Neutral Citation Number: [2010] IEHC 459

THE HIGH COURT

2005 3590 P

BETWEEN

JAMES VICTORY AND YVONNE LEAVY

PLAINTIFFS

AND

GALHOY INNS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice McMahon delivered on the 16th day of December, 2010

Introduction

1. The central issue in this case is whether the right of way over the servient tenement is extended to property other than the dominant tenement, when part of the dominant tenement is by transfer absorbed into a larger unit of property?

2. The defendant owns a nightclub/licensed premises in Longford town known as "P.V.'s". The front of the public house opens onto Ballymahon Street, and the premises stretches backwards in an east west direction. If one turns right on exiting P.V.'s frontage on Ballymahon Street, one soon comes to Market Square which meets Ballymahon Street at right angles. The properties involved in this dispute are broadly located to the rear of the corner formed by Ballymahon Street and Market Square. The defendants purchased P.V.'s from Thomas Kearns in 2005. Mr. Kearns had in turn purchased the property in two lots in 2000 and 2001 from Pat Fallon, and after extensive refurbishment sold it on to the defendants. The main lot of property consisted of a licensed premises, P.V.'s, which ran east to west from Ballymahon Street in the town. The second lot was a small piece of land on which a storehouse (storehouse A) stood, and which on the map presented as a small rectangle attached to, and dropping off the rear of the long east/west rectangle on which the nightclub and licensed premises stood. When Pat Fallon first developed P.V.'s licensed premises (then Clarke's pub) in 1972, he found that there were some difficulties in making deliveries to the pub through the front of the premises from Ballymahon Street. Storehouse A and a larger piece of property of which it was part, to the rear of P.V.'s, came on the market in 1986, and Mr. Fallon bought it because it meant, by breaking through the wall of Storehouse A, that deliveries could then be made to the pub through Storehouse A to the rear of P.V.'s premises. This was possible because the premises, of which the storehouse was part, enjoyed a right of way over the plaintiffs' premises which had access from the Market Square in the town which right of way is referred to as "A" "B" herein.

3. The plaintiffs' premises comprise of two shops at ground level, with two second floor overhead apartments which front onto the Market Square. As one faced the shops and looked northwards, there was an archway to the left of the shops which led into the plaintiffs' yard. The yard extended some metres beyond the archway and a door to the right allowed access to the plaintiffs' premises from the side. The plaintiffs' boundary was originally defined by a wall and a gate to the left.

4. The property to the left of the archway was owned by McCormacks at one time and stretched all the way from the Market Square back to the boundary wall of P.V.'s licensed premises, and included at its most northerly point Storehouse A. It is not disputed that by various grants commencing with a lease in 1918, there was a right of way for the benefit of the McCormack lands through the plaintiffs' archway, over their yard and turning left, through the gateway into McCormack's premises. This right of way is referred to as "A" "B" in the various title deeds and it is also not disputed that the McCormack's lands (including Storehouse A at the north end) was the dominant tenement, and the lands now in the ownership of the plaintiffs, were the servient tenement for this right of way.

5. When Pat Fallon, the owner of P.V.'s, purchased the McCormack lands in 1986, he made an opening from the newly acquired Storehouse "A" into the rear of P.V.'s yard and took all his deliveries for the licensed premises from then on through the plaintiffs' archway and through Storehouse A.

6. This continued to be the case until the year 2000, when Thomas Kearns bought the licensed premises from Pat Fallon. The sale was in two lots: the licensed premises known as P.V.'s and Storehouse A, through which deliveries were made to P.V.'s by using the "A" "B" right of way over the plaintiffs' premises. The second lot, storehouse A, was not purchased until 2001.In addition to transferring the storehouse at that time, Pat Fallon also purported to convey an additional right of way YY1 which ran over the plaintiffs' property, again from the archway entrance at Market Street, through the archway and yard of the plaintiffs, but instead of going left from the plaintiffs' yard, as the existing right of way "A" "B" did, YYI went directly north onto Pat Fallon's yard and directly into Storehouse A.

7. This did not appear as a problem initially as it was not possible to use this way because of the wall which encircled and the gate which defined the plaintiffs' yard. In or around 2004, or thereabouts, however, Thomas Kearns apparently knocked the plaintiffs' wall and gateway to the left of the plaintiffs' yard, without permission, thereby opening up the plaintiffs' yard to Pat Fallon's (formerly McCormack's) yard. It is also significant to note that at this time Thomas Kearns also owned land and premises to the right of the plaintiffs' shops on Market Street, and behind and to the right side of the plaintiffs' yard. Thomas Kearns was involved in a major development of this property at that time. After the plaintiffs' boundary wall was knocked, it was possible for Thomas Kearns to take delivery directly to his pub, P.V.'S, along the YY1 route. The plaintiffs' yard was indistinguishable from the other open spaces at the rear of the archway.

8. In advancing his development plans Thomas Kearns had to get planning permission and from documents and maps lodged in connection with this application, it is clear he received permission to dig trenches and lay pipes and cables in the yard and under the archway. Some of this work, however, was carried out on what transpired to be the plaintiffs' land. Thomas Kearns also ran electrical wires and attached lights to the archway belonging to the plaintiffs.

9. Alerted by these works, the plaintiffs investigated their title documents and discovered that some of these works were done on their property without permission and that Thomas Kearns was claiming the right of way granted by Pat Fallon to Thomas Kearns (that

is YY1) for access to P.V.'s licensed premises. It is significant to note that during the year 2002 when Mr. Kearns was developing the pub, P.V.'s, Storehouse A was knocked and rebuilt in a new configuration and became more integrated into the redesigned licensed premises. In 2005 Thomas Kearns sold P.V.'s to the defendants herein.

10. The present proceedings were commenced by a plenary summons issued in October, 2005. In these the plaintiffs seek a declaration that the defendants do not have a right of way either "A" "B" or YY1 over the plaintiffs' land to make deliveries to P.V.'s licensed premises. They also seek, *inter alia*, an injunction in respect of same and damages for nuisance, *etc*.

11. Many of the facts in this case are not in dispute between the parties and where there is a dispute of significance I will address it at the appropriate stage in these deliberations. The real dispute relates to the determination of the relevant legal principles and their application to the facts.

The Right of Way "A" "B"

12. While it is clear from the documents of title that the right of way "A" to "B" is for "all purposes", it starts and ends at "A" and "B" on the map. "B" is the entrance at the archway on Market Square and "A" is at the entrance to McCormack's shed on the left hand side shortly after emerging from the archway. Secondly, the dominant tenement is "the adjoining premises" and "the plot in the occupation of the said Matthew McCormack". While this, in my view, defines the dominant tenement as all the property in McCormack's site at the time, including the Storehouse A, it does not include access to other property owned by different people on different sites off the yard. It clearly does not extend to all the premises now in the possession of the defendants and to P.V.'s licensed premises in particular. The fee simple to this property i.e. the dominant tenement (originally it was a lease) was subsequently brought in by McCormack and Son Limited on 4th February, 1985, and this was conveyed to Pat Fallon on 4th July, 1987. It included the benefit of the right of way "A" "B". This is what the defendant relies on as being an express grant in favour of his present property. As already noted, Pat Fallon later, on 22nd November, 2001 purported to convey part of this property (Storehouse A) once more to Thomas Kearns, including the right of way "A" "B", but also purported to convey an additional right of way through the archway and up through the yard to the Storehouse A at the rear of the site which right of way was marked YY1 on the map. This new right of way differed from "A" "B" and it is my view that Mr. Fallon purported, without authority or permission, to grant to Thomas Kearns another right of way over another small part of the plaintiffs' property which was not covered by the existing right of way "A" "B". The plaintiffs never sanctioned or authorised this additional right of way. When Thomas Kearns conveyed the property to the defendants herein, he could not in turn pass on a right of way YY1, because Mr. Fallon could not have granted it to Mr. Kearns in the first place and Mr. Kearns himself did not own all the property over which YY1 right of way ran: *nemo dat quod non habet*. I have no hesitation in coming to this conclusion having examined the various documents of title, the relevant files from the Planning Authority, and having listened to the evidence of many witnesses before the court.

13. By way of summary, therefore, the position was as follows prior to 2002. When one entered from Market Square, under the archway owned by the plaintiffs, one came to the plaintiffs' yard which was enclosed on all sides. As one advanced northwards at the end of the plaintiffs' yard, there was a wall and immediately to the left, there was a gate which opened onto McCormack's yard. This was the extent of the right of way given to McCormack in the first instance and the right of way which Pat Fallon purchased when he purchased the properties from McCormack. Maps from the Planning Department of the Urban Council show this gate and this boundary wall at the north side of the plaintiffs' property were still in existence in late 2000 and early 2001. The gate and the wall were gone in a similar map of the area in 2004. It is clear from the evidence that the wall and the gate were demolished by Thomas Kearns, as was a narrow triangular building which projected northwards from the plaintiffs' boundary wall. This was to facilitate smokers after the smoking ban was introduced in March 2004. It appears that Mr. Kearns also demolished that at the same time as he demolished the plaintiffs' end wall and the gateway. This had the effect of opening up the area and joining the plaintiffs' yard with the McCormack's /Pat Fallon's/ Thomas Kearns' yard. Insofar as the right of way purported to be transferred by Pat Fallon to Thomas Kearns in 2001(*i.e.* YYI), it was not an extension of the "A" "B" right of way which would have been represented on the map by a zigzag line instead of the straight line between Y and Y1. Accordingly, YY1 was not within the original grant to be found in the leases dated 1918 and 1941. It may have been that the variation was slight in direction, but it was not what was granted. Moreover, as noted above, the route YY1 could only happen if the plaintiffs' end wall and side gate were demolished to make it possible, something again that was done without the plaintiffs' consent.

Extension of Dominant Tenement not Permitted

14. When a right of way exists over private property, it has the effect of restricting the servient tenement's property rights and this interference cannot be further extended without the authorisation of the owner of the servient tenement. The law does not allow the dominant tenement to be extended without the permission of the servient tenement in such situations. Even if one accepts that what was once Storehouse A is still part of the original dominant tenement, and even if the defendants, have acquired a right of way when its predecessor purchased Storehouse A from Pat Fallon on 22nd November, 2001, which I do not accept, the dominant tenement benefiting from this right of way, in both situations would still be confined to Storehouse A only. When Pat Fallon sold the Storehouse A to the defendant's predecessor in title in 2001 and purported to give a right of way from the Market Square through the archway and up the yard to the storehouse (marked YY1) it could not extend the dominant tenement to include all the licensed premises known as P.V.'s. In *Harris v. Flower & Sons* [1905] 74 L.J.Ch. 127, Roomer L.J. said at 132:-

> "If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B." (See also *Gale on Easements,* 18th Edition at 9 – 31; *Bland Easements*, 2nd Edition at para. 2.22)

15. Modern authorities to this effect include *Peacock & Anor v. Custins & Anor* [2002] 1 W.L.R. 1815, where the conveyance of a field constituting the dominant land to the claimants was expressed to be subject to the benefit of a right of way over land owned by the defendants, enabling the claimants to reach the dominant land "at all times and for all purposes in connection with the use and enjoyment of the property hereby conveyed".(at 1817) The dominant land was farmed by the claimant's tenant as one unit with an adjacent field which the claimants also owned. The tenant used the right of way to reach both fields, taking a tractor over it approximately six times a year, involving one or two more visits than if he had farmed the dominant land alone. The defendants sought a declaration that the terms of the grant did not entitle the claimants or their tenant to use the right of way to access the adjacent field, and that any such use would constitute a trespass. The judge, refusing to make the declarations sought, found that the claimants were entitled to use the right of way for the joint purposes of farming both fields so long as the use was not excessive and that it was not likely to be greatly increased by being for access to both fields. On appeal by the defendants, it was held, allowing the appeal, that the right to use a right of way was determined by the terms of the grant specifying the dominant tenement for the purposes of the right created, and whatever was not provided by the Grant would be a trespass.

16. Schliemann L.J., delivering the judgment of the court referred, *inter alia*, with approval to *Harris v. Flower (Supra)* and referred specifically to the passage from Cozens-Hardy L.J. at p. 133 (p. 1821F):-

> "It is a right of way for all purposes – that is, for all purposes with reference to the dominant tenement. The question is whether the defendant has not attempted, and is not attempting, to enlarge the area of the dominant tenement. The land coloured white is entirely landlocked by the acts of the defendant. The only access is by the passage over the land coloured pink; and it is, in my judgment, impossible to use the right of way so as to enlarge the dominant tenement in that manner."

17. In *Macepark (Whittlebury) Limited v. Sargeant* [2003] 2 P.C.R. 12, Mr. G. Moss, Q.C., sitting as a Deputy High Court Judge at 185, set out the approach to problems of this kind and emphasised the general principles:-

> "It seems to me that as a matter of analysis there are two overlapping questions in this type of case. The first question concerns the nature of a right of way by way of easement. An easement is a proprietary right over someone else's property. To use the technical language in such cases, an easement is a right over a 'servient' property for the benefit of a 'dominant' property. It follows from the nature of an easement that such a right *cannot* consist of a right over the servient property for the benefit of a non-dominant property. The cases usually concern non-dominant property owned by the same party as the owner of the dominant property. As a general principle, he cannot use the right of access over the servient property for the benefit of the non-dominant property.
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> Does it make a difference if the relevant non-dominant property is in different ownership from the dominant property? It should not do so. If it did, an owner of dominant land who wished to use an access beyond its proper scope could simply enter into a contractual arrangement with the owner of the non-dominant land sought to be benefited rather than purchasing the non-dominant land outright. The House of Lords case *Alvis v Harrison* (1991) 62 P & CR 10, 15-16 shows that different ownership does not make a difference to the principle. Although that was a Scottish law appeal, the House of Lords considered that the law of England was the same."

18. In the same case the Deputy High Court Judge, recognising that a right of way can extend to non-dominant land if such use is insubstantial or "ancillary" summarises the law on that issue as follows at para 50:-

> "On the basis that I have accurately understood the current standing of the 'ancillary' doctrine, the following propositions now seem to be correct. (1) An easement must be used for the benefit of the dominant land. (2) It must not 'in substance' be used for the benefit of non-dominant land. (3) Under the 'ancillary' doctrine, use is not 'in substance' use for the benefit of the non-dominant land if (a) there is no benefit to the non-dominant land or if (b) the extent of the use for the benefit of the non-dominant land is insubstantial, i.e. it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant land and the non-dominant land. (d) 'Benefit' in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, e.g. as a result of an arrangement with the owner of the dominant land.
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> 51. The application of these principles can involve potentially difficult questions of fact and degree.
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> 52. One significant factor, identified by the Court of Appeal in *Peacock v Custins* [2002] 1 WLR 1815, 1823-1824, para 24, is whether the benefit to the non-dominant land is likely to have its own 'commercial value'. It also seems from Peacock v. Custins that it is not necessary to prove that separate value if it can be regarded as 'self-evident'."

I accept this as an accurate summary of the law in this jurisdiction and hold that the facts in the case before this court clearly fall outside any such ancillary doctrine.

19. The plaintiffs herein submit that because of the construction of the super pub and the nightclub on both of the two plots comprised in the 2005 conveyance to the defendants that is the licensed premises known as P.V.'s and the Storehouse A, it is submitted that what might have been the lawful user in respect of the dominant tenement itself, cannot be extended to benefit the licensed premises/nightclub which now embraces the plot on which Storehouse A stood. I agree with this submission for the reasons stated.

20. To avoid this conclusion**,** the defendant's claim is now based on the grant he received from Thomas Kearns when he bought the licensed premises which contained the right of way over the plaintiffs' premises marked Y/Y1 in 2005. This in turn was based on a conveyance of the Storehouse A and an independent right of way (in addition to "A" "B") marked Y/Y1 to Thomas Kearns from Pat Fallon in November 2001. Insofar as Pat Fallon had any right of way over the plaintiffs' lands, however, it was the right of way known as "A" "B" and this was for the benefit of his lands known as McCormack's lands and not any other lands, and particularly not in favour of the licensed premises known as P.V.'s. The dominant tenement in relation to "A" "B" was McCormack's lands including Storehouse A and in law does not extend to other lands. The fact that the Storehouse A was subsequently subsumed into the licensed premises (P.V.'s) as it developed into a nightclub does not mean that any right of way in favour of Storehouse A inured for the benefit of the larger property which later engulfed it.

21. In any event, the defendant's claim now that it has a right to use an exit from its premises, through the plaintiffs' archway, as an emergency fire exit from the nightclub, does not amount to a right of way in the ordinary sense, and cannot hope to claim legitimacy from whatever rights of way may have previously existed.

22. It is my conclusion, therefore, that the defendant herein does not have a right of way from the Market Square through the plaintiffs' archway and up through the plaintiffs' yard in a straight line to the rear entrance of the defendant's nightclub. Furthermore, even if such a right of way existed it could only be a right of way for the benefit of what was Storehouse A and any attempt to use this right of way for the purposes associated with the nightclub and licensed premises and in particular as a fire exit from these premises, would be an attempt to extend the dominant tenement of the original right of way as it was first created. While it is true that Storehouse A was part of the dominant tenement when the "A" "B" right of way was granted originally and while I accept that extensive deliveries were made to this store for the benefit of the licensed premises known as P.V.'s from 1987 onwards without objection from the plaintiffs or their predecessors in title, this, however, cannot amount to an express grant to the defendants or their predecessor in title. I will refer in more detail to the statutory declaration made by Eileen Farrell, the plaintiffs' predecessor in title, in March 1992, later in this judgment.

23. The evidence was that Mr. Fallon first broke an opening from Storehouse A to the licensed premises in early 1986 and he began to

take deliveries for the pub, P.V's, *via* the archway immediately after that. The herein proceedings, however, were commenced by Plenary Summons dated 26th October, 2005, which means that the user for deliveries falls short of the required 20 years user which would raise the presumption of last modern grant. (See Bland P., *Easements*, 281, 2nd Ed.) In any event, Mr. Kearns admitted in evidence that when he bought the licensed premises from Mr. Fallon in 2000, he did not get the Storehouse A at the same time. He had to purchase this separately in 2001, and between 2000 and 2001, Mr. Kearns' evidence was that he used Storehouse A for deliveries with Mr. Fallon's permission. His user during this period, therefore, was not *"nec precario"*, and accordingly, would not count for prescriptive purposes. Moreover, both Mr. Kearns and his daughter Karen confirmed that no deliveries for the pub were made between 2002 and 2005 in any event. That presumably is why the defendants have not pleaded prescription in this case.

Right of Way not Emergency Fire Passage

24. There is also the issue of the nature of user permitted. The original right of way was granted for the benefit of the McCormack lands and while it was expressed in generous terms to be "for all purposes" it must be kept in mind that it was at all times intended to be a right of way to the McCormack lands only. This normally means that the beneficiaries are entitled to pass and re-pass over the servient tenement and carry out such activity as would normally be associated with the lands in question. It cannot, in my view, ever have been intended to act as a fire exit/escape for a nightclub not located on the dominant tenement although now attached to it, which can sometimes, according to the evidence, accommodate up to a thousand people. That, to me, amounts to user which was never intended in the first instance. In fact, such use, having a right to exit in emergency only, cannot be described as a right of way at all. If the user could be expanded and extended by attachment in this fashion there would be no limit to where it could end. If, instead of a nightclub, Storehouse A was opened up into a football grounds or a dog track, would the plaintiffs' premises then be subjected to the crowds coming and going to such entertainments? When the defendant's predecessor in title, Mr. Kearns, replaced the gate at the entrance to the archway from Market Square, with a fire gate which could only be opened outwards by pushing the horizontal bar mechanism, the passage was effectively changed from a way to pass and re-pass to a fire exit passage from the nightclub to be used in emergencies only. Moreover, since I accept that this gate could not be opened from the street side, having looked at the photographs and heard the evidence of the plaintiff and Mr. Madden, the Architect engaged on his behalf, the effect was that the plaintiffs could not, after that, pass under their own archway from the Market Square.

Trespass and Nuisance

25. It must also be acknowledged that a right of way by its nature does not permit users to dig trenches, erects lights or otherwise interfere with the passageway and in carrying out such acts, there can be no doubt that a trespass has been committed. Such interferences were carried out by Mr. Kearns primarily and not by the Defendant who would not normally be liable for the damage so caused. I will deal with these transgressions in more detail later in this judgment. Insofar as such acts amount to a nuisance, liability will rest not only with those who created the nuisance, but also with those who continued and adopted them. In the present case, there is evidence that trenches were dug on the plaintiffs' property, to carry various services including pipes, wires and cables, for the benefit of the defendants' premises; that lights and wiring were attached to the archway and that some party walls were knocked, separating the plaintiffs' premises from that of the defendants. All of these were apparently done by the defendant's predecessor in title prior to 2005 when the defendants bought the properties. I accept, on evidence before the court, that these complaints have been substantiated as against the defendant's predecessor in title, Mr. Kearns. Additionally, since the smoking ban was introduced in March 2004, many patrons of the defendant's premises now access the plaintiffs' yard if they wish to do so. It is alleged that since the party walls were knocked by Thomas Kearns, there is nothing to prevent these persons from trespassing onto the plaintiffs' portion of the yard and from causing a nuisance in the area. It is also alleged that because of unrestricted access to the gateway at the Market Square end of the archway, the gate had to be "hotwired" to prevent customers facilitating their friends gaining entry to the nightclub without paying by pushing open the gate from inside the archway. I accept the plaintiffs' evidence in these matters also. Apparently, these security measures (the defendant objected to the term "hotwired") were installed by the defendants, but this, of course, did not mean they were permitted.

Ms. Farrell's Statutory Declaration, 1992

26. Before addressing the question of reliefs, a word should be said about the statutory declaration of Eileen Farrell sworn on 27th March, 1992, and exhibited to the Court. Ms. Farrell was a predecessor in title of the plaintiffs. Ms. Farrell, referring to the original right of way at issue here, "A" "B", declares that she owned the property which was subject to the right of way in question and that it had been used without restriction or interruption for the 25 year period prior to 1992 and that it went with the title. She also averred that the right of way was used by Pat Fallon for access to his property. Pat Fallon's evidence, however, was that he only broke an opening from the storehouse into the pub which he also owned in 1986. The 25 year user referred to by Ms. Farrell was primarily focused on McCormack's land which as already noted Pat Fallon owned only since 1985. The declaration does not specifically refer to deliveries to the pub. This declaration does not add much to my earlier analysis since no one denies the existence of the right of way known as "A" "B" through the archway for the benefit of Fallon's property (previously McCormack's premises). The issue was whether this right of way could be extended for the benefit of licensed premises known as P.V.'s in the manner claimed by the defendants. Furthermore, Ms. Farrell could not be referring at that time to the right of way, YY1, which we know was only created by Pat Fallon for the benefit of Thomas Kearns in 2001.

27. When the plaintiffs bought the premises in 1992, having previously rented them for a period of years, they were not aware of Ms. Farrell's statutory declaration. They only became aware of it earlier this year when it was discovered to them in these proceedings. This did not alert them to any right of way other than "A" "B". Nor could the statutory declaration be considered as being a grant of an additional right of way to Pat Fallon over Ms. Farrell's land, the plaintiffs' property now. It is not specific enough nor is the language used indicative of an intention to make such a grant. To reach such a conclusion would necessarily cast serious doubt on Ms. Farrell's bona fides as vendor in the sale to the plaintiffs, in the same year, where the only burden referred to was the right of way known as "A" "B". I am not prepared to ascribe such duplicity to Ms. Farrell.

Acquiescence

28. The defendants contend that the plaintiffs knew of the various alterations and changes taking place at the back of his building from 2001 or thereabouts and acquiesced in the developments to such an extent that this Court should not give him any remedy in these proceedings. To assess the validity of this argument I must examine more closely the conduct of the plaintiffs during the relevant period from 2001 onwards in particular.

29. The plaintiffs bought the servient tenement in 1992, from Ms. Eileen Farrell. They had previously rented the properties for about a year from which the first plaintiff conducted his veterinary practice. During that year, i.e. 1991, they also rented the shed at the end of the archway from Mr. Pat Fallon and used the right of way ("A" "B") in that connection. The first plaintiff continued to practice at this location until he moved out to new premises in 2002. At that point they rented out the two commercial units and the two

apartments. The first plaintiff's evidence was that after he moved out in 2002, he visited the premises infrequently, once every six months or once every nine months only.

30. The plaintiffs were aware that Thomas Kearns purchased the pub and licensed premises known as P.V.'s from Pat Fallon in the year 2000 and the storehouse A in 2001. Shortly after that the first plaintiff said he got a phone call from the builder who was working at the yard to say that the builder had damaged the gate under the archway and wished to replace it. It was put to him that Mr. Fallon and Mr. Kearns came to him with a proposition to replace the gate with a new modern gate and that he was delighted. The first plaintiff agreed that he consented on the phone to the builder about the replacement, but he denied meeting with Mr. Fallon or Mr. Kearns personally on the matter. It was also put to him that Mr. Kearns would say that the gate could be opened from the outside and that a key was offered to the first plaintiff. The first plaintiff denied this and stated that the gate was such that it prevented him from accessing his own premises from the street. He said he only became aware of the impact that the changes made in the yard after March 2004, when the smoking ban was introduced and when he noticed one night when he was casually passing the premises that there was a large floodlight installed in the yard. After this he became more alert and visited the premises, especially at weekends, where he noticed that patrons of the pub/nightclub were using the yard when they were smoking. He said that some weekends there were more than 20 people congregated and other weekends there was up to 50 people using the yard. The wall around his yard had been demolished. He consulted his solicitor in January 2005, after the defendant bought the licensed premises for a sum advertised in the local newspapers being €7m. After that he kept a regular eye on the property. He said it was not until then that he closely examined his title deeds and took advice from his solicitor. On one occasion, together with his architect, Mr. Madden, he proceeded to take down one of the lights attached to the archway and this lead to an altercation where the gardaí were called. This was in September, 2005. There were other occasions when Mr. Madden is alleged to have attended and bored holes in the wooden gate erected at the archway (September 2007) and where Mr. Madden is also alleged to have attempted to block the drains, constructed on the plaintiffs property. The first plaintiff said he did not instruct Mr. Madden in this regard. The first plaintiff gave the following evidence in relation to his knowledge and awareness of what was happening to the rear of the archway and in his yard:

> (i) The first plaintiff said he never saw Pat Fallon bringing barrels in the archway to P.V.'s through storehouse A. I accept that Mr. Fallon had broken a doorway through from storehouse A into the rear of P.V.'s from 1987 and that he did take deliveries through this route from that time.
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> (ii) The first plaintiff said he never saw the laneway or the archway used in connection with the pub or licensed premises known as P.V.'s in all that time.
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> (iii) Mr. Tom Kearns bought P.V.'s and storehouse A, in 2000 and 2001 respectively, from Mr. Fallon. From 2001 onwards, Mr. Kearns undertook a large refurbishment of P.V.'s and there was work being done on the site until the autumn of 2002. It was put to the first plaintiff in cross examination that at one point, there was a large crane being used at the site to which he answered that it was at the front of the licensed premises. Mr. Fallon gave evidence that he was not very conscious of the works even though he still had a business there. The first plaintiff alleged that most of the work was not being done near his yard and he did not inspect the planning permission. He maintained that he was not aware of the works in spite of the fact that electric cables were laid underground in the yard and drains were dug. It must, however, be recalled that the first plaintiff, Mr. Victory, had moved his practice out of the premises in 2002 and only visited very occasionally up to March 2004. Moreover, had he looked at the planning permission, he would have seen that the plans indicated that there was to be a fire exit into the yard and out through the archway.
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> (iv) The first plaintiff admitted that he did not object when the defendants leased the licensed premises from Mr. Kearns in July 2004, or when the defendants bought the premises from Mr. Kearns in January 2005, or when monthly licensing applications were made for licence extensions.
>
> (v) Against this factual matrix that I must now consider whether the failure by the first plaintiff to intervene constitutes what in law amounts to acquiescence.

31. For the most part I accept this as an accurate account of the first plaintiff's knowledge and awareness of what was going on to the rear of his premises during the period 2002 to March/April 2004. The question arises then as to whether this amounted to acquiescence of such a kind that it should have deprived the plaintiffs of any remedy. Before the law will deprive a person of his *prima facie* entitlements in such a case, however, the inaction or passivity of the complainant must amount to something approaching dishonesty or unconscionableness on his part. In *Shaw & Anor v. Applegate* [1977] 1 W.L.R. 970, the Court of Appeal held, reversing the lower court, that a delay of more than two years, during which a convenantee was in breach of a covenant not to use the property as an amusement arcade, did not prevent the beneficiaries of the covenant, who knew of the development, from enforcing the covenant, as on the facts, the plaintiff's failure in that respect was not dishonest or unconscionable. It appears that the plaintiffs were confused as to whether, during the two year period, the defendant was in breach of the covenant or not, and this subjective doubt was a relevant factor in avoiding a conclusion of dishonesty. The fact that the early infringements did not particularly compete very strongly with the plaintiff's own interests, was also seen as justification for not commencing enforcement proceedings. Furthermore, failure by the convenantee to pursue breaches of covenant which were minor or insignificant would not be considered by the court as amounting to acquiescence in ordinary circumstances. (The court cited *Richards v. Revitt* [1877] 7 Ch. D. 224 and *Osborne v. Bradley* [1903] 2 Ch. 446 in that connection).

32. The court in *Shaw* at p. 977 referred to the dictum of Fry J. in *Wilmot v. Barber* ([1880] 15 Ch. D. 96, at 105) where he said that for acquiescence to deprive a man of his legal rights which rights were expressed in a legal document it must amount to "fraud". He then goes on to define the elements of the "fraud" required to constitute acquiescence:-

> "What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place [the covenantor] must have made a mistake as to his legal rights. Secondly, [the covenantor] must have expended some money or must have done some act (not necessarily upon the [covenantees] land) on the face of his mistaken belief. Thirdly, [the covenantee], the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claim by [the covenantor]. If he does not know of it he is in the same position as the [covenantor], and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, [the convenantee], the possessor of the legal right, must know of the [covenantors] mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, [the covenantee], the possessor of the legal right must have encouraged [the covenantor] in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud as such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

33. The court, in *Shaw*, understood Fry's dictum as meaning that before acquiescence can be established the conduct in question must be either dishonest or unconscionable as assessed in the context of the particular facts of the case. It doubted whether the standard was as high as Fry J. put it, and in particular doubted that all five tests had to be complied with before a conclusion of acquiescence could be reached in every case. (It referred to a similar doubt expressed by Sir Raymond Evershed M.R. in *Electrolux Limited v. Electrix Limited* [1954] 71 R.P.C. 23, at 33).

34. Without being definitive on the matter it is sufficient to say, that the level of inactivity required to deprive the person who wishes to assert his right is high and must be so reprehensible that it approaches dishonesty. A lower standard might be seen as a policy by the courts of encouraging and promoting litigation before the claimant is sure of his entitlement or of his likelihood of success (see *Shaw supra,* at 978).

35. Applying that standard to the first plaintiff's passivity in this case, and bearing in mind the first plaintiff's limited knowledge or appreciation of what was going on, on his property during the relevant periods, I am not satisfied that it could be described as something approaching dishonesty. For this reason I am not of the view that the plaintiffs should be deprived of their entitlements herein.

36. Neither, in these circumstances, am I prepared to find that the plaintiffs were guilty of laches in commencing these proceedings. The delay in my view was neither unreasonable nor unconscionable on the facts.

37. Having determined the substantive issues, I now turn to the questions of relief.

Reliefs

No Injunction

38. The plaintiffs seek an injunction against the defendant or, in the alternative, damages. The court, of course, has discretion to award damages in such a case if it is appropriate to do so, bearing all the circumstances in mind. *Solomon v. The Red Bank Restaurant Limited* [1938] I.R. 793; *Bracewell and Anor. v. Appleby* [1975] 1. All E.R. 993. I am determined that damages are the appropriate remedy in the present case for the following reasons:

(i) The first plaintiff's evidence was that he rarely used the archway entrance, which was borne out by the fact that he said he was unaware of the considerable works that were undertaken in that area in the period 2001 to 2002;

(ii) All these works were executed in an open and transparent manner without objections from the plaintiffs;

(iii) Construction works to the pub/licensed premises carried out by the defendants' predecessor in title were carried out in compliance with planning requirements and all other regulatory requirements including the fire safety regulations. This necessarily involved the publication of statutory notices etc;

(iv) An application was made for a new license to the Circuit Court again with all the attendant publicity required of such an application and there was no objection from the plaintiffs. Neither did the plaintiffs object at subsequent hearings to renew the licence;

(v) The effect of an injunction on the defendants' business would be disproportionately onerous in comparison to the effect of its refusal on the plaintiffs, who are entitled to damages in any event and who, it was suggested, may prefer damages.

39. The above narrative and the narrative that follows is not seriously disputed and is compiled from the evidence given by the main witnesses in this affair including: the first named plaintiff, Pat Fallon, Thomas Kearns and Mr. Liam Madden, and from a perusal of the documents of title as well as from the various planning files. In relation to the latter, Mr. Madden had undertaken a serious study and was able to compare the planning maps in particular with what was on the ground. This was helpful in establishing dates relating to various events and features as to walls, gates and configuration of buildings, etc. Mr. Madden was born in 1951 and lived most of his life in the area. He was very familiar with the whole area and at present lives about 300 yards from the locus. Insofar as minor matters were in dispute, I accept Mr. Madden's evidence in relation to the following matters:-

(i) A planning application made in 2001 shows that there was an iron/metal gate which opened inwards at the entrance to the archway at that time;

(ii) Mr. Thomas Kearns was mistaken when he said that the later wooden gate erected in 2002 with the consent of the plaintiffs opened inwards;

(iii) That in a planning application made in 2004, Pat Fallon asserted that he was the freehold owner of the yard, something that he had to correct subsequently, when an objection was raised;

(iv) That Mr. Thomas Kearns had interfered without permission with the plaintiffs' drains in the plaintiff's yard in or around 2002;

(v) That Thomas Kearns was involved in erecting lights without permission in the archway in 2004;

(vi) That Thomas Kearns demolished the plaintiffs' wall and gate to their yard in or around 2004;

(vii) That there was no opening from Storehouse A into the public house before 1986 (confirmed also by evidence from Clyde McCormack), but on the balance of probability, I accept that Mr. Pat Fallon created an entrance connecting these two properties about this time. I do not accept Mr. Madden's evidence that when he did an investigation for an insurance company in respect of a personal injury claim in 1991, which occurred on P.V's licensed premises, there was no such opening in existence. Mr. Madden's focus in that investigation was on a different part of the licensed premises, and his conclusion on this point was an error;

(viii) That Mr. Fallon was wrong when he initially said he did not rent McCormack's shed to the first named plaintiff for a period of about twelve months in 1992; and

(ix) That works in the yard were carried out by Mr. Kearns in the summer of 2002 and also in the summer of 2004.

Damages

40. What then is the standard which the court should apply in measuring damages due to the plaintiffs in this case? In *Bracewell v. Appleby* [1975] 1 All E.R. 993, Graham J. relying on Brightman J. in *Wrotham Park Estate Company Limited v. Parkside Homes Limited* [1974] 2 All E.R. 321, [1974] 1 W.L.R. 798, said at 1000:-

> "It seems to me that the defendant must be liable to pay an amount of damages which insofar as it can be estimated is equivalent to a proper and fair price which would be payable for the acquisition of the right of way in question. In dealing with the case before him, Brightman J. said:
>
> > 'In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant.'
>
> Then, after rejecting the approach which aimed at obtaining half or a third of the development value, he went on:-
>
> > 'I think that in a case such as the present, a land owner faced with a request from a developer which, it must be assumed, he feels reluctantly obliged to grant, would have first asked the developer what profit he expected to make from his operation.'
>
> The profit in that case was large, being of the order of £50,000 and in the end the damages were assessed at £2,500 being five per cent of the profit."

I agree with this approach and applying the principle to the facts of this case I find that although the plaintiffs never sought to sell the right of way over their land to the defendant, their interest now seems to be more in getting compensation for the intrusion rather than restoring the status quo. Their interest in the properties affected is purely commercial, unlike the situation in *Bracewell* where the amenity value of the plaintiff's house was at issue. Moreover, there was evidence before the court, which I accept, that the plaintiffs indicated to the defendant that they would have to pay for the intrusion.

41. In *Conneran & O'Reilly v. Corbett & Sons Ltd* [2006] IEHC 254, Ms. Justice Laffoy had to address the quantification of damages where the plaintiff had successfully sued the defendant for interference with an easement to receive and make deliveries over a particular route on private property. In searching for the proper measures for damages to be used, where there has been no breach by a covenantor of a restrictive covenant, Laffoy J. (at 25/26 of her judgment) relied on the commentary by the learned editors in the 17th Edition of McGregor on "*Damages"* at para. 22-049 where she said:-

> "In outlining the normal measure of damages in torts affecting land, trespass and nuisance, McGregor considers the particular case of nuisance at para. 34-015 stating:
>
> > 'Where the nuisance does not entail physical damage to land, diminution in value at cost of abatement again appear as acceptable measures of damages. Thus, in *Snell & Prideau v. Derton Mirrors* [[1995] 1 E.G.L.R. 259, C.A.], where the claimants right of way was obstructed and narrowed by building by the defendants, the claimants' entitlement to damages was said to amount to the difference between the value of their property with the full right of way, including the right of passageway for vehicles, and its value with the more limited right now existing.'"

Laffoy J. then continues:-

> "As is noted by McGregor, the defendants in the *Snell* and *Prideau* case were not ordered by mandatory injunction to pull their building down. The issue of the quantification of damages was dealt with in that case in the judgment of Stuart Smith L.J. who stated (at p. 264):-
>
> > 'Although, in my opinion, the plaintiffs have suffered substantial damage, with the loss of vehicular access and the restriction imposed by the proximity of the defendants' building on the free and easy use of trolleys and forklift trucks, the fact is that, for many years, they made virtually no use of it and they do have an alternative access at the front of the building. Indeed at one time they had two such accesses, the garage and the loading bay, although the garage has now been converted to offices or a showroom. In the light of these considerations, I consider that the plaintiffs can be adequately compensated by an award of damages which will reflect the difference in value between the plaintiffs property with the benefit of the full right as compared with its value with the limited right as now exists.'
>
> What all of the foregoing extracts from McGregor illustrate is that the cornerstone of the traditional or normal measure of damages for breaches analogous to the breach of the plaintiffs' rights complained of here is diminution in value. The absence of evidence of diminution in value in this case undermines the court's ability to measure damages in accordance with the normal measure. In particular, the approach adopted in the *Snell* and *Prideau* case, which commends itself because of the similarity of the factual circumstances in that case and here, cannot be adopted."

42. Although the absence of evidence did not give Laffoy J. the opportunity to apply the approach adopted in the *Snell* and *Prideau* case, which in turn owes its origin to the *Wrotham* case, it is clear that it commended itself to her as an appropriate approach to adopt in a case such as that which was before her. It is the approach that I consider appropriate also in the case before this Court.

Damages: The Evidence before the Court

43. With regard to the intrusion of the defendant onto the plaintiffs' property and its entitlement to use the archway as an emergency exit passage in the event of a fire in the pub/nightclub, I am satisfied that damages for this incursion onto the plaintiffs' property should be calculated by reference to the principles established in the English cases of *Wrotham, Bracewell* and *A.G. v. Blake* mentioned above, and approved in *obiter dictum* by Laffoy J. in *Conneran* (*supra*).

44. With regard to the claim in nuisance, (noise, bright lights, litter *etc*) which, according to the plaintiffs, affects the potential for letting the residential flats in their property, different principles might apply, although in a case like the present it may be difficult, as

a practical matter, to separate this from the first heading. The same applies to the alleged incidents of trespass, that is, the placing of lights in the archway and "hotwiring" the exit gate therefrom. It should be noted that the defendant will be liable for acts of trespass it committed since it purchased the pub, it is not responsible for trespasses committed by its predecessors in title. It is different, of course, in the case of nuisance, where the defendant is liable for continuing a nuisance which may have been created by someone else. It may be that in a case like the present, these ancillary complaints should also be taken into account when calculating what the plaintiff, as a reluctant vendor, would be willing to sell for at the end of the day. Furthermore, some of the plaintiffs' complaints with regard to their own access and the access of their tenants through the archway might be resolved by furnishing the plaintiffs with a key to facilitate access in those situations.

45. From the above authorities I find that the damages to be awarded in a case like this are to be measured in the following way: first, one must assess the diminution in value of the plaintiffs' property if the defendant is now allowed to use the disputed route as a emergency fire exit: in other words I must calculate the difference in value between the plaintiffs' property without this burden and the property with this burden. Second, the plaintiffs are entitled to an enhancement by virtue of the leverage which they are entitled to exert in a commercial situation like that before the court. The amount of this leverage may be related to the value of the exit to the defendant's enterprise, and in particular to the profits which the enterprise generates for the defendant. Finally, the total amount of damages must be proper, fair and just in all the circumstances.

46. In this connection it must be noted that the use which the plaintiffs made of their archway and their yard was very limited since 2002, as is clear from the fact that they were unaware of the works that were carried out during the period 2002 – 2004. The premises is now primarily for letting and the property has no amenity value for the plaintiffs. It is not their home and the intrusion has no amenity impact such as is found in other cases. From the point of view of the defendant, it is a bona fide purchaser for a value without notice and the trenches and other works as well as the demolition of the plaintiffs' boundary wall which was done openly were executed by the defendant's predecessor in title after planning permission had been secured. Although the plaintiffs' passivity in this regard did not amount to acquiescence it is something the court should bear in mind when calculating what is fair in the circumstances.

47. There was evidence before the court from Mr. J. Quinn, a valuer called by the defendants, that the difference in value between the plaintiffs' property with the burden and without the burden is €40,000 and this is what the defendant feels should be the maximum measure of damages due to the plaintiffs. The plaintiffs claim a sum of €570,000 as the appropriate measure. It is clear that Mr. Quinn's valuation was based on putting the plaintiffs' property on the open market, and it was pointed out in cross examination that an easement had an impact on both properties, that is the dominant tenement as well as the servant tenement, and that in a case like the present this must be factored into the price. Mr. Quinn did not take into account the value of the right to the defendant's enterprise or the fact that in the present case we are not speaking of a sale in an open market. His reaction to the suggestion that the plaintiffs valued the right at €570,000 was that that might have been possible in boom years, but that no one would pay "more than he needed to".

48. Mr. Campbell, a director of the defendant, gave evidence that the business did well the first years they took it over, that is, from 2005 – 2007, but that a slowdown was evident from 2008. He said that takings between 2006 and 2009 were down 36% in the nightclub and 40% in the bar. He said that now the defendant was not able to meet the capital payments on the premises and was only serving the interest due at the moment. He said that the turnover for each year 2006, 2007, and 2008 was € 1.75m, but that for 2009 it was down to € 0.95m and he indicated that it would be down a further 20% in 2010, although no figures were available as yet. Counsel for the plaintiffs put it to the witness that this would mean that the net profits for these years would be € 750,000 for the years 2006, 2007 and 2008, € 400,000 for 2009 and possible € 320,000 for 2010. The plaintiffs' counsel was working on a profit to turnover ratio of approximately 40%. It is also to be noted that the nightclub was licensed to hold 815 patrons and according to Mr. Kearns's evidence on commission on a good night there might be as many as a thousand there.

49. It is important to note that the defendants could not operate the premises as a nightclub without having the third exit from the premises, that is, the fire exit in cases of emergency which passed through the plaintiffs' archway. The fire officer would not permit it. Accordingly, the importance of this exit to the defendant is huge. The point was made, however, since the defendant no longer takes deliveries through the archway, regular intrusion to the plaintiffs' property is greatly reduced. The defendants need is for an emergency exit only, which it hopes, with good management will never have to be used.

50. Bearing this evidence in mind and the principles which I must apply, I have come to the following conclusions as to what is an appropriate sum to award the plaintiffs in the instant case. First, I accept the evidence of Mr. Quinn that the difference between the plaintiffs' property in an open market with and without the burden is € 40,000. Clearly, the plaintiffs are entitled to this sum. Second, I am of the view that the plaintiffs are entitled to a sum by way of enhancement or leverage, bearing in mind the lucrative nature of the defendant's operation. I think that a fair sum under this heading, bearing in mind all the above circumstances, is €110,000. This, of course, is only in respect of the right of the defendant to use the passage as a right of way into the rear of its premises and to use it as an emergency fire exit in connection with its operation. Third, it is appropriate that I should indicate that on payment of this sum, the defendant should be able to maintain the gate under the archway in a manner appropriate to the user as an emergency fire exit, which should include appropriate locking and opening mechanisms and appropriate and suitable lighting. The plaintiffs should be furnished with a key to enable them to access their premises through the archway. Fourth, to avoid doubt, nothing in this order reduces the plaintiffs' ownership of their yard, but they must only use it now in a manner that respects and observes the defendant's rights as granted by this Court. The defendant must make its own arrangements in providing facilities for smokers from its premises and in doing so, it is not entitled to use the plaintiffs' land without their permission. In awarding the plaintiffs a sum of €110,000 in respect of the defendant's right to use the passage as an emergency fire exit as well as an ordinary right of way, the plaintiffs must not use their land, formerly described as his yard, in such a manner as to prevent or reduce the defendant's use in that regard. Finally, the defendant is not responsible for any acts of trespass to the plaintiffs' property as of this date.

51. I award the plaintiffs the sum of € 150,000 as damages.