Neutral Citation Number: [2010] IEHC 157

THE HIGH COURT

2003 4311 P

BETWEEN/

NIGEL GRENNAN AND FRANCES GRENNAN

PLAINTIFFS

AND

LIAM O'FLAHERTY AND GARY RYAN

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin delivered the 27th day of April, 2010.

1. The plaintiffs are owners of a house known as "Wendell" on Torquay Road, Foxrock, Co. Dublin. It is a two-storey detached dwelling on approximately 0.35 acres of land. It is positioned to the south side of Torquay Road. To the south, the rear garden backs onto a green open space which forms part of a sports ground owned by Kilmacud Crokes G.A.A. Club for the defendants, the nominated representatives of the Club.

2. The plaintiffs' claim is essentially brought in nuisance and trespass. This judgment is confined to the issue of liability, the question of damages or other remedies being held over.

3. The case arises from flooding which the plaintiffs contend was caused by acts of nuisance of the defendants as occupiers of the neighbouring playing pitches and land which lies to the south of the plaintiffs' land and runs along their back garden wall. Kilmacud Crokes' grounds are extensive. They run some hundreds of metres to the south and west at the rear of the plaintiffs' land. The Grennan's rear garden wall forms part of the boundary to the club lands as do the garden walls or fences of the neighbouring houses on the south of Torquay Road.

The defendants' property

4. The defendants' premises are not a perfect rectangle. They are best imagined as "hatchet shaped" with Wendell lying just below the junction point between the upturned head and the handle. The hatchet "handle" runs to the left as one stands at the rear of Wendell. The area surrounding this junction will be called the "neck area" or the "subject lands".

5. There is now on the defendants' side a raised line of earth which runs very close to the rear boundary walls of the Torquay Road houses. How this was built in 2004 will be described in greater detail. The former Harcourt Street railway line ran near the path of this earth wall or "berm" until the late 1950s. Its path ran along the rear boundary of the houses. The iron tracks and supporting foundation material - known as "ballast" - was laid years before by the Great Southern Railway Company. Obviously for safety reasons there could then have been no direct access from the gardens of the houses onto the railway. However, after the line became derelict things changed.

6. After the railway, the subject lands which lay outside these garden walls fell into disuse. From some point, possibly in the early nineteen eighties it was used by builders to store material. The land became partly covered with brambles and undergrowth. A narrow space of perhaps 18 feet ran from the plaintiffs' rear boundary to the path of the line itself. Many of the Torquay Road homeowners (including the owners of Wendell) opened rear gates or doors onto this derelict land. Some (but not the plaintiffs), tried to extend their gardens right into the subject lands. Ultimately the defendants repulsed their efforts when they acquired the property. The residents used the rear area for recreational purposes. After the plaintiffs moved into the house in 1989 their two young children used to play there. Much court time was devoted to determining the relative level of the garden then compared to the club lands.

7. One of the reasons why the Grennans bought Wendell was because the rear garden was south facing. The family had previously lived in Torquay Road for many years though they had never visited this house prior to purchasing it. The Grennans put a new roof on the house and carried out many renovations. They added extensions to the rear and to one side of the house. While the plaintiffs had not been familiar with the house prior to the purchase they clearly knew the area very well as they had lived just across the road.

8. Mrs. Grennan is a keen gardener. This was also one of the reasons why she and her husband decided to buy the house. She described the rear garden as having been particularly beautiful containing a number of very old shrubs, plants and trees. She said it had a "fabulous" lawn and a beautiful garden. The plaintiffs' gardener Mr. Paddy O'Brien, retired, came in to tend the garden one half day a week both winter and summer.

9. There is no brick or block wall lying between the plaintiffs' back garden and the defendants' lands. Instead the boundary is described by a large laurel hedge and fencing. Every so often Mr. O'Brien, the gardener, would cut the hedge back.

10. Immediately to the right or west, as one stands at the back of Wendell, there is another house which has now fallen prey to the recession. It was being re-developed but this has ceased for some time past. What lies there at the moment is a half re-built dwelling surrounded by scaffolding. There is no boundary wall to the rear of this house either. Instead there is some hedgerow and a chain link fence. Wendell too, has a chain link fence lying within its laurel hedge. This acts as a reinforcement of the boundary against intruders.

11. To gain access by car to the club grounds from the Wendell direction, one would turn left coming out of the front gate of the house, travel down Torquay Road, turn left again at Leopardstown Road and thereafter enter Tudor Lawns, a newer development of well established semi-detached houses built in the early 1980s. The entrance to the club lands is through Tudor Lawns and lies at the corner of that property furthest away from the plaintiffs' land. To the south and east of the G.A.A. grounds (at the opposite side of the "axe handle" from Wendell) there lies the boundary to Leopardstown Racecourse, bounded by a high wall.

12. If one draws a line diagonally from the Tudor Lawns entrance across to "Wendell" the land is not flat. From the club's entrance gate, diagonally across to the plaintiffs' rear boundary the land falls by a little more than eleven feet. There is too, a slight incline as one walks the much shorter distance straight across the neck from the back garden of Wendell to the racecourse wall. In some areas here there are hollows which are damp and marshy.

13. By the time the plaintiffs bought Wendell in 1989 the defendant had already commenced reclamation work of the playing area, situated in the main part of the club lands. But one area which remained neglected was the neck area and all that immediately to the rear and to the east of the plaintiffs' property.

14. The playing fields were subject to "ponding" from the time that the defendant moved in during the early 1980s. The problem became very evident after heavy rain. The club premises had been grassland and pasture. Prior to the club's acquisition it was used as a temporary or part time pitch by Bective Rangers Rugby Club. The pitch itself was an inclined plane falling four to five feet with minor undulations. The land in total runs to twelve acres, approximately nine acres of which are now the relatively flat pitch area. The entire "handle" area measures approximately an acre and a quarter.

15. The railway line closed in 1956. Shortly thereafter, the rail sleepers and ballast were removed. What remained on the subject land generally was rough ground overgrown with bushes, briars and weeds. There was then no topsoil in that area.

16. Mr. Hank Fogarty testified on behalf of the defendants. He is a chartered civil engineer and was managing director of SIAC Construction. He was deeply involved in the club committee which dealt with the acquisition and development of the club lands known as "Silver Park". He testified that as and from 1981 no new rear gates were permitted from the Torquay Road houses onto the defendants' lands. The defendants considered that these had been improperly opened in the first place. The occupied land was reclaimed. Furthermore the club reasonably considered that it was inappropriate that dogs be exercised on their lands in circumstances where there would be children or young people playing Gaelic football and hurling. Mr. Fogarty testified that from time to time the residents dumped grass and hedge clippings into the derelict area. This was also a source of concern to the defendants. There is no evidence that there was active hostility between the defendants and its neighbours or *vice versa*. However, I infer there was not the high level of cooperation which one would expect between neighbours who might otherwise have common interests.

17. Work was carried out on the pitches to level them. Mr. Fogarty carried out a thorough survey himself. This showed the fall of eleven feet from the north west to the south east corner, that is from Tudor Lawns diagonally across to Wendell. Laterally across the pitch there was a fall of between four and five feet. The club carried out work levelling the undulations on the pitch, stripping back and distributing the topsoil so that the local undulations were smoothed and levelled. Thereafter the pitch was seeded. Around this time the defendants also built their clubhouse and erected the present walled entrance.

18. It was necessary to move boulders or large rocks from the pitch area. Some of these were placed near the corner or on the neck of land close to the plaintiffs' property. There was spoil from the construction of the entrance roadway and the foundations of the dressing room and clubhouse. This was placed in the same area as a temporary spoil heap. It was transported there by lorries. These mounds of spoil were not spread or distributed in any way. They comprised 28 loads of soil material, and ultimately turned into grass and bracken-covered mounds which ran between the pitch area and the rear boundaries of the Torquay Road houses. The defendants also placed gravel on part of the former path of the railway line to facilitate car parking. This ran perhaps 200 yards from the Tudor Lawns direction down along the rear boundaries of the Torquay Road houses but stopped short perhaps 100 yards east of Wendell. This was placed on top of any "sub-grade" material which remained from the railway line.

19. In the mid 1990s the defendants gave thought to the development of the "subject lands". They thought this might be used as a training area. Clearly at all times there were budgetary considerations. Such a project presented financial difficulties in terms of expensive lights and facilities. The defendants had a budget of £8,000. They decided to take such steps as they might within that budget. By this time the 28 mounds had been neglected and become somewhat overgrown. There was undergrowth, weeds and brambles there. The large container left by the builder who carried out the works, together with planks and other building materials remained.

20. In 1998 the mounds were dug out and removed. I am satisfied the defendants then brought in what was described as 20 loads of topsoil and laid it as a "skin" over the entire subject area, harrowed and fertilised it. I find that this work did not have the effect of altering the gradient of the neck which always sloped somewhat towards Wendell from the racetrack but, rather, that it affected the level of the land, critically raising it by up to one foot in height *vis á vis* the level of the plaintiffs' garden.

21. When the plaintiffs had previously walked out through their rear gate, onto the defendants' property the subject land outside had been approximately level with, or just below their own garden. I am satisfied that the excavation, levelling and re-levelling carried out by the club rendered the lands outside the rear gate of Wendell significantly higher than the base of the access gate leading from Wendell onto the subject lands. The soil was compacted up against the gate itself and, for a while, whether intentionally or not, the plaintiffs had no access to the club lands. This re-levelling was a radical step. There was no prior discussion or consultation between the defendants and its neighbours. While there is no evidence as to any malign motivation for the manner of this work, one of its effects was (at least temporarily) to deny the Torquay Road residents access onto the defendants' lands.

22. It seems that the residents felt that they had some degree of "entitlement" to enter onto the defendants' lands for their own recreational purposes. Thus, when this re-levelling occurred, the plaintiffs' gardener excavated the land outside and ultimately it was necessary to raise their gate so as to allow it to swing outwards into the defendants' lands. This was of course, technically a trespass of the defendants' property. Although denied by both parties there was something of a subterranean "tit for tat" relationship between the residents and the defendants, although again nothing amounting to overt hostility. The steps taken by the residents and the club as neighbours, however, gave rise to heightened sensitivity.

23. There was at some point an exchange of solicitors' letters between the defendants and the plaintiffs. The defendants asserted that their land was private property and that the plaintiffs had no access rights. The plaintiffs' solicitor suggested that they had acquired some form of right by long usage. Ultimately the plaintiffs replaced the wooden door which gave way onto the defendants' property with a different raised door.

24. I am satisfied that the effect of these works was to constitute an alteration of the level of the defendants' lands. This altered the respective relationship between the two properties with results which emerged in the year 2000, at a time of particularly heavy rain.

25. Things became critical on or about 7th December, 2000. The second named plaintiff said that she woke up on that night. She could hear the rain falling in their back garden. She felt it was making a "different" sound. She testified that the entire garden was absolutely covered with water. It looked like a "huge river". She took photographs of this. Her husband went out to try to get the

shores open but there was so much water that they could not get them open that night. She described the flood which took place at that time as being "disastrous". The water was flowing from the club lands into the garden of Wendell.

26. The following day, 8th December, the plaintiffs phoned the defendants. They invited representatives of the club to come over and look at the damage done. They contacted the County Council who came out with sand bags. They had to ask the fire brigade to come to pump the water out of the garden because the shores were filled. The water had permeated into the house. The second named plaintiff described the damage as being such that an observer could see the moisture rising through the floors, and smell the muck and sewage in the house itself. She said that the whole ground floor of the house was "destroyed", and permeated with water. She described the flooding as coming from under the access door to her garden from the defendants' property like "white water". The water did not remain confined to the back garden, and flowed round to the front of the house.

27. A groundsman, Brendan O'Connell, from the defendant club called. He brought sand bags and assisted in placing them along the vents at the back of the house. On the same day, 8th December, 2000, the first named plaintiff wrote to Mr. Tom Rock, chairman and a Mr. Martin Glynn, a committee member of the defendant.

28. As a result of the discussion in December 2000 there seems to have been an impasse. The Grennans did not take legal proceedings at this stage. The club did not take any remedial steps for three years thereafter. But the flooding problem did not return until two years later and later that year.

29. There was repeat heavy flooding in February 2002. The second named plaintiff describes the water on the former occasion as "flying in" the garden. The plaintiffs telephoned the defendants on numerous occasions but apparently to no avail. The County Council came and assisted again with sand bags.

30. Thereafter the garden was often wet and the flooding problem was less dramatic. But for four years up to 2004, the plaintiffs had to deal with a situation where, on occasions of heavy rain, their garden flooded necessitating them to open up the shores. While the defendants had had notice of what was happening (including the initiation of proceedings in 2003) there is no evidence that they took any significant steps to either abate or attenuate the flooding up to 2004. The source of the problem was or should have been obvious. During this time the plaintiff says the water that flooded the garden had the effect of permeating into the house creating a foul smell and dampness. While prior to the 1998 works the garden may have been prone to some ponding when there was heavy rain because it was low lying, it was nothing like what occurred after the works.

31. Before any work was done in 1998 there was at least one area in particular, near the neck lands which should have raised an alarm for the defendants. It lay at the connecting area between the corner of the playing fields proper nearest Wendell and the "neck area". This zone was particularly prone to flooding as it was lower lying than the rest. Extensive flooding is shown there in photographs even up to 2009. In fact this area which was often subject to ponding was known to both the plaintiffs and the defendants. The wet area expanded when there was heavy rain. This very fact should have alerted the defendants to the risks of water settlement and movement from their lands permeating into any neighbouring gardens. At times of heavy rain, water from this direction travelled diagonally across towards the plaintiffs' property. The risk of flooding was obviously particularly prevalent when the prone to ponding areas were at a high level.

32. I say parenthetically that Mr. Glynn, who testified in the proceedings, was, as also in the case of Mr. Fogarty, a civil engineer. He rose in the profession becoming a director of Collen Construction. Both Mr. Fogarty with SIAC, and Mr. Glynn with Collen Construction, therefore, had long experience in very large construction projects and had worked for large construction enterprises. Issues such as ground levels, slopes and drainage cannot have been strange to them. I make a similar comment in relation to Mr. Liam O'Flaherty, the first named defendant, also a club official. He is the holder of a degree in agricultural science and worked for 40 years as a crop specialist dealing with all aspects of soils, nutrition, pest control, cultivation and harvest.

33. To men of the experience of Mr. Fogarty, Mr. Glynn and Mr. O'Flaherty, the potential consequences of re-levelling should have been obvious from the outset. It was reasonably foreseeable that an alteration in the level of the subject land would have this consequence. Up to 2004 the attitude of the club seems to have been to try and keep the problem at arms length and to deny liability.

34. The plaintiffs made an insurance claim. It was necessary apparently to take up the floors and dry out the house as well as having to get new carpets in two rooms. Mrs. Grennan testified that the patio was replaced, i.e., taken up and put back down and that a lot of the shrubbery and growth in the garden was lost at that point.

35. As far back as the year 2000 the plaintiffs retained an engineer, Mr. Roger Cagney of Hayes Higgins Consulting Engineers. Both he and the plaintiffs made occasional contacts with the club between 2000 and 2001 but nothing concrete came of this. The plaintiffs wrote to the defendants. They invited consultants to advised them as to what course of action they should adopt. In 2002 the Grennans received further advice as to a range of measures which they might adopt in order to abate the problem on their side of the fence. They considered erecting a wall on foundations behind the hedge. Mrs. Grennan's testimony on this point is of particular importance. She says that when they considered building such a wall, she was advised that they could not do so because the result would be to push flood water into neighbouring gardens on either side of them.

36. What emerged only upon an inspection of the lands was that the neighbours in the house to the left as one looks out from the back of Wendell, adopted precisely this course of action, and have created a substantial block wall between their lands and the defendants. The Grennan's boundary line with the defendants still to this day consists only of a chain link fence and laurel hedge. They never built a wall, even bearing in mind that their neighbours to the left did so at some point. The house and lands to the right of Wendell looking from the rear remained unoccupied.

37. The plaintiffs were advised by their then solicitors and Mr. Cagney that if they were to build a wall it might have the effect of "pushing the water to the other gardens each side of us". This will have to be considered in the light of what has now emerged on the question of damages and their mitigation. The plaintiffs lack nothing in initiative. It ultimately emerged during the hearing that they had applied for planning permission to build a large conservatory/extension at the back of the house. Their architect filed a planning application for this purpose in 2003. In the planning application form, applicants are asked whether the lands were prone to flooding. The reply given to this was in the negative. I believe this answer was done on the architect's initiative. But part of the plan involved a substantial raised terrace extending a substantial distance across the lawn toward the back wall. This might have been of assistance as a protection – had it been built. There has been no direct evidence as to the legal advice which the plaintiffs received from their then solicitors at this time in relation to protective measures which they might legitimately have adopted to defend their own land and property. One question that arose was whether the protection, be it a wall or berm was to be built on the plaintiffs or the defendants lands.

38. In a letter to the Grennans of 14th May, 2002, Mr. Cagney made a number of suggestions. He adverted to the fact that the period from the beginning of February, 2002 had been an extremely wet period when there had been extensive flooding to the coastal areas of Dublin City, together with storm force conditions. This had resulted again in water logging to the defendants' lands which flooded or drained in to the plaintiffs' garden.

39. In the letter Mr. Cagney revisited various options which he had proposed to the plaintiffs from December, 2000 onwards. He wrote that going back as far as the year 2000:-

> "…we believed this potential *to be a lot more critical than history has in fact shown to be the case over the last eighteen months*". The proposal to construct a bermed wall was discussed but substantial difficulties and subsequent responsibility for long term consequences rendered this solution impractical, if not impossible for further consideration".

But he added:-

> "In addition, *to save your laurel hedge* it would have to be built upon G.A.A. lands to the rear boundary of your property. This entails getting their permission to do so."

But then he said:-

> "Upon construction of this bermed wall you would then become responsible both for its long term behaviour and for the potential for any flooding which this wall in turn caused to adjoining properties."(*sic*)

40. A number of issues arise from this letter the contents of which were not disputed. The first is that the problem was not as acute as anticipated. The berm and wall proposals have been outlined. But next is the fact that the plaintiffs appear to have been concerned as to the loss of their laurel hedge. I consider this is relevant as to the scale of importance they attached to the flooding problem and its resolution or solution and may also go to the question of mitigation. By late 2002, or early 2003, there were indications from Mr. Martin Glynn and Mr. Tom Rock, that the club was agreeable "in principle" to the idea of building a bermed wall on this land. However, no written confirmation was received. It appears that both parties were paralysed by a concern as to the financial and legal consequences for themselves by taking any of these possible abatement measures.

41. Mr. Cagney commented at this time that the proposal to build a bermed wall was likely to promote the retention of water on the *plaintiffs*' side of the boundary and being unlikely to provide any real security from flooding of the adjoining lands. This might be thought to beg the question as to why. What was the source of the water? It suggests if the land was prone to ponding it was sub-surface water which emanated from the defendants' land. The wall with an adequate foundation might have been an effective protection. He commented:-

> "Should the conditions prevail again to cause you such major flooding, I believe that responsibility for the *global* drainage to rest not with you, but with [the] the G.A.A. together with Dunlaoghaire Rathdown County Council. The G.A.A. having altered the topography of the adjoining lands must retain responsibility for these works. In conjunction with these alterations I believe that a dialogue should have been initiated with Dunlaoghaire Rathdown County Council and the G.A.A. in this respect as to the overall drainage provisions."

42. The outcome of this advice was that the plaintiffs looked to the defendants to construct a substantial and costly two stage drainage system which would gather the water in subterranean tanks, in the "ponding area", thereafter to be pumped electronically over a distance of several hundred yards up to the nearest possible junction with council drainage, that is on Leopardstown Road. The cost of such a scheme would have run into hundreds of thousands of euro. It was a classical example of the best being the enemy of the good. The proposal was beyond the club's finances. Such purist and unrealistic advice did not expedite remediation.

43. As a lesser, but not preferred, option Mr. Cagney recommended "a drainage gravel bed along the rear boundary" of Wendell as being "probably the best way forward". The plaintiffs did not avail of any of these options in 2002, but rather awaited developments literally and metaphorically from the other side of the fence. Mr. Cagney's concerns as to the likely prevalence of ongoing flooding were reiterated in subsequent letters to the plaintiffs. In each of these, he suggested matters be "raised" with the defendants *and also* Dunlaoghaire Rathdown County Council. I infer the local authority did not wish to get involved in the more costly option.

44. The possibility of a bermed wall was one which had in fact been seriously raised with the defendants as far back as the year 2000. It was referred to in a letter from the first named plaintiff to the defendants on the 5th November, 2002, at a time when the plaintiffs were experiencing yet more flooding.

45. I am satisfied that the occasional periods in which the plaintiffs experienced flooding between 2000 and 2002 were generally at times of exceptionally heavy rainfall when, as the evidence demonstrated, the degree of precipitation was multiples of the average. This would not, of course, avail the defendants to this claim. This was not an act of God – it was simply very heavy rainfall, an event all too foreseeable.

46. The impasse continued into 2003. At last, on the 4th March of that year a warning letter was sent to the defendants evincing an intention to issue proceedings. A plenary summons was issued on the 3rd April, 2003. In it, as well as claiming damages, the plaintiffs sought an injunction directing the defendants to restore the level of the lands and to maintain its porosity; orders directing the defendants to install a drainage system on their lands adequate to prevent rainwater flowing into Wendell; and restraining the defendants from carrying out any further works which would increase the flow of rainwater into the plaintiffs' lands.

47. No interlocutory order was sought or obtained. The proceedings moved very slowly, perhaps influenced by the fact that the defendants ultimately if ineptly constructed a berm wall on their lands in 2004. Ultimately an amended statement of claim was filed on the 6th June, 2006, by the plaintiffs' then solicitors. This was six years after the problem first arose. This action was heard nine years after the issue emerged.

48. One can only conclude that when faced with the apparent intractability of the problem the instinct of the defendant was to bury its collective "head in the sand". The nuisance should have been obvious but the solutions were expensive. On the 15th November, 2002, Mr. Liam O'Flaherty the first defendant wrote:-

> "…having fully investigated the matter we do not feel that our Club is in any way to blame for the flooding caused to your premises…"

He deprecated any suggestion that representatives of the club who met with the first named plaintiff in 2000 had in any way accepted liability or indicated a desire for the defendants to take an initiative to put an end to the cause of the problem.

49. Late in 2003 the plaintiffs got a call from their then solicitors. They attended their solicitor's offices where a meeting took place with the defendants and their representatives. An agreement was reached that the club would construct a berm in accordance with a Hayes Higgins plan, as stipulated. It was agreed that this would proceed on the basis of identified steps and that the works would proceed on the basis of engineers from the defendants, and the plaintiff, being present during construction so that the plaintiffs' engineer would be in a position to assure that the berm had been constructed in compliance with what was stipulated.

50. From the defendants' point of view this was obviously preferable to the other, and far more costly option which had been put to them by Mr. Cagney.

51. As designed by Mr. Cagney of Hayes Higgns, the proposed berm was to be 155 metres in length and 0.6 metres high. It was to be located a significant distance from the plaintiffs' property. It was to be an inverted L in shape, starting from the south at the boundary wall to Leopardstown Racecourse, moving directly north and then turning west and proceeding along the back garden boundary line of the Torquay Road properties for approximately 120 metres. The existing topsoil on the site was to be removed to an average depth of 0.15 metres. Compacted black boulder clay and topsoil was to be applied. The top and sides of the berm were to be seeded. The construction was intended to be shaped as a "cut off" pyramid, with a base of 3.6 metres and at the top 1.2 metres. Had the defendants built the berm in accordance with the plaintiffs' specifications this would surely have been a significant step toward ending the matter.

52. Work on a berm started at 5.00 am in the morning, on 1st March 2004. There was no meeting beforehand. There was no consultation between the engineers. The plaintiffs' engineer was not called out to inspect the work, or the soil which was delivered. The plaintiffs called on Mr. Cagney who said the work would be an insufficient protection and the material substandard. The material which was used by the defendants was substandard. The plaintiffs called out the litter warden who came down to the house and took photographs of the material. Photographs demonstrate that the material used by the defendants for its berm was demolition waste containing pipes, cement and other building waste. An engineer from the County Council arrived. He established that what was being used was demolition waste and that it had to be removed. Club officials discussed the matter with him and suggested that the defendants might merely remove the pieces of rubble and leave the remainder. However, the Council were not disposed to permit this and directed that all of it should be taken away. The work ceased for a number of weeks. Then, for reasons unexplained, the Council's hard line position appears to have relented, and the defendants were allowed to clear out the demolition waste including iron bars, slates and pipes, and to leave the remainder. No digging down or foundation work was carried out as stipulated in the Hayes Higgins plan. The type of soil that had been stipulated in that plan was not used. In all this the defendants were guilty of a fundamental breach of faith. What happened is not even seriously disputed.

53. A degree of Court time was spent in inconclusive cross-examination of the defendants' witnesses on the issue as to whether or not the spoil which had been deposited in the subject area was taken away or in fact used for the construction of a berm. I find that as a matter of probability it was removed, as evidenced by an invoice paid by the club. It is unlikely that the club in its straitened financial circumstances paid a man to remove the spoil unnecessarily.

54. In response to the plaintiffs' complaints, the defendants' solicitors wrote on 15th September 2004, bravely asserting that the works (which had by then been finished) had been "completed in accordance with the preliminary measures that were agreed upon without prejudice to "satisfy your client's claim and that all engineering steps had now been taken in relation to same". This was ingeniously if opaquely worded – but it did not convey fully what actually occurred. The club had dishonoured the deal.

55. Not only was the berm's construction substandard – it had been built in the wrong location. It brought the gathering of water closer to the plaintiffs' property. The berm as constructed started from the wall of the racetrack, but very considerably further down in to the "neck" or subject area, and well past the plaintiffs' rear boundary. It then took a left turn at the boundary wall of the Torquay Road houses, and ran along this line for in excess of 100 metres. This had the effect of bringing the berm and any trapped water, and its effects, far closer to the plaintiffs' garden.

56. The second named plaintiff describes the berm as it was constructed as having been approximately four feet high, it is now significantly lower. This may be due to the impacting of soil.

57. The new berm nonetheless had both positive and negative consequences. I am satisfied that it had a significant benefit in preventing much surface water moving from the defendants' lands onto the plaintiffs'. But this has come at a cost, as confirmed by the consultant engineers on both sides of this case. At times of heavy rain the berm now acts as a dam, thus creating significant ponding on the club lands which comes close to the plaintiffs' back hedge. The gathered water can reach up to one foot in depth. It may stay in a flooded condition for a number of days. By reason of the pressure of this ponded water there is still a subterranean percolation or seepage of water into the plaintiffs' back garden. In the plaintiffs' words, this occasionally makes the garden look like a "golf course under water".

58. The expanse of this water can be considerable. Photographs taken in May 2006, March 2007, March 2008, September 2008, and February 2009, show a body of water running behind the berm for a distance of up to 50 yards and stretching back diagonally as far as the nearest corner of the defendants' playing pitch to Wendell.

59. It is not clear why the defendants' officials, apparently otherwise reasonable people, acted in such an unreasonable and high handed way. This was not a large construction project with large budgets requiring speedy work in accordance with time deadlines, but an issue between neighbours. There are some grounds for inferring there was still a want of concern between the residents and the club, even though not explicitly admitted. The club clearly still had long term concern as to its Torquay Road boundary line. There had been the trespass on their land by some of the residents who had moved their back boundaries to incorporate part of the subject lands into their gardens. While the Grennans did not do this, they nonetheless had a gate which opened directly onto the club lands, a technical trespass. There had been the solicitor's letters between the parties on the conflicting issues of alleged trespass and long usage. But none of this excuses nuisance or want of reasonableness on the part of the defendants from 1998 and 2004 in relation to their use of their land. All the parties disavowed there was any friction – I do not accept this.

60. It is clear the 1998 works were done without any prior consultation or discussion with the plaintiff. I do not think that the defendant acted appropriately as a good neighbour should in embarking on such work without consultation. The fact is that in 1998 the material came up as far as the plaintiffs' boundary line and had the effect of blocking the wooden door. This speaks for itself. A lack of consideration was reflected in the defendants' reaction to what occurred to the plaintiffs' house and garden in the year 2000. It continued up to the issuance of proceedings in 2003. The unilateral breach of the agreement to build the Hayes Higgins berm made

between the parties in 2003, was an act of bad faith. The defendants acted unreasonably throughout this period. They knew or ought to have known the effect of the re-levelling in 1998. They were certainly on notice of this by the year 2000. They did not take any action for another four years.

61. The construction of the berm in 2004 was carried out without any reasonable consideration for the rights and interests of the plaintiff. While there is no evidence as to the defendants' motivation in relocating the berm, one cannot ignore that one consequence is that the berm now, as explained, brings ponded water right to the brink of the plaintiffs' boundary line. Had it been constructed in accordance with the Hayes Higgins plan there would have been two consequences. The first, obviously, is that it would have been placed substantially further from the plaintiffs' property. The second, is that the *effect* of the berm as designed would have caused inconvenience, flooding and ponding to a far greater extent in the defendants' property. Photographs of flooding in 2008 and 2009 demonstrate that the ponding effect actually approached one of the defendants' main pitches. It is not difficult to infer therefore, that the effect of the Hayes Higgins berm as properly located further onto the defendants' lands would have been to create flooding which would have constituted a potential for far greater water incursion into the main part of the defendants' property, perhaps including the main playing areas. In all this the club acted unreasonably.

62. The want of reasonableness applies to both sides. It is striking that even after the flooding in the year 2000, the plaintiffs did not take *any step whatever* in order to protect their lands. They saw the causes of the flooding as being the defendants' problem.

63. The plaintiffs may have received "mixed messages" from their engineering advisers. But the reference in Mr. Cagney's letter to the laurel bushes on the boundary is striking. By way of contrast to the defendants' immediate neighbours who had built a block wall, the plaintiffs did not dig a culvert or drain, nor did they engage in any work to protect their own property such as a block wall with a significant foundation. They did not explore other alternatives. There is a question too as to how frequent the flooding truly was. These issues must be explored and tested in any hearing on the issue of damages.

64. Moreover even in the course of the proceedings the plaintiffs and their advisers maintained an obdurate insistence on expensive remediation works which must inevitably have been prohibitively expensive for the defendants. Draining and tanking the water in the pond area and thereafter pumping it electronically to the Leopardstown Road level would inevitably have been an expensive exercise. Yet the plaintiffs' engineers continued to maintain that their option was perhaps the only option. Only after extensive cross-examination did the plaintiffs' consultant engineers concede that the berm, as constructed, despite its infirmities, had a significant effect in attenuating the flooding problem. The plaintiffs' engineer, Mr. Goggin, when pressed accepted that the berm had been up to 95% effective.

65. While the sums at stake in this case in no way come within the jurisdiction of the Commercial Court, the case is a prime example of the requirement for case management and the early identification and agreement on issues in dispute.

Issues of fact

66. The factual issues in this case come down to simple questions. Did the plaintiffs buy a house where the garden was already prone to flooding? The evidence on this issue lies in the plaintiffs favour. The second named plaintiff has testified that the garden was dry prior to the defendants' works. She described the lawn and the garden and shrubs as being one of her motivations for buying the house. It must be recollected that the family previously lived directly across the road, thus the issue may on one level reduce itself to a question as to whether the plaintiffs bought a house and garden which was prone to flooding? There is no such evidence although the second named plaintiff did concede that from time to time ponds of water formed on the lawn. The engineer's correspondence raises the question implicitly. However this ponding is very different from the substantial water which is shown in the video evidence and in the photographs from 2000, 2002 and to a degree later. One particularly striking piece of footage from December 2000 shows quantities of water discernibly moving from the defendants' to the plaintiffs' lands. There was still water seepage even after the berm was built as shown by photographs from 2004 and afterwards.

67. A number of conclusions can be safely and logically drawn from this evidence. The evidence is both negative – a process of elimination; and also positive. Some cause or causes created the flooding which, on the evidence, started in the year 2000. No other cause has been identified by the defendants. The undisputed fact is that the defendants engaged in works on the land in March of 1998. They dispute that they raised the level of the land. I reject the defendants' evidence on this point. I think they are mistaken. I should say I have been less persuaded by theorising on the part of the plaintiffs' engineers than by the evidence of Mr. Paddy O'Brien, the gardener who provided short but clear positive evidence of what happened in 1998.

68. Mr. Paddy O'Brien is the Grennan's gardener. He is a mature man and an entirely credible witness. He testified that he came in winter and summer for half a day a week. Prior to the works in 1998 he testified that about twice a year he would go out by the door beyond the fence into the subject lands because nettles and briars used to grow across the door from the Grennan's garden into the defendants' lands. This wooden door opened outwards into the defendants' property. It is shown clearly in a photograph taken in December 2000 entitled in the book of photographs "flooding from Silver Park 2000". Mr. O'Brien had extensive experience of the garden, and what lay beyond it. I think his testimony is, in fact, the best evidence available on whether the land was raised. It was corroborated by a night time photograph taken in December 2000 of the area around the Grennan's garden back door. It shows significant flooding coming from the defendants' land.

69. Mr. O'Brien testified that prior to 1998 there was "no bother" opening the door into the defendants' land. He said:

> "There was no bother opening the door first but when the development happened the door couldn't be opened *so I had to go out and dig it because the door opened out onto the pitch…I had to dig the side out of it, I would say about 8 to 12 inches to open the door*."

Mr. O'Brien testified that prior to the 1998 development works one stepped "down" from the gate. The December 2000 night time photograph corroborates Mr. O'Brien's testimony. It shows that by December 2000 the general ground level in the club land, was substantially higher than the base of the wooden door; and the earth was between 8 and 12 inches higher than the base of the door before the work was carried out. But, vitally, it bears out Mr. O'Brien's other evidence, and shows that he dug an arc of earth beneath the door so that the level beneath the swing-arc is substantially lower than the surrounding ground further into the defendants' land. It shows precisely what Mr. O'Brien said – that he had to dig out the earth by as much as 8 to 12 inches to allow the door to swing open. I find Mr. O'Brien's evidence credible and independently corroborated by the photograph. His evidence was not disputed or contested when much else was. He described the garden as being now wet for three or four months a year and now being like "a bog". His evidence is also corroborated by Mrs. Grennan on this point. Prior to 1998 there was a significant step down from the level of her garden to the defendants' lands. This is not borne out by the level of the land shown in the photograph.

Forseeability and reasonableness
70. A number of the defendant club officials who testified were vastly experienced in the world of engineering and construction, including the engineering of very large projects. The issue of the slope and incline of the club pitch and the lands had been a matter of concern as far back as 1981 when Mr. Hank Fogarty carried out his survey of the levels throughout the pitch area. The area close to the neck of the subject lands was always prone to ponding or flooding. It was reasonably foreseeable that the re-levelling that took place in 1998 would give rise to drainage issues. This applies *a fortiori* when the ground level was raised.

71. The minutes of the defendant club prior to embarking on the development of the 1.23 acres contains references to "drainage". I do not infer this as being a direct reference to a *specific* awareness of the consequences of their action. But this must be seen in the context of the defendants' witnesses who were the Club officials involved, all being highly experienced in the business of drainage and soil treatment. It indicates they were alive to the general issue of drainage and ponding – on their land. The evidence of ponding in the neck areas was before their eyes at any time of heavy rain. They could not have been unaware of it. Mr. Glynn gave evidence as to a document which set out the budget for these development works. One item was "drainage – assume connection can be obtained to mains £1,750."

He testified:-

> "… in excessively heavy rain the water from the playing pitch is collected in a pond *there at the neck of the land, at the entrance to the neck of the land, where it is to day*."

He further testified:-

> "So the suggestion was, if we're going to clean up and develop the neck of land we should get rid of that pond and is there any hope of getting a connection to get that piped out to the county council's sewer. We investigated that, we just put in an estimate there for that."

He testified that the defendant had assumed that there would be difficulty with the County Council in establishing a connection to the drains out at Torquay Road as they were land locked in that direction. While this may not have been a plan to "drain the neck and lands" to my mind it demonstrates that the defendants and their officials were very much alive to the entire drainage issue such that a potential hazard to the plaintiffs' land were readily foreseeable. They either knew of the hazard or ought to have known of it.

72. Had the defendants properly addressed the issue in 2000, and at that stage if necessary, commissioned an expert investigation, they would surely have been advised to construct a berm in accordance with the Hayes Higgins specification. Instead this was delayed until 2004.

73. I turn then to the second period, that after the construction of the berm in 2004. By reference to the continued wetness in the plaintiffs' land it is evident that the berm while effective with regard to flooding, is not completely so with regard to preventing the seepage of water. The construction *and* location of the berm were not in accordance with the agreed Hayes Higgins stipulation. Those drawings and that plan was for the protection of the plaintiffs' land. Failure to act in accordance with the plan would foreseeably give rise to additional water threats to the plaintiffs' land which have unfortunately been realised. For the reasons outlined earlier, I find there was negligence in the construction of the berm in 2004. Furthermore, I consider that the construction of the berm was such as to cause a new and separate nuisance. I again bear in mind that a number of the defendants' officials were qualified engineers or experienced in other fields. They knew or should have been aware of the risk of negligent construction and location.

Consideration and application of the legal principles
74. The tort of private nuisance consists of any interference without lawful justification with a persons use and enjoyment of his property. The courts expect a degree of give and take between neighbours but this is only to the extent that it is reasonable.

75. McMahon & Binchy *Irish Law of Torts* (3rd Ed.), at pp. 690 to 698 identify a number of factors which are of relevance to the Court in deciding what is reasonable for a landowner to bear. These include:

> (1) frequency of the interference;
>
> (2) the gravity of the harm suffered to the plaintiff's proprietary interests;
>
> (3) the nature of the locality;
>
> (4) the presence of any malice on the part of the defendant; and
>
> (5) the social utility of the defendant's conduct.

With regard to issues (1) and (2) I am satisfied the plaintiffs experienced occasional but serious flooding for a matter of weeks in the year 2000, the year 2002 and from time to time thereafter, although substantially diminished after 2004. The nature of the locality has been described in detail earlier.

76. With regard to the other factors, of the five; I do not think I can ignore the background relationship (or the lack of it) between the parties. There was a lack of consultation in 1998, a lack of cooperation in 2000 and 2002 and a want of good faith in 2004 when the club built the berm. While some degree of seepage from higher lands to lower may be inevitable, it was by no means the inundation illustrated in the photographs from the year 2000 and afterwards. While the interference on the plaintiffs' land was not constant and varied in quantity and extent, there is ample evidence to infer nuisance having regard to the issues of continuity, repetition and persistence (*Halpin v. Tara Mines* [1976-77] I.L.R.M. 28 at p. 30).

77. I consider that the flooding and inundation of the plaintiffs' property, even though substantially attenuated after the construction of the berm in 2004, still constitutes a disturbance in the plaintiffs' use of their property such as would amount to continuing actionable nuisance.

78. I accept too Mr. O'Brien's evidence in relation to the time and degree of wetness in the plaintiffs' garden. He described the flower beds inside the hedge after 1998 as being "saturated with water for three or four months of the year". Mr. O'Brien described planting camellias which bloomed in 1997 but not thereafter. Even at the time of his testimony in December, 2009 he described the grass and lawn as being "soggy". When asked to describe the lawn as of December, 2009 he described it as being "like a bog now really".

79. In *Read v. Lyons* [1945] K.B. 216 Scott L.J. at p. 236 of the report described private nuisance as:

> "Unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it"

The proviso that the interference be "unreasonable" is usually added. Private nuisance is not actionable *per se* and damage must actually be proved. Moreover, more recent authorities establish that a defendant will only be responsible for causing harm where it could have been reasonably foreseen. In *Hunter v. Canary Wharf* [1997] 2 W.L.R. 684, Lord Lloyd categorised private nuisance into the following three forms; (1) nuisance by encroachment on a neighbours land; (2) nuisance by a direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.

80. In *Halpin v. Tara Mines* [1976-77] I.L.R.M., Gannon J. observed at p. 30 of the report that:

> "Insofar as the nuisance alleged consists of interference with comfort and enjoyment of the property of the plaintiff his evidence must show sensible personal discomfort, including injurious affection of the nerves or senses of such a nature as would materially diminish the comfort and enjoyment of, or cause annoyance to, a reasonable man accustomed to living in the same locality."

In *Hanrahan v. Merck Sharp & Dohme* [1988] I.L.R.M. 629, Henchy J. expressly approved of this test.

81. A test of reasonableness is not restricted to nuisances resulting from discomfort or inconvenience. It is also relevant in cases of material damage to the claimant's property. If the defendants' intentional activities foreseeably caused damage to the plaintiffs' property liability will be established. I find this occurred here. This is applicable to the defendants conduct from the year 2000 to 2004.

82. In *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 the plaintiff's lands were flooded because the drainage system on the defendant's land became blocked by a trespasser. The defendants were held liable because they were aware of the cause of the flooding but had failed to take reasonable steps to abate it. There is therefore positive duty on occupiers. Viscount Maugham said in his speech at p. 894:

> "In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so."

83. The number of Irish cases dealing with failure to take reasonable steps to abate a nuisance is relatively small. Nevertheless *Fitzpatrick v. O'Connor* (Unreported, High Court, Costello J., 11th March, 1988); *Daly v. McMullen* [1997] 2 I.L.R.M. 232; and *Larkin v. Joosub and Dublin City Council* [2007] 1 I.R., all support the principle that in the case of omission some level of culpability on the defendant's part is required.

84. In *Fitzpatrick v. O'Connor*, the plaintiff's property which is surrounded by the defendants lay at the bottom of a natural slope. In 1985 a large amount of soil was dumped on the defendant's land. Soon after the plaintiff's property flooded following reasonably light rainfall. Costello J. held that the erection of the earth mound by the defendant was an unreasonable use of the land and caused the plaintiff's property to flood. This damage was reasonably foreseeable and accordingly the defendant was liable in nuisance for the damage caused. The principle of law is applicable to the defendant's conduct.

85. The recent decision of Dunne J. in *Ambrose v. Shevlin* (Unreported, High Court, Dunne J., 11th December, 2009) outlines the principles succinctly. This case concerned the liability of a farmer who had constructed a farm pass on his land which resulted in blocking the flow of water from the stream when there was heavy rain. This thereby caused the plaintiff's house to flood on two consecutive nights. To alleviate the flooding on the first night the dam was breached. The following day the defendant restored the dam and subsequently flooding occurred on that night also. Dunne J. was satisfied that the result of the construction works was to raise the level of the farm pass with the result that it acted like a dam causing the flooding of the house. In deciding that the defendant was liable for the damage caused, Dunne J. referred to the decision in *Fitzpatrick* where Costello J. said:

> "The proper legal principles which I should apply are set out in *Home Brewery v. Davis & Co*. [1987] Q.B. 339. The legal position is as follows; the defendant was under no obligation to receive water from the plaintiff's land but if the use of his land by him is unreasonable and is resulting to damage to a higher occupier, which the plaintiff is, then a nuisance is created."

86. I consider that the factual situation surrounding the construction of the 2004 berm is not dissimilar to that which obtained in *Leakey v. National Trust* [1980] Q.B. 485. There the defendant held property at the rear of the plaintiff's house. The topsoil began to slip onto the plaintiff's property due to an unusual combination of climatic factors thereby causing damage and creating significant risk of further damage. The plaintiff sought mandatory injunctions to compel the defendant to remove soil and debris from his property, to take measures to prevent further encroachment. He succeeded both at first instance at the Court of Appeal where it was held that persons in control of property will be liable in nuisance if they do not do all that is reasonable in the circumstances to prevent or minimise the risk of foreseeable damage where they knew or ought to have known that something on the land has encroached or threatens to encroach on neighbouring land.

87. Were it necessary I would find that the defendants had also been guilty of negligence in the construction of the berm in the manner and in the location described for the same reasons. This is not a situation such as obtained in *Halpin v. Tara Mines Ltd* [1976-77] where the activities were carried out to the highest standards of care, skill and supervision. Even in *Halpin* that defence failed. *A fortiori* it fails in the instant case where it cannot be said that those standards were observed.

88. I find that the defendants behaved unreasonably in that without any care as to the consequence they changed the level of the land in 1998. They behaved unreasonably in failing to have regard to the effect of such change on the plaintiff's property, particularly in relation to drainage. They failed to take effective action when the consequences of their works were made known to them. They behaved unreasonably in that, having devised an agreed plan to relieve the nuisance they failed to follow their own experts' specification to abate the nuisance and, regrettably, continued to do so up to the date of hearing. They are liable in damages, subject to any issues of alternative causation of the damage to the house, mitigation of loss, and proof of the sums claimed.

89. On the facts, I find that the principles outlined in *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330, do not arise in this case. This is not a situation, even after 2004, where there is an unnatural user of the land. The purpose of the berm is to attenuate the natural drainage of rainwater from the defendants' lands. It is not the plaintiffs case that the flooding has, since the construction of the berm become more intense, but rather that since the construction there is less water draining than prior to 2004. The water behind the berm was not "brought onto the defendants' lands". It is not an unnatural "accumulation" or reservoir of water for the defendants' purposes. It is not the plaintiffs' case that the berm should be removed.

90. Subject to the above, I find that the defendant club is liable to the plaintiff in nuisance and negligence.