

THE HIGH COURT

2000 No.12541P

BETWEEN

CATHERINE MCKEEVER

PLAINTIFF

AND

RICHARD HAY, CYRIL McELHINNEY, PATRICK DOHERTY

&

BY ORDER

THE COUNTY COUNCIL OF THE COUNTY OF DONEGAL

DEFENDANTS

Judgment of Mr. Justice Kevin Feeney delivered on the 8th day of May, 2008.

1. The plaintiff is the owner and entitled to occupation of a 1/17th share of one hundred and seventy acres of land at Ballyoghagan, Rosepenna, Downings in the County of Donegal. She is the registered owner under Folio Number 35746, register of ownership of Freehold land in the county of Donegal.
2. The hundred and seventy acres are referred to as "The Commonage" and are situated just outside Carrickart on the road to Downings. A detailed map of the lands was handed into Court by Tom O'Brien, consulting engineer. That map shows that there is a public road running through the lands which is a side road off the main Carrickart to Downings road. That road cuts across the Commonage Lands and then turns left at a right angle to run parallel to the sea shore until it reaches a causeway to the Island Roy.
3. The houses on the Island Roy did not have a piped water supply and had to rely on wells. The supply from such wells was erratic and during dry periods no water was available. There was also a problem with occasional contamination resulting in an inability to use the water for drinking. This resulted in considerable efforts being made to have the island provided with a permanent water supply. There was a treated public water supply available in both Carrickart and Downings and that water supply came from a lake adjacent to Carrickart, where it was treated, and was then piped through Carrickart and along the main road to Downings.
4. In the late 1970s the community on the Island Roy, which is a small community consisting of a handful of houses, sought to establish a group water scheme. At that time it proved impossible to achieve such objective due to the limited funds available from the local authority for such schemes and due to the inability of all the householders on the Island Roy to fund a large percentage of the overall cost.
5. The need for a water scheme on the Island Roy remained and in 1998 the plans for same were reactivated. By that stage there were greater grants available and it was possible to progress the scheme. The scheme was one of many sought to be implemented throughout the county of Donegal. The method adopted for the implementation of such group water supply schemes is that there is a preliminary agreement between a group of persons seeking the group water supply and Donegal County Council. In this instance the preliminary agreement was completed on the 8th July, 1998 and that agreement was to be signed by all group members. It is in fact signed by eight persons.
6. The agreement sought to follow recognised procedures in that the works were to be carried out by the group. In this case the group was called the Island Roy Group Water Scheme. The contractor was employed by that group but the works were to be carried out in accordance with general specifications issued by Donegal County Council. In fact the County Council were actively involved in enforcing appropriate specifications and standards. This was due to the fact that the agreement envisaged the water supply system being taken over by the County Council at a future date.
7. By the second half of 2000 considerable progress had been made in relation to the scheme and the stage was reached where the commencement of work could be contemplated. The Group Water Supply Scheme was to receive water from the Carrickart/Downings supply by attaching a pipe to that supply at a point on the main Carrickart to Downings road. It was then envisaged that the pipe would proceed on or adjacent to a side road leading to the causeway to the Island Roy. The road which went from the Carrickart to Downings main road to the causeway crossed the hundred and seventy acres of land known as The Commonage. The first portion of that roadway was a road which had been "taken in charge" by the local authority and the second portion of the roadway after the left hand right angle as far as the causeway was over a right of way.
8. Under the preliminary agreement it was the obligation of the group to acquire all necessary lands, rights of way, way-leaves and water rights to the satisfaction of Donegal County Council. The terms of the agreement also provided for the transfer of such rights and ownerships to the County Council.
9. The Court heard evidence from a senior engineer in Donegal County Council in relation to the implementation of group water schemes such as this one. A certain informality of approach was identified. To some extent such informality was inevitable given the composition of the groups and a necessity to obtain rights of way and way-leaves over third parties lands which were often the lands of neighbours or friends. It was clear from the evidence of the senior engineer that on a number of occasions the County Council allowed schemes to proceed where not all the legal details were in place and a practice had developed of dealing with problems as they arose. It was the experience of the senior engineer that in all cases, except this one, those problems were ultimately resolved. It appeared that to some extent the schemes operated and depended upon the hope and expectation that local landowners would be supportive and co-operative and would not block their neighbours from receiving a pure and constant water supply. It is clear in this instance that the organisers of the group scheme, to some extent, proceeded on the basis that they would rely upon the understanding and tolerance of their neighbours and local landowners.
10. At the end of August, 2000 the County Council approved a grant allocation to the Island Roy Group Water Scheme. The members of the scheme thereafter proceeded with considerable speed and by the end of the first week of September, 2000, had identified and employed a contractor, Dan O'Donnell, and had the necessary piping on site by the 6th September, 2000.
11. The pipe which was to run from the main Downings to Carrickart road as far as the causeway was to be on the lands known as The Commonage. It appears, though it is to some extent uncertain, that the initial plans in 1978 had envisaged that the pipe would go down the public road which was in charge and then turn and proceed along the right of way. The evidence which was available to the Court suggested that the Road Section of the local authority were against using the road as it would result in the road having to be re-surfaced and could also cause unevenness in the road surface thereafter due to the nature of the subsoil. Laying the pipes on the roadway would also significantly increase the cost. As a result of those factors the implementation of the scheme proceeded on

the basis that the pipe would be laid parallel to the side roadway and to the right of way.

12. The lands known as The Commonage are lands within a special area of conservation for the purposes of the Habitats Directive and permission from Dúchas for the laying of the pipe was required. That permission was obtained on the 6th September, 2000. It is unclear as to whether or not Dúchas was provided with the precise details of where the pipes would be laid. This arises from the fact that there appears to have been an alteration from the initial proposal which was based upon the pipes going along the roadways to the final scheme which placed the pipe work adjacent and parallel to the roadways. It is unclear if Dúchas was made aware of this alteration. The evidence established that alterations in the precise implementation of group water schemes often occur at a late stage due to the local authorities' insistence on certain details and specifications.

13. The evidence demonstrates that the members of the Island Roy Group Water Scheme did not appreciate the necessity of acquiring the relevant rights of way and way-leaves, notwithstanding the terms of the preliminary agreement, until a date early in September, 2000. It was the contractor who had been employed who raised the issue of the group getting the formal permission from the land owners. The main organisers within the group were the first named defendant, Richard Hay and his wife, Katherinea. On the 6th September, 2000, Katherinea Hay set about dealing with obtaining permissions. She made various contacts commencing on the 7th September, 2000, and it was the next day that the plaintiff was first contacted with a view to obtaining her consent or permission to the works. On the 8th September, 2000, Katherinea Hay made telephone contact with Catherine McKeever, the plaintiff, who indicated that she would not sign any consent until she saw a letter approving the works from Dúchas. Katherinea Hay arranged for a letter from Dúchas to be faxed to her and contacted the plaintiff to indicate that she would bring that fax to her home in Letterkenny that evening. At that stage Catherine McKeever informed Katherinea Hay that she wished to see the signatures of all other sixteen "shareholders" in the hundred and seventy acres giving their consent before she would sign. Because of that indication Katherinea Hay did not bring the fax to the plaintiff but rather set about trying to obtain the various consents. At no time did the plaintiff indicate that she would not sign and the implication was that she would do so if all the other "shareholders" did so.

14. Over the next two days, the 9th and 10th September, Mrs. Hay obtained a substantial number of consents. There were certain problems due to people being away or unwell. Problems arose in relation to two persons. One was James Sweeney who was an eighty eight year old man in a nursing home who was identified as being so unwell as possibly not being capable of understanding any document which he might be asked to sign. The second person was William McDaid who resided in Derry. He informed Katherinea Hay that in Northern Ireland when water pipes were being laid that written way-leaves were obtained.

15. On the 10th September, 2000 following a conversation between Mr. McDaid and Richard Hay, concerning the necessity for written way-leaves, a request was made on behalf of the group to Donegal County Council for copy draft way-leaves to be provided.

16. There was further contact between Mrs. McKeever and Mrs. Hay on the 11th September and by that stage Mrs. McKeever had made it clear that she would not consent unless Mrs. Hay obtained the signatures of all sixteen of the other 1/17th shareholders.

17. On the following day, the 12th September, Mr. McDaid sent a notice to Mr. and Mrs. Richard Hay which proceeded on the basis that as the group members were refusing to enter into an agreement to facilitate the laying of pipes over lands of which he was a joint owner he was therefore requesting the removal of all plant and equipment and the cessation of trespass on property in which he had a legal interest and that in the absence of same legal action would be taken. By that stage Mr. McDaid had noticed that there were pipes stored on the lands.

18. On the same day Mr. and Mrs. Hay made contact with Dermot Walsh, who was the then proprietor of the hotel in Carrickart. Following a conversation with Mr. Walsh, Mrs. Hay proceeded on the basis that Mr. Walsh had bought all the 1/17th shares outright for the portion of the lands where he had proposed to build an air strip. It was intimated that his consent, which he gave, would be sufficient to permit pipes to be laid on the area to the right hand side of the right of way up as far as the causeway. It was believed that Mr. Walsh's consent was sufficient to allow the group to proceed with their plans. The plans were at an advanced stage and the money was available, the contractor was on site and the pipes and equipment were present.

19. The belief that Mr. Walsh's consent was all that was needed was a convenient belief for the members of the group to hold and was relied upon more in hope and expectation that Mr. Walsh might own the lands in question rather than on any critical analysis or detailed consideration of same. Indeed the action of Mrs. Hay and the group in continuing to seek consents is demonstrative of the fact that, at best, they were uncertain if Mr. Walsh could give a full consent. They did however believe, with justification, that if written way-leaves were obtained that Mr. McDaid would consent and that when all other consents were in place that Mrs. McKeever would also consent.

20. A meeting of what was known as the Ranagh Committee was held on the 15th September, 2000, to discuss the group water supply to Island Roy. Not all the "shareholders" in the land in question were present due to ill-health and absence but a significant majority of the shareholders were able to attend. By that date a significant number of shareholders had already indicated their agreement to the works either by signing a notice to that effect or by oral statement. But it is clear that there were a number of members, in particular Catherine McKeever and Mr. McDaid, who did not want the works to proceed until all the way-leaves were obtained and a formal permission in place. On the 16th September, 2000, Catherine McKeever wrote to the Donegal County Manager indicating that the works were not to proceed until way-leaves were obtained and absent such documentation that the works were not to proceed. The letter went on to indicate that if the pipe was laid that it would be removed and that if proceedings were necessary that the letter of the 16th September, 2000 would be relied upon as proof of the owners' refusal to grant permission. Following the meeting of the 15th September, and the receipt of the letter of the 16th September, both the group members and the County Council can have been in little doubt of the fact that at least some of the 17 "shareholders" were not at that point in time consenting, and that any works carried out thereafter would be carried out against their express wishes and without their permission. That was the position of Catherine McKeever and William McDaid.

21. On the 18th September, 2000, Dan O'Donnell, the contractor, commenced digging on Island Roy but by the 21st September, works commenced on the lands known as "The Commonage". The first works which were carried out on those lands were from the causeway at point C on Mr. O'Brien's map to the junction of the right of way and the roadway in charge at point B. Those works were carried out on the left hand side of the roadway as one proceeded from the causeway, that is on the sea side and varied in distance from the margin of the road surface. In some places the pipe was laid 1.5 to 2 metres from the road margin and in other places closer to the road. Those works were carried out commencing on the 21st September, 2000. The second portion of the works carried out by the contractor on the lands in question was from point B to point A on Mr. O'Brien's map, that is from the junction of the right of way and the road in charge to the junction with the main Downings to Carrickart road. That pipe was laid in the margin of roadway on the left hand side as one proceeded towards point A on Mr. O'Brien's map some 0.6 of a metre from the road margin. The work from point B to point A was carried out on the 25th September, 2000 and the days immediately thereafter.

22. Following the digging that took place on the 21st September, 2000 the plaintiff endeavoured to contact the County Manager of Donegal on the following day but was unable to do so. She also tried to contact the engineer in Donegal County Council in charge of group water schemes, namely, Gerry Keeney. He returned the plaintiff's call and indicated that it was his understanding that the group had permission to lay the pipe from Dermot Walsh. It is clear that the plaintiff took this opportunity to reiterate that she was the registered freeholder with a Folio and that she did not consent to anybody entering the lands or carrying out works. There can be no doubt but that the plaintiff's position whereby she was declining any consent at that time to the laying of pipes and was objecting to the trespass. This was stated to the local authority on the 22nd September. Following that conversation a representative of the local authority contacted Dan O'Donnell, who was the contractor, and advised him to cease operations.

23. Later on the afternoon of 22nd September, 2000 the plaintiff and William McDaid visited the site. They spoke to the contractor. The contractor was informed that the County Council had indicated that works were to cease. The contractor in fact ceased working on that Friday afternoon and did not recommence until the Monday. However, it appears that the pipe from point B to point C. on Mr. O'Brien's map had already been laid at that stage and that the works which were carried out from point A to point B on the said map from the Monday onwards were carried out in the margin of the roadway. The local authority had indicated that they believed they had an entitlement to carry out such works in the area immediately adjacent to a road which had been taken in charge as it was "a public road". The contractor commenced digging on the road verge on the 25th September, 2000 and continued to do so until on or about the 28th day of September, 2000 by which stage that portion of the pipe line was complete. That pipe had been laid in the verge of the public road which ran from point A to point B on Mr. O'Brien's map. The local authority had formed the view that they were entitled to lay the pipe in the verge given that the road was in charge and had so informed the members of the group scheme.

24. On the 22nd September, 2000, the plaintiff made a complaint concerning trespass to the Gardaí at Millford Garda Station and a statement was made to the Gardaí. The evidence indicates that the plaintiff went to Letterkenny Garda Station on the following Tuesday, the 25th September, and was informed that the alleged trespass was a civil matter and that nothing could be done by the Gardaí.

25. After the six inch water pipe was laid over the lands the subject matter of these proceedings, certain other works were completed and finally on the 2nd October, 2000, a connection was made to the main water supply running along the Carrickart to Downings road and water became available through the scheme to the people residing on the Island Roy.

26. The evidence is that the lands in question were within a proposed special area of conservation on the dates when the pipe was laid in September, 2000. Thereafter the lands in question together with other adjoining lands were designated as a special area of conservation.

27. On the 16th day of October, 2000 the third named defendant, Patrick Doherty, received a letter from the plaintiff's then solicitors. There was no response to that letter from any of the defendants and the plaintiff duly commenced these proceedings by plenary summons on the 27th day of October, 2000. The plaintiff sought a number of reliefs and in particular a mandatory injunction requiring the defendants to take up and remove the pipe and a further mandatory injunction requiring the defendants to restore the lands to their original condition. Counsel for the plaintiff has stated that the primary relief being sought in these proceedings relates to the claim that there is a continuing trespass in that the water pipes on the lands are present without the plaintiff's consent and that such trespass should be discontinued by the grant of a mandatory injunction requiring the removal of the pipes. I will address the issue of the nature of the relief and the legal consequences arising there from later in this judgment.

28. On the same day that the plenary summons was issued the plaintiff issued a notice of motion seeking interlocutory relief and in particular an injunction restraining the defendants from entering onto the lands and also a mandatory injunction requesting the removal of the pipes and the restoration of the lands to their original condition. Initially Donegal County Council were not a defendant but they were joined following an application to do so by Order of the Court made on the 11th day of December, 2000.

29. The plaintiff's notice of motion seeking interlocutory relief was returnable for the 3rd November, 2000. This Court was informed, and it is common case, that that application for interlocutory relief was adjourned to the hearing of the action by consent. There is no Order available to that effect but it is clear that the interlocutory reliefs sought are identical to the reliefs sought in the plenary summons.

30. After Donegal County Council were joined as a defendant an application was made on their behalf by notice of motion dated the 7th day of February, 2001 initially returnable for the 28th day of May, 2001 seeking to have the proceedings herein remitted to the Circuit Court. That application exhibited a certificate of rateable valuation which demonstrated that the valuation of the lands in question were within the jurisdiction of the Circuit Court. The plaintiff resisted such application on the basis that the damages to which the plaintiff might be entitled would be in excess of the Circuit Court jurisdiction. In a supplemental affidavit the solicitor for Donegal County Council averred that there had been no loss to the plaintiff in that there had been no diminution in the value of the land and further that by May of 2001 the track where the pipe had been laid was being covered by growth and with further growth that within a short period there would be no evidence of the track of the pipe on the ground. It was further contended that the presence of the pipe would not prevent any development which might be permitted but would facilitate same and it was also averred that there was an existing Eircom cable laid in the same vicinity along the public road. The Court was informed that the motion to remit was heard and determined by the High Court. There is no Order available to this Court but it is common case that an Order refusing the application to remit was made by the Court.

31. On the 10th October, 2002 the plaintiff issued a motion for judgment against the fourth named defendant in default of defence. This resulted in the solicitors for the fourth named defendant taking over carriage of the defence on behalf of all the defendants and a joint defence was delivered on the 1st day of November, 2002. There is no issue as to contribution or liability as between all the defendants. On the 25th day of March, 2004 the plaintiff's solicitors served a notice of intention to proceed and on the 27th day of April, 2004 a notice to admit facts was served on the solicitors for the defendants requesting the defendants to admit certain facts. A reply was delivered on the 1st day of June, 2004 and a notice for particulars was raised by the solicitors for the plaintiff dated the 1st day of July, 2004.

32. Thereafter, the plaintiff sought discovery by motion dated the 20th of October, 2004 and an amended Statement of Claim was delivered on the 22nd day of November, 2004. An amended defence was delivered on behalf of all the defendants on the 29th of November, 2004, and that was followed by an amended reply some ten months later in October 2005. On the 18th of November, 2005, an amended notice to admit facts was served. The plaintiff brought a motion to compel replies to particulars by notice of motion dated the 25th day of May, 2006, and the discovery motion was re-entered on the 26th day of May, 2006. On the 26th day of June, 2006, the solicitors for the defendants acting on behalf of the fourth named defendant, Donegal County Council, brought a motion seeking to stay the proceedings pending the outcome of a compulsory acquisition process by the fourth named defendant in relation to a portion of the lands the subject matter of this claim. That relief was not granted but the Court has not been informed if

the relief sought was refused or alternatively was not proceeded with. Replies to the amended notice to admit facts were sent dated the 7th of September, 2006 and replies to the amended notice for particulars were also sent on the same date. Two affidavits of discovery, one sworn by the first named defendant and one sworn on behalf of the fourth named defendant were sworn on the 14th day of December, 2006. The above provides a detailed if not comprehensive account of the pleadings between the parties in this case.

33. In the light of the replies to the amended notice to admit facts dated the 7th of September, 2006, the Court was able to confirm a number of matters. Firstly, it is clear that there is no issue but that the plaintiff is the registered owner of the land comprised in Folio 35746 of the Register of Freeholders, County Donegal. That was admitted in the replies to the amended notice to admit facts and was also acknowledged in court by counsel on behalf of the defendants. Secondly, the defendants admitted in the replies to the amended notice to admit facts that one or more of the defendants, their servants or agents, entered onto the plaintiff's land on the 21st day of September, 2000. That was also acknowledged in court by counsel on behalf of the defendants. The chronology of the entry onto the plaintiff's lands gleaned from the evidence is herein before set out. Thirdly, it was acknowledged that the plaintiff did not give permission, licence or authority to the defendants or any of them to enter onto her lands. It was also admitted that the defendants carried out work on the plaintiff's land. That was expressly admitted in the reply to the amended notice to admit facts.

34. A number of issues crystallised during the course of the hearing. It was contended on behalf of the defendants that they had a belief as and from the 12th of September, 2000, that part of the lands in issue were in the ownership of Dermot Walsh. The evidence establishes that such belief amounted to no more than wishful thinking and that the actions of the Island Roy group as and from the 12th of September, confirmed that they knew that the plaintiff's permission was required. That knowledge was confirmed by the outcome of the meeting of the 15th September, 2000.

35. The Court is satisfied that the Island Roy group proceeded not so much in the belief that the plaintiff's permission was not required, as that amounted to no more than wishful thinking, but rather on the basis that if the pre-arranged works proceeded that matters would work out and the plaintiff could be appeased.

36. The plaintiff contributed to this by her stated position that she would not sign until all other signatures were obtained. That position gave an indication to the group that matters would eventually work out when time, good health and the availability of signed way-leaves would result in the plaintiff signing her consent.

37. The group must have known that the works were being carried out prior to the plaintiff consenting to such works but they reasonably believed that the plaintiff would, when certain matters were put in place, give her consent. The plaintiff in fact would not have consented even if all the other 'shareholders' signed up and thereby indicated their agreement to the works. However, that stance was not made clear until the hearing before this Court. The plaintiff then made it clear that she would not consent even if all other shareholders agreed and that her stated position in September, 2000, was based upon her knowledge that at least one shareholder couldn't sign his consent and that therefore the group could not comply with her demand that all other shareholders sign up before she would.

38. The plaintiff thereby created a situation where the group was able to proceed on a misapprehension that all consents could be obtained. The facts of this case do not demonstrate a wanton interference with the plaintiff's rights nor were the group's actions oppressive or vindictive. They carried out the works at a time when they truly had a belief that the plaintiff would ultimately consent.

39. There is little doubt but that the fourth named defendants were aware that not all matters in relation to permission and way-leaves had been tied down. They proceeded, based upon previous experience, that it would be possible to placate the plaintiff at some future date notwithstanding the absence of her prior consent.

40. It follows that the laying of the pipe across the lands known as the Commonage was carried out without the permission of the plaintiff. The vast majority of the other co-owners agreed to such works but there was no agreement from all the co-owners and the plaintiff and at least one other person had expressly not consented at the time the works were carried out. This Court is satisfied that the entry onto such lands in the absence of the prior consent of all the owners amounted to a trespass and the placing of the water pipes thereon has resulted in a continuing trespass.

41. During the course of her evidence, the plaintiff identified a number of matters which it was contended should be taken into account in considering the damage caused to the plaintiff as a result of the trespass and nuisance. Firstly, it is clear that the plaintiff was put to certain inconvenience at the time that the works were carried out. As a result of the defendants' actions in proceeding without her prior consent, the plaintiff had to take a number of steps which caused inconvenience and a certain amount of distress.

42. A number of other matters were raised as potential matters to take into account in relation to considering the issue of damage. It was suggested that the land might have been devalued as a result of the presence of a water pipe and the potential development value diminished. This Court is satisfied that there is no reality in relation to such contention. The lands are designated as a special area of conservation for the purposes of the Habitats Directive. The presence of a water pipe, even in the unlikely circumstances that a development would be permitted, would tend to enhance rather than diminish the value of the property. It is also clear that whilst the works disrupted the appearance of the lands that within a relatively short time they had returned to their natural appearance. The plaintiff also expressed worry in relation to the possibility that the water might be contaminated as a result of the pipe being adjacent to an old landfill site and/or that there could be a leak from the pipe. This court is satisfied that this suggested worry was contrived and that there was little or no reality in the plaintiff's stated apprehensions. It is also clear that the plaintiff's use of the lands was in no way altered or effected by the works.

43. The injunctive relief sought by the plaintiff is an equitable remedy. It is clear that relief by way of injunction is a discretionary remedy. (see *Patterson v. Murphy* [1978] I.L.R.M. 85 at page 99, Costello J.):-

"The defendants have submitted that even if an infringement of the plaintiff's rights has been established the Court has the discretion to award damages in lieu of an injunction and that it should do so in this case. I agree that relief by way of injunction is a discretionary remedy. There are, however, well established principles in which the Court exercises this discretion."

44. I will return later in this judgment as to how this Court proposes to exercise its discretion but it is well established that the power of awarding damages in lieu of an injunction is discretionary. The main area of contention in this case, where trespass is admitted, is the claim by the defendants that the Court should decline to grant the injunctions sought in the particular circumstances of the present case and should award damages in lieu. In considering whether to exercise its discretion to award damages in lieu of an injunction it is clear that such power must be exercised with an intimate knowledge of the facts. (See *Greenwood v. Hornsey* [1886]

33 C.H.D. 471). This requirement is particularly relevant in cases of trespass so as to prevent landowners being compelled to sell property against their will at a valuation and also to ensure that defendant trespassers are not encouraged to believe that they may carry out wrongful acts of trespass on the payment of a specified sum of money. The grant of mandatory injunctions, sought in this case, is not only entirely discretionary but also unlike a negative injunction can never be "as of course". (See statement of Lord Upjohn in *Redland Bricks Ltd. v. Morris & Anor.* [1970] A.C. 652 at p. 665). The Court must have due regard to the facts and circumstances of the particular case as each case must depend essentially upon its own particular circumstances. It is also clear that when a Court comes to consider whether or not to grant an injunction or award damages in lieu, that it must do so by reference to the circumstances as they exist as of the date of hearing. (see statement of Millett L.J. in *Jaggard v. Sawyer* [1995] 1 W.L.R. 269 at p. 285:-

"when the court comes to consider whether to grant an injunction or award damages instead, of course, it must do so by reference to the circumstances as they exist at the date of the hearing."

45. The particular circumstances of this case and the facts which assist the Court in deciding whether or not to award damages in lieu of an injunction can be gleaned from the admissions made during the proceedings, the evidence heard and from the contents of the agreed documents placed before the Court. In the following paragraphs the Court will outline the essential facts and circumstances relevant to its consideration.

(a) The defendants and their servants or agents trespassed on to the plaintiff's lands in September, 2000.

(b) The trespass on the lands continue in that the pipes placed thereon remain in situ.

(c) The plaintiff is the owner and entitled to occupation of a 1/17th share of the one hundred and seventy acres of the Commonage Lands situated in the townlands of Rosepenna and Ballyoghagan, registered in Folio Number 35746 in county Donegal.

(d) The defendants ultimately acknowledged the plaintiff's said ownership in the replies to amended notice of particulars dated the 7th September, 2006, and in a reply to an amended notice to admit facts of the same date. The said documents also admitted that the defendants or any one or more of them, their servants or agents entered onto the plaintiff's lands on the 21st September, 2000, without the plaintiff's consent or authorisation.

(e) The vast majority (representing some 15/17th's) of the 1/17th shareholders consent and agree to the water pipes being placed upon and remaining on the said Commonage Lands. Some persons hold a number of 1/17th shareholdings.

(f) The plaintiff's now stated position is that she will not consent to the pipes being present on the said Commonage Lands, irrespective of the consent of the other shareholders. This inevitably places her in conflict with the other shareholders who are agreeable to the pipes being on the lands. This conflict has the consequence that there is conflict between the shareholders with the potential for embarrassment.

(g) The presence of the water pipes on the Commonage Lands has resulted in no significant or real damage to such lands or to the plaintiff's enjoyment or use of the lands.

(h) The presence of the pipes on the lands has not resulted in any identifiable diminution in the value of the said lands.

(i) As a 1/17th shareholder in the said Commonage Lands, the plaintiff, is not in a position to dictate any alteration in the use of the said lands.

(j) In September, 2000, when the works were carried out, the defendants knew that the plaintiff had not, at that time, consented to the pipes being laid but believed that the plaintiff would consent in the future. The plaintiff had facilitated such belief and had allowed and permitted the defendants to proceed on the basis that the plaintiff would consent once all of the other shareholders had consented and when the necessary way-leaves were in place.

(k) As of the 21st December, 2004, the plaintiff's solicitors confirmed that the plaintiff had indicated "she would be willing to give her consent in circumstances where each of the other co-owners also gave consent".

(l) The plaintiff's true position was that in fact she would not have consented, even if the other co-owners had given their consent, but she had not informed the defendants of same.

(m) This is a case of trespass and not nuisance and the gist of an action for nuisance is damage as such tort only exists if damage has occurred.

(n) Mr. McDaid, a 1/17th shareholder, did not consent to the laying of the pipes in September, 2000. His apparent concern in relation to the matter was not that he objected to the pipes being laid but rather that permission should be obtained from Dúchas for the actual works being carried out and way-leaves completed by the shareholders. Mr. McDaid did not appear, in principle, to object to the granting of consent. This was apparent from what he indicated at a meeting on the 22nd September, 2000.

(o) A mandatory injunction to remove the pipes would have the effect of cutting off a water supply to a number of homes and would cause real and substantial hardship.

(p) Absent the piped water supply to the residents of the Island Roy, no consistent or pure water supply can be guaranteed.

(q) The alternative means of supplying water to the residents of the Island Roy which operated prior to 2000, has not been used for a period of some eight years. If there was no piped water, wells would be required.

(r) The cost of the removal of the water pipes would be considerable and the cost of laying an alternative water supply over other lands, even if such works could be carried out, would be substantial.

(s) The consequence of granting an immediate injunction, in the terms sought, would result in the residents of the Island Roy being deprived of a pure and consistent water supply.

(t) Implementing a mandatory injunction to remove the water pipes from the Commonage Lands would result in an action being taken which is contrary to the wishes and desires of the vast majority of the other shareholders.

(u) There was no laches or delay on the part of the plaintiff in threatening or commencing the proceedings herein. The plaintiff made it clear at the time that the works were carried out that she had not provided her consent. She also contacted the local authority to try and have the works halted. Given the speed with which the works were completed this is not a case in which it can be claimed that the plaintiff stood idly by or acquiesced in allowing or permitting works to be carried out.

(v) The facts of this case indicate that there was no reckless disregard of the plaintiff's rights but rather a situation in which the defendants allowed the works to proceed on the expectation that the plaintiff would in the future consent. The defendants did not treat the plaintiff's objections as being fundamental but rather treated them as being of a temporary or procedural nature. The Court is satisfied that the defendants' actions were not such as could be categorised as a reckless or wilful disregard of the plaintiff's rights. On the facts of this case the Court is satisfied that there is no basis for exemplary or punitive damages.

(w) The plaintiff did suffer a degree of upset and disruption, particularly in the month of September, 2000. There was also further upset caused to the plaintiff by the failure to acknowledge her title.

(x) The damage to the Commonage Lands caused by the pipe laying was minor and of a temporary nature.

(y) The circumstances now prevailing include the facts that the water pipes are in position and that such water pipes provide a clean and constant water supply to a number of homes. The pipes were laid without the plaintiff's consent. There are now two separate compulsory purchase orders made by Donegal County Council in respect of the lands. The local authority has issued compulsory acquisition of land orders having decided to effect the acquisition of the way-leaves over/in respect of land to which such orders relate under the Housing Act, 1966. In the event that such compulsory purchase orders are completed and the way-leaves sought acquired, the water pipes the subject matter of these proceedings, could not be said thereafter to cause a trespass on the said Commonage Lands. The procedures in relation to the compulsory purchase orders provide for the identification and calculation of the compensation to be paid in the event of a final order. If such orders are completed and if such compensation is paid, the plaintiff in this action will receive her proportionate share.

(z) The making of the compulsory purchase orders and the attempt by the fourth named defendant to stay these proceedings pending the completion of that process are indicative that the fourth named defendant recognises and acknowledges the ownership of the Commonage Lands by the plaintiff and others and the need for legal authorisation to retain the pipes on the lands.

46. The Court must, in the light of the above facts determine whether or not the equitable remedy of a mandatory injunction should be granted to the plaintiff. As indicated above the defendants urge that damages should be granted in lieu of an injunction.

47. In the case of *Patterson v. Murphy* [1978] I.L.R.M. 85, Costello J. considered the issue of whether or not the Court should grant an injunction even where an infringement of the plaintiff's rights had been established. The Court recognised that it had a discretion to award damages in lieu of an injunction and identified well established principles to apply in relation to the exercise of such discretion. In that case the Court was considering a claim for damages and injunctive relief in relation to nuisance caused by blasting operations, heavy traffic and dust and noise. The cause of action was a nuisance action and not a trespass action. Whilst the same principles require to be considered, there is and can be a different emphasis required in cases of trespass rather than nuisance. The well established principles which Costello J. identified as being relevant to the Court's exercise of its discretion are set out at p. 99 and 100 of the judgment. Costello J. stated:-

"There are, however, well established principles on which the Court exercises this discretion. The relevant ones for the purposes of this case can be summarised as follows:-

(1) When an infringement of the plaintiffs' right and a threatened further infringement to a material extent has been established the plaintiff is *prima facie* entitled to an injunction. There may be circumstances however, depriving the plaintiff of this *prima facie* right but generally speaking the plaintiff will only be deprived of an injunction in very exceptional circumstances.

(2) If the injury to the plaintiffs' rights is small, and is one capable of being estimated in money, and is one which can be adequately compensated by a small money payment, and if the case is one in which it would be oppressive to the defendant to grant an injunction, then these are circumstances in which damages in lieu of an injunction may be granted.

(3) The conduct of the plaintiff may be such as to disentitle him to an injunction. The conduct of the defendant may be such as to disentitle him from seeking the substitution of damages for an injunction.

(4) The mere fact that a wrongdoer is able and willing to pay for the injury he has inflicted is not a ground for substituting damages."

48. Whilst those principles were identified by Costello J. in relation to the facts of that particular case, they are also relevant for the purpose of this case. The plaintiff's rights have been infringed and a trespass and a continuing trespass has been admitted. It follows that the starting point for consideration by this Court is that the plaintiff is *prima facie* entitled to an injunction. In such circumstances the plaintiff will only be deprived of her entitlement to such injunction if very exceptional circumstances are identified. This is particularly so where the infringement is in the form of trespass rather than nuisance. This *prima facie* entitlement was reiterated by Keane J. in *Keating & Co. Ltd. v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512 where he stated (at p. 518):-

"It is clear that a land-owner, whose title is not in issue, is *prima facie* entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only."

49. That judgment reiterated that one of the factors which the Court must take into account in exercising its discretion is the behaviour of the parties. This had also been identified by Costello J. in *Patterson v. Murphy* as a relevant factor.

50. The requirement for very exceptional circumstances to exist before the land-owners' *prima facie* entitlement to an injunction to restrain a trespass will be refused recognises that the practical consequences of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs. It is well recognised that the jurisdiction to award damages instead of an injunction should not and must not be exercised as a matter of course so as to legalise the commission of a tort or a wrong by any defendant who is willing and able to pay compensation. Lindley L.J. recognised that position in the case of *Shelfer v. City of London Electrical Lighting Company* [1895] 1 C.H. 287 at p. 315 and 316 where he stated:-

"But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairn's Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict."

51. This judicial approach has been identified in terms that a defendant must not be encouraged to believe that he may do a wrongful act on the payment of a given sum in terms of money.

52. As pointed out by Costello J., (in *Patterson v. Murphy*) if the injury to the plaintiffs' rights is small and is capable of being estimated in money, and is one which can be adequately compensated by a small money payment, and if the case is one in which it would be oppressive to the defendant to grant an injunction, then those are circumstances in which damages in lieu of an injunction may be granted. However, the mere fact that damage is small is not of itself decisive. If a Court comes to the conclusion that the plaintiffs' property will remain substantially as useful to the plaintiff as before the act complained of, and does not take the property away from him and the injury can be compensated by money, then an injunction need not necessarily be granted. The Court may still grant an injunction if the facts are such as to indicate that the Court should exercise its discretion to do so. This is a case in which the injury to the plaintiff's rights is small and it is one capable of being estimated in money and is one which can be adequately compensated by the payment of a relatively small amount of money. It is also the case that if the injunction sought was granted, that such injunction would be oppressive to the defendants and would cause them real and substantial damage.

53. The current position is that there are two compulsory purchase orders made by the local authority. If those orders result in the acquisition of the way-leaves sought then the pipes in question would be permitted thereafter to be upon the Commonage Lands and also the quantum of damages necessary to compensate the plaintiff and the other joint owners of the land would be identified. The process being followed would identify a proper and fair price which would be payable for the acquisition of the way-leaves in question.

54. The very existence of the said orders and the attempt by the fourth named defendant to stay these proceedings pending the completion of the compulsory purchase process and the use of such process recognises the fact of trespass. It also provides a potential mechanism for the estimation of the compensation to be paid. The Court must have regard to such actions on the part of the fourth named defendant in considering if the defendants are disentitled from seeking the substitution of damages for an injunction. Such conduct is a factor which causes the Court to consider that a once off final order of damages in these proceedings would be inappropriate and would be a failure to recognise the existing circumstances.

55. The plaintiff in this case urged the Court to follow the approach identified in *Wollerton & Wilson Ltd. v. Richard Costain Ltd.* [1970] 1 All E.R. 483. That case involved the trespass into the plaintiffs' airspace by the jib of the defendant's crane and no damage was done. Stamp J. regarded the absence of damage as a reason for, not against, the grant of an injunction and held that the working rule identified by A. L. Smith L. J. in *Shelfer v. City of London Electrical Lighting Company* did not apply in cases of trespass finding a claim for nominal damages only. On the facts of that case Stamp J. thought it right to suspend the operation of the injunction for a period which would enable the defendants to finish the job for which the crane was required. The approach adopted by Stamp J. was later criticised by Sir Thomas Bingham M.R. in *Jaggard v. Sawyer* [1995] 2 All E.R. 189 in the following terms (at p. 199):-

"*Wollerton and Wilson Ltd. v. Richard Costain Ltd.* [1970] 1 All E.R. 483, 1 W.L.R. 411 involved a trespass into the plaintiff's airspace by the jib of the defendant's crane. No damage was done. But Stamp J. regarded the absence of damage as a reason for, not against, the grant of an injunction and held that A. L. Smith L.J.'s working rule did not apply in cases of trespass founding a claim for nominal damages only. On the facts, however, he thought it right to suspend the operation of the injunction for a period which would enable the defendants to finish the job for which the crane was required. This decision cannot in my view be supported. The working rule formulated by A. L. Smith L.J. cannot be limited in the way suggested; and the fact that a plaintiff has suffered only nominal damage cannot in common sense be a reason for confining his remedy to an injunction if the court is then, by suspending the injunction, to deny him any remedy at all."

56. This Court does not have to decide on this controversy as it is satisfied that the principles identified by Costello J. in relation to the exercise of a Court's discretion to award damages in lieu of an injunction, even in cases of nuisance as opposed to trespass, as set down in *Patterson v. Murphy* can be applied to the facts of this case. There is a distinction in that claims of trespass or continuing trespass are actionable at law without proof of actual damage and claims in nuisance must be grounded on a claim of damage. If an injunction is granted in the case of nuisance then there would be no continuing wrong. In a case of trespass, such as this, the wrong would continue without a mandatory injunction and would have to be compensated by a once off payment if no injunction was granted.

57. This Court in considering the particular facts of this case will follow the well established principles identified by Costello J. in *Patterson v. Murphy* and reiterated by Millet L.J. at page 287 in the *Jaggard v. Sawyer & Anor.* case. Millet L.J. stated:-

"When the plaintiff claims an injunction and the defendant asks the court to award damages instead, the proper approach for the court to adopt cannot be in doubt. Clearly the plaintiff must first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement by the defendant, but also by overcoming all equitable defences such as laches, acquiescence or estoppel. If he succeeds in doing this, he is *prima facie* entitled to an injunction. The court may nevertheless in its discretion withhold injunctive relief and award damages instead."

58. Millett L. J. then went on to re-affirm the usefulness of the working rules identified by A.L. Smith L.J. in *Shelfer v. City of London Electrical Lighting Co.* and adopted by Costello J. in *Patterson v. Murphy* and to confirm them as working rules which do not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.

59. The plaintiff in this case is *prima facie* entitled to the injunction sought and that is all the more so as it is a case of trespass as opposed to nuisance. This is, however, a case in which the injury to the plaintiff's right is small and is one capable of being estimated in money. However, there is already in place, through the compulsory purchase order process, a process which has the capacity to identify the appropriate and proper compensation for what otherwise would be the continuing trespass. The existence of such process

is a significant factor both in relation to determining whether or not an injunction should be granted and if so, at what point in time. When a Court comes to consider whether to grant an injunction or award damages instead, it must do so by reference to the circumstances as they exist as of the date of the hearing. Those circumstances include the ongoing compulsory purchase order process. That process has within it a recognition by Donegal County Council that such process is an appropriate and proper means of endeavouring to ensure legal way-leaves over the Commonage Lands and of identifying the appropriate compensation for all the land-owners. That process has the capacity to identify a once and for all figure to compensate all the land-owners for future use of the lands.

60. Whilst the grant of an injunction would potentially be oppressive to the defendants, the Court must recognise a number of other factors. Firstly the defendants in this case carried out the works at a time when they knew that the plaintiff had not consented to such works. In those circumstances if an injunction were to be refused the defendants' conscious act in proceeding without obtaining all consents would effectively be sanctioned by the Court awarding damages in lieu of an injunction. The conduct of the defendants, in this case, in proceeding without the consent of the plaintiff, even in circumstances where they believed that such consent would ultimately be forthcoming, is conduct which must be taken into account by this Court in exercising its discretion. There was also no conduct on the part of the plaintiff such as to disentitle her to an injunction in that she objected to the works before they were carried out, reiterated her objection during the course of such works and attempted to have them discontinued and shortly after the works were carried out, commenced proceedings. There can therefore be no suggestion of laches or acquiescence on the part of the plaintiff. It is also the case that the plaintiff's conduct in misleading the defendants as to her true position is not sufficient to ground a claim in estoppel. However, the Court should also have regard to the fact that the plaintiff effectively misled the defendants and reiterated her position in December, 2004.

61. This Court is satisfied that where there was a deliberate and continuing trespass without the plaintiff's consent that it is appropriate to grant an injunction if the compulsory purchase process does not result in final orders being made and compensation paid. However, the Court must consider the nature and timing of such injunction by reference to the circumstances as they exist as of this date. In the *Wollerton & Wilson Ltd. v. Richard Costain* case, Stamp J. identified that in cases where in principle a plaintiff is entitled to the injunction which they claim, that it was still necessary to consider the question whether there were circumstances such that the operation of the injunction should be postponed for an appropriate period. That approach is all the more relevant in this case where there is a process in being which could result in there being a legal entitlement for the pipes to remain *in situ*. To order the removal of such pipes pending the completion of that process would be oppressive.

62. On the facts and circumstances existing as of this date, this Court is satisfied that no injunction should be granted until the final completion of the compulsory purchase process and then only if that process does not result in final orders. That process has the capacity to ensure that legal permission and authority is in place for such pipes to remain and that appropriate and proper compensation has been identified and paid. This Court is satisfied that the implementation of any injunction must be postponed to allow and permit that process proceed to completion. If the compulsory purchase orders sought are ultimately granted thereafter there would be no continuing wrong. The circumstances which dictate a requirement that such process be allowed to be brought to a conclusion without altering the current position include the fact that these proceedings were commenced over seven years ago, that the water supply has been in place during that time and the cost of the removal of the pipes.

63. If the compulsory purchase order process does not result in the way-leaves being obtained then a period of time would still be required to ensure that the residents of the Island Roy could arrange alternative water supply. This Court must recognise that to grant an injunction which would come into effect without providing adequate time to provide alternative water supplies would be oppressive.

64. This Court will grant an injunction in the event that the compulsory purchase process does not finally result in orders being made and compensation paid. In assessing the separate question as to the damages to which the plaintiff is entitled the Court will do so on the basis that after the date of the injunction or alternatively after the date upon which the way-leaves are obtained by means of the compulsory purchase process that there will be no continuing loss or damage to the plaintiff or the other land-owners. Therefore the damages which the Court assesses relate to all damage sustained by the plaintiff up to the date of the potential injunction coming into effect or the successful completion of the compulsory purchase order process by means of way-leaves being obtained and compensation paid.

65. The Court will grant an injunction in the following circumstances, that such injunction will only be granted six months after the final completion of the compulsory purchase process and if such process does not result in final orders being made and compensation paid. If an injunction comes into effect it will be in the following terms, namely, that the defendants, their servants or agents, are obliged to take up and remove the pipes laid on the said Commonage Lands and to restore the said lands to its original condition. If such way-leaves are obtained then there shall be no such injunction. In any event no injunction shall come into effect until six months after the date of the final completion of the process relating to the compulsory purchase orders. In the event of such injunction coming into effect, the defendants, their servants or agents, shall be permitted to enter upon the lands for the purpose of removing the said pipes and restoring the said lands to its original condition.

66. As identified above the Court also proposes to identify an appropriate figure for damages for all loss, damage, inconvenience and distress suffered by the plaintiff. The Court is satisfied that there has been little or no interference with the plaintiff's use of the lands nor has there been any diminution in the value of the lands. In those circumstances the main matters which the Court has to take into account in assessing the quantum of damages are the upset and the distress which the plaintiff has suffered, the fact that her title was denied and that she was obliged to bring these proceedings so as to obtain a recognition of her legal right and of the wrong done to her. An appropriate figure in damages to recognise those matters and other matters is €7,500.00.

67. The Court's determination in relation to the appropriate figure for damages gives rise to an additional issue relating to the fact that the plaintiff resisted an application to remit this case to the Circuit Court. On the basis of the judgment herein this Court is satisfied that these proceedings should have been brought in the Circuit Court and in those circumstances the Court requires to hear the parties in relation to the issue of costs including the costs of the interlocutory proceedings. The Court will also hear the parties in relation to the terms of the order which it proposes to grant.