[2018] IEHC 233

THE HIGH COURT

[2016 No. 3444 P.]

BETWEEN

THOMAS CONDRON

PLAINTIFF

AND

GALWAY HOLDING COMPANY LIMITED AND DANMAR CONTRUCTION LIMITED AND STEPHEN TRACEY AND MAUREEN TRACEY

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of April, 2018

1. The plaintiff seeks an injunction restraining the defendants, their servants or agents from further interfering with the road-facing boundaries of the plaintiff's property, an injunction directing the defendants to restore the said boundaries to their former condition and damages for trespass on same.

Background

2. The plaintiff, a retired farmer is the owner and occupier of land situate at Seamount Road, Malahide, Co. Dublin. The plaintiff's father acquired the property under a deed of conveyance dated 21st April, 1952. The plaintiff inherited the property in 1979 upon the death of his father and built the house in which he now resides in the 1980s. The property is located on the southern side of Seamount Road, a cul-de-sac between Knockdara Estate and Seamount House, which is situated at the end of the cul-de-sac. The width of the black top surface road running alongside the plaintiff's property is some 3.5m. The plaintiff claims that the lands abutting the black top surface of Seamount Road running alongside his property, hereinafter referred to as the "grass verge" comprises part of his property either by way of the deed of conveyance of 1952 or alternatively, by way of a legal presumption that the ownership of land extends to the middle of the road abutting that property. The plaintiff claims that since 1952 the grass verge abutting the road surface has always been treated by himself and his family members as their property and no other party has lawfully entered upon it for the purpose of maintenance or otherwise. He denies that the grass verge has been taken in charge by the local authority, Fingal County Council.

3. The first and second named defendants are limited liability companies of which the fourth and third named defendants are directors: they are family owned companies. The first named defendant is the owner of most of the land around Seamount House. The second defendant is the building developer on the site. The late Stephen Tracey, the third defendant and the fourth defendant own Seamount House: the fourth named defendant, his widow, continues to reside there.

4. A planning application for this development was submitted on 16th January, 2009. It was proposed that vehicular access to the development site would be provided off Seamount Road. This required a re-alignment and widening of the road. A road design was submitted in the course of the application illustrating the proposed road and footpath layout on the northern side of the road in front of property which is owned by the Nolan family.

5. The defendants contend that the roadway at Seamount Road has been taken in charge by Fingal County Council. It was claimed in their planning submission that Fingal County Council had confirmed by letter dated 7th August, 2003 that the required width of roadway for the design submitted lay within the Council's ownership. The letter addressed to the late Mr. Tracey was headed "Cert No. TIC/88/2003" and stated:

> "RE: PREMISES: SEAMOUNT ROAD MALAHIDE
>
> Dear Sirs
>
> I wish to refer to your letter dated 31st July 2003 and to state that the roads, footpaths, sewers water mains and public lighting abutting Seamount Road are in charge of the County Council from The Hill, Malahide up to the entrance of Seamount House. Between Knockdara and the entrance to Seamount House the width of the Road in Charge is 7.5m."

The relevance of the certificate number was never established in evidence. One might infer that it was a certificate number 88 issued in 2003 in respect of a taking in charge (TIC). No evidence was led from the council that the numbering had any significance or that there was a register of such certificates. The defendants submit that as a matter of evidence the certificate is *prima facie* evidence that Seamount Road is a public road by virtue of s.11(5) of the Road Traffic Act 1993.

6. This letter issued as a very prompt response to a short letter typed by the fourth defendant at the instigation of her late husband on 31st July, 2003 to Ms. Kathleen Power of the Roads Department, Fingal County Council making what she described as an application for the taking in charge of a 9m wide section of roadway outlined in an attached map and accompanied by a fee of €90 which the official had requested accompany the application.

7. The purported "cert" was signed by Ms. Bridget Gilbert, Senior Executive Officer, Fingal County Council. The nature and effect of this document is in issue between the parties. In particular, the width of 7.5m is questioned by the plaintiff who claims that the distance from hedge to hedge at the relevant section of Seamount Road was 4.6m on average. It is claimed that a width of 7.5m would require the council to not only take in charge the grass verge, but also encroach significantly past the hedge into the plaintiff's property, the Nolan's property on the opposite northern side of Seamount Road or both in order to provide a carriageway and footpath of the dimensions required. Witnesses from the council were unable to clarify to the court's satisfaction the status of the document or the basis for the assertion that a 7.5m width of roadway was taken in charge. Neither Ms. Power nor Ms. Gilbert gave evidence in these proceedings. Mr. William Mc Clean, a senior executive engineer in the Council from 2001 to 2010, stated that on receipt of the letter he sent an unidentified technician out to the location to check the length and width of Seamount Road which gave rise to the measurement of a width of 7.5m. No documentation was produced to establish these measurements which if made must have given rise to some form of internal paperwork having regard to the undoubted importance of the matter. He had no recollection of the personnel who dealt with the query or with whom he engaged concerning the query. He did not draft, write or sign the letter in response. However, Mr. James Cleary, a recently retired Senior Engineer with the council confirmed in evidence that Ms. Power was a member of the administrative staff in the Roads Department in August 2003 but he was unable to give any explanation for the assertion in the document that a 7.5m wide area had been taken in charge and in effect rejected it as an accurate measurement:

there was nothing to support it. The court is not satisfied because of the absence of relevant documentation, the fact that those directly involved in the exchange of correspondence are not available as witnesses and what I regard as the unsatisfactory nature of Mr. McClean's recollection of this event and the overall lack of cogency of the evidence advanced to accept the council's account of how this correspondence arose and was addressed.

8. On 7th October, 2009, Fingal County Council made a decision to grant planning permission to the late Mr. Tracey for the development of 159 dwelling units comprising apartments, houses and a crèche on the lands at Seamount House, Seamount Road (Order No. PF/1579/09). These lands had been the subject of two previous planning applications for residential development (Application Nos. F03A/0076 and F97A/0512) both of which were refused for reasons including the unsuitability of Seamount Road to service such a development and the fact that the road surface available was limited to 3.5m with no footpaths. There has not been any challenge by way of judicial review to any of the planning decisions made or conditions imposed including that of 2009. While these proceedings are not and could not be used as a means to challenge the planning permission granted in this case or any purported compliance with the conditions attached thereto an outline of the history of the planning issues related to the site and roadway has been a central feature of the evidence in the case and is of some assistance in understanding the history of the roadway and the plaintiff's claim.

9. The plaintiff wrote a letter to the council objecting to the 2003 application for planning permission dated 28th February, 2003 outlining his concerns regarding the capacity of Seamount Road to accommodate the traffic flow arising from the development. He wrote:

> "The road itself is very narrow and would not be able to accommodate large vehicles. My main worry is that it would be a health hazard for my family and for residents at the top of Seamount Road. For example if there was an emergency a Fire brigade or an Ambulance would not be able to pass.
>
> Obviously another worry would be hygiene the Bin-men would also not be able to pass and therefore would not be able to collect the bins. At present the top of Seamount Road is suitable for the residents and cars it holds. It would not be able to deal with traffic congestion and large, heavy vehicles.
>
> … I would like to state that the public road is not an adequate width. As the road goes up it gets narrower and there are also no footpaths on either side of the road in the affected area of where the building plans to commence."

The 2003 application was made in respect of approximately one half the number of units for which permission was eventually granted in 2009 but the capacity of the road to cope with the potential traffic ensuing was a consistent theme in the plaintiff's subsequent opposition to the 2009 proposals.

10. On the 12th March, 2009 Fingal County Council requested that further issues be addressed by the applicant. These included a request for details for the provision of pedestrian access between the existing housing estates and other lands, a Road Safety Audit, the provision of a minimum road width of 5.5m on Seamount Road and details of a pedestrian footpath for the entire development with a minimum width of 1.5m with a 1.5m verge or 1.8m without a verge.

11. A Road Safety Audit Report which was completed on 17th June and submitted on 11th September, 2009 to Fingal County Council addressed the absence of a footpath on Seamount Road. It stated at paragraph 3.1:

> **"Problem: Pedestrian Tie-ins with Development:** There is a continuous footpath running along the southside of Seamount Road, while the footpath on the north side is uneven and narrow in sections and intermittent. The proposed footpath extending out from the development site and linking up with the existing facilities is on the north side of the road. As a result pedestrians will end up in the carriageway if walking on the northside of Seamount Road, or encouraged to cross the carriageway uncontrolled to access the more continuous footpath on the southside which will put them at risk while they do so.
>
> **Recommendation:** Failing the placement of footpaths on both sides of the development site road extending out to the existing facilities on Seamount Road, pedestrian crossing facilities mid-way along Seamount Road should be provided to allow pedestrians to cross to the footpath on the southside of the road. [This] will provide safer conditions for pedestrians along Seamount Road."

12. The Safety Audit team's response to the problem identified in paragraph 3.1 was set out in Schedule B of the Report:

> "It is proposed to construct a new 1.8m wide footpath linking the existing
>
> footpath, northern side of Seamount Road to the proposed Development.
>
> Southern side of Seamount road is in private ownership …"

The pedestrian crossing recommended was deemed to be beyond the scope of the site boundary.

13. Molony Millar Engineers on behalf of the defendants also furnished details on the 10th September of the works proposed. It was noted that the main road had a width of 5.5m. The footpath proposed was 1.8m without a verge for the main access boulevard. The drawing relied upon indicated that the footpath would be along the northern side of Seamount Road. Thus a total width of 7.3m was required to provide the proposed widened carriageway and footpath without a verge.

14. The County Council granted permission for the development subject to various conditions. In particular condition 11 states:

> "Prior to the commencement of development the following revisions/requirements in relation to transportation infrastructure shall be agreed in writing with the Planning Authority, following discussion with the Transportation [sic] Department, and implemented by the developer as part of the development:
>
> > (a) The detailed design of the traffic calming, entry treatments, shared surface areas and junction's layout shall be agreed with the Transportation Department prior to construction. The access road shall be 5.5m wide
> >
> > …

(e) The developer shall submit details of the Pedestrian footpath for the entire development. The footpath should be a minimum width of 1.5m with a 1.5m verge or 1.8m without a verge."

15. An appeal to An Bord Pleanála was taken against this decision by various parties including the plaintiff. The extent to which Seamount Road could accommodate the proposed level of traffic was again raised. Attention was focussed on the fact that the road narrowed significantly between Knockdara estate and Seamount House. The plaintiff, in a letter to An Bord Pleanála dated 30th October, 2009 stated:

> "The deficiency of the existing road in the immediate vicinity of the subject site and serving the proposed development would be unsuitable to carry the increased Road Traffic resulting from the proposed development. [The] [a]pplicant proposes to widen and upgrade this section of the road. Part of the upgrading works proposed are within an area of land which is within my ownership. I have documentary evidence to support this. [The] [a]pplicant has no right or permission to carry out these works on my land."

The plaintiff contended that the existing road width was substandard and inadequate to serve 159 dwellings.

16. The planning inspector in his report of 16th March, 2010 noted that the developer planned to widen the carriageway and construct a footpath on the northern side of the road. The inspector addressed the plaintiff's contention that the proposed works were to be carried out on land which he owned but which the applicant again claimed was within the ownership of the local authority. He stated that disputes over land were civil matters and noted that s. 34(13) of the Planning and Development Act provides that a person shall not be entitled solely by reason of a grant of permission to carry our any development.

17. An Bord Pleanála granted permission for the development subject to conditions in 2010. Condition 1 provided that:

> "1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted on the 11th day of September, 2009 except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to the commencement of development and the development shall be carried out and completed in accordance with agreed particulars".

Condition 3 related to the requirements of Seamount Road to service the development and states that:

> "3. Prior to the commencement of development, the developer shall submit to and agree in writing with, the planning authority, proposals for traffic calming measures, parking control measures and pedestrian crossings along Seamount Road as recommended in the 'Stage 1 Road Safety Audit' submitted to the planning authority on the 11th day of September, 2009. No dwelling unit shall be occupied prior to the construction and commissioning of these and other proposed road improvement works along Seamount Road, as confirmed in writing by the planning authority."

18. It is a feature of the development and the permission granted that the developer was obliged to execute works on the public roadway along Seamount Road leading to the new estate which is outside the lands owned by the third and fourth defendants upon which the units were to be constructed. The court also notes that the construction and development of the main site proceeded in the absence of a submission of the revised drawings for carriageway and a footpath situated on the southern side thereof or agreement in respect of same between the applicant and the local authority though this is not determinative of the issue in the case.

19. A number of letters were written on behalf of the plaintiff and the Nolan family in respect of the proposed works on Seamount Road by Vincent and Beatty solicitors. In a letter sent to the County Council on 4th September, 2014 they state:

> "Our client owns lands and two houses… on Seamount Road. We have been instructed that Fingal County Council has commenced works to the area between the edge of Seamount Road and our client's hedge. This area is in our client's ownership and is not in the charge of Fingal County Council. In addition to the above, it appears that the works would necessitate digging up our client's pathway between the edge of Seamount Road and one of his houses. Obviously, this is completely unacceptable to our client.
>
> In the event that either evidence as to why Fingal County Council are entitled to carry out these works is not furnished or these works are not ceased immediately, our clients will have no alternative but to apply to the Court to [*sic*] seek injunctive relief.
>
> Please revert immediately with confirmation that the works to our client's lands will cease. In the absence of such confirmation before close of business today, we have been instructed to commence proceedings to seek injunctive relief."

20. Some months later, on 4th June 2015, the plaintiff's solicitors wrote to Mr. Niall Thornton, Executive Engineer of the Roads Department of Fingal County Council, stating that their clients disputed the assertion made in Cert TIC/88/2003 that a 7.5m width of roadway had been taken in charge by the council, and stating the plaintiff's case that only circa 3.5m in width had been taken in charge, namely the blacktop surface of the road. They requested that the council confirm the exact area and the width of Seamount Road taken in charge by the council. Numerous requests for a reply from the county council to their letter of 4th June 2015 were made by the solicitors throughout June and September 2015.

21. In the meantime, in an email from Mr. John Downey, an architect retained by the defendants to Mr. Thornton on 17th June 2015 Mr. Downey wrote :

> "…we have agreed to get a road of minimum 4.1m and path of min 1.5m. To ensure the path goes in first. Ray will organise the Road Opening Licence shortly.
>
> In relation to the letter and conversation on Friday on the phone call, please see attached a copy of the letter detailing from Fingal CC Roads that the area taken in charge is 7.5m along Seamount Lane."
>
> In response to this email, Mr. Thornton, on 18th June, 2015 requested a copy of any document that Mr. Stephen Tracey had indicating the area taken in charge as being 4.8m wide.

22. On the 2nd September the plaintiff's solicitors wrote again to the county council and the defendants' solicitors expressing concern

at the lack of response to their requests contained in the letter of 4th June, 2015 and requesting that a response to same be furnished by the 4th September failing which proceedings would be issued. On 3rd September Ms. Maureen Tracey wrote to Mr. Thornton by email requesting a copy of the council's response to Vincent & Beatty's letters. The defendants' solicitors replied on 4th September stating that their clients would undertake not to carry out any works on Seamount Road pending the clarification sought from the county council. However, their clients were "concerned not to give an open-ended commitment in this regard, in particular in circumstances where our clients are already in possession of the letter dated the 7th August, 2003 referred to in your correspondence which we believe is definitive on the matter."

23. On 4th September, 2015, the plaintiff's solicitors received a letter from Mr. Sean McGrath, a Senior Executive Engineer with Fingal County Council which stated:

> "I have researched the question of the taking in charge of Seamount Road. I have been provided with an extract from a schedule of roads deemed to have been taken in charge. The schedule includes Seamount Road, listing its length as 680 linear yards and its average width as 15 feet. I attach a copy of this schedule for your information".

The attachment is entitled "Roads in Charge – Excerpt from 1930 + 1952 Road Schedules". The excerpts do not include any maps, but list Seamount Road as a roadway that has been taken in charge: the dimensions of the area taken in charge were given in length as in or about 680 linear yards and in width as 15 feet, or approximately 4.6m. This is considerably less than 7.5m wide and slightly wider than 3.5m. The Court has heard that although the ledger in which the originals of these excerpts is kept by the council in "safekeeping", the council was unable to locate the original ledger.

24. In a further email dated 22nd October, 2015, from Mr. Cleary of Fingal County Council to Ms. Harty, of Vincent Beatty Solicitors, solicitors for the plaintiff and the Nolan's, he stated his opinion that there was no basis for the issuing of a "Cert" indicating that 7.5m of roadway had been taken in charge but that he was satisfied that the entire roadway boundary to boundary had been taken in charge:

> "My opinion on some of the issues is as follows.
>
> The council has taken the road outside your clients' property in charge. The road is taken by the council to mean from boundary to boundary excluding the boundary itself. Accordingly, should the council need to maintain the road in any manner, it will act to do so between the road boundaries, with due regard to the nature of those boundaries. It is probably unnecessary to state that these boundaries delineate the extent of the private ownership of the adjoining landowners.
>
> There are no extant maps showing limits to the taking in charge at Seamount. I see no basis for the statement set out in the Council's letter of the 7th August, 2003, that the width of the road in charge is 7.5m.
>
> As the Council has taken the road in charge, it follows that any work proposed on or under that road must have the approval of the Council. This normally takes the form of the granting of a licence to open the road, subject to relevant conditions with regard to the satisfactory restoration of the road and the lodgement of a suitable sum against which the costs of restoration works, carried out by the Council, should the need arise would be offset.
>
> I am aware that approval for the development was granted with the usual caveat of section 34(13).
>
> The Council is anxious to ensure that all parties to the issues at hand work to reach an amicable solution to the needs of all ..."

25. Mr. Cleary stated in evidence that he formed this opinion on the basis of a site visit he made from which it was clear that the stated width did not exist, rather than on the basis of documentary evidence in the council's possession. He concluded that the road had been taken in charge on the basis of the excerpts from the road schedules of 1930 and 1952. No map of the road taken in charge exists as of the time it was taken in charge which is also unclear.

26. Against this background an application for a Road Opening Licence was made by Mr. Ray Goggin on behalf of the defendants, on 8th September, 2015. The application was for the widening of the blacktop surface of Seamount Road to 5.5m and the installation of a footpath of 1.8m. The drawing accompanying the application showed the proposed footpath on the southern side of the road. On 22nd October, 2015 Mr. Cleary wrote by email to Mr. Stephen Peppard of the County Council stating:

> "There has been some dispute about [the] extent of taking in charge… at Seamount Road since the beginning of the summer. Various solicitors' letters have been received. The present position seems to be that the granting of a road opening licence will give rights to a developer which are being opposed by neighbours
>
> We need to meet to ensure all are aware of the likely outcome.
>
> Kevin Valley has recommended a grant…"

27. Further correspondence followed between county council officials and representatives of the plaintiff and defendants in which it was proposed that all parties would meet to attempt to reach some agreement on these matters. These meetings did not result in any agreement between the parties. The plaintiff and the Nolans remained concerned "with the FCC proposal to put in a substandard road and footpath infrastructure and the implications that will have for safe access and egress to their properties and what the long term consequences of this construction will be".

28. On 3rd March, 2016 a second application for a Road Opening Licence dated 1st March, 2016 was sent by Mr. Goggin to the County Council, which superseded the previous application. This application now sought permission for works to widen the road to 5.0m and the installation of a 1.8m wide footpath. The drawings submitted were in purported compliance with Condition 3 (drawing no. 705/5/CO1J) and also indicated the installation of the proposed footpath on Seamount Road on the southern side of the carriageway. It reduced the proposed road width from 5.5m to 5m "to tie in with the existing 5.0m road width on Seamount Road". This was in response to views and preferences expressed by council officials to have one continuous footpath along the southern side of the roadway rather than one which was interrupted in the area outside the Condron home thereby requiring pedestrians to cross the road and requiring traffic to adjust its path in response to a change in road layout. The moving of the footpath to the southern side of the road was also said to be in response to the issue raised at para. 3.1 of the Stage 1 Road Safety Audit quoted above.

29. Mr. Sean McGrath on behalf of the council sought clarification on various issues, including confirmation that there would be "no works carried out on private property, or cause damage to the exiting hedgerow, or require the removal of any electricity pole, on the north side of Seamount Road." An email from Mr. Cleary on 7th March, 2016 stated that no licence should issue until the issues raised by Mr. McGrath have been resolved. At this stage relations between the parties had further deteriorated, the plaintiff maintaining that any works on the grass verge would amount to trespass and non-compliance with the grant of planning permission. The council granted the road opening licence on 16th April, 2016.

30. It is apparent that in order to comply with the conditions of planning permission based on the original drawings the defendants considered themselves entitled to encroach on the verge abutting the Nolan's property for the purpose of widening the blacktop surface and installing the required footpath. When planning permission was granted it was envisaged, in accordance with condition 3 and the drawings upon which permission was granted that the road would be widened and the footpath would be installed on the northern side of Seamount Road. However, a decision was later made to install the footpath on the southern side of the relevant portion of Seamount Road by encroaching upon the grass verge abutting the Condron property. This decision culminated in the defendants obtaining the Road Opening Licence from Fingal County Council in April 2016, at which point the development was at a very advanced stage with many of the residential units completed. On or about the 19th April the servants or agents of the defendants proceeded to dig up the grass verge and install the carriageway and a concrete footpath in its place, which in turn resulted in the plaintiff issuing these proceedings for injunctive relief and damages for trespass.

The Dispute

31. The plaintiff claims that while the map attached to the deed of conveyance of 1952 from which he derives his title does not include any portion of the road, the boundary of the lands are indicated by a hedge. The plaintiff claims that he enjoys a presumption that his ownership of land extends to the middle of the road running alongside his property; a presumption which the defendants have not rebutted.

32. The plaintiff also accepts that a portion of the area beyond the hedge was taken in charge by the local authority and acknowledges that there is a presumption that a roadway, if taken in charge, is normally to be regarded as taken in charge from hedge to hedge. It is accepted that this presumption applies to the roadway on Seamount Road. However, counsel for the plaintiff submits that the facts necessary to give rise to this presumption must be proved by the person who is alleging that the lands have been taken in charge. The plaintiff concedes that the blacktop surface of the road was taken in charge of the county council but maintains that the grass verge was not and that there is no or no sufficient evidence to establish that it was.

33. The plaintiff therefore seeks an injunction compelling the defendants to remove the concrete footpath and return the grass verge to its previous state. The plaintiff also seeks an injunction restraining the defendants from further interfering with the verge and damages for trespass.

Taking in Charge

34. In Keane on "Local Government" the learned author states in respect of "Taking in Charge" at pp. 83 to 84:-

> "The concept of taking in charge of roads or other services is surrounded by some mystery. The only definition of the concept appeared in the Public Bodies Order 1946. Therein the phase a road "in the charge of" was defined to mean a road the construction, repair and improvement of which is the duty of such road authority. The concept would appear to arise out of the terms used in rating legislation.
>
> In s. 10 of the Local Government Act 1946 the expenses of a county were required to be charged over the whole of the county. Therefore any matter or thing which the county had a responsibility for and gave rise to an expense, must be paid for out of rates charged on the county. Therefore the maintenance of a road, gave rise to an expense, was a charge on the county. This gave rise to the phase that the road was "in charge".
>
> The Public Bodies Order 1946 has been repealed by S.I. No. 508 of 2002 and the definition referred to above has not been replaced."

In more recent legislation the planning code provides that where a housing estate of more than two houses has been constructed in accordance with planning permission and that the works have been completed in accordance with that permission a request may be made by the developer to take the development in charge and the local authority must do so (s. 180 of the Planning and Development Act 2000). The mechanism whereby a road may be taken in charge is provided under s. 11 of the Roads Act 1993.

35. The learned author also dealt with the "Extent of [a] Public Road" at pp. 80 to 85 concerning the area of ground to which the local authority's duties extend and which is not specifically addressed in the 1993 Act:-

> "At common law everything between the fences including footpaths, cycling tracks and grass margins constitute the public road, unless there is evidence to the contrary. Unless the land has been acquired for the purposes of building the road, the owner of the land remains the owner of the soil and of the space above it subject to the public use of the road. This was defined in ancient times as follows:
>
> > 'The king has nothing but the passage for himself and his people; the freehold and all profits belong to the owner of the soil'. (1 Roll. Abr. 292)
>
> At common law the presumption is that the owner of the land beside the road is the owner of the soil to the centre of the road. The owner of the soil is entitled to the produce of the land, including trees and grass growing on it. Also the owner of the soil, *prima facie*, was free to build cellars under the road, but this is subject to statutory restrictions under the Public Health Acts and the Planning and Development Acts. The owner is also entitled to access to the road, but not at every point on the road. …
>
> It is accepted that in maintaining or improving a road that the road authority has to go down to provide foundation, drainage and various layers of construction. It is accepted that they are entitled to take so much above and below the surface that is reasonably necessary for the construction and maintenance of the road to the public road. This may now include a substratum for tunnelling. …"

36. Section 55 of the Grand Jury (Ireland Act) 1836 provided the original basis for the charging of rates in respect of roads. The statutory use of the term "public road" in Ireland was reviewed by Kenny J. in *Holland v Dublin County Council* (1979) I.L.T.R 1 at p.2:-

"In the statutes of the British Parliament dealing with the widening and construction of roads in Ireland and in the statutes passed since 1921 the expression 'public road' is used instead of the term 'highway' which is used in Acts of Parliament dealing with roads in England. Sections 55 and 58 of the County Dublin Grand Jury Act, 1844, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, authorised local authorities to widen any part of a public road and to make new roads. Section 24 of the Local Government Act 1925 (parts of which including section 24 did not apply to the City and County of Dublin) provided that the maintenance and construction of all county and main roads in a county should be the duty of the Council of the County and 'maintenance' was defined by section 1 as including the widening or the reasonable improvement of a road. The Local Government (Dublin) Act 1930, repealed… sections [55 and 58 of] … the County Dublin Grand Jury Act 1844…and applied section 24 of the Local Government Act 1925 to the City and County of Dublin."

37. In the 1982 Edition of Keane on Local Government, the learned author noted that the procedure for the creation of public roads was set out in s. 25 of the Road Act 1925 pursuant to which a county council might pass a resolution declaring any road which was not a public road but over which a public right of way for foot passengers and vehicles existed and which connects to public roads and is not less than 11 feet wide to be a public road. This provision repealed s. 55 of the Grand Jury Act 1836 and provided the modern statutory basis for the procedure known as "taking in charge".

38. Article 86 of the Public Bodies Order 1946 (S.I. 273 of 1946) provided that every road authority was obliged to keep a road schedule in Form RO1 showing the number assigned to each road in its charge and whether such roads are divided into sections and other matters set out in the form. Three copies of the road schedule had to be sealed; one was to be sent to the designated Minister and the other retained and made available for inspection. The road authority was also obliged to prepare in triplicate a map showing on a convenient scale the roads in its charge. This official road map was required to be sealed with the seal of the authority; the road authority retained one copy and the other was to be displayed in a prominent position and remain open to inspection by the public during office hours. Article 90 provided that the secretary or clerk of the council should keep a periodical record of expenditure on the repair and every work of improvement on each road. Article 92 provided that if an urban road was in the charge of a county council a separate account was to be kept in respect of the receipts for expenditure on such roads.

39. Article 2 defined a road "in the charge of" a road authority as "a road the construction, repair and improvement of which is the duty of such authority". The following two definitions are also of relevance:-

" 'Repair' when used in relation to roads means all work of repair of roads, and includes resurfacing with the materials similar to the existing surface, patching, dressing with tar or bitumen, repairing surface water drains, trimming cutting or removing hedges or trees abutting on roads, repairing or renewing kerbing, channelling, or paving, the maintenance of guard posts, weighbridges or traffic signs, the maintenance of walls or fences for the protection of the public, the maintenance of supporting walls, and other similar works;

'Improvement' when used in relation to roads means and includes the making of any new road or portion of a road, widening roads, resurfacing roads with a material different from the existing surface, constructing or strengthening foundations of roads and the resurfacing necessary in connection therewith, provision of kerbing, channelling, paving, or systems of surface water drainage, rebuilding bridges, weighbridges or traffic signs, removing buildings and structures obstructing the view on roads, and other similar works; …"

40. The "extract of schedule" produced in the course of the hearing has some similarities to the road schedule Form RO1 prescribed under Article 86. It requires that a road schedule should contain the name of the road authority, the distinguishing number of the road, the number of the sections of the road where the road is divided into sections, important points on and points of termination of a road, the length and width of the road and whether it is a main, county or urban road. In this instance the road number given is 133. It does not appear to be a road divided into sections as are other roads listed and the following "description" is given which appears to coincide with what might be regarded as a "important points on and the termination of road" :-

" 'Seamount Road' from the three roads next north of Broomfield House on the main Malahide – Hazelbrook to Portmarnock Bridge east road east for 680 yards. (cul-de-sac)."

The average length and width of the road is then given as 680 yards long and 15 feet (4.6m) wide.

41. The maps prepared and records kept, if any, under the various articles of the Regulation concerning the identification of the road and the keeping of accounts in respect of its repair and maintenance as a road taken in charge were not produced in evidence. In fact there is no evidence that the maps which ought to have been prepared and updated by the road authority were ever compiled and updated. Articles 85, 86 and 87 were subsequently revoked by s. 10(5)(e) of the Roads Act 1993.

42. Fingal County Council is the relevant road authority in respect of Seamount Road under the Roads Act 1993. Section 2 of the 1993 Act provides the following relevant definitions:-

" 'public road' means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority;

'roadway' means that portion of a road which is provided primarily for the use of vehicles; …

'road' includes—

(a) any street, lane, footpath, …

(b) any … carriageway (whether single or multiple), pavement or footway …

(d) any other structure or thing forming part of the road and —

(i) necessary for the safety, convenience or amenity of road users or for the construction, maintenance, operation or management of the road …"

A reference to "maintenance" in relation to a public road "includes improvement and management".

43. Section 13(6)(a) provides that a person (in this case a developer) may with the consent of a road authority, in this instance

Fingal County Council, carry out maintenance works on a local (public) road. To that end s. 13(6)(b) provides that a consent under sub-para. (a) may be given by the road authority subject to such conditions, restrictions and requirements as it thinks fit. The works carried out pursuant to that consent are deemed to have been carried out by the road authority.

44. Section 11(6) of the 1993 Act provides that every road which was previously regarded under earlier legislation as a public road shall be a public road: s. 11(5) provides that a certificate of a road authority that a road is a public road shall be *prima facie* evidence thereof. Under s. 10(5) a road authority is obliged to keep a schedule and map of all public roads in respect of which it has responsibility.

45. Under s. 2(1) "footpath means a road over which there is a public right of way for pedestrians only not being a footway" and a "footway" means that portion of any road associated with a roadway which is provided primarily for use by pedestrians".

46. The area of black-top or bitumen which covered the carriageway of Seamount Road until the works carried out on the area outside Mr. Condron's property was 3.5m wide approximately. There was no footpath installed on either side of the bitumen surface but there were two margins, a grass verge between a hedge and the surface on Mr. Condron's side, the southern side and a verge in front of another "boundary hedge" on the Nolan side, the northern side. The question arises whether the road taken in charge is limited to the tarmacadam surface or whether it includes the grass verge on Mr. Condron's side.

47. The extent of the space subject to the public right of passage on a highway (here a public road) was considered in Halsbury's *Laws of England (4th Ed.)* paras. 113-115:-

> 113. **Width of Highway**.
>
> At common law a highway may be of any width but statutes such as the Enclosure Acts, generally prescribe the width of highways to be set out in pursuance of their provisions. Apart from any special enactment the width of a highway, that is the extent of land subject to the public right of passage, is a question of fact. …
>
> 114. **Presumption where a metalled track exists**.
>
> The existence of a metal track, or *via trita*, does not necessarily mean that the public is confined to that track; and in many cases strips of land alongside the metalled track form part of the dedicated highway and are equally subject to the right of the public. Where a metalled road crosses unenclosed land, there being no ditch or physical feature to indicate other limits to the highway, the proper inference is that the metalled track alone formed the highway, unless public user of ad- joining land for the purposes of traffic is proved. …
>
> 115. **Presumption where fences or dykes exist**
>
> Where there are fences or dykes on both sides of a highway, the public right of passage *prima facie* extends to the whole space between the fences even though the width of the highway may be varying and unequal; and where there is a fence on one side only, the presumption is equally applicable to the space between the highway proper and that fence.
>
> However this presumption does not arise in every case, and it may always be rebutted by evidence. It does not arise at all if the existence of the fence is not in some way referable to the existence of the highway. Thus the distance of the fence from the roadway may be so great that there cannot be supposed to be any connection between them; or its erection may be satisfactorily accounted for by a wish to separate cultivated land from waste over which the highway happens to run; or the age or line of the fence may show that it existed before the highway. In those circumstances, if the public claims a right of passage over land lying between the metalled track and the fence, it must prove actual user sufficient to justify an inference of dedication. If however the fence is so near to the road that some connection between the two can reasonably be inferred, and the existence of the fence cannot otherwise be satisfactorily accounted for, it must be regarded as having been erected with reference to the highway, and the presumption then arises that the whole intervening space forms part of the highway."

In Keane *The Law of Local Government in the Republic of Ireland* the learned author states at p.70:-

> "The public right of passage extends to the whole surface which has been dedicated to the public or which has been constructed as a public road. Where a public road has been set out, or fenced at each side, but part only of the space so defined has been metalled and used as a road, the public right of passage *prima facie*, and unless there is proof to the contrary, extends to the whole space set out. The strips of land alongside the metalled track (or *via trita* as it is called) are equally subject to the right of the public, in the absence of clear evidence to the contrary."

48. In *Attorney General (Cork County Council) v. Perry* [1904] 1 I.R. 247 the Irish Court of Appeal considered a claim that a strip of land located between a water table adjacent to a metalled road and a cliff which was part of the defendant's property was part of the public road. The defendant had stored building materials on this strip of land which was alleged to form part of the public road. It was held by the Court of Appeal that the onus of showing that the waste strip of ground had been dedicated as part of the highway lay on the plaintiff and that since the evidence adduced showed no use by the public of this strip as a highway and as there was no obstruction by the defendant of the metalled road at the other side of the water table the injunction sought was refused. Fitzgibbon L.J. set out a number of principles concerning the limits of a public highway (or road) at pp. 253- 254:-

> "… Here we must have recourse to presumption and the evidence of user, because no documentary evidence of title to the highway is now forthcoming.
>
> *Turner v. Ringwood Highway Board* (L.R. 9 Eq. 418); *Nicole v. Beaumont* (53 L.J. Ch. 853); and *Reg. (Rothschild) v. U.K. Electric Telegraph Company* (31 L.J.M.C. 166), show that, where a highway has been set out, or fenced at each side by metes and bounds, and afterwards, for a length of time, or in course of time, part only of the space so defined has been metalled and used as a road, the public right of passage, *prima facie*, and unless there is proof to the contrary, extends to the whole space set out; in the absence of clear evidence to the contrary, or with slight evidence of user of the land fringing the actual road, by foot passengers, or for other public purposes connected with the highway, even the owner cannot appropriate or obstruct the more or less waste and useless land adjoining the metalled road. But in such cases the proof of original dedication of the whole space rests on the plaintiff, though such proof is sufficiently supplied by the evidence of the original setting-out or fencing of the space in question.

> On the other hand, where there is a defined and metalled road, edged by an appropriate water table, the mere fact that adjoining land, more or less waste and useless, is open and accessible from the highway will not, in the absence of other evidence, establish dedication of any land except that which has been actually used for highway purposes, and even slight evidence of user for private purposes, having regard to the character of the place in question, will establish the private right of exclusive occupation. …"

In that case there was considerable evidence to the effect that the defendant had exercised private rights over the strip of land and there was convincing and un-contradicted evidence that the land had been used for private purposes and never used for public traffic (Holmes L.J. at pp. 269-270). In *Holland* Kenny J. (at pp3-4) adopted and applied this statement of the law.

49. In this case the area of ground in issue is bounded by hedging on either side. The metalled, black-top area prior to the housing development and up to the time of the planning permission sought in 2003 was 3.5m wide with a grass verge on either side. It seems to me having regard to the above authorities that these grass margins are presumed to be part of the area dedicated as a public road unless there is evidence to the contrary. In addition, of course, there is documentary evidence that Seamount Road was taken in charge as set out in the schedule to which reference has already been made. The width taken in charge was 15 feet or approximately 4.6m on average leaving a grass verge or margin on either side of that area. Mr. Cleary in his letter regarded the taking in charge of Seamount Road as being from boundary to boundary: he regarded the boundary to Mr. Condron's land to be the hedge inside the grass verge. This is so unless the presumption is rebutted by the Plaintiff.

50. In *Attorney General v. Beynon* [1970] Ch. 1 a declaration was sought that a grass verge on a section of highway was part of the highway on the basis that the public had continually used the verge as a right as part of the highway without interruption; the verge had been mowed and maintained by the council over very many years; the ditch had been cleaned, widened and maintained by the council; a section of the highway lay between two hedges whose existence was referable to the highway and the grass verge had been extended from the carriageway to a ditch over which the public had passed and re-passed. The plaintiffs relied upon the presumption that the highway extended from fence to fence over the verge and up to the hedge. The Court of Appeal determined that the fences had been put up by reference to the highway. This gave rise to a rebuttable presumption which supplied any lack of evidence of dedication of the verge as part of the highway from which its user as part of the highway could be inferred; the highway extended to the whole space between the fences. The court acted on the presumption that the fences were to be taken to have been put up by reference to the highway in the absence of a contrary indication (applying *Offin v. Rochford Rural District Council* [1906] 1 Ch. 342 per Warrington J. at p. 354). The court was satisfied that there was no explanation that the hedge was made other than by reference to the highway. It also held that the presumption had not been rebutted by the defendant's alleged acts of ownership since they were inadequate or of little value in the absence of any title shown to the land in question whereas the authority had shown that some part of the verge was included in the highway. It was held that the verge was part of the highway and the keeping of vehicles there by the defendant was an actionable obstruction.

51. The defendants rely upon this presumption and definition of the area between the hedges as a public road and the further proposition that the area of the grass verge was within the area taken in charge as a public road notwithstanding the narrower measurement set out in the schedule. It was therefore at all material times a public road and as such must be regarded as taken in charge from hedge to hedge.

Evidence for the Plaintiff

52. In an affidavit sworn on 12th May, 2016, the plaintiff states that when the property was acquired in 1952 Seamount road was a stone road, and a cul-de-sac which effectively served only the Condron, Tracey and Nolan properties. The plaintiff maintains that at some point in the 1980s the road was surfaced with tarmacadam by Dublin County Council leaving two verges on either side thereof. In a later affidavit sworn on 16th May, 2016 he stated that at no stage did Dublin County Council, or its successor Fingal County Council maintain the verge and further that at all times since the property was acquired by his late father in 1952 the verge on his side was maintained by him and his family. He outlined his case in this way:

> "5. .... I own the lands fronting onto the road, and am advised and do believe that I have the benefit of the presumption that I own out to the middle of the road in front of my house. I fully accept that insofar as the tarmacadam surface of the road is concerned the same is subject to a public right of way and may properly be said to have been taken in charge by the Local Authority albeit that there is no documentary evidence vouching this. I accept that the installation of the tarmacadam surface would be evidence of that portion of my lands being *"taken in charge"*, that does not however mean that the same is no longer my property. What I do not accept is that the grass verge in front of my house, which has been solely maintained by me for the last 63 odd years has been *"taken in charge*", it is this portion of my property which is the subject matter of the dispute, the Defendants having trespassed on same ... and installed a pavement."

53. The plaintiff gave oral evidence to the effect that he had always considered the grass verge to comprise part of his property and that at all times he, his family members namely his children or his sister maintained the grass *verge* using a sickle, a strimmer, or a ride-on lawn mower. He would maintain the hedge or pay a third party to do so "occasionally" or "every couple of years" and as the plaintiff was "into nature" and he and his family enjoyed the privacy which the somewhat untamed hedge provided. He stated that no one from the council ever cut the hedge or asked him to cut the hedge. The grass verge would be cut back "a couple times a year". He could not recollect anyone from the council cutting the verge or telling him to cut it.

54. Mr. Condron was cross-examined to the effect that the defendants, who resided at Seamount House since the 1970s never saw the plaintiff or his family maintaining the verge or the hedge. It was put to him that diary entries of a Mr. Tommy McCormack, an employee of Fingal County Council, recorded that the council cut the hedge "opposite the Hayes and Condron House" going up to the fourth defendant's house. The plaintiff did not accept this statement, stating that he never saw anyone employed by the council cutting back the hedge. The plaintiff states that he had seen the council maintaining the hedge and the verges down the road from him and that over the years additional houses were built along Seamount Road in front of which pavements with grass verges were installed and maintained by the council but this stopped short of his property.

55. The plaintiff stated that in or about the 1980s he installed a kerb and laid gravel outside the entrance to his house at about the same time as it was completed. He also installed cobble lock paving and a kerb outside his sister's house ("Bettyville") which is situated adjacent to his house in or about 2002. This became necessary because when the tarmacadam road was laid at about the same time the level of the road was raised; rain water would run off the road and flow down the driveway to his sister's house which is on a downwards slope from the road. The kerb and cobble lock were installed in order to prevent this. While initially denying that he spoke to anyone in Fingal County Council before installing the kerb and the cobble lock at Bettyville, the plaintiff recalled that he spoke to a Ms. Helen Cuddy, an engineer with the county council. He said that Ms. Cuddy gave him to understand that he would have to install the kerb himself as the grass verge was his. Mr. Condron's recollection of the context in which this occurred was not very clear.

56. The plaintiff gave evidence that when his late father built his house, he and a Mr. Humphreys who at that stage resided across the road, paid to have water brought from the mains into their houses. The water main was situated at the yard gate of the late Mr. Condron's property, where Bettyville is now situated. The plaintiff also recounted that his father arranged for an electricity connection for the house in or about 1953 when they moved in. They did not have a telephone in that house. The plaintiff recalled that when he was about fourteen years old, he and his brother dug a trench between their father's property and Seamount House in order that the water supply to the Condron property could be brought up to Seamount House at the request of Mr. Norman, its former owner. The plaintiff states that at no point did any person from Fingal County Council, eircom, telecom or any other utility person seek permission from him to open up the grass verge for the purpose of installing utilities. He did not recall seeing any person installing services on the grass verge, save for an occasion when it was dug up to enable the placement of a cable box there for the purpose of supplying residents on the road with cable TV about two years prior to the hearing of this matter. He accepted that a telephone pole was installed in the verge which subsequently blew over.

57. Under cross-examination the plaintiff accepted that there was a telecom box installed on the grass verge. It was also put to him that a Post & Telegraphs pole was installed on the verge in or about 1962 or 1963. There was no evidence as to whether his father's permission was sought to install the pole on the grass verge. It was also claimed that another pole was installed on the verge by an entity called "cable management" for the purpose of supplying cable TV to the residents of Seamount Road. The plaintiff simply stated that he did not know where they put it. The plaintiff then maintained that he did not remember the cable management box being installed on the verge which was somewhat inconsistent with his earlier evidence on that issue.

58. It was put to the plaintiff during cross-examination in various ways that he is seeking to assert ownership over the grass verge in order to frustrate the defendants' ability to comply with the planning permission for their development and put the homes comprising same on the market. In particular, it was put to him that in objections to previous planning applications by the defendants the plaintiff never asserted his ownership of the grass verge until his most recent objection to the permission for the 2009 application. The plaintiff denied this. It was also suggested that he never maintained the grass verge or hedge, and that he installed the kerbing and cobble lock at the entrance to Bettysville in response to the defendants' previous application for planning permission in 2003, and that he simply opposed the development at Seamount House because he never wanted it to proceed. The plaintiff denied these allegations, and asserted that the cobble lock and kerb were installed to prevent water from coming into Bettyville. It was put to the plaintiff that he and the defendants were negotiating a deal for the grass verge but that inadequate money was offered to him. The plaintiff denied this and stated that the Traceys would not talk to his son, John Condron, who was dealing with the matter. It seems to me that whether or not Mr. Condron was or remains willing to sell whatever rights he has to the land in issue is irrelevant to the issues to be determined in these proceedings. I do not accept that his credibility is tainted simply by his assertion of what he believes to be his rights in the matter or that he may even be willing to enter a contract to dispose of such rights for consideration and I do not accept the proposition that his evidence is untruthful or otherwise tailored to procure recognition of such rights by the court. The converse is also correct, an offer to Mr Condron does not necessarily indicate an acceptance or admission of his claimed right.

59. Mr. John Condron, the plaintiff's son also gave evidence. He states that there has been concrete kerbing alongside the road outside the family home since the 1980s. The cobble lock outside Bettyville he states was installed about fifteen or sixteen years prior to the hearing of the matter in or about 2001 or 2002. He states that the road in front of the house had been "like a boreen". There was a small area of black top which was there since he was a child. The original black top had a "stoney surface" which was later upgraded at some point that he could not precisely recall. He disputed the suggestion that many school children over the years would have used the grass verge as a footpath when walking to and from school.

60. He stated that he, his aunt and other members of his family would regularly cut the grass on the verge. It had to be cut on a regular basis. He also stated that he had never seen Mr. McCormack or any person from the council ever cutting the grass verge or the hedge. He recalled one occasion when a friend of the family cut the hedge with a tractor and strimmer.

61. Mr. Condron Jr. disputed that certificate (No. TIC/88/2003) amounted to evidence that the portion of Seamount Road outside his father's property was in the charge of the County Council. He was of the view that the note is inaccurate insofar as it suggested that the sewers abutting Seamount Road were in charge of the council because his father's house and Bettyville have their own septic tanks and are not serviced by the main sewerage system. He accepts that there is public lighting but that is on the opposite side of the road. He accepts that the blacktop of the road is in the charge of council, but did not accept that the certificate amounted to evidence that the road was taken in charge of the council from boundary to boundary.

62. During cross examination it was established that Mr. Condron Jr. had drafted the letter dated 28th February 2003 objecting to the planning application reference no.FO3A.0076 for the plaintiff. It is clear that the plaintiff's education was very limited and it is not surprising that his son assisted him in formulating his objection. It was put to Mr. Condron that in this letter he raised no claim to owning out to the middle of the road, including the grass verge. The witness responded that the 2003 planning permission application did not envisage any changes to the road which would intrude on the grass verge, the implication being that it was unnecessary to raise ownership of the verge on that occasion.

63. Mr. Cleary, a recently retired senior engineer in the capital investments department of the council also gave evidence on behalf of the plaintiff. Mr. Cleary was unable to assist the court on the taking in charge of the relevant portion of Seamount Road, despite being heavily involved in discussions between the Condrons, Traceys and Nolans from in or about September 2015 onwards on behalf of the council. He states that when he became involved in the development at Seamount Road, the development was approximately 90% complete. Mr. Cleary emphasised in the course of his evidence that there were many people in the Roads Department of the County Council who would know about the process for taking roads in charge, road maintenance, construction and planning, but that he worked in the capital projects Department within the council and would therefore have no function in the above aspects of the council's work and responsibility regarding roads. He stated that he never worked in the taking in charge section of the council and therefore could not assist the court on that matter.

64. As regards the email of 22nd October, 2015 to Ms. Margaret Hartley of Vincent & Beatty Solicitors, quoted above, Mr. Cleary states that he formed the view that the road outside the plaintiff's property was taken in charge between boundary to boundary from "research" that he carried out which yielded the excerpts from the schedules of 1930 and 1952 referenced above. He averred that the schedule came from the administrative section of the county council which deals with roads that have been taken in charge, from records that the council maintains.

65. Mr. Cleary gave evidence of two meetings that were held in or about December 2015. One meeting was intended to address the concerns of the developer and was attended by representatives for the defendants and members of the council. Another meeting was attended by members of the council and representatives of the Condrons and the Nolans. He stated that the purpose of these meetings was to encourage discussion between the parties with a view to reducing the apparent animosity between the neighbours stemming from the fact that the defendants were operating under the assumption, which has now been established to be incorrect,

that the width of road taken in charge was 7.5m. This assumption had been incorporated into the planning permission for the development while the Condrons were disputing the taking in charge of the grass verge. The council believed this intervention to be necessary due to its responsibility to the residents in its administrative area. Mr. Cleary gave evidence that he was concerned that access to a proposed estate at Seamount Road comprising some 160 living units would be substandard in nature and therefore it was important that some resolution be reached. He was also concerned that the council was facing a situation where a breach of the peace might arise and the Condrons and/or Nolans would awake one morning to find that their hedges had been removed by the developers. He states that he formed the impression that the Condrons and Nolans were concerned that their hedges would be interfered with from correspondence from their solicitors.

66. Mr. Cleary gave evidence that an access road to a residential estate of that scale needed to be a two-lane road with a pedestrian footpath along same. He was conscious of the fact that the northern side of the road was more or less a continuous straight line whereas the southern side of the road was of variable width and while pedestrians could take into account the variable widths of a footpath as they walk, vehicles may not readily take variable road widths into account. Mr. Cleary stated that the fact that a condition for the planning permission granted to Mr. David Condron, another son of the plaintiff, for the construction of a house on the plaintiff's land required him to set back his boundary 4m for the installation of a footpath along the southern side of Seamount road was also a consideration taken into account by the council when contemplating solutions to the Seamount Road dilemma. He stated:

> "With that in mind, then, having checked the width of the road at various cross-sections, it was proposed that we would accept a 4.8 metre wide road which is deemed to be sufficient to accommodate a vehicle travelling in each lane of that road and a footpath that varied in width from 1.6 down to 1.3."

Mr. Cleary stated that should any further permission be sought for additional developments on the plaintiff's lands, a condition would be imposed in the planning permission that the plaintiff's boundary would be set back to allow for the installation of a footpath and the widening of Seamount Road. He states however that:

> "The parameter of time here didn't allow the council to wait for each of those individual planning permissions to come to remedy the situation that we were facing with regard to the 160 houses. So as I understand it we were therefore moving towards a 4.8m carriageway and a varying footpath of over one metre."

The witness states that this decision to install the footpath on the grass verge was arrived at in or about December 2015. This is somewhat at odds with correspondence in relation to applications for a road opening licence referenced above and a Map dated June 2015 identifying the southern side of Seamount Road as the location for the proposed footpath.

67. The decision to install the footpath on the southern side of Seamount Road was executed by reference to the conditions of the planning permission but not in accordance with any prescribed protocol for engagement with those most affected. Rather, the decision was made following discussions between the defendants, their servants and agents, and officials of the county council. The court is satisfied that such a limited engagement concerning compliance with a condition and the agreement as to how a condition might be implemented does not require further public consultation with other interested parties under planning legislation. However, in this case the court is also satisfied that the process adopted and driven by the council which led to this decision effectively changed what the plaintiff hitherto understood to be the intended layout of the roadway and footpath during the planning process. The traffic and pedestrian issues identified post permission in Mr. Cleary's testimony and the property issue were clearly known during the earlier public phase of the planning application but were not addressed adequately or at all by the local authority. The local authority has in my view contributed significantly to the difficulties created by this dispute for the parties and other interested third parties in failing to ensure that these issues were properly and fully addressed and that the development did not proceed until that was done to its satisfaction as envisaged by the terms of the condition.

68. The decision to proceed with a footpath on the southern side of the roadway was finalised and executed by way of the Road Opening Licence granted to the defendant on 16th April, 2016. Mr. Cleary said in evidence that this course of action was in accordance with the planning permission for the development insofar as the relevant condition stated that the "developer shall submit to, and agree in writing with, the planning authority, proposals for traffic calming measures … and pedestrian crossings along Seamount Road as recommended in the Stage 1 Road Safety Audit". The witness averred that this condition therefore allowed a degree of discretion for the council to have discussions and arrive at an agreement of what would be acceptable to the council. The witness was unable to confirm whether there was documentary evidence of this process and agreed it ought to have occurred prior to the commencement of the development.

69. Mr. Cleary states that he and the council accepted that the plaintiff may enjoy private ownership of the grass verge. He maintains, however, that this verge was taken in charge of the council and that it was available for construction of a road or footpath as occurred following the granting of the Road Opening Licence to the first named defendant on 16th April, 2016. He based his opinion on the ledger maintained by the taking in charge section of the council. However, he was not aware of maintenance records for the relevant section of Seamount Road having never worked in that section in the council. During cross examination, Mr. Cleary stated that he considered the grass verge to be taken in charge irrespective of its maintenance and the laying of kerbing stones on the basis of the excerpts from the schedules of 1930 and 1952. The court is satisfied that the council clearly led the defendants to believe that the width of the road taken in charge was 7.5m. Mr. Cleary subsequently disavowed this measurement but only after the planning permission which accepted that measurement as accurate had been granted. The council then maintained that regardless of that fact the entire width of the roadway whatever it was had been taken in charge from boundary to boundary. He was satisfied that there were no extant maps showing limits to the taking in charge of Seamount Road.

Evidence for the Defendants

70. Ms. Maureen Tracey stated in evidence that in July 2003 she telephoned the Roads Department in Fingal County Council for clarification on the width of roadway that had been taken in charge at the relevant part of Seamount Road. The first time she telephoned, she was told that the area taken in charge was 9m in width. She recalls that when she told her husband this he said that it would not be 9m. He asked her to call again and ask for the width of the road taken in charge between Knockdara estate to the entrance of Seamount House. During the second telephone conversation with a council employee, she was told that if she wanted the exact measurements she would have to write a letter enclosing a fee of €90.00. She stated that she wrote the letter of 31st July, 2003 requesting that 9m of road be taken in charge, and recalls that two people from the council measured the road some days later. She and her husband then received the document of 7th August 2003. At that time she was aware that the plaintiff was objecting to the 2003 application for planning permission but that he had not said anything about owning any portion of Seamount Road. She states that she did not have any discussions with the plaintiff at this stage regarding the road and does not believe that her husband had either.

71. Under cross-examination Mrs. Tracey stated that she had never spoken to anyone in the council prior to the initial phone conversation in which she was told the area taken in charge was 9m in width. She agreed that the width of Seamount Road was not consistently 7.5m and narrows in parts but stated that overall it would be 7.5m. She initially spoke to a male official. She was asked about her letter of 31st July in which she requested that 9m of roadway be taken in charge. She said that she made the request in the letter adopting the wording which the official told her to use: he had said they had 9m in charge so she wrote down 9m. She states that she was told that if she wanted to know the exact measurements of the road that was taken in charge she would have to send the letter with a €90 fee and that somebody would come out and measure the road and provide the exact measurements. The witness denied that the letter of the 31st July 2003 was part of a pre-ordained agreed campaign with a council official and maintained that she only made two phone calls to the council. She simply did what the council officials with whom she spoke instructed her to do.

72. The witness agreed that the representation made by the council in Cert TIC/88/2003 was incorporated into the 2009 planning application and permission. As far as the defendants were concerned the council had taken the road outside the plaintiff's property in charge, including the verge. As the council was the competent authority, if it said that the area was taken in charge then as far as the defendants were concerned the council could instruct them as to what work they could do on Seamount Road. She referred to Mr. Cleary's letter of 22nd October, 2015 in which he stated that the road was taken in charge from boundary to boundary, namely from the root of the Condron hedge to the root of the Nolan hedge. Since the plaintiff had not produced any documentary evidence establishing his ownership of the grass verge, and as the council had said that the road was in change "from boundary to boundary" she and the other named defendants were satisfied that they could carry out the proposed work on the verge.

73. Mrs. Tracey stated that she was satisfied to rely on what the council said they had in charge in 2003 due to the fact that roads change and the schedules from 1930 and 1952 could represent a different road to the one that exists currently. The witness maintained that as the council was the authority on roads taken in charge, she was satisfied to rely on what they said was taken in charge, even in circumstances where the plaintiff's ownership of the verge was acknowledged in the Atkins Road Safety Audit which was compiled on their behalf in support of the 2009 planning application.

74. In relation to services on the grass verge, the witness stated that the water mains going up to Seamount House runs underneath the grass verge. She also states that there is an Eircom pole and box and an Electricity pole on the verge, and there was a Cablelink box on the verge. She states that there is also a water metre for Seamount House in the verge which was installed for the purpose of water charges. She stated that the Eircom pole and box had been installed for some time prior to the water meter about 20 years ago.

75. As regards the maintenance of the grass verge, the witness stated that she saw David Condron cutting the verge with a strimmer in or about the end of 2014. She said she did not see the plaintiff maintaining the verge. She states that about a year after she saw a truck from the county council trimming the hedges on Seamount Road. In the decade before these events she never saw the plaintiff or his sons maintaining the grass verge or their hedge, and states that in fact they were very seldom cut except when the council would maintain them. She stated that initially when she moved to Seamount Road the council maintained the hedges and grass verge regularly but from the mid-eighties or nineties the road was not maintained very often by the council. She states that she recalls the Nolans maintaining their hedge on the northern side of the road. She states that she recalls the cobble lock outside Bettyville being installed sometime after the submission of the planning application in 2003. She claimed that it was installed because cars would drive on the grass verge at the entrance to Bettyville which would reduce it to muck.

76. Under cross examination Ms. Tracey stated that the local authority would maintain the hedges and grass verges about every 18 months or 2 years. She states that they came all the way up Seamount Road. She stated however that she had not seen the council maintain Seamount Road in around 7 or 8 years. Various photographs were put to the witness in which she agreed that it did not appear that the grass verge or hedge running alongside the plaintiff's property had been maintained. This was in contrast to the hedges and verges running alongside neighbouring properties which were neatly maintained. The witness maintained that she had seen the council maintaining the grass verge and the plaintiff's hedges but that this had ceased in recent years. Mrs Tracey wrote a letter to Fingal County Council in which she stated that it was "vital" to establish that the council had maintained the grass verge. The witness accepted that she had called the Operations department in the county council seeking information on the maintenance of the verge which was not forthcoming. She subsequently wrote the letter because the plaintiff was claiming that he had always maintained the verge when she knew he had not. She maintained that the first time she saw Mr. Condron out on the grass verge was in 2014.

77. In relation to the application for the Road Opening Licence the witness stated that her son, Martin Tracey had marked out the road and verge to define where it was intended to put the footpath and demarcate the width of the carriageway. She states that the decision to put the footpath on the southern side of the road was arrived at after Christmas 2015. She states that Mr. Downey had been in contact with Mr. Shay Fenton, an architect retained by the plaintiffs, for the purpose of arranging a meeting to come to some agreement about the location of the footpath on Seamount Road and this was arranged for the 14th April, 2016. She states that she, Mr. Martin Tracey, Mr. John Downey, Mr. Ray Goggin, and Ruba Feeney went to the site to go through the proposed works and reassure the Condrons that they "had no intention of touching their boundaries". She states that Mr. Fenton was the only person there representing the Condrons, and the only thing that he would discuss was the planning. She states that Mr. Fenton got very annoyed and drove away. She states that while this was happening the plaintiff and his wife drove past them but did not engage with the defendants or their representatives. She states that Mr. Fenton then called Mr. Richard Nolan to try and arrange a meeting but this never occurred. She was not aware of a phone call made by Mr. Fenton to the plaintiff or any of the other Condrons. There was no subsequent meeting set up and she states that neither she nor the servants or agents of the defendants heard anything more from Mr. Fenton. The witness stated during cross examination that the defendants never had any intention of touching the Condron's or the Nolan's hedges.

78. The witness stated in relation to the decision to change the location of the footpath from the northern to the southern side of the road that the defendants did not make this decision but rather Mr. McGrath from the council met Mr. Goggins and stated that it would be better from a planning perspective to install it on the Condron's side of the road. The witness also stated that she considered that it would be beneficial for Mr. Condron to agree to the installation of the footpath on his verge because if he was to apply to have his land rezoned he would be obliged to set back his land and install a footpath.

79. The witness stated that prior to the planning permission application in 2009 she and her family had no problems with the plaintiff and his family.

80. Martin Tracey also gave evidence on behalf of the defendants. He claimed that the verge was used by pedestrians. He said that children used to walk across the fields from the local schools and walk down Seamount Road on the grass verge if there was a car coming. He recalled that the Condron's gate was erected around the mid-80s and stated that the gates have always been open. He

recalls that the pillars were erected outside the plaintiff's property in the mid-80s as well.

81. Mr. Tracey had no recollection of Mr. Condron maintaining the grass verge, and that the council were "always up there maintaining it." In relation to services, the witness states that the council would use a fire hydrant situated on the verge in order to access the water mains. He stated that the council were on Seamount Road the week prior to the hearing of this matter cleaning gullies, and that they pulled up to the path outside the plaintiff's farmyard gate and filled up the tanker and then proceeded to wash down all of the gullies. He states that there is also an eircom duct going from the pole outside the cottages further down the road all of the way to the pole between Condron's property and Bettyville. There is a cable management duct going between the eircom and the water running the whole length up to Seamount House. There used to be white box just at the Condron's gate. He became aware of this when the council came to put in water mains. The workmen dug up the road to see what other services were installed so they would not hit them and when they did so he saw the three ducts. He states that the road had a tarmacadam surface for as long as he could remember.

82. The witness gave evidence that when he dug up the grass verge following the grant of the Road Opening Licence, there was old tarmacadam underneath it. He stated that the tarmacadam did not go all the way underneath the verge but intruded into it some five or six inches. The witness stated that the tarmac was re-laid in the early 2000s. When the council re-laid it the grass had grown out but they did not cut back the grass in a straight line. So if one were to cut the grass back there would be more tarmacadam visible. He remembered the road being resurfaced three times and that each time it was resurfaced the grass would grow out a bit more except on patches along the road where cars or pedestrians kept the grass at bay.

83. Mr. Tommy McCormack, a now retired employee of Fingal County Council gave evidence on behalf of the defendants. Mr. McCormack commenced employment with Dublin County Council in 1966 when he was 19 years old. He was employed as a general operative in the road maintenance department where he was promoted to act as a ganger and then a Roads Foreman, a Roads Overseer and then completed his career as an Inspector. Mr. McCormack first worked on Seamount Road in June 1966 three days after he started employment with the county council, when they had to put surface dressing on the road. He recalled that he and his co-workers sprayed the footpaths scattered chips and cleaned the stopcocks. This was on the right hand side of the road going straight up towards Seamount House. He recalled that work carried out by the council on Seamount Road included surface dressing, repairing manholes, surface water links on the drainage and cutting hedges. To cut the hedges they would use a slash hook. On the right hand side of the road he was told to work from the end of Seamount Road up to a few yards from the gate at Seamount House, about 10/12 feet from the cattle grid at the entrance.

84. He gave evidence that the council maintained the grass verge. He said that they worked up there in 2008 and before. They trimmed back some of the bushes. They would have flayed it with a flay mower as well. They worked all the way along Seamount Road because from the bottom back up to that location was all in charge to the council. Mr. McCormack stated that he was told this by the people who had been working there before him. He continued working on Seamount Road until 1983 when he was promoted to the rank of overseer. The maintenance of the hedge would have been carried out around once a year as all the maintenance was done seasonally: it would be cut back in June.

85. In 1987 Mr. McCormack was appointed an inspector during which he inspected the general maintenance of Seamount Road. Throughout this period they resurfaced the tarmac, replaced some of the stopcocks so people would not fall over them. The council repaired some potholes and a manhole.

86. He maintained a works diary while employed by the council. He made diary entries on 21st and 22nd January, 2008 and a further Diary Entry on 4th August. Mr. McCormack stated that a note of what work was being carried out on the road would have to be taken in case someone made a complaint to the council. When asked why the 2008 diary was the only record produced, the witness stated that he shredded all his diaries upon retirement and the 2008 diary was the only one to survive having been initially misplaced by him. He states that the entry for 4th August records that there were very few briars coming out at Seamount Road on the left hand side when looking towards Seamount House but then when they turned around there were a lot of briars on the left hand side, namely the Condron side of the road. Therefore on 4th August, the hedgerow along the plaintiff's property was trimmed back. The witness also stated that a ledger was maintained which recorded the code they were working under, the amount of materials used, all of which would have been documented and recorded by a clerk in the office of the county council. No such ledger was produced in evidence.

87. When questioned on the extent of the maintenance of the hedges on the plaintiff's side of Seamount Road, the witness stated he was not cutting into the hedges as such but was trimming the briars along the road where they were protruding out into the road. They did not "dig into the hedge". In respect of the diary entry of 4th August, 2008, the witness states that the council trimmed briars out on the left hand side of the road, going up to Seamount House, turned around at Seamount House and trimmed/flailed the briars that were protruding out over the tarmacadam on the Condron side of the road. He recalls that in or about 10 inches would have been trimmed from these briars. Thus the witness clarified his earlier testimony indicating that the maintenance of the hedging was confined to trimming briars that extended out over the surface top of the carriageway.

88. I am satisfied that while some works were carried out by the council in or near the grass verge outside the Condron property it was of the most minimal and infrequent kind and largely focussed upon keeping the surfaced carriageway in a reasonable state and free from material such as briars that might protrude from the verge onto the tarmacadam surface. Where council workmen trimmed grass in other locations, this was recorded in the diary entries. There is no such entry in respect of Seamount Road in the extract of diary produced to the court. Indeed Mrs. Tracey's evidence confirms that such trimming as had occurred had ceased in recent years.

89. The court has also considered the evidence of Mr. Ray Goggin, engineer, who acted on behalf of the Traceys and outlined in detail the extensive engagement which he had on their behalf with the council officials and other interested parties including representatives of the plaintiff during the planning and road opening process. He was satisfied from a review of measurements previously taken and his own measurements that between the hedges there was a width of 7.5m (and a maximum of 7.84 at one point) available for the road surface and footpath ultimately agreed with the council as part of the compliance agreement and approval required under the planning conditions. The actual width of road and footpath required was 5m for the road surface and 1.8m for the footpath on the southern side. This change was effected because of the council's desire to change the footpath to the southern side expressed at a meeting in June 2015. He was satisfied that there was a sufficient width of roadway to accommodate the proposed works.

Summary and Conclusion

90. The court is satisfied that the grass verge beyond the hedge on the plaintiff's property comprises part of the plaintiff's property by operation of a legal presumption that the ownership of land extends to the middle of the road abutting his property.

91. There is a legal presumption that the hedging on the edge of the plaintiff's property beyond which the grass verge lies defines the

area of ground which has been dedicated as a public road. This presumption also applies to the area of similar ground on the northern side of the tarmacadam surface bounded by the hedging on his neighbour's property.

92. There is therefore a presumption that the public roadway at the time of the planning application in 2003 consisted of the black tarmacadam surface of approximately 3.5m and the margins on either side thereof up to the hedges. The court is satisfied that the court must apply this presumption to the whole space between the hedging in the absence of clear evidence to the contrary and that the facts giving rise to the presumption may constitute sufficient evidence in itself that this space has been dedicated as the public road.

93. The evidence establishes that the plaintiff's hedge has been in place for many years and certainly since his father bought the property in 1952. Between the hedge and the tarmacadam surface was a grass margin. There were no footpaths on either side of the tarmacadam surface. Indeed this was the reason for the refusal of planning permission in 2003. The court is satisfied that the grass verge was in reality an area of land to the side of the tarmacadam surface of which the plaintiff and his family made no use. However, the court is also satisfied that the plaintiff or some members of his family trimmed the grass on the verge occasionally. He did not believe in trimming his hedge. The court is also satisfied that the county council trimmed back elements of the hedge or briars that may have intruded upon the tarmacadam surface. However, I am satisfied that the council's work to remove intruding vegetation was very limited and sporadic.

94. The council does not appear to have any record of when or how the space was taken in charge as a public road. No maps have been produced or appear to exist of Seamount Road as a road taken in charge by Dublin County Council, Fingal County Council's predecessor as a road authority or at some earlier stage. No records were produced in relation to the works carried out on the grass verge apart from the diary entries produced by Mr. McCormack which reflect a minimal engagement by the council with the grass verge though it is accepted by the plaintiff that the council repaired the road surface. In fact the Council's workmen were not seen by Mrs Tracey to carry out any works on the verge for some eight years prior to these events.

95. The court does not accept that the grass verge was used as some sort of public pedestrian footway over many years as a matter of right or otherwise by persons using Seamount Road including school children taking a shortcut. Up to the commencement of the development the tarmacadam surface would have carried very little traffic as there are only a few properties in the vicinity. I am satisfied that it was most unlikely that persons would be obliged to use the grass margin as opposed to the tarmacadam surface even if using that end of Seamount Road as a shortcut, quite apart from the fact that the physical obstruction of the overgrown hedge, the briars referred to and the long grass would likely discourage such use.

96. The court is also satisfied, however, that whatever area of public road existed was taken in charge by the roads authority as set out in the schedule. This indicates that an average width of the entire of Seamount Road of 4.6m was taken in charge. This is clearly wider than the 3.5m of tarmacadam that existed in 2003. I accept Mr. Condron's evidence that he installed a kerb and gravel outside the entrance to his home in the 1980s at the time his house was completed and that he also installed cobble-lock paving and a kerb outside his sister's house in or about 2002 on the grass margin. While he says that he discussed this work with a council official prior to its execution it was by no means clear that this work was the subject of or required any permission from the council. These actions were clearly consistent with his assertion of ownership over this area of his property. However, evidence was also adduced of telegraph poles and cable link facilities installed in the grass margin area. I accept Mr. Condron's evidence in relation to the private installation of water services works carried out by him and his brother, ultimately facilitating a supply to Seamount House in the vicinity of the grass margin. I am not satisfied that the evidence concerning the installation of poles and cable link facilities which was very limited in its nature and cogency negate the plaintiff's property rights over the grass verge or on the facts of this case offer sufficient evidence to enable me to conclude that the presumption should stand and that the grass verge was a public road or was taken in charge by the roads authority.

97. The court has heard a considerable body of evidence in relation to the unhappy state of relations between the Tracey family and the Condron family which has developed over the last number of years in respect of the works carried out on the roadway and various other issues arising between them which were canvassed in the course of evidence. I do not consider much of this evidence to be of any relevance or assistance to the court in determining the single issue that arises in this case. Consequently I do not intend to rehearse the minutiae of these events. If relevant at all they might be said to impinge on the credibility of the various witnesses but I do not consider those issues to be central to my determination.

98. The court has considered all of the evidence and submissions in the case. I am satisfied that the presumption of the existence public road or right of way extends to the whole space between the hedges but that the presumption has on the evidence been rebutted by the evidence of the plaintiff's continued exercise of control over his grass verge which he demonstrated by installing kerbing when enhancing his entrance, his decision to let the hedge grow and remain in its natural state, his and his family's members trimming the grass on occasion and his assertion of his property interest in the verge during the later planning process: it was an interest acknowledged in the Road Audit Report. I am not satisfied that any of the grass margin on his side of the space was on the balance of probabilities used by the public as a footway or otherwise as a matter of public right.

99. It is a curious feature of this case that the limitation of space on the public road available for traffic namely 3.5m of tarmacadam surface without footpaths was one of the reasons given for the refusal of planning permission in 2003. This position was later abandoned by the planning authorities on the basis of a substituted measurement of 7.5m for the width of space available which though furnished by the council and relied upon in the 2009 planning decisions was later disavowed by Mr. Cleary. This measurement was given in the form of a purported certificate issued by the council as a road authority. Section 11(5) of the Roads Act 1993 states that such a certificate shall be *prima facie* evidence that a road is a public road. If this document was intended to be such a certificate its value has been considerably undermined by the evidence in this case and I am not satisfied to consider it to be dispositive of the nature and extent of the area of Seamount Road that is a public road. Furthermore though the court does not base its decision on the sequence or nature of the planning decisions made in this case the abandonment by council officials of previously cited and accepted measurements of the road width in the 2003 and 2009 decisions has not, in the courts assessment, been adequately addressed or explained in the evidence or in terms of the council's rights and duties as a road authority on Seamount Road.

100. I am satisfied that the area of Seamount Road that was taken in charge at some stage was one of 4.6m in average width for the entire length of the road. Seamount Road narrows as it advances towards Seamount House which may explain the existence of 3.5m of hard surface in 2003. Alternatively, it may be that some of the verge in issue encroached marginally over the hard surface over time. However, the actual accepted average width of the central band of hard surface in 2003 was 3.5m. This is consistent with though somewhat less than the average width designated in the schedule. It seems to me that this gives some further support to the Plaintiff's case that the verge was not part of the public road and was not taken in charge.

101. It follows that the court is satisfied that in entering upon the plaintiff's property albeit with the support of the council, the defendants were trespassing upon the plaintiff's property and wrongfully interfered with it by digging it up and installing a footpath. The court is satisfied that the defendants should be directed to restore the area with which it has wrongfully interfered to its previous state. The plaintiff is also entitled to damages for the trespass from the date of commencement of works to date. There has been a considerable disruption of the plaintiff's enjoyment of title and possession and in the course of the works and because of the nature of the inadequacy of the footpath, access to and from his home was disrupted which has given rise to considerable inconvenience and upset. The court will grant the sum of €10,000 in general damages for the trespass to date. The court will hear counsel as to the terms of the order that should issue.