**Neutral Citation No. [2005] IEHC 93**

**THE HIGH COURT**

**Record Number: 1989 No. 174P**
**Between:**
**Frank Towey Limited, Patrick Farrelly, Barrett Haulage Limited,**
**And By Order: Sibra Building Company Limited**
**Plaintiffs**

**And**

**The County Council of the County of South Dublin**

**Defendant**

**Judgment of Mr Justice Michael Peart delivered on the 16th day of March 2005:**

**The Parties:**
For the purpose of this judgment the plaintiffs who seek relief are Frank Towey Limited ("Towey") and Sibra Building Company Limited ("Sibra"). For the most part I shall refer to these parties collectively as "the plaintiff". It may become necessary to distinguish between them, and if so I shall in such instances make that clear by using "Sibra" or "Towey" as appropriate. These proceedings no longer involve the second and third named plaintiffs.

Sibra is the freehold owner of the licensed premises known as "The Foxhunter", at the centre of this claim ("the premises"), and which are situated on the south side of what used to be called the Palmerstown Road, near Lucan, Co. Dublin, before it became the Palmerstown By-Pass. This location is now on the south carriageway of the N4 Dublin to Galway Dual Carriageway.

There is for all practical purposes a common shareholding between Towey and Sibra.
Towey trades in the premises, and holds the leasehold interest therein from Sibra under an Indenture of Lease dated 13th July 1993 expressed therein to be for a term of ten years from the 1st July 1993 at a rent of £20,000 per annum, reviewable every five years. That Lease has expired and while no new lease has been entered into, Towey remains in occupation under the same terms as the expired Lease.

There has been evidence that Sibra contracted to purchase the premises by Contract for Sale dated 20th June 1984 from the previous owners whom I shall refer to as "Langan". The sale was closed on the 21st December 1984.

There has also been evidence that Towey has in fact been in occupation of and trading from the premises from that time, and that what was clearly a somewhat informal relationship of landlord and tenant between Sibra and Towey was "formalised" in 1993 by the execution of the Lease referred to.

The defendant is the roads authority for the relevant area.

**The historical background to the proceedings:**

It appears that prior to the commencement of these proceedings in 1989, in which certain injunctions and damages for breach of contract are sought against the defendant, there had been discussions between Langan and the County Council which culminated in a certain "agreement" regarding what access openings the Council would include in the median of the dual carriageway, so as to permit access to the premises to traffic comings eastwards towards Dublin city by crossing the dual carriageway, and which would also permit patrons to exit the premises by crossing the westbound carriageway so as to make a right turn towards Dublin city. I will return to the nature of those discussions and the "agreement" concluded in due course.

It is contended by the plaintiff that at the time of the negotiation of the purchase of the premises from Langan around 1984, a letter dated 4th August 1983 from P.J.Bannon (of Harrington Bannon, Estate Agents) on behalf of Langan to Dublin County Council, and the letter dated 26th August 1983 in reply thereto and which confirmed that the items 1-6 contained in the letter dated 4th August 1983 *"are as agreed with you on site"*, were handed over by Langan.

In evidence, Frank Towey junior (a son of Frank Towey senior, who was in negotiations for the purchase), stated that it was made clear by Langan to his father that these letters were very important and that *"we should not lose sight of them"*.

These openings were regarded by Langan and Towey as important to the business run in the premises, as without them eastbound traffic would have no direct access to the premises and business would be diminished accordingly, and it is certainly to be reasonably inferred from the evidence of Frank Towey that since the price agreed for the purchase in 1984 was based on turnover, as is usually the case with the sale of a licensed premises, the price paid for the purchase was influenced by the reassurance they took from this exchange letters which had followed upon negotiations between Langan and The County Council regarding the openings in the median of the dual carriageway, and that had they known that there would be a closure of the median openings, and in particular opening No. 2 opposite the premises, they would have paid less in order to reflect an anticipated and consequential drop in sales.

Following these negotiations it appears that the dual carriageway contained 4 openings in the vicinity of the premises. In due course openings 1, 3 and 4 were closed on road safety grounds, but it was opening No. 2 which was of critical importance to the plaintiff since it was that opening which provided direct access across the dual carriageway for patrons wishing to enter and the premises by means of crossing the dual carriageway. It does not appear that the plaintiff made any move to prevent or persuade the defendant not to close openings 1, 3 and 4, when the Council did so, since it was opening No. 2 which was of major significance to them.

In 1989, it appears that the County Council commenced to close the remaining opening No.2 and this led to the commencement of these proceedings for the purpose of seeking injunctive relief. At that stage certain undertakings were given by the defendant not to close the last remaining opening pending the determination of the proceedings. Much time has elapsed since then. In addition, in the intervening period, the Road Traffic Act, 1994 ("the 1994 Act") has passed into law, s.38 of which entitles a road authority, such as the defendant in these proceedings, to provide such traffic calming measures as the consider to be in the interests of safety and convenience of road users, subject to compliance with the requirements contained in the section.

Superintendent William Collins gave evidence which would certainly leave no room for doubt that in his opinion the existence of the remaining opening in this median poses extreme danger for traffic and should be closed under the powers provided for in that section.

In these circumstances, the defendant contends that whatever may or may not have been agreed with Langan in 1983 concerning the existence of a permanent opening in the median to facilitate entry to and egress from the premises, they are now statutorily entitled to close it in the interest of safety, and that accordingly injunctive relief should not be granted, and the undertaking given in 1989 ought to be discharged so that work can be commenced to close the opening. The defendant denies that there is any privity of contract between it and the plaintiff, and that the plaintiff is not entitled to damages for any alleged breach of contract, even if one existed with Langan as a result of the negotiations and correspondence in August 1983 (which is of course denied).

The plaintiff now contends that the rights arising from the negotiations in 1983, leading to the two letters to which I have referred amount to an easement for the benefit of the premises. It is further submitted on behalf of the plaintiff that since it is beyond argument that this easement is not the subject of any deed or grant, it is equitable in nature and operates by way of a proprietory estoppel against the defendant.

It is alternatively argued that the contents of the "agreement" amount to a restrictive covenant the benefit of which passes to the current owners without any deed.

It is further submitted that the rights created by the exchange of letters following the 1983 negotiations with Langan constitute a chose in action in respect of which there has been an equitable assignment by the vendor to the plaintiff.

In these circumstances, the plaintiffs claim in the first instance an entitlement to injunctive relief to restrain the closure of the opening, but in view of the plea that the defendant is entitled under the 1994 Act to close the opening, the plaintiff seeks damages in the event that the opening is found to be in the interests of public safety and convenience to close it, since to do so would cause a breach of rights to which the plaintiff are entitled and in respect of which they say they can prove a loss into the future.

**The legal issue to be first determined:**

The question to be determined prior to embarking on any examination of any claim to injunctive relief, or more likely the claim for damages, is to ascertain the precise nature of any arrangements or agreement entered into by the County Council with the plaintiff's predecessors in title, Langan, in 1983. Once that is ascertained, the Court will have to determine whether, in the absence of anything expressed, in relation to any such rights as may accrue from those arrangements, the plaintiff has any entitlement in equity to the benefit of them, such as would entitle them to claim damages from the County Council who wish to exercise a statutory entitlement to close the opening.

**The terms of the agreement in 1983:**

Before turning legal submissions in relation to equitable easements, proprietory estoppel, the equitable assignment of a chose in action, and restrictive covenants, it is necessary to look at the evidence which has been given as to the terms of the agreement made in 1983 by the County Council with Langan. Fortunately, some of the personnel involved at that time are still available to recall, as best they now can, what was the agreement, and the Court also has the benefit of the correspondence which was exchanged after the oral negotiations were completed.

***The meeting on site on 26th July 1983:***

There is a memo under ref: RF/AK, which is a reference to Mr Ronald Fox of Harrington Bannon, which firm was acting on behalf of Langan in the discussions with the County Council. That file memo states, in relation to the access problems, as follows:

*"PJB [Mr Joe Bannon] and RF met Mr Langan on site on the 26th July 1983. Mr Langan explained that he had co-operated with the County Council up until the temporary closure of the existing road. He complained that he had not got a temporary access directly in front of his pub and that consequently his trade was substantially diminished."*

That memo refers to other complaints such as noise, oil, dust and so on but those matters are not strictly referable to the present case.

***Meeting on site with County Council – 27th July 1983:***

There is also a memo by Mr Fox of a meeting on the following day the 27th July 1983 which states as follows:

*"PJB arranged a meeting on site with the various individuals concerned.*

*Present: PJB – Harrington Bannon*
*RF - ditto*
*Jim Gahan, Dublin County Council, Chief Valuers Office.*
*Dermot Heaney, Engineer on Site*
*Frank , Engineer [probably Frank Vaughan]*
*The alignment and positioning of the road has now been marked on site and it is clear that very little if any land will be acquired from Mr Langan.*

*Mr Gahan explained to him that the Council would do all that was reasonable to facilitate him but that this could not include a temporary access as such access would be dangerous. With regard to permanent access Mr Langan was assured that two openings in the median strip would be available with traffic being able to do a complete U turn.* (my emphasis)

*With regard to his own property a small wall would be built associated with marginal changes in the existing road level and the question of access to this could be discussed at a later date.*

*In addition, Mr Gahan agreed that the County Council would put up larger signs advertising the pub in either direction on the road. These signs to be prepared by Mr Langan.*

*The engineer explained the timing on site which basically envisaged the digging up of the road to the front of the pub in August and proceeding in August and proceeding eastwards. In January of next year it was hoped to restore two-way traffic on this section, closing the eastwards bound carriageway for resurfacing and by this time next year to have both carriageways in operation.*

*Concerning the ditch it was agreed that the best method to deal with this was to wait until September and October when all the gullies and surface water traps were in operation and see if flooding occurs.*

*Concerning the small field adjoining Ballyowen Lane it was agreed that the adjacent bank would be graded to ensure that it was not possible to jump over the chain link fence.*

*On the question of compensation it became clear that Mr Gahan felt that Edwards versus the Minister of Transport applies and that this disruption will not of itself be compensatable. It would appear that the £25,000 sum however, is still acceptable."*

Mr Bannon wrote to Mr Gahan of the County Council by letter dated 4th August 1983. That letter stated as follows:

*"Dear Mr Gahan,*

*I refer to our meeting on site on the 28th ult., with your goodself, Mr Dermot Hanney and Mr Frank Austin.*

*The following verbal agreements were entered into and I should be grateful for your confirmation of same in writing:*

*1/ During the construction of the works full access will be maintained to Mr Langan's property and every effort will be made to minimise the disturbance.*

*2/ Dublin County Council will erect large display direction signs to be prepared by Mr Langan in order to indicate the positioning of this access.*

*3/ The temporary surface water outfall which presently discharges into a deepened ditch close to the western boundary of the lands will be observed to check flooding and increased water table levels and remedial action taken if necessary.*

*4/ The finished level of the new road will not be substantially different from the existing surface level and a small 2 ft. concrete block wall with a pre-cast concrete capping will be erected 3m from the edge of the new kerb.*

*5/ Two permanent accesses will be provided at either end of the property, their exact location to be agreed between the engineers and Mr Langan at the relevant time.*

*6/ Openings in the completed median strip will permit a right turn from the east bound carriageway at the entrance to the Hermitage Golf Club and a right turn from the west bound carriageway at the opening just west of the public house.*

*Thanking you for your co-operation.*

*Yours sincerely,*

_____

*P.J. Bannon"*

A letter dated 26th August 1983 was written by the County Council in response to this letter, and in the following terms:

*"I acknowledge receipt of your letter of the 4th instant and confirm that the matters referred to as items 1/6 inclusive are as agreed with you on site."*

The next series of relevant correspondence between these parties commenced with a letter dated 31st August 1984 which obviously followed a meeting in the offices of the County Council. This letter is in the following terms:

*"Further to previous correspondence and to your Mr Bannon's recent meeting with Mr Faley (sic) at this office, I now set out hereunder the terms of settlement which I would be prepared to recommend for acceptance in this case.*

*1. That the three plots outlined are held by the claimant under Registered Freehold title and vacant possession can be given.*

*2. That the sum of compensation payable in full and final settlement under all heads of claim will be £25,000 (twenty five thousand pounds).*

*3. That the Council will also pay your clients proper legal costs of transfer and Valuer scale fee of 1.25% of the compensation together with V.A.T. at the appropriate rate.*

*4. That the Council will carry out all the accommodation works necessitated by the Scheme, as previously discussed and agreed on site with the resident Engineer, Mr Dermot Hanney.*

*5. That these terms are subject to the necessary approvals and consents being acquired.*

*I would be obliged if you could submit these terms for your client's consideration and let me hear from you in due course.*

*Yours faithfully,*

_____ "

By letter dated 7th December 1984 Mr Bannon replied, regretting some delay in doing so due to the fact that he needed to obtain the acceptance of the decision from the "Trustees of Mrs Langan's estate". He went on:

*...I am pleased to confirm that the terms of settlement, as set out in your letter of the 31st August 1984 are acceptable in their entirety to my clients.*

*Concerning Item No. 4 in your aforementioned letter, I would be grateful if we could set out in more detail the exact nature of the accommodation works to be carried out by the Co. Council, so as to avoid disagreement at some future stage."*

I should just note at this point before setting out the terms of a letter from the County Council dated 28th January 1985, that the exchange of letters dated 31st August 1984 and that of the 7th December 1984 took place at a time after the Contract for Sale of the premises had been executed on the 20th June 1984. The sale itself was completed on the 21st December 1984. During this period the purchasers enjoyed an equitable interest in the property by virtue of the said Contract for Sale.

By letter dated 28th January 1985 (after the completion of the sale of the premises) the County Council wrote to Mr Bannon as follows:

*"I wish to acknowledge the receipt of your letters herein of the 7th December and the 24th instant, and I confirm that the proposed terms of settlement have been submitted to my principals. I expect that the formal manager's Order approving of the settlement will be obtained shortly and the Council's Law Agent will then be given instructions to complete the legal formalities.*

*You should submit your fee account in respect of this matter through your client's solicitor and arrangements will be made to discharge the account due when the transaction is being completed.*

*The accommodation works to be carried out by the Council are briefly as follows:*

*a) Provide a concrete post and chain link wire fence on the new boundary to Plot 79. Provide, and fit in position a new farm type gate to this field and construct a suitable access from the Galway Road. Re-seed the ground adjoining the working area as necessary.*

*b) Provide a two foot high boundary wall to Plot 82. The wall to be built of split block, properly capped and with piers provided as necessary. In addition the tarmacadamed area adjacent to the working area will be renewed as found necessary.*

*As you are no doubt aware these accommodation works have been completed some time ago.*

*Yours faithfully,*

_____"

In addition to seeing this correspondence, the Court has heard oral evidence from various witnesses concerning what took place between the different parties and the County Council around that time. It is necessary to set out that evidence to some extent before being in a position to draw conclusions from it, and thereafter to consider the legal submissions in the light of the factual conclusions arrived at.

**Mr Joe Bannon:**

He stated that he was instructed in 1983 on behalf of Langan to negotiate a package, including compensation for part of the land belonging to the Foxhunter pub. His recollection of details of what occurred in 1983 was understandably dim at this remove in time, but he has refreshed his memory as best he can from a recent perusal of the file relating to these instructions. He stated in evidence that he believes that the memo of the meeting with the County Council in July 1983, and which I have already set out, represents what took place at that meeting.

He stated that the existence of these openings in the median, giving access to the premises by traffic travelling from the westerly direction was a matter of considerable importance at the time to the owners in relation to the volume of the passing trade enjoyed by the premises.

In relation to the sum of £25,000 agreed in respect of compensation, Mr Bannon stated his view that if it had not been for the agreement about the number of openings in the median at that time, the amount of compensation would have to have been a higher sum.

**Cross-examination:**

George Brady SC, on behalf of the defendant suggested to Mr Bannon that in 1983 when this meeting took place with the Council regarding what was then the Palmerstown By-Pass, the later Lucan By-Pass would have been in contemplation and that he would have known that it would happen in due course. Mr Bannon frankly admitted that he could not recall now whether that would have been within his knowledge at that time. He did however accept that he would have been aware of the Compulsory Acquisition Order made in September1983. Mr Brady suggested that it was in the nature of these road developments that they are simply a phase at any particular time, and that things inevitably in time will move on and change, and that any person, such as the plaintiffs, who were buying property in the area would be aware of the risks attendant on this. Mr Bannon accepted that this was probably the case. But he added also that at that particular time it was quite common to have openings in a median on a dual carriageway. I took that to mean that his view was that even if the plaintiffs could be expected to have realised that the road might well change, that would not mean that must be assumed to have realised that the openings in the median would necessarily have to be closed as part of any further development of the road.

Mr Brady also referred to the fact that what Langan really appears to have been concerned about when the meeting was arranged in July 1983 was access to the premises itself rather than the openings in the median. In this regard Mr Bannon was referred to the first paragraph of the file memo dated 28th July 1983 which states:

*"He [Mr Langan] complained that he had not got a temporary access directly in front of his pub and that consequently his trade was substantially diminished."*

In this regard it is relevant to refer also to the first item in the letter dated 4th August 1983 which states:

*"During the construction of the works full access will be maintained to Mr Langan's property and every effort will be made to minimise the disturbance."*

And also the fifth item on that letter:

*"Two permanent accesses will be provided at either end of the property, their exact location to be agreed between the engineers and Mr Langan at the relevant time."*

It is apparent that neither of these paragraphs refer to the openings in the median. The reference to the openings in the median come in the sixth paragraph which says:

*"Openings in the completed median strip will permit a right turn from the east bound carriageway at the entrance to the Hermitage Golf Club and a right turn from the west bound carriageway at the opening just west of the public house."*

Mr Brady points to the fact that the reference to "permanent" relates to access at either end of the premises referred to in item 5 – not the openings in the median strip referred to in item 6.

In his questioning of Mr Bannon, Mr Brady drew attention to the fact that the land on which openings 1, 2 and 3 on the median are constructed had been acquired from the Hermitage Golf Club across the road, and was never in the ownership of the plaintiff.

**Evidence of Mr Frank Towey:**

He stated that he and his late father had been approached by Langan in 1984 in relation to buying the premises. Negotiations had taken place and there had been chat about the openings in the median due to the construction of the Palmerstown By-pass. He stated that Langan had produced to them the letters from the County Council to which I have referred already and that *"it had been conveyed that these letters were very important and that we should not lose sight of them."*

Mr Towey stated that it was critical to them to have access to customers approaching from the West, otherwise they would lose a huge amount of business. He stated that at the time they signed the Contract for Sale, openings 1, 2 and 3 were in situ in the median.

By 1986 there were four openings in the median as shown on the map produced to the Court. At that time the plaintiff was

anxious to build an extension and sought permission. There were discussions with the County Council who considered that with the advent of the Lucan By-pass, openings 3 and 4 were hazardous on the median. He also stated that at that time the plaintiff did not have the two letters of the 4th and 26th August 1983 to produce to the County Council He thinks they had been mislaid at the time. But he also said that at that time the members of the County Council to whom they spoke denied the existence of the letters, and said that they had no knowledge of any such agreements regarding any openings in the median.

Mr Towey thought that it was Mr Bannon who at a later date provided the plaintiff with further copies of the letters.

He stated that without opening No.2 in the median, traffic approaching from the West would have to continue past the Foxhunter, along the carriageway as far as the Liffey Valley exchange or the M50 Roundabout and then come back to these premises. But the difficulty from the plaintiff's point of view is that while that is possible to achieve, any potential patrons making that journey would pass two other licensed premises and in all probability would not bother to come back to the Foxhunter. Their business would be lost to the plaintiff as a result.

Mr Towey stated that over the years since 1983, openings 3 and 4 were closed, as already stated, and that opening 1 was also closed. In spite of these closures, Mr Towey was happy enough since it is opening 2 which is of importance to the traffic coming from the West accessing the plaintiff's premises.

He also gave evidence about a wall which was required to be built between these premises and the Texaco Service to the east of the premises. It was a condition of a planning permission that this wall be put in place, because the County Council was keeping opening No.2 and they did not want a situation whereby cars from his carpark would access Opening No.2 by going into the Texaco premises and going across the median at that point. Mr Towey was of the view that they could have closed opening No 2 instead, and suggests presumably that they did not do that because they knew that they had agreed not to in August 1983.

Mr Towey stated in his evidence that the plaintiffs would not have engaged in their expansion plans had they been aware that the Council were entitled to close the opening at No.2. He described the effect of this closure as "hugely devastating". He was of the view that a significant amount of business would be lost on days such as GAA match days when a large volume of traffic comes from the westerly direction, because they serve food and drink on the premises.

**Cross-examination:**
When cross-examined Mr Towey accepted that in 1983 he would have been aware of the plans to develop the Lucan By-Pass, but stated that he always knew that opening No.2 would be there so he was not too worried about the road development. He said he was always aware that there was a possibility that openings 1, 3 and 4 might go, but that he could always rely on No.2.

He also accepted that at the time of purchase he would have been aware that opening 4 was going to be closed, and it was put to him that at that point on time he was aware that anything contained in the August 1983 correspondence was unreliable as far as being a guarantee that openings would never disappear. But Mr Towey stated in response that the significance of opening No.4 was for traffic exiting from his premises rather than traffic accessing the premises from the West. In that regard he was aware that a bridge was being constructed which would conveniently take traffic exiting the premises back towards the city, and that there would therefore be no negative impact with its closure, such as will result from the closure opening No.2. He therefore had not gone back to Langan for any abatement in the purchase money being paid for the premises, because opening No.2 was remaining.

He also accepted that in the sale of the premises to the plaintiff, it was a straight transfer of the property and that there was no assignment of any contract or agreement between Langan and the County Council, or the benefit of any such agreement, if any, and that there was no notice given to the County Council of any assignment of any such rights following completion of the purchase.

He also accepted that opening NO.2 was not exclusively for the benefit of persons wishing to access these premises, but that it also provided access to the Texaco Service Station, and also for persons travelling westwards who wish to cross over to the Hermitage Golf Club, and persons coming from the West who wish to cross onto the westbound carriageway.

It was also accepted that there was no agreement under seal in relation to any such agreement.

Mr Towey was of the view that if the opening at No.2 is now closed, the loss of turnover will be in the order of 20%. I shall return in due course to the issue of damages.

**Evidence of James Gahan:**

Mr Gahan is now retired but in 1983 he was the Deputy Chief Valuer with what was then the Dublin Corporation, and he was present at the meeting arranged for the 28th July 1983 to discuss Langan's concerns in relation to work on the Palmerstown By-Pass. He said in evidence that Langan's concern was the works were preventing him operating his business, and he wanted the Council to do everything possible to ameliorate the situation.

Mr Gahan thinks the meeting lasted about one hour and they all discussed the operational works in connection with the construction of the road. He described the concerns expressed by Langan as being of an "interim nature". He referred top the nature of the items referred to in the letter of the 4th August 1983 in this regard. Item 1 in the letter being what he called the reasonable requirement that access to the pub be maintained during the pendency of the works; and item 5 referring to 2 "permanent" access points to his premises, the location of each to be agreed at a later stage; and item 6 referring to "openings in the median strip".

**Mr John Foley** also gave evidence on behalf of the Council. He had been a valuer in the Valuation Office of the Dublin Corporation at the relevant time and was involved in the negotiations with Langan which lead to the settlement reached as appearing in the correspondence already referred to and a letter dated 28th January 1985. He was in fact the author of the letter dated 4th August 1983. Nothing in his evidence advances the sum of knowledge to date.

**Mr Dermot Hannay** also gave some evidence. He was also at the meeting with Langan in July 1983. He stated that prior to that meeting there were works being carried out in the location of the Foxhunter and as part of those works, the westbound carriageway had been closed completely and the eastbound carriageway had been turned into a two way carriageway while they excavated and resurfaced the road outside the Foxhunter. He said that Mr Langan had parked his car on the westbound carriageway which prevented works being carried out, and that he would not allow the works to continue. This appears to be what precipitated the meeting on site on the 28th July 1983. He stated that Langan's principal concern was that access to his premises should be maintained while that work was going on. That was the main problem, and following that meeting the matters appearing in the correspondence were agreed. He stated that these works had in fact commenced in June 1982, and that about one week prior to this meeting they had interfered with the business of the Foxhunter. The works in question lasted until July 1984. He also gave evidence of the particular matters agreed in relation to the wall between the Foxhunter and the Texaco garage, as well as certain arrangements agreed in relation to access points into the Foxhunter, including facilitating possible future development at the premises.

**Factual conclusions as to the nature of the "agreement" in August 1983, and the intention of the parties:**

Before proceeding to consider whether the plaintiffs are in some manner entitled to exercise any rights derived from the 1983 agreement between Langan and the Council in 1983, as evidenced by the correspondence, or whether any easement or restrictive covenant can be deemed to have arisen from the events which have happened, it is necessary to reach a conclusion as to exactly what was agreed between the Council and Langan in July/August 1983.

At this time work was in progress on the main road outside the Foxhunter. Mr Langan complained that there was no temporary access in place to permit traffic coming from the west to access his premises while these works were in progress. He was told that no temporary access (i.e. while the works were in progress) was possible but that in due course permanent access would be via two openings in the median. The letter from Langan's negotiator, Mr Bannon, does not refer to "permanent" in this context in his letter dated 4th August 1983 which followed this meeting, although his file memo does so.

My view from the evidence is that these roadworks in 1983 caused Langan considerable disruption to his trade at that time. One source of disruption was the loss of access across the carriageway for patrons to his premises, while the works were in progress. The Council informed him that it was unable to facilitate him with a temporary access while the work was ongoing, but agreed that when the works were completed there would be two openings in the finished roadway. A sum of £25,000 was agreed to compensate him for the loss of business and disruption generally while the works were being completed.

If the exchange of correspondence is looked at in this context it is clear that the word "permanent" referred to <u>in the file memo</u> (and it is not replicated in the follow-up letter in connection with these openings) is used not in the sense of "for all time" but rather in the sense of when the works have been completed, or being other than temporary while the work was in progress. It is not in my view reasonable to interpret the use of the word "permanent" in that context, to extending to a guarantee or commitment by the Council that at no time in the future when the roadway might be altered in any way in connection with the Lucan By-Pass, that these openings would be left in place forever. Far more by way of certainty would be needed in the terms of the agreement for such a broad commitment to be inferred.

The plaintiff states that the letters of August 1983 were handed over to them by Langan with the comment that these letters were very important and that they should not lose sight of them. However, there is no evidence at all that the letters were regarded, and neither could they be so construed in my view, other than as some form of letter of comfort, and certainly did not constitute any sort of warranty by Langan that the openings would remain for all time. That this is so is confirmed from

the fact, as was stated in evidence, that when the openings were closed one by one and it became clear eventually that opening No. 2 was under threat, there was no question of the plaintiff going back to Langan for any abatement of the purchase price, or seeking to involve Langan in the proceedings which were commenced against the Council when opening No.2 was under threat. I have no doubt that when discussions were taking place prior to the agreement to purchase the premises, Towey was naturally concerned, as would any prospective purchaser, to know what the status of the openings in the median was, and that these letters were handed over by Langan or his solicitor to either Towey or Towey's solicitor at the time of the transaction and that they served to give him some comfort as to the intention of the Council that there would be a number of openings in the median. But Towey never seems to have approached the Council directly either before the Contract for Sale was signed or in the immediate aftermath of the purchase in order to have the position clarified with any certainty.

It is clear from the evidence that Towey was aware that what was at that time the Palmerstown By-Pass would in due course become the Lucan By-Pass. Searches would have disclosed that situation in any event. He must be taken to be aware that roads evolve over time, especially in an area such as this so close to the capital city. My view is that Towey in all probability purchased the premises in the knowledge that the existence of these openings was something over which some doubt necessarily existed for the future, but he will have derived some comfort from the letters. However, he must have been aware, and would have to have been so advised if such advice had been sought, that the letters could not form any guarantee against closure should Council plans in the future require it.

**Legal submissions:**

This finding of fact as to what was agreed between Langan and the Council is sufficient to dispose of what is perhaps the strongest line of legal argument put forward by Hugh O'Neill SC on behalf of the plaintiffs. That is the argument that even though there is no direct privity of contract between the Council and these plaintiffs, the rights under that agreement of July/August 1983 amount to an equitable chose in action and are such as can benefit the plaintiffs on the basis of proprietory estoppel. The judgment of Lord Denning in **Crabb v. Arun District Council [1976] 1 Ch. 179** is most interesting in this regard and it is at least arguable that it could have assisted the plaintiffs if a wider interpretation could be given to the word "permanent" in the context of these openings in the median. There may have been some difficulty in arguing that the plaintiff had been encouraged to act to their detriment, but that is another matter which I do not have to consider.

If the plaintiffs are entitled to the benefit of what was agreed by Langan with the Council in 1983, it must be no more and no less that what was then agreed. It follows that even if the Court was to find that there has been an equitable assignment of the rights thereunder, those rights extend to nothing other than what was agreed at the time. In these circumstances, it follows that success on this legal argument would not advance the plaintiffs' position.

**Estoppel by conduct?:**
For it to be successfully argued that, by its conduct since 1983 in creating and maintaining the opening(s) in the median the Council has thereby encouraged the plaintiffs to act to their detriment such that it would be unconscionable for it to now resile therefrom and seek to enforce its legal entitlements, it would have to be shown that the agreement reached with Langan was of the nature contended for by the plaintiffs. Since I have found as I have above, it seems to follow that the Council's conduct in seeking to close the opening does not amount to unconscionable behaviour or conduct amounting to fraud, as referred to in cases such as **Crabb v. Arun District Council** [supra], **Dunne v. Molloy [1976-7] ILRM 266**, and **Annally Hotel Ltd v. Bergin [1967] 104 ILTR 65**, to which I have been referred.

**An equitable easement?:**

The next question is one which is not dependent in the same way as the previous point, on exactly what was agreed in 1983 with the Council. It is whether the creation and existence since creation of the opening in the median had the legal effect, regardless of the intention of any party, of creating some sort of equitable easement over the Council's property for the benefit of the plaintiffs' property, and being one for which no legal instrument is necessary for its transfer to the plaintiffs. What would the nature of such an easement be? The very difficulty in trying to formulate the nature of such an easement gives rise to difficulty.

It seems to me that one possibility of what is contended for is a right of passage to the plaintiffs' premises at opening No.2 for persons travelling in an easterly direction. If it is that, it is the potential patrons who are the beneficiaries and not the owners of the premises. It would be their entitlements which are being infringed by the removal of the opening.

Alternatively, it may be contended that it is a right of access, to be recognised by equity, to the plaintiffs' property, and which attaches to the plaintiffs' property over property belonging to the Council. But the present case is not a situation, more usually the subject of cases on the subject, where an easement of necessity is deemed to exist in circumstances where there is no other available access to the dominant tenement. In the present case there is alternative access, even for the eastbound

traffic. It may be less convenient but it is not so inconvenient as to be meaningless.

The plaintiffs would have to contend that equity would recognise the right or easement on the basis of extending the concept of necessity from actual physical access, to the right to maintain a previous profit level for the business carried on at the premises, or even a property value, although in the present case the distinction between these two concepts is probably faint. I have been referred to no case in which such an extension of the meaning of "necessity" has been recognised as giving rise to equitable relief, and it seems improbable in the extreme that such a case could possibly exist.

Mr Brady argued also that there could be no question of the easement contended for over the land constituting the median existing since it would be an easement in gross, and that as such, unlike with a *profit a prendre*, it cannot exist. He points out that this area serves traffic of many kinds, such as customers of the Texaco Service Station, eastbound traffic wishing to make a U-turn back to the city, and that it is not therefore something which serves only the dominant tenement, namely the Foxhunter pub.

Mr Brady has argued that it cannot be an easement amounting to a public right of way as such, since the public already have a right to cross the opening as long as it exists.

However, Mr O'Neill has sought to argue that there is nothing in principle which prevents a private right or easement co-existing with a public right, and that accordingly there is nothing impermissible in a situation such as this where there is a public right over the median in tandem with the plaintiffs' private right. He has referred the Court to a passage from **Bland on The Law of Easements and Profits a Prendre**, at para 2-26 thereof, where the learned author states:

*"It is possible for private rights of way to co-exist with a public right of way……..An occupier of property adjoining a highway has a private right to enter upon a highway distinct from any public right to pass on the highway."*

The cases footnoted as being authority for this proposition, which is uncontroversial are, inter alia, **O'Keeffe v, Dromey [1898] 32 ILTR. 47** and **Moore v. Great Southern Railway Co. [1861] 10 I.C.L.R. 46**. Both of these cases involve a right of access to enter upon the highway over property in circumstances where the plaintiff enjoyed no other access thereto. I do not think that the plaintiffs in the present case can be assisted in their arguments by reference thereto.

**A restrictive covenant against the Council's property**?

The plaintiffs argue that the agreement of July/August 1983 with Langan had the legal effect of creating a restrictive covenant over the area of the Council's property covering the opening in the median - that covenant being presumably that the Council would not use that area or allow it to be used for any purpose other than as an opening in the median, and by implication that they could never close it. Given my finding in relation to the nature of what was agreed between Langan and the Council it could not in my view have given rise to what is contended for by the plaintiffs, even if it could be successfully argued that such a covenant did not have to be contained in a document under seal.

Given these findings it is not necessary for me to proceed with an examination of the evidence given in relation to the question of damages related to what the plaintiff fears will be a drop in the level of business enjoyed by the plaintiffs from the premises, if eastbound traffic is prevented from accessing the premises when the opening is closed.

I must therefore dismiss the plaintiffs' claims, and discharge the undertaking given by the Council at the time of the application by the plaintiff for interlocutory relief.