THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 132

Record Number 2014/621

Peart J.
Whelan J.
Gilligan J.

BETWEEN/

JOSEPH WALKER

PLAINTIFF/

RESPONDENT

- AND -

NIALL LEONACH AND NOEL BARRY

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 15th day of May 2018

1. This is an appeal against the judgment of 8th February 2012 and consequent orders of MacMenamin J. delivered in the High Court granting, inter alia, a declaration *in personam* as against the appellants that the respondent's lands comprised in Folio 6913 and 48.5 acres of adjoining unregistered land at Annacrivey, Enniskerry, Co. Wicklow ("the lands") are not subject to any public right of way.

Background History

2. The respondent's father purchased the said lands as part of a larger holding in the year 1950. The respondent became beneficially entitled to the lands, subject to certain rights in favour of his mother, in 1980. The lands are situate in an area of great scenic beauty in Co. Wicklow. The respondent's holding adjoins Annacrivey Wood which is managed and controlled by Coillte. The area has long been popular with hill walkers including an informal umbrella group known as Enniskerry Walking Association. It was contended by members of the association that the respondent's lands were subject to a public right of way. The respondent denied this claim. The route of the disputed way is shown on the map annexed to the High Court judgment. For ease of reference a copy of said map is appended to this judgment (hereinafter the judgment map).

3. The dispute appears to have escalated significantly following the publication of a booklet of hill walks by Albert Smith and Kevin Warner in 2002 which identified the contested route as a public right of way. The second named appellant, Noel Barry, who resides in Enniskerry and is secretary to the Enniskerry Walking Association, wrote to the respondent in 2004 seeking to discuss the ongoing dispute regarding the existence of a public right of way over the respondent's lands. A meeting took place in August of 2005 at which Noel Barry furnished to the respondent copies of a Jacob Nevill map of 1760 and an A.R. Nevill map of 1798, documents which were heavily relied on by the appellants at the trial of the action, as depicting the route of the public right of way contended for.

4. Subsequently, on 30th January 2006 Noel Barry sent to the respondent a letter with details of evidence and attaching documentation which had been gathered by Enniskerry Walking Association in support of their claim. He suggested that the respondent should examine this evidence carefully;

> "It is taken from Wright's Guide to Co. Wicklow. The first edition was published in 1822, the second in 1827. Copies are available in the National Library. This guide was on sale to the general public, was widely sold and used and clearly describes the old road running through your property as 'tolerably good'."

5. The letter identified various pieces of evidence which the author suggested supported the claim of Enniskerry Walking Association that the disputed way:

> (a) was and is a public road in use since ancient times;
>
> (b) has been in continuous use as a pedestrian route by a wide variety of people and
>
> (c) had never been extinguished.

6. The letter goes on to state;

> "I would further refer you to Patrick Power, one of Ireland's leading authorities on maps. Power states in his essay *"A Survey of Some Wicklow Maps 1500 – 1888"* ("Wicklow History and Society");
>
> > "Many of the errors in "Jacob Nevill's 1760 map were corrected by his nephew Arthur Richard Nevill, City Surveyor of Dublin in his "map of the said County Wicklow". This last is the reference to the 1798 map which I have given to you."

The letter concludes;

> "As one who has known you for many years and always regarded you as a friend, I would like to offer you the opportunity

> to meet with me again to see if a solution can be agreed between us without recourse to the courts. I make this offer in an effort to find a solution which does not lead to humiliation for either yourself or those who regard this route as sacrosanct. I am sure you can see the sense in reaching an agreement which will not enrich our friends in the Law Library. I still hope that reason can prevail. However, matters are rapidly reaching the point of no return as far as legal action is concerned. The present impasse and continuous harassment cannot continue."

Ex Parte injunction

7. An affidavit was sworn by the respondent on 19th September 2008 in support of an *ex parte* application moved before Clarke J. to the High Court for an interim injunction restraining the appellants, their servants or agents from entering onto the lands without lawful authority. However, this affidavit omitted to make any reference to the said evidence including maps, material and information which had by then been in the possession of the respondent for a number of years.

8. Upon securing an injunction *ex parte* the respondent was granted liberty to erect a notice of the making of the injunction at a suitable location on the property. The *inter partes* interlocutory application was made returnable before the High Court for 24th September 2008.

9. On the latter date the interlocutory application did not proceed to a hearing. Instead an undertaking was given by the appellants through their counsel not to enter upon the respondent's lands pending the trial. As such, the interim order did not continue in operation beyond 24th September 2008. The said undertaking of the appellants continued to be operative throughout the intervening years up to the conclusion of the trial of the action in 2012.

The Pleadings

10. A plenary summons issued on 19th September 2008. The statement of claim delivered on 1st December 2008, pleaded the respondent's ownership of the lands. The respondent sought a declaration *in rem* that his said lands were not subject to any public right of way together with certain injunctive orders restraining the appellants, their servants or agents, from entering onto the said lands without lawful authority or from wrongfully asserting that same were subject to a public right of way or otherwise slandering his title.

11. On 9th December 2008, a defence by way of traverse was delivered.

Amended Defence

12. On 20th January 2010, a week after the commencement of the hearing in the High Court, the appellants delivered an amended defence. A public right of way was referred to in the following manner;

> "The lands where the walks took place ("the lands") are about half way between Enniskerry and Glencree and the route is marked as a road on maps of the area for the last 250 years. The route existed there before the Military Road was built around 1803 but that New Road did not put an end to the route being used as a public road. The route is marked as a public road in, for example – Jacob Nevill's map of 1760, A.R. Nevill's map of 1798, John Taylor's map of 1816, a Wicklow Survey map of 1816, Ordnance Survey maps of 1899, 1952, 1975, 1978, 1981 and 1986 and a map prepared by Coillte in 1990. Copies of these documents have already been furnished to the plaintiff."

13. The appellants further pleaded as follows;

> "The public right of way is that in respect of which the plaintiff obtained an *ex parte* injunction from Clarke J. (without making full disclosure of all the relevant material known to him at that time). It is the route, insofar as it crosses the plaintiff's alleged lands, described as the "Kilmolin – Curtlestown – Ravens Rock Loop" in exhibit "JW2" in the plaintiff's own Affidavit of the 12th September 2008, grounding his application for an interim order. It comprises the pathway as described below from the westerly point where the plaintiff has posted and maintained notice of that order."

14. The extent of the public right of way contended for was pleaded as follows;

> "The public right of way is of approximately 750 metres in length. It is described and characterised as a Right of Way, "The Old Coach Road", in inter alia a report prepared by Wicklow County Council on rights of way ("R.O.W. 9") in the 7th and subsequent paragraphs and on the attached map… in the extract from O.S.I. Discovery Series No. 56 map, annexed hereto, it traces the red line placed on the map insofar as that line covers property allegedly belonging to the plaintiff."

15. The appellants also delivered a "contingent counterclaim". It pleaded as follows;

> "All that the defendants seek herein is that these proceedings be dismissed, viz that the restraining orders sought should not be made against them and that damages should not be awarded against them, or any further or other relief granted against them (or their servants or agents). They contend that the Court has only to decide whether, as a matter of defence, they have made out that they have such public right of way as they allege so that the plaintiff is not entitled to exclude them, on the grounds that they are trespassers, or have committed slander of title or wrongfully interfered with his lands."

Fiat of Attorney General

16. It would appear that an issue had arisen before the High Court at the commencement of the hearing on 13th January 2010 as to whether the appellants were required to obtain the *fiat* of the Attorney General in order to maintain their claim that a public right of way existed over the route.

17. In their "contingent counterclaim" delivered on 20th January 2010, it was contended that;

> (a) It is for the plaintiff to "take the requisite steps to implicate the Attorney".
>
> (b) In the context of the 21st century, that such a requirement is "an anomaly that is no longer applicable."
>
> (c) It is unconstitutional and contravenes Art. 6(1) of the European Convention on Human Rights, as… "an unnecessary and disproportionate interference with the defendant's freedom to defend these proceedings."

18. Ms. Aoife O'Connell, solicitor for the respondent, in an affidavit sworn 19th April 2010, called upon the appellants to obtain the fiat of the Attorney General; "The purpose of the *fiat* of the Attorney General is to prevent multiplicity of suits, so that, in the context of this case, the determination of the court will be final and the plaintiff will not have to re-litigate the issue if any person in the future seeks to assert public rights on his lands."

19. However, a letter written to the Office of the Attorney General on 26th July 2010 by Rosemary Scallon & Company, solicitors for the appellants, indicates that by then the respondent's position had altered;

> "… on Friday, 18th June, the plaintiff's counsel indicated to the judge that the fiat objection was not any longer being maintained; at least that is our understanding of the plaintiff's position. The judge indicated that a letter along those lines should be sent, and adjourn the case pending receipt of a reply.
>
> Now that the *fiat* issue no longer appears to be live, we cannot see why the Attorney would intervene. An earlier response to this letter would be appreciated as the trial continues to be adjourned."

20. In a response dated 23rd September 2010 the Chief State Solicitor, David J. O'Hagan, states;

> "The Attorney General has considered the matter and has no objection in the circumstances of this case to the issue of the public right of way being pleaded and litigated by the defendants as part of their defence without his *fiat*."

Orders in Rem

21. As events transpired the decision of the parties not to seek the fiat or otherwise take steps to have the public law aspect of this claim appropriately determined, whether by joinder of Wicklow County Council as the relevant highway authority or otherwise, placed significant limitations on the nature of the orders ultimately available to the trial judge at the conclusion of the hearing.

22. In correspondence dated 4th February 2011 agents on behalf of the respondent did not appear to accept this inevitability;

> "If the Declaration sought by our client is obtained from the Court it will bind the defendants, their servants, agents and all persons having notice thereof as will any injunction to the same effect, which we will ask the Court to make at the conclusion of the case. We reiterate that our client's claim is *in rem* (the declaratory and injunctive relief sought) and *in personam* (the claim for damages for trespass)."

Hearing in High Court

23. The hearing was conducted in the High Court over 13 days or so between 13th January 2010 and 27th June 2011.

Submissions on behalf of plaintiff before High Court

24. A written submission was filed on behalf of the respondent on 15th May 2011. It sets out his position of seeking to restrain trespass and damage to his growing trees and fences. A series of marches over his property by "Enniskerry Walking Association" had precipitated the institution of the proceedings in this regard. The appellants were officers of that association and were promoting and organising members of the public to enter on and traverse his lands as constituting "the Old Coach Road". An express aim of the association was to find and open up routes they believed were once public roads or paths.

25. The respondent denied the claim that a public right of way existed on, inter alia, the following key grounds;

> (a) The evidence of any established road or path along the entire of the "way" contended for had not been demonstrated as a continuous uninterrupted and open passage.
>
> (b) A house, Canavan's Cottage, was shown constructed across the route of the alleged public right of way. No connecting way had been shown between Canavan's Cottage and Butler's Cottage, points E and F respectively on the judgment map. The path was an internal or estate route on the very substantial Powerscourt Estate.
>
> (c) The evidence of the plaintiff's witness, Dr. Vandra Costello, suggested the implausibility of any historic dedication of the way as a public right of way.
>
> (d) It was contended that the route was not recorded as existing on the ground in the Powerscourt Estate Map of 1816 or any subsequent Ordinance Survey maps and no explanation was advanced by the respondents as to why the public road or path contended for did not appear on said maps.
>
> (e) A key argument centred on what was claimed to be a lack of *animus dedicandi*, it being contended that there was no evidence of an express dedication and no evidence to show of an unequivocal indication of such an intention and that it was not open to the Court to infer that such *animus dedicandi* existed as a fact in such circumstances.
>
> (f) It was contended that evidence of a lack of public expenditure points towards the lack of an intention to dedicate and a lack of a reputation as a public right of way.
>
> (g) It was claimed that any entrant onto the disputed route had to negotiate a locked gate, a stone wall and two barbed wire fences.
>
> (h) It was asserted that the *terminus a quo* and the *terminus ad quem* of the disputed route over the appellant's lands were not public places.
>
> (i) It was argued that the defendants lacked *locus standi* to bring a claim asserting that a public right of way existed over his property. In particular, it was contended that before the respondents could maintain their claim they had to demonstrate special damage which was not common to others who were users of the claimed way.

26. With regard to the High Court decision in *Walsh v. Sligo County Council*, [2010] IEHC 437, [2011] 2 I.R. 260 the respondent's submission to the High Court was as follows;

> "Insofar as the defendants may seek to rely on the decision of *Walsh v. Sligo County Council*, the plaintiff respectfully

> submits that the decision has no bearing on the issue before the court in this case since all of the facts in evidence here (including use by the defendants, location of the site and occupation by the landowners) are so different from the facts in the Walsh case as to make that authority entirely distinguishable."

However, whilst I accept the significant material differences in the factual matrices between *Walsh* and the instant case nevertheless it is appropriate to have regard to the dicta of McMahon J in the High Court in *Walsh* - insofar as not reversed by the Supreme Court - and also the Supreme Court's own judgment in that case, *Walsh & Anor v Sligo County Council* [2013] IESC 48, [2014] 4 I.R. 417, which was delivered after the appeal was lodged in this case, to the extent same are relevant or of assistance.

27. The respondent contended that the Court was entitled to distinguish between use that was based on neighbourly tolerance and use that implies dedication.

Submissions on behalf of defendants before High Court
28. There was a wide divergence between the parties at the hearing as to the appropriate approach to be taken by a court in determining whether to infer dedication of a public right of way. The respondent contended that in any case in which dedication of a public right of way is asserted the Court must establish dedication to have taken place as a fact. It was argued that a landowner can establish the absence of an *animus dedicandi* by relying on evidence contrary to that proposition, for example his own acts which are contrary to such a proposition.

29. It was contended on behalf of the appellants at the trial that since the respondent had put the existence of the public right of way directly in issue the onus of proof rested with him to demonstrate its non-existence. Witnesses were called to testify as to their user of the route of the disputed way over many decades. Significant reliance was placed on maps dating from 1760 onwards which are considered in detail hereafter.

Judgment of the Court
30. The judgment of MacMenamin J. was delivered on 8th February 2012. He reviewed the history of relationships between the parties and considered also attempts at reconciliation.

31. The trial judge considered the respondent's conduct at the *ex parte* injunction application in the first instance finding that his failure to disclose to the Court documentation previously supplied to him by the second-named appellant "which went to the question as to whether there was actually a public right of way", was unsatisfactory.

32. He noted;

> "This highly relevant documentary material was not mentioned. It should have been. The application was brought on the day before the walk. The plaintiff was very remiss in not referring to the material. The fault for this omission lies only at the plaintiff's door. It is one of a number of factors which may have a consequence in costs."

Fiat
33. With regard to the issue of the *fiat*, the trial judge noted that in the past such consent or fiat of the Attorney General was frequently deemed necessary. The appellants had been reluctant to apply for a *fiat* in support of their counterclaim -which the Court noted was advanced on a "contingent basis"- that there was a public right of way over the lands. The trial judge considered correspondence from the Chief State Solicitor and concluded that it did not indicate "that there was consent to the Court determining whether the lands were burdened by a public right of way *in rem*, as opposed to *in personam*" He noted that Wicklow County Council had elected not to participate in the proceedings;

> "This has some significance in light of the fact that one relevant piece of material which the defendants sought to introduce in evidence was said to emanate from the County Council." (para. 28 of the judgment)

34. The trial judge having reviewed the jurisprudence including *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279, concluded that the proceedings could only be viewed as a *lis inter partes*. He pointed out the significant limitations of such a finding; "The fact that neither, the local authority, nor the Attorney General, are involved means that there can be no finding on this Court binding on the public at large." (para. 32)

35. The trial judge characterised the appellants' position as follows;

> "The defendants invite the Court to infer dedication of the route as a public right of way; they have adduced evidence regarding long user from old travel guides and maps and other users of the route. However, they do not assert that at some specific time, some landowners action show a time and occasion from which dedication might be inferred. They do not point to any prior owner of the land holding a legal capacity to dedicate who might have actually done so. Capacity to dedicate hinges on whether the owner holds sufficient title to engage in an act of dedication; for example, by holding the fee simple in the land. The defendants' case is derived, rather, from historical sources and from a particular form of user, that is, effectively, by members of the public who are transient, who used the route in question as a shortcut or as a route for hill walking and from the old maps which they say show a public right of way." (para. 35)

36. The trial judge identified what he considered to be the factors of relevance in determining whether a public right of way existed as including the following;

> (a) the extent and nature of the user which gives rise to inferred dedication?
>
> (b) what is the extent of toleration by a landowner?
>
> (c) was the toleration of such a degree that it may be inferred that the owner was 'acquiescent' in public user so that dedication should be inferred?

"These are questions of fact to be determined in each case." (para. 39)

> "*A public right of way* is created by the dedication of the way as a public way by a *landowner*. … That act of dedication need not be formal. Sufficiently unequivocal conduct by an owner, evincing an intention to dedicate will suffice. There must also be acceptance of the dedication by the public, evidenced by their use of the path or way. . . as a component

part of these tests the Court considers the notoriety of the user or, . . . asks itself was the public user obvious or should it have been so? The Court will look at how the owner then acts or fails to act." (para. 43).

37. The trial judge, in evaluating whether there was evidence of dedication of the disputed way, considered that the issue of toleration lay at the heart of the case and cited with approval *R. v. Oxfordshire County Council* (*ex parte* Sunningwell P.C.) [1999] 3 W.L.R. 160 where Lord Hoffman had stated;

> "The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corporation v. Brockman* [1914] A.C. 338. …This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932 (UK) which introduced a statutory presumption of dedication and a way of rebutting deemed dedication."

38. The trial judge considered that the starting point for consideration of the law in this jurisdiction was the Supreme Court decision in *Connell v. Porter* (1972) [2005] 3 I.R. 601. He noted from the facts that "ordinary public user" in that case pertained to customers accessing a licenced bar;

> ". . . who must have been frequent and numerous. But this evidence in isolation was weak and insufficient. What made the evidence conclusive was that this frequent customer user was to be seen in the context of the expenditure of public monies on maintenance and repair on the lane." (para. 51)

39. He attached importance to the fact that in *Connell v. Porter* (1972), above, there had been evidence adduced of public expenditure on the disputed way including laying of concrete in 1931, road sweeping and cleaning, bin collections and (up until 1962) public lighting.

40. The trial judge also considered the High Court decision in *Walsh & Anor v. Sligo County Council* and, agreeing with the respondent, found it to be distinguishable on its facts from this case;

> "The nature of the user evidence described in the very recent *Lissadell* case was very distinct from that which arises here." (para. 57)

41. He reviewed the common law jurisprudence including *Mann v. Brodie* (1885) 10 App. Cas. 378, at p. 386 where Lord Blackburn considered 19th century jurisprudence and had cited the doctrine laid down by Parke B. in *Poole v. Huskinson* [1843] 11 M&W 827 at 830 where it was stated: 'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an *animus dedicandi*, of which the user by the public is evidence and no more.'

42. The trial judge identified the following questions as being germane to his determination as to whether a dedication of a public right of way could be inferred:

> (i) was there any actual dedication? It was noted that on this issue and in the question of acquiescence "the owner's state of mind is material."
>
> (ii) was there any act of public acceptance?
>
> (iii) what is the evidence of public user?
>
> (iv) was there evidence of public user "as of right"?
>
> (v) was there evidence of acts of public expenditure on the disputed way?
>
> (vi) was the evidence of user consistent with the three tests of *nec vi*, *nec clam*, *nec precario*? – "Whether such user was long, continuous and uninterrupted are relevant considerations, but may not be determinative."
>
> (vii) was the evidence of public user referable to acquiescence of the landowner or, alternatively, mere toleration not amounting to acquiescence?
>
> (viii) was there evidence of public user "as of right" together with a requisite degree of knowledge of same which can be imputed to the landowner sufficient to show his acquiescence?
>
> (ix) over what period of time did the public user take place?
>
> (x) how intense and on what occasions did such user taker place?
>
> (xi) what steps did the landowner take to counteract such user?
>
> (xii) were such steps proportionate to the acts of trespass in the sense that they were a commensurate action to prevent repetition of such acts?
>
> (xiii) is there evidence of local reputation of the disputed route being a public right of way?
>
> (xiv) what was the users state of mind? (para. 65)

Review of the Facts

43. The trial judge noted that in 1603 the Wingfield family were granted lands around Powerscourt including the subject property. He considered a detailed Powerscourt Estate map of 1816 which showed "how the land in the area was then apportioned; it identifies each tenant by name, and the size of each field to each acre, road, and perch." It appears that the Powerscourt Estate was broken up over the 19th century, from the coming into operation of the Land Acts 1860-1903. The enfranchisement of the Powerscourt estate tenants under the said tenant purchase scheme had substantially concluded by 1897.

44. The trial judge observed that the respondents did not seek to adduce positive evidence as to whether or not any part of the neighbouring property to the north of the respondent's land or the track leading down to the respondent's land is a public right of way. He observed that no application had been brought by the appellants to join adjoining property owners or any other owner along the disputed way;

> "The consequence of that decision is that the defendants are left asserting a "public right of way" which as it was put by the plaintiff's counsel, is a "road to nowhere". The failure to join Patrick Geoghegan and other landowners on the lane north of the plaintiff's property is puzzling, as well as creating a fundamental procedural obstacle for the defendants." (para. 76)

45. The trial judge was of the view that subsequent to the institution of the proceedings and prior to the hearing the respondent had removed earth in the vicinity of his dwelling house;

> "for a large access road or track which the plaintiff decided to build recently; this crossed the path of the disputed route... The plaintiff erected forest fencing around the plantation, which was made up of sheep-wire run between wooden posts with a strand of barbed wire running along the top. There were gates at both ends of the route." (para. 75)

46. Whilst the trial judge considered that the respondent was truthful he observed;

> "However, I think that he was also remiss in failing to apprise the court of the fact that he was actually going to build the new access track, though he did say in evidence that this was his intention." (para. 77)

47. The Court noted that a structure known as Canavan's Cottage stood directly across the route of the alleged right of way;

> "A number of maps show a cottage at or adjacent to the same site for nearly two centuries. In fact, there is a cottage shown just there in the Powerscourt Estate map of 181[6] . . . The cottage is clearly shown in the Ordnance Survey map of 1885. . . A laneway leads up to the Canavan's Cottage from Hughes' Lane, but goes no further. It was a cul de sac even then." (para. 81)

48. It appears that the respondent had been furnished with copies of evidence of witnesses to be called on behalf of the appellants, the trial judge noting in this regard;

> "The plaintiff did not dispute their evidence as to use of the disputed route." (para. 86)

The respondent accepted that the lands were not continuously policed and that it would have been easy for people to walk through unnoticed. The trial judge accepted his evidence that neither the respondent nor his father expressed any intention to dedicate the route as a public right of way. Under cross examination, two documents had been put to the plaintiff suggesting that he and his wife had acknowledged the existence of the public right of way in the year 1990 in a conversation with an individual carrying out a survey on behalf of Wicklow County Council. The trial judge found this evidence inadmissible since the said documents were never proved by the appellants in evidence. The respondent denied that he had ever acknowledged the existence of a public right of way as contended for by the appellants. In this regard, the trial judge stated "… the Court must therefore accept his denial, and that of his wife."

49. In the context of the assertion by the appellants that there was acquiescence and implied dedication of the path to the public, the trial judge considered two incidents that had occurred "from 2004 onwards" as negating any such acquiescence; the first being where trees planted by the respondent along the route of the right of way were "barked" i.e. killed by cutting around the base of the tree and removing the bark. A separate incident involved small fires being lit along the pathway. The trial judge considered that these incidents negatived any suggestion of acquiescence on the part of the respondent and "… demonstrate that the plaintiff had made entirely clear that he would not tolerate persons crossing his land."

50. The Court considered the evidence adduced by the appellants in relation to user and acquiescence. He noted in particular that the appellant's evidence on user "does not establish that the two appellants themselves were frequent users of the route at all." The evidence of the first appellant was that he had walked along the route a number of times in the early 1980's and again in the early 1990's;

> "He stated he did not record any obstructions but described the road as being quite overgrown. His walks took place only after Norman Walker's death. He accepted that he saw a gate at a point doing the route." (sic) (para. 106)

The second appellant testified to having used the route whilst training for marathon runs in the early 1980's and part of the 1990's.

51. The trial judge noted the evidence of Ms. Marie McDonnell, a witness called on behalf of the appellants, who for many years had been a Director of An Óige. Her evidence was that she had used the route whilst engaged with walking groups from the 1960's onwards. It was used by An Óige groups going to a youth hostel south of the respondent's property. She recalled that there had been a locked gate at one stage across the route of the disputed right. The trial judge noted;

> "I infer from her evidence that she accepted there was fencing at the Burned House [end] of the route, but did not recollect any fence on the Hughes' Lane end. She remembered meeting a gate [which] was a bit shaky. She accepted that this gate had been locked." (para. 108)

52. Mrs. Vera Fox gave evidence of having walked the route from the early 1940's onward. Her husband, Mr. Fox, provided testimony to the effect that it appeared to him as though the late Mr. Walker, father of the respondent, recognised that the route was a right of way. The Court noted he did not give any basis for this inference. It appears Mr. and Mrs. Fox when walking the disputed route occasionally met Mr. Norman Walker. He never objected to their user of the disputed way.

The lands were fenced and gated

53. In evaluating the evidence adduced on behalf of the appellants the trial judge stated at para. 118 "the defendant's witnesses were generally credible." The trial judge concluded, in this regard, at para. 119;

> "On one aspect of the users' testimony, however, I prefer other evidence. . . as a matter of probability I find the lands were fenced and gated at this period and at all times afterwards. It is impossible to conceive that sheep and ponies were kept on the land over years without fencing and gates back to Norman Walker's time. From that time onwards the

plaintiff's evidence on fencing and gates was simply not challenged in cross examination."

54. The trial judge noted the evidence of Dr. Costello, a landscape historian, who gave evidence on behalf of the respondent. The Court noted her evidence that in referring to a "road", she meant a "public road which would be under the charge of a Grand Jury";

> "For this purpose, she considered the various presentments to the Grand Juries under the Grand Jury Act 1765 – 1865 and the Restriction of Public Roads Act 1796. Such Grand Juries were the precursors of the modern-day local authorities although they were comprised mainly of local land owners. They were the bodies responsible for raising funds from local land owners for public works and road construction and maintenance." (para. 122)

55. The Court noted that;

> "The witness testified there was no evidence that the route in question was a public highway as and from the eighteenth century. Indeed the indications were to the contrary in that there simply were no such highways in the Wicklow uplands at that time, although there are indications that there was a track or path either proposed or in existence along part of the route." (para. 123)

56. The trial judge noted that "the defendants did not adduce any evidence in relation to the Powerscourt estate documentation or in relation to any previous owners." He noted that the appellant's own historical expert, Mr. Goodbody, had carried out a meticulous research in the Registry of Deeds and "found no evidence of a public right of way on any relevant title document. He did not find any evidence of public expenditure at any point either." The trial judge considered it noteworthy that "the defendants here chose not to engage in this aspect of proof." – para. 129 of the judgment.

57. With regard to older maps the trial judge stated;

> "There is good authority that old maps can be of assistance to a court in case of this type (see *Re McNeill's Application*, Barr J., High Court, 14th December, 2001, Unreported). But this does not justify a court engaging in speculation. Some of the evidence, and much of the cross examination by counsel for the defendants, while ingenious and creative, was entirely speculative. There is no evidence of the public actually using the route for at least a century prior to Liam Price in 1932." (para. 134)

Liam Price was an antiquarian and archaeologist who was also a retired district judge. He was the author of the so-called "Liam Price notebooks", which contain a description of walking the route of the disputed right of way on 18th December 1932. The trial judge noted in relation to this evidence;

> "This entry describes a line which I think is consistent with the disputed route." (para. 94)

Topographical representations on maps

58. At para. 139 onward of the judgment the trial judge summarises his assessment of the appellants' maps adduced in evidence. He indicated that he construed such maps as depicting roads, tracks and by-roads by "double lines on the one hand; but they depict walls by single lines. A single line depicts a wall, not a track or path unless there is some indication to the contrary." He reiterated that the Powerscourt Estate map of 1816 did not show any road or track between Canavan's Cottage and Butler's Cottage, i.e. between points E and F on the map.

59. The trial judge found that a number of maps adduced in evidence on behalf of the appellants were not consistent with the claim that a public right of way existed in the manner contended. These included an extract from William Duncan's 1821 map of Wicklow, the 1857 Ordinance Survey map, the 1865 Ordinance Survey map , an extract from the 1898 Ordinance Survey map, the "Red Cover" 1899 Ordinance Survey map. Referring to the latter two, the trial judge stated;

> "I find these two maps show the existence of a track proceeding from the end of Annacrivey Wood southwards, then westwards. I do not read this track, however, as connecting with the old road or Hughes' lane." (para. 140)

60. He made the following central findings of fact;

> "the 1760 Nevill map shows either a projected or actual route; but what is shown has no destination. It is not conclusive evidence as a right of way. The path of the route depicted does not traverse the entire of the disputed route. But the 1798 Nevill map does, as a matter of probability show a track, lane or road along that entire route. What was shown on this 1798 map (and on the Taylor and Wright maps) simply disappears on the 1816 estate map and all the Ordnance Survey maps of 1913." (para. 148)

He continued;

> "In my view, this was not a simple situation of a road falling into disuse. On the basis of the many later maps beginning with the 1816 Powerscourt Estate map what once apparently existed, simply no longer existed. It is no longer a road at all. It is true, of course, that "once a highway always a highway". But this *dictum* presumes that there was a highway from the beginning. The mapping evidence as a whole is in my view inconsistent with there actually having been a public highway. Had there been one, as a matter of high probability, it would have been identified in the Powerscourt title records or mentioned in Grand Jury Presentments, or in county or other local records. It appears in none of these. The fact that a path or road could actually "disappear" from maps for a century allows for only two possible conclusions; first; possibly it was a highway which was actually removed perhaps to assist in constructing the military road, or second, as I find more probable it was at all times an estate access track. Either of these conclusions is inconsistent with the defendants' case." (para. 148)

61. The trial judge concluded that the route was most probably an estate track;

> "It follows then that it was not a public highway. But even if this finding was incorrect, I do not think the defendants' case advances as a result."

The trial judge acknowledged that a public right of way cannot generally be extinguished by simple abandonment;

> "The maxim is "once a highway always a highway". There cannot be a presumption of extinction." (para.149).

62. In part of the judgment which is clearly *obiter* the trial judge cited *Representative Church Body v. Barry* [1918] 1 I.R. 402 as authority for the proposition that where an alleged highway had been stopped and the public excluded for about seventy years and a new road made, the Court could presume that the necessary legal steps had been taken to extinguish the highway under the Grand Jury (Ireland) Act of 1836;

> "Even if the route had been shown on some reliable evidence to be a public highway, I would be prepared to make a similar presumption on the very strong evidence here. Almost one hundred years' absence from the maps is a very long time indeed. It must be seen in the context of the building of the military road on a location very close to the route." (para. 149)

The trial judge concluded;

> "I infer that as and from 1816, (and very likely before then, from the inception of the Military Road), there was in fact no road or track along the route." (para. 150)

63. At para. 151 the judgment states;

> "I find it probable that a track was again constructed at the beginning of the last century. It is clearly illustrated in the Ordinance Survey maps of 1912, 1917, 1918, up to 1950. Much later, during Norman Walker's time it became covered at some points with furze nearer to Canavan's Cottage."

The trial judge continues;

> "The difficulty of all this, from the defendants' point of view, is that there is no evidence from which it can be inferred that there was dedication, other than the fact that the lines showing a road path or lane were depicted on the Ordnance Survey maps later. When one goes to the Ordnance Survey map for 1981, eight years *prior* to the afforestation, there is no continuous connection shown between the termini, but rather, a single line depicting a stone wall. The track has again entirely disappeared. … If the route was an "old road", it is surprising that the first reference to it in this way is in a map of Dublin and West Wicklow mountains published in 1990 by East West Mapping." (para. 152)

64. The trial judge concluded, at para. 154, that the respondent, as a matter of probability had negatived any act of actual dedication. "The evidence was that there had been no such actual dedication at any point during the Powerscourt dominion over the lands or at any point subsequently. It was open to the defendants to seek to controvert this, but they did not do so."

65. He considered at para. 156 that "the plaintiff has negatived the probability of inferred dedication up to the year 1950 when the defendants' evidence of user begins."

Tolerance is not acquiescence

66. The trial judge then considered whether the appellants had established that by virtue of long user a court should infer dedication. The trial judge focused on evidence regarding the respondent's father, Mr. Norman Walker, who had ownership of the lands from 1950 to 1980;

> "…he did not… raise significant opposition to any occasional groups as took a shortcut through his property." (sic)

The trial judge found such conduct consistent with tolerance but not acquiescence;

> "The evidence here is sporadic use by occasional hill walkers and local people, and certainly nothing in comparison to the situation from 2002 onwards. There is nothing in these events which posed an obvious challenge to his title." (para. 159)

67. The trial judge considered whether mere tolerance of hillwalkers crossing land by an owner gave rise to inferred dedication on its own. He concluded at para. 160 in this regard; "This question simply cannot be divorced from the nature of the user and the extent to which that user was obvious and "as of right" (*Folkestone Corporation v. Brockman*)."

68. The trial judge noted that the state of mind of the user may sometimes be material evidence as to whether they were taking advantage of permission and concluded;

> "There is no evidence of implied or express permission. … There is nothing to suggest that there was any assertion of user as of right during Mr. Norman Walker's time. It cannot be said that the use by the occasional hitchhiker was either "notorious" or "obvious". Much of the user evidence has a strong "local" connection where witnesses obviously knew Norman Walker to see." (para. 164)

69. He assessed the conduct of the respondent from 1980 onward finding on the evidence before him that use of the disputed way during that time was not continuous, "… it was occasional. It was not "obvious" in the sense of being a challenge to the owner. It was not "as of right". When the plaintiff encountered walkers, he remonstrated with them." (para. 166)

70. The trial judge concluded at para. 168 of the judgment;

> "Taking all the evidence together, and viewed in all the circumstances, I find the evidence and each part of it falls significantly short of inferred dedication and that that part of the counterclaim cannot succeed. Insofar as the plaintiff may have contended otherwise, I am not persuaded that the law states that a public right of way must necessarily lead to a public place (*Attorney General v. Antrobus* [1905] 2 Ch. 188)"

Appeal

71. The appellants, in a submission to this Court dated 2nd September 2016 identified the following as the key net issues for determination in this appeal:

> -Is the respondent, a private landowner, entitled to obtain an *in personam* negative declaration that the disputed route is not a public right of way?

-If yes, does the evidence establish that the disputed way is a public right of way?

Role of this court on appeal

72. It will be recalled that in *M.C. (A Ward of Court) v. F.C* [2013] IESC 36 the Supreme Court, MacMenamin J., considered the position of an appellate court;

> "Article 34.4.1 of the Constitution provides that the Supreme Court is the Court of Final Appeal. This Court exercises an appellate jurisdiction from the High Court. The jurisdiction of this Court on such appeals is addressed in the case of *Hay v. O'Grady* [1992] I.R. 210. This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As *Hay v. O'Grady* makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence (see also *Pernod Ricard and Comrie plc v. Fyffes plc* (Unreported, The Supreme Court, 11th November 1988)). Furthermore, in *Hay v. O'Grady*, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon on oral evidence or recollection of fact. In drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge."

73. In the instant case it is clear from the evidence that was before the High Court that an express dedication of a right of way was not established by the appellants.

74. In this regard the dictum of Lord Diplock in *Suffolk C.C. v. Mason* [1979] AC 705, at para. 709, is instructive;

> "The law of highways forms one of the most ancient parts of the common law. At common law highways are of three kinds according to the degree of restriction of the public rights of passage over them. A full highway or 'cartway' is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A 'bridleway' is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles and sometimes, though not invariably, the exclusion of the right of driftway, i.e., driving cattle, while a footpath is one over which the only public right of passage is on foot.
>
> At common law too a public right of way of any of the three kinds has the characteristic that once it has come into existence it can be neither extinguished nor diminished by disuse, however long the period that has elapsed since it was last used by any member of the public - a rule of law that is the origin of the brocard 'once a highway, always a highway."

Dedication by inference

75. Lord Diplock noted in Suffolk C.C. v. Mason aforesaid that in the case of ancient highways dedication by inference from public use is the most common method of establishing the existence of a highway. The classic description of dedication by inference is that of Lord Blackburn in Mann v. Brodie [1885] mentioned above where at p. 386 it was stated;

> " … where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

76. The decision in *Folkestone Corporation v. Brockman* [1914] A.C. 338 is an important exposition on the common law principles governing implied dedication of a public right of way. It is authority for the proposition that the presumption of dedication from use by the public is "… a probable inference from facts proved to the fact in issue, and it follows that in a particular case it is for the judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn." It represents good law in this jurisdiction.

77. As Lord Diplock noted in *Suffolk*;

> "If the way leads from one recognised highway to another, or from one inhabited settlement to another, the inference may be relatively easy to draw. If, on the other hand, the way leads nowhere, the inference may be more difficult to draw. But there is no rule of law that precludes a factual conclusion that a public highway has been established over a route that ends in a cul de sac."

Lord Justice Diplock cited *Moser v. Ambleside UDC* [1925] 23 L.G.R. 533 where Lord Atkin L.J. said at p. 540;

> "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see, you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise."

78. Whether or not there has been dedication is a question of fact to be decided upon a consideration of all the evidence adduced. The burden of proof of dedication lies upon the party alleging it. The issue cannot be determined without consideration of the entire corpus of evidence. *Animus dedicandi* can be inferred or presumed from evidence of long uninterrupted user as of right. It is noteworthy that in the instant case the appellants were in a position to point to a map dating from 1760 which showed the route of the way in question. The origin of the disputed way in question was not known nor the circumstance which might have led to its devotion to public use by an unequivocal act of any owner of the fee as would manifest the intention that it be dedicated, accepted and used for public purposes. In the absence of evidence to dispute or contradict the finding of the trial judge that the way constituted an estate way in the tenure of the Viscounts Powerscourt - a period which spanned almost three centuries - that crucial determination cannot be disturbed by this Court.

Relevance of non-joinder of other freehold owners along the disputed route

79. It is noteworthy that the disputed way ran over the lands of others apart from the respondent. The respondent's predecessor had effected a disposition of part of the lands acquired in 1950 to a Mr. Geoghegan. There were other owners along the route, particularly from points G, H, I and K of the route. This included the property known as "Burned House", also a locked gate at point H on the map

and the property of a Mr. Duggan.

80. Direct evidence of user by the public of the disputed way in 1760 and 1798 and indeed for almost a century and a half thereafter was not forthcoming. It was necessary therefore for the trial judge as the arbiter of fact to draw inferences from circumstantial evidence adduced before him. As has been stated; "The nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost limitless." *per* Diplock L.J. in *Suffolk C.C. v Mason*.

81. In the case of *R. v. Exhal* [1866] 4 F&F 922 Pollock C.B. stated;

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

The burden of proof for inferred dedication

82. The trial judge correctly identified the relevant Irish authorities, particularly *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279 which stated at p. 287; "The law relating to highways and the creation of public rights of way is a very ancient one and the relevant principles are well-established."

83. Dedication is a question of fact and can be inferred from the evidence. Though a witness for the appellants, Mr. Goodbody, suggested that records of any express dedication of a public right of way could have been destroyed in the fire at the Four Courts on 30 June 1922. However it is clear that this was an exercise in conjecture there being no evidence that the disputed way had been the subject of an express dedication.

84. In *Bruen v. Murphy* (Unreported, High Court, McWilliam J., 11th March, 1980) McWilliam J. considered the burden to be discharged where a public right of way is claimed as follows;

> "No question of user from time immemorial or creation by statute arises here. Therefore evidence of dedication is essential to establish this right of way. In this connection it must be emphasised that a public right of way cannot be acquired by prescription although user may prove sufficient evidence to support a presumption of dedication. The user need not be for any particular length of time but it is only evidence of dedication and must be such as to imply the assertion of the right with the knowledge and acquiescence of the owner of the fee."

85. At issue is whether the appellants established a public right of way which can be inferred from indirect evidence of dedication. The onus rests with the appellants to show that the evidence adduced was sufficient to lead the trial judge to a conclusion that on the balance of probability the owner of the property dedicated a right of way over his lands to the public.

86. There are three distinct elements to be satisfied;

> i. Evidence of user by the public as of right of the way over the owner's land.
>
> ii. Evidence from which an inference of dedication to the public can be made. Dedication is implied where an intention to devote the way over the land is clearly manifested by the conduct of the owner. The *animus dedicandi* is the vital element of every dedication.
>
> iii. Evidence must be adduced to entitle the court to infer and find acceptance by the public of the dedication of the way.

User alone does not establish or prove the creation of a public right of way rather dedication is the fundamental proof.

87. The trial judge had to determine whether the cumulative effect of all the evidence advanced on behalf of the appellants entitled him to conclude that some owner in fee, being a predecessor in title to the respondent had the requisite intention or *animus dedicandi* to dedicate the way to the public across his landholding. This is clear from texts such as "*Irish Land Law"*, Wylie, Fifth Edition, at para. 7.20.

88. Proof of "user as of right" does not require that the users believe subjectively that they have a right to use the way. The test is objective. In Bright v. Walker (1834) C.M. & R. 211, a judgment frequently cited in the jurisprudence of England and Wales on this point, at page 219, Parke B. said that the right must be enjoyed "openly and in the manner that a person rightfully entitled would have used it." Lord Scott of Foscote in *R (Beresford) v. Sunderland City Council* [2004] 1 A.C., 889 at page 904 suggested that it is sufficient if the user by the public is "apparently as of right."

89. Smeltzer is authority for the proposition that to establish a public right of way what has to be proved is an intent on the part of the owner to dedicate his land to the public, an actual dedication, and acceptance by the public of the dedication. *Smeltzer* represents an important authority in relation to implied dedications of rights of way. Thus, depending on the evidence adduced as to duration, frequency and intensity of user, an inference may be drawn by the court that the landowner has dedicated the way to public user.

90. The function of the court was described correctly by McMahon J. in the High Court decision in *Walsh & Anor. v. Sligo County Council*;

> "The court's quest, where public user is relied on, may be assisted by the availability of an inference, but in the final analysis, all the evidence placed before the court must be assessed against this single criterion: does the evidence advance or defeat the argument that the owner dedicated or must be assumed to have dedicated a right of way to the public. In this case a distinction must be made between mere permission granted by the owner to use pathways and dedication to the public in perpetuity."

Whilst his conclusions on the facts were reversed on appeal this statement was not disturbed.

91. Whether there was dedication is a question of fact and it is not necessary for the claimants to point to any express act of dedication. The process is one of inference, drawn from the strength of the probative evidence of user, and the fact that the user was as of right. It is relevant to have regard as to whether the landowner took any steps to, as was stated in *Folkestone*, "disabuse"

the public of their belief that it was dedicated as a public right of way and that they had a right to use the way. "The application of the presumption in a particular case is a question of fact." It must be shown that there was public user as of right. It must be exercised "*nec vi, nec clam, nec precario*". In Folkestone *Corporation v. Brockman*, Lord Kinnear explained, at p. 352, that in regard to proving dedication by implication;

> "public user…will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, with the knowledge and the acquiescence of the owner of the fee."

92. No particular duration of user is necessary to establish the dedication of a way as a public right of way.

The public

93. There was evidence before the High Court of the fall in population in Lower Curtlestown in the mid and late 19th century. However, it is important to note that, as a matter of law, the intensity of user or actual numbers availing of the way is not the material test with regard to proof of either user as of right by the public or acceptance by the public of an implied dedication. Rather it must be shown that the way was available to and availed of by the public at large and not merely to a closed category or class of individuals linked to an identified *propositus nexus* or other personal nexus such as family, employment, servants or tenants of the landowner. Provided a way is proven to be accessible to and used for the benefit of the public generally though the numbers actually availing of the way be low does not preclude a finding of implied dedication of a public right of way. Hence the determination of the trial judge that the disputed way constituted an estate way or track is inconsistent with an implied dedication to the public and precludes the occurrence of dedication by implication at any time during the tenure of the lands by the Viscounts Powerscourt.

Public maintenance

94. The statutory regime for public expenditure on the construction, repair and maintenance of roads commenced with the Presentment for Roads Act 1765 and was considered by McMahon J. in *Walsh v. Sligo County Council*. Subsequent amending statutes ensued including: Highways Acts of 1817 and 1818, the Grand Jury (Ireland) Act of 1836. The Act of George III 1796, entitled:- "An Act for the Amendment of Public Roads, for directing the Power of Grand Juries respecting Presentments, and for repealing several Laws heretofore made for those purposes" embodies the legal framework regarding a presentment for the construction, repair or maintenance of a public highway or public right of way.

95. McMahon J. in the High Court judgment in *Walsh & Anor v. Sligo County Council*, at paragraph 191 of his judgment, described the scheme in the following manner;

> "Presentment sessions were held in spring (Lent) and summer each year and were responsible, inter alia, for road construction, maintenance and bridge building. A person wishing to repair or construct a road was required to have a survey carried out by two engineers and have an affidavit sworn before a Justice of the Peace in the prescribed form. The affidavit required the road to be identified as being: "the road from … to …between … and … all in the barony or half barony of…", the spaces being filled in by the applicant. If the work was approved, payment was made only after another affidavit of completion was sworn, again before a Justice of the Peace. The grand jury also, of its own motion, could present a road for repair or construction, subject to similar affidavits being sworn."

96. While evidence of public expenditure on the maintenance of a way supports an inference that it is a public right of way, it is not of conclusive effect. A record of a presentment does not create a highway: it is merely evidence which may support the existence of a highway. As Holmes L.J. in *Giants Causeway Co. Ltd. v A.G.* (1898) 5 N.I.J.R 301, 320 stated, the value of evidence of a presentment might be great or small depending on the circumstances.

97. After 1836 only roads which had been taken "in charge" were subject to a public duty to maintain. The failure to make such public repairs, particularly in respect of a pathway where vehicles or carriages were not shown to go past does not necessarily have the same force nor can adverse inferences be drawn from the absence of records of maintenance and public expenditure per se. A distinction must be made between a public road and a public right of way. The latter may exist over any particular route, but it is not a public road unless and until it is taken in charge by a local authority pursuant to statute.

98. The judgment of Ó Dálaigh C.J. in *Connell v. Porter* (1972) is illustrative of the probative value of adducing clear evidence of maintenance of a lane or pathway at public expense particularly where other evidence in support of an implied dedication is weak, inconsistent or not forthcoming;

> "The evidence of user, in this instance, if it existed in isolation, I would consider weak and insufficient; but when taken in conjunction with the evidence of expenditure, for various purposes on Nash's Court, a strong case is made out for the presumption of dedication." (p. 606 of the judgment)

At p. 608 of the judgment Ó Dálaigh C.J. commented on the probative significance of the evidence of actual public expenditure on the maintenance of the way which had been advanced at the hearing in the High Court;

> "The maintenance of Nash's Court by the corporation as a highway was such a notorious and obvious fact that it would require strong evidence on the part of the owner of the fee to displace the presumption that he must have been aware of it."

99. The stance adopted by the appellants in the instant case in regard to the disputed public right of way was unorthodox. It would appear overall they took a position of refraining from expressly claiming or asserting the existence of such a public right of way such as seeking a specific declaration in that regard but simply asserted the existence of a public right of way in substance as a defence to any claim in respect of trespass.

100. Arising from that approach, a number of factors require to be taken into account:

> i. Firstly, the appellants did not seek to adduce positive evidence as to whether any part of the adjoining properties to the north of the respondents or the track leading down to the respondent's land constituted a public right of way.
>
> ii. Hence no application was brought to have potentially affected adjoining landholders joined as parties or notice parties to the proceedings.
>
> iii. The trial judge correctly noted that this presented a fundamental procedural obstacle for the appellants.

101. I conclude that the evidence of Dr. Costello was of very limited assistance since, as the trial judge noted, her evidence was focused on whether the disputed route was a public road the maintenance and upkeep of which would be under the charge of a Grand Jury. As stated above, it is clear that, particularly from 1836 onward, such were confined to public highways and clearly this route was at best capable of supporting passage on foot and there did not appear to be any evidence before the trial judge of user of the way with vehicles or horses.

102. The evidence of Dr. Costello could not be outcome determinative as to the nonexistence of a public way on foot along the disputed route, though her evidence on balance clearly indicated the absence of any records of it being treated as a public highway or maintained as such under the Grand Jury Acts 1765 – 1865 or the provisions of the Restriction of Public Roads Act 1796.

The appellants' map evidence

103. The appellant's case in the High Court and on appeal was substantially based on mapping evidence and 12 separate maps were advanced for consideration by the trial judge which were disposed of as follows;

(a) The Jacob Nevill map of 1760;

The trial judge noted at para. 147 that "this does show a lane from Blackhouse southwards to Annacrivey. However, what is illustrated on this map is, I find, inconclusive. The illustrated laneway actually stops some hundreds of yards short of the Curtlestown Bann River. It does not show that the lane or path had any destination, or that it was a connection to any other road or population centre in the map. It is possible that in fact what is shown here is a projected road rather than an actual one. This is to be contradicted with the 1816 estate map referred to earlier." (sic)

The trial judge accordingly rejects the Jacob Nevill 1760 map as probative of the existence of the right of way as at the date of that map.

(b) The 1798 A.R. Nevill map;

The trial judge found that this map clearly showed a road proceeding from Kilmolin southwards to Annacrivey and thereafter connecting to the Military Road. "It is possible that what is being illustrated here was a projected roadway but what is shown is undeniable. It cannot be simply explained away especially in conjunction with other maps. I find this shows a road, or track, along the disputed route. My inferences as to what occurred are set out later."

(c) The 1816 John Taylor map;

The trial judge took issue with the depiction of the disputed pathway on this map. "I find this map, unusually, shows a by-road as parallel faint pecked lines extending westward from Blackhouse Lane across the valley to Loch Bray. … The detail appears to be taken from A.R. Nevill's map. There is a milestone "10" depicted along the line of the route which Mr. Goodbody says would be unlikely on a private road." (sic)

(d) A map from G.N. Wright's Guide to County Wicklow;

Attached to this map and guide was a commentary which stated: "From Lough Bray there is a tolerable good road through the vale of Glencree in front of the barrack and along the foot of Glasskenny Mountain to Enniskerry a distance of about four miles passing Blackhouse, Killmolin and Killganon and joining the high road at Enniskerry Bridge."

The trial judge noted that this map appeared to illustrate a route referred to in the guidebook along a route which may be consistent with that illustrated in the two Nevill maps of 1760 and 1798. The trial judge noted in this regard "However the commentary is too imprecise to raise any inference; it might equally refer to the Military Road as to any other road."

(e) The Ordinance Survey 1839 six inch map;

The trial judge rejected the proposition that the line of a road is or could be shown by a single line which might depict it as being "fenced on one side" or informal. He expressed the view that it was more probable that the line on this map was illustrative of a stone boundary wall. "I consider that any proposition to the contrary would be inconsistent with the accepted norms."

(f) The Ordinance Survey 1885 six inch map;

The sixth map relied upon was the second edition of the 1885 Ordinance Survey six inch map which again showed a single line along the route of the disputed right of way. The trial judge rejected its probative value stating "In my view, this demonstrates a boundary wall." However he did attach significance to one element of the map as follows, "What is significant … is that this 1885 map shows as does the 1816 estate map, that Canavan's Cottage is actually on the line of the route. Therefore, the 1885 map shows a boundary wall proceeding from the southern point of Annacrivey Wood southwards and then westwards to Canavan's Cottage where it stops. I consider this is not at all consistent with the continuance of a track or lane to a terminus on the public road."

(g) The Ordinance Survey one inch maps of 1904 and 1909;

Both show a track or path running through the disputed section. The trial judge noted however; "They do not show a double continuous line along the route, but rather, one continuous line and one broken parallel line. This would suggest a pathway running beside the boundary wall. However, I consider that this is not supported by the Ordnance Survey twenty five inch map for 1909 which simply shows a stone boundary wall."

(h) The Ordinance Survey half-inch maps of 1917 and 1918;

These were found by the trial judge to be supportive of the appellant's case in that they undoubtedly show a double lined pathway along the disputed route.

(i) The Ordinance Survey half-inch map of 1832;

The trial judge likewise found the said maps to be probative of a pathway along the disputed route.

(j) The Ordinance Survey half-inch maps of 1945 and 1946 were found by the trial judge to "show a path or laneway along the route in question."

(k) The Ordinance Survey maps of 1948 to 1951 also showed the said path or laneway.

(l) The Ordinance Survey map of 1975 showed the route as a double line leading from Blackhouse through Annacrivey to the Military Road at Curtlestown.

104. The trial judge assessed the maps adduced in evidence by the appellants against the 1816 Powerscourt Estate map, which was adduced in evidence on behalf of the respondent. He concluded; "The mapping evidence as a whole is in my view inconsistent with there actually having been a public highway." Whilst he accepts the maxim "Once a highway, always a highway" he cautions "This dictum presumes that there was a highway from the beginning."

Estate road
105. The trial judge concluded on the evidence before him that the way shown on the maps adduced on behalf of the appellants was more probably "at all times an estate-access track". He expressed the view, that such a finding was inconsistent with the appellant's case. As a matter of law such a private estate track is inconsistent with user as a public right of way and proof of public user, dedication -express or implied- and public acceptance of such dedication must be adduced from the point in time when it is established that such a way ceased to be an estate track.

106. There was uncontroverted evidence before the trial judge upon which he was entitled to rely to establish that the freehold title to the disputed way was vested in the Wingfield family, later Viscounts Powerscourt between 1603 and circa 1897.

107. No evidence was adduced on behalf of the appellants as to the freehold title from 1897 to 1950. In fact it was specifically pleaded in the amended defence that the way constituted a pathway from "the westerly point where the plaintiff has posted and maintained notice of that order." Nevertheless, the fundamental proofs were not before the Court to satisfy the evidential requirements for such a claim and hence the findings of the trial judge in that regard cannot now be disturbed on appeal.

108. The appellants failed to discharge the burden of proof including as to the requisite user by the public as of right of the disputed way over the owner's land. There was not sufficient unequivocal evidence, including evidence of conduct, from which an inference of dedication or *animus dedicandi* could be made consistent with an implied intention to dedicate the disputed way to the public. Such an intention should be manifest from the conduct of the owner. There was insufficient evidence which would have entitled the Court to infer or find acceptance by the public of the dedication of the way.

109. This Court is confined to the grounds of appeal as they have been framed. The failure to adduce evidence at the trial of the action as to the freehold title and ownership to the lands over which the disputed way ran prior to 1950 represents one of several significant omissions in respect of key proofs on the part of the appellants.

110. The trial judge treated the 1816 Powerscourt Estate map as outcome determinative in regard to the non-existence of a right of a public highway;

> "It is very improbable such a remarkably detailed estate map from 1816 would have failed to show a public road running through the Powerscourt Estate, if it then existed. It certainly showed every other detail. The Ordinance Survey maps following show a bare stone wall standing along the route for almost precisely one century thereafter." (para. 150)

111. From an historical perspective in the case of a public right of way a key proof of lawful origin for such a right is an *animus dedicandi* of the landowner at some unknown date in the past. In the context of public rights of way, in the case of Jones v. Bates [1938] 2 All E.R. 237 at p. 244 Slesser L.J. at p. 239 noted;

> "Before the passing of the 1932 Act, when dedication had to be either proved or to be inferred, the mere proof of long, continuous and uninterrupted user of the way by the public, though it was evidence from which dedication might be inferred, did not create a presumption in favour of dedication. It was always a question of fact."

Scott L.J. in the said case stated that actual dedication was "often a pure legal fiction [which] put on the claimant of a public right of way an artificial onus which was often fatal to his success."

112. Since the decision in 1914 of the House of Lords in *Folkestone Corporation v. Brockman* [1914] A.C. 338 which is considered to offer a framework for determining the existence of a public right of way said to be based on implied dedication, it has become settled law that user is no more than evidence from which dedication can be inferred. It is open to the arbiter of fact to ascribe the user to toleration or to some other cause depending on the strength of evidence adduced.

Canavan's Cottage
113. It is clear that the appellants did not address the issue of Canavan's Cottage adequately at the hearing of the action. The physical presence of a cottage built right across the route of the right of way in such a manner as to block it at the very least offers evidence that the route ends at the obstruction in question. It is shown on maps from the early 19th century onwards as entirely obstructing the way contended for.

Documents not proven
114. A key material omission on the part of the appellants at trial pertained to the Wicklow County Council documentation. It was alleged by the appellants that the documentary evidence emanated from a County Council survey of rights of way effected in the early 1980s. It was contended on behalf of the appellants that this amounted to "documentary proof of an acknowledgement by the respondent of the existence of a public right of way. It appears the documentation suggested that the respondent and his wife had acknowledged the existence of the right of way and its route to an official of Wicklow County Council. The trial judge rejected their admissibility stating; "To accept such material as evidence as to acknowledgment in the absence of any form of proof whatsoever would amount [to] allowing hearsay upon hearsay."

115. The trial judge acknowledged that the said documentation "could have been very significant." He noted that it was difficult to understand why official witnesses could not have been *sub poenaed* from the County Council to prove the documents if they emanated from it and had been held in its custody. The trial judge further continued; "It was not even shown there had been such a survey or who conducted it. No application was made to hear evidence on commission from the witness who was ill."

116. Perhaps that omission and its practical consequence for the case is illustrative of the desirability of the greatest care being taken in pursuance of a claim or counterclaim which is advanced in the public interest and for the public benefit.

117. The inadmissibility of that evidence would appear from the statements of the trial judge to have fatally undermined the appellant's prospects of procuring a declaratory order that a public right of way existed over the route and that its implied dedication was to be inferred. As a history of the case of *Connell v. Porter* (1972) demonstrates, the same issue concerning the same laneway had previously been determined differently with a different plaintiff and on different evidence in the High Court in the year 1956. Since the orders were made *in personam* it is open to the Court to consider the issue of an implied dedication *de novo* should new or different evidence be forthcoming there being no issue estoppel arising.

Negative Declaration

118. The purpose of a declaration is to specify what the rights of the parties are by defining in a binding and conclusive manner the rights in question. The respondent's pleadings are couched in negative terms.

119. The relevant legislation in this jurisdiction is s. 155 of the Chancery (Ireland) Act of 1867 which provides that:

> "No suit in the said (Chancery) Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the Court to make binding declarations of right without granting consequential relief."

The capacity to grant a declaration in the instant case of the kind made by the trial judge was however fundamentally circumscribed by his determination at para. 151 of the judgment;

"I find it probable that a track was again constructed at the beginning of the last century. It is clearly illustrated in the Ordnance Survey maps of 1912, 1917, 1918 up to 1950. Much later, during Norman Walkers time, it became covered at some points with furze nearer to Canavan's Cottage."

In *Messier – Dowty Ltd. v. Sabena* [2001] W.L.R. 2040, at p. 2050, Lord Woolf M.R. stated;

> "The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the Court should not be reluctant to grant such declarations. They can and do assist in achieving justice.
>
> While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling "defendant." This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so."

Lightman J. in *Greenwich Healthcare NHS Trust v. London & Quadrant Housing Trust* [1998] 1 W.L.R. 1749 cautioned that;

> "A declaration as to the future should only be granted where there can be no serious dispute about the facts (or future facts) and their impact on the legal right in question. This is particularly so where the disputed facts are of the "fact and degree" variety."

In the text Zamir & Woolf, *"The Declaratory Judgment"*, 3rd Ed., the general reluctance of courts to adjudicate on any issue which has a hypothetical dimension is emphasised where it is stated that the motivations of parties to either seek or oppose a declaration do not render a case incapable of being considered hypothetical. The key element in determining whether a case is hypothetical is instead based on whether the particular dispute is based on concrete facts.

120. In *Ciara Quinn & Ors. v. Irish Bank Resolution Corporation Ltd. & Ors.* [2015] IESC 29, [2016] 1 I.R. 1 the Supreme Court noted that the courts are prepared to entertain applications for negative declarations so that clarity could be brought to a question of liability denied by the applicant in very limited circumstances. At p. 223 Clarke J. observed;

> "It is well settled in this jurisdiction that, at least in certain cases, a party can seek a so-called "negative declaration". While the precise parameters of the circumstances in which such declarations can be obtained have not yet been fully established, the underlying rationale is clear.
>
> A party may be faced with a claim which it denies. It does not, in itself, make any cross claim. Rather, it simply denies that it has any liability to the claimant. However, the claimant does not commence proceedings and, in the absence of an ability to apply for a negative declaration, the relevant party would be left with the claim hanging over them until such time as either the claimant sues (in which case the matter will be resolved by the court) or withdraws its claim or, indeed, allows the period provided in any relevant statute of limitations to expire."

121. Prior to the mid-1800's, a declaration had to be ancillary to specific equitable relief.

In the context of a claimed public right of way it must be borne in mind that the within proceedings were not constituted in such a fashion as would facilitate a declaration in rem. Viscount Maugham stated in *London Passenger Transport Board v. Moscrop* [1942] AC 332;

> "I also think it desirable to mention the point as to parties in cases where a declaration is sought. The … persons really interested were not before the court... It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

122. A public right of way cannot be released by abandonment at common law. The public cannot release their rights, and there is no extinctive presumption arising in the case of a public right of way.

123. This was acknowledged in a number of authorities, including O'Hanlon J. in *Carroll v. Sheridan & Sheehan* [1984] I.L.R.M. 451. The learned judge considered that the way under consideration in that case was likely to have been a public right of way however

the plaintiffs had failed to make such a claim in their civil bill. His comments are necessarily obiter. He stated that had the plaintiffs advanced a claim that the lane constituted a highway, the fact that the lane had become overgrown would present them with no difficulty. The trial judge stated in this regard "It is an established maxim — once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription."

The Representative Church Body v. Barry

124. The trial judge stated, *obiter*, that if the route shown on the maps (and which he acknowledges at para. 147 of the judgment to be apparent from the Ordinance Survey maps of 1917, 1918, 1932, 1945, 1946, 1948 – 1951 and 1975) had been found by him on the evidence to have constituted a public right of way then he would have proceeded to declare same extinguished (para. 149 of judgment and para. 62 ante.). This option he considered available to him as outlined by Peter Bland in his text *"Easements"* 3rd edition, 2015, which states: "In the appropriate circumstances a court will bring to an end the right of the public to pass on highway by presuming that the necessary legal steps had been taken to extinguish it on the basis of the maxim "*omnia praesumuntur rite esse acta*"." The author references the decision in *The Representative Church Body v. Barry* [1918] 1 I.R. 402 where an alleged highway had been stopped and the public excluded for 70 years and a new road constructed, Dodd J. had been prepared to presume that the necessary legal steps had been taken to extinguish the highway pursuant to the provisions of the Grand Jury (Ireland) Act of 1836.

125. However I consider that the facts of the *The Representative Church Body v. Barry* case are wholly distinguishable from the facts in the instant case and the evidence adduced before the High Court. I am satisfied it is not a useful or even relevant authority in that the evidence of non–user was extreme and unusual in *Barry* being that there had been no public user whatsoever of the disputed way for over 60 years. At the level of principle *Barry* is distinguishable on its facts in several respects not least that the public right contended for was claimed to be confined to user on foot only and by day only since the estate gates were locked each evening and re-opened each morning. In light of key findings of fact made by the trial judge and the uncontested evidence of the respondents and their witnesses which are fundamentally inconsistent therewith, a finding of extinguishment could not have been validly made by the trial judge based on *The Representative Church Body v. Barry* in the instant case, had the issue arisen for determination,

User referable to toleration and not dedication

126. The trial judge classified the stance of the appellant and his father as "tolerance of occasional trespass" and as such inconsistent with a claim of implied dedication by either or both of them of the disputed route to public use. At the level of principle user of a pathway without express permission is not necessarily user as of right. Whether particular acts of user amount to user as of right requires account to be taken of all the material circumstances. Acts may be tolerated or acquiesced in by a landowner without being considered to amount to the exercise of a right. Lord Hoffmann outlined the position at common law as follows in *R. v. Oxfordshire County Council* (*ex parte* Sunningwell P.C.);

> "in the case of public rights of way, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated the use."

127. Bowen L.J. 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) stated;

> "…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."

128. Lord Dunedin at page 375 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. But from that house there leads another avenue to the north which connects with a public road different from that from 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 the one avenue and down the other - perhaps without actually calling at the house - raise a presumption that the landholder had dedicated his private avenues as highways? The user would be naturally ascribed to good nature and toleration."

129. Farwell J., in *Attorney-General v. Antrobus* [1905] 2 Ch. 188 at 199, which concerned a claimed public right of way to access Stonehenge, extolled "the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property…" adding, at page 199, that;

> "It would indeed be unfortunate if the 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. By contrast, where there is clear evidence of open public user for an extensive period of time, the owner will not easily displace the inference of dedication by proof of purely subjective and uncommunicated objection. Lord Blackburn in the passage from *Mann v. Brodie*, suggested that dedication would be inferred if a landowner "took no steps to disabuse [the public] of their belief" that the way had been dedicated. The decision of the House of Lords in *R (Godmanchester Town Council) v. Secretary of State for the Environment*, involved evaluation and consideration of a landowner's intention in the context of the statutory regime which operates in England and Wales under the Highways Act (UK)1980. there was "sufficient evidence that there was no intention during that [20 year] period to dedicate it." Under the statutory scheme the onus is on the land owner to negative a presumption of an intention to dedicate a way as a public footpath."

130. Subject to the caveat that *Godmanchester* involved a statutory regime which does not operate in this jurisdiction the dictum of Lord Hoffmann is illuminating where at page 96, he stated "the evidence must be inconsistent with an intention to dedicate." He referred to *Mann v. Brodie* and the necessity to "disabuse" the public if an owner does not intend to dedicate a right of way to public use. Lord Hope stated, at page 101, that the common law had not "laid down fixed rules" as to how an intention not to dedicate should be properly communicated but was of the view that "the landowner must communicate his intention to the public in some way…"

131. Whether the respondent and his father had communicated their intention not to dedicate was a matter of fact. Looking at all the circumstances, it had to be determined objectively whether, in spite of the evidence of user, they had demonstrated that they had resisted dedication. If an individual has acquiesced without demur in the user, it will normally be inferred that he has dedicated. Communication may take many forms.

132. Lord Bingham, in *R (Beresford) v. Sunderland City Council* [2003] 3 W.L.R. 1306 (at page 893) provided examples of acts which a landowner might take to show that land is being used by permission, and not as of right. That decision turned on whether the admitted user of the land had been by virtue of an implied licence. Lord Bingham stated as follows;

> "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 the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so 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 so permits such use."

In determining whether dedication is proven the primary focus is on the intention of the landowner, Lord Atkinson in *Folkestone Corporation v. Brockman* saying, at page 367, that the "crucial matter [is] the existence in the mind of the owner of an intention to dedicate……"

The Supreme Court in *Walsh & Anor v. Sligo County Council* [2013] IESC 48, [2014] 4 I.R. 417 stated at para. 109;

> "The basic rule is that regard must be had to all of the evidence when considering proof of dedication. The private thoughts of the landowner not communicated to anybody would be insufficient to rebut the inference. However, the entire context must be taken into account. Regard should be had to the entire approach and behaviour of the landowner."

Jurisdiction of trial judge to grant negative declaration *in personam*

133. The objective of the trial judge in granting a negative declaration *in personam* appears to have been of his own motion to "serve a useful purpose from the standpoint of clearing the plaintiff's title." At the level of principle, I am satisfied that he did have jurisdiction to grant such a declaration in very limited and defined circumstances. It is imperative that a negative declaration not be granted in language so wide as to risk its use as a stratagem by the beneficiary of such a declaration to assert rights greater than or inconsistent with the underlying findings and determinations of the court which grants the negative declaration in the first place. The ambit of a negative declaration granted *in personam* and the identity of those it seeks to bind should be unambiguous and apparent from the face of the order particularly where it pertains to title to property.

134. That the appellants failed to establish the existence of a public right of way across the disputed route is not probative of whether a public right of way exists or not. At best, the respondent is entitled to a negative declaration *in personam*, having regard to the stance adopted by him at the trial and in circumstances where the appellants failed to satisfy the trial judge that there was sufficient evidence of an implied dedication by him or by any predecessor in title of fee simple to the disputed way.

135. The ambit of the negative declaration granted, as the trial judge makes clear in his judgment, is restricted to operate *in personam*. This requires to be expressly evident on the face of the order. The negative declaration should be directed to the appellants alone. In its current formulation the declaration granted, considered without reference to the detailed judgment of the trial judge, appears to potentially oust the jurisdiction of the courts *in futuro* to make determinations regarding the disputed way. The terms of the order should be adjusted to ensure clarity and in the interest of third parties who also may come to rely on the Court order.

136. A claim for a negative declaration cannot be construed as giving rise to a cause of action in itself. Clarke J. in *Ciara Quinn & Ors. v. Irish Bank Resolution Corporation Ltd. & Ors.* [2015] IESC 29, [2016] 1 I.R. 1 stated at 11.28;

> "A plaintiff who seeks a negative declaration does not claim any redress against the defendant. Rather, the plaintiff simply wishes to have it established in advance of any claim being brought by that claimant that the relevant claim would necessarily fail. For the reasons which I have addressed, the courts are prepared to entertain such applications because, at least in some circumstances, it might be considered unfair to require the person claimed against to await, perhaps for some time, a claim being brought, and thus have the claim hanging over them. But that does not alter the fundamental position which is that the substance of the claim, even in proceedings involving only a negative declaration, is one where the cause of action lies in the hands of the defendant and the only relief sought by the plaintiff is to deny that a valid cause of action exists."

On the facts of that case the learned judge stated;

> "In those circumstances, it does not seem to me that the type of negative declaration sought by the Quinn's, in which the validity of the various guarantees or securities are questioned on the grounds of unenforceability, is a cause of action in itself. It is in substance an attempt to get the court to declare in advance that any claim which might be brought on foot of those guarantees and securities would fail on the grounds of unenforceability."

Order *in personam* not *in rem*

137. The decision of *Moore & Ors. v. The Attorney General* [1930] I.R. 471 (Supreme Court) is authority for the proposition that an order which is in the nature of an execution will only be granted *in personam* and will not be granted against any person not a party to the action. Kennedy C.J. stated "The words "and all other persons", in the decree made in the present case are nugatory and of no effect. A perpetual injunction seems to have been erroneously supposed to mean a universal injunction." (at p. 499.)

Encouragement to settle

138. The fact that the trial judge urged the parties to reach a compromise does not constitute a valid ground of appeal. It is clear that the fitful nature of the trial was referable in part at least to the unusual approach adopted by the appellants in regard to how they would proceed with the public rights aspect of the claim.

Interpretation of maps

139. The approach of the trial judge as to how the depictions of a way on the map and other topographical features were to be construed was not the subject of challenge at the hearing. Neither does it appear that the appellants submitted evidence suggesting that the trial judge was in error in the approach he adopted at the trial. It is not open to this Court to interfere with the unchallenged methodology adopted by the trial judge now.

Conclusions
140. The appellants failed to establish as a matter of law that a public right of way subsisted along the route shown on the judgment map and marked with the letters A – K inclusive.

141. The appellants had contended that the path constituted a public right of way but do not appear to have asserted or adduced evidence that it ever constituted a public highway.

142. The appellants did not address adequately in their evidence the adverse legal inferences to be drawn from the construction of a permanent structure described as "Canavan's Cottage" across the route of the right of way which appears on maps including a map adduced in evidence by the respondent being the Powerscourt Estate map of 1816.

143. The appellants failed to properly prove at the hearing of the action potentially significant evidence including a survey carried out by Wicklow County Council in relation to public rights of way in the county.

144. The County Council was not joined as a party to the proceedings or as a notice party, nor was a third party application brought, and relevant witnesses from the County Council were not called and evidence was not sought to be taken on commission in regard to same.

145. Freehold owners of a significant portion of the disputed path way were not joined as parties or made notice parties to the counterclaim. This circumscribed the capacity of the trial judge to make any declarations or orders affecting their freehold ownership.

146. The appellants failed to establish that they were entitled to go on the respondent's lands as of right for the purposes of the exercise and enjoyment of a public right of way.

147. I am satisfied that the trial judge did have discretion to make a negative declaration *in personam* in the circumstances. However the terms of same require to be modified for the reasons outlined above.

148. Accordingly, subject to modification to the declaratory order made by the trial judge, this appeal should be dismissed on all grounds.

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...