[2019] IEHC 455

THE HIGH COURT

[RECORD NO. 2002/3411P]

BETWEEN

KATHLEEN EUSTACE, GERARD EUSTACE, RONALD EUSTACE AND NOEL EUSTACE

PLAINTIFFS

AND

THE LORD MAYOR, ALDERMEN AND BURGESSES OF DROGHEDA BOROUGH COUNCIL AND JONS CIVIL ENGINEERING

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 29th day of March, 2019

Nature of the Case

1. This is a case about land in the town centre of Drogheda. The plaintiffs seek damages for trespass and nuisance and, in respect of the first defendant, for misfeasance in public office. In 2001, the first defendant (hereinafter referred to as "the Council") purported to give permission to the second defendant (a construction company) to enter upon the plaintiffs' land and construct both a slip road and a sewer connection. This was done not only without the plaintiffs' consent but in the face of repeated correspondence from them complaining about the trespass and unequivocally informing the Council of the Eustace family title to the land in question. The Council, many years later, decided to acquire the land from the plaintiffs by compulsory purchase order, but this was not until 2010. It is now admitted by the Council that there was a trespass, although I note that trespass was denied in the defence filed in these proceedings in 2007.

2. Despite the trespass being no longer in contention by the time the case came on for hearing in the autumn of 2019, the case ran for a number of days and witnesses were called. The primary issue I was asked to decide was whether the Council was liable for the tort of misfeasance in public office. I was also asked to decide on the appropriate quantum of damages, including whether aggravated damages should be awarded. It might be questioned whether it was really necessary to run the case on the basis of misfeasance in public office when there was an admitted trespass. I am somewhat doubtful as to whether it ultimately makes any difference to the amount of damages that might be awarded in circumstances where the same facts are being relied upon for the claim of aggravated damages in respect of the trespass and the tort of misfeasance in public office. Be that as it may, the case ran in a particular manner without objection and it falls to me to reach a conclusion on the matters identified. The issue of fact common to both is what the likely state of mind of various public officers was during the relevant period. This exercise has been undertaken with regard to such contemporaneous written records and correspondence as were made available to the Court, in conjunction with the oral evidence given by witnesses in the course of the hearing. I understand that the documentation available came primarily from the records of the Council. There was substantial criticism from counsel for the plaintiffs as to the absence of documentation in certain specific areas.

3. In broad terms, the parties' respective positions on the issue of fact identified above were as follows. The plaintiffs submitted there was bad faith on the part of Council officials and employees with regard to how the entry upon the land was dealt with. It was pointed out that the Council officials were repeatedly and explicitly told from the very outset of the works in question that the land belonged to the Eustaces; that they sent in copy title deeds; and that the Council nonetheless proceeded to authorise a private developer to trespass and engage in works upon the Eustace land in full knowledge of the objection of the Eustaces. They submit that in view of the state of knowledge within the Council of the Eustace family's title to the land, the decision to continue with the works constituted, at the very least, a reckless disregard of their property rights and that the tort of misfeasance can therefore be demonstrated. They characterised the Council's behaviour as high-handed in the extreme and extraordinary in all the circumstances. The Council submitted that a fairer interpretation of the available evidence was that the Council made an honest mistake and believed that it owned the land at the time of the entry and that it made reasonable efforts to engage with the Eustace family to compensate them after the mistake came to light. It was submitted that this honest mistake arose for a variety of reasons, including that the Council had maintained the land in question in a park-like state, with planting and grass-cutting over a number of years; that there had been no objection from the Eustace family when a different (public) sewer connection had previously been put through the same land in or about 1997; and that there was confusion over who owned the land because of a prior history of a compulsory purchase of part of the land in 1976.

4. One of the curious features of the case was the fact that the title deeds to the land (which showed that the Eustace claim to own the land was correct) was physically located, at all relevant times, within the offices of a solicitors' firm, Tallan & Co., who were the law agents acting for the Council. This arose from the coincidence that the same firm had acted many decades before for Mr. Eustace (the father of the male plaintiffs) when he purchased the land in 1964. As will be seen, one of the puzzling aspects of the facts is why it apparently took so long for the Council to consult these solicitors about the Eustaces' complaints and claim to title of the land, given that this raised an issue which was obviously legal in character. It is in any event an irony, putting it at its lowest, that the title deeds proving the plaintiffs' title to the land in dispute lay in the physical possession of the defendant throughout the relevant period.

5. I should perhaps clarify that the first plaintiff was the mother of the other plaintiffs, who are three brothers, but she has died since the proceedings were instituted. Each of the three brothers gave oral evidence before me.

6. The first defendant was variously referred to as "the Council" and "the Corporation" at the hearing and in the documentation, and those terms will be used interchangeably in this judgment. In fact, I was informed that the correct defendant by the time of hearing was Louth County Council, and that that this could be altered in due course on consent.

Misfeasance in Public Office

7. As I said earlier, the primary issue litigated before me was whether the tort of misfeasance in public office had been committed. The tort of misfeasance in public office is an unusual and infrequently pleaded tort. Contrary to the usual practice in judgments, I propose to deal with the law in advance of the facts. I take matters in this particular order because of the unusual nature of the tort and because the evidence seems to me to be quite finely balanced on the issue of whether misfeasance in public office has been established, such that it is better approached with a clear grasp of the ingredients of the tort which must be established by the plaintiffs.

8. A number of Irish authorities have discussed the ingredients of the tort of misfeasance in public office. In a number of cases, this arose in the context of a more general discussion about the contours of tort law, such as whether and when it is appropriate to

award damages in respect of an *ultra vires* act of a public officer; such a discussion took place, for example, in the leading cases of *Pine Valley Developments Ltd v. Minister for the Environment, Ireland and the Attorney General* [1987] IR 23, and *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 IR 84. The specific question of the state of mind required of the official to establish the tort was addressed by the Supreme Court in *Kennedy v. Law Society of Ireland* [2005] 3 IR 228, where the applicant had sued on foot of an investigation into his practice as a solicitor, which investigation had been held by the Supreme Court to be unlawful. The matter was remitted to the High Court to determine the applicant's entitlement, if any, to damages. By this time, there had been important judgments in the United Kingdom (*Three Rivers D.C. v. Bank of England (No. 3)* [2000] 2 W.L.R. 1220) and in Australia *(Northern Territory v. Mengel* (1995) 69 A.L.J.R. 527) concerning the mental element required for the tort of misfeasance in public office, and pronouncements by the House of Lords and the High Court of Australia featured heavily in the Irish courts' analysis of the tort. The High Court (Kearns P.) dismissed the claim for damages on the basis that the necessary ingredients of misfeasance had not been proved, and the Supreme Court dismissed the subsequent appeal. In the course of his judgment, Geoghegan J. said:

> "15. The tort of misfeasance in public office has been variously though not inconsistently defined. Kearns J., at p. 234 above, in commencing his treatment of the subject said the following: -
>
> > 'Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his office whereby loss is caused to a claimant. Lack of vires is insufficient of itself to ground a cause of action sounding in damages. In the ordinary course, the quashing of the decision by judicial review completes the remedy.'
>
> That is, I think, a reasonable summing up of the result of the authorities. The trial judge goes on to quote Keane J. in *McDonnell v. Ireland* [1998] 1 I.R. 134, at p. 156: -
>
> > '... such a tort is only committed where the act in question is performed either maliciously or with actual knowledge that it is committed without jurisdiction and with the known consequence that it would injure the plaintiff.'
>
> This passage begs the question to some extent as to what is meant by "maliciously". Counsel for the applicant made it clear both in the court below and in this court that, although malice was alleged, it was not malice in the sense of an intention at the relevant time to injure the applicant. Rather it was malice in the sense of *mala fides*.
>
> 16. The most exhaustive treatment of the subject is to be found in the speech of Lord Steyn in the relatively recent decision of the House of Lords in *Three Rivers D.C. v. Bank of England (No. 3)* [2000] 2 W.L.R. 1220. As pointed out by Kearns J., Lord Steyn identified at p. 1231, two different forms of liability in misfeasance of public office. There is what he called "targeted malice" by a public officer which is conduct intended to injure. That necessarily involves bad faith in the exercise of the public power for an improper or ulterior motive. The second form of liability identified by Lord Steyn is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. As Lord Steyn then puts it: "It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful." It is the second type of liability which is claimed by the applicant in this case. Lord Steyn, however, expands on those definitions, at p. 1232, by pointing out that "reckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can, therefore, now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.
>
> 17. Subjectivity and recklessness are not easy bedfellows, though analogous concepts do apply in the criminal law in relation to say manslaughter and certain types of non-fatal injury offences. It is, I think, necessary to consider whether this court should adopt this extension into the concept of "reckless indifference".
>
> 18. Lord Steyn, with minor qualifications, was effectively approving the lengthy reasoned judgment at first instance of Clarke J. In the following passage of his speech, at pp. 1231 and 1232 of the report, Lord Steyn puts in context the relevance of "recklessness": -
>
> > "The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals. It is not every act beyond the powers vesting in a public officer which will ground the tort. The alternative form of liability requires an element of bad faith. This leads to what was a disputed issue. Counsel for the Bank pointed out that there was no precedent in England before the present case which held recklessness to be a sufficient state of mind to ground the tort. Counsel argued that recklessness was insufficient. The Australian High Court and the Court of Appeal of New Zealand have ruled that recklessness is sufficient: Northern Territory v. Mengel 69 A.L.J.R. 527; Garrett v. Attorney-General [1997] 2 N.Z.L.R. 332; Rawlinson v. Rice [1997] 2 N.Z.L.R. 651). Clarke J. lucidly explained the reason for the inclusion of recklessness [1996] 3 All E.R. 558, 581:
> >
> > > 'The reason why recklessness was regarded as sufficient by all members of the High Court in Mengel is perhaps most clearly seen in the judgment of Brennan J. It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to perform the relevant duty. It is that lack of honesty which makes the act an abuse of power.'
>
> 19. Lord Steyn went on to deal with the limits of the tort. He had no hesitation in rejecting a test which had been suggested in the Court of Appeal and which was stricter than any test laid down by Clarke J., namely, a test of knowledge or foresight that a decision would cause damage. His Lordship did not consider that such a test readily fitted into the standard of proof generally required in the law of tort and, specifically, in the case of an intentional tort. Indeed, he considered that such a test would unnecessarily emasculate the effectiveness of the tort. Lord Steyn considered that the real choice was between the test of knowledge that the decision would probably damage the plaintiff (which was the test suggested by Clarke J.) and the test of reasonable foreseeability which was contended for by counsel for the plaintiffs in that case. Lord Steyn went on to make the following comment at p. 1235 of the report: -
>
> > "And there has been no academic criticism of the view of Clarke J. that a test of foreseeability is not enough in this tort. Given that his ground-breaking first instance judgment has been poured over by many judicial and academic eyes, this is a factor of some significance. Nevertheless, it is necessary to consider the merits of the competing solutions from the point of view of principle and legal policy."
>
> In the event, Lord Steyn came down firmly in favour of the test enunciated by Clarke J. and I find myself in agreement

with his reasoning. If the "reasonable foreseeability" test was permitted, it would introduce an objective element and, effectively, remove the requirement of bad faith. To the argument that recovery of all foreseeable losses was necessary in a democracy as a constraint upon abuse of executive and administrative power, Lord Steyn pointed out, at p. 1235 of his judgment, that the force of that argument was "substantially reduced by the recognition that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law." He went on, on the same page, to point out that this test represented a satisfactory balance between two competing policy considerations, that is to say, invoking the law of tort, on the one hand, to combat executive and administrative abuse of power and, on the other hand, not allowing public officers to be "assailed by unmeritorious actions".

20. A feature of advocacy in this court in recent years, largely due to the internet, has been the extensive citing of caselaw from common law jurisdictions such as Australia, New Zealand and Canada, quite apart from United Kingdom decisions. In cases, therefore, involving pure common law, unmodified by either the Constitution or Irish statute law, it would seem to me to be particularly important that considerable respect be paid to any consensus that may have emerged in these common law jurisdictions without in any way surrendering the right to disagree. *I do not think that there is any Irish authority which prevents the element of subjective recklessness being introduced into the ingredients of the tort of misfeasance in public office* (a tort which has not received much judicial consideration in this jurisdiction at any rate). I would, therefore, favour acceptance in this jurisdiction of that concept in the context in which it is introduced by Clarke J. and, ultimately, in the House of Lords by Lord Steyn." (emphasis added)

9. Thus, the decision in *Kennedy v Law Society* [2005] 3 IR 228 gives the Supreme Court stamp of approval to the standard of subjective recklessness as the required mental element for the tort of misfeasance in public office. In *Omega Leisure Limited v. Superintendent Barry and Others* [2012] IEHC 23, Clarke J. (as he then was) referred to what had been said by Geoghegan J. in *Kennedy* and stated (at para 8.3):

> "It follows that the test as described by Kearns J. is now the appropriate standard to be applied and it seems clear, therefore, that the law in this jurisdiction now recognises that a public official can be guilty of the tort of misfeasance of public office in circumstances where that official is subjectively reckless as to whether his actions are lawful."

10. Of particular interest in the Omega case is the analysis by Clarke J. of the evidence put forward in support of various claims that the public officer in question, a Garda Superintendent, had been reckless as to the law. The case arose out of the opposition of a Garda Superintendent to a proposed bingo business. One of the complaints was that the Superintendent, in his application to the District Court for a search warrant, had referred to the wrong section of the legislation concerning the gaming machines. In this regard, he had relied upon information in the Garda Síochána Guide which was itself erroneous. Clarke J. held that no adverse inference could be drawn as to his state of mind from that particular error. Another complaint was that the Superintendent, in his sworn information, had said that the holding of the anticipated bingo sessions would constitute an offence either because of the large-scale commercial nature of the operation or because of questions about the licence. It emerged from the evidence that at the time of the swearing of this information, the Superintendent had sought but not yet received legal advice on whether the operation of the sessions by a commercial agent was lawful. He had gone ahead to make this averment to the District Court without waiting for the legal advice. Clarke J. commented:

> "If the test were one of objective recklessness rather than subjective recklessness, I would be inclined to the view that it would be necessary to find against Superintendent Barry.... However, Superintendent Barry had been given a credible basis for the suggestion that there was nothing unlawful in the conduct of bingo sessions through a large-scale commercial agent. As it happens, I have come to the conclusion that the information in that regard given to Superintendent Barry on behalf of Omega was correct. While it was reasonable for Superintendent Barry to seek his own advice, he had not yet obtained the advice in question. If the test were that of a reasonable man it might well be necessary to conclude that, in those circumstances, it was unreasonable for Superintendent Barry to swear an information suggesting that the activities of Omega were likely to be unlawful on the basis of an issue on which he had sought, but not yet obtained, advice and where there was a credible legal basis for the alternative view. However, the test is not objective recklessness but subjective recklessness. On all the evidence I was not satisfied that the actions of Superintendent meet that test."

11. Another complaint was that Superintendent Barry had obtained a warrant when he could simply have gone to visit the premises on a voluntary basis. His explanation was that evidence obtained on foot of a warrant was stronger than evidence voluntarily obtained, which of course is incorrect as a matter of law. Clarke J. commented: "Again, if the test were one of objective recklessness there might well have been the basis on which it would have been necessary to find against Superintendent Barry", but he did not think this met the standard of subjective recklessness.

12. A further complaint related to the manner in which the warrant was executed. Clarke J. said that he did not find the explanation to be such as would "justify an inference that Superintendent Barry did not genuinely hold the view that he was legally entitled to execute the warrant in the manner in which he did". Clarke J. concluded as follows: -

> "In all those circumstances I was not satisfied that the evidence supported finding that Superintendent Barry, viewed subjectively was reckless as to whether his activities were lawful. It is also necessary to take into account, in that regard, that the warrant in question was issued by the District Court. There can, of course, be cases, thankfully rare, where it is suggested that evidence given to the District Court in support of an application for a warrant or submissions made by a Garda seeking such a warrant, were knowingly false so that the learned District Judge concerned was misled into granting warrant which would not otherwise properly have been granted. If, for example, the learned District Judge had been told that there was an anticipated breach of s.10 of the 1956 Act in circumstances where the applicant member of An Garda Síochána actually knew that the section was no longer in force, then very different considerations might apply."

13. From my examination of how the test was applied to the evidence in that case, it seems to me that the threshold for establishing subjective reckless is high and that the evidence from which an inference of the necessary state of mind may be inferred must be clear. Negligence, even gross negligence, is not sufficient. The standard is not that of a reasonable person in the office but rather whether the actual decision-maker had knowledge of the risk and took the risk anyway. The distinction is a fine one both in theory and in practice.

14. It may also be helpful for a court considering a case where misfeasance is pleaded to bear in mind the underlying policy considerations which give rise to the parameters of this and other torts involving public officers. This was mentioned in *Cromane*

Seafoods v. Minister for Agriculture [2016] IESC 6, [2017] 1 IR 119, a case involving a claim for damages arising out of a mistake made by a Minister concerning EU law on habitat assessments. In the course of his judgment in the Supreme Court, Clarke J. (as he then was) said:

> "The fact that the courts have defined the limits of the tort of misfeasance in public office in a particular way must be taken to stem from an analysis of the competing entitlements of those affected by the wrongful acts of public officials or bodies when exercising legal powers, on the one hand, and the need to ensure that such legal powers can be reasonably exercised for the public good, on the other. Torts such as misfeasance in public office have their boundaries and limitations precisely because, over the years, courts have come to the view that balancing factors, such as those which I have identified, require that liability be confined within the boundaries of the tort as thus defined".

15. In the same case, Charleton J. referred to the adoption of Professor Wade's statement of the ingredients of the tort of misfeasance in public office (HWR Wade, *Administrative Law*¸ 5th edn at page 673), as approved by Finlay C.J. in *Pine Valley Developme*nts at page 36:

> "The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations: —
>
> 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.
>
> 2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.
>
> 3. If the authority knows that it does not possess the power which it purports to exercise."

16. The fact that the liability of an entity such as a government department for misfeasance in public office is in the nature of vicarious liability was highlighted in *Racz v. Home Office* [1994] 2 AC 45. Here the plaintiff alleged that he had suffered ill-treatment at the hands of prison officers and claimed damages for assault and battery, negligence, and misfeasance in public office. The House of Lords held that the Home Office could be vicariously liable for acts of prison officers which amounted to misfeasance in public office and that the question was whether the unauthorised acts of the prison officers had been so unconnected with their authorised duties as to be independent of and outside them, which was a question of fact and degree in each case. I mention this case because it emphasises that insofar as there may be liability for misfeasance on the part of a collective entity, such as a Council or a government department, this arises via the route of vicarious liability for the individual act of misfeasance by one or more officers within that entity. I am not in the present case concerned with the precise nature of what test of vicarious liability would be held to apply, but rather with the narrower point that the liability in question is vicarious and that the evidence must, in the first instance, prove the ingredients of the tort on the part of the individual public officer(s) before the Court even considers the issue of vicarious liability.

17. I also wish to refer to the case of *Southwark LBC v. Dennett* [2007] EWCA Civ 1091, because it focuses on the need to clearly identify who is alleged to have acted in bad faith and *the precise evidence* alleged to support the claim of misfeasance in public office. In *Southwark*, a tenant gave notice to a local authority in order to exercise his statutory right to buy a long lease of his flat. There were long delays on the part of the local authority in processing his case, including delays caused by a dispute as to the boundary of the property in question and an issue about parking rights. The tenant claimed damages for misfeasance in public office and his claim was upheld at first instance, with the test in the *Three Rivers* case being applied. The judge of first instance held that various officials in the authority were aware of and understood their duty to progress his application expeditiously and that they had decided over periods of time that they would not do so in two particular respects: (a) by not sending out documentation or agreeing the terms of the lease until he gave access for the purpose of re-inspection, knowing "perfectly well" that there was no need for a re-inspection before draft documentation was sent out; and (b) by not agreeing the terms of the proceedings to grant the lease unless he had agreed to give up his parking rights when "they knew that Mr. Dennett was entitled to parking rights but sought deliberately to deprive him of those rights as a matter of 'policy' and to do so surreptitiously". He found that the evidence supported the conclusion that the authority had acted in bad faith with subjective reckless indifference. However, an appeal to the Court of Appeal on behalf of the Council was successful. May L.J. noted the submission of counsel that the element of subjective recklessness "virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith" and added: "An institution can only be reckless subjectively of one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established". May L.J. commented that the tenant did not seek to demonstrate, nor did the judge find, precisely who on behalf of the local authority acted in bad faith and what subjectively was their state of mind. Although counsel for the tenant had said that it was for the local authority to call the appropriate people to explain themselves, he took the view that it was for the tenant to establish the serious allegations of bad faith which the pleaded cause of action required. May L.J. went on to find that the evidence did not support the judge's finding of bad faith in either of the critical respects. As regards (a), it was a step too far to deduce that the officials knew "perfectly well" that there was no need for re-inspection to take place and while subjective reckless indifference was a possibility, it was not a necessary inference; two other possibilities were the strain of overwork or incompetence. As to (b), the issue of the car parking rights, there was again the problem that neither the tenant nor the judge identified the person or persons who were said to have acted in bad faith with reckless indifference. Longmore L.J. and Carnwath L.J. agreed that the appeal should be allowed, with Carnwath L.J. expressing some regret because "the case reveals maladministration of a high order".

18. The discussion of proofs referred to in the preceding paragraph points up a particular practical difficulty which may arise when a plaintiff wishes to prove misfeasance in public office. The plaintiff needs to prove the subjective state of mind of an official, but if he calls the official as a witness, he is confined to examination-in-chief and cannot cross-examine. The defendant is highly unlikely to call the witness, for obvious tactical reasons. It is difficult to establish bad faith without cross-examining a witness if the documents lend themselves to several possible interpretations. Possible explanations alternative to bad faith may well include a lack of resources, incompetence or systemic failures within the public body in question. The reality therefore is that there are not only legal but also practical obstacles to proving this particular tort. It may be that in reality, the tort can only be established if there is a paper trail which points unequivocally to bad faith or the conduct is so egregious that it speaks for itself.

19. To summarise the discussion above, it seems to me that the appropriate principles which may be extracted from the authorities and which I must apply to the evidence in the case before me are as follows:

> (a) A collective entity which is a public body (in this case, the Council) may be vicariously liable for the misfeasance of the one or more individual officers or employees, but it is necessary to establish in the first instance that at least one individual employee committed the tort of misfeasance;
>
> (b) A key ingredient of the tort is that the individual officer or employee knew that he or she was acting unlawfully or

acted with subjective recklessness as to the lawfulness of his or her actions, which I understand to mean that he or she acted with knowledge of the risk that he or she might be acting unlawfully but proceeded to act anyway;

(c) A high degree of negligence, even gross negligence, which is judged by an objective standard, is not the same as subjective recklessness, which is as defined above;

(d) The Court should bear in mind that the overall inquiry is as to whether the officer acted with bad faith, although it seems to me that bad faith is defined more particularly by the requirement of knowledge of, or subjective recklessness as to, the lawfulness of the action in question and that the phrase "bad faith" may not bear any additional substantive content over and above this element of subjective recklessness;

(e) There should be clear evidence before the Court from which an inference of subjective recklessness is drawn;

(f) The Court should not reach the conclusion that the tort has been proved or embark on the issue of vicarious liability unless there is clear evidence that at least one individual acted in the particular manner alleged with the requisite subjective recklessness.

20. I turn now to an application of the above principles to the evidence in the present case.

Chronology of Events
Purchase by Mr. Eustace of the land the subject of the trespass

21. In 1964, the father of the plaintiffs, Mr. Ronald Eustace, purchased a piece of land in the town centre of Drogheda, located within one corner of the junction created by the intersection of Donore Road and St. John's Road, and opposite what is now the Haymarket development. A small piece of this land was subsequently acquired by the Council pursuant to a compulsory purchase order for the purpose of a road-widening project; apparently the order was made in 1976 but the formal Deed of Dedication was not drawn up until 1989. The position by 1990 was that most of the land purchased in 1964 remained in the ownership of the Eustace family.

Correspondence concerning the Derelict Sites Register 1991-3

22. Some documents were produced to the Court because of an issue which arose, apparently from 1991 onwards, as to whether or not the Eustace land (by which I mean the remaining Eustace land at the relevant location, and which I will hereinafter refer to as 'the Eustace land') should be placed on the Register of Derelict Sites. This series of documents is of interest because it shows that the Council was told by the Eustace family in 1991 that they owned this property. These documents included an internal memo from January 1991; a letter dated 2nd July, 1991, from Mr Aidan Conroy, Staff Officer, to Mrs. Catherine Eustace (mother of the plaintiffs); and a letter dated 5th July, 1991, in which Mr Gerry Eustace replied on behalf of his mother, stating that his mother owned the entire area outlined in red on the enclosed map and requesting that her interest be registered in the Register of Derelict Sites. This was followed up by another letter from him dated 20th September, 1991, requesting clarification as to whether the site had been included in the Register of Derelict Sites, which was replied to by Mr Conroy on 27th November, 1991, requesting that they forward to him a map clearly defining the extent of the property and also asking whether Mrs. Eustace would be interested in disposing of her interest in the property. Clearly, at this stage, the Corporation had correspondence signalling the Eustace ownership of the land. A reminder letter was sent on 15th January, 1992, and again on 12th February, 1992. There are some further documents from 1993 but there is no suggestion that the issue of purchasing the property from Mrs. Eustace was ever pursued to any conclusion. Curiously, an extract from the Register of Derelict Sites, printed out in 2005, shows that the site was in the Register at that stage, but I have no information as to how the property belonging to Mrs. Eustace ended upon the Register or when. Nonetheless, what this series of documents shows is that the Council in the early 1990's was told, and apparently accepted, that Mrs. Eustace was the owner of the site marked in red on the map sent on her behalf.

The installation of an Interceptor Sewer in 1997

23. A public interceptor sewer was installed in this area in the late 1990's and part of the connection traversed the Eustace land ("the public sewer connection"). From the documents available to the Court, it appears that the overall project may have commenced on 1st July, 1996 and that the certificate of completion issued in 1999. I understand that the portion traversing Eustace land was laid in 1997. No written or other complaint was made by anyone in or on behalf of the Eustace family concerning this event. Mr. Gerard Eustace gave evidence that he took legal advice at the time from the then family solicitor, Mr. Gillan of Tallan & Co. and, in light of the advice given, decided that it would be fruitless to challenge the Council and therefore did not do so. This failure to object is a fact to which reference was made by counsel on behalf of the first defendant as part of a submission that the Council subsequently made an honest mistake as to who owned the land. For completeness, I should say that there was some documentation before me concerning a complaint made by one of the Eustace brothers at the time of the laying of this public sewer connection, but in the course of the oral evidence, it became apparent that this related to a different location north of the junction (as distinct from the land the subject of these proceedings, which is south of the junction) and that the complaint was about disruption caused by the ongoing works to Mr. Eustace's business rather than any allegation of trespass. Accordingly, this particular documentation does not alter the fact that no complaint of trespass was made to the Council to the effect that the public sewer connection was trespassing on to Eustace land south of the junction.

24. It is of some interest to examine some internal Council documentation concerning the obtaining of wayleaves in connection with the laying of the public sewer connection at that particular time. A document dated 21st February, 1994 from Patrick J Tobin, Consulting, Civil and Structural Engineers (hereinafter "Tobin Engineering"), to the Town Clerk, Mr BP Hoey, is headed "Drogheda Main Drainage and Waste Water Disposal Scheme-Acquisition of Wayleaves". As one might expect, it said that in order to proceed to the tender stage of the scheme, it would be necessary to acquire wayleaves along the route of the pipeline. At the end of the letter, there is a schedule which lists a number of maps and persons from whom wayleaves are to be acquired. This list did not include any member of the Eustace family, although one of the maps is map number 029021/11/422, which I understand to show Eustace land. Other documents show that land or wayleaves and/or rights of way over land were acquired in respect of various property owners, either on a voluntary or a compulsory basis. A letter dated 13th December, 1994 from Tobin Engineering refers to Acquisition Maps to enable the Town Clerk to research land ownership which, if necessary, would include research at the Land Registry Offices. In relation to one of the locations discussed in this document, it is said "we understand that the grass banks on the south side of the By-pass Road either side of the Bus Depot are also in the ownership of the Corporation". This was, in fact, Eustace land.

25. The last document in the folder of exhibits before me was a letter dated 15th May, 2006 from Tobin Engineering to the Council which replies to a previous letter seeking information from them about how they went about establishing ownership of relevant land. It says:

> "The procedure to establish ownership of Wayleaves was that Tobin's made enquiries on site as to ownership of the lands through which the wayleaves were required. In the case of the land is shown on map 029021/11/422, at that stage these lands were maintained by the Corporation and were believed to be in the ownership of the Corporation".

It further says that:

> "Having established the best information on ownership of the Wayleave areas, suitable maps were then prepared, setting out Wayleave lengths and widths and given the names of the landowners as established. Several copies of each map were then forwarded to the Corporation to enable them to negotiate for acquisition of Wayleaves".

26. As regards the wayleave area shown on map 029021/11/422, work was carried out in 1997 over several months and "insofar as I am aware there was no objection from a third party to the contractor entering on these lands carry out contract work".

27. What appears from the above is that, at the time of the laying of the public interceptor connection in the 1990's, the construction company mistakenly believed that the land was Council land, and the Council failed to probe or correct the engineering company's "understanding" in this regard. As noted above, no complaint was made by the Eustace family at that time and the work in 1997 proceeded on the basis of a mistaken understanding on the part of the two defendants.

The Haymarket Development: the planning phase

28. A separate and distinct construction project then came into the picture, namely the Haymarket development. Some documents relating to the planning phase of the Haymarket development were produced to the Court. A document dated February 1998 entitled "Corporation of Drogheda and Jon's Civil Engineering Ltd. Joint Venture Project for Drogheda" contains the proposal for the project put before the Council by the County manager, Mr. John Quinlivan. In this document, he set out the reasons for the project and recommended that the Council enter into a "joint venture project" with the company for the purpose of providing a multi-story car park, bridge and ancillary facilities at the Haymarket. It then details each of the participant's area of responsibility. The construction company was to engage in the construction of various buildings while the Corporation was to provide the sites as well as engage in a "revamp" of existing traffic management arrangements. A meeting of the Corporation on 17th February, 1998 resolved to support the proposed project.

29. By letter dated 16th March, 1998, Mr. Hoey, Town Clerk, wrote to Jon's Civil Engineering Ltd stating that the Corporation had no objection to its property at the Haymarket or the south bank of the river being included in the application for planning permission. At a meeting on 24th March, 1998, recorded in minutes of the Corporation, a solicitor, B. Gogarty, raised a question relating to the title of the sites. The Town Clerk "confirmed that the Corporation would produce title at the appropriate time". The minutes also record that "no reference to the Corporation would be included in the application" for planning permission, and that "any joint venture arrangements would be formally entered into when planning permission, foreshore licence and bridge order had been dealt with". By letter dated 23rd October, 1998, Mr Hoey, the Town Clerk, wrote to Tallan & Co, solicitors for the Council referring to a map and described the land depicted as "held by the Corporation as part of the Corporate Estate".

30. On 28th October, 1998, planning permission was granted for the development subject to a number of conditions. One of these was condition 7 which provided as follows: "The water and drainage arrangements serving the development, including connection points to the Interceptor Sewer on both sides of the River Boyne, gradients and levels of drainage pipes shall be agreed with the Corporation prior to any development commencing on site". As a matter of fact, the connection with which we are concerned in the present proceedings runs from the Haymarket development across the river and to a manhole on the plaintiff's property referred to as Manhole 36. Counsel for the plaintiffs was highly critical of the absence of any documentation from the Council with regard to condition 7 and submitted that one would expect much more in the way of documentation on the issue.

31. By letter dated 11th January, 2000 from Tallan & Co. Solicitors to Mr Hoey, reference was made to the draft contract forwarded to them and they said that there was a lack of clarity as to what properties would remain in the public ownership after the works carried out. This was replied to by letter dated 1st February, 2000 from Mr Hoey, in which he referred to agreement at a meeting on 23rd November, 1999 that the Corporation would grant a licence to the company to enter on lands at Haymarket and John Street for the purpose of carrying out the developments and that the Corporation would transfer ownership of the sites to the company when the construction of the bridge and access roads has been completed. The letter states: "All of the proposed development is a private development in accordance with the terms of planning permission 98061. There are no public works as such. Accordingly, the question of a public works contract between the Corporation and the Company does not arise." The letter states that the wording of the draft licence needs to be amended "as there are no 'public' works: All of the works are in fact 'private' works being carried out by Jon's Engineering" and "all of the development other than the bridge and the access roads shall remain in the ownership of Jon's Civil Engineering (Drogheda) Limited". Counsel on behalf of the plaintiffs emphasised this letter in order to support his submission (discussed below) that section 15 of the Public Health (Ireland) Act 1878 (hereinafter "the 1878Act") does not apply because this is a private development.

32. The licence dated 14th February, 2000 between the Corporation and Jon's Engineering recites that the parties have entered into a "joint venture" for the completion of the works, and also refers to the Grantor granting the right to enter on the property for the purpose of carrying out the "public works referred to in the planning permission reference 98061". Counsel on behalf of the Council understandably laid emphasis upon this document.

The trespass begins in November 2001

33. The construction which impacted upon the Eustace land and amounted to the trespass on their land appears to have commenced around November 2001. Mr. Gerard Eustace testified that he had a clear memory of receiving a phone call telling him that there were people on the land in November of that year; he could place it on a particular date because he was at a funeral when he received the call. His two brothers went to the site and informed the people there that the land belonged to the Eustace family and that the solicitors for the Corporation had the title deed. This was a reference to Tallan & Co. Solicitors, who had acted for Mr. Eustace previously and who were currently the law agents for the Council. He said that a few days later, the people were back and he went down again and told them to leave the site; he said that there were two engineers there at the time, one from the Corporation and one from Jon's Engineering, and that they again told them that the solicitors had the title deeds.

34. Mr. Gerry Eustace testified as to the interactions at this stage and his evidence gives a flavour of events. He said:

> "They were told the land wasn't theirs, they shouldn't be on it. They went off and came back. I mean, it was to-ing and fro-ing for days with them. They would leave the site -- within three or four days, we actually had to call the police. It

> was just nobody was listening to us, nobody. We kept telling them and reiterating to them [that the original title documents are with the Council's legal team] …They just carried on or they left and went back to their respective site office and -- the Drogheda Borough Council engineers went back to their offices and… They would go off the land and stay off for a day and then we would get another phone call to say they're back on the land again. I would have to drive from Dublin from my job to come down onto the site. Ronald would drive from his, wherever he was. We were becoming like gatekeepers on the site on a daily basis. You know, when we weren't there, they were there. When we'd arrive, there'd be words and discussions and they'd leave and go off. And then the following morning, they're back again, despite what we done or what we said to them…. [t]he Drogheda Borough Council seemed to be throwing engineers at us. Every single time they sent an engineer down, it was a different one, and they all seemed to be pretty young. That was the big thing that we did happen to notice. These are young guys being sent down. I mean, they weren't the people to send down to talk to us, you know. None of the senior people were coming down and that's for sure. … they didn't seem to know whether we were right or they were wrong and they went off to take instruction. Now, we couldn't stand around on the site all day waiting to see whether they'd come back and tell us "we're coming back or we're not." When nobody came back, we assumed that's that, we'll hear from it through our solicitors or whatever else. But we didn't. We went off and then, the next morning, we get a phone call "those guys are back on your site again."

35. Mr. Eustace was asked how many times in November he personally attended in person in this manner and he said: "I would say ten times, possibly, if not more, and that was only me. They guys, Ron and Noel, on various different occasions." He said:

> "[t]hese guys just weren't listening" and that "[a]ll we got from the people representing Jons Engineering was 'well, look, we're under instruction, you know, we're told to be down here and that instruction is coming from Drogheda Borough Council through Jons Engineering to us. We're the workers, we're doing what we're told.' That's basically the way it went.".

He said that on the first occasion he called the Gardaí, but was told that they could not assist because it was a civil matter, and that on the next occasion, he produced the copy title documents, and the Gardaí told the construction workers to leave. He said the Gardaí were called on other occasions also. He said that they instructed Feran & Co. solicitors to act on their behalf but that this changed nothing on the ground.

Correspondence between the Eustace family solicitors and the Council: November 2001-16th January 2002

36. The documentary record for November reflects the events as described by Mr. Eustace. By letter dated 7th November, 2001, the solicitors for the plaintiffs (Feran & Co) wrote to "the Town Clerk, Corporation of Drogheda" to complain about construction work on a slip road that had commenced and which they said constituted a trespass on their land. They threatened to institute proceedings if the works were not halted immediately. The letter could not be clearer in its assertion of title to the land and a claim that a trespass had commenced, and is the starting-point of a series of letters complaining of trespass.

37. One copy of this letter emanating from the Council files has two handwritten notes on it. One note, dated the 13th November, 2001, says: "Brona, please consult with Mary Moran in Tallan's before reply issues". This is presumably Brona O'Reilly, Senior Staff Officer, who by letter dated 8th November, 2001, sent a copy of the Eustace letter to Martina Sheeran, Senior Executive Engineer. I do not know whether the law agents for the Council, Tallan & Co., were consulted at this point; the first letter written by them to the plaintiffs' solicitors appears to have been the 21st February, 2002, discussed below.

38. The other handwritten note on the Eustace letter of 7th November, 2001, was dated 9th November, 2001 and signed by Martina Sheeran, which says:

> "The lands referred to were purchased by the Corporation of Drogheda for the purposes of constructing the Dublin Belfast dual carriageway and widening of Donore Road. The works currently underway are within Corporation property and do not encroach onto third-party lands. Should Feran & Co's client wish to pursue this matter further they should be requested to produce title of ownership deeds for the lands they claim to own in this area. In the meantime, works are continuing and Feran & Co's client should be advised that they shall not trespass on nor interfere with the works in hand".

39. It is not clear whether anyone other than this engineer was consulted about the plaintiff's assertion of title around this time. In her evidence, Ms. Sheeran said that what she wrote in the note was based on her understanding at the time that the Corporation owned the land; that she had started working with the Council in 2000; and that she was aware of the scheme for the road widening project in the 1980s when lands were purchased along that section of the road. She said she did not recall what investigations she did at that time but it was likely that she discussed it with colleagues. She said that, in the normal course of events, if they were looking at land ownership, they would look at the Land Registry and she thought that was what they would have done at the time. She also said: "from local knowledge, people who worked in the Council for a lot longer than me would have been able to advise me as to what we did or didn't own". She accepted that it was decided to press on with works despite the assertion of title by the plaintiffs and said that it was because of her understanding that they had a right to carry out those works. She had previously worked for Dundalk Town Council and Fingal County Council, and said that the normal procedure would be that they would ask for legal advice if matters arose that could not be dealt with through their own investigations. She said that she was not aware of any internal protocol or procedure for dealing with a situation where conflict arose as to ownership of land and that it was her first time dealing with such a situation. When asked why she had not left the ownership of land issue to the solicitors, she said: "I think it was referred to our solicitors, but it was sent to me, as the engineer, to investigate". When asked about her handwritten note and the fact that she based her view on conversations with people within her department rather than advice from the solicitors, she answered that the job of liaising with the solicitors "would have been the job of the Town Clerk". She said "that was only a comment I was making back to the Town Clerk. It was up to the Town Clerk then to decide what to do with my opinion… It was up to the Town Clerk because the letter was sent to him. I was asked for my comment or to look at the issue, so I wrote back my comments. Now, if I'm giving legal advice, I am overstepping, but it's up to the Town Clerk then to deal with…". She accepted in her evidence that the solicitors were not in fact involved before 28th January, 2002, as referred to in her memo of that date (see below). This late involvement of the solicitor is puzzling given the first of the handwritten notes on this letter already referred to above, which suggested that "Brona" should consult with Tallan & Co. before a reply would issue, and, in any event, because one would expect that lawyers would become involved immediately, once a claim of title had been made.

40. By letter of 7th November, 2001 also, the Eustaces wrote to Tallan & Co, Solicitors, as their former solicitors, directing them to forward all title deeds relating to the affairs of Mr. Eustace (deceased) to Feran & Co., stating that the matter was extremely urgent.

41. By letter dated 8th November 2001, Feran & Co. re-sent to the Council by fax their complaint letter of the previous day and said that they proposed immediately to exercise their rights of ownership in securing their property and that they awaited hearing from the

Council.

42. By letter dated the 15th November, 2001, Feran & Co. wrote to complain that employees of Jon's Civil Engineering Ltd were back on the property again and that fencing had been removed. The letter expressed astonishment at these actions and said that their clients had the good sense to call the Gardaí and that the matter had been resolved. The letter complained of joint action between the Council and a private developer to the detriment of their private interests.

43. A further letter followed the next day, 16th November, 2001. Feran & Co. advised in this letter that the ongoing situation was causing great distress to their clients, in particular Mrs Eustace, because the property represented the final part of her husband's estate and recent events had caused her great stress and sadness. The letter said that the fencing remained on the client's property and requested that it be removed immediately. It reported that machinery from the Haymarket development had entered the property again this morning and the Gardaí were again called. It reported that the machine operator said he was acting from instructions from his employer, who was acting on instructions from the Corporation. Arrangements had been made for the day, but the solicitors were calling on the Corporation to address the situation immediately. It said that the "repeated trespassing on our client's property is to serve a private commercial development" and "it seems that there is a lack of communication between the Corporation and its employees appear to be ignorant of our client's ownership of the property".

44. There is then a minute of a meeting dated 20th November, 2001, entitled "Progress Meeting No. 1" at which there were representatives from Corporation, including Martina Sheeran, the engineer, and Jon's Civil Engineering. This minute notes that the Council told the developer that any queries about ownership should be referred to the Council.

45. By letter dated 22nd of November, 2001, a letter in the name of Town Clerk, Mr. Des Foley, was sent to Feran & Co, acknowledging their letters, but saying:

> "The works to which you refer are being carried out on behalf of Drogheda Corporation and do not encroach into third party lands. Your clients should be advised that they should not trespass on or interfere with the works in hand. Having regard to the above if your clients wish to pursue this matter further, they should be requested to produce title of ownership deeds for the lands they claim to own in this area."

There was no attempt to explain how the Corporation had arrived at the conclusion that it owned the property. Ms Sheeran accepted in evidence that she probably had an input into this letter. There is no evidence before the Court as to any interaction between the Corporation and its law agents before this letter was written. It is somewhat startling to see the Corporation requesting the Eustaces to produce the deeds to the land when it is claiming that it (the Council), and not the Eustaces, is the owner. One would have thought that the obvious thing for the Corporation to do would be to itself produce evidence of the title it was asserting.

46. A reply dated the same day from Feran & Co. stated, inter alia:

> "We are instructed that part of the property involved is owned by our clients. Doubtless in due course evidence of title can be furnished, whether documentary or otherwise, but in the mean while it is your Corporation which seeks to disturb and develop the property, and our clients are quite satisfied that your Corporation has no title to the property our clients have indicated. If you are suggesting that our clients are wrong, we call upon your Corporation to provide evidence of title as the party carrying out the activities complained of".

47. Meanwhile, the Eustaces renewed their effort to obtain the original title deeds. By letter dated 29th November, 2001, Feran & Co. wrote to Mr. Gillan of Tallan & Co., stating: "Our instructions are that you hold the deeds to lands at the corner of John Street and Donore Road, Drogheda. These lands were purchased many years ago from the Bell Ball estate." The letter requested the solicitors to confirm by return the documents to the property.

48. By letter dated 10th January, 2002, the solicitors on behalf of the plaintiffs wrote to the Corporation noting their "continued activities in this area and development of their property", and called upon the Corporation "forthwith to desist from all trespass and use of our clients' lands".

Letter enclosing copy title deeds dated 16th January, 2002

49. By letter dated 16th January, 2002, Feran & Co. wrote to the Town Clerk recording "our disappointment and our clients' outrage that works are continuing on their property". It is important to note that the letter says that they "yesterday" came into possession of a copy of the Deed of Conveyance dated 9th of June, 1964 between the Balls and Mr Ronald Eustace, which they enclose and "which speaks for itself". It says that the copy was procured from the solicitors who acted for the late Mr. Eustace and that they hoped to have the original deeds shortly. This suggests that Tallan & Co. had responded to the request for the title deeds from the Eustaces by sending them a copy of the title deeds. The letter continued: "It seems wrong that we should keep putting you on notice of your Corporation's transgression of our clients' rights and interests, whilst your Corporation, the actor in this matter, has shown no evidence, and has made no attempt to explain, any adequate interest in the property in question at all".

50. This clear assertion of title, coupled with the provision of the title deed, was not met with immediate capitulation on the part of the Corporation. In a short letter dated 22nd January, 2002, Mr. D. Foley, Town Clerk, wrote back saying that the Council proposed "to establish on site the boundary line showing the extent of land in the ownership of the Borough Council" and that "once this has been determined, we would hope to discuss the matter further and hope to come to an amicable agreement should your clients' claim be verified". There was no apology and little softening of tone.

51. An internal memo dated 28th January, 2002 was prepared by Martina Sheeran, Senior Executive Engineer for Brona O'Reilly and is quite lengthy. It is headed "RE: N1/Donore Road Junction Improvements-Eustace Property at Donore Road". It starts by noting that contractors on behalf of DBC were carrying out works for the new Donore Road Slip Road. It said that DBC took responsibility for and had been maintaining the area of the green, "believing they were the owner of the property since completion of the Donore Road/Rathmullen Road Improvement Scheme circa early 1980s". It noted that upon the commencement of the works, Feran & Co. had notified them of the Eustace interest in the property. It says that "Drogheda Borough Council carried out a thorough search for relevant documentation to establish ownership in this regard". It then lists "all available documentation" as including: a letter from Feran & Co. Solicitors dated 16th January, 2002 and Deed of Conveyance attached to same indicating lands in the ownership of Messrs. Eustace coloured red and blue; a Deed of Dedication indicating the lands acquired from Messrs. Eustace by Drogheda Corporation coloured green, also showing the existing property of Drogheda Corporation coloured yellow; N1/Donore Road Junction Improvements Contract Drawing No.972011-411 indicating extent of road re-alignment; and an extract of Drawing No.972011-411, 'Lands Required for Donore Slip Road', at scale 1:500, indicating lands which according to the attached Deed of Conveyance are in the

ownership of Messrs. Eustace and which are necessary for provision of Donore slip road. It then says: "Messrs Eustace claim that they own lands in this area appear to be correct". However, it goes on to refer to Mr Donal Ryan, architect acting on behalf of Feran & Co, and says that he "concurs with my opinion that it is not possible to establish the extent of land ownership on site from the documentation available" and "a more accurate measure of lands actually taken for the Donore Road Slip Road would require a comparison with 'as constructed' drawings." The memo concludes by requesting the matter to be referred to the solicitors Tallan & Co. in order for an agreement to be reached to legally acquire the area in question. When giving evidence, Ms Sheeran was asked whether there was somebody in overall charge of trying to establish what the Corporation owned in the area and answered as follows:

> "No, the correspondence coming in from the Feran & Co solicitors, based on the drawings they submitted, I would have then contacted Mr Donal Ryan, the architect acting on behalf of Feran & Co and from that conversation we agreed that we would have to-there would have to be further investigations done i.e. a survey of the land to try and establish what was Council property and what was used as property, and then I asked for that, the matter to be referred to our solicitors."

52. If the tone of the internal memo is one of acceptance that the Eustace family had at least some claim to the land in the area, with the precise parameters to be examined by and discussed with the Eustace's architect, a similar tone is not found in responses to the Eustace correspondence, nor does it seem that anyone was instructed to stop the building works until the matter was resolved. By letter dated 6th February, 2002, Feran & Co. complained to the Town Clerk that the Corporation and its contractors were now dumping soil and rubble on their clients' property, and called upon them to desist immediately. A handwritten note on this letter says "Brona 1. Please [illegible] to advise that Borough Council's Law Agent will contact Feran & Co in [illegible] to resolve the matter". The rest of the note is illegible. There is also a letter from Brona O'Reilly to Martina Sheeran enclosing this latest letter of complaint, upon which there appears part of a handwritten note which says: "Brona 13.02.02. The rubble and soil are excavations as part of the roadworks and will be removed and the area reinstated prior to completion of the works. The Eustace family did not once declare their interests in the property, least of all accuse the Council of trespass, in all our years of maintaining and landscaping…". Meanwhile, by letter dated 12th February, 2002, the reply from Brona O'Reilly to Feran & Co. stated that their letter had been forwarded to the law agents who would be in contact in the next few days. A letter dated the next day, 13th February, 2002, was sent by Brona O'Reilly to an auctioneer, seeking a report and valuation on the plot because the Council were "anxious to acquire it in order to complete the present roadworks". On the same date, there is a letter of Ms. O'Reilly to Tallan & Co, enclosing a copy of a map of the site with the Council "proposes purchasing from the Eustace family" and indicating that a valuation has been requested from auctioneers. On the same date, she sent the map to Martina Sheeran, and a handwritten note from Martina Sheeran says: "The landtake should extend to the edge of the kerb". I do not detect any note of concern that there has already been a trespass on the Eustace property or that the works might have to cease pending resolution or that the Eustaces might decide not to sell. What comes across is that the Eustace interest is considered a possible inconvenience which will be sorted out in due course.

53. By letter dated 15th February, 2002, Feran & Co. wrote to Tallan & Co. referring to a telephone conversation, enclosing a copy Deed of Conveyance 1964 and "again" calling on the Corporation to desist from trespass and use of their clients' land. It also says "kindly furnish title, if any, which your client claims to have in relation to this property". This appears to be the first letter written by Feran & Co. directly to the Corporation's Law Agent, Tallan & Co., as distinct from to the Town Clerk.

54. Another letter of complaint came from the plaintiff's solicitor on 20th February, 2002, stating that soil and rubble was being dumped on their property and requesting the activities to desist immediately. A handwritten note on this letter, authored by Martina Sheeran, says: "Site clearance referred to is ongoing. All works in connection should be completed by 10th of March 2002 or thereabouts…". Counsel on behalf of the plaintiffs asked the Court to infer from this that a decision had been made by the Council to press on in the knowledge that it had no title and because the works would shortly be completed. In her evidence, Ms Sheeran said that the completion date probably came from the contractors and when she was asked whether she had confirmed with them whether they were satisfied that the land taken for the road widening was appropriately taken, she said that drawings had been prepared for Jon's Civil Engineering and she had agreed those drawings "on the assumption that that land was ours". She says that "afterwards", she tried to compare what was taken as opposed to what was on the Deed of Dedication. A record of that exercise is found in an internal memo dated the 28th February, 2002 (see below).

55. A letter dated the 21st February 2002 complained that the Corporation and its contractors were continuing to dump soil and rubble on the property; that this was their clients' property; and that the this was totally unacceptable. A response came the same day, 21st February, 2002, from Tallan & Co. to the plaintiffs. This appears to be the first letter from Tallan & Co, as distinct from individuals within the Council. They said that they were "fully investigating the title to this matter" that they would revert as soon as possible. They indicated that construction material which had been placed on the property would be removed pending determination of the matter. The reference to investigating title is somewhat puzzling and opaque. One would have thought, from earlier documents set out above, that matters had moved beyond investigation of title and were at the stage of finalising boundaries between the engineers and architects.

56. The Eustaces were understandably not satisfied with the response, because by letter dated 22nd February, 2002, Feran & Co. said that they were "astounded by your client's relaxed attitude to our repeated warnings and calls upon them to desist from trespassing on this property…" and also called upon them to produce a copy of the Deed of Dedication referred to in their conversation of the previous day. There must, therefore, have been some solicitor-to-solicitor discussion on the 21st February, 2002.

57. The Deed of Dedication was sent by Tallan & Co. to Feran & Co. by letter dated 25th of February, 2002, which also said: "We repeat our offer to meet and attempt to settle the issues raised by your clients", and suggested they meet "tomorrow" on site "to enable our engineers establish the portion the subject matter of the dispute". By letter of the same date, Feran & Co. acknowledged receipt of the Deed of Dedication and advised that it related to the portion of land purchased under CPO in 1974 and that it was not relevant to the matter at hand. They complained that dumping on the property was continuing and again requested the Corporation to remove the rubble and soil and to cease all activity. In another letter of the same date, they enclosed a copy map from Donal Ryan, architect, which they said "speaks for itself".

58. By letter dated 26th February, 2002, Tallan & Co. said:

> "We refer to your letter of the 25th instant and note that you failed to recognise the telephone conversations which we have had with you and our attempts to meet with you to establish exactly the portion of the ground which is under dispute. We are at a loss to understand why our respective engineers cannot meet to discuss this matter and indeed we, ourselves, are attending on site today to see if the matter can be advanced and the area in dispute established. As you are aware the area, the subject matter of your claim, has been in the possession of Drogheda Corporation since 1976. It has been maintained and controlled by them during that period without any objection by you."

59. It is difficult to understand the reference to the maintenance of the land by the Corporation, which obviously has no relevance to the question of title. Feran & Co. replied on the same date indicating that they were waiting advices from senior counsel. By letter dated the 27th February, 2002, Feran & Co. wrote to Tallan & Co., indicating agreement to meet at Dundalk on the 4th or 5th March. It appears that a meeting took place at Dundalk courthouse on the 4th or 5th of March, 2002. Obviously, discussions were unsuccessful and the issue remained unresolved. The plenary summons issued on 4th March, 2002, and appearances were entered on 20th March and 25th of March, 2002 respectively.

60. An internal memo dated 28th February, 2002 authored by Martina Sheeran refers to a map highlighting lands in the area of the open space at the relevant junction. She refers to the fact that the new Donore slip road incorporates lands coloured pink and yellow and that the land coloured pink "are in the ownership of Messrs Eustace" as indicated by the title deeds dated 1964. She also refers to lands coloured blue and green which she describes as remaining within the open space area which is "maintained" by the Council.

61. By letter dated 6th March, 2002 from Tallan & Co. to Feran & Co., reference was made to the meeting at the courthouse in Dundalk and regret expressed that it was not possible to settle the issues. The letter goes on to state the position as Tallan & Co. see it. They state that they had been furnished with map setting out the area in dispute and now accept that the Eustaces owned the freehold title to the property. This is the first clear acceptance on behalf of the Corporation in correspondence with the plaintiffs that the plaintiffs had title. The letter, however, immediately goes on to point out that "our clients have been in occupation and possession of the said lands for in excess of 20 years" and continues:

> "our clients have maintained in every way these lands including grassing and putting in flower beds and indeed in the last five years have laid the main sewer for the time of Drogheda. The main optic fibre cable from Dublin to Belfast has also been laid in these lands, at no time was any objection made by your clients in respect of our use of the said lands. Because of our continued and uninterrupted use of the said lands our clients believed that they owned a fee simple and recently entered upon the lands for the purposes of constructing a slip road. We now accept that we do not own the fee simple to the property but are willing and ready to acquire this title from you at open market price to enable the roadway to be completed".

62. It says that unless agreement is reached, they would have no option but to compulsorily acquire the lands. It concludes by saying that their clients were prepared to cease all work on the disputed land. I understand the position to be that the works had ceased by this stage in any event; this would be so if the deadline of 10th March referred to in the earlier handwritten note of Martin Sheeran was adhered to.

63. A further letter from Tallan & Co. to Feran & Co. dated 8th March, 2002 refers to the receipt of a plenary summons but expresses the hope of being able to resolve the issues and negotiate the purchase of the freehold title. Counsel on behalf of the Council sought to persuade the Court that the Council had, from March 2002, bona fide tried to resolve the situation with the plaintiffs.

December 2002: a skirmish about the Haymarket sewer

64. The next document put before me was from December 2002, some nine months later, when correspondence was exchanged in relation to the Haymarket sewer connection. I should say that I have no information about the actual construction or laying of the Haymarket sewer (as distinct from the public sewer which had been laid in 1997). It seems likely that the Haymarket sewer connection was laid across the Eustace land at the time of the construction of the slip road, that is to say, late 2001 and/or early 2002. By letter dated 16th December, 2002, Tallan & Co. wrote to Mr Noel Eustace indicating that access had been denied to the Council which was carrying out "essential works on the sewer which comes from the Haymarket bridge development". This suggests that what had arisen at this point in time was an issue about access to the sewer for repairs or maintenance, rather than the laying of the sewer in the first place. The letter says that the sewer "is the property of Drogheda Borough Council and is vested in them in accordance with the provisions of section 15 of the Public (Ireland) Act 1878", and that under this legislation the Council has the legal authority to carry out essential maintenance works to the said sewer. The plaintiff in the present proceedings disputes that this legislation applies to the sewer on the basis that it is a private sewer.

65. The letter continues, rather surprisingly, "In addition thereto it should be pointed out that the lands within which the sewer is situate has been occupied by the Borough Council for a period in excess of 25 years. Both the occupation and the constructions of the sewer on these lands are matters which were never the subject of any protest by your clients". The letter calls on Mr Eustace to undertake that no further interference will take place in respect of the works. It has been pointed out to the Court that the pipeline for the Haymarket sewer connection runs straight through the Eustace property; there is no question of it being on any boundary and one would have thought that the issue of title to the land was no longer in question, given the earlier events described above.

66. A letter of 18th December, 2002 from Tallan & Co. to solicitors for the Eustaces, now Fionnuala Cawkhill & Associates, referred to "numerous conversations with your office yesterday when we agreed to facilitate your client by allowing inspection facilities of our sewer this morning by your engineer in consultation with our own engineer". It complains that they have not been able to finalise arrangements and gives notice that they intend to enter onto the lands and carry out work "today". A fax of the same date from Fionnuala Cawkhill & Associates to Tallan & Co. says that if the Council its servants or agents enters the land, they are committing a trespass. By letter dated 19th December, 2002, Tallan & Co. indicated that their engineers and workmen would be on site that morning and that the necessary works will be carried out to ensure that "the previous flooding experienced by the Town of Drogheda will not reoccur".

67. Tallan and Co., on behalf of the Council, then wrote a letter on 22nd January, 2003, referring to a meeting of representatives of the Council and the Eustaces on site on the 19th December, 2002. It notes that the Council was refused access to the manhole on the basis that the Eustace family were in a position to prove title to the land and that they had a letter from the Council to confirm that they owned the fee simple. The letter continues: "We have now carried out a survey of the lands and in particular the position of the manhole and the connection thereto and we can confirm that the manhole is not situated on any land to which your client can show title. Indeed as you are aware your clients have never held title to these lands". I simply do not know on what basis this assertion was made, and it was not stood over in any way in the present proceedings. The letter went on to say that without prejudice to the above, the Council was entitled, under the Act of 1878 and section 17 of the Act to go onto land for the purpose of inspection and maintenance of sewers already vested in the local authority. It said their intention was to make application to the High Court for an order restraining them from interfering with their engineer in attempting to access the main sewer.

68. What was asserted in the letter of 22nd January, 2003 ("…the manhole is not situated on any land to which your clients can show title") may be contrasted with what was said at a meeting on the 30th January, 2003 between three engineers and Mr. Gerry Eustace, the purpose of which was "How to progress the technical aspect of the dispute between the Eustace family and Drogheda Borough Council in regard to DBC gaining access to manhole MH36 on southern interceptor sewer". In the course of this meeting, Mr

Padraig Judge, Senior Executive Engineer with the Council, "proposed that the issue of immediate concern was to establish the exact location of the contested manhole and drainage pipes in relation to the limits of the property owned by the Eustace family". There was then discussion of who should carry out the survey and whether it should be done jointly, and it was agreed that no further work would be carried out within manhole 36 at the time of surveying. It was agreed that, pending approval from both legal teams, a professional survey company would carry out the survey, after which a meeting would be arranged to allow the survey information to be overlaid onto the original deed map of the property. A survey was apparently carried out because it is referred to in a letter dated 4th of June, 2003, but counsel on behalf of the plaintiff informed the court that they had never seen this survey.

69. A letter dated 4th June, 2003 from Tallan & Co. complained of lack of progress in relation to the survey and indicated an intention to proceed with the matter to ensure access would be made available to the Council for necessary maintenance work.

70. A letter from the solicitors for the plaintiffs dated 22nd October, 2003 refers to the intervention of the Gardaí after which the contractors left the site and the works ceased. The letter requires an undertaking that there will be no further trespass and that that the Council reinstate grounds and compensate the Eustace family.

71. A letter from Tallan & Co. dated the 5th November, 2003 referred to contractors carrying out "landscaping works" and that these were "on lands occupied by the Borough Council for upwards of 30 years past". It is said that the legal proceedings issued by the plaintiffs would be defended on that basis. It says that insofar as there has been a "technical trespass" on lands owned by your client, same is regretted and that the contractor has been instructed to refrain from carrying out any work on their lands. It then refers to the necessity of the Council to carry out "urgent maintenance work on piping on these lands" and that the Council is entitled to access for the purpose of repair and maintenance of sewers. It threatens an injunction in respect of "your continued obstruction of Council in the carrying out of its statutory duty".

72. A letter dated 20th May, 2004 from Tallan & Co. to Mr. Des Foley, the Town Clerk, refers to a long meeting at which maps were discussed. It notes that maps furnished by the Eustace family were at odds with the maps prepared by the Council a year ago, and "show the interceptor sewer and pipe being located on the lands owned by them" as well as "a larger take of land for the new road way than that conceded by us". The letter requests that a further map be prepared and that they then meet with the engineer acting for the Eustace family, to clarify exactly what is on the Eustace land and what is on "no man's land", which it says should now be called Corporation lands.

73. There are further letters in June and July 2004 from Tallan & Co. to solicitors for the Eustaces, in which they are seeking to progress the above anticipated meeting. I have not been furnished with copies of any replies.

Conclusion on the claim of misfeasance in public office

74. I have set out at paragraph 19 above the principles which I consider should be applied in a case where the tort of misfeasance in public office is sought to be proved. Having considered the transcript of the oral evidence of the witnesses called and the documentation described above, I am not satisfied that the evidence before me is sufficient to prove this particular tort. The conduct of the Council as a collective entity was in my view deeply disrespectful of the Eustaces' property rights and bewilderingly incompetent, but I cannot say that the evidence clearly demonstrates that there was at least one particular public officer who had *both* the requisite level of Council authority to (purport to) authorise the developer to enter upon the land and the knowledge that the Eustaces were claiming to own the land.

75. To explain further what I mean, I would point out while it is necessary to prove the ingredient of subjective recklessness, as discussed in detail earlier, it is not sufficient. There must be a decision or action as well as knowledge or recklessness as to lawfulness. For example, a secretary who was working in the Town Clerk's office at the time might have the requisite knowledge of the Eustace title claim, but he or she could not be said to have committed the tort of misfeasance if he or she had no responsibility for taking any decision which interfered with their property rights. So, it is the taking of action (or perhaps more accurately, taking a decision which leads to the action complained of) combined with the relevant state of mind that constitutes the tort. Applying this reasoning to the individuals identified by the plaintiffs in the present case, the following comments can be made.

76. Mr. Quinlivan was the county manager at the time, and presumably had the requisite authority to make the decision or give the order that the construction company (Jons Engineering) be permitted to enter upon land for the purposes of the development; but there is nothing in the documents or in his oral evidence which proves that he had knowledge of the correspondence with the Eustaces. He gave sworn evidence that he was involved only at a high level and left the execution and detail to others with the appropriate expertise. It is also fair to record that he retired not long after the events in question and was being asked to recollect matters relating to 2001-3, some fifteen or more years before he gave his evidence. I cannot make a finding of misfeasance on the basis of a possibility that he may have been told about the correspondence at the time and has now forgotten, nor is it appropriate to draw the inference that he 'must have been aware' from the evidence before me. The authorities suggest to me that there must be clear evidence which establishes the requisite knowledge on the balance of probabilities and in my view, there is insufficient evidence from any such inference could be drawn.

77. The evidence regarding Ms. Martina Sheeran is, in a sense, a mirror image of that relating to Mr. Quinlivan. She was clearly very involved with the correspondence and undoubtedly had the requisite knowledge regarding the Eustace claim to the land. But she was an engineer being asked about the land title and there is no evidence before me that she had any role in making the ultimate decision about whether or not the construction should proceed. Indeed, she herself gave evidence that she assumed the lawyers were being consulted about the Eustace letters and that she was only providing such information as she was asked to give in her capacity as engineer.

78. There is something in itself rather peculiar about a claim of land title being referred to an engineer for her opinion. One would imagine that the first and obvious port of call would be the law agents. It is also peculiar that there was a note on the first letter of complaint from the Eustaces (7th November 2001) saying that the law agents should be consulted, but there is no evidence that this happened. The Council's law agent does not appear to have become involved for a number of months, and even then, there seems to have been delay in accepting the Eustace's title. One could speculate as to what might have happened but there is insufficient evidence to draw solid inferences.

79. I have considered the position of the Town Clerk, who was the person receiving the correspondence from the Eustaces, but he was not called as a witness, and his precise role in the whole affair is not clear to me. Further, the Supreme Court has recently cautioned against drawing inferences of fact in respect of witnesses who swear affidavits but are not called for cross-examination (*RAS Medical Limited -v- The Royal College of Surgeons in Ireland* [2019] IESC 4). This reasoning must apply with equal if not considerably greater force to the position of a witness who has not given evidence in circumstances where the issue is whether the person acted in bad faith. I note also that, as regards the Council witnesses who were called to give evidence before me, they could

not be cross-examined by counsel on behalf of the plaintiffs because it was the plaintiffs who had called them. This may have led to the practical problem identified by me at paragraph 18 above, but I must take the case on the evidence adduced before me.

80. No other individual actor was really identified to me as being potentially liable for the tort, even though a number of names had been furnished by the plaintiff in replies to particulars.

81. I also take into account the factors upon which the Council relied for the proposition that the Council acted pursuant to a bona fide and honest mistake, namely: (a) that the Council had acquired some of the land in a previous road-widening project in the 1980s, which may have caused genuine confusion as to who owned what; (b) that there was no objection from the Eustaces when the public sewer was laid in 1997; and (c) that the Council had maintained the land in question for years without comment from the Eustace family. In my view, these factors only carry the Council so far. There was a deluge of correspondence from the Eustaces including the furnishing of a copy deed showing title, and even when the Council appeared to withdraw from a hard-line position that they owned the property, their acceptance of the Eustace title appears to have been grudging and gradual. If there was a genuine and honest mistake in November 2001, one would expect a greater tone of apology and considerably more haste in setting matters to rights once the Council had realised its mistake. Accordingly I do not accept that this was a simple situation of honest mistake. But I do think the factors identified are relevant to a consideration of whether the plaintiffs have proved a state of mind at the other end of the spectrum, namely bad faith. The factors mentioned above tend to rebut the suggestion of bad faith and engage the real possibility that other factors may have been in play, such as incompetence or systemic failure.

82. In conclusion, I am not persuaded that the evidence proves that one or more individuals committed the tort of misfeasance in public office and therefore the Council cannot be vicariously liable for this tort. However, it does seem to me that the evidence establishes that the Council's conduct was grossly negligent and that this is something which should be taken into consideration when awarding damages.

83. Before leaving this discussion of the tort of misfeasance in public office, I would also raise a question which I have not yet seen explicitly addressed in the authorities or featuring in the argument before me. This is whether the tort of misfeasance in public office encompasses decisions or conduct by a public officer other than decisions made in the exercise of a discretionary power. The alleged unlawful act in this case was the purported authorisation of a trespass, which is more in the nature of the exercise of an executive function and not the exercise of a discretionary power. The authorities opened to me concerned the exercise of discretionary powers, which in turn led to discussions not only as to the requisite degree of knowledge of the unlawfulness of the action but also the degree of likelihood of the damaging consequence of the action. This is a rather different scenario from an act of trespass and seems to me to be straying rather far away from the original purpose of the tort, which I understand to be fundamentally concerned with preventing public officials from abusing their discretionary powers and using them for improper purposes. To take a different example, if a police officer strikes a citizen in the course of conducting an unlawful arrest, knowing that the arrest is unlawful, has the police officer committed the tort of misfeasance in public office in addition to the torts of assault and false imprisonment? And, to return to a point I made earlier about the sufficiency of damages, even if he has, does it matter, for any practical purpose? Are the damages not going to be the same one way or another? As I do not think the evidence goes far enough to establish misfeasance in the present case, I do not consider it necessary to answer the question I have posed in relation to the scope of the tort in this sense and it may arise for decision in some future case. I turn now to the issue of compensating the plaintiffs for the (admitted) trespass.

Damages for the trespass

84. For what should the plaintiffs in the present case be compensated? There was undoubtedly a trespass consisting of the construction of the slip road on the plaintiffs' land, but the parties were in disagreement as to the position concerning the Haymarket sewer connection. Section 15 of the Public Health (Ireland) Act, 1878 provides that existing and future sewers within the district of a sanitary authority, together with all buildings, works, materials, and things belonging thereto, shall vest in and be under the control of such sanitary authority. There are three exceptions to this, only one of which is potentially relevant and is defined as "sewers made by any person for his own profit, or by any company for the profit of the shareholders". Section 17 provides that every sanitary authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district. Counsel for the plaintiffs submitted that the Haymarket sewer had been laid in connection with a private development and that the above-mentioned exception to s.15 applied. In this regard, counsel pointed to the correspondence set out at para 24 above. Counsel for the defendant pointed out that the authorities have interpreted this exception narrowly and that a sewer "for profit" is not to be equated with "a sewer serving a private development" (see *Acton Local Board v. Batten* 28 Ch. D 283; *Bonella v. Twickenham Local Board of Health* (1887) 18 Q.B.D. 577; *Ferrand v. Hallas Land and Building Co.* [1893] 2 Q.B. 135; and *Vowles v. Colmer* (1895) 72 L.T. 389). Nonetheless, it seems to me that even if the sewer itself vested in the Council at some point, and even though they appear to have the right to enter land in order to maintain or repair a sewer, I cannot see how this could provide a legal basis for the laying of the connection across Eustace land in the first place. Accordingly, I consider that the trespass for which the plaintiffs are to be compensated is not only the construction of the slip road and its continued existence on their land, but also the laying of the Haymarket sewage connection without their consent and its continued presence on their land. As to the length of time of the trespass, it seems that it is the entirety of the period 2001-10, the end-point being when the notice to treat was served in 2010.

85. On the issue of the appropriate level of compensatory damages, the Court was referred to two Irish cases. The most recent was *Condron v. Galway Holding Company Limited and others* [2018] IEHC 233, where the plaintiff maintained that a grass verge on his land had been interfered with and trespassed upon during the course of road widening works. The High Court (McDermott J.) awarded a sum of €10,000 in general damages for trespass, and also directed that the defendants should restore the area to its previous state. The area in question was a very small piece of land and a reading of the judgment suggests to me that this was almost akin to an award of nominal damages. The other case was *Mc Keever v. Hay* [2008] IEHC 145, (Unreported, Feeney J., 8th May, 2008), where an award of €7,500.00 was made by the High Court. Having regard to the interactions between the public authority and the plaintiff in that case, it seems to me that there was nothing in the nature of the extensive correspondence that there was in the present case. Neither of the two cases seem to me to involve anything comparable to the present case, where the land in question was a piece of land of some size in the centre of a busy town, and where the title to the land had been strongly and repeated asserted by the true landowner.

86. Counsel on behalf of the plaintiffs also referred to a number of authorities dealing with what are known in the United Kingdom as *Wrotham Park* damages and submitted that they were entitled to damages measured on the basis of the value of the loss of their ability to negotiate and strike a bargain concerning the sale of land or granting of wayleave in 2001. However, I was not referred to any expert evidence as to the value of any bargain the plaintiffs might have struck at the relevant time. They also referred to *Conway v Irish National Teachers' Organisation* [1991] 2 IR 305 and submitted that the Court should award aggravated damages on the basis of the manner in which this trespass was committed, involving (on the part of the Council) elements of "oppressiveness, arrogance or outrage".

87. I have not been referred to any case in which aggravated damages have been awarded in respect of a trespass, but I do not see any reason in principle as to why they could not be awarded in respect of a tort committed by a public authority in certain circumstances. I do consider that the conduct of the Council in the present case amounts to "oppressiveness, arrogance or outrage" within the meaning of *Conway*.

88. It seems to me that the essential features of the present case, for the purpose of quantifying damages, are as follows:

(a) The land was located in a city centre location in Drogheda and therefore had some commercial value, which would have been relevant if the Council wished to purchase the land and/or acquire a wayleave at the relevant time.

(b) The land was not being used by the Eustace family nor adjacent to a family home, and there is no question of an interference with any day-to-day enjoyment of their property. Indeed, it seems to have been left, if not derelict, certainly vacant, to the extent that the Council had been maintaining the land over a large number of years.

(c) The Eustace family clearly told the Council in 1991 that Mrs. Eustace owned the land, in the context of the Council's consideration of whether the land should be placed on the Derelict Sites Register.

(d) The Eustace family repeatedly corresponded with the Council in 2001/2, from the very first day of the trespass complained of, informing them that they owned the land, and they sent them a copy of title deeds on the 16th January, 2002.

(e) The Council could easily have ascertained the position regarding title to the land by immediately making appropriate enquiries with their law agents, but instead authorised the second defendant to continue with the works in progress until they were complete.

(f) The Council allowed the trespass to continue until 2010, when they served the notice to treat, which culminated in a purchase price being arrived at in arbitration in 2018. Insofar as there was reference before me to unsuccessful without prejudice settlement discussions, these do not seem to me to be relevant. While the proceedings remained unsettled, the trespassed was continuing. The defence filed in the present proceedings denied the trespass.

(g) The behaviour of the Council clearly caused considerable distress and inconvenience to the Eustace family. I note in particular that the matter was not resolved within the lifetime of the first plaintiff.

(h) The Council never adopted a position of clear apology to the Eustace family nor did it show any great haste to remedy the situation it had itself created.

(i) I have characterised the attitude of the Council in the early part of the period as one of gross negligence, and its attitude to acknowledging its mistake as grudging and gradual.

89. In light of all of the above circumstances, I propose to award a figure of €65,000 for the 9-year trespass, by way of compensatory damages, and a figure of €12,000 in respect of aggravated damages by reason of the manner in which the Council dealt with the problem throughout the period 2001-2010 as described above.