THE COURT OF APPEAL

Record No. 2015/633

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

ZOPITAR LIMITED

PLAINTIFF / RESPONDENT

- AND -

HAROLD JACOB ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE RUTH MCKINNEY

DEFENDANT / APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of June 2017

1. This appeal raises a difficult issue concerning the scope of private rights of way. Does a landowner who permits the drivers of oil tankers and "ride on" lawnmowers and other visitors to traverse his land for the purposes of gaining convenient access to a neighbouring property for a period of twenty years thereby create a right of way in favour of that neighbouring property? In the High Court Gilligan J. rejected this contention on the particular facts of this case: see *Zopitar Ltd. v. Jacob* [2015] IEHC 790. The defendant (and counter-claimant) now appeals to this Court against that decision.

2. The plaintiff in these proceedings, Zopitar Ltd., ("Zopitar") is a limited liability company having its registered office at Donegal Creameries, Ballyraine, Letterkenny, Co. Donegal. Zopitar is the holding company of Donegal Creameries Ltd. The defendant and counter claimant, Ms. Ruth McKinney (now deceased), was formerly a director of William McKinney & Sons Ltd., and a substantial shareholder in that company. Ms. McKinney was the owner of and resided at Oatfield Bungalow, Ramelton Road, Letterkenny, Co. Donegal. That property had been conveyed to her in 1999 by her late father, Mr. Ira McKinney, who was in turn a son of Mr. William McKinney. As I shall presently recount in greater detail, the Bungalow and the factory premises immediately abut each other and there is, indeed, no formal hedge or fence which demarcates the two properties.

3. Unfortunately, however, Ms. McKinney died in 2013 at some point after her defence and counterclaim was delivered. On 21st November 2013, the High Court directed that the proceedings were reconstituted with her cousin, Mr. Harold Jacob, named as defendant in his capacity as administrator *ad litem* and executor of the estate of the late Ms. Ruth McKinney.

The background to the proceedings

4. Before, however, explaining any of the legal issues which arise in this appeal, it is necessary first to set out in some detail the facts as found by Gilligan J. in the High Court. At some stage in the 1950s Ms. Ruth McKinney's grandfather, a Mr. William McKinney, established William McKinney & Sons Ltd. At some stage in the early 1950s this company acquired certain property at the Ramelton Road (comprised and described in Folio 13490F of the Register of Freeholders for Co. Donegal) from Mr. Ira McKinney, the son of Mr. William McKinney. These lands comprised a well known sweet factory which produced products under the brand name, "Oatfield Sweets." In 1999 Zopitar became the registered landowner in respect of the factory premises following a share and purchase agreement involving Donegal Creameries plc. Zopitar is the holding company for Donegal Creameries.

5. At some stage in 2011, Zopitar was anxious to secure an agreement for the sale of the lands upon which the former sweet factory was situated, and the supermarket chain, Lidl (Ireland) Ltd. ("Lidl"), emerged as a potential purchaser of the premises. Prior, however, to the formalisation of any final agreement, Lidl raised the issue as to whether a right of way ran from the factory premises into Oatfield Bungalow in which Ms. McKinney had resided during her lifetime with her father Mr. Ira McKinney. In the autumn and early winter of 2011 discussions took place at a number of Zopitar board meetings regarding this issue. The views of the board were expressed in a letter dated 11th October 2011 to the solicitors for Lidl:

> "Our client understands that two former substantial shareholders in the firm of William McKinney & Sons Ltd. who lived adjacent to the subject property walked to and fro from their dwellings to the factory premises through a gap in the boundary. However, when our client purchased the issue share capital of the said company in 1999 no easement or quasi-easement was sought or disclosed by the vendors and, as far as our client is concerned, none now exists."

6. Correspondence ensued from the defendant's solicitor who maintained initially that there was a right of way across the site of the old factory premises to the bungalow and subsequently, two related rights of way. The assertion of this right of way was probably one of the reasons why Lidl did not proceed with the purchase.

7. Ms. McKinney continued nonetheless to assert the existence of a right of way over the factory premises. The plaintiff then commenced proceedings seeking a declaration to the effect that there was no such right of way. The defendant filed a defence and counterclaim by which she positively asserted the existence of such a right of way.

The background to the claim regarding the right of way

8. The Oatfield Bungalow and the factory premises are immediately contiguous to each other and as I have already noted, there is, in fact, no fence or other physical boundary between the two premises. There is, indeed, a paved roadway from the back of the Bungalow to the factory yard and given the absence of any physical barrier between the two premises, the causal observer might, as Gilligan J. observed, justifiably form the view that the two properties are really one single item of property. This reflects the fact that both properties were at one stage originally owned by Mr. William McKinney, as had acquired these properties in February 1930. At some stage in the 1950s the lands on which the factory is situate were transferred to William McKinney & Sons Ltd., the original factory owner.

9. Prior to 1982 both the Oatfield Bungalow and the factory premises each had a separate entrance onto the Ramelton Road. The new de Valera Road was, however, constructed in 1982. This new road provided a new wide entrance into the factory premises and the

old Ramelton Road entrance fell into disuse.

10. The Oatfield Bungalow could still, of course, be entered from an entrance on the Ramelton Road but two practical difficulties arose. The first was that oil lorries, if they entered the small avenue lead to the bungalow premises, could not turn to get back down the avenue to the Ramelton Road. The second was that there would have been difficulty in gaining access to the rear gardens behind the bungalow with, for example, heavy gardening machinery or ride-on lawnmowers and the like.

11. In the High Court Gilligan J. found that Ms. McKinney often crossed the plaintiff factory's land, from the de Valera Road entrance, to gain access to the Oatfield Bungalow. This means of ingress to the Bungalow was also used in the years prior to Ms. McKinney's death in 2013 by psychiatric nurses and that this happened sometimes once a week. Gilligan J. also found that oil lorries used the same route in order to deliver oil to Ms. McKinney's house, and that this occurred twice or, at most, three times, a year. The judge accepted that the private avenue leading up to Ruth McKinney's house from the Ramelton Road was not wide enough to accommodate large oil lorries. Gilligan J. also accepted the evidence of Ms. Ruth McKinney's gardener, Mr. Paul McCormack. Mr. McCormack had stated that he had accessed Ruth McKinney's garden using a "ride on" lawnmower via the second alleged right of way, the so-called 'gardener's route,' and that he carried out work on her garden for seven or eight months out of every year.

12. Gilligan J. then summarised the user as follows:

> "I am satisfied that nobody in the factory ever stopped or challenged Ruth McKinney or any of her visitors from using these routes. Many witnesses attested to this, not least Mr. Desmond Doherty, who worked on the factory for almost 50 years, eight of which he was general manager. All of the factory workers who gave evidence during these proceedings illustrated fondness for Ruth McKinney and the fact that she had a deep familial history with the factory; that she was more or less part of the furniture. Mr. Gareth Whitmore, property manager of the Donegal Investment Group plc, explained in his evidence that allowing Ruth McKinney to use the factory yard was, in his view, "the neighbourly thing to do".
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> I accept, based on the evidence of Mr. Harold Jacob, defendant ad litem in these proceedings, and also on the evidence of Mr. Oliver Duffy, who worked on the factory for almost 40 years, that Ira and Ruth McKinney drove through the factory premises on their way to their holiday home in Portnablagh once or twice a year. I am also satisfied, based not only on sworn evidence but on photographs submitted to the Court, that as a result of both vehicular and pedestrian traffic coming in and out of the factory, on one particular occasion, Mr. Oliver Duffy was instructed by Mr. Frank O'Donnell, the Health & Safety Officer of the factory, to put 5 mile per hour signs facing the direction of the de Valera Road from Ms. McKinney's house. From inspecting the 'post-demolition' photographs of the lands, as evidenced to this Court, I accept that there is no physical boundary separating the entrance to Ruth McKinney's bungalow from the factory lands, and there is no barrier to prevent access between the two. There is also smooth tarmacadam covering the whole compound making it appear to a passerby that the compound is all the one property. An aerial photograph taken in or about 1954 shows the overall plot and demonstrates the free passage that existed between the factory premises and Oatfield Bungalow.
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> I am satisfied from the evidence given, particularly by Mr. Ian Ireland, chairman and chief executive officer of Donegal Creameries plc, that pedestrian traffic (factory staff) sometimes used Ruth McKinney's avenue entrance from the Ramelton Road as a shortcut to gain access to the factory premises.
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> There is no major dispute on the evidence that, from in and around 1982, if people were coming to visit Oatfield Bungalow they could do so either by using the entrance off the Ramelton Road or, alternatively, by simply driving through the factory gates when they were open from the de Valera Road, moving across a non-obstructed open yard area, and driving straight through into the rear of Oatfield Bungalow. This entrance clearly was the preferred route of oil lorries who entered from the de Valera Road, drove across the yard and, having made the delivery of oil to Oatfield Bungalow, drove back across the yard and out through the gates onto the de Valera Road. And likewise, gardeners, hedge cutters, and grass cutters did the same for ease of access to the rear of Oatfield Bungalow, as did psychiatric nurses who went to visit Ruth McKinney."

13. In order to understand the context of this prescription claim it is next necessary to chronicle the history of the factory and the decision of the McKinney family to sell the premises in 1999. As I have already observed, Ms. McKinney's grandfather, Mr. William McKinney, was the founder of William McKinney & Sons Ltd. and it appears that he developed the factory premises on what had originally been part of his lands and which were later transferred in at some stage in the 1950s to the ownership of William McKinney & Sons Ltd.. Two of William McKinney's sons, Ira and Haddon, became involved in the business and at some point in time, two houses were constructed on the lands adjacent to the factory premises. Ms. McKinney's father, Mr. Ira McKinney, succeeded to the house abutting the factory premises (i.e, Oatfield Bungalow), and his brother, Haddon, succeeded to the other.

14. The factory premises were conveyed at some point by Mr. Ira McKinney to William McKinney & Sons Ltd. He remained, however, the owner of Oatfield Bungalow, where he lived with his wife, who predeceased him, and his daughter, Ms. Ruth McKinney. Haddon McKinney and his family lived in a second house on the far side of Ira McKinney's house. On the death of their father, Ira and Haddon became principal shareholders in the company, each holding 43.24% of the ordinary shares. Unfortunately, however, Haddon McKinney died suddenly in August 1972, leaving Ira McKinney, as the de facto owner of the family sweet business, the balance of the shares being owned either by family members or close associates of the family. Mr. Ira McKinney worked the business as a very substantial shareholder (albeit not majority shareholder), and was a director of the company and chairman up and until in or around 1997, when he resigned.

15. The Oatfield sweet factory was a very successful one and at one stage was the largest employer in Letterkenny with a workforce of some 178 employees. In or about 1982, a new road was constructed to join the Ramelton Road and an old railway line was abandoned, thereby giving the company the opportunity to acquire quite a significant amount of land between the old boundary of the factory premises and the edge of the new de Valera Road.

16. All of this facilitated the construction of the de Valera Road entrance and new factory gates were erected for this gateway. There was now a new entrance to the factory from the de Valera Road, along very extensive parking facilities. No new buildings were, however, actually constructed on this additional land, so in effect, one simply drove in through the de Valera Road gates along a driveway, which led in turn to the yard of the factory premises. This then led on across the yard and up to the rear portion of Oatfield Bungalow and then across to the rear of Haddon McKinney's house.

17. Accordingly, following the construction of the de Valera Road in 1982 anyone wishing to access Oatfield Bungalow – whether for the purposes of social visits or to make deliveries or otherwise - could come through the new de Valera Road gates when they were

open. For that matter such visitors could also use this route to access the rear of the other bungalow, then occupied by the widow and children of Mr. Haddon McKinney. It may be noted that although pretty well identical circumstances apply in the case of both houses, the descendants of Haddon McKinney have made no claim to any right of way across the factory premises to the rear of their house.

18. As Gilligan J. explained:

> "The factual reality of the situation that pertained from 1982 onwards was that the company, William McKinney & Sons Limited, which owned the factory premises, was, in turn, owned and controlled by the wider McKinney family but principally by Ira McKinney and his daughter, the original defendant herein, and Haddon McKinney's daughters.. ….Effectively, what was happening on the ground was that, between a company controlled by the McKinney family and principally by the owners and occupiers of the two houses on the adjacent lands, they used the de Valera Road entrance for the purpose of access to the rear of their property and quite simply nobody in the factory would ever have dared to state that either Ira McKinney or his wife or daughter, or Haddon McKinney's widow and daughters, could not have people coming to make deliveries to them through the open factory gates across the factory premises."

19. All of this was probably the reason that during the period between 1982 and early 1999 the issue of any right of way simply did not arise. There was certainly no indication that Mr. Ira McKinney was ever conscious of the fact that he might well have been setting up a right of way over the factory premises in favour of Oatfield Bungalow.

20. By the late 1990s, however, despite a booming economy, changes must have been afoot in the confectionery market. The factory was no longer prospering and the threat of receivership loomed. This threat was averted when Donegal Creameries Plc indicated that they would subscribe to a share purchase arrangement provided they obtained no less than 76% of the shares of the company. Donegal Creameries became majority shareholder in a share purchase transaction dated 12th February 1999 for the sum of IR£758,000.

21. This transaction has some significance for the present case for the reasons which Gilligan J. explained in his judgment:

> "…..the existence of two rights of way, right across the factory premises to Oatfield Bungalow, would have been a matter which would have merited examination by the purchasers in a commercial transaction of a strategically sited factory premises in respect of which the purchasers, being the holding company of the present plaintiff company, were paying over a large sum of money. Not only is the agreement silent as regards either the existence of or a claim to any rights of way across the factory premises, but the agreement contains several terms and conditions as regards warrantor protection provisions and, in particular, Schedule 5(1) relating to warranties and information stated.:-
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> "All information given by or on behalf of the company or the vendor to the purchaser or to its professional advisers in the course of negotiations leading to this agreement contained in the documents set out in a list of documents in the agreed form was when given and is at the date hereof true and accurate in all respects and so far as such information is expressed as a matter of opinion, such opinions were when given and are at the date hereof truly and honestly held and not given casually or recklessly or without due regard for the accuracy. There is, to the best of the knowledge, information and belief of the warrantor, no fact or matter which has not been disclosed in writing to the purchaser or to its professional advisers which would render such information untrue or misleading or which on the basis of the utmost good faith ought to be disclosed to an intending purchaser of shares in the company or the disclosure which might reasonably effect the willingness of the purchaser to purchase the shares on the terms (including price) of this agreement."At para. 20 relating to encumbrances, it is specifically set out that "there are no burdens effecting all or any part of the properties which are capable of affecting registered land without registration by virtue of s. 72 of the Registration of Title Act 1964". At para. 21, relating to possession and enjoyment at subs. 1(a) it is stated:- "The company is entitled to and is in possession and exclusive occupation of the properties and no person other than the company is entitled to or is in possession or occupation or has any interest of whatever nature howsoever arising in the properties or any part thereof and none of the properties or any part thereof is affected by or the subject of any lease, tenancy, licence, agreement or arrangement relating to the occupation or user thereof by any person other than the company."
>
> Further, it is set out at s. 23 relating to notices and orders and matters affecting the properties at subs. 1(b):-
>
> > "None of the properties or any part thereof, nor the company as owner or occupier thereof, is affected by nor, to the best of the information, knowledge and belief of the warrantor, is any of the properties or any part thereof likely to be affected by, any of the following matters:-
> >
> > (i) any exception, reservation, stipulation, restriction, burden, inhibition, covenant, obligation, condition, easement, quasi easement, profit prendre, license, way leave, right or privilege of whatever nature howsoever arising which is of an usual or onerous nature or which conflicts with or adversely affects or may conflict with or adversely affect the present use of any of the properties or any part thereof or which adversely affects or may adversely affect the title to or value of any of the properties or any part thereof and there is no agreement or commitment to give or create any of the foregoing and no person has claimed to be entitled to any of the foregoing."
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> Further, at s. 28 of the agreement relating to no other adverse matters, it is set out at 28(1) "there are no matters which materially and adversely affect the title of the company to any of the properties or the value of any of the properties or the continued use and enjoyment thereof".
>
> Further, at 29 relating to requisitions on title, it is stated at 29(1) "any deeds, documents and information supplied for the purpose of deducing title to any of the properties in connection with this agreement are true, complete and accurate and the company has not entered into any transaction affecting the title to or use or value of any of the properties".

22. The net effect of the share agreement is that in essence the original defendant, Ms. Ruth McKinney, warranted that there were no rights of way affecting the company's property when she sold her holding of 142,375 shares in the company to the plaintiff's holding company for IR£453,511.09 in 1999. At this time Ms. McKinney was the largest single shareholder. It is true that the question of Ms. McKinney's general mental health and the lack of independent legal advice were raised by the defendant in the Court below. (There was evidence that Ms. McKinney had suffered from depression). But, as Gilligan J. noted, Ms. McKinney never moved to have the share purchase agreement set aside and he was not satisfied on the evidence that she "was in some way incapable of understanding the nature and extent of the documents she was signing in respect of the sale of her shares on 12th February 1999."

23. Gilligan J. also rejected the lack of independent legal advice argument saying:

> "A further issue raised is that she did not have independent legal advice. The situation that occurred was that the same firm of solicitors acted for the company and its shareholders and for Donegal Creameries Plc, but separate solicitors were appointed to represent the interests of the McKinney family and the interest of Donegal Creameries Plc. There is really no clear indication such as to satisfy the balance of probabilities as to what occurred in the background. A solicitor was available to consult with the defendant and may or may not have done so, but it is clear on the evidence that Mr. Henry Patterson, who was the accountant to the company, brought the share purchase agreement to the defendant and she signed it. Further, she received the purchase price for her shares which was a very substantial sum of money at the time, and she never moved to set that agreement aside or to attempt in some way to renege on any of its provisions."

24. Gilligan J. also pointed to the fact a series of requisitions on title were raised on behalf of Donegal Creameries Plc and a number of relevant issues were raised in the following terms:-

> "Are there any disputes with any adjoining owner, to which the answer was "no".
>
> Is the property subject to any right of way, water, light, air or drainage or to any other easement, reservation, covenant condition or restriction or to any right of any kind, to which the answer was "none, save those on title or revealed by an inspection of the property".
>
> Confirm that clear, vacant possession of the entire property will be handed over at closing, to which the answer was "confirmed".
>
> Is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it, or the use thereof or has any adverse claim thereto been made by any person, to which the answer was "no"."

25. Gilligan J. considered the answers to this question to be revealing, since "if there was a right of way in existence and/or if the defendant was claiming such a right of way, the simple answer to the question was "yes"." The Oatfield Bungalow was transferred to Ms. McKinney in 1999, but there was no reference to the rights of way which are now being claimed by the defendant in the instrument of conveyance.

The potential Lidl purchase and the assertion of the right of way

26. In late summer 2011 the plaintiff was interested in securing a purchaser for the factory premises and it indicated to Lidl, the supermarket chain that the site might be available for purchase. Mr. Mark Clifford, the property acquisition manager for Lidl, confirmed the contents of a letter of 26th August 2011, namely, an offer to purchase the site conditionally from Donegal Creameries Plc. Around that time Mr. Clifford met Mr. Whitmore and then he drove onto the factory premises and he saw that there was a link between the factory property and the adjoining land. In evidence he described it "there appeared to be a link to a couple of houses adjoining the site, yes".

27. In the letter Mr. Clifford stated, *inter alia*, as follows:-

> **"Way-leave/A Right of Way**:
>
> The vendor will extinguish the existing right of way across the property in favour of the adjoining residential dwelling (shaded yellow on the attached plan for illustrative purposes only) prior to contract closing. The existing access to the residential dwelling on the western boundary of the property will be removed and the access will be permanently replaced with a suitable boundary treatment by the vendor."

28. In a subsequent letter dated 27th September 2011 Byrne Wallace, the solicitors on behalf of Lidl, drew attention to the right of way issue:

> "We understand that there is a right of way through the property and we would be obliged if you could please furnish us with full details of this right of way."

29. In a further reply of 11th October 2011, Brian O'Mahoney, solicitor of VP McMullin (the solicitors for Zopitar) replied to the query in the following terms:-

> "2. Our client understands that two former substantial shareholders in the firm of William McKinney & Sons Ltd. who lived adjacent to the subject property walked to and fro from their dwellings to the factory premises through a gap in the boundary. However, when our client purchased the issued share capital of the said company in 1999, no easement or quasi easement was sought or disclosed by the vendors and as far as our client is concerned, none now exists."

30. Mr. Clifford confirmed in evidence that subsequent to the first letter of the 26th August 2011, he had a discussion with Mr. Whitmore, and Mr. Whitmore informed him that there was no legal right there and on that basis, the parties moved into legal negotiations. It would seem, therefore, that it was the letter from Lidl of 26th August 2011, that, for the first time, raised an issue as regards a right of way through the de Valera gates, across the factory premises to the rear of the defendant's house.

31. The board minutes of Zopitar on 23rd September 2011 record that it was stated that an offer had been received from Lidl Ireland of €1.9m for the Oatfield site. Mr. Gareth Whitmore was asked to arrange a meeting with Mr. Harold Jacob, Ms. Ruth McKinney's cousin, on the site to see what could be done with the avenue from the Ramelton Road adjacent to the factory. Correspondence and meetings between the parties ensued, but a resolution of the dispute did not prove possible.

The defendant's specific evidence in support of the right of way

32. The gates at the de Valera Road entrance were left open during the day providing uninterrupted access and egress to the factory site. The gates were locked at night and at all times when the factory was not actually operational, particularly at weekends, subject to the factory shifts. Gilligan J. noted that there was never any request made by Ms. Ruth McKinney or her father, Mr. Ira McKinney, for keys to the gates or a request to use the gates outside normal factory working times.

33. Gilligan J. then observed:

> "It does appear that at some time in 1993, arising from a fire that occurred at a premises on the opposite side of the de

Valera Road, it was considered appropriate that Ira McKinney should have a set of keys in case access was required through the De Valera Road gates in a similar emergency situation to that which occurred across the road. There is also evidence that Ira McKinney had a master set of keys to the entire factory premises. In respect of the master set of keys, it was at a time when Ira McKinney was chairman, director, and a substantial shareholder in the company who lived immediately adjacent to the factory premises, and the master set of keys was neither requested nor given to him for the purpose of utilising an alleged right of way through the factory gates at a time when they were locked. The emergency set of keys that, on the evidence, were given to Ira McKinney, was for the sole purpose of enabling the gates to be opened in an emergency situation, and on the evidence adduced neither Ira McKinney nor the defendant ever actually used the keys themselves to open the gates at a time when they were closed so as to utilise the alleged right of way. On one or two occasions when oil deliveries were made outside of normal working hours, it appears that a phone call was made to the factory and the personnel would open the gates to enable the oil to be delivered."

34. Gilligan J. also found that Mr. Paul McCormack, who, as I have already noted, did gardening work for the McKinneys, asked Mr. Frank O'Donnell, an employee of the company, for permission to come through the gates at a time when they would be locked. The judge then stated:

> "Neither Ira nor Ruth McKinney ever sought permission for a set of keys to be utilised in furtherance of their alleged right of access to the right of way across the garden and with either of the two sets of keys which they did possess, they were never utilised to open the factory gates. Further, the evidence confirms that, in a situation where somebody wished to get to the back of the defendant's house for any purpose when the gates were locked, they would ask for the gates to be opened."

35. Gilligan J. then stressed the neighbourly interchange and the informal reciprocity of arrangements which obtained as between the two adjoining properties:

> "It does appear that at all times there was reciprocity of arrangements between the various members of the McKinney family and their companies. Members of the family living in the two houses and people who came to see them could pass and re-pass over the factory yard and out the gates onto the de Valera Road. Likewise, the factory workers and other persons wishing to enter the factory premises from the Ramelton Road could go up the driveway leading to the defendant's home and then turn right into the factory premises. At some stage in the recent past the defendant facilitated the factory premises by allowing a fire escape to be built on her land. On a variety of occasions members of the factory staff would be called up to the defendant's house to carry out small repairs, and generally to assist. All of this was against a background where, from in or about 1999, the defendant was confined to her home through illness."

The Judgment of the High Court

36. Following a comprehensive review of the evidence and the law, Gilligan J. found that the user in the present question was simply *precario* so that an essential pre-condition to twenty years uninterrupted user as of right for the purposes of s. 2 of the 1832 Act had not been established. In his judgment Gilligan J. posed what he had considered to be the critical question as follows:

> "The important question is whether the use would suggest to a reasonably careful and prudent owner of the land that a casual use only of the land was being made dependant for its continuance upon the tolerance and good nature of such servient owner, or would it put such servient owner on notice that an actual right of way was being asserted. It cannot therefore be secret, clandestine or surreptitious. The use also cannot be forced upon the servient owner, for prescription theory demands acquiescence in order for a right to be established. Finally, for the Court to be satisfied that there has been acquiescence to the establishment of a right, the necessary use cannot be referable to a consent, permission or licence. It cannot be precatory, in the sense of being precarious, that is, subject to the will of the servient owner and capable of being interrupted. The determination as to whether a case falls on either side of the acquiescence/toleration divide depends on its particular facts."

37. Gilligan J. then referred to the decision of Herbert J. in *Orwell Park Management Ltd. v Henihan* [2004] 5 JIC 1409 that:

> "To establish an easement of way by prescription, the party claiming that right, either by virtue of s. 2 of the Prescription Act 1832 or under the doctrine of Lost Modern Grant, must provide evidence of continuous use of the way for the prescription period. Continuous use is not, however to be equated with incessant use; what the law requires is that the use be such that would clearly indicate to a servient owner that a continuous right to do what would otherwise amount to trespass was being asserted. A right of way is a non-continuous easement; a right to pass and re-pass over the property of another whenever the person claiming that right has occasion so to do. In my judgment where the evidence establishes that there has been an open, uninterrupted and continuous use of land as a right of way, in the instant case for 35 years, the Court should presume that the owner of the land was aware of this use and acquiesced in it. The important question is whether the use … would suggest to a reasonably careful and prudent owner of the [land] that a casual use only … was being made dependent for its continuance upon the tolerance and good nature of this servient owner, and would put such servient owner on notice that an actual right to do these things was being asserted."

38. Gilligan J. then continued by saying:

> "The requirement that use be *nec precario* goes beyond express permission that is sought by the dominant owner and given by the servient owner. It includes circumstances of licensed access and tolerated access, where the permission to enter can be tacit, born of conduct or particular circumstances or otherwise subject to the exigencies of the servient owner. …. I find that there was reciprocity of arrangements between the McKinneys and the plaintiff company. Access did not take place in a vacuum, but was part of a web of surviving connections. Some staff accessed the factory over the McKinney's private avenue. The Court also heard evidence of factory staff carrying out repairs and maintenance on the McKinney premises. It is in this context that there was toleration of nurses attending to an elderly lady who was often confined to her house. It is what one would expect from the relationship between the parties. In the view of this Court the use of the de Valera gates by Ira McKinney and by his daughter, Ruth McKinney, was tolerated, and was not as of right, and the user now being asserted was never brought as such to the attention of the company so that they could have made a choice. Given the effect that the establishment of rights of way would have on the factory site, it is just not plausible that the plaintiff would have submitted to the use if it was aware that it took place in pursuance of a right. The plaintiff was simply unaware that the access by the McKinneys was for any purpose other than their involvement in the factory and for neighbourly short-cuts. Neither father nor daughter alerted the plaintiff that a right was contemplated, much less asserted. I find on the evidence that neither Ira McKinney nor the defendant ever asked for a

> set of keys for the purpose of opening and closing the gates in the event that they wanted to traverse the factory premises after factory hours or at the weekend when the gates would be closed, so effectively the gates were closed against all comers, including Ira and Ruth McKinney, and they asked permission for the gates to be opened if there was any type of a situation arising such as the delivery of oil after hours. Ira McKinney did have a master set of keys, but this set was given to him while he was chairman and a director of the company, who also lived immediately adjacent to the factory premises, and they were neither requested nor given to him for the purpose of utilising an alleged right of way through the factory yard. Ira and Ruth McKinney did have another set of keys to the De Valera gates but these were given to them for the sole purpose of enabling the gates to be opened in an emergency situation such as a fire."

39. Gilligan J. then concluded by holding that there was no right of way established by Ms. McKinney:

> "On the evidence adduced there was never a legal right to use a right of way or two rights of way over the factory premises by or on behalf of the defendant. …. This view is further confirmed by the reply in Clause 29 of the requisitions on title that no person had made any adverse claim to any part of the factory premises so that certainly by 1999, not only had no claim been made, but the issue had never been raised as remained the position throughout until the letter from Mr. Clifford in 2011. I, accordingly, for the reasons as set out herein, find that the use of the plaintiff's factory premises by Ruth McKinney, and by her father, Ira McKinney, and/or their servants or agents and people coming to see them at their home, from 1982 until 2011, could not be characterised as setting up a legal, adverse, right of way as against the plaintiff."

40. The defendant has accordingly appealed against this conclusion of Gilligan J., maintaining that the user was of right. It is this issue which requires to be examined for the purposes of this appeal.

The concept of nec precario

41. The essence of the appellant's claim is that a right of way was acquired by prescription by reason of twenty years (or more) uninterrupted user under s. 2 of the Prescription Act 1832 ("the 1832 Act") (as applied to Ireland by the Prescription (Ireland) Act 1858) between the date of the construction of the de Valera road in 1982 and 2011. It is clear from the authorities that in order to establish such a prescriptive claim under the 1832 Act, the user must be "as of right" and that this requirement imports the traditional concepts of *nec vi, nec clam* and *nec precario*: see, *e.g.*, *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] A.C. 229, 239, *per* Lord Lindley and *R. v Oxfordshire C.C., ex p. Sunningwell Parish Council* [2000] 1 A.C. 335, 353 *per* Lord Hoffmann.

42. For completeness I should observe that although the 1832 Act is no more – it having been repealed by s. 8(3) of the Land Law and Conveyancing Law Reform Act 2009 ("the 2009 Act") – since the events which are the subject of the present litigation pre-date such repeal, the provisions of s. 2 of the 1832 Act continue to govern the present case.

43. It is fortunately not necessary for present purposes to examine the many obscure and arcane features of the 1832 Act. Few tears will have been shed upon its demise, as its repeal by the 2009 Act removed from the statute-book what the English Law Reform Committee had previously described as "one of the worst drafted statutes": see 14th Report, *Acquisition of Easements and Profits by Prescription* (Cmd. 3109)(1966) at 40.

44. Section 2 of the 1832 Act speaks of the person "claiming right" thereunder and s. 5 - which deals with the form of pleadings in prescription cases – refers to user as "of right". In one of the early post-1832 Act decisions on the point, *Bright v. Walker* (1834) 1 C.M. & R . 211, 219, Parke B. said that these provisions referred to persons using the servient tenement (*i.e.*, the land the user of which was said to give rise to the right of way):"openly and in the manner that a person rightfully entitled would have used it" and not by stealth or by licence. This understanding of the effect of the 1832 Act was confirmed by Lord Lindley in *Gardner v. Hodgson's Kingston Brewery Ltd.* [1903] A.C. 229, 239 when he said that the words "as of right" in the 1832 Act were intended "to have the same meaning as the older expression, *nec vi, nec clam*, *nec precario*". In the same case Lord Halsbury L.C. said ([1903] A.C. 229, 231):

> "That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean an user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought."

45. It is accordingly clear from these authorities that in order to establish such a prescriptive claim under the 1832 Act, the user must be "as of right" and that this accordingly imports the traditional concepts of *nec vi, nec clam* and *nec precario*. There is, of course, no question of force (*vis*) or secrecy (*clam*) in the user in the present case. The real question is whether the user amounted to precario.

46. The concept of *nec vi, nec clam*, *nec precario* ("without force, without stealth and without permission") is a quintessentially Roman law concept which, it is now generally accepted, was taken over by Bracton in his four books of *De Legibus et Consuetudinibus Angliae* ("On the laws and customs of England") which were published some time around 1235: see *R. (Beresford) v. Sunderland C.C.* [2004] UKHL 60, [2004] 1 A.C. 289 *per* Lord Rodger and *London Tara Hotel Ltd. v. Kensington Close Hotel Ltd.* [2011] EWCA Civ. 1356, [2012] 2 All ER 554*, per* Lord Neuberger M.R. This entire concept of *precario* had been well explained by Bracton in his Fourth Book (as quoted in *Gale on Easements* (2012)(19th.ed.) at 260):

> "Si autem seisina precaria fuerit et de gratia, quae tempestive revocari posit et intempestive, ex longo tempore no acquiritur jus" ("If, however, seisin shall have been from mere favour (*precario*) and from grace (*de gratia*), which may revoked in season and out of season, no right is acquired from a long period of time.")

47. Part of the difficulties which beset this entire area of the law is that, the law of probate aside, this is one of the comparatively rare examples of where the common law has borrowed promiscuously from Roman law concepts. Unlike, however, the position which obtained in Roman law and which still obtains in modern civilian systems, there is no consistent common law theory of prescription which can always fully accommodate itself to this wholesale adaptation of Roman law concepts.

48. All of this was highlighted in the judgment of Lord Rodger – who was himself a Roman law scholar of great distinction – in *R. (Beresford) v. Sunderland City Council* [2003] UKHL 60, [2004] 1 A.C. 289. In this case the question was whether for the purposes of particular UK legislation the public had acquired the entitlement to use a particular recreational area as "of right". As Lord Rodger explained:

> "….From at least 1977 members of the public have used an area near the town centre - referred to as "the Sports Arena" - for recreation. In truth it is just an open, flat area of grass of some 13 acres which the Washington Development

> Corporation laid out in about 1974. In the Washington New Town Plan 1973 the land was identified as "parkland/open space/playing field". In 1977, around the time of the Queen's Silver Jubilee visit to the ground, the Development Corporation constructed wooden seats along much of the perimeter. A hard-surface cricket pitch was laid out in 1979. For the rest, the public bodies who have owned the land - most recently, the council - have done little except keep the grass cut. Local people have used the ground in their different ways. Toddlers have played there, children of all ages have kicked a ball around or played cricket and other games, a Sunday league football team have used it for their matches. Many have simply treated it as a place to picnic, socialise, take their ease in the sunshine or walk the dog. …if the inhabitants of any locality have engaged in lawful sports and pastimes *nec vi nec clam nec precario* for at least 20 years, they have engaged in them 'as of right' and the land can be registered as a town or village green in terms of the 1965 Act.
>
> It is not suggested that members of the public used the Sports Arena *vi*, by force: the owners did not try to stop them and so there was no question of them overcoming any resistance on the owners' part. Equally, the public were not enjoying themselves clam, by stealth: on the contrary, they used the land openly and the owners knew what was going on. The Council concluded, however, that the local residents and others enjoying the land had been doing so *precario*, by virtue of the licence of the owners of the land. Admittedly, there was nothing to show that the owners had given any express permission or licence to the public. But the facts as a whole, and cutting the grass and constructing the seating in particular, showed that the owners had actively encouraged the use of the area for recreation and so had impliedly granted a licence, or given permission, for it to be used in that way. Use of the land by virtue of this licence or permission could not constitute use "as of right" for purposes of section 22(1) of the 1965 Act.
>
> In Roman law *'precarium'* is the name given to a gratuitous grant of enjoyment of land or goods which is revocable at will. The arrangement is informal and is based on the grantor's goodwill, whether more or less enthusiastic. But, however informal, the arrangement does involve a positive act of granting the use of the property, as opposed to mere acquiescence in its use. The name suggests, and the Digest texts indicate, that in Roman law the paradigm case is of a grant in response to a request. The arrangement lasts for only so long as the grantor allows, *tamdiu quamdiu is qui concessit patitur*: D.43.26.1 pr, Ulpian 1 institutionum. The concept of *precarium* crops up in different areas of Roman law, but importantly in connexion with interdicts. The praetor protects someone from interference if he has taken possession of land, or begun carrying out work, *nec vi nec clam nec precario*.
>
> In *de legibus et consuetudinibus Angliae* Bracton took over the *noun precarium* and its congeners from the vocabulary of Roman law and used them in a number of contexts, but always with reference to a gratuitous grant which is revocable at any time at the grantor's pleasure. See, for instance, lib 2 ff 52 and 52b. In lib 4 f 221 Bracton discusses the acquisition of easements by use for some time *nec vi nec clam nec precario* - the last being, he says, the same as *de gratia*, of grace. Under reference to the second of these passages, in speaking of the use of a watercourse in *Burrows v Lang* [1901] 2 Ch. 502, 510, Farwell J. asked 'What is precarious?' and answered his own question: 'That which depends, not on right, but on the will of another person.' Some years before, in *Sturges v Bridgman* (1879) 11 Ch. D. 852, 863, Thesiger L.J. had indicated that, if a man 'temporarily licenses' his neighbour's enjoyment, that enjoyment is *precario* in terms of the civil law phrase *'nec vi, nec clam, nec precario.'* It is important to notice that, in this regard, English law distinguishes between an owner who grants such a temporary licence or permission for an activity and an owner who merely acquiesces in it: *Gale on Easements* (17th. ed. 2002), para 4-83. Someone who acts with the mere acquiescence of the owner does so *nec precario*.

The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the Sports Arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances.

> In the present case the owners did not expressly license the use of the land by the public. The Council rely on two circumstances, however, as justifying the inference that those who used the Sports Arena did so *precario*, merely by licence from the owners of the land. The first is that the owners cut the grass. But that is at least equally explicable on the basis that the owners were concerned, as many owners would be, for the appearance of such a large and prominent area of open land in the heart of the town. Like charity, care of amenities begins at home. The second matter relied on is the, now rather dilapidated, wooden seating along the perimeter. Whatever may have been its original purpose, the continued existence of the seating is consistent with the owners of the land having acquiesced, perhaps quite happily, in people using the area for football or other games which their friends or relatives would wish, or feel obliged, to watch. To an extent the owners may thus have encouraged these activities. The mere fact that a landowner encourages an activity on his land does not indicate, however, that it takes place only by virtue of his revocable permission. In brief, neither cutting the grass nor constructing and leaving the seating in place justifies an inference that the owners of the Sports Arena positively granted a licence to local residents and others, who were then to be regarded as using the land by virtue of that licence, which the owners could withdraw at any time. In these circumstances I would conclude that local people used the land *nec precario*."

49. It may be worth pointing out that in this passage Lord Rodger is using the term "licence" to refer to a purely gratuitous user of the land, revocable at the pleasure of the owner, *i.e.*, the use of the term "licence" in this sense and context is really a reference to *precarium.*

50. There is, of course, no question of *vis* (force) or *clam* (stealth) so far as the present case is concerned. The fundamental question, therefore, is whether the factory premises were used for the purposes of a right of way openly and in the same manner that a person rightfully entitled to do so would have used it, as, in such circumstances, the claimant may be said to have been using it as of right within the meaning of s. 2 of the 1832 Act and not in the sense of *precarium* (*i.e.,* by virtue of the grace and favour of the landowner). Before applying that question to the facts, it may be useful to consider the decision of the English Court of Appeal in *London Tara Hotel Ltd. v. Kensington Close Hotel* [2011] EWCA Civ 1356, [2012] 2 All E.R. 554, as this is a case with some similarities to the present one.

The decision in London Tara Hotel

51. In *London Tara Hotel* a roadway linked two hotels and it was used continuously as a sort one way means of access as between the two hotels. The London Tara Hotel granted the Kensington Close Hotel a personal licence in 1973 to use the roadway from "year

to year" for the payment of £1. That licence expired in 1980 when the ownership of the Kensington Close Hotel changed. No licence was subsequently granted. The critical thing, however, is that coach drivers and others who used the London Tara part of the roadway to bring guests to the Kensington Close Hotel behaved as if they had the right to do so, even though everyone seemed to have forgotten the fact that given that the licence had actually lapsed upon the change of hotel ownership, they no longer had that right. As Lord Neuberger M.R. then observed ([2012] 2 All E.R. 554, 562):

> "…..it seems to me that the use of the roadway by KCH and its predecessors cannot be said to have been *precario*, and therefore, subject to any other argument, as a result of more than twenty years' such use, a prescriptive right of way arose…. On the facts of this case, this conclusion is reinforced by two further factors. First, there is the fact that the licence provided for a payment of £1 a year if demanded, and it is worth mentioning that this payment was specifically stated to be an acknowledgment that the use of the roadway was under the licence. There was no reason why Tara should not have protected its position as a landowner by enforcing its contractual right to this payment – even if only once every eighteen (or even nineteen) years. Secondly, given that the licence did not extend to coaches, Tara, as a reasonably vigilant landowner, could and should have appreciated that the terms of the licence were not even being adhered to on the ground."

52. Pausing at this point, it may be observed that *London Tara Hotel* provides a good contemporary example of where the habitual use of a roadway for the purposes of access and ingress may, with time, ripen into a right of way acquired by prescription. There are nevertheless significant differences between the two cases of which the fact that the taxi drivers and coach drivers who used the London Tara roadway as a means of accessing the Kensington Close Hotel acted as if they had the unquestioned right to do so is perhaps the most significant.

53. Had anyone challenged this user on the part of Kensington Close Hotel in the 1980s or the 1990s and had, for example, questioned the hotel concierge as to the basis upon which they instructed taxis and coaches how to get to the hotel using this roadway, they would doubtless have been informed that by virtue of the contractual licence those accessing the hotel had the perfect right to use the roadway. It is true that this information would have been incorrect – since the licence had in strictness lapsed in 1980 – but what was critical is that the hotel users who accessed the roadway acted *as if they had the right to do so*. For various reasons which I propose presently to set out I do not think that this is true of the present case. But before doing so, it is next necessary to consider some of the other Irish cases – both pre- and post-1922 – which deal with the concept of *precarium*.

Some Irish authorities dealing with the concept of precario

54. An old Irish authority dealing with the concept of *precarium* is *Barry v. Lowry* (1877) 11 I.R. C.L. 483. The evidence in that case was that the defendant, Mr. Lowry, used an alleged right of way from 1833 to 1874 without interruption. A gate was put up in 1867. The plaintiff's herdsman gave the key to a Mr. Buckley, telling him "here is a key for you to let in people wanting water", and explaining that the gate was locked to prevent cattle from trespassing. Mr. Buckley gave the key in turn to Mr. Lowry, and Mr. Lowry made a key from it for himself and used this key without hindrance until 1874. Mr. Lowry claimed a right of way by prescription, and the servient owner contended that the use was not as of right because the gate was locked for at least six years. The conclusion of the old Irish Court of Exchequer was that the use was amounted to *precario*. Fitzgerald B. said ((1877) 11 C.L.R.Ir. 483,486):

> "It is admitted that for six years of that period, between 1867 and 1874, the gates with which the way is claimed was kept locked by the plaintiff, so that no passage was possible otherwise than by use of a key directly or indirectly procured from the plaintiff. The key appears to have been left with some person in the employment of the plaintiff, who let persons wanting to draw water from the well past, on their application. The defendant appears to have got the use of a key during a part of the period of six years, but his evidence in no way counts as acquiescence in the locking up of the passage by the plaintiff, or his use of it being only through a key directly or indirectly obtained from him.

55. The judgment of Deasy B. is equally illustrative ((1877) 11 I.C.L.R. 483, 486-487):

> When once the landlord locked the gate, that was an interference with the enjoyment as of right. It was an assertion that he had a right to keep that gate locked, and to keep all parties out. The defendant should have thereupon disputed that right. Instead of that, he too, took a key of it from the landlord, that is, prima facie in all events, an acquiescence in the assertion of a right by the landlord, and the subsequent use by means of that key is evidence of a permissive occupation. If the defendant *could show that he then asserted a right to pass through the gate to the well, and that the landlord gave his key in order to enable him to exercise that right*, that would be different, but there was no evidence of that. It is, *prima facie* in all events, permission to use the way, and there was no evidence that while he passed through the gate by the use of the key given to him by the landlord to enable him to do so, he did so as of right." (emphasis supplied)

56. As Gilligan J. also observed, the concept of *precariu*m was at the heart of the decision of the Supreme Court in *Walsh v. Sligo County Council* [2013] IESC 48, [2013] 4 I.R. 417, albeit that this decision was in the context of a public right of way. In that case the question was whether the continued usage by the public of the main road through the grounds of Lissadell House in Co. Sligo was evidence from which the existence of a public right of way might be inferred. There was also evidence that the gates to the main road were locked while a shoot was in progress.

57. The joint judgment of Fennelly, McKechnie and MacMenamin JJ. stressed that the use of the public road by the public at most amounted to *precarium* ([2013] 4 I.R. 417, 447-448):

User by permission of the owner is not user as of right. At the same time, user without express permission is not necessarily user as of right. Whether particular acts of user are to be described as being as of right requires account to be taken of all the circumstances. Acts may be tolerated or indulged by a landowner vis-à-vis his neighbours without being considered to be the exercise of a right….The cases concerning toleration contain several indications that owners should not be constrained to be 'churlish' and insist on their own property rights. It would be undesirable and inconsistent with the policy of good neighbourliness if the law was so ready to infer dedication of public rights of way from acts of openness and toleration that landowners were induced to act a fortress mentality. Bowen LJ, in a passage in his judgement in *Blount v. Layard* [1891] 2 Ch. 681, approved by Lord MacNaghten in *Simpson v. Attorney General* [1904] A.C. 476 at 493 and by Lord Atkinson in *Folkestone Corporation v. Brockman*, at page 369, proclaimed that: ' . . . nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood.'

Furthermore, Lord Dunedin at page 375 of the report in *Folkestone* said: 'But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. From that house there leads another avenue to the north

which connects it to a public road different from that which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up one avenue and down the other - perhaps without actually calling at the house - raise the presumption that the owner had dedicated his private avenues as highways? The user would be naturally ascribed to good nature and toleration.'

In the same vein, Farwell J in *Attorney General v. Antrobus* [1905] 2 Ch. 188 at 199, in the context of a claim that there was a trust permitting public rights of access to Stonehenge, wrote of the 'liberality with which landowners in this country have for years passed allowed visitors free access to objects of interest on their property . . .' he added, at page 199, that: 'It would indeed be unfortunate if courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property.' On the other hand, where there is clear non contradictory evidence of excessive public user for a long time, the landowner will not easily resist the inference of dedication by proof of purely subjective and uncommunicated objection."

58. When considering the claim to a public right of way over the main avenue, the Supreme Court also said as follows ([2013] 4 I.R. 417, 461):

> ". … However, it is significant that the main gate was closed and locked at least on the occasion of shoots on the estate. This was accepted by the learned judge. Mr. Bernard Barton, Senior Counsel, gave evidence as a witness, that when he was attending Lissadell for a shoot in or about 1996 he found the gate of the main avenue was locked. There was a notice directing the public to use the Crushmore entrance. Mr. Barton vividly recalled it as it made him late for the shoot and he had friends travelling in a different car and no phone with him. This coincides with the evidence of Mr. Prins to the effect that he closed the main gate on occasion especially during the woodcock shoots and tree felling. These are acts of ownership inconsistent with the existence of a public right of way. The learned trial judge found it significant that Mr. Prins, when explaining these actions, did not suggest that the purpose was to prevent the public from entering onto the estate. That is not necessary. The very act of closing the gate showed that rights of ownership were being exercised."

What was the nature of the user in the present case?

59. If, then, one applies these principles to the present case can it be said that the user of the access through the factory premises was otherwise than *precarium*? In my view, taking the evidence in the round, it points overwhelmingly to the existence of an admittedly consistent user which was nonetheless at all times no more than *precarium.* Several factors impel me to this conclusion.

60. First, there is no evidence to suggest that the McKinneys - or any one visiting them, whether lorry drivers, gardeners or public health nurses – regarded this access over the factory yard from the de Valera road as being anything other than gratuitous on the part of the factory owners. In particular, none of them behaved as if they believed they had the *right* so to traverse the lands. Had, for example, the factory owners ever sought to block such access this might well have been justly resented by the McKinneys and their visitors as not a very neighbourly act. Yet, at least prior to the running of any prescription period, it could scarcely be supposed that the McKinneys could have opposed this curtailment of access on the ground that they enjoyed a positive legal entitlement to cross the factory yard over and above any gratuitous act on the part of the factory owners.

61. The present case is accordingly different from a case such as *Beresford* where the fact that the Council had not only tolerated the playing of games etc., but had actually put in seating to enable members of the public to watch. It was these factors which led the House of Lords to the conclusion that the Council had granted members of the public something more than a purely revocable licence, so that their presence was *nec precario*.

62. Second, the balance of the evidence all suggests that the user in question was tolerated simply as an act of neighbourliness on the part of the factory which was, to some degree, reciprocal in that, as Gilligan J. found, factory employees sometimes used the Oatfield Bungalow driveway entrance on the Ramelton Road and then turned right into the factory premises. Adopting the words of Herbert J. in Orwell Park Management the nature of the user in the present case – whether it be, for example, the accessing of the factory premises by the drivers of the oil tankers or the use of the "ride on" lawnmower by Mr. McCormack – all suggested a casualness which was dependent "for its continuance upon the tolerance and good nature" of the factory owner and was not such as would have put that owner on notice that "an actual right to do these things was being asserted."

63. It is true that Mr. O'Donnell, the factory health and safety officer, directed that a 5 mile an hour signs be placed facing the direction of the de Valera road on the paved road connecting the two properties. For my part, however, I would regard this item of evidence as best ambiguous and not one which necessarily compels the conclusion that this was an unequivocal acknowledgement that Ms. McKinney (or those visiting her) had a positive right to travel from the back of the bungalow through the factory premises and through to the de Valera road.

64. Third, the erection of the gates by the factory at the de Valera road entrance coupled with the fact that the gates were closed at night and at weekends cannot be regarded in the light of the comments of the Supreme Court in *Walsh* as anything other than the assertion of ownership rights in the respect of the factory, the yard and the factory entrance. As that Court made clear in that case, it is irrelevant in this context that there was no evidence that the object of this was to exclude the assertion of any right of way by the McKinneys: it was sufficient that the rights of ownership were thereby exercised. I appreciate, of course, that the right of way at issue in *Walsh* concerned an alleged public right of way and not a public right of way as in the present case. But the reasoning of the Supreme Court on this feature of *Walsh* nonetheless concerned the question of whether the user by the public of the main entrance into Lissadell House could amount to *nec precario* and the Court ruled decisively that the closure of the gates served to negative the claim that the user by the public was as of right.

65. Neither do I overlook in this context the fact that the McKinney family always possessed a set of master keys for the factory and the gate. But as Gilligan J. pointed out, these keys were either given to Mr. McKinney qua owner and director of the factory premises or, as in the later times, simply for reasons of ensuring access in the case of safety or emergency, in much the same way as householders frequently possess a spare set of keys for their neighbour's property. No one would suggest, however, that the householder in that example would stand possessed of these keys as of right.

66. The evidence, moreover, shows that these keys were never used and that on a few occasions when the drivers of oil lorries found the de Valera gates locked, the McKinneys arranged to telephone the factory with a request to open them. Likewise, when Mr. McDonald found the factory gates locked, he asked for permission to have them opened to facilitate access to the McKinney garden. Just as in *Barry v. Lowry,* all of this is consistent simply with a user which is precario only and not as of right.

67. Fourth, the failure on the part of Ms. McKinney to assert a right of way at the time of the sale/purchase transfer in 1999 is also

instructive. I appreciate that there may well have been issues regarding her general mental health, but there has been no suggestion to this Court that Gilligan J. was not entitled to find that she had the appropriate capacity to execute this agreement. In these circumstances, it is hard to see the share purchase agreement and the replies to requisition on title as anything other than a positive acknowledgement that no right of way was being asserted and a tacit acceptance that the user of the factory yard for access purposes was simply *precario*.

Is there an easement of necessity?
68. So far as an alleged easement of necessity is concerned, it is perhaps sufficient to say that an easement of necessity could generally only arise where the dominant tenement would otherwise be landlocked or otherwise unusable, which is simply not the case here as there was at all times access to Oatfield Bungalow from the Ramelton Road. There is no basis for implying an easement of necessity simply because the dominant tenement has access arrangements which might be thought to be less than perfect or because such an easement of necessity might be thought to be convenient for the occupants of Oatfield Bungalow.

Conclusions
69. Summing up, therefore, since I am of the view that the user in the present case was at all times precario, the defendant accordingly cannot establish that the user was as "of right" within the meaning of s. 2 of the 1832 Act. Gilligan J. was accordingly correct to hold that the defendant had not established any right of way by prescription through the factory yard and premises in favour of Oatfield Bungalow.

70. It follows, therefore, that the defendant's appeal must be dismissed.