Neutral Citation: [2015] IEHC 790

**THE HIGH COURT**

**[2011 No. 10180 P]**

**BETWEEN**

**ZOPITAR LIMITED**

**PLAINTIFF**

**AND**

**HAROLD JACOB (ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE RUTH MCKINNEY)**

**DEFENDANT**

**JUDGMENT of Mr. Justice Gilligan delivered on 29th day of July, 2015**

1. The plaintiff in these proceedings is a limited liability company having its registered office at Donegal Creameries, Ballyraine, Letterkenny, in the County of Donegal. The defendant and counter claimant, Ruth McKinney (now deceased), was formerly a director of William McKinney & Sons Ltd, and a substantial shareholder, and was the owner of and resided at Oatfield Bungalow, Ramelton Road, Letterkenny in the County of Donegal.

2. Unfortunately, subsequent to the delivery of the defendant's defence and counterclaim, the defendant passed away and by order of this Court of 21st November, 2013, the proceedings were reconstituted with Harold Jacob named as defendant in his capacity as executor of the estate of the late Ruth McKinney.

3. At all material times, the plaintiff, and its predecessor in title, William McKinney & Sons Ltd, were the full owner of lands comprised and described in Folio 13490F of the Register of Freeholders in the County of Donegal, upon which lands were situated a well known sweet factory which produced a product with the brand name, "Oatfield Sweets."

4. In or about the earlier part of 2011, William McKinney & Sons Ltd were desirous of securing an agreement for the sale of the lands upon which the former sweet factory was situated, and the supermarket chain, Lidl, emerged as a potential purchaser for a sum of €1.9m.

5. Prior to the formalisation of any final agreement, Lidl raised an issue as regards a right of way running from the factory premises into Oatfield Bungalow in which the defendant resided during her lifetime with her father Ira McKinney.

6. A discussion took place at a number of board meetings of the plaintiff company and correspondence ensued from the defendant's solicitor who maintained that initially there was a right of way across the site of the old factory premises to the bungalow and subsequently, two rights of way.

7. Lidl did not proceed ahead with the purchase of the factory premises and the defendant, despite being requested on the plaintiff's behalf to desist from making adverse claims against the plaintiff's lands, failed and/or refused to do so and in these circumstances the claim of the plaintiff is:-

> "1. A declaration that the defendant does not enjoy any right of way over the plaintiff's lands comprised and described in folio 13490F of the Register of Freeholders in the County of Donegal and all that and those (unregistered) lands comprising a factory and premises which said registered and unregistered lands are shown on the map annexed to the plenary summons herein and thereon surrounded with a green line verge.
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> 2. An injunction restraining the defendant whether by herself, her servants or agents, from trespassing upon any part of the said registered and unregistered lands shown on the map annexed to the plenary summons herein and thereon surrounded with a green line verge.
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> 3. An order restraining the defendant whether by herself, her servants or agents, from making any adverse claim in respect of the plaintiff's said lands or from acting so as to prejudice the proposed sale of such lands.
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> 4. Damages for trespass.
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> 5. If appropriate, damages for slander of title arising from the loss of the sale of the said lands.
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> 6. Interest pursuant to statute.
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> 7. Further and other relief.
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> 8. The costs of these proceedings."
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> 8. The defendant, in her defence, denies that she wrongfully claimed a right of way over the plaintiff's lands as alleged or at all and further denies that she jeopardised the sale of the said lands in any way, and she counterclaims alleging that she was a director of the company known as William McKinney & Sons Limited and that her directorship ended with the sale of her total shareholding in the company to Donegal Creameries Plc of which the plaintiff is a subsidiary company. She averred that in relation to this sale, there were no enquiries at all concerning any rights of way across the company property of William McKinney & Sons Limited. The defendant further sets out that by indenture of conveyance dated 2nd March, 1999, and made between the late, Ira James McKinney, her father, and herself, she became the owner of Oatfield

Bungalow, Ramelton Road, Letterkenny and that there is appurtenant to the defendant's said property, a full right and liberty at all times and for all purposes on foot and with or without vehicles to pass and re-pass through and over the lands owned by the plaintiffs which said lands are comprised partly in Folio 13490F over the Register of Freeholders, County of Donegal, add those parts of the plaintiff's lands that are on register, and that these rights of way lead from the public road, being the DeValera Road, through the plaintiff's lands, to the defendant's lands and avenue. The defendant claims that Ruth McKinney had, for upwards of 30 years, until her death in 2011, exercised regular use and enjoyed the said rights of way and exercised same without secrecy, without permission and without interruption, without force and as of right, and at all material times, it was the defendant's intention to use the said rights of way for the purpose of gaining access to her property from the DeValera Road.

9. In particular, as set out in para. 9 of the defendant's defence, she refers to the fact that either she and/or her servants or agents, licensees, and invitees, have exercised the rights of way across the factory yard to and from the DeValera Road entrance and she instances examples of the delivery of oil, gardeners, persons generally coming to see her, members of her family, her invitees, having passed and re-passed across the yard of the factory premises for upwards of 30 years without any difficulty.

10. In particular, the defendant alleges that at no time prior to the proposed sale of the shares in William McKinney & Sons Limited in early 1999, was it ever indicated to the defendant that there was no such right of way across the factory yard nor did anyone ever seek to attempt to stop, challenge or query either the defendant, or any of her relatives, licensees, or invitees in their use of either of the two rights of way that the defendant says she has enjoyed over the factory premises.

11. The defendant accordingly counterclaims for a declaration that she is entitled to the said rights of way at all times and for all purposes on foot and with or without vehicles, to pass and re-pass through or over the factory premises and the defendant seeks further relief to register the rights of way as a burden on Folio 13490F.

12. The proceedings are easily modulised in that the first part of the proceedings which this judgment deals with has simply one objective and that is to determine as to whether or not the defendant enjoyed the benefit of the two rights of way over the plaintiff's lands constituting the factory premises.

**Background facts.**

13. The plaintiff's factory premises and the defendant's house are situated side by side and prior to and in or about 1982, the situation was that Oatfield Bungalow had an entrance onto the Ramelton Road and likewise the factory premises was entered from a gate further down also on the Ramelton Road. In 1982, the new DeValera Road was constructed which provided a new entrance into the factory premises and the old Ramelton Road entrance fell into disuse. Oatfield Bungalow could be entered from an entrance on the Ramelton Road but two practical difficulties arose, one being that oil lorries, if they entered the bungalow premises, could not turn to get back down the avenue to the Ramelton Road, and the second was that there would have been difficulty in gaining access to the rear gardens behind the bungalow with, for example, heavy gardening machinery or ride-on lawnmowers and the like.

14. I am satisfied, based on the evidence given to the Court, that from 1999, when the Oatfield Bungalow was conveyed unto Ruth McKinney by her father, Ira, until Ruth McKinney's death in 2013, she often crossed the plaintiff factory's land, from the De Valera Road entrance, to gain access to her adjoining house, Oatfield Bungalow. I am satisfied that, particularly in Ruth's later years, psychiatric nurses, including a Ms. Fiona Graham who gave evidence to the Court, drove across the plaintiff's premises in order to gain access to the said property, and that this happened sometimes once a week. I am also satisfied that oil lorries used the same route in order to deliver oil to Ms. McKinney's house, and that this occurred twice or, at most, three times, a year. Mr. Ed Moore, an oil tanker driver, gave evidence to this effect. I accept that the private avenue leading up to Ruth McKinney's house from the Ramelton Road was not wide enough to accommodate large oil lorries. I can also accept Mr. Paul McCormack's evidence, Ruth McKinney's gardener, that he accessed Ruth McKinney's garden via the second alleged right of way, the so-called 'gardener's route,' and that he carried out work on her garden for seven or eight months out of every year.

15. I am satisfied that nobody in the factory ever stopped or challenged Ruth McKinney or any of her visitors from using these routes. Many witnesses attested to this, not least Mr. Desmond Doherty, who worked on the factory for almost 50 years, eight of which he was general manager. All of the factory workers who gave evidence during these proceedings illustrated fondness for Ruth McKinney and the fact that she had a deep familial history with the factory; that she was more or less part of the furniture. Mr. Gareth Whitmore, property manager of the Donegal Investment Group plc, explained in his evidence that allowing Ruth McKinney to use the factory yard was, in his view, "the neighbourly thing to do".

16. I accept, based on the evidence of Mr. Harold Jacob, defendant ad litem in these proceedings, and also on the evidence of Mr. Oliver Duffy, who worked on the factory for almost 40 years, that Ira and Ruth McKinney drove through the factory premises on their way to their holiday home in Portnablagh once or twice a year. I am also satisfied, based not only on sworn evidence but on photographs submitted to the Court, that as a result of both vehicular and pedestrian traffic coming in and out of the factory, on one particular occasion, Mr. Oliver Duffy was instructed by Mr. Frank O'Donnell, the Health & Safety Officer of the factory, to put 5 mile per hour signs facing the direction of the de Valera Road from Ms. McKinney's house. From inspecting the 'post-demolition' photographs of the lands, as evidenced to this Court, I accept that there is no physical boundary separating the entrance to Ruth McKinney's bungalow from the factory lands, and there is no barrier to prevent access between the two. There is also smooth tarmacadam covering the whole compound making it appear to a passerby that the compound is all the one property. An aerial photograph taken in or about 1954 shows the overall plot and demonstrates the free passage that existed between the factory premises and Oatfield Bungalow.

17. I am satisfied from the evidence given, particularly by Mr. Ian Ireland, chairman and chief executive officer of Donegal Creameries plc, that pedestrian traffic (factory staff) sometimes used Ruth McKinney's avenue entrance from the Ramelton Road as a shortcut to gain access to the factory premises.

18. There is no major dispute on the evidence that, from in and around 1982, if people were coming to visit Oatfield Bungalow they could do so either by using the entrance off the Ramelton Road or, alternatively, by simply driving through the factory gates when they were open from the De Valera Road, moving across a non-obstructed open yard area, and driving straight through into the rear of Oatfield Bungalow. This entrance clearly was the preferred route of oil lorries who entered from the DeValera Road, drove across the yard and, having made the delivery of oil to Oatfield Bungalow, drove back across the yard and out through the gates onto the DeValera Road. And likewise, gardeners, hedge cutters, and grass cutters did the same for ease of access to the rear of Oatfield

Bungalow, as did psychiatric nurses who went to visit Ruth McKinney.

19. However, it is necessary to consider the entire background to come to a conclusion, on the balance of probabilities, as to whether or not a lawful right of way existed as claimed by the defendant herein.

20. The defendant's grandfather, William McKinney, was the founder of William McKinney & Sons Limited and it appears that on part of his lands he developed the factory premises. Two of William McKinney's sons, Ira and Haddon, became involved in the business and at some point in time, two houses were constructed on the lands adjacent to the factory premises and the defendant's father, Ira McKinney, succeeded to the one abutting the factory premises, and his brother, Haddon, succeeded to the other.

21. At some point in time, the factory premises was conveyed by Ira McKinney to the company and he remained the owner of Oatfield Bungalow, where he lived with his wife, who predeceased him, and his daughter, Ruth McKinney, the original defendant to these proceedings. Haddon McKinney and his family lived in a second house on the far side of Ira McKinney's house. On the death of their father, Ira and Haddon became principal shareholders in the company, each holding 43.24% of the ordinary shares. Unfortunately, Haddon McKinney died suddenly in August 1972, leaving Ira McKinney, the defendant's father, effectively as the main player in the family business, the balance of the shares being owned either by family members or close associates of the family. Ira McKinney worked the business as a very substantial shareholder but not the majority shareholder, and was a director of the company and chairman up and until in or around 1997, when he resigned.

22. The business appears to have been very successful and for a long period of time was the largest employer in Letterkenny, attaining a workforce of some 178 employees. In or about 1982, a new road was proposed to join the Ramelton Road and an old railway line was to be abandoned thereby giving the company the opportunity to acquire quite a significant amount of land between the old boundary of the factory premises and the edge of the new DeValera Road, and thus the DeValera Road entrance came into play and factory gates were erected for this gateway. This enabled the main entrance to the factory to be from the DeValera Road with very extensive parking facilities. No buildings were actually constructed on this additional land, so in effect, one simply drove in the DeValera gates down through a driveway, which led to the yard of the factory premises, which led on as it had always done across the yard and up to the rear portion of Oatfield Bungalow and across to the rear of Haddon McKinney's house.

23. From 1982 onwards, people wishing to access Ira McKinney's house could come through the new DeValera Road gates when they were open and likewise people wishing to visit or make deliveries could access the rear of Mrs. McKinney's house, being the widow of Haddon, and her daughters Beryl, Helen, and Joan.

24. Notwithstanding that much the same circumstances prevail to both houses, the descendants of Haddon McKinney make no claim to any right of way across the factory premises to the rear of their house and it is some significance to state that, as of October 1997, Beryl and Helen McKinney, Haddon's children, were substantial shareholders, each holding 28,000 shares in the company out of a total of 323,750 issued shares, and Ira J. McKinney and Olivier Fry held on trust for the three daughters of the late Haddon McKinney being Beryl, Helen and Joan, a total of 30,117 issued shares. To further put the matter in context, as of October 1997, the defendant, Ruth McKinney, held 90,300 issued shares out of the total of 323,750 issued shares, and Ira McKinney held 57,075 shares, so between them they held 45.52% of the total issued shares.

25. The factual reality of the situation that pertained from 1982 onwards was that the company, William McKinney & Sons Limited, which owned the factory premises, was, in turn, owned and controlled by the wider McKinney family but principally by Ira McKinney and his daughter, the original defendant herein, and Haddon McKinney's daughters. It also has to be borne in mind that on 11th December, 1973, the Register of Companies was notified of new appointments having been made to the Board of Directors on 13th November, 1973, and two of these directors were the original defendant, Ruth McKinney, and Helen McKinney, Haddon McKinney's daughter.

26. Effectively, what was happening on the ground was that, between a company controlled by the McKinney family and principally by the owners and occupiers of the two houses on the adjacent lands, they used the DeValera Road entrance for the purpose of access to the rear of their property and quite simply nobody in the factory would ever have dared to state that either Ira McKinney or his wife or daughter, or Haddon McKinney's widow and daughters, could not have people coming to make deliveries to them through the open factory gates across the factory premises.

27. Between 1982 and early 1999, nobody ever raised any issue as regards the access and there was no indication that during that period of time, Ira McKinney was claiming that, notwithstanding that he was chairman, director, and a substantial shareholder, he was setting up or claiming a right of way for Oatfield Bungalow across the factory premises. That situation simply did not arise.

28. Unfortunately, in or around 1999, the factory was no longer prospering and there was concern as regards the survival of the factory and the question of the factory going into receivership was looming. That difficulty was solved by an interest expressed by Donegal Creameries Plc buying into the company. Donegal Creameries Plc indicated that they would subscribe to a share purchase arrangement provided they obtained no less than 76% of the shares of the company and in accordance with their offer, 76% of the shares would be purchased for a sum of £783,750.00.

29. Much of the focus of attention in this case has centred on the share sale and purchase agreement between William McKinney & Sons Limited and Donegal Creameries Plc as dated 12th February, 1999. In my view, the existence of two rights of way, right across the factory premises to Oatfield Bungalow, would have been a matter which would have merited examination by the purchasers in a commercial transaction of a strategically sited factory premises in respect of which the purchasers, being the holding company of the present plaintiff company, were paying over a large sum of money. Not only is the agreement silent as regards either the existence of or a claim to any rights of way across the factory premises, but the agreement contains several terms and conditions as regards warrantor protection provisions and, in particular, Schedule 5(1) relating to warranties and information stated.:-

> "All information given by or on behalf of the company or the vendor to the purchaser or to its professional advisers in the course of negotiations leading to this agreement contained in the documents set out in a list of documents in the agreed form was when given and is at the date hereof true and accurate in all respects and so far as such information is expressed as a matter of opinion, such opinions were when given and are at the date hereof truly and honestly held and not given casually or recklessly or without due regard for the accuracy. There is, to the best of the knowledge, information and belief of the warrantor, no fact or matter which has not been disclosed in writing to the purchaser or to its professional advisers which would render such information untrue or misleading or which on the basis of the utmost good faith ought to be disclosed to an intending purchaser of shares in the company or the disclosure which might reasonably effect the willingness of the purchaser to purchase the shares on the terms (including price) of this agreement."

30. At para. 20 relating to encumbrances, it is specifically set out that "there are no burdens effecting all or any part of the properties which are capable of affecting registered land without registration by virtue of s. 72 of the Registration of Title Act 1964".

31. At para. 21, relating to possession and enjoyment at subs. 1(a) it is stated:-

> "The company is entitled to and is in possession and exclusive occupation of the properties and no person other than the company is entitled to or is in possession or occupation or has any interest of whatever nature howsoever arising in the properties or any part thereof and none of the properties or any part thereof is affected by or the subject of any lease, tenancy, licence, agreement or arrangement relating to the occupation or user thereof by any person other than the company."

32. Further, it is set out at s. 23 relating to notices and orders and matters affecting the properties at subs. 1(b):-

> "None of the properties or any part thereof, nor the company as owner or occupier thereof, is affected by nor, to the best of the information, knowledge and belief of the warrantor, is any of the properties or any part thereof likely to be affected by, any of the following matters:-
>
> (i) any exception, reservation, stipulation, restriction, burden, inhibition, covenant, obligation, condition, easement, quasi easement, profit prendre, license, way leave, right or privilege of whatever nature howsoever arising which is of an usual or onerous nature or which conflicts with or adversely affects or may conflict with or adversely affect the present use of any of the properties or any part thereof or which adversely affects or may adversely affect the title to or value of any of the properties or any part thereof and there is no agreement or commitment to give or create any of the foregoing and no person has claimed to be entitled to any of the foregoing."

33. Further, at s. 28 of the agreement relating to no other adverse matters, it is set out at 28(1) "there are no matters which materially and adversely affect the title of the company to any of the properties or the value of any of the properties or the continued use and enjoyment thereof".

34. Further, at 29 relating to requisitions on title, it is stated at 29(1) "any deeds, documents and information supplied for the purpose of deducing title to any of the properties in connection with this agreement are true, complete and accurate and the company has not entered into any transaction affecting the title to or use or value of any of the properties".

35. In essence, the original defendant, Ruth McKinney, warranted that there were no rights of way affecting the company's property and she sold her holding of 142,375 shares in the company to the plaintiff's holding company herein for a consideration of £453,511.09. The defendant at this time was the largest single shareholder.

36. There are, however, a number of issues behind this agreement and in this regard this Court can only decide the issues that arise before it on the evidence adduced.

37. One particular issue raised is that it is contended that Ruth McKinney was not in a fit state of mind for health reasons to have entered into the agreement. However, on the pleadings, there is no plea that the agreement should be set aside on this ground. The court was furnished with medical evidence which does show that Ruth McKinney did suffer from significant depression, but there is nothing contained in the medical documentation as furnished to the Court which was agreed without the necessity to call medical evidence, which would satisfy this Court that, on the balance of probabilities, at the time of the signing of the share sale and purchase agreement, Ruth McKinney was in some way incapable of understanding the nature and extent of the documents she was signing in respect of the sale of her shares on 12th February, 1999.

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

39. A further issue that arises is that objections and requisitions on title were raised on behalf of Donegal Creameries Plc and a number of relevant issues were raised in the following terms:-

• Are there any disputes with any adjoining owner, to which the answer was "no".

• Is the property subject to any right of way, water, light, air or drainage or to any other easement, reservation, covenant condition or restriction or to any right of any kind, to which the answer was "none, save those on title or revealed by an inspection of the property".

• Confirm that clear, vacant possession of the entire property will be handed over at closing, to which the answer was "confirmed".

• Is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it, or the use thereof or has any adverse claim thereto been made by any person, to which the answer was "no".

40. It is the view of this Court that the question which was raised under the section dealing with easements and rights of way is perfectly simple and asked as to whether or not the property was "subject to any right of way…or restriction…or to any right of any kind," and the answer given was "none, save those on title or revealed by an inspection of the property" which appears to be a type of catch-all protection used, whereas if there was a right of way in existence and/or if the defendant was claiming such a right of way, the simple answer to the question was "yes". Further, clear vacant possession of the entire property was being handed over on closing.

41. From 1992 onwards, the situation remained the same on the ground and no issue was ever raised by the defendant as regards having a right of way and no issue was ever taken with her as regards people accessing her property.

42. In March, 1999, Ira McKinney transferred ownership of his house to his daughter and the same solicitor, Quinn Dillon & Co.,

represented both Ira McKinney and Ruth McKinney. The transfer was a voluntary one between a father and his daughter and the court was advised on instruction that no requisitions on title were raised, and while the property may have been conveyed with all the benefits to which it was entitled, there was no reference to the rights of way which are now being claimed by the defendant.

43. Matters proceeded from 1999 and evidence was given by Mr. Gareth Whitmore, Property Manager of Donegal Investment Group, formerly known as Donegal Creameries Plc, that he was conscious of vehicles moving over the factory yard to visit the defendant in her house and he consulted the share sale and purchase agreement, and noted that there was no issue of a right of way and, accordingly, he did not intervene with the situation that continued to prevail as it had done for many years.

44. In or about September, 2011, the plaintiff was interested in securing a purchaser for the now defunct factory premises and it was indicated to Lidl, the supermarket chain, that the site may be available for purchase. Mr. Mark Clifford, the property acquisition manager for Lidl, confirmed the content of a letter of 26th August, 2011, being a letter to purchase the site conditionally from Donegal Creameries Plc, and that a day or two previous to the letter, and in this regard he cannot recall the exact date, he met Mr. Whitmore and then he drove onto the factory premises and he confirmed that there was a link between the factory property and the adjoining land and as he describes it "there appeared to be a link to a couple of houses adjoining the site, yes". The letter was then sent and, in cross examination, Mr. Clifford confirmed that his predecessor had already inspected the site and that, in effect, if it came up for sale they would be interested in purchasing it to have a second premises in Letterkenny. In the letter Mr. Clifford stated, inter alia, as follows:-

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

45. In a subsequent letter from Byrne Wallace Solicitors on behalf of Lidl dated 27th September, 2011, at para. 2 it was stated:-

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

46. In a further reply of 11th October, 2011, Brian O'Mahoney Solicitor of VP McMullin, replied to the query in the following terms:-

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

47. Mr. Clifford confirmed to this Court that subsequent to the first letter of the 26th August, 2011, he had a discussion with Mr. Whitmore, and Mr. Whitmore informed him that there was no legal right there and on that basis, the parties moved into legal negotiations.

48. Accordingly, it appears that it was the letter from Lidl of 26th August, 2011, that, for the first time, raised an issue as regards a right of way through the De Valera gates, across the factory premises to the rear of the defendant's house.

49. It then appears that there was a board meeting of the plaintiff company held in the offices of Donegal Creameries Plc in Letterkenny on Friday, 23rd September, 2011, at 2.00pm at which Ian Ireland, Geoffrey Vance, Lexi Tinney, John McDermott, Bill Gibson and Harold Jacob, the defendant ad litem in these proceedings, were present. The board minutes record that it was stated that an offer had been received from Lidl Ireland of €1.9m for the Oatfield site. Gareth Whitmore was asked by Ian Ireland to arrange a meeting with Harold Jacob, Ruth McKinney's cousin, on the site to see what could be done with the avenue from the Ramelton Road adjacent to the factory. It was proposed by Ian Ireland, seconded by Geoffrey Vance, and agreed unanimously that the sale to Lidl should go ahead. It is clear that the board were on notice that Lidl were of the view that there was a right of way across the factory premises to the rear of the defendant's house, and it is unfortunate that it appears that there is a complete conflict on the evidence surrounding the events that followed this board meeting.

50. I can, I am satisfied, on the balance of probabilities, accept Mr. Jacob's evidence that he was asked to speak with Ruth McKinney by the board regarding the sale to Lidl in order to discuss with her the difficulties she had with oil lorry deliveries and potentially expanding her avenue. It is recorded in the minutes of the said board meeting that "Gareth Whitmore was asked by Ian Ireland to arrange a meeting with Harold Jacob, Ruth McKinney's cousin, on the site to see what could be done with the avenue from the Ramelton road adjacent to the factory." Mr. Jacob gave evidence during these proceedings that he went to talk to Ruth McKinney following this meeting and that she asked him to put forward certain proposals to the board. Mr. Jacob recounted in his evidence that Ruth McKinney "wanted her avenue widened on the Donegal Creameries side. She wanted to retain the trees which again were on the Donegal Creameries side of her avenue because her father had planted those trees so she wanted to keep [them]. The other thing that she wanted … she needed to have a turning circle for her oil lorry up at the garage, at the top of the avenue [sic]." Mr. Jacob also gave evidence that, having spoken to Ruth McKinney, he contacted Mr. Whitmore and later met with him on Ruth McKinney's avenue, where he informed him of Ms. McKinney's three requirements. Mr. Jacob stated that Mr. Whitmore was happy to widen the avenue as long as Ruth McKinney was prepared to give an equal amount of land in return. He added that when he suggested to Mr. Whitmore that the trees be retained and a turning circle be added, Mr. Whitmore dismissed these requirements out of hand.

51. I am satisfied to accept as a fact that Ruth McKinney asked Harold Jacob to put forward these three proposals and that these requests were dismissed by the Board, despite conflicting evidence given by Ian Ireland and Gareth Whitmore. I arrive at this conclusion based not only on Mr. Jacob's evidence, but on the fact that the minutes of the board meeting on Friday, 18th November, 2011, at 10.00am, mirror this situation. Under the heading, 'Dispute with Ruth McKinney re alleged right of way across Oatfield yard,' there is a reference to Ian Ireland stating that "the offer by Zopitar Ltd to widen the avenue at the side of the factory was a goodwill gesture to Ruth." Secondly, in the second paragraph of the minutes, Bill Gibson refers to the "strip of land along the avenue where the trees are." Lastly, Bill Gibson mentions in the same paragraph that "consideration should be given to allowing a turning circle at the top of the avenue and also the retention of the trees along the avenue." The minutes of this board meeting thus indicate that the three proposals which Mr. Jacob alleged were put forward by Ms. McKinney were indeed broached at this subsequent meeting, albeit couched in slightly different terms.

52. Unfortunately, matters then deteriorated between the parties, culminating in a letter from the defendant's solicitors of 3rd

October, 2011, wherein they sought compensation for the loss of the benefit of the right of way in the sum of €500,000.00, and a myriad of other conditions.

53. Subsequently, by a further letter of 19th January, 2012, and a time when a notice for particulars had been raised by the defendant's solicitors in respect of the statement of claim as dated 8th December, 2011, it was indicated that it had just come to the defendant's attention that she had, in fact, established a second right of way across the factory yard in that it had long been the practice of her gardener and of his predecessors, that on entering the factory yard by the De Valera Road gate, he would take a diagonal direction across the yard to the rear entrance of the defendant's garden.

54. The gates at the De Valera Road entrance were left open during the day providing uninterrupted access and egress to the factory site. The gates were locked at night and at all times when the factory was not actually operational, particularly at weekends, subject to the factory shifts. From the evidence adduced at the trial of the action there was never any request made by the defendant or her father, Ira McKinney, for keys to the gates or a request to use the gates outside normal factory working times. It does appear that at some time in 1993, arising from a fire that occurred at a premises on the opposite side of the De Valera Road, it was considered appropriate that Ira McKinney should have a set of keys in case access was required through the De Valera Road gates in a similar emergency situation to that which occurred across the road. There is also evidence that Ira McKinney had a master set of keys to the entire factory premises. In respect of the master set of keys, it was at a time when Ira McKinney was chairman, director, and a substantial shareholder in the company who lived immediately adjacent to the factory premises, and the master set of keys was neither requested nor given to him for the purpose of utilising an alleged right of way through the factory gates at a time when they were locked. The emergency set of keys that, on the evidence, were given to Ira McKinney, was for the sole purpose of enabling the gates to be opened in an emergency situation, and on the evidence adduced neither Ira McKinney nor the defendant ever actually used the keys themselves to open the gates at a time when they were closed so as to utilise the alleged right of way.

55. On one or two occasions when oil deliveries were made outside of normal working hours, it appears that a phone call was made to the factory and the personnel would open the gates to enable the oil to be delivered.

56. It also appears that Paul McCormack, who did gardening work for the McKinney's, asked Frank O'Donnell, an employee of the company, for permission to come through the gates at a time when they would be locked. Neither Ira nor Ruth McKinney ever sought permission for a set of keys to be utilised in furtherance of their alleged right of access to the right of way across the garden and with either of the two sets of keys which they did possess, they were never utilised to open the factory gates. Further, the evidence confirms that, in a situation where somebody wished to get to the back of the defendant's house for any purpose when the gates were locked, they would ask for the gates to be opened.

57. It does not appear that it ever occurred to Ira McKinney that he was in the course of burdening the company's lands with a right of way at a time when he was chairman, a director, and a substantial shareholder in the company. The reality of the situation, on the facts of this case, appear to be that the idea of setting up a legal right of way across the factory premises to the two houses simply never occurred, and also never occurred to the defendant herein until Mr. Clifford made his presumption when writing the letter of offer from Lidl in 2011. There is evidence that Ira McKinney, in the deed of transfer of 1999 of the property Oatfield Bungalow to his daughter, demonstrates that there was no instruction to the agent who valued the lands that there was a right of way from the factory gates across the yard to the house that was being conveyed.

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

**Submissions of the plaintiff:**

59. Counsel for the plaintiff, Mr. Bland, submitted that Mr. Ira McKinney was in and out of the sweet factory as the chairman of the family firm, and not pursuant to rights of way to get to the public road. Counsel submitted that it must be established that Ira McKinney's use of the sweet factory premises from 1991-1999 was as of right and in pursuance of a claim to a right of way so that the plaintiff company knew that he was asserting a right of way over the company property when he walked to and from work. The plaintiff submitted that there could be no actual or constructive knowledge of the intention of Ira McKinney to assert a claim for a prescriptive easement in the circumstances of this case. At all times, the plaintiff contended, Mr. McKinney had licensed entry onto the servient tenement and he did not ever articulate a claim for an easement. Mr. Harold Jacob conceded under cross-examination that it was not in Ira McKinney's nature to set up an adverse claim against his own company prior to 1999, something that could be very detrimental to the shareholders of the company, which included members of his family. There can be few more obvious examples of licensed use than the use by the chairman of a company to go to work, counsel added.

60. In relation to the characterisation of Ruth McKinney's use when traversing the plaintiff factory's site, counsel emphasised that any access by Ms. McKinney after 1999 (when Oatfield Bungalow was conveyed unto her by her father) was tolerated merely as good neighbourliness. As counsel submitted, nobody objected to the occasional short cut by Ms. McKinney through the factory grounds after 1999; why would they? Several members of her family remained shareholders of the company. Her first cousin, Mr. Harold Jacob, was a director of the company from approximately 1990 until the sale to Donegal Creameries in 1999. He was also company secretary from 1990 until 2011. Ms. McKinney was part of the history of the factory. Ms. McKinney herself instructed her solicitors to say in the initiating letter sent on her behalf on the 3rd October, 2011:

> "Ms. McKinney has had a very long association with that company, of which she was a director until the company was acquired by Donegal Creameries Ltd in or about 1998. She also devoted her entire working career to the McKinney family business and grew up and has lived all her life in the McKinney family home beside the factory, to which she retains a strong attachment to the present time."

61. Counsel then turned to the presence of the gates on the De Valera Road entrance to the factory premises. It was argued that the presence of a gate is indicative of a desire to achieve privacy and security. When an owner of land erects gates at the entrance to the property, he makes a public statement as to the privacy of his land. The closure of gates is an even more emphatic statement of a denial of right. By erecting gates, the owner makes it clear that he reserves the right to exclude, and by closing the gates he exercises that right. Closure at night is sufficient to manifest and communicate the right to exclude, counsel contended.

62. In order to neutralise the evidence of locked gates, counsel for the plaintiff submitted, the defendant would have to call evidence to the effect that, more than 20 years ago, Ira McKinney demanded keys strictly for the purpose of accessing the factory yard in furtherance of his rights of way. There was no such evidence.

63. Counsel for the plaintiff argued that the defendant is mistaken in his suggestion that the length of the evidence of use heard by the Court commenced in 1951. The evidence advanced by the defendant was of use of the two means of access across the factory yard since 1982 when the de Valera gates were opened. Any use of the factory yard to gain access to the factory gates on the Ramelton Road until that access was closed, in or about 1982, was over different routes. It was thus submitted by counsel that the defendant cannot rely on a history of use from Ira McKinney's house to the access on the Ramelton Road in support of a claim for a right of way from that house to the de Valera Road. When the defendant makes submissions about evidence of "at least 49 years, if not 50 years user as of right", he conflates use of the factory yard to get to the Ramelton Road entrance (up to 1982) with use of the factory yard to get to the de Valera Road (after 1982).

64. Counsel for the plaintiff further submitted that Ms. McKinney's claim to rights of way cannot be reconciled with the warranty that she gave when she sold her majority shareholding on the 12th of February, 1999, in a share sale and purchase agreement, for £453,511.

65. Ruth McKinney and the other McKinney shareholders expressly disavowed the existence of any adverse rights when selling shares for a very considerable sum of money, it was contended on the plaintiff's behalf. This disavowal was relied upon by the parent company of the plaintiff. Mr. Gareth Whitmore testified that he looked at the share sale and purchase agreement of 1999 when he commenced work in 2005 and satisfied himself that there were no rights of way. Mr. Desmond Doherty said that he "assumed all property issues would have been pretty well settled in 1999 by the professionals and so on. So, it wasn't of concern to me." Counsel submitted that the plaintiff could be "neighbourly" to Ruth McKinney thereafter as there was no question of any claim of an adverse right over the factory premises. She represented that there was no such right or burden or any matter adversely affecting the title to the property. Her estate cannot now claim that there was a prescriptive right in gestation at that time. Nonetheless, at no point, either before or during these proceedings, were any efforts made to try to set aside the share sale and purchase agreement.

66. It is submitted on the plaintiff's behalf that it is not possible to maintain a claim in prescription when the claimant has acknowledged that he has no right. Not only is the proposition that such a situation could prevail offensive to reason and justice, but it is also contrary to prescription theory. Counsel for the plaintiff put it thus: "If I deny my claim to a right, the servient owner can let me onto his land in the comfort that my access is permissive. He cannot be said to have acquiesced in the establishment of a right when the adverse nature of the user was concealed from him." Counsel illustrated this proposition by reference to the following two cases.

67. In *Field Common Ltd. v. Elmbridge Borough Council* [2014] IEHC 202, the defendant, a borough council, had acquired a site with a right of way over the plaintiff's lands in 1966. When the use of that land changed from a site for growing plants for parks into something of an industrial estate, the way was widened. The council claimed it had a prescriptive right of way over the expanded route. Proceedings issued in 2004. However in 1991, the council's solicitors wrote to say that they were not claiming a right. Having made this disavowal, Lewison J was satisfied that that there could be no claim in prescription:

> "The whole tenor of the correspondence between the council and Creeksea is that the council laid no claim to encroachment and relied upon its paper title. More specifically, it expressly disavowed any reliance on prescription. I do not, therefore, consider that, at least, after the council's disavowal of any intention to claim prescriptive rights in 1991, its subsequent use can be said to have the necessary quality of use as of right. This means that the claim under the Prescription Act fails because any period of use as a right did not continue until action brought."

Lewison J explained how prescription is based on acquiescence. He said that the crucial matter for consideration is "whether for the necessary period the use is such as to bring home to the mind of a reasonable person that a continuous right or enjoyment is being asserted." But this cannot be so if there has been a disavowal:

> "However, if a person who is, in fact, using a right of way to which he has no legal entitlement, protests of the servient owner that by his use he does not intend to acquire any prescriptive rights or to acquire rights beyond his paper title, it is difficult to see how his use thereafter can be of such account as to bring home to the putative servient owner that a continuous right of enjoyment is being asserted. A servient owner, in my judgement, is entitled to infer that once the paper title is resolved that will determine the extent of the rights."

Counsel also relied on a Court of Appeal decision concerning a claim in prescription, *Patel v. W.H. Smith (Eziot) Ltd* [1987] 2 All E.R. 569. The defendant claimed a right to park in the yard of the plaintiff. Balcombe LJ stated first that the burden was on the claimant of a right of way to show that the use was not forcible, secret or permissive. Thereafter, "if there are two equally possible explanations for the existence of the usage, one which involves a legal origin and the other tolerance or licence by the servient owner, then exercise of that usage as of right is not established." He cited the judgement of Lord Lindley in *Gardner v. Hodgeson's Kingston Brewery Co. Ltd* [1903] A.C. 229 at 239:

> "A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained. This, I think, is the proper inference to be drawn from the authorities discussed below. If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established; and this, I think, is the real truth of the present case."

Also cited as authority for the same proposition was the judgment of Harman LJ in *Alfred Beckett Ltd. v. Lyons* [1967] Ch. 449 at 474:

> "If it be clear the usage has long been practiced under a claim of right, then the court will be astute to find legal origin for it; but where another explanation is equally possible, this principle does not prevail. Here, I think, toleration is a sufficient explanation."

Balcombe LJ elaborated on the requirement of "as of right":

> "Secondly, the 'right' in the expression 'user as of right' must be a right claimed against the will of the person over whose property it is sought to be exercised. Again I refer to *Gardner v. Hodgeson's Kingston Brewery* and the passage from the speech of Lord Halsbury, LC at page 231 where he says:

> 'The right [the right contemplated by the Prescription Act] means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised.'

Or, as it was put in *Thomas W. Ward Ltd. v. Alexander Bruce (Grays) Ltd.*, a decision of this Court reported (1959) 2 L.L.L.R. 472 at 477:

> 'It seems to us that, in the absence of oral evidence the appellants have not discharged the burden which lies on them to show that their user was not precario, but was a deliberate invasion of the respondent's property.'" Balcombe LJ considered that the overwhelming effect of the correspondence between the parties prior to the issue of the proceedings was that the plaintiff's predecessors were saying to the defendants "you have no right to park cars" and the defendants were in practice conceding that and negotiating for a license to park. One letter from the solicitors for one of the defendants stated: "Our clients appreciate that they do not have a right to park on the yard in question."

Balcombe LJ considered this was a clear concession that at that stage that defendant was not claiming the right which he now claimed. The Court of Appeal was quite satisfied that parking was by licence.

**Submissions of the defendant:**
68. Counsel for the defendant, Mr. Smyth, submitted that for upwards of 30 years, Ruth McKinney, and her predecessor-in-title, Ira McKinney, as occupiers of Oatfield Bungalow, exercised regular use and enjoyed the rights-of-way and exercised same without secrecy, without permission, without interruption, without force, and as of right, and that at all material times it was the defendant's intention to use the said rights-of-way for the purpose of gaining access to her property.

69. Counsel for the defendant argued that the evidence demonstrates that, at least since 1961 (and in all probability ever since the 1951 conveyance of the factory and yard to the company), up until the date the factory was closed in May, 2012, the deceased and her predecessors in title have used the factory grounds as of right to gain access to their dwelling house for all purposes including access to visitors, oil lorries delivering oil to Oatfield Bungalow owned by the deceased and her predecessors in title, gardeners to gain access to the rear gardens when, as remains the case, there was no access available from the private avenue, and access in later years in particular for the deceased for nurses and hairdressers.

70. The defendant stated that the oil lorries could not gain access by the private avenue from the Ramelton Road to Oatfield Bungalow, but had to use the factory grounds for access across the route X-Y and, the gardeners had to use the route X-B to gain access to the rear gardens of Oatfield Bungalow. Thus, counsel for the defendant argued, there is clear evidence that the access was as of right and had been enjoyed since at least 1961, on the evidence of Peter Bradley and of Frank O'Donnell until he left employment of the factory in 2010. There is evidence that this right was therefore enjoyed for at least 49 years.

71. Evidence of this use, counsel argued, is apparent in the oil deliveries which occurred at least twice a year, the visiting of psychiatric nurses often on a weekly basis, and other friends and family members visiting the McKinney house via the De Valera Road entrance. Counsel also submitted that the gardeners were using the 'gardener's route' for 45 or 50 years, who brought tractors and cars and lawnmowers into the McKinney garden, crossing the factory premises in order to do so as they could not traverse the private avenue from the Ramelton Road.

72. Counsel submitted that the keys to the factory gates were at all times in the possession of the McKinney family. There is clear evidence, from the defendants own witness, Mr. Doherty, that they were kept in a particular place in the McKinney house. The fact that they chose not to use them at particular times was more to do with security than the fact that anybody was asserting that they had no right to establish a right of way, counsel added.

73. In relation to the signing of the share sale and purchase agreement in 1999, Mr. Smyth contends that Ms. McKinney had no independent legal advice, and was not advised to obtain any such advice, but was advised only by the company accountant, Mr. Henry Patterson, who himself had a vested interest in the transaction, and was not, it is alleged, independent. Counsel submitted that it was never explained to Harold Jacob or Ruth McKinney what an easement or a quasi-easement was before they each signed the documents. Medical records were submitted to the Court as evidence that Ruth McKinney suffered from depression in her later life, and was quite a vulnerable and elderly individual. It is pleaded by the defendant that Ruth McKinney was prevailed upon to sign the share sale and purchase agreement.

74. The share agreement was a complex document and the negotiations leading to it were obviously complex and yet no evidence was given by the plaintiff that Ruth McKinney was properly advised that she was making a representation that the property on sale was not affected by an easement or quasi easement. If the Court deems in the circumstances of this case that Ruth McKinney knowingly and, as described in Clause 1.1.8 at Page 12 of the Share Agreement, "after due and careful enquiry" made the representation that the property was not affected by an easement or a quasi easement, then, counsel for the defendant contends, such representation can have no effect of the right of way which is acquired by long user thereof since 1961 until the closure of the factory in 2012.

75. Counsel for the defendant pointed to the fact that only one firm of solicitors represented both vendor and purchaser in the share sale and purchase agreement, and that in the context of a complex document, it could not be said that Ruth McKinney could have made due and careful inquiries. None of the solicitors involved in this firm gave evidence at the hearing. Nonetheless, it is submitted by counsel for the defendant that by signing the document, Ruth McKinney in no way abandoned her claim to a right of way.

76. The share sale and purchase agreement provides that if any of the directors is guilty of breach of warranty or representation there is a clear provision for compensation limited to the amount of the share purchase price of £783,750. Nonetheless, Mr. Smyth argued that breach of warranty or misrepresentation in the share agreement cannot amount to an abandonment or release of the defendant's right of way already acquired by Ruth McKinney and her predecessors in title.

77. Mr. Smyth referred to the decision of this Court (Herbert J.) in *Orwell Park Management Limited v Henihan and Another* [2004] 5 JIC 1409, at Page 63, where the Court stated as follows;

> "Because a right of way is a very valuable property right the Courts will not lightly find that such a right has been released or abandoned. In the case of Benn v Hardinge (13th October 1992) the Court of Appeal of the United Kingdom declined to find an intention on the part of the dominant owner to abandon a right of way even though no use had been made of that right of way for 175 years because the dominant owner had other access to the particular land".

78. Moreover, counsel for the defendant submitted, in terms of the plaintiff's claim that Ms. Ruth McKinney disavowed any claim to

easements or rights of way in the share sale and purchase agreement of 1999, that at the date of the execution of the said agreement, Ruth McKinney was not the owner of the dominant tenement, which at that time was in the ownership of her late father Ira McKinney who did not die until the following year, 2000. It follows therefore that Ruth McKinney could not disavow that which she did not own. Even had it been possible for Ruth to have disavowed a right of way by the signing of the document of the 12th February, 1999, such disavowal would not have been binding upon her father, who was then still the owner of the dominant tenement, and when he, a month later, conveyed that property to his daughter, he conveyed with it the benefit of all appurtenant easements (which, of course, included the rights of way across the factory yard). The Deed of Conveyance from Ira McKinney to Ruth McKinney of his family home expressly did so, as the deed states that not only was the property conveyed but the hereditaments (and therefore the incorporeal hereditaments) were conveyed by it.

79. The evidence, particularly that of Peter Bradley and Frank O'Donnell, confirmed that vehicles, including oil lorries, were coming and going to the McKinney houses since at least 1961, when Mr. Bradley commenced his employment. Mr. O'Donnell commenced his employment in the factory in 1965. This evidence is of at least 49 years, if not 50 years, user as of right. Under Section 2 of the Prescription Act, 1832, user as of right for 40 years or more is deemed "absolute and indefeasible", unless it has been enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing". Therefore, only consent in writing can defeat user for 40 years or more. The only further requirement is that the claimant claim "right" to an easement (which Ruth McKinney did through her solicitor's letters of the 3rd and 17th October, and 4th November, 2011, and that she allege in the pleadings enjoyment "as of right", which she did at paragraph 4 of the counterclaim.)

**The legal position:**
80. To establish a right of way by prescription, the party claiming that right by virtue of the Prescription Act, 1832, (extended to the Prescription (Ireland) Act 1858) must provide evidence of continuous use of the way for the requisite prescriptive period. The prescriptive period for the purposes of this action is the 20 years next before suit pursuant to Section 2 of the Act. This equates to the period 1991 to 2011 in the instant case. Ira McKinney was the owner of the alleged dominant tenement between 1991 and 1999. Ruth McKinney was the owner of the alleged dominant tenement between 1999 and 2011.

81. To constitute an easement, a right must satisfy four requirements:

1.) There must be a dominant and servient tenement.

2.) The two properties must be linked, although not necessarily adjacent once there is sufficient proximity between them.

3.) The right over the servient tenement must be for the accommodation of the dominant tenement, i.e. it must benefit the land itself and not merely the owner in a personal capacity.

4.) Section 5 of the Prescription (Ireland) Act 1858 provides that to establish an easement by prescription, the user must be as of right. 'User as of right' means without force, secrecy, and without oral or written consent of the servient owner, or, as it is often put, *nec vi, nec clam, nec precario.*

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

83. In the case of *Orwell Park Management Limited v Martin Henihan and Rachel Henihan* [2004] 5 JIC 1409, this Court (Herbert J.) stated, at page 51, that:

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

84. The requirement that use be *nec precario* goes beyond express permission that is sought by the dominant owner and given by the servient owner. It includes circumstances of licensed access and tolerated access, where the permission to enter can be tacit, born of conduct or particular circumstances or otherwise subject to the exigencies of the servient owner.

85. The meaning of *precario* was at the heart of the decision of the Supreme Court in *Walsh v. Sligo County Council* [2013] IESC 48. At first instance, McMahon J. held that use was not evidence as to whether the owner decided to dedicate to the public, but that it was right-creating in and of itself. He took the view that toleration amounted to acquiescence. The locking of gates and the erection of signs were irrelevant unless there was total effective exclusion. The Supreme Court disagreed with this approach, and reinforced the necessity for use sufficient to indicate acquiescence in order for dedication to be inferred. It is worth quoting at length from the relevant part of the judgment of Fennelly, McKechnie and MacMenamin JJ:

> "94. The cases concerning toleration contain several indications that owners should not be constrained to be 'churlish' and insist on their own property rights. It would be undesirable and inconsistent with the policy of good neighbourliness if the law was so ready to infer dedication of public rights of way from acts of openness and toleration that landowners were induced to act a fortress mentality. Bowen LJ, in a passage in his judgement in Blount v. Layard [1891] 2 Ch. 681, approved by Lord MacNaghten in Simpson v. Attorney General [1904] A.C. 476 at 493 and by Lord Atkinson in Folkestone Corporation v. Brockman, at page 369, proclaimed that:

'. . . nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood.'

95. Furthermore, Lord Dunedin at page 375 of the report in Folkestone said:

'But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. From that house there leads another avenue to the north which connects it to a public road different from that which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up one avenue and down the other – perhaps without actually calling at the house – raise the presumption that the owner had dedicated his private avenues as highways? The user would be naturally ascribed to good nature and toleration.'

96. In the same vein, Farwell J in *Attorney General v. Antrobus* [1905] 2 Ch. 188 at 199, in the context of a claim that there was a trust permitting public rights of access to Stonehenge, wrote of the 'liberality with which landowners in this country have for years passed allowed visitors free access to objects of interest on their property . . .' he added, at page 199, that:

'It would indeed be unfortunate if courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property.'

97. On the other hand, where there is clear non contradictory evidence of excessive public user for a long time, the landowner will not easily resist the inference of dedication by proof of purely subjective and uncommunicated objection."

When considering the claim to a public right of way over the main avenue, the Supreme Court said as follows:

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

86. The second of the recent Irish considerations of *precario* is the decision of MacMenamin J. in *Walker v. Lenoach* [2012] IEHC 24. This judgment was delivered between the decisions of the High Court and the Supreme Court in the Walsh case. MacMenamin J. held that the evidence was of tolerated use, rather than use exercised as of right. The learned Judge observed that:

"The question of acquisition of right of user can be an acutely sensitive one. The relationship between hill walkers and sightseers, on the one hand, and farmers, on the other is sometimes troubled. The legal principles which apply to 'user' in this case involving a significant land-holding in north Wicklow might also be applicable to a case of a small holding sheep farm in west Cork, Kerry, Connemara or in County Wicklow itself. Not all cases of this kind concern significant-sized properties or big landowners.

Among the questions which emerged from the case law are, first; what is the extent and nature of the user which gives rise to inferred dedication, and second, what is the extent of *toleration* by a landowner, big or small? Was the toleration of such a degree that it may be inferred that the owner was 'acquiescent' of public user so that dedication should be inferred? These are questions of fact to be determined in each case."

MacMenamin J. held against the claim advanced by hill walkers in *Walker* because he held the use to be tolerated, and not as of right. Similarly, O'Leary J. held against a claim advanced by the same group of hill walkers in *Collen v. Petters* [2007] 1 I.R. 790 to be borne of neighbourliness and not of the requisite character to be deemed as of right. MacMahon J. in the Circuit Court converted evidence of use into right, just as he did at first instance in *Walsh*. O'Leary J. took a different approach on appeal, and this approach was the same as prevailed in Walsh. The use of a path was a "neighbourly convenience." The character of the use indicated toleration, not acquiescence.

87. However, the decisions in *Walsh* and *Walker* concerned an assertion as to the existence of public rights of way across private lands. There is a fundamental distinction between an action for a private right of way and an action for a public right of way in so far as the person or persons asserting a right to a public right of way over property do not own land or a dominant tenement which will enjoy the benefits of a right of way. In an action claiming a private right of way it is an essential proof that a dominant tenement enjoys certain rights of way over a servient tenement, which is enjoyed for the betterment and necessary purposes of the dominant tenement. The closure of a gate against a public user or person asserting a public right of way is somewhat distinct to a situation such as the present case where a family initially purchased a field and constructed thereon a factory premises and on the better portion of the property to the rear of the factory premises, two dwelling houses for their own private purposes. In cases such as the present case, the Court must arrive at its decision based on the particular facts and circumstances of each individual case.

88. In *R (Beresford) v Sunderland City Council* [2003] 3 W.L.R. 1306 at 1309, a prescription case, Lord Bingham explained how a claim of user as of right could be defeated by evidence of a license that falls short of permanently excluding all entry:

"I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement notice, or record, that the inhabitants' use of his land is pursuant to his permission. This may be done, for example, by excluding the inhabitants where the landowner wishes to use the land for his own purposes, or by excluding inhabitants on occasional days: the landowner in this way asserts his right to exclude, and makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and permit such use."

89. An issue which deserves close scrutiny in any claim made in prescription, such as the present case, is that of the existence, or lack thereof, of gates on the alleged servient premises and whether or not these gates were locked at the will of the alleged servient landowner. In the instant case, in replies to particulars furnished on 18th March, 2014, it was indicated on the defendant's behalf that in or about 1993, a fire occurred across the road from the plaintiff's premises and upon discovering the fire, gardaí arrived at the home of Ruth McKinney in the hope her father might have had keys to the padlock on the gates of the former knit craft premises so that the gates could be opened to admit the fire brigade. It is specifically alleged that neither Ruth McKinney nor her late father had any keys with which to assist the gardaí and when the fire brigade arrived, they cut the padlock on the gate at the entrance to the former knit craft building in order to gain access. Subsequently, a set of keys were supplied to her and her father to ensure that they would be quickly available for emergency services in the event of any future fire or other emergency. Ruth McKinney did not request the keys and had no knowledge of her father having requested them. Ruth McKinney believed that in delivering the keys, Bert Davidson was probably acting on his own initiative because of her and her father's inability to assist the gardaí and fire brigade on the night of the fire when the urgent telephone call was made to Mr. Davidson. It is further alleged in these replies to particulars that neither the deceased nor her late father ever used the keys delivered to them in 1993 to open the DeValera Road gates for any purpose either personal or company-related. The deceased recalled that on any occasion that she and her late father needed a delivery of central heating oil during any period when the factory was closed for holidays, including one particular Good Friday, she telephoned a staff member and key holder of the premises to request that he make the necessary arrangements which included his attending at the factory to open the DeValera Road gates to admit the oil delivery lorry and to lock the gates again after the delivery had been completed, and the lorry had exited again by the same route across the factory yard. The deceased and her late father never had any occasion to use the factory gates after the gates had been locked for the evening after normal factory closing hours.

90. As seen above, in Walsh, the Supreme Court emphasised the significance of the locking of gates during biannual shoots at Lissadell:

> "136. … These are acts of ownership inconsistent with the existence of a public right of way. The learned trial judge found it significant that Mr. Prins, when explaining these actions, did not suggest that the purpose was to prevent the public from entering onto the estate. That is not necessary. The very act of closing the gate showed that rights of ownership were being exercised."

The Supreme Court quoted with approval the dicta of Lord Bingham in *Beresford* that locking gates on occasion is an act which a landowner might take to show that land is being used by permission and not as of right. The very act of closing the gates showed that the right to do so was being exercised.

91. The earliest Irish authority on the effect of gates in a claim of prescription is *Barry v. Lowry* [1877] 11 I.R. CL. The evidence was that Lowry used an alleged right of way from 1833 to 1874 without interruption. A gate was put up in 1867. The plaintiff's herdsman gave the key to a Mr. Buckley, telling him "here is a key for you to let in people wanting water", and explaining that the gate was locked to prevent cattle from trespassing. Buckley gave the key to Mr. Lowry, and Lowry made a key from it for himself and used this key without hindrance until 1874. Lowry claimed a right of way by prescription, and the servient owner contended that the use was not as of right because the gate was locked for at least six years. The conclusion of the Court of Exchequer was that the use was precarious. Fitzgerald B. said:

> "It is admitted that for six years of that period, between 1867 and 1874, the gates with which the way is claimed was kept locked by the plaintiff, so that no passage was possible otherwise than by use of a key directly or indirectly procured from the plaintiff. The key appears to have been left with some person in the employment of the plaintiff, who let persons wanting to draw water from the well past, on their application. The defendant appears to have got the use of a key during a part of the period of six years, but his evidence in no way counts as acquiescence in the locking up of the passage by the plaintiff, or his use of it being only through a key directly or indirectly obtained from him. To state this might be accounted for consistently would be easement of a right of way in the defendant is, I think, nothing to the purpose. What he has to prove is such an enjoyment as will warrant the statutable inference of a right."

The judgment of Deasy B:

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

92. In *Green v. Ashco Horticulturalist Ltd* [1966] 2 All ER 232, the tenant of a shop claimed a right of way over a passageway to the street. This access was enjoyed from 1931 to the issue of the proceedings in 1963. The evidence was that there were gates on the passageway which were only opened during business hours and that the claimant often had to ask for them to be unlocked. The claim was made not in prescription, but pursuant to section 62 of the Law of Property Act, 1925, (the English equivalent of the old section 6 of the Conveyancing Act, 1881). Nevertheless, the principle was the same: if there was use in the nature of an easement at the time that the lease was renewed in 1959, it would be converted from a quasi-easement to an easement. There was no such use: Cross J held that as the claimant's use was always subject to the exigencies of the servient owner's own business and the requirements of the tenants of nearby garages, the right of way claimed could not have been the subject of a legal grant so section 62 could not operate. Cross J found that there was a tacit consent, a "consent which reduced the privilege enjoyed to something which could not be the subject of a legal easement."

93. The issue as to whether the presence of a locked gate is a real substantial disturbance of an easement was also considered in the case of *Flynn v. Harte* [1913] 2 I.R. 322. In that case, a gate had been erected by the servient owner at the end of the way where it met the public highway. The gate was erected for the convenience of the plaintiff and the defendant who had a right of way over the plaintiffs holding was allowed free ingress and egress through the gate. The defendant objected to the presence of the gate. In that case Dodd L.J. found at page 327 as follows;

> "Whether a gate is or is not an obstruction of the right is a matter of fact. He who acts in a neighbourly way may be sure he is within the law. He who acts in an un-neighbourly way is breaking the law, and the Judge will find out the truth and fact. The question in most cases is – convenience or "cussedness"? "Convenience or cussedness" in putting up a gate; "convenience or cussedness" in not closing a gate after passing through. No one hearing this case could have any doubt.

> The gate is certainly convenient and the defendants conduct arises from "cussedness".

Also, *Donnelly v Adams*, [1905] 1 I.R. 154, 174, a case in which a right of way was recognised, by the old Irish Court of Appeal, to exist for the bringing in of coal across the lessor's property to his tenant's house through a locked door in a wall, even though a key to the door was given by the lessor to the lessee at the time of the demise. Access for coal delivery was viewed as essential to the requirements of the dominant property in that case.

94. In relation to the share sale and purchase agreement, which was signed by the Ruth McKinney, in February, 1999, there is jurisprudence regarding individuals in commercial circumstances who subsequently claim that they were not fully aware of what they were signing or the consequences therefrom – especially in circumstances where the individual is or was a director of a company at the time they entered into written agreements or signed commercial contracts. The case of *IRBC v. Quinn* [2011] IEHC 470 contained a number of similar claims as made by the defendant in this case. The case dealt with whether Mrs Quinn was liable on foot of a letter of facility which she signed along with her husband. The facility was for a sum of €3,000,000. Mrs Quinn claimed that she should not be bound by the document she signed. The following facts were outlined to the Court which were fully accepted by Judge Kelly:

a) She was a homemaker for the previous 36 years.

b) She had no business experience - she was never involved in any business or financial dealings beyond deciding upon the weekly groceries and providing for household expenses.

c) Even though she was appointed company director of a number of companies she did not possess any sophistication or even basic knowledge on business matters.

d) She was never involved in any of the day-to-day decision-making processes of her husbands businesses.

e) She had no appreciation of the existence of the facility for €3,000,000, the provision of funds or whether the funds had been purportedly lodged.

f) She did not even know she was a customer of Anglo Irish Bank as the plaintiff then was.

g) Typically she signed documents when requested by her husband or his colleagues but the documents were never explained to her nor was she ever consulted or provided with any explanations or legal advice informing her as to the nature or impact of the documents she was asked to sign.

h) She had no recollection of ever seeing the facility letter or of actually signing it.

Kelly J. commented that Mrs. Quinn simply signed documents as part of a course of conduct without giving the matter a second thought. He still held against her on every ground. It is worth bearing in mind that this was a claim by the bank for summary judgement and as such Mrs. Quinn only had to satisfy the Court she had a bona fide defence. Regarding *non est factum,* the learned Judge quoted and approved of the following passage from the judgment of Clarke J in *ACC Bank v Kelly* [2011] IEHC 7:

> "7.5. … By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances."

The claim of undue influence was rejected. Kelly J. quoted from the judgment of Carroll J in the case of In *Re Hunting Lodges Limited* [1985] ILRM 85, at page 85, which dealt with a wife who sought to avoid personal responsibility for the debts of a company where she acted as a director:

> "In relation to Mrs Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influence of her husband. Mrs Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned."

**Conclusion.**

95. In essence, the plaintiff contends for declarations that there is no right of way and the defendant counterclaims for a declaration that there are two rights of way which arise pursuant to the Prescription Act 1832 (or Prescription (Ireland) Act 1858). As discussed, the use relied upon must be as of right or *nec vi, nec clam, nec precario*. It must be such as to put the servient owner on notice that the claim is being made and thus, it cannot be secret, clandestine or surreptitious. The use cannot be forced upon the servient owner, for prescription theory demands acquiescence in order for a right to be established. Further, for the court to be satisfied that there has been acquiescence to the establishment of a right, the necessary use cannot be referable to consent, permission, or license. It cannot be precatory in the sense of being precarious, that is subject to the will of the servient owner and capable of being interrupted. As the plaintiff brings the proceedings, the onus of proof rests with it to satisfy the Court, on the balance of probabilities, that it is entitled to the declarations as sought.

96. As discussed herein, there is no great dispute as to the history of use of the two routes over the plaintiff's premises. The parties differ instead as to the character of that use. Evidence was given on behalf of the plaintiff, echoed in the evidence given on behalf of the defendant, that there was ongoing access across the factory yard to the two McKinney houses situated behind the factory since gates were opened onto the de Valera Road in 1982. The principal access by this route was said to be by oil lorries visiting the McKinney house two to three times a year, a psychiatric nurse attending to Ms. McKinney, and vehicular access by the late Ira McKinney on the way to and from his holiday home in Portnablagh. There was also access over the second route by gardeners. The principal route to both of the McKinney houses was the avenue from the Ramelton Road. Ira McKinney conveyed his house to his daughter, Ruth, by deed of the 2nd March, 1999. On the evidence of her solicitor, Mr. Quinn, by this point in time Ruth McKinney was effectively housebound due to obesity and mental health issues. What is in dispute is whether, on the particular facts of this case, the proven use can be characterised "as of right." The plaintiff contends that the use of the factory yard was tolerated access, subject to locked gates outside of factory hours, and therefore not use as of right. The defendant contends that there is a clear

distinction between the use of the factory grounds by the McKinney family in their capacity as officers or employees of the company, and the use of the factory grounds to serve the dominant tenement comprising the premises of Oatfield Bungalow. It is contended on the defendant's behalf that the right of way across the factory grounds was exercised for the benefit of Oatfield Bungalow and its curtillage, including the rear gardens thereof.

97. The Court does not accept, on the balance of probabilities, the testimony of Mr. Gareth Whitmore that he looked at the share sale and purchase agreement of 1999 when he commenced work in 2005 and satisfied himself that there were no rights of way. Mr. Whitmore did not elaborate on why he decided, upon joining the company, to look at the agreement to check that there were no rights of way encumbering the plaintiff's land on the off-chance that there were. Mr. Whitmore attested that, upon joining the company, he merely wanted to familiarise himself with all of the issues, however, he conceded that he had never looked at any other share purchase agreements in his professional career. I do not accept, on the balance of probabilities, that when the letter from Lidl arrived in August, 2011, referencing a right of way over the factory's lands, that Mr. Whitmore's recollection of perusing the share sale and purchase agreement six years previously, automatically swung to his mind, and convinced him, without having to make any further enquiries, that there were no rights of way. The reality of the situation is that the original defendant, Ruth McKinney, believed that there was a right of way, and the board members of the plaintiff company were on notice of this, and sought to have the matter resolved before the sale to Lidl fell through. I do not accept Mr. Whitmore's evidence that the Board was not at all concerned about the reference in the letter from Lidl to a right of way. Minutes of the board meetings adduced to the Court run contrary to this proposition. Nonetheless, merely assuming or believing that a right of way may exist, does not equate to a legal right of way.

98. In order to be satisfied, on the balance of probabilities, that the requisite character of use by both Ira McKinney and Ruth McKinney respectively of the rights of way as claimed in these proceedings over the plaintiff's premises between 1991 and 2011 as has been illustrated, this Court must be able to conclude that such use was 'as of legal right.' This must be determined taking into account the relationship between the McKinneys and the plaintiff company, the existence of the locked factory gates outside of office hours and at weekends, of which they had two sets of keys which they never used, and the signing by Ruth McKinney of the share sale and purchase agreement in 1999 for a substantial amount of money at the time, and on the basis of certain warranties given by her to the purchaser on which they relied.

99. In the particular circumstances of this case, whether particular acts of use are to be described as being "as of right" requires account to be taken of all the circumstances.

100. The reality of the situation in this instance is that Ira McKinney, from 1982 until in or around 1997, was the chairman, a director, and a substantial shareholder of the McKinney company business, and he was entitled to access the factory premises through the gates leading onto the De Valera Road and to further access any part of the factory premises. He was in a like situation as the owner of his family home immediately adjacent thereto. In my view there is no indication that on the balance of probabilities he ever intended to set up a right of way that would burden the family company which, after all, appears to have been his life's work. As Mr. Doherty indicated in evidence, he was surprised that any member of the McKinney family would attempt to set up a right of way across the factory premises. The preponderance of evidence is suggestive, on the balance of probabilities, of a permissive user or user by license because of the position of Ira McKinney or of tolerance to members of the McKinney family who lived adjacent to the factory premises utilising access and egress through the De Valera gates. As was indicated by the UK Supreme Court in *R. (Barkas) v. North Yorkshire County Council & Or* [2014] UKSC 31:-

> "If a right is to be obtained by prescription the persons claiming that right must by their conduct bring home to the landowner that a right is being asserted against him so that the landowner has to choose between warning the trespassers off or eventually finding that they have established the asserted right against him."

In the circumstances of this case it is inconceivable that Ira McKinney could have been regarded as a trespasser as he moved across the factory premises to his home or vice versa. For the defendant to succeed in satisfying the court that Ira McKinney did set up a right of way, then the court would be having regard to the fact that he was chairman, a director, and a substantial shareholder, but this did not give him any entitlement to utilise the factory premises for the purpose of accessing his family home, a situation that he no doubt did on every day of his working life.

101. I find that the character of the access enjoyed by Ira McKinney from 1991 until 1999 is not consistent with the assertion of an adverse legal right. The evidence of use prior to 1999 by Ira McKinney is much more comfortably viewed as by permission or as a facility, personal to Ira McKinney and his family, rather than to the benefit of the Oatfield Bungalow. As discussed, a claim in prescription rests in acquiescence. If a servient owner believes a use is *qua officer* of the company then it cannot be said that the owner is on notice of a right being asserted against his land. This becomes all the more relevant when the owner of the dominant tenement is traversing the servient land under the cloak of chairman of the company.

102. This Court can thus see no basis upon which the defendant's contention can be based on the actions of Ira McKinney, and as he was the owner of the adjacent premises up until 1999, any subsequent expression of the user of the alleged right of way can only arise from 1999 onwards, and in these circumstances under the Prescription Act, the defendant does not have twenty years continuous user and thus, it would appear that on this basis alone, a lawful enforceable right of way has not been established.

103. Even if the actions of Ira McKinney are to be taken into account and the defendant can rely on them in addition to her own user, the reality is that the user was tolerated and any number of opportunities to express an assertion of a right of way across the factory premises were, firstly, never made and, secondly, on occasions when they could have been made in legal format the opportunity was never availed of.

104. There has been much controversy in the submissions as made on behalf of both parties as regards the share sale and purchase agreement of February, 1999. There is no application pleaded to set the document aside. The defendant had the facility of legal advice available to her which she may or may not have taken, but in any event, on the evidence of Mr. Dillon, her solicitor, it is quite clear that she was aware of the nature and content of the agreement that she was signing because she told him, as he said in evidence, that having signed the document she went off to have a good cry having effectively sold out the family business. This evidence demonstrates that she was not mentally incapacitated at the time, and that she knew, at least in general terms, the nature of the document that she was signing. If she failed to avail of legal advice and failed to read the document which clearly was of a commercial nature and which conferred on her a considerable financial benefit, then that was a matter for herself when she signed the document which warranted that there were no easements or quasi easements affecting the property. In relation to the signing of the share sale and purchase agreement, the defendant did not plead lack of capacity, non est factum, undue influence, misrepresentation, improvident transaction or any basis on which the agreement of 1999 should be set aside or its contents ignored. Instead, what was pleaded was that Ms. McKinney had no independent legal advice, that she was advised only by Henry Patterson, who had a vested interest in the transaction and was not independent, and that Mr. Patterson did not draw to her attention that the

documents he prevailed upon her to sign contained any warranties regarding easements or rights of way. In his evidence, Mr. Patterson denied prevailing upon Ms. McKinney to do anything, which evidence I accept. The court takes cognisance of the fact that Ms. McKinney was vulnerable as she was elderly and had been in and out of hospital at certain stages during her later life. Medical evidence was submitted to the court showing that Ruth McKinney was diagnosed with episodes of severe depression and bipolar affective disorder. She had been admitted to psychiatric units once or twice in the final two decades of her life, and evidence was adduced that she often did not leave her house for weeks on end. Nonetheless, the plaintiff is not obliged to call evidence to prove that Ruth McKinney is bound by the agreement that she signed. She is prima facie bound by it until such time as she is held not to be by the Court. However, as discussed, no claim has been made to set the agreement aside in these proceedings. As such, this Court cannot simply go behind a contract which Ms. Ruth McKinney appears to have knowingly and voluntarily signed, as a shareholder in the company, with the availability of legal representation and advice.

105. It appears to have been conceded in argument during the proceedings that the representations and warranties made in the share sale and purchase agreement must be false if the defendant's claim is to succeed. Counsel for the defendant submits that it is still open to the plaintiff to bring a claim against the defendant for misrepresentation. If the representation of Ruth McKinney in the share sale and purchase agreement amounts to a breach of warranty, counsel added, then the plaintiff is entitled to issue proceedings for all damages arising as a result of that breach. If there is a right of way, Mr. Jacob is open to being sued. If that is the case, then each of the shareholders who signed the warranties would be susceptible to being sued if a right of way is established. There is a provision under Clause 8 of the agreement to such effect. Clause 8(1) refers to any claims arising from dishonesty, fraud, wilful misconduct, or wilful concealment by the warrantor or the vendor. Counsel submits on the defendant's behalf that this claim cannot be statute-barred, as the loss has not yet arisen. From the Court's point of view, it appears, from the evidence, that Ira and Ruth McKinney were not the type of people who would wilfully conceal or misrepresent something so important. In reply, counsel for the plaintiff contends that, at a remove of 16 years, the suggestion that a claim could be made against all of the warrantors in the agreement for breach of warranty or misrepresentation, is not sustainable, and that the only issue to be decided by the Court in these proceedings is whether or not a legal right of way existed. Regardless, as neither side has moved to set aside the document, it stands.

106. It is contended on the defendant's behalf that the replies to requisitions with reference to any right of way that could be seen on the ground, negatives the entire document and should have put the plaintiffs on notice if they carried out a visual inspection that there was a right of way. The requisitions on title were raised and replied to on the same day as the agreement itself is signed. As I have already indicated herein, in the manner in which the question was phrased, it is quite clear that if the defendant was in her own view exercising a right of way, or if she believed that there was a right of way in her favour across the two points of the factory yard premises, then acting with candour and in the utmost good faith, that was the moment to express her view and the reality is she did not claim any right of way. Neither, for that matter, did any of the other shareholders, including her immediately adjacent cousins who also signed the share sale and purchase agreement. An interesting feature of the agreement is that, of course, Ira McKinney was still alive when it was signed.

107. It is the view of this Court that it is not so much a question as to whether or not the agreement constituted a disavowal of a right of way against a background where at that moment in time it was Ira McKinney's right of way as he was the owner of the adjacent premises, but that no party to the transaction appears to have given thought to there being a right of way because of Ira and Ruth McKinney's use, amongst others, of the gates when they were open from the De Valera Road.

108. There were further occasions when the right of way could have been asserted, being the transfer by Ira McKinney of the family home to the defendant on 2nd March, 1999, and it was also clear that the defendant and her father, Ira McKinney, were meeting with their solicitor, Mr. Quinn, and as the evidence concedes there was never any mention of a right of way until the issue was raised in Mr. Clifford's letter of offer from Lidl in August, 2011. It is also revealing that when Ira McKinney conveyed the factory yard to the plaintiff, Zopitar, in 1951, he did not reserve a right of way at that stage. The state of mind of Ira McKinney is thus reflected in the deed of 1999, his instructions to the estate agent who valued the land, and the letter to his tax advisors. There is no mention of any right of way in that correspondence. It is undisputed that no claim to a right of way was ever made by the defendant until the time of the proposed sale to Lidl in October, 2011.

109. I find that there was reciprocity of arrangements between the McKinneys and the plaintiff company. Access did not take place in a vacuum, but was part of a web of surviving connections. Some staff accessed the factory over the McKinney's private avenue. The Court also heard evidence of factory staff carrying out repairs and maintenance on the McKinney premises. It is in this context that there was toleration of nurses attending to an elderly lady who was often confined to her house. It is what one would expect from the relationship between the parties.

110. In the view of this Court the use of the De Valera gates by Ira McKinney and by his daughter, Ruth McKinney, was tolerated, and was not as of right, and the user now being asserted was never brought as such to the attention of the company so that they could have made a choice. Given the effect that the establishment of rights of way would have on the factory site, it is just not plausible that the plaintiff would have submitted to the use if it was aware that it took place in pursuance of a right. The plaintiff was simply unaware that the access by the McKinneys was for any purpose other than their involvement in the factory and for neighbourly short-cuts. Neither father nor daughter alerted the plaintiff that a right was contemplated, much less asserted.

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

112. On the evidence adduced there was never a legal right to use a right of way or two rights of way over the factory premises by or on behalf of the defendant.

113. Further, even when the discussions were taking place following the letter from Mr. Clifford of Lidl, and there was a meeting between Mr. Jacob and Ruth McKinney, the discussion in respect of the right of way only centred on the alleged right of way that was used for the oil deliveries and any other use to that area immediately at the rear of the defendant's house, and when these discussions broke down there followed the letter from the defendant's solicitor seeking €500,000.00 and a whole raft of requirements, but it was not until some months later, after a statement of claim had been delivered, that the issue of a second right of way was raised.

114. This Court is of the view that this particular sequence of events demonstrates that a right of way was never considered to be in operation with respect to the gardeners and the hedge-cutters and the other persons who used the lower entrance to access the rear of the garden behind the defendant's home, and that it clearly was an afterthought months into the proceedings and a long time after the letter from Lidl that it was decided, on the defendant's behalf, that there was, in fact, a second right of way arising to do with access to the garden.

115. This view is further confirmed by the reply in Clause 29 of the requisitions on title that no person had made any adverse claim to any part of the factory premises so that certainly by 1999, not only had no claim been made, but the issue had never been raised as remained the position throughout until the letter from Mr. Clifford in 2011.

116. I, accordingly, for the reasons as set out herein, find that the use of the plaintiff's factory premises by Ruth McKinney, and by her father, Ira McKinney, and/or their servants or agents and people coming to see them at their home, from 1982 until 2011, could not be characterised as setting up a legal, adverse, right of way as against the plaintiff.

117. I will hear the submissions of counsel as to the form of the Order to be drawn up.