's property on a regular basis during the months of May, June, July and August. He recalled that cars were parked on the forecourt area from time to time and walking across the forecourt area when it was not obstructed by cars.

52. Mr. Flynn, a senior executive engineer with Kildare County Council since 1998 gave evidence that there had always been free unrestricted two-way movement of traffic along Corban's Lane and Lough Bui during his time in Naas. He always viewed the open space in front of Dara Court as public space which was unrestricted. He said the Council was aware that pedestrians, in particular, school children and parents, passed over the forecourt area. He said that if there was any trip hazard along the forecourt that the Council would treat it in the same way as a normal public roadway in terms of maintenance. However, there was no direct evidence that any such maintenance was carried out in the forecourt area by the Council at any stage. No documentation to that effect was ever produced. He also expected workers to sweep and be alert for any potholes that appeared in the forecourt area and duly maintain it. He said that no one ever objected to a sweeper being sent to tidy the area but, had any objection been made, it would have been considered. It would have been the Council's obligation to remove any litter in the area. The Council had a mechanical sweeper which would sweep the disputed area on a regular basis if cars were not parked there. He had no recollection of any complaint made by Mr. Morrin regarding an encroachment onto his property by an ESB duct.

53. Ms. Veronica Lyons was a consultant engineer who had previously worked with the Council. She lived in Naas for almost forty years. She was a regular user of Corban's Lane which she said had a two-way traffic system without any restriction. She did not recall any demarcation of parking spaces at the corner of the charity shop and the corner of the road jutting out onto the bed of the road. She stated that one would travel around the bend of the lane at a slow pace and keep to the kerb to facilitate oncoming

traffic. She recalled a number of parking spaces in front of the two-story building and that there was safe parking for one parallel space outside the charity shop. If persons parked in another way, it would be at their peril as the spaces were not standardised spaces. She took photographs of an area of road where two different types of pavement were visible. She pointed to a joint along the road between the forecourt area and the area public traffic was using as a carriageway at the time. The line was that it was said to represent the edge of the carriageway. She believed that at some stage the Council surfaced the road and that anything inside the joint could be characterised as used for parking and anything outside the joint was an established public right of way. She said that as far as she could remember from the last forty years, people had been using the contested area of 202 as a public right of way. She considered the Council would not have paved an area in private ownership that it did not need to pave but if it was being used by cars or public traffic, they would have paved it if it was in poor condition. She believed the laying of tarmac may have begun in the mid-1970s when the wall came down. She agreed the laying of the tarmac had nothing to do with the issue of title but it was based on the use of the area. She was happy to accept Mr. McGearailt's representation concerning the parking of vehicles at the site.

54. Mr. Devlin, a chartered surveyor was engaged by the County Council to attend a site meeting in relation to Mr. Morrin's property on 11th September, 2014. He was satisfied that yellow dots to which he was directed on the carriageway by Mr. Morrin represented the original wall on the property which was demolished in the 1970s. They were approximately in the middle of the carriageway at the most western point. He agreed that a drawing presented to him of the forecourt prepared by Mr. McGearailt showing eight nose to kerb parking spaces and one parallel space was a fair description of the capacity of the forecourt and for parking outside the shop without encroaching on the public road. He believed that Mr. Furey's map representing eleven car parking spaces only arose in the planning permission in 1974 and did not reflect the reality on the ground. Since the demolition of the wall, traffic on Corban's Lane travelled over the disputed area so the extra car parking spaces did not exist and could not be allocated or occupied as suggested in Mr. Furey's map. He stated that the forecourt could only have accommodated nine car parking spaces and that carpark spaces one to five or six or seven could not have been used for car parking as shown because they would have encroached on traffic: that would have been dangerous for those parking and blocked the road.

55. Mr. Reel, the engineer with Kildare County Council between 2002 and 2014 recalled that roadworks on the lane were carried out in 2011 and 2012 which comprised localised patching and improvements to certain sections of the roadway due to wear and tear which were paid for by the Council. There was one instance of work carried out in Corban's Lane which involved the repair of a trench at the side of the road opposite Mr. Morrin's property. Resurfacing works were carried out which included a section of the roadway on Mr. Morrin's side of the road. Some potholes inside the area marked 201 on the map were filled in and resurfaced. These were in the forecourt area rather than the roadway and they may have been repaired because people were passing and repassing over the area: they were next to the road resurfacing works. Mr. Morrin complained about the works and the encroachment of the works on his property at the time. He did not accept that the CPO area 202 was comprised of carparking spaces and said he had never seen vehicles parked in the formation set out in Mr. Furey's drawing. If they had been set out in that formation, it would be very difficult for vehicles to pass both ways through the lane. He considered the area to be a public road. He stated that the Council swept, salted and resurfaced the property in area 202. He claimed that if the maps drawn by Mr. Furey were correct, there would be no way for cars to pass each other. This was not the situation that operated on the ground where cars could pass each other reasonably along that section of road and around the corner. In his experience from 2000 to the present, one could travel across the area encompassed in area 202 without impediment. In his experience of eighteen years living in Naas, he had never experienced encroachment of the traffic flow in Corban's Lane by cars parked in the manner contended for in the eleven spaces outlined in map A1-002. If that situation pertained, he said it would amount to a major traffic hazard at that location which was not his experience. He had not carried out any measurements.

56. Mr. Morrin said he was familiar with the property since the late 1960s. He purchased the two-story premises in Dara Court consisting of six bedsits which he renovated and converted into three apartments which eventually became offices. Before he purchased the property, he had a planning search conducted and was aware of the planning permission and conditions attaching to the premises. He understood that planning permission allowed for car parking for eleven cars across both properties. When he purchased the property in 1990, seven spaces applicable to the properties at Dara Court were available. Working from the drawing A1-005, he considered that spaces 5, 6, 7, 8, 9, 10 and 11 were applicable to the purchase in 1990. He states he parked freely and unhindered at the property as did his tenants.

57. He purchased the shop on the corner in 2007. There was car parking activity in the area in front of the shop. He states that before he purchased the property, cars parked nose in at the building and would occasionally park parallel. He stated that cars and vans would have parked in this fashion at the premises. When he purchased the shop in 2007, he checked the planning status of the property and the parking spaces allocated. He stated that parking activity in front of the shop was quite heavy and people parked in parallel and herringbone and nose-in fashion. There was a lot of activity and no interference by the local authority. The properties were located between two paid parking areas and there were yellow lines all along the laneway except at his property. The area was heavily patrolled by traffic wardens and none of his tenants or clients were ever given a ticket or asked to move on by anyone from the local authority or a member of An Garda Síochána. He also employed a company, Nationwide Controlling Parking Systems Limited to patrol the car parking at night from 2006. He erected signage in relation to parking at about the same time. He employed a company to resurface the tarmac in the forecourt in or about March, 2016. This resurfacing did not occur outside the charity shop. He considered spaces 1, 2, 3 and 4 on map A1-005 applied to the charity shop.

58. Mr. Morrin stated he wrote a number of letters to the Council objecting to Part 8 of the Friary Road/Corban's Lane Improvement Scheme which was then being carried out by Naas Town Council. In a letter dated 25th March, 2008 to the town clerk, he raised an objection on the grounds that his property which was included in the scheme was currently used for twelve parking spaces. He noted the development would have resulted in most of the existing parking on Corban's lane and Lough Bui being removed. The reference in the letter to twelve parking spaces should have been to eleven.

59. Mr. Morrin also gave evidence that an ESB duct or trench was dug on the public footpath from a shopping centre which was being built by Marshalsea Developments further up on the northern side of Corban's Lane. It ran from the shopping centre down across the shop property and then cut across to go up to Lough Bui and onto the defendant's property at or about spaces 1 and 2 on Mr. Furey's drawing. The duct then proceeded up the footpath at Lough Bui. He sent a letter of complaint to McDermott O'Farrell Limited on 17th February, 2009 enquiring as to when the ESB duct would be removed. He sent a follow up letter of 30th March, 2009. The duct was not removed. A query was raised in relation to his title.

60. In another letter dated 1st February, 2011 to the town clerk, the defendant complained that the Town Council were trespassing on his property outside the charity shop and carrying out surfacing works on the public road on his property without his permission. He noted that the Council was well aware of the boundary to his property as a result of the CPO process.

61. Mr. Morrin disagreed that the Council cleaned the forecourt area because this would not have been possible because cars were

parked there constantly. Parked cars would have precluded cleaning along the kerb with a sweeper or salting the area. He said he did not dedicate his forecourt area to public use. He maintained his property and he and his tenants parked vehicles on the property. He, at all material times considered it to be his private property. There was never any communication from the local authority that his property might be the subject of a declaration as a public road. While there may have been people crossing the property when it was not occupied by parked cars, this was not done with his specific acquiescence or consent. He stated that he filled in the potholes in his carpark which extended twenty feet out from his building. He did not fill in potholes on the public road. He never had a conversation with or saw any personnel from Tidy Towns cleaning up his property. He did recall telling unauthorised persons who parked on the property to leave. However, parking signs had been erected on the property since he bought it in 1990. He accepted that pedestrians walked across the area if there were no cars there and he would never complain to a pedestrian about doing so.

62. Mr. Paul Murphy, a retired army officer who had lived in Naas for over 30 years gave evidence that he was familiar with Corban's Lane. He would have parked outside the charity shop frequently as his children went to the local schools and when he went socialising on the main street he parked his car there overnight collecting it the following day. He frequently saw cars parked nose- in at the corner over the years and in front of the other property. Sometimes, if there was space, cars would park parallel to the buildings and there was varied parking in the forecourt area. Sometimes, at the corner, cars would not park at the very edge of the building but would park where the shop window was located some distance from the edge of the corner. Traffic flowed in both directions but took great care and caution, particularly at the corner. He said that the cars could not pass simultaneously if there were cars parked there. A driver would have to slow down approaching the corner and take it with care. He could not, however, recall a situation where the driver would have to stop the vehicle to allow the opposing vehicle to take the corner. The amount of caution required depended on the manner in which the cars were parked at the corner. If there was space to proceed around the corner created by the absence of parked vehicles, he would take advantage of that but he always exercised caution in negotiating it. He accepted that the mark between the tarmac which delineated different coloured tarmac represented the angle at which traffic took the corner when vehicles were not parked at the charity shop and that it could also be the angle at which cars would take the corner depending on the manner in which cars were parked there. He parked in the forecourt with Mr. Morrin's explicit permission. He knew other members of the public would park in the forecourt from time to time at night. As a matter of prudence, he would endeavour to park his car in one of the spaces away from the corner of the charity shop.

63. Mr. Adrian Thomas operated a rental agency at 2 Dara Court. He stated that cars would be coming and going outside the premises all day. Cars would park nose-in, reverse in and park parallel to the charity shop. Cars would park right up to the corner at the window of the shop. He was aware that the landlord had retained a clamping company which was employed to clamp cars parked against the building blocking access to it and which had no permission to be there. I accept the evidence given by Mr. Morrin, Mr. Murphy and Mr. Thomas and insofar as there is a conflict between the evidence given by them and other witnesses concerning the history and use of the area in dispute I accept their evidence.

64. I am satisfied that there was a considerable area within the boundary defined by the title held by the defendants in which parking habitually occurred during the relevant period. The parking of vehicles in this area became more difficult and created more difficulties for traffic when the carriageway was moved southwards following the construction of the footpath on the northern part of the lane. Nevertheless, I am satisfied on the evidence that notwithstanding the difficulties caused by the increased flow of vehicles over this area after 1991, vehicles continued to be parked there with the permission of the owner whether by tenants or by customers of the shop. I am also satisfied that this on occasion must have given rise to an obstruction of and hazard to traffic within the area and negotiating the bend using that side of the carriageway. Of course this difficulty was lessened when no cars were parked there.

Conclusion

65. The court is not satisfied that the plaintiff has proven as a matter of probability based on sufficiently cogent evidence that there was established, between 1991 and 2012 or 2016 or from before 1991, a public right of way over the area in dispute or its dedication as such by the property owners who were still exercising their rights over it. By 1991 Mr. Morrin was the owner of the property at Dara Court. By 2007 he was also the owner of the T.V. rental shop that was operating on the corner. I am satisfied that tenants and patrons of these premises were permitted by the respective owners of the premises to park their vehicles, whether perpendicularly, in a herringbone fashion or sideways outside the premises. On occasion I have no doubt that this caused difficulties for traffic negotiating the corner and that parking particularly at or near the corner may on occasion have caused a hazard. This was an inevitable consequence of the construction of the footpath which should have been anticipated by the local authority. However, I am satisfied that the owners were exercising control over the area in issue having obtained their title by reference to the map which outlined that it was vested in them. They did not prevent vehicles from driving over the area or pedestrians from walking over it when there were no vehicles parked there. I am not satisfied that their acquiescence in the flow of traffic onto their land which was forced upon them by circumstances created by the local authority could in any sense be regarded as a dedication of parts of their property as a public right of way.

66. For its part the local authority took no steps to make a declaration in respect of this area under section 11 of the Roads Act 1993 following its enactment and commencement.

67. The relief claimed by the plaintiff is for the reasons set out refused.

The Counterclaim

68. The defendant seeks a declaration that the area in suit was at all times prior to its compulsory purchase by the plaintiff in the ownership and use of the defendant and his predecessors in title. He also claims damages for slander of title because the plaintiff published or caused to be published a notification that the land on 106a202 was a public road and not therefore in the possession of the defendant.

69. I am satisfied that the defendant is entitled to the declaration sought in paragraph 1 of the relief claimed based on the findings of fact made by the court.

70. I am not satisfied that there is any basis for the claim for damages based on slander of title. It is clear from s.42 of the Defamation Act 2009 that the counterclaimant must establish that the statement upon which the claim was based was referable to his property, untrue and published maliciously and that he was caused special damage as a result. Furthermore, he must establish that the publication was calculated and likely to cause him financial loss in respect of his property. I am satisfied on the authorities cited that a claim based upon a statement which is made bona fide on the basis of a reasonable belief in its truth by a person having an interest in the matter should not succeed. There is no evidence of malice in the publication of the statement made and it may fairly be regarded as, at most, an honest belief in a claim that has now been found to be unfounded. In addition I am not satisfied that the defendant has established any special damage arising from the publication or that it was calculated or likely to cause the defendant loss in respect of his property (Mc Mahon & Binchy, Law of Torts (4th Ed.) at par.35.30 and the cases cited therein). The claim for damages for slander of title is therefore dismissed.