THE HIGH COURT

[2013 No. 2849 P.]

BETWEEN

MINISTER FOR THE ENVIRONMENT,

COMMUNITY AND LOCAL GOVERNMENT, IRELAND AND

THE ATTORNEY GENERAL

PLAINTIFF

AND

PIERRE DAMIENS AND CATHERINE DAMIENS

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 24th day of October, 2018

1. The plaintiff's claim is for injunctive and declaratory relief and/or damages in respect of development works carried out by the defendants and their predecessors in title on State owned foreshore adjacent to the defendant's property at Blind Harbour, Reen, Union Hall, Co. Cork.

2. The defendants are French citizens who acquired their property in or about 1999/2000.

3. At the commencement of the within proceedings in 2013, the developments in issue comprised a breakwater the majority of which is constructed on the State foreshore, a seawater retention basin (hereinafter referred to as a swimming pool) part of which was constructed on the State foreshore, certain elements pertaining to the swimming pool, namely a seawater intake valve and a water outlet valve constructed on the State foreshore, and a slipway part of which was also on the State foreshore. Subsequent to the issue of the within proceedings, certain adjustments and reconfigurations were made by the defendants to the swimming pool, the valves and the slipway such that these structures no longer protrude onto the State foreshore.

4. The position, however, with regard to the breakwater is that it remains substantially on the State foreshore, as it is largely constructed below the mean High Water Mark (HWM). As will be referred to in detail later, it was originally the defendants' position that the breakwater was within the confines of their property, it is now accepted by all concerned that the majority of the breakwater is on the State foreshore. This is set out in a letter from the defendants' solicitor to the plaintiff dated 8th December, 2016:-

> "[F]or the avoidance of any doubt we would ask you to note that our clients are the unfortunate victims of history in this matter. They did not construct the breakwater…It was present when they purchased the said property. A portion of the breakwater is undoubtedly on your client's property and it is for your client to decide how it wishes to deal with the same going forward. In making this decision we would ask you to note that the pre-existing and longstanding breakwater performs [an] extremely useful protective function from our clients' perspective for the protection of their family home and the elements of the sea…It is very exposed and open to the elements particularly in bad weather and while we do not wish to get into the technicalities of the legal position, our clients are anxious that the State would take the protective nature of the breakwater into account when determining as to how it wishes to proceed."

5. It is common case that the breakwater was constructed by one of the defendants' predecessors in title, a Mr. Len Forsey, in or about 1990 following a significant storm event which occurred on 16th December, 1989 and which caused substantial damage to what was then Mr. Forsey's house and which is now in the ownership of the defendants. It transpired that Mr. Forsey had just acquired the house from the previous owners when it was hit by the December 1989 storm. He subsequently arranged for the construction of the breakwater which was completed in 1990. In or about 1991, Mr. Forsey applied for planning permission for an extensive development concerning the house itself and the development of a commercial enterprise including a diving centre. In this context, he applied also for retention permission for the breakwater. He was refused planning permission for all of the developments, including the retention of the breakwater, by Cork County Council and by An Bord Pleanála.

6. While the breakwater was constructed in or about 1990, it appears that its existence only came to the plaintiff's attention in or about 2006.

The plaintiffs' evidence

7. According to Mr. Niall Dunne, who in 2006 was an engineer in the plaintiff's department, on 14th March, 2006, the plaintiff received notification about a structure which was then being built on the State foreshore at Blind Harbour. This notification related in all probability to a swimming pool then being constructed by the defendants. Mr. Dunne inspected the locus on 29th March, 2006. His report of 12th April, 2006 makes reference to a breakwater approximately ten to twelve (3/4 metres) in height and some 30m in length. It refers also to the swimming pool then under construction. The report goes on to state:-

> "The structure is below the high watermark and does require a foreshore licence. The structure does restrict pedestrian access across the beach. The structure is for private use only and does not have any public merit. I therefore recommend that CZMD instruct [the first defendant] to remove both the breakwater and the swimming pool."

A manuscript note on the report describes the developments as "unauthorised" and "not in the public interest to remain".

8. Following this report, the first named plaintiff wrote to first named defendant was written on 19th April, 2006, c/o of a Mr. Michael Burns. Mr. Burns had been an engineer in the firm of O'Sullivan & Associates, Consulting Engineers, who had been retained by the defendants to conduct a survey prior to the purchase of their property in 1999/2000. The first plaintiff requested the defendant to remove the breakwater and the swimming pool within four weeks of the date of the letter.

9. On 24th April, 2006, Mr. Burns telephoned the first plaintiff's department and advised that the developments were on privately owned foreshore and that he would furnish title documents to this effect. Mr. Burns was advised at that juncture that even if on

privately owned lands, permission for the developments was still required pursuant to s. 10 of the Foreshore Act 1933 (hereinafter "the 1933 Act").

10. The first defendant was next written to on 2nd June, 2006, again care of Mr. Burns, and the promised title documents were requested. By letter of 1st August, 2006, the first defendant was advised that if, following inspection, the developments remained in situ the plaintiff would have no alternative but to seek legal advice. This letter did not elicit any response from the defendants. The plaintiff wrote again on 3rd October, 2006 to the first defendant care of Mr. Burns, again requesting that the defendants furnish their title documents in respect of the privately owned foreshore and requesting the first defendant's full address. This correspondence elicited an email on 20th October, 2006 from Mr. Burns who provided an email address for the first defendant.

11. In evidence, Mr. Bernard Nolan, Assistant Principal Officer, in the plaintiff's department testified that throughout 2006 and 2007, the first plaintiff's department received further complaints in respect of the swimming pool then being constructed by the defendants.

12. On 9th October, 2007, Mr. Gearóid O'Shea of the engineering division of the Department of Agriculture, Fisheries and Food, inspected the locus. His report of 30th October, 2007, described the works in the following terms:-

> "Breakwater
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> The existing breakwater consists of large rock units. The structure is 4 metres above the beach level in places and is approximately 30 metres in length. The location and size of the breakwater restricts pedestrian access across the beach safely at most stages of the tide…The survey shows the majority of breakwater lies on State owned foreshore.
>
> Out-door Seawater Retention Basin
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> The out-door seawater retention basin is constructed against an existing seawall. The pool is approximately 13 metres long, 10 metres wide and 2 metres deep. Seawater is pumped from the intake chamber, situated on the foreshore, into Blind Harbour House. The seawater is heated and used to fill the basin. The seawater is discharged into Blind Harbour after use…The survey shows the out-door seawater retention basin lies partly on State owned foreshore below the mean high water mark. The entire out-door seawater retention basin is on tidal lands as defined under the [Act].
>
> Intake/Discharge Chamber and Buried Pipe
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> The survey shows the Intake/Discharge chamber and buried pipe lies on State owned foreshore. A licence is also required to extract and discharge the seawater.
>
> Slipways
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> Two slipways run from land to state foreshore at Blind Harbour. The slipways appear to be constructed at mass concrete…The survey shows the slipways cross tidal lands and extend onto state owned foreshore. The slipway alongside the out-door pool seems to be owned by [the first defendant] and the other slipway appears to be owned by a Mr. Donal Ryan.
>
> Revetment
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> The revetments constructed of rock armour units protect the land from erosion by the sea. The revetments are not located on state foreshore and do not, in my opinion, have a significant visual impact."

13. Mr. O'Shea too recommended that the breakwater, outdoor pool and slipways be removed from the foreshore.

14. In evidence, Mr. O'Shea stated that if the breakwater was not there, the public would be able to walk across beach via the foreshore at low tide. He testified that while it was presently possible to do so, this involved climbing over the breakwater in order to access the southern/ western beach. In Mr. O'Shea's opinion, it would be unsafe for the public, especially elderly people, to do so. Under cross examination, he agreed that the breakwater protected the defendants' house and that if there was no breakwater the house would be at the mercy of strong storms and thus ran a significant risk of being damaged. Mr. O'Shea, however, had not carried out any analysis of the efficiency of the breakwater as a defence mechanism.

15. It appears that in 2008, a decision was made by the plaintiff to involve the office of the Chief State Solicitor (CSSO). The CSSO wrote to the first defendant on 8th July, 2008, advising that the breakwater, swimming pool and discharge outlets and slipway were fully or partially constructed on State owned foreshore. The letter continued:-

> "No foreshore lease or licence was sought or obtained from [the plaintiff]. This matter has already been the subject of correspondence at the address furnished on the Planning Application, i.e. c/o Mr. Mike Burns, in particular, by letter dated 19th of April 2006, you were requested to remove the works then constructed. Mr. Burns originally asserted that you had title to the lands, but failed to produce any supporting documentation. I am instructed that not only were the title documents not produced, but further work continued despite the letter dated 19th of April 2006.
>
> It is clear from my instructions that this constitutes trespass and nuisance on State owned foreshore at the area. The action is also a criminal offence under section 13 of the Foreshore Act 1933…
>
> I am instructed that the Minister regards your action in placing an unlawful structure on State foreshore, restricting pedestrian access across the beach, breaching statutory requirements and failing to respond to the Department's correspondence, as a matter of considerable concern.
>
> I am now instructed to call upon you to:-
>
> 1. Remove the works described above;
> 2. Restore the foreshore to its pre-works condition;
> 3. Cease the extraction and discharge of seawater."

16. The first defendant replied on 12th July, 2008, advising, *inter alia*, that the breakwater had not been constructed by the defendants and that they had bought the house in 1999. He enclosed a copy of the sales brochure. He advised that to the defendants' knowledge, the breakwater had been built (financed by an insurance company) after a storm had hit the house and that no objection to the breakwater had been notified despite successive sales of the house since the construction of the breakwater. He went on to state:-

> "In regard of our land registry and other plans and measurements on site by professional people, this breakwater had been built correctly inside the line and the limits of the foreshore (slipway along the outdoor pool include also) on a rock serving for the start of foundations (the same rock of the house)."

17. He enclosed a copy of the defendants' land registry. He also advised that the breakwater did not prohibit access to the public and did not prevent pedestrian access across the beach which could be accessed in low water on the outer side of the breakwater. He further advised that at high tide, if people asked kindly, the defendants allowed the public to pass in front of the defendants' house. He referred to having received planning permission on 19th August, 2004 to build the swimming pool. He further referred to work done by the defendants to enhance the beauty of the area.

18. This letter was followed up by further correspondence from the first defendant on 14th July, 2008, wherein he advised as follows:-

> "We confirm that the depicted appendix (red arrow) on the land registry of our property that the foreshore skirts round, is an existing visible rock on our site. This rock is the foundations of the front part…of the breakwater (sea side). Also it is obvious that the other principal part of this breakwater in its total form is thus outside of the border of the foreshore in legal position (house side)."

19. On 29th July, 2008, the defendants' solicitors, Collins Brooks and Associates, wrote to the plaintiff in the following terms:-

> "Firstly we would wish to emphatically rebut your statement in relation to the breakwater situate to the front of [the defendants'] dwellinghouse. The writer can confirm that she acted for [the defendants] in their acquisition of this property in or around 1999/2000. At that time the [Auctioneer's] brochure clearly evidenced the position as it now stands in relation to the breakwater and on further enquiry it would appear that these works will have been carried out many years prior to our client's purchase of this property.
>
> …
>
> Prior to receiving correspondence from yourselves there has never been any other formal complaint of any nature in relation to the breakwater. In addition, upon [the defendants'] acquisition of the property, the Land Registry boundaries would have been checked by a competent Engineer and it does appear as if the breakwater is entirely within the confines of our client's property.
>
> In this regard we now call upon you to withdraw your statement that either our clients their servants or agents constructed this breakwater as this is patently incorrect.
>
> In relation to the seawater retention pool/basin, a formal application for Planning Permission was made to Cork County Council, the matter was dealt with by [the defendants'] Engineer and presumably [the] Council's Engineers inspected the Plans as submitted and the boundaries of [the defendants'] property which were also submitted at the time and Planning Permission was granted without any objection being made at the time. It would also appear that the slipway as referred to in your said letter is also within the confines of our client's Land Registry boundary. In relation to the emission of water from the pool basin into the sea, our clients can only do this at middle tide as they do not use chemical products. It would appear that this is permitted if the effluent discharged to the sea does not exceed a standard of 25mg/biochemical oxygen demand and 35mg/1 suspended solid. Effectively, our clients take in natural water and return natural water after 3/4 days of use.
>
> …
>
> Any works carried out by our client and the previous breakwater as constructed do not impede access to the breach for the public at large. In fact, many visitors and locals alike visit the beach on a regular basis and our clients have never received any complaints in this regard. Given the proximity of our clients' property to the foreshore, there have been many incursions on to their private property over the years to which they have turned a blind eye. If anything they have taken it upon themselves to maintain the foreshore in a proper manner to have in fact expended time and effort in the removal of some unsightly blocks of concrete which had been lying on the beach for a number of years…"

20. A further complaint was made to the plaintiff about the breakwater in November 2008 by Mr. Pat O'Driscoll who gave evidence in the within hearing. Mr. O'Driscoll testified that he was born and reared approximately a mile away from Blind Harbour. He lived in the area until age eighteen. He maintains his connection to the area in that he has a holiday home some half mile east of Blind Harbour. He testified that as a boy he used Blind Harbour for walking and other recreational activities. Mr. O'Driscoll described the Blind Harbour of his childhood as a nice quiet beach the favoured part of which was the western/southern portion which he says is now inaccessible because of the breakwater. He stated that prior to the construction of the breakwater, it was possible for the public to undertake a circular walk encompassing the beach, beginning from the eastern/northern corner of the beach, which is accessed by a public road, moving onto the beach itself and walking onwards towards the western/southern portion, then moving right and ultimately making a circle back to the original starting point.

21. Mr. O'Driscoll also stated that the beach was used in the mid 1940s and 50s by the residents of Reen to access their school, church and the creamery and for other activities such as shopping. It was used by farmers with a horse and cart also, notwithstanding the presence of a natural rocky outcrop (on which the breakwater is now constructed). He stated that it was no longer possible to now walk the beach as members of the public had to encounter the breakwater in front of the defendants' house. He testified that when in November 2007 he had attempted to walk across the beach the first defendant physically restrained him by the arm. On subsequent visits he had managed to access the beach. On those occasions the first defendant was present at a distance with a camera and made comments about private property and his property and continued to maintain that Mr. O'Driscoll was walking on the defendants' property. Mr. O'Driscoll stated that he was disinclined to now use the beach because it involved climbing over the breakwater and he feared injury.

22. In cross-examination, it was put him that the first defendant had never sought to physically restrain him. In response to the question as to why he had waited until 2007 to raise the issue of the breakwater which was in place since 1990, Mr. O'Driscoll stated that he had raised the matter following the first defendant's attempt to physically restrict his access in November 2007. Mr. O'Driscoll denied that his version of events was in any way coloured by litigation involving the defendants and the estate of Mr. O'Driscoll's wife's late uncle and which concerned the sale of land by the uncle to the defendants. While he acknowledged that prior to the construction of the breakwater there already existed a rocky outcrop on the beach, Mr. O'Driscoll stated that this had posed no difficulty to walkers.

23. As he testified to, Mr. Barry McDonald, an engineer with the plaintiff's department, first visited the locus on 10th January, 2012. His reports of 17th January, 2012 and 13th June, 2012 confirmed that the breakwater and the swimming pool were largely on State owned foreshore.

24. On 8th March, 2013 the plaintiff wrote to the defendants directly, and to their solicitors, in terms which replicated the contents of the plaintiff earlier letter of 8th July, 2008.

25. The defendants responded to the plaintiff's on 13th March, 2013. They enclosed a report which had been compiled in 1990 by Mr. Forsey's then architect, Mr. Donal Hoare. They also enclosed a copy of the planning permission which they had obtained in respect of the swimming pool in 2004. They also maintained that two fences (described by them as handrails), which they had erected, were located exclusively on their property.

26. The within proceedings issued on 19th March, 2013.

27. A further report was compiled by Mr. McDonald on 20th May, 2013, apparently in response to correspondence from the defendants' solicitors of 13th May, 2013. Mr. McDonald described as "not tenable" the defendants' claim that they did not maintain and are not responsible for the removal of the structures in issue in the within proceedings, stating: "both structures physically start on [the defendants'] property and continue from there onto State foreshore. [The defendants] are the only beneficial users of the structures." Mr. McDonald points to the auctioneer's sales brochure as provided to the defendants at the time of their purchase which referred to both the breakwater (listed as a pier) and the slipway. Mr. McDonald's view was that it was clear from the sales brochure that the breakwater and slipway formed part of the property proposed for sale which the defendants subsequently purchased. Insofar as the defendants made an offer to purchase the foreshore for the purposes of retaining their swimming pool, Mr. McDonald's view was that this offer should be rejected on the basis that there was no public interest served by the development given that the swimming pool was for the private and sole use of the defendants. His view was that the defendants have ample property within their own ownership on which to construct a similar structure. His view was that there was no demonstrable overriding need or requirement for the swimming pool to be on State foreshore.

28. Mr. McDonald's next report is dated 5th June, 2014, compiled following an inspection of Blind Harbour on 28th May, 2014. By this time, the sea water intake/discharge chambers, which had previously serviced the swimming pool, were no longer evident on the State foreshore. However, the swimming pool remained in place on the State foreshore, as did the breakwater and a portion of the slipway, albeit in Mr. McDonald's view the extent of incursion of the slipway onto the State foreshore was not significant. His report also refers to the two fences which the defendants had erected to prevent the public accessing their property. In Mr. McDonald's view, the second fence, which had been erected between the breakwater and the swimming pool, was on State owned foreshore. He further noted an additional structure on the foreshore which appeared to be an outfall discharge point adjacent to the swimming pool. He believed this structure to be a recent addition and most likely a replacement discharge for the intake/discharge chamber which had been removed. He recommended its removal.

29. Under the heading "*Evidence of use, maintenance or possession of the breakwater and slipway"*, Mr. McDonald stated:

> "While there is no direct evidence of maintenance of the breakwater it is in good condition and there is no evidence that the structure is abandoned or that it is in disrepair or derelict. There is no doubt that [the defendants] are gaining the benefit of the breakwater as without the breakwater it would not be possible to maintain the swimming pool at this location. [The defendants] are using the breakwater for its intended purpose to provide shelter from wave action to the swimming pool and their property. No other property benefits from the shelter provided by the breakwater. … The slipway is in use by the [the defendants] as is evident by a dinghy and kayak in place at the top of the slipway."

In evidence, Mr. McDonald stated that he had encountered the first defendant on 24th May, 2014 during his site visit. The first defendant had informed him that he was making plans to remove the portion of the swimming pool that encroached onto the State foreshore. He described the encounter with the first defendant as "civilised".

30. On 18th January, 2014, the defendants delivered their defence to the within proceedings wherein it is pleaded, *inter alia*, as follows:

> "The breakwater … acts as an essential [coastal] protection and/or natural defence and …is necessary for the preservation, integrity and/or maintenance of [the defendants'] property and the immediate coastal area in proximity thereto."

31. In response to this assertion, in his 3rd November, 2014 report Mr. McDonald's states:

> "While the structure may appear to provide some form of protection to [the defendants'] property it is not properly designed, constructed or located and oriented. The structure is not in compliance with standard practice and design principles for coastal defence works. I would have major concerns about the integrity, safety and effectiveness of this structure in the event of [a]significant storm.

Breakwater slope and construction

> The current structure has a seaward face with the slope of approx. 1 in 0.5 to1 in 0 (vertical), standard practice would require a breakwater's seaward face to have a slope of minimum 1 in 2.5, and where the beach in front is used for recreation etc., as in this instance, a more gentle slope of 1 in 3 to 1 in 4 would be required. The slope enhances wave energy absorption and minimises wave reflection and run up.
>
> …

> The existing structure is a rubble mound breakwater built of approximately 300kg to 700kg rock … Standard practice for a rubble mound breakwater [is] to use a large range of rock sizes by constructing a core of quarry run rock overlaid with graded 1kg to 500kg stone filter layer, this core and filter layer would then be protected by rock armour from 500kg to 3,000kg … The steep slope and homogenous nature and size of the rock used in the existing structure will lead to instability and failure when exposed to large waves action during a significant storm."

32. As to the breakwater's location and orientation, Mr. McDonald stated:

> "There was no necessity for the breakwater to project down from the upper shore line and across the beach. There is no technical requirement for the breakwater to have any off shore element. In my opinion the only reason to construct the breakwater in this manner is to extend the property boundary seaward in an effort to privatise the foreshore. This also blocked public access around the beach. The optimum solution would have been to run the revetment along the upper shore directly fronting the house in the same manner as was carried out to the north of the breakwater … Such a revetment be entirely within the property owner's legal boundary."

33. He concluded as follows:

> "While the structure may appear to provide some form of protection to [the defendants'] property it is not properly designed, constructed or located and oriented and it must be removed. A revetment of appropriate seaward slope, height and construction directly fronting [the defendants'] property parallel to the shore would provide an effective protection and defence structure and would not require a lease of state owned [property] nor would it block public access along the beach".

34. It is common case that in or about August and September, 2014, the defendants engaged in works to realign their swimming pool so that it would be entirely constructed on private foreshore. At that time also they removed the portion of their slipway which abutted onto State owned foreshore. As the defendants had originally obtained planning permission for the construction of the swimming pool, they had to apply again for planning permission to readjust the pool. It is accepted that all of the readjustment works were done in accordance with a Method Statement issued by the plaintiff.

35. Mr. McDonald visited on the locus on 16th April, 2015, in the aftermath of the aforesaid works. His report of this visit, dated 21st April, 2015, noted the readjustment works conducted by the defendants.

36. The report further noted:

> "8. There are no evident changes to the breakwater structure itself that would indicate maintenance or assertion of possession of the breakwater by the Defendants.
>
> 9. Part of the defence being put forward by the Defendants is that there was always a rocky outcrop at this location, where the breakwater is now situated. There is very little evidence of the rocky outcrop as it is covered by the breakwater. This fact demonstrates that it was quite a low level rock outcrop and the old OS map shows that the beach passed to the landward of the outcrop so it could not have impacted in the passage of pedestrians along the beach.
>
> 10. No other structures have been erected on the foreshore at this location since my last inspection. However, the discharge point of the non modified pool discharges to the foreshore, i.e. the discharge structure itself is on private property but any effluent discharged via it would immediately land on the foreshore … This department cannot allow any such effluent to be discharged to foreshore and [the defendants] should be directed to remove this discharge point and to submit details how they propose to dispose of the swimming pool effluent in an appropriate manner."

37. Mr. McDonald prepared another report on 27th March, 2017 following a further inspection of the site. The report states:

> "Since my previous inspection on 16/04/2015 wave action has uncovered a concrete structure on State owned foreshore … This concrete structure is the remnants of the foundation of that part of the pool which the defendants have removed from foreshore. These concrete foundations were hidden from view on my last inspection by beach material.

The defendants' position in relation to these remnants was that they dated to the time of the construction of the house. In any event, this is not an issue of significant concern, as acknowledged by Mr. McDonald in evidence.

38. In his further report of 16th May, 2017, following an inspection of the locus on 31st January, 2017, under the heading "*Responsibility for Breakwater Structure*", Mr. McDonald again opines that the defendants' contention that the breakwater has nothing to do with them is not tenable, particularly in the context where discovery documentation made available by the defendants include photographs taken in March, 2014 which show construction and maintenance works being carried out to the breakwater on the State owned foreshore under the instruction of the first defendant. Mr. McDonald viewed this as "clear evidence" that the defendants were maintaining the breakwater "as if owners of the structure." He also reiterated his view that the pre-existing natural rocky outcrop did not form a barrier to public access to the beach given that it was less than a metre high and thus not comparable to the three-metre-high breakwater.

39. In his final report of 7th March, 2018, Mr. McDonald disputes that the other breakwaters referred to by the defendants' expert, Dr. Jimmy Murphy, in his report were comparable to the breakwater in issue in the within proceedings. Mr. McDonald states:

> "As supporting evidence that the Blind Harbour structure is in accordance with what Mr. Murphy refers to as "standard practice" for Ireland in 1990s [Dr. Murphy's] report provides photographs of six other close to vertical coastal protection structures in the Cork/Kerry area. Some are misleading as they … show locations not comparable with Blind Harbour in terms of exposure to swell and waves where vertical rock walls would be suitable …"

The Court will later address other issues of dispute as between Mr. McDonald and Dr. Murphy.

40. In the course of his evidence, Mr. McDonald reiterated his view that the breakwater and swimming pool had initiated on [the defendants'] property and extended out onto the foreshore. He testified that leases or licences for once-off private developments involving the State foreshore can only be issued if it is the public interest. His view was that the public interest was best served by centralised facilities in marinas and by slipways that are in public use as opposed to once-off private developments. Mr. McDonald maintained his position that the breakwater was not designed to requisite standards. He testified that the breakwater lacked a

reinforced toe at the bottom of the slopping area which would have given strength and which would stop it being undermined.

41. He reiterated his view that there was no necessity in 1990 for the construction of the breakwater and that protection for the house could have been achieved if the rock armour or revetment that had been put in place in 1990 to the east of the house had been continued across the front of the house. Had this been done, the protective structure would have been on the defendants' own property. Mr. McDonald restated his opinion that there was no technical or engineering reason for the breakwater to have been constructed in the manner it was and that it was now open to the defendants to build a rock structure/revetment in front of their property in order to protect their house.

42. Under cross-examination, it was put to Mr. McDonald that irrespective of its composition and the manner of its construction, the breakwater had stood the test of the time over a period of 28 years notwithstanding some not inconsiderable storms during that time. It was also put to Mr. McDonald that the defendants' expert, Dr. Murphy, was of the view that the breakwater, while not perfect, was nevertheless perfectly acceptable and that similar structures in other coastal areas have equally served their purpose.

43. Asked what purpose would be served by removing the breakwater, Mr. McDonald's response was that it would restore public access across the beach at Blind Harbour. He did not accept that the restriction posed by the breakwater to public access to the beach was relatively modest. It was further put to Mr. McDonald that if in 1990 a revetment had been constructed in front of the defendants' house, instead of the breakwater, (and indeed if such a revetment were to be now constructed) that that would mean it would be very close to the defendants' house and would protrude above the height of the current patio, probably up to two metres. It was also put to Mr. McDonald that a revetment of this nature would visually obstruct views of the sea from the house. Mr. McDonald's view was that a construction of a revetment in front of the defendants' house would require only the existing wall to be extended by approximately one metre. According to Mr. McDonald, this would not obstruct sea views from the defendants' living quarters, which are located on the first floor of the property.

44. It was suggested to Mr. McDonald that the 1 in 3 slope advocated by him as the appropriate design for the revetment would protrude out beyond the State foreshore. Mr. McDonald's response was that the defendants can build a revetment with a vertical wall on top of it so as to prevent any encroachment on the State foreshore.

45. It was further put to Mr. McDonald that Dr. Murphy's view was that the existing breakwater, orientated as it is perpendicular to the incoming waves, is entirely suited to its purpose and that it is part of integrated protection system which includes the existing revetment to the east of the defendants' house. Moreover, it was put to Mr. McDonald that the breakwater has withstood some 76 storms of varying intensity since 1990, including storm Ophelia in the Autumn of 2017.

46. Mr. McDonald did not dispute the defendants' need for coastal protection for their property. However, he disputed Dr. Murphy's view that a revetment two metres higher than the existing breakwater (albeit it would be successful in protecting the house) would not be the optimum solution for the defendants.

47. Mr. Nolan of the first plaintiff's department testified that the plaintiff commenced the within proceedings because the public's rights had been extinguished due to the existence of unauthorised structures on the State foreshore at Blind Harbour. He also testified that the developments in question had a knock-on effect on access to other parts of the State owned foreshore. He stated that the existence of the breakwater cannot be accepted because the State foreshore is public land and it is the plaintiff's role to act as a guarantor and protector of the public interest. He stated that it is for this reason that the State foreshore is regulated under ss. 2 and 3 of the Foreshore 1993 Act (hereinafter "the 1933 Act").

48. Mr. Nolan testified that his understanding was that the defendants have acted as if they had adopted the breakwater, and that they have had the benefit of it and had maintained it over time. Moreover, he pointed to the fact that when the defendants put their house on the market in recent times the sales brochure described their property as "[a] magnificently located residence with extensive access to Blind Harbour. This wonderful property boasts a shore side swimming pool, a lovely sandy beach, slipway and moorings" and "the property is protected by a substantial breakwater pier". Thus, the defendants appeared to Mr. Nolan to be selling the breakwater protective structure as an integral part of their property.

49. In response to questioning under cross-examination, Mr. Nolan was unaware of any attempts by the plaintiff to locate or contact Mr. Forsey, who had constructed the breakwater in 1990. Mr. Nolan also accepted that it was likely that the plaintiff was aware in 1991, via the contents of a letter from Cork County Council to a third party and which was circulated to an official in the plaintiff's department, of Mr. Forsey's application for retention planning permission for the breakwater.

50. It was put to Mr. Nolan that the plaintiff's delay in processing the within claim until 2013 led to the defendants being unable to pursue O'Sullivan and Associates, Consulting Engineers, who had produced a report for them in 2000 in connection with their purchase of the property, for an indemnity. It was further put to Mr. Nolan that had the plaintiff moved in 2006, or indeed in 2008, to commence proceedings (as opposed to only doing so in 2013), it was unlikely that O'Sullivan and Associates would have been let out of the proceedings. Mr. Nolan's response to this suggestion was that the defendants could have moved against O'Sullivan and Associates when they were first put on notice in 2006 of the State's complaint regarding the breakwater.

51. It was further put to Mr. Nolan that the plaintiff's delay was a gross delay, a contention denied by Mr. Nolan in light of the limitation period of 60 years under the 1933 Act.

The defendants' case in evidence

52. Dr. Jimmy Murphy, a senior lecturer in marine engineering in Cork University, testified on behalf of the defendants. His report of 6th February, 2018 described the defendants' property as being "almost entirely protected by both the breakwater and rock revetments. Without these coastal protection rocks [the defendants'] house would have long since been lost and it is likely that the other [neighbouring] property would be at risk."

53. He described the design of the breakwater as an almost vertical rock structure which takes advantage of a natural rock outcrop. He described the purpose of the breakwater as trying to stop erosion and he viewed the breakwater as comparable in terms of its design and construction to many other coastal protection structures around Ireland. He described it as a relatively standard coastal protection technique where wave energy is dissipated offshore and thus a particularly useful solution in locations where a valuable property is situate very close to the edge of the coastline, as in the defendants' case. While not perfect, the construction of the breakwater with its retaining wall was a very innovative solution for the time in that it identified the main problem which was the wave energy approaching the coastline. Albeit the breakwater did not have a filter layer or core, comprising as it does of large rocks, in Dr. Murphy's view, this was not a difficulty given the large porosity of the rocks which allows for energy dissipation through large voids on the face of the structure, resulting in less reflection. Dr. Murphy's report states:

> "[I]n relation to the breakwater in Blind Harbour it is considered that the large rock size in combination with its stable foundation on an existing rock outcrop along with it having sufficient width ensures that the breakwater is a very stable structure with the capacity to withstand the most severe wave conditions at the site."

54. Dr. Murphy testified that as the rocks have remained in place for over twenty seven years under numerous storm conditions (as analysed in his report), they were thus appropriately sized rocks for the location in question. He testified that if the defendants were to construct a revetment (which, Dr. Murphy acknowledged, would protect the defendants' property if designed properly) in place of the breakwater, as suggested by Mr. McDonald, it would have to be both a high and wide revetment which would probably extend onto the State foreshore in order to be appropriate. In his view, to construct such a revetment, the swimming pool would have to be demolished, the ground would have to be prepared for the inclusion of a filter layer upon which rock would sit at a slope and the crest of the revetment would have to extend by two to three metres in order to minimise the amount of overtopping of waves. In the present case, this will require the revetment to be two metres above the existing patio of the defendants' house. He was also of the view that the crest of the revetment would have to be three to four metres in width. Moreover, the width of the base would have to extend by approximately fifteen metres.

55. Dr. Murphy was also of the view that the construction of a revetment of the type suggested by Mr. McDonald could lead to flanking of the lands on either side of the defendants' house. Dr. Murphy pointed to photographic evidence from October, 2017 (after storm Ophelia) which showed changes to the defendants' garden at the location of the existing revetment (together with damage to the revetment itself). This, he said, was in contrast to the breakwater which showed no evidence of signs of change and to which only minor damage had occurred in October, 2017.

56. Dr. Murphy did not believe that the beach in issue in the within proceedings was of high amenity value. His view was that even if the breakwater did not exist, the existing rocky outcrop and the rough terrain rendered it hazardous for people walking the beach. Insofar as the breakwater itself hindered access to the beach, he was of the view that that problem could be solved by making a break or gap in the breakwater to allow for easier access by the public to the western/southern side of the beach.

57. Overall, Dr. Murphy described the breakwater as "benign" in terms of impact on the local environment. In his report, he stated:

> "it would serve no engineering purpose to remove the breakwater and replace it with a revetment. The design of coastal protection structures is not an exact science and the best designed and well-funded solutions are not always successful. What is known is that if a structure has been demonstrated to work, as is the case of the breakwater in Blind Harbour, it should be left in place rather than being replaced with something that could have unknown consequences. It is the opinion of the author that if an analysis of the erosion issue facing the house was examined today it would come to a similar conclusion in terms of what is the best option. Therefore, the breakwater should stay in place with perhaps a modification to allow access across the whole of the beach."

58. Dr. Murphy agreed that in promoting the retention of the breakwater he was approaching the matter from an engineering perspective and had not addressed the issue of encroachment onto the State foreshore.

59. In cross-examination, Dr. Murphy acknowledged that a major problem with the breakwater is that the majority of it rests on State foreshore. He acknowledged that he could not recommend a solution that involved creating that solution on State owned foreshore without a licence or lease being applied for. He further accepted that the storm events he described in his report caused damage to the breakwater such that on occasion it required repair.

60. Dr. Murphy also accepted that he did not know how much of the breakwater rested on the existing rocky outcrop and acknowledged that he had assumed (based on the first defendant's belief) that there were large rocks inside of the breakwater.

61. He was not contending that a revetment of the type suggested by Mr. McDonald would not work to protect the defendants' property; rather, his view was that the existing breakwater provided the necessary protection.

62. The Court also heard from Dr. Martin Hogan who for a number of years between 2001 and 2012 had rented the ground floor of the defendants' property. He described the beach at Blind Harbour as an area not commonly used. He rarely saw people on the beach. This was because beyond the breakwater the terrain was not terribly hospitable. He acknowledged however that it was possible to walk in a circular loop, as described by Mr. O'Driscoll, and that he himself had done this on one or two occasions.

63. Dr. Hogan had never observed the first defendant taking issue with people walking on the beach or when they sought to access the western/southern part of the beach by walking either side of the breakwater. He had only seen the first defendant take issue when people accessed the defendants' patio in their attempts to cross the beach. With regard to the breakwater, he had not seen any repair works being carried out to it. Nor had the first defendant ever said to him that the breakwater was the defendants' property.

64. Mr. Donal Hoare, architect, testified that on or about 20th December, 1989 he had been contacted by Mr. Forsey following extensive damage to the latter's house as a result of a violent storm on 16th December, 1989. Mr. Hoare's report of 29th August, 1990 described the damage in the following terms:

> "A concrete block retaining wall approximately 7ft. in front of the house had been demolished and portions of it had been thrown through the windows of the house by the force of the waves. The concrete footpath in front of the house and remains of the retaining wall were partially undermined. The windows to the south of the dwelling were all broken and the entire ground floor was flooded except a small area of the north side which is at a higher level. The dwelling, however, had not suffered any structural damage. In addition, a field of approximately of one acre at the side of the house (which did not have the benefit of any form of retaining wall) was eroded to approximately half [its] size."

65. As it was an engineering issue, Mr. Hoare retained O'Donovan & Associates, structural engineers, to inspect the site. As a result of their involvement, the current breakwater was constructed. Mr. Hoare testified that he himself had no involvement in the construction of the breakwater. His report describes the construction of the breakwater in the following terms:

> "It was decided to endeavour to give maximum protection to the house by trying to take as much as possible of the force from the waves before they reached the house. A pier [breakwater] was constructed with large boulders on top of an existing ridge of rock on the foreshore in front of the dwelling. By plugging the gaps in this natural physical barrier and by extending it to an approximate height of 8 ft., a first line of defence has been established to take initial power out of storm waves. A second line of defence was then established by the construction of a concrete retaining wall. This wall

was designed by the structural engineer as a gravity type retaining wall and was constructed entirely on a rock base and integrated with this rock base by means of 2 rows of 25mm steel bars drilled and grouted 800mm into the rock base. The outer profile of the wall was designed to absorb storm waves and discharge them back on themselves, thus using the force of the waves to counteract themselves.

The height of the wall decided upon so that it would not interfere with a view from the house, and so that it would not be an eye sore from the beach."

66. Mr. Hoare's report also describes the construction of a revetment which was necessitated by the erosion of the field to the east of the property caused by the December 1989 storm.

67. Mr. Hoare testified that he was involved in Mr. Forsey's planning permission application in 1991 for the construction of a number of houses and a commercial enterprise and which application included an application for retention of the breakwater and slipway. As set out previously, all of these applications were refused. A letter from O'Donovan & Associates of 21st May, 1992 to Hoare & Associates confirmed that O'Donovan & Associates had recommended "the erection of a substantial sea wall and an outer breakwater".

68. Mr. Timmy McCarthy testified that on occasions he had been retained by the first defendant to carry out repairs to the existing revetment and to the breakwater. He believed that, at most, he had carried out repairs to the breakwater on three occasions. He recalled an occasion in 2014 where he had replaced two stones which had fallen from the outer side of the breakwater. Similarly, he had reinstated three stones back into the breakwater after storm Ophelia in 2017.

69. The first defendant testified that he and the second defendant had purchased their property in 2000, initially as a holiday home. In 2006, it became the defendants' permanent home after they sold their French property. Prior to the purchase, O'Sullivan and Associates, engineers, were retained by the defendants to prepare a report on the property, which was duly furnished on 13th November, 1998. It is accepted that the report did not deal in any respect with the breakwater. Nor did it refer to Mr. Forsey's planning permission application in 1991 for retention of the breakwater.

70. In or about 2004, the defendants decided to construct a swimming pool. They retained Mr. Burns, engineer, to seek planning permission for same, which was duly obtained. The swimming pool was constructed with the aid of a bank loan, duly paid off when the defendants sold their French property. The construction of the swimming pool cost approximately €15,000. By and large, the swimming pool was constructed by the time the plaintiff wrote to Mr. Burns on 19th April, 2006. The first defendant testified that neither he nor the second defendant was made aware by Mr. Burns of the plaintiff's correspondence of 19th April, 2006 and 2nd June, 2006. He accepted, however, that both he and his solicitors received correspondence from the plaintiff in 2008.

71. Following the institution of the within proceedings, the defendants had reconstituted the swimming pool in October, 2014 to ensure that it lay within their boundary. This had cost €15,000, again financed by a bank loan.

72. As regards the breakwater, the first defendant testified that the defendants did nothing to the breakwater from the time of the acquisition of their property save that on two occasions (in 2014 and 2017) they retained Mr. McCarthy to replace stones that had fallen down. In contrast, the revetment to the east of the house had been repaired on a number of times by Mr. McCarthy. The reason for such repairs was that the revetment was more susceptible to damage as, unlike the defendants' house, it was not protected by the breakwater.

73. With regard to the evidence given by Mr. O'Driscoll, the first defendant denied ever having assaulted Mr. O'Driscoll or preventing him from traversing the beach. He stated that he had only ever taken issue with people who attempted to cross the beach by using his patio. I should say that whatever interaction took place between the fist defendant and Mr. O'Driscoll, I am entirely satisfied that there was no question of Mr. O'Driscoll having been assaulted by the first defendant.

74. Albeit that the defendants had not built the breakwater and that they were denying that they had ever asserted ownership over it, the first defendant testified that his preference was that the breakwater would remain. This was so given that it had shown itself to be an efficient protective measure.

75. Under cross-examination, the first defendant maintained that when he and the second defendant moved into their property in 2000 they did not know who owned the breakwater, albeit the breakwater was located in front of their house. He did not accept that the 1998 sales brochure's reference to "a private pier" referred to the breakwater. It was put to the first defendant in his letter of 12th July, 2008 he stated that the breakwater was built correctly inside the line of the limits of the foreshore (in other words on the defendants' property) and that it had been built, and financed by an insurance company, after a storm.

76. The first defendant acknowledged that the letter of 29th July, 2008 written by his solicitors to the plaintiff more than suggested that the defendants were asserting that the breakwater was on their property. He testified that however that the defendants "never really thought very much about what belonged to what".

77. It was also put to the first defendant that maps prepared by Mr. Burns in 2004 in connection with the planning application for the swimming pool were prepared on the basis that both the area of the proposed swimming pool and the breakwater were within the defendants' property boundary. The first defendant described this as a mistake by Mr. Burns. In his later evidence, he stated that he was not going to contest if Mr. Burns had found that the breakwater was on the defendants' property.

78. The first defendant accepted that he had constructed a fence between the swimming pool and the breakwater. He stated that this barrier had been constructed to prevent people trying to access the defendants' patio as they sought to traverse the beach. He stated that the barrier was to encourage people to pass along the outer part of the breakwater. He accepted that the barrier had been constructed on the State foreshore.

79. It is common case that a map prepared by Mr. Burns on 16th January, 2008 shows a portion of lands coloured green described in the legend as "lands to be transferred from Dept. of Marine to [the defendants]". It was put to the first defendant that this suggests that the defendants knew as of 16th January, 2008 that much of the pool (and the breakwater) was on State lands, yet, in July, 2008 both the first defendant and his solicitors had disputed that the swimming pool or the breakwater was on State lands. The first defendant's response to this was that the defendants were caught "in the middle between Mr. Burns and the solicitors". The first defendant could not say whether he had requested his solicitors in July, 2008 to concede the breakwater was on State lands.

80. Under cross-examination, the first defendant conceded that the defendants had carried out repairs to the breakwater "to protect the house". He acknowledged that a brochure prepared on their behalf in relation to their proposed sale of their property described

their property as "protected by a substantial breakwater pier". However, he described that assertion as a "sales tactic" to attract clients.

Considerations
81. As can be seen from the evidence adduced in this case, the matter of dispute as between the parties is now largely confined to the issue of the breakwater. It is also the case that all concerned now accept that the greater part of the breakwater sits on State owned foreshore. Thus, the question for the Court is what is to be done about the breakwater.

82. After the conclusion of evidence, extensive written and oral submissions were received from the parties' respective counsel. These submissions, together with certain factual disputes arising from the evidence, give rise to a number of issues which require to be determined, namely:

- The defendants' contention that the plaintiff should be denied relief in this case by the failure of the plaintiff to comply with the provisions of s. 12 (1) of the 1933 Act;
- The defendants' contention that they did not construct and were never in possession of the breakwater;
- Whether the plaintiff's delay in instituting the within proceedings has caused prejudice to the defendants;
- Whether in all the circumstances the breakwater should be left in situ given that it has provided protection for the defendants' property in excess of twenty seven years.

***Section 12 of the 1933* Act**
83. Section 12 of the 1933 Act provides:

> "(1) Where any building, pier, wall or other structure has been erected (whether before or after the passing of this Act) without lawful authority on foreshore belonging to Saorstát Eireann, the Justice of the District Court having jurisdiction in the district in which such foreshore is situate may, on the application of the Minister, either (as the case may require)—
>
> (a) make an order requiring the person by whom such structure was erected or, where such person is dead or (if a corporate body) is dissolved or such person is not known or cannot be found, any person in possession of such structure, to pull down and remove such structure within a specified time, or
>
> (b) where such Justice is satisfied that the person by whom such structure was erected is dead or (if a corporate body) is dissolved or is not known or cannot be found and that no person is in possession of such structure, make an order authorising the Minister to pull down and remove such structure.

84. It is submitted on behalf of the defendants that s. 12 of the 1933 Act sets out the necessary proofs which the first named plaintiff must establish when the State initiates proceedings in respect of structures that are built on the State foreshore without a requisite lease or licence as required by ss. 2 and 3 of the 1933 Act. The defendants contend that s. 12 (1) schedules the category of persons against whom an order may be made, to wit, the person who built the structure or where the person is dead, not known or cannot be found, any person in possession of the structure. It is submitted that in those circumstances, and consequently prior to the first plaintiff proceeding to seek relief as against any person in possession of the structure, the first named plaintiff has to satisfy the Court that the person who erected the structure is dead or not known or cannot be found. Counsel submits that in circumstances where the plaintiffs accept that the breakwater was constructed by Mr. Forsey, the first plaintiff was obliged to locate Mr. Forsey. Yet the evidence tendered by the plaintiffs is that no effort was made to locate him and took no steps to institute proceedings against him. It is further submitted that the plaintiffs took no steps in 1991 to pursue Mr. Forsey in relation to the breakwater in circumstances where they were clearly on notice of Mr. Forsey's planning application for, *inter alia*, retention permission in respect of the breakwater, as is evident from the contents of a letter of January, 1991 from Cork County Council to a third party objector to Mr. Forsey's retention planning application for the breakwater, which was copied to an official in the first plaintiff's department. It is submitted that the plaintiff's have furnished no explanation as to why they did not pursue Mr. Forsey in 1991 or indeed any of Mr. Forsey's successors in title prior to the defendants' acquisition of the property in Blind Harbour.

85. It is also submitted that pursuant to s. 12(1)(a) of the 1933 Act, the burden of proof rests on the plaintiffs. Accordingly, counsel contends that if the plaintiffs have not established the requisite proofs under the 1933 Act, they cannot obtain relief under the 1933 Act. While it is accepted that the relief claimed by the plaintiffs is equitable relief, as opposed to relief under s. 12 of the 1933 Act, it is the defendants' contention that the relief that should have been claimed is that provided for in s. 12 given that there is a specific statutory form of relief provided for in the 1933 Act. It is further submitted that even if the defendants are wrong in this contention, the relief sought by the plaintiffs should not be granted in circumstances where there is no proof of damage.

86. Counsel for the plaintiffs submits that s. 12 of the 1933 Act has not been relied on by the plaintiffs in the within proceedings and that the plaintiffs are not obliged to rely on the provisions of that section. It is submitted that the plaintiffs rely on trespass and nuisance, and the continuation/adoption of those torts by the defendants, in order to ground the within proceedings.

87. Insofar as it is maintained by the defendants that where the plaintiffs wish to pursue unauthorised developments on State owned foreshore they are restricted to the remedy provided for in s. 12 of the 1933 Act, I do not find merit in this argument. It seems to me that for the Court to adopt the defendants' argument would be tantamount to the Court depriving the State (as a juristic person capable of owning property) of the benefits of remedies which are otherwise available to all landowners in the State.

88. Article 10 of the Constitution provides:

> "All lands and all mines, minerals and waters which belonged to Saorstát Eireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Eireann."

89. Article 11 of the Constitution of Saorstát Eireann provided:

> "All lands and waters …within the territory of [Saorstát Eireann] the State hitherto vested in the State, or any department thereof…shall from the date of coming into operation of this Constitution, belong to [Saorstát Eireann].

90. The aforesaid provisions were considered in *Irish Employers Mutual Insurance Association Limited (In Liquidation)* [1955] IR 176 where, at p. 224, Kingsmill-Moore addressed the word "belong" in Article 11 of the Saorstát Eireann Constitution in the following terms:

> *"I hold that this word was intended to confer full ownership, legal as well as beneficial, on the new State, which for this purpose was conceived as a juristic person capable of owning property."*

He went on to state:

> *"The subsequent legislation dealing with public lands (State Lands Act, 1924 (No. 45 of 1924), State Lands (Workhouses Act, 1930 (No. 9 of 1930) and Foreshore Act, 1933 (No. 12 of 1933) certainly contains nothing to controvert this view, and it is pertinent to note that when Article 10 of our present Constitution was drafted the word 'belong' was used as the appropriate word to vest natural resources and public property in the new state as a juristic person."*

91. More recently, in *Cromane Seafoods v. Minister for Agriculture, Fisheries and Food* [2016] IESC 6, [2017] 1 I.R. 119 Charleton J. opined:

> *"Rights on the foreshore are limited as regards private citizens. With possible exceptions for grants prior to independence, the State controls the foreshore in Ireland…Without permission from the relevant department of State, work by way of dredging on the sea bed within the limits of the exclusive competence of the State cannot take place." (at p. 200)*

92. Accordingly, insofar as the defendants maintain that in pursuing the issue of the breakwater the plaintiffs were restricted to proceedings under s. 12 of the 1933 Act, that argument is rejected.

The argument that the defendants did not construct, and are not in possession of, the breakwater

93. As already set out, it is accepted by all concerned that the defendants did not construct the breakwater. The plaintiffs maintain however that the defendants entered into occupation and/or exercised possession of the breakwater for many years following their purchase of the property.

94. In support of its submissions that the defendants are guilty of, *inter alia*, continuing trespass and /or of a continuing nuisance counsel for the plaintiff cites *Clarke v. Midland Great Western Railway* [1895] 2 IR 294. In that case, liability on a continuing basis was held to attach to the defendants, who had interfered with the plaintiff's water supply some time previously and in respect of which the defendants had already paid damages, in circumstances where there was a continuing interference with the natural flow. In the present case, counsel points to the dictum of Gibson J. in Clarke v. Midland Great Western Railway (as adopted by the Court of Appeal on appeal):

> *"Where the trespass consists in the imposition of something upon the premises of another, so long as the trespassing structure is allowed to remain, the wrongdoer is responsible for the continuance as furnishing a new cause of action, though he cannot legally enter to remove it without committing another trespass…*
>
> *The cause of action in these cases is not for damages for the original tort…but for its continuance considered as a new wrong. The liability of the trespasser does not depend on any active or intentional continuance of the trespass, which may be involuntary: it goes upon the principle that he is, during his lifetime, bound by all the consequences of his illegal conduct, and is under a continuing duty to discontinue the trespass or remove the nuisance…Though I am not aware of any direct authority on the point, I think that the doctrine of the continuance of trespass must be subject to the following qualifications. First, where the wrongdoer asks leave of the rightful owner to remove the trespassing structure, and the owner refuses to allow it to be removed, the liability to such owner should perhaps be deemed to determine on such refusal. Secondly, where a new occupier of the trespassing structure may be deemed to have adopted the trespass, and the rightful owner of the premises trespassed on elects to treat such new occupier or owner as responsible, the continuance of the tort ought to be attributed to such new occupier or owner…"* (at p. 297)

95. The Court was also referred to the decision of the House of Lords in *Sedleigh-Denfield v.O'Callaghan* [1940] AC 880 where it was held that the defendant had adopted a nuisance caused by a faulty grating attached to the entrance of the defendant's property by his predecessor in title. In that case, Viscount Maugham defined continuance/adoption of a nuisance by an occupier of land as follows:

> *"If with knowledge or presumed knowledge of [the existence of the nuisance], he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, or artificial structure which constitutes the nuisance."* (at p. 880)

96. In *Yankwood Ltd v. London Borough of Havering* [1998] EWCA Civ 1764, the defendant council were found to have adopted the acts of persons who trespassed on the plaintiff's lands by failing to take adequate measures to prevent them doing so.

97. Counsel for the plaintiffs also cites *Vitalograph (Ireland) Ltd v. Ennis Urban District Council and Clare County Council* [1997] 4 JIC 2301. That case concerned injunction proceedings requiring Clare County Council to alleviate acts of nuisance and trespass being carried out on public lands by members of the travelling community. Kelly J. cited *Sedleigh-Denfeld* and concluded that the Council had failed to take the necessary steps to counteract the nuisance once it became aware of it:

> *"In my view, Clare County Council in the present case has not taken appropriate steps within a reasonable period of time so as to bring to an end the nuisance complained of. Whilst it has never given its permission for either the trespass or the tortious activities which are going on on its lands, neither has it does anything to bring them to an end in an effective way. In my view, Clare County Council has with knowledge left the nuisance occurring on its lands."* (at p. 3155)

98. On behalf of the defendants, it is submitted that the defendants never exercised physical detention of the breakwater and that they do not and never asserted ownership of it or claim an exclusive use over it. The defendants maintain that they do not occupy the foreshore or the breakwater or possess the breakwater or otherwise interfere with the plaintiffs' possession thereof. It is submitted that, as occupation is a prerequisite to either the continuance or the adoption of either trespass or nuisance, in the absence of any occupation by the defendants the question of whether the defendants have continued or adopted any such trespass or nuisance does not arise.

99. Whilst some of the case law relied on by the plaintiffs is not on all fours with the present case, I am satisfied that a case has been made out that the defendants have asserted possession of the breakwater in issue in the within proceedings.

100. I am satisfied that the following acts of the defendants in respect of the breakwater are consistent with their having exercised possession over the breakwater:

> (i) Maps prepared by Mr. Burns in 2004 in relation to the defendants' planning application for the swimming pool showed the entire breakwater contained within the defendants' land boundary.
>
> (ii) Mr. Burns' telephone communication to the first named plaintiff on 24th April, 2006 wherein he stated that the swimming pool and breakwater were on private foreshore;
>
> (iii) The evidence of Mr. O'Driscoll, who testified that the first defendant claimed the breakwater as the defendants' private property;
>
> (iv) The contents of the first defendant's correspondence of 12th July, 2008 and 14th July, 2008. While a case could be made that there is some ambiguity in the first defendant's letters on as to whether the defendants were maintaining that the breakwater was located on their property, on balance, I am satisfied that the message being conveyed in this correspondence was that the defendants were maintaining ownership of the breakwater.
>
> (v) The defendants solicitors letter of 29th July, 2008 which stated that it appeared that the breakwater was located "entirely within the confines of [the defendants'] property: it is to be noted that whilst the defendants were maintaining this position in July, 2008, a map prepared by their engineer, Mr. Burns, some six months earlier, suggests that the defendants believed that part of the pool and the breakwater was situate on State foreshore;
>
> (vi) The evidence of Mr. McDonald, as contained in his report of 5th June, 2014, that the defendants were "using the breakwater for its intended purpose to provide shelter from wave action to the swimming pool and their property";
>
> (vii) The fact that a sales brochure advertised on 24th February, 2014 on the website of Charles McCarthy (Estate Agents retained by the defendants) described the defendants' property, *inter alia*, as "protected by a substantial breakwater pier". Despite the first defendant's testimony, I am not convinced that this was merely a "sales tactic";
>
> (viii) The erection by the defendants in or about 2012 of a fence, on State foreshore, between their swimming pool and the breakwater, which, to my mind, is indicative of the defendants desire to integrate the breakwater more fully into their property;
>
> (ix) The repair and maintenance works carried out by the defendants on the breakwater in 2014 (and 2017);
>
> (x) The construction of the swimming pool in 2004, the feasibility or viability of which could not have been achieved without the existence of the breakwater.

101. All of these matters, I am satisfied, demonstrate that the defendants have occupied the breakwater and sought to assert private ownership thereof, most particularly until at least until December, 2016 when the defendants, through their solicitors, acknowledged that a portion of the breakwater was constructed the State foreshore. While I am not convinced, on balance, that a case relating to the continuation or adoption of a nuisance has been made out by the plaintiffs, I am satisfied that the plaintiffs have established sufficient acts of possession on the part of the defendants in relation to the breakwater to ground its claim of a continuing trespass. The Court will address the consequences of the aforesaid findings later in this judgment. I turn now the question of delay.

Alleged delay on the part of the plaintiffs

102. The defendants contend that the manifest delay/*laches* on the part of the plaintiffs in the instituting of the within proceedings has resulted in an inherent unfairness and prejudice to them in respect of their defence of the within proceedings and claim for an indemnity and/or contribution. The defendants also plead that the plaintiffs' claim for equitable relief in the within proceedings, in particular the claim to remove the breakwater, is inherently unfair when same was not constructed by the defendants and on the basis that it has long since existed prior to their acquisition of their property.

103. It is acknowledged by the defendants that pursuant to s. 13(1)(b) of the Statute of Limitations Act, 1957 ("the Statute"), the State has an extended period of time to institute proceedings concerning the State foreshore. The section provides:

> "An action to recover foreshore may be brought by the State authority at any time before the expiration of sixty years from the date on which the right of action accrued to a State authority."

104. Counsel for the defendant submits that the traditional view that the doctrine of *laches* cannot apply where there is an express statutory limitation period has been refined in a number of UK cases such as *Nelson v. Rye* [1996] 2 ALL ER 186, *Frawley v. O'Neill* [1999] EWCA Civ 875, *P&O Nedlloyd BV v. Arab Metals (No.1)* [2006] EWCA 1717.

105. Counsel also cites *O'Sullivan's Pharmacies and Beauticians (Sarsfield Street) Ltd v. HSE* [2008] 106, where Laffoy J. opined, at p. 109:

> *"…An injunction is an equitable remedy and you are supposed to come [to court] as quickly as possible".*

106. Counsel further cites the comments of Mummery L.J. in *Fisher v. Brooker* [2008] EWCA 287:

> *"Laches looks to undue delay, to any change of position by the defendants resulting from the delay and to the unreasonableness and injustice of stopping the defendants from carrying on doing what they have been doing for very many years. The concept of unconscionability, which, as I shall explain, underpins the doctrine of propriety estoppel, also appears in formulations of the defence of laches and acquiescence. The change of position aspect of acquiescence and laches is less stringent than the requirement of detrimental reliance in cases of propriety estoppel. Undue delay by the claimant and the defendant's intervening activities over a long period may suffice to make it unjust to disturb the situation, especially if it is impossible to return the defendants to their original position without some injustice to them. "* (at para. 550)

107. The defendants also rely on the inherent jurisdiction of the Court to strike out a claim where there has been a long delay. In this regard, counsel cites *O'Domhnaill v. Merrick* [1984] IR 151, where Henchy J. found, that although the plaintiff was entitled to issue the proceedings, a trial in 1985 of a claim for damages for personal injuries sustained in a road traffic accident in 1961 "*would be apt to give an unjust or wrong result*". It is submitted that a similar approach was adopted by Finlay C.J. in *Toal v. Duignan & Ors. (No. 1)* [1991] ILRM 135.

108. Counsel for the defendants also referred to *Dunne v. ESB* [1999] IEHC 199 where Laffoy J., in addressing the issue of delay, stated, at para. 15:

> *"Essentially…two questions arise in this case, namely, whether the Defendant is prejudiced by the delay and, in particular, whether there is a substantial risk that it is not possible to have a fair trial because of the delay, and whether there was anything in the conduct of the Defendant which militates against granting the relief sought."*

110. Counsel further relied on the decision in *Manning v. Benson &Hedges* [2004] 3 IR 556 where Finlay-Geoghegan J. concluded that there was an inherent jurisdiction to dismiss proceedings even in the absence of culpable delay where a real and substantial risk of an unfair trial arose, an approach followed by the Court of Appeal in T*anner v. O'Donovan & Anor* [2015] IECA 24.

111. It is submitted that the defendants did not contribute to the delay in the present case. It is also submitted that the significant delay has given rise to substantial prejudice, in particular the inability of the defendants to obtain an indemnity or seek to obtain an indemnity from O'Sullivan & Associates, Consultant Engineers, who carried out a pre-purchase inspection of the property prior to the defendants' purchase.

112. In refuting the defendants' entitlement to invoke the doctrine of laches, counsel for the plaintiffs referred the Court to *Cahill v. Irish Motor Traders' Association* [1966] IR 430. There, the plaintiff sought an injunction restraining the defendant from coercing the plaintiff's supplier to refrain from supplying him with motor accessories, in contravention of the Restrictive Trade Practices (Motor Cars) Order, 1956. Budd J. held that delay would not disentitle a plaintiff to an injunction to enforce a legal right, in circumstances where the claim is not statute barred, unless the delay was of the nature of a fraud. He stated:

> *"This is, however, an application for a perpetual injunction to enforce a legal right and it is in my view well established that in order to deprive a person of a legal right to such an injunction, to which he would otherwise be entitled, there must be such delay and acquiescence as, in the view of the Court, would make it in the nature of a fraud for the plaintiff afterwards to insist upon his legal right. Mere delay will not of itself disentitle a plaintiff to an injunction in aid of his legal rights unless the claim to enforce the right is barred by a statute of limitations".*

113. The Court was also referred to Keane: Equity and the Law of Trusts in Ireland (3rd ed. Bloomsbury Professional, 2017) where the question of whether the equitable defence of *laches* applies to claims for equitable relief arising from common law rights in circumstances where the common law right is not statute-barred. Keane states:

> "Whether the equitable defence of laches will apply to a claim for equitable relief in respect of common law rights in contract and tort where the common law claim is not barred by the statute is a difficult question. Section 5 preserves the equitable jurisdiction to refuse relief on the ground of 'acquiescence *or otherwise'* and it is clear that this was intended, *inter alia*, to preserve the equitable defence of laches. But in the case of an injunction sought in protection of a common law right, it had been held in England that laches afforded no defence where the cause of action was not statute barred. It was also said that this applied as much after the Judicature Acts as before them. This was the view taken by Budd J in *Cahill v Irish Motor Traders' Association…*

The Court of Appeal in England, however, in *Habib Bank Ltd v Habib Bank AG Zurich*, [[1981] 2 ALL ER 650] brushed aside rather sweepingly the distinction between common law and equitable rights and said that the defence of laches is available whenever an injunction is sought. I said in earlier editions that this approach was redolent of the 'fusion' heresy discussed earlier and it could not be assumed that an Irish court would depart from the view of Budd J. A similar view has been taken in Australia. I also remain of that view. Why should a person who brings a claim for breach of contract or tort within the statutory period be confined to a claim for damages, where that is an inadequate remedy, because of laches? The court in *Habib* ignored the fact that, even before the Judicature Act, the common law courts could give injunctions in aid of legal rights, a common law remedy to which laches afforded no defence." (at paras. 3.41-3042)

114. Halsbury's Laws of England states, at Volume 47 (2014) para. 253:

> "The defence of laches is, however, allowed only where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the claimant is entitled to the full statutory period before his claim becomes unenforceable; and an injunction in aid of a legal right is not barred until the legal right is barred, although laches may be a bar to an interim injunction."

115. Based on the authorities opened to me, including Keane on Equity and the Law of Trusts in Ireland, I am not persuaded that the defendants have made out a case that the equitable doctrine of *laches* provides a defence to the within proceedings in circumstances where the plaintiffs' claim is most definitely not statute-barred.

116. Furthermore, with regard to the defendants' reliance on the *dictum* of Mummery L.J. in *Fisher v. Brooke*, as quoted above, the position in that case was that the UK Court of Appeal set aside two declarations which had been made by the lower court to the effect that the claimant was the joint owner of copyright in a musical work to the extent of forty percent and that the defendants' implied licence to exploit the musical work had been revoked from the date of the issue of the claimant's proceedings. On appeal however to the UKHL (*Fisher v. Brooker* [2009] 1 WLR 17640, the trial court's declarations were reinstated, the UKHL holding, *inter alia*, that since *laches* could only bar equitable relief it could not bar the claimant's claim for a declaration as to the existence of a long term property right, recognised as such by statute, which was not equitable relief. In the course of his judgment, Lord Neuberger stated:

> *"In the present case, the majority of the Court of Appeal thought it appropriate to take such a course primarily because of the apparent inequity of Mr. Fisher being able to seek an injunction to enforce his rights as the holder of an interest in the musical copyright in the work. Quite apart from the point made by Lord Mance, this point, as Mr Purvis argues, involves the tail wagging the dog. If the declarations set aside by the Court of Appeal are reinstated, then, were Mr Fisher subsequently to apply for injunctive relief to prevent unauthorised use of the work, such an application would be dealt with on the merits. If the court was satisfied that it would be oppressive to grant an injunction in the particular*

circumstances, for instance because of prejudicial delay, it would refuse an injunction to restrain the infringement, and leave Mr. Fisher to his remedy in damages…"

117. To my mind, the reasoning of Lord Neuberger is not dissimilar to the reasoning of Budd J. in *Cahill v. Irish Motor Traders' Association*, where he states:

"in order to deprive a person of a legal right to such an injunction, to which he would otherwise be entitled, there must be such delay and acquiescence as, in the view of the Court, would make it in the nature of a fraud for the plaintiff afterwards to insist upon his legal right."

118. I turn now to the defendants' argument that the Court in exercising its inherent jurisdiction should not grant the plaintiff the relief claimed because of the plaintiffs' delay and the prejudice which has been caused to the defendants as a result.

119. The defendants allege that the plaintiffs' delay must be considered to run from in or about 1991 since the first plaintiff was on notice of the breakwater from that time onwards. In this regard the defendants point to a letter dated 10th January, 1991 from Cork County Council to an objector to Mr. Forsey's planning application and which referred to "[p]rotection works having been recently constructed" in respect of which Mr. Forsey had been advised that a foreshore licence and planning permission was required. This letter had been copied to an official in the first plaintiff's department.

120. Counsel for the plaintiffs argues that the first named plaintiff is not under an obligation to investigate all developments in respect of which retention planning permission has been refused so as to ensure that the relevant structure has been removed.

121. I am inclined to agree with the plaintiffs' submission. On the evidence before the Court, I am satisfied that the first named plaintiff became actively aware of the breakwater in 2006 when complaint was made by a member of the public. I also accept the plaintiffs' proposition that they cannot be expected to police the coastline such as to become aware of interference with State owned foreshore at the exact moment such interference occurs. Presumably, this is one of the reasons the legislature has provided for a sixty year time limit in relation to State owned foreshore.

122. Nor do I believe that the plaintiffs should be penalised because proceedings did not issue between 2006 and 2008. It is clear from the correspondence put before the Court that in this period the plaintiffs could reasonably argue that they were awaiting the title documents which they had sought after Mr. Burns advised them in April 2006 that the breakwater and swimming pool were on the defendants' lands.

123. By 8th July, 2008, however, the CSSO were involved on the part of the plaintiffs. As has been seen, both the defendants, and their solicitors, responded in July, 2008 to the CSSO's correspondence. There is no doubt that a hiatus occurred between August, 2009 and 8th March, 2013 when the CSSO next wrote to the defendants and their solicitors. In the course of his evidence on behalf of the plaintiff, Mr. Nolan testified that the five year hiatus in the progressing the plaintiff's claim from 2008 and 2013 was due to reduced resources within the plaintiff's department, together with the restructuring of responsibility for the State foreshore within departments of government which took place during those years. Mr. Nolan accepted that as a matter of fact there was delay in the progressing of the plaintiffs' case.

124. Were the requisite limitation period otherwise than the sixty years provided for in the Statute, the Court would be minded (for the purpose of considering whether the defendants would be unduly prejudiced) to consider the plaintiffs' non-activity between August 2008 and March 2013 as a substantial delay. However, given that the within case relates to State foreshore in respect of which the Legislature saw fit to allow for a considerable limitation period, I cannot consider this five year delay, of itself, sufficient to deny the plaintiffs relief in this case.

125. I turn now to the defendants' claim that they are prejudiced by the delay in the progressing of this case. As to the matters directly in issue between the plaintiffs and the defendants, I find no basis upon which it can be maintained that the defendants have been unable to meet the plaintiffs' claims. That case has been heard in full. The first defendant gave evidence and did not profess to suffer from any failure of recollection due to the lapse of time. Nor did the lay witnesses called on the defendants' behalf make such a claim. Moreover, the defendants were in a position to retain and call expert evidence in relation to the breakwater itself.

126. There is, however, the Third Party issue. It is common case that by Order of 12th January, 2015, the defendants obtained leave from the High Court to issue and serve a Third Party Notice on O'Sullivan &Associates, the Consulting Engineers retained by the defendants to conduct a survey when purchasing their property at Blind Harbour. Thereafter the defendants delivered a Third Party Statement of Claim. By motion dated 9th June, 2015, O'Sullivan & Associates sought an order setting aside the Third Party Notice. By Order of 2nd December, 2015, the High Court (Binchy J.) set aside the Third Party Order on the basis of delay and in particular as a result of the inherent unfairness with respect to O'Sullivan & Associates' ability to properly defend the proceedings in light of the extensive period of time which had elapsed between the date of the contract/inspection report and the institution of the within proceedings.

127. It is thus the case that the defendants are now prohibited from maintaining their claim against O'Sullivan & Associates.

128. The plaintiffs acknowledge that the defendants' Third Party Notice in respect of O'Sullivan &Associates has been set aside. They submit however that the balance of justice remains in favour of the plaintiffs being able to succeed in their claim given that the relief claimed in the within proceedings is sought in order to vindicate public rights and to protect the environmental integrity of the foreshore. It is submitted that the unavailability to the defendants of their remedy against the aforementioned Third Party should not prohibit the plaintiffs from obtaining an injunction in pursuit of those goals.

129. Whilst I am satisfied that it is not the case that the defendants were restricted only to suing O'Sullivan & Associates on foot of third party proceedings, given that they were aware of the plaintiff's complaint since at least 2008, I accept that the submission that the plaintiffs' delay in processing the within proceedings probably contributed to the overall delay which was found by the High Court to prejudice O'Sullivan & Associates.

130. However, having regard to the public interest objective in preserving the State owned foreshore, the Court agrees with the plaintiffs' argument that the outcome of the Third Party proceedings should not debar the granting of relief in this case. Unfortunate and all as the loss of the defendants' remedy against the aforementioned Third Party is, that factor, to my mind, cannot, of itself, be sufficient to deny relief to the plaintiffs in this case in circumstances where it is now uncontested that the breakwater stands largely on State owned foreshore and where the first named plaintiff is vested with the task of ensuring the integrity of the State foreshore. The Law Reform Commission, in its "*Consultation Paper on Limitations of Actions* (LRC CP 54-2009, at 2.122) cites "a greater public

interest in the right to recover the foreshore" as an explanation for the very lengthy limitation period provided by the Statute.

131. The Court must also factor into the equasion that even when on notice of the plaintiffs' claim in 2008 (the Court accepting the first defendant's evidence that he had not been apprised of that claim in 2006 by Mr. Burns), the defendants' position in 2008 (and for a considerable period of time thereafter) was that the breakwater was on their property. On the first defendant's own evidence, in 2008, he spoke to Mr. Burns about the plaintiffs' claims. While it is not clear to the Court whether Mr. Burns remained at that time a principal in O'Sullivan & Associates, it seems to me the defendants then had opportunity to approach O'Sullivan & Associates in relation to the matter. In all the circumstances of the case, I do not find that the delay, which undoubtedly occurred in this case (and which, I acknowledge, contributed to the defendants' inability to pursue O' Sullivan & Associates) is sufficient to deprive the plaintiffs of a remedy.

***The defendants' contention that the breakwater should be left in situ in circumstances where it is fit for purpose and has provided protection for the defendants' property in excess of twenty seven years*.**
132. As already referred to, in their Defence the defendants plead that the breakwater is necessary for the preservation, integrity and/or maintenance of their property and the immediate coastal area in proximity thereto. In oral and written submissions to the Court, the defendants assert that given that it has served its purpose well over a period of twenty seven or so years, the breakwater should be left in situ, albeit it is accepted that it rests largely on State foreshore. It is further submitted, effectively, that the public interest objective in protecting the integrity of the State foreshore and in ensuring public access to the beach at Blind Harbour can be achieved by the adoption of the solution advocated by Dr. Murphy, as set out in his report and in his evidence.

133. There was a difference of opinion between Mr. McDonald and Dr. Murphy as to the structural integrity of the breakwater.

134. I note that both in his report, and in evidence, Dr. Murphy acknowledged that the design of the current breakwater was not perfect. In his view, however, it had qualities that rendered it attractive from an engineering perspective in that it provided for sufficient separation distance from the defendants' property to enable the waves to be dissipated without damage to the defendants' property. In his view, the fact that the breakwater was built on an existing rock foundation, which lends stability, together with the existing revetment, constitutes sufficient protection for the defendants' property.

135. Dr. Murphy also accepted that there were international standards existed in 1990 in relation to the construction of coastal protection structures but denied that the breakwater was constructed to poor practice, as suggested by Mr. McDonald in the course of his evidence. He accepted however that the breakwater had been constructed without the use of a filter or core and that the absence of a filter or core probably related to cost issues as opposed to a considered decision having been made in 1990 as to the effectiveness of a breakwater using only large rocks.

136. According to Mr. McDonald, the almost vertical nature of the breakwater goes against all good practice for rubble mound or rubble constructed breakwaters. He testified that the more vertical the structure the more reflective it is such that waves simply crash against it and go out again, leading to the undermining of the structure. On the other hand, a gradient in the breakwater would have caused no reflection and wave energy would be released more slowly. Mr. McDonald had concerns about the integrity of the breakwater in the event of a storm event of the like that occurred in December, 1989.

137. Apart from its vertical nature, Mr. McDonald also took issue with other elements of the breakwater. He described it as comprising of a selection of large to medium rocks placed on top of each other with no core, no real mass at the centre. His fear was that in a big storm event of the type that occurred in December, 1989 the rocks would move.

138. Overall, I prefer the evidence of Mr. McDonald that the breakwater does not adhere to international standards, even as they stood in 1990. The fact that the breakwater has stood for almost twenty eight years cannot gainsay this, particularly in view of the fact that on two occasions at least the defendants have had to carry out repairs to the breakwater.

139. As to the public's right of access to public to the western/southern portion of the beach, Dr. Murphy was of the view that a gap could be opened up on the portion of the breakwater that is situate on the State foreshore in order to ensure continued access for the public. Dr. Murphy accepted, however, that, to date, he had not thought out the solution in its entirety from an engineering perspective.

140. Mr. McDonald did not agree with Dr. Murphy's solution that a break or gap could be created in the breakwater so as to facilitate public access to the western/southern part of the beach. While he accepted that if it was technically feasible to put a gap in the breakwater, and that this would resolve the issue of public access, he was nevertheless concerned as to how a vertical cut in the breakwater could be achieved given that it would require a lot of reinforced concrete. Thus, in Mr. McDonald's opinion it would be simpler to remove the breakwater. Moreover, Mr. McDonald did not support the defendants' suggested solution in view of the fact that the breakwater had not been constructed to recognised British and US standards and where there was no evidence that it had been designed by a consulting engineer in 1990. While Mr. Hoare's report of 1990 referred to the retaining wall having been designed by a consulting engineer, there was no reference to there having been any engineering input into the design of the breakwater. Thus, in Mr. McDonald's view, even with a gap for the public to pass through, the breakwater would still have its design deficiencies. Given his concerns as to its design, he could not stand over Dr. Murphy's suggested solution.

141. Having regard to the evidence as to how the breakwater has been constructed, I am not persuaded that Dr. Murphy's proposed solution is a feasible one. Moreover, even if cutting a gap in the structure were viable solution from a purely engineering point of view, it remains the position that the breakwater is largely on State foreshore and thereby represents a restriction to public access to the beach at Blind Harbour.

142. There was debate in the course of the within hearing as to how frequently the beach is used. I am satisfied, however, that there is sufficient evidence before the Court that the beach is a public amenity that is capable of use by the public. I accept Mr. O'Driscoll's evidence in this regard. I also had the evidence of Dr. Horgan who himself completed the circular walk, described by Mr. O'Driscoll, on a number of occasions. I note also that the defendants' solicitors' letter of 29th July, 2009 refers to "many visitors and locals" visiting the beach "on a regular basis".

It is of course the case that even if the breakwater was not there to impede access, the beach is accessible largely only at low tide, albeit that it is possible also to walk above the HWM, as is demonstrated by Mr. O'Shea' survey sketch of 9th October, 2007, as attached to Mr. McDonald's report dated 13th June, 2012. I should also say that I am satisfied that the natural rocky outcrop which predated the breakwater did not impede public access to the beach, particularly in circumstances where an old OS survey map shows the beach to be on the landward side of the rocky outcrop.

143. It was suggested by the defendants that it was possible for the public to access the western/southern portion of the beach at low tide, by passing by the breakwater at its outer extremity. Mr. McDonald agreed that this could be done at a time of a very low tide but that most of the time this cannot be done, even at low tide.

144. On balance, I am satisfied, from the available evidence, that reasonable and safe access to the beach for the public requires the removal of the breakwater.

145. It was accepted by Mr. McDonald in the course of his evidence that the defendants require some form of coastal protection to protect their property from extreme weather events. The defendants ask that the Court take account of their property's need for coastal protection and the role played by the existing breakwater in providing such protection.

146. As can be seen from his report of 7th March, 2017, and his evidence, Mr. McDonald is of the view that the defendants' coastal protection concerns can be alleviated by the construction on their property of a rock revetment in front of their property. Essentially, he says that the defendants can achieve coastal protection by embarking on works to continue the existing revetment, which lies to the east of their property, across in front of their property. It was acknowledged by Mr. McDonald that if the defendants were to build the protective structure he advocates they would lose their swimming pool which they realigned in 2014 in order to confine it within their own boundary.

147. There was also dispute between Mr. McDonald and Dr. Murphy as to whether the construction of a revetment of the type suggested by Mr. McDonald would nevertheless entail an encroachment onto the State foreshore. Dr. Murphy was of the view that this would occur. Mr. McDonald testified that there were ways to prevent such encroachment, including restricting the slope of the revetment to I in 2, and constructing a vertical wall on top of the revetment Overall, having regard to the evidence of both experts, I prefer Mr. McDonald's evidence. I am satisfied that it is entirely possible for the defendants to construct a revetment of the type suggested by Mr. McDonald which will lie entirely on their lands.

148. There was dispute between the parties as to the likely cost of the revetment protection structure advocated by Mr. McDonald. Dr. Murphy was of the view that the required works would cost €105, 000 (later revising it to at least €35, 000). Mr. McDonald estimated that the cost would be in the region of €10,500, in circumstances that when the breakwater was deconstructed the defendants would have that rock material available to them for the construction of the revetment. Overall, I am not persuaded by Dr. Murphy's figures and find Mr> McDonald's assessment more realistic.

149. Dr. Murphy testified that if the defendants had to construct a revetment of the type suggested by Mr. McDonald they would lose the view of the sea which they presently enjoy from their house. While I entirely understand the defendants' concern in this regard, to my mind, such a loss cannot be said to outweigh the right the public have to access public amenities, or indeed trump the plaintiffs' entitlement to seek to protect such public rights. In any event, I am not satisfied that the defendants themselves would lose their sea view. The available literature with regard to the defendants' house is that their living quarters are on the first floor. I perceive nothing in Mr. McDonald's revetment solution that would interfere with the views enjoyed by the defendants from their first floor living quarters.

150. Having regard to the findings which the court has made, I have not been persuaded that it would be unduly prejudicial or oppressive to the defendants for the plaintiffs to be granted relief in this case.

Summary

151. Having regard to the findings set out in the within judgment, in particular that the defendants asserted ownership of the breakwater and that it would be neither unduly prejudicial nor oppressive to the defendants if the breakwater was removed, the Court is satisfied to direct the defendants to remove the breakwater from the State foreshore at Blind Harbour and to restore the foreshore to its condition prior to the said works.

152. The Court is mindful that the defendants would be afforded a period of time to carry out the said works and that same should be engaged on in a timeframe when storms are less likely. I will hear submissions in this regard.