

## THE HIGH COURT

[2017 3490 P]

BETWEEN

IRENE WALSH

PLAINTIFF

AND

GERARD WALSH, JOHN ARCHIBOLD,

AND

PROMONTORIA (ARAN) LIMITED.

DEFENDANTS

**Judgment of Ms. Justice Creedon delivered on the 1st day of June, 2018****BACKGROUND**

1. In these proceedings, the plaintiff, Irene Walsh, is seeking a number of declarations and orders against her husband, Gerard Walsh ("First Named Defendant"), his business partner, John Archibold ("Second Named Defendant") and Promontoria (Aran) Limited ("Third Named Defendant").

2. On the 19th December, 2006, the first and second named defendants, Messrs Gerard Walsh and John Archibold, purchased from a Mr. George Corcoran, a site (formerly known as "The Orchard") behind 7-12 Victoria Road, Rathgar, Dublin 6. The first and second named defendants purchased the site with borrowings from EBS Building Society. Sole access to the site exists over a laneway ("Victoria Lane") running along the side of number 7 Victoria Road.

3. On the 5th of February, 2008, planning permission was secured by the first and second named defendants to build three houses on the site.

4. On the 7th of March, 2008, loan approval was obtained by the first and second named defendants from Ulster Bank Ireland Limited. The total borrowings amounted to €3.875 million; €1.075 million to refinance the EBS loan and €2.8 million to build the aforementioned houses.

5. By deed of mortgage, dated the 25th July, 2008, the first and second named defendants signed a mortgage in favour of Ulster Bank on the condition that their solicitor provide a Certificate of Good and Marketable Title and that the mortgagees gave the Bank a first legal charge.

6. By the end of 2009, three houses were constructed on the site by the first and second named defendants. Access to the three houses is over Victoria Lane and services are laid under Victoria Lane. The houses were not sold but were rented. The three houses are now known as 3, 4 and 5 Victoria Lane.

7. On or about the 14th of October, 2011, Irene Walsh, the plaintiff agreed to purchase, from one Ground Rent Assurances Ltd, the superior long leasehold title to the Walsh family home at 7 Victoria Lane, and also the laneway itself, running from the roadway to the Walsh family home and onwards to the site.

8. Irene Walsh was registered as owner of the superior long leasehold title to 7 Victoria Lane and the laneway itself, as outlined on the folio map DN 147858L, on the 18th of November, 2014.

9. The interest of Ulster Bank Ireland Ltd is now held by the third named defendant by virtue of an assignment dated 12th March, 2012. Following demands for repayment of the loan, the third named defendant, pursuant to the provisions of the Mortgage, appointed joint receivers over the property, by Deed of Appointment dated the 23rd of August, 2016.

10. After the appointment of receivers, the plaintiff issued High Court plenary proceedings. Those proceedings were not served by the plaintiff, but a *lis pendens* was registered against the property.

11. The instant proceedings were issued on the 19th of April, 2017. At the opening of the hearing, the court was informed that the first and second named defendants had not entered a defence, that they would abide by the order of the court and their counsel was maintaining a watching brief only.

**RELIEFS SOUGHT****The plaintiff's claim against the defendants is for the following declarations and orders:**

- (1) A declaration that the defendants have not acquired and do not enjoy any right of easement for electricity, gas, water or in respect of any services under Victoria Lane;
- (2) A declaration that the defendants have not acquired and do not enjoy any rights of way over Victoria Lane, giving access to or egress from the three dwelling houses constructed on the premises known as the Orchard, to and from Victoria Road via Victoria Lane;
- (3) A declaration that the plaintiff is entitled to remove and otherwise render inoperable any electricity, gas, water, or other services installed in or under the premises Victoria Lane by the defendant;
- (4) An injunction prohibiting and restraining the defendants or each or any of them, their servants or agents from trespassing upon Victoria Lane or any part thereof;
- (5) An injunction restraining the defendants or each or any of them, their servants or agents from using the services now

in and under Victoria Lane;

(6) If necessary, an injunction requiring the defendants or each or any of them, their servants or agents to restore the said laneway to its property and former condition;

(7) If necessary, an interlocutory relief in terms of subparagraphs d, e, and f.

#### **And the third named defendant counterclaims for:**

(1) A declaration that the third named defendant and the owners of number 3, 4 and 5 Victoria Lane are entitled, for the benefit of the said premises, for themselves, their servants, agents, and licensees at all times with and without vehicles to pass and re-pass over that part of the lands comprised in Folio DN 147858 L, known as Victoria Lane and the free and uninterrupted passage of services below the said laneway;

(2) An order for the registration of such rights as a burden on Folio DN 147858 L;

(3) Alternatively, a declaration that the plaintiff is estopped from denying the right of the third named defendant or the owners of number 3, 4 and 5 Victoria Lane, for the benefit of the said properties for themselves, their servants, agents, and licensees at all times with or without vehicles to pass and re-pass over that part of the lands comprised in Folio DN 147858 L, known as Victoria Lane and a free and uninterrupted passage of services below the said laneway;

(4) A declaration that any rights held by the plaintiff which are not admitted, can be exercised only by the advance of a financial claim by the plaintiff against the first and second named defendants;

(5) Further or other relief and costs.

#### **THE PLAINTIFF'S CASE**

12. The plaintiff resides at 7 Victoria Lane, Victoria Road, Rathgar Dublin 6 with her husband, the first named defendant. She says that since they took up occupation of that house in 1999, she has been the sole owner of the house. She also asserts that she caused gates to be erected on Victoria Lane, before purchasing it from Ground Rent Assurances Ltd, and exercised control in relation to access over and through same. She says that it was her intention to purchase the laneway, if possible.

13. The plaintiff says that the construction of the three dwelling houses on the Orchard site, which was completed in 2009, required a right of way over Victoria Lane and the construction and installation of gas, electricity and water services under the laneway. These facilities were necessary to service the three houses and therefore, it is alleged that an agreement was struck, whereby the services were laid with the plaintiff's consent, subject to the payment of €1.3 million compensation being made to her by the first and second named defendants, from the net proceeds of the sale of the houses.

14. The plaintiff says that in breach of said agreement, the first and second named defendants have failed and refused, or neglected, to compensate and/or purchase the right of way and all necessary easements in respect of the laneway from the plaintiff.

15. On or about the 14th of October, 2011, the plaintiff agreed to purchase the superior long leasehold title in the Walsh family home, at 7 Victoria Lane, and the laneway from Ground Rent Assurances Ltd. By Indenture of Assignment, dated the 5th April, 2012, the long leasehold interest in 7 Victoria Lane and Victoria Lane were assigned to the plaintiff for all the residue then unexpired of the term of 900 years, from the 1st May, 1898, which said interest is now comprised in Folio DN 147858 L, in respect of which the plaintiff was registered as owner on the 18th November, 2014.

16. The plaintiff contends that the houses on the development site do not enjoy any right of way over Victoria Lane, nor does there exist any easement in respect of the services installed under Victoria Lane. As such, the plaintiff argues that the defendants do not enjoy a right of way or any easements over the plaintiff's property under common law, nor any grant of user subsequently lost, nor under the law of necessity, nor under the law of estoppel, nor under the Prescription Act 1832, as extended and /or pursuant to Section 35 of the Land and Conveyancing Law Reform Act 2009, as amended.

17. The plaintiff pleads that the first and second named defendants have significantly and substantially restricted her enjoyment of Victoria Lane; that by reason of the unlawful acts of the first and second named defendants, she has suffered loss, damage, inconvenience and distress and that the first and second named defendants have been guilty of trespass, breach of contract and nuisance.

#### **THE THIRD NAMED DEFENDANT'S CASE**

18. The third named defendant, in its defence, contends that the plaintiff has brought proceedings to restrain the use of rights, to which, on the case pleaded by her, she had previously acquiesced to.

19. It is argued that the underlying nature of the claim before the court is in respect of a contingent money claim against the first and second named defendants (the terms of which are not pleaded with any level of detail and which does not disclose an action *in rem*). The third named defendant points to the Statement of Claim and the Replies to Particulars and highlights that the plaintiff did not allude in either document to any particular sum of compensation the subject of an alleged agreement between parties. It was only in the Supplemental Affidavit, which was filed on a separate application for an interlocutory injunction, last year, that the plaintiff revealed her "*intention*" to be paid €1.3 million for grant of easements over the laneway/to enter an agreement regarding same. Further, the third named defendant notes that in separate affidavits of discovery, sworn on 20th October, 2017, both the plaintiff and first named defendant disclosed the existence of a written agreement, dated 29th September, 2009, concerning the promise of compensation for the grant of the aforementioned easements. This was the first time that said written agreement was mentioned by parties.

20. The third named defendant contends that the true purpose of the proceedings is to devalue and prevent the use of the three houses 3,4 and 5 Victoria Lane, which on the plaintiff's own case, were constructed with her consent and for which she envisaged providing a formal grant of rights.

21. It is argued that the bringing of the proceedings is vexatious and an abuse of process, designed to prevent the exercise by the third named defendant of its rights as mortgagee over the property, in circumstances where the plaintiff has sought to assert an agreement for the grant of rights at a time when she had no interest or estate in law.

22. The third named defendant alleges that the intended owners of the laneway were, in fact, the first named defendant and/or the second named defendant. The third named defendant supports this claim by pointing to a draft contract which was prepared by the first and second named defendant's solicitors, which showed the first named defendant as the purchaser. It is highlighted that ultimately, the transaction transferred the long leasehold title to the plaintiff and this was effected on her behalf by her husband's solicitor.

23. It is argued that the plaintiff acquired the laneway, subject to all existing rights, for a token consideration of €4,500. It is alleged that no contractual arrangement between the plaintiff and the first and second named defendant had been disclosed or evidenced, nor any demand made for the alleged sum owed on foot of their alleged written agreement of 2009, prior to the appointment of receivers, to indicate the existence of a genuine basis of claim, even against those defendants.

24. It is argued that that the plaintiff has not come to equity with clean hands and is guilty of laches.

25. The third named defendant contends that at all material times, the first and second named defendants were the owners of the site behind numbers 7-12 Victoria Road, now described as 3, 4 and 5 Victoria Lane. Further, at all material times the first and second named defendants sought to develop the site with the approval and acquiescence of the plaintiff, who was aware of their intended purpose, and who actively supported same.

26. The third named defendant states that the security provided to Ulster Bank Ireland Limited (to which the third named defendant is now entitled) included a charge over the sites at 3, 4, and 5 Victoria Lane, and following the transfer of the rights of Ulster Bank Ireland Limited, to the third named defendant, the latter became entitled to exercise all rights connected with same.

27. It is stated that following the making of requisite demand to the first and second named defendants for repayment of the loan, receivers were appointed by deed dated 23rd August, 2016. It was then and only then that the plaintiff issued a Plenary Summons, having record number: [2016] 8988P, which the plaintiff refused to serve, but which allowed the plaintiff to register a *lis pendens* for the purpose of interfering with any sale.

28. It is alleged that at all material times, the plaintiff was closely connected with the affairs of the first named defendant with whom she still resides and with whom she shares a family home.

29. The third named defendant argues that at the time of construction of the houses on the Orchard site, and the carrying out of any works to Victoria Lane, the plaintiff was not the owner of the laneway, nor was it contemplated that she would be. At all material times, the acquisition by the plaintiff of the formal legal title to the laneway was financed and made possible by the acts of the first and second named defendants. It is argued that at all material times, the premises at 3, 4 and 5 Victoria Lane enjoyed a right of way pursuant to the express right of way created by Deed of Assignment, dated 17th February, 1923 as between Agnes Mary Smyth of the one part and Florence JB Newsom of the second part. In that deed, the right of way is recited as follows:

*"All that right and liberty with horses and carts and other vehicles to pass and repass by the track or passage marked on the said map annexed hereto by the letters A.B.C across the lands of the said Michael James Smyth between Victoria Road to the point lettered C at the southeastern angle of the said part of the lands of Rathgar hereby thirdly granted in as full and ample a manner as the said right of way was granted and secured to the said Agnes Mary Smyth by the said agreement dated the 12th day of September 1923."*

30. Further, it is argued that at all material times, the services (whose use the plaintiff seeks to preclude) were laid without secrecy or force.

31. It is contended that long before the agreement with Ground Rent Assurance Ltd, dated the 14th October, 2011 and the abovementioned transfer, dated the 5th April, 2012, the first and second named defendants, with the agreement, permission, and/or acquiescence of the plaintiff and Ground Rent Assurances Ltd, and without demur by either, had constructed three dwelling houses at the end of Victoria Lane, served by access over and services laid under Victoria Lane.

32. The third named defendant argues that the houses were constructed and services laid with monies advanced by Ulster Bank Ireland Limited (on a solicitor's undertaking to provide good title as well as a first charge) and secured by a mortgage over the property (supported by a solicitor's Certificate of Title), with the intention that they would eventually be sold and the proceeds of sale would be used in the first instance to repay the loan.

33. It is argued that despite the 2009 agreement alleged by the plaintiff, (the fact and content of which is denied by the third named defendant), the plaintiff is not entitled to maintain against a third party (including the mortgagor of the first and second named defendants) any rights which preclude or limit the right to use the laneway and services servicing number 3, 4 and 5 Victoria Lane, Rathgar Dublin 6.

34. The third named defendant contends that the plaintiff is estopped from seeking declarations and injunctions which are unrelated to any legitimate concern on the part of the plaintiff and merely a stratagem by her husband, the first named defendant, to interfere with enforcement by the receivers and where the plaintiff has advanced a claim of a monetary nature against the first and second named defendants.

## **EVIDENCE AT TRIAL**

### **Mapping Evidence**

35. Evidence was given by Mr. Martin Hamm, Chartered Engineer in relation to his visual inspection of the location, the maps he prepared on foot of that inspection and the maps attached to the various title deeds produced. This evidence is important in order to gain an understanding of the location and the significance of the various transactions. The most significant parts of his evidence were as follows:

#### **i) Access**

36. On Map 3, which Mr. Hamm had prepared of the site and surrounding area, he traced the outline of the right of way attached to the 1923 deed. His evidence was that this right of way, outlined in yellow, is 8ft wide (2.4 m width of car park space) as it runs from

the Orchard development site to 7 Victoria Lane, and 12 ft wide (3.65m) as it runs from 7 Victoria Lane to the main road.

37. He confirmed that the entrance on the main road is now wider than the original right of way, as marked on the map to the 1923 deed, and measures 4.2m. He gave evidence of the current dimensions of the laneway as it runs from the road all the way to the site as marked on Composite Map 1.

38. As the lane runs from the main road to 7 Victoria Lane, it is now wider in parts than the original right of way, where residents of mews houses on Zion Road have moved boundaries back to install gates and have created entrances onto the laneway.

39. While the original right of way as marked on the map to the 1923 deed runs under 7 Victoria Lane, the laneway on the ground now widens in front of 7 Victoria Lane. Again, referring to Map 4, Mr. Hamm referred to a shed hatched in red, which existed prior to development of the houses on the Orchard site, but which has now been demolished. That shed, before demolition, was positioned over the lands of what is now 1 Victoria Lane and also over the current laneway as it now stands, but not over the original right of way. His evidence was that the demolition of this shed again improves the accessibility of the laneway. This shed was bought by Gerry Walsh and Patrick Doherty jointly and was subsequently demolished to improve the accessibility of the laneway and Patrick Doherty's back garden.

40. He confirmed that numbers 1 and 2 Victoria Lane have entrances onto the lane beyond number 7 Victoria Lane and before the entrance to the site.

41. He referred to what is known as "The Vicars Sliver" (coloured blue on his Map 4), which is 2.7 m wide and was acquired by the first and second named defendants from a back garden on Bushy Park Road. He confirmed that this additional piece of land has the effect of making the lane wider at that point. It also has an entrance gate onto the laneway.

## **ii) Services**

42. Mr. Hamm referred, on Composite Map 1, to a small alleyway that is understood to run between 6 & 7 Victoria Terrace from the main road down to the lane. His evidence was that he was unable to access this alleyway. He said that out on Victoria Road, between 6 & 7 there is a mock front door. That he could not say whether or for what the alleyway is used or if in fact it still allows access to the site.

43. Mr. Hamm referred the court to Map 5, which shows the services on the laneway and also its dimensions. With regard to services, he gave evidence of observing what he understood to be a number of Dublin City Council manhole covers for services on the laneway, which he had marked on the map. He observed two such manhole covers on the laneway as it runs from the main road to 7 Victoria Lane, one such manhole cover on what is referred to as the Vicar's Sliver and two further manholes on the site in proximity to 2 and 3 Victoria Lane. All manhole covers were described by Mr. Hamm as being what he described as: "*Dublin City Council, taking in charge standard manholes*" from his visual inspection.

## **Solicitor Evidence**

### **i) Purchase of the Site**

44. Mr. O' Grady, solicitor, confirmed that he was instructed by the first and second defendant to purchase the Orchard site from Mr. George Corcoran. He said that negotiations and discussions took place over a protracted period, between 2003 and 2005, as there were various complications.

45. He said when the first and second named defendants entered into negotiations with George Corcoran, he already had a contract with the Representative Church Body to purchase the Vicar's Sliver. It was part of George Corcoran's agreement with the first and second named defendants that the benefit of his contract with the Representative Church Body would pass to them. This is reflected in the written contract.

46. In cross examination, Mr. O' Grady was brought through various transactions, evidenced through disclosure, which show title to the laneway and site:

(1) By Deed of Assignment, dated 23rd December, 1999, Michael Blethin assigned to Gerard Walsh alone, his possessory title on foot of a High Court Order, to three garages numbered 1, 3 and 4, together with the right of way to and from same, for £60,000.

(2) By contract dated 19th May, 2000, Alan and Fiona Duffy agreed to assign to Gerard Walsh alone, for the sum of €24,000, the garage number 2, together with all rights pertaining thereto.

(3) By Deed of Assignment dated 19th November, 2003, Alice Griffin agreed to assign to Patrick Doherty and Gerard Walsh the large garage and all the pertinent rights for the sum of €101,579, with Patrick Doherty contributing €80,000 to the price.

(4) By contract dated 11th April, 2005, George Corcoran agreed to sell property, which is not described in the contract, for €500,000, which is accepted to be the main site. This purchase was financed by the original loan, procured by the first and second named defendants from EBS. In its special conditions this contract assigned the benefit of a contract, dated the 12th of November, 2004 (a copy of which was also discovered), between the Representative Church Body and George Corcoran, to the first and second defendant. This 2004 contract assigned The Vicar's Sliver and accompanying right of way to George Corcoran for the sum of €35,000. It is described as being part of the land comprised in Folio 76389 L. The conditions in that contract provide that it is subject to planning permission for the erection of a boundary wall and vehicular access into the vendor's retained land, which was to be completed within three months of the granting of said permission. The first and second named defendants are liable to pay to the Representative Church Body the balance of the purchase monies for the strip of land, in the sum of €31,500. The contract of the 11th of April 2005, in its special conditions, sets out the first and second defendants intention to apply for planning permission to construct three houses on the site being sold and the fact that the first and second named defendants are liable to pay George Corcoran the sum of €100,000 and a further €15,000 in Architect's fees within thirty days of the completion and the sale of the houses, when built and sold.

47. Mr. O' Grady acknowledged the various transactions and confirmed that it was his understanding that the 1923 deed provided access to the site over the laneway and that the purchase of the Vicar's Sliver by the first and second named defendants improved that access. He gave evidence that on looking at OS sheets, he had concluded that rights of way had been exercised over the

laneway.

## **ii) Plaintiff's Residence: 7 Victoria Lane**

48. With regard to 7 Victoria Lane, Mr. O'Grady's evidence was that in respect of this particular property he was at all times acting on behalf of the plaintiff, Irene Walsh, and not on behalf of the first named defendant or indeed the plaintiff and first named defendant jointly. He said that he had not been involved in the purchase or construction of 7 Victoria Lane. His evidence was that the plaintiff had "*paper title*" i.e. possessory title, to 7 Victoria Lane, when he received papers from the Walsh's former solicitor in the spring of 2008. He said that he was instructed to perfect the title so it was saleable, as it was a "*fine house*". He said that the plaintiff was also having difficulties with her waste pipe running from number 7, as it was only a two inch waste pipe. He said that the plaintiff wanted to acquire the lane so that she had control over the waste pipe. Mr. O'Grady said that it was in this context and not in the context of the purchase of the Orchard site, that he traced Ground Rent Assurances Ltd in order to purchase the long leasehold title of 7 Victoria Lane and the laneway itself.

49. He stated that when he was investigating title to 7 Victoria Lane, it transpired that the first named defendant had disposed to the plaintiff his interest in 7 Victoria Lane, by virtue of three separate deeds all dated the 24th of September, 2005. The first Deed dealt with what was described as:

*"All that plot of ground with the garages erected thereon known as Numbers 1, 3 & 4 Victoria Lane, now in the City of Dublin and more particularly described in the schedule hereto..."*

The second Deed dealt with:

*"All that plot of ground with the garage erected thereon known as Number 6 Victoria Lane, now in the City of Dublin..."*

The third Deed dealt with:

*"All that plot of ground with the garage erected thereon known as Numbers 2 Victoria Lane, now in the City of Dublin..."*

The third named defendant objected to the production of these deeds into evidence as they were copies only. No originals were produced and the copies that were produced had no adjudication stamp and were unregistered. In his direct evidence, Mr. O'Grady said that no stamp duty was required on the transfers due to their voluntary nature, nor was it necessary to alert the Revenue Commissioners of same. He said he could not say if the original was lodged in the Land Registry as part of the registration of the plaintiff's title. Under cross examination on this matter, he confirmed that he had not prepared these deeds, was vague as to how it came into his possession and could not say that it came from the Walsh's previous firm of solicitors when they forwarded to him all deeds in their possession in 2008. These deeds were not referred to at all by the previous firm of solicitors in their written correspondence.

50. When Mr. O'Grady was asked how his dealings in purchasing the long leasehold title of the laneway for the plaintiff overlaid with his acting for the first and second defendants in their purchase of the site, he answered by referring to a proposal that the construction and installation of services for the site would run between 6 & 7 Victoria Road. He further stated under cross examination that when certifying title for the Bank he was not addressing the issue of services. He said that the planning permission granted indicated that the first and second defendants, as developers of the site, should liaise with Dublin City Council. He said he had nothing to do with that. He went so far as to say that he was not really involved with matters pertaining to the development site, that there was therefore no real overlap between his work for the first and second named defendants and his representing the plaintiff in the purchase of the long leasehold title to the laneway. However, Mr. O'Grady did confirm that he acted as solicitor for the first and second named defendant in the finalisation of the mortgage with Ulster Bank Limited, to include certifying title. He said that he didn't act for the first and second named defendants after the 2008 mortgage was acquired.

51. Mr. O'Grady conceded under cross examination that all of the legal bills issued by him in respect of the purchase of the long leasehold title were addressed to Mr. Gerard Walsh, the first named defendant, and were paid by Walarc Developments Ltd. He agreed that the new folio that he registered in the plaintiff's name, disclosed no burdens.

## **Discovery**

52. Discovery in this case is significant and a number of discovered documents were put to Mr. O'Grady in cross examination to include:

53. An email dated the 11th of February, 2008 from the second defendant to William O'Grady, solicitor stating inter alia:

*"And the site is already fully serviced (services brought to the site boundary) which will save us a pile of time and money when it comes to construction".*

54. A report of the 27th of March, 2008 from KPMG to the second named defendant dealing with tax and VAT implications of the partnership between the first and second defendants as it relates to the development of the site at Victoria Lane in which reference is made to the intention of the first named defendant to make a gift to his wife, the plaintiff, of €100,000.

55. An email of the 30th March, 2008 from the second defendant to O'Grady Solicitors, which makes references to the services of Victoria Lane, stating that at that time:

*"We have taken great care to carry out works that bring services to the site, that improve access to Victoria Lane and that prepare us to bring construction forward quickly".*

56. Discovered emails indicate that an issue appears to have been raised at a meeting in June, 2008, by the first and second defendants' legal advisors, in respect of the first and second defendants' title to lay services along the laneway.

57. Discovered documentation shows that, between 2008 and 2011, considerable efforts were made by the first and second defendants to improve title to the newly constructed houses and to trace the owner of the superior interest in the laneway. In an email dated the 17th June, 2009, Mr. John Archibold, the second named defendant, confirms that he met a representative of Birchfield Securities, who he believed may own this long leasehold interest. There is a second email from Mr. Archibold to Mr. O'Grady in September 2009, telling Mr. O'Grady to expect a contact concerning the superior interest presently and to progress matters urgently.

58. A letter to O'Grady Solicitors from the previous firm of solicitors on behalf of their former clients, the first and second defendant,

dated the 11th June, 2008, was discovered. This document sets out the title to Victoria Lane, the development site and to 7 Victoria Lane. Among other matters, this letters refers to aforementioned services to the site having been already laid at the point of writing. No reference is made to any transfers of any kind having been made by the first named defendant and the plaintiff. A file note from Ronan O' Grady, solicitor, dated the 31 August, 2011 states:

*"We discussed the current site on Victoria Road and the contracts for sale. We stated that Irene should buy the freehold of Gerry's existing house and possibly hold a declaration of trust in respect of same".*

59. A letter from O' Grady Solicitors to a Mr. John Ryan, dated 5th November, 2009 records Mr. Ryan's agreement to make a loan to the first and second defendant of €100,000. A first fixed charge is noted in favour of Ulster Bank Limited, in the sum of 3.6 million euro. There is no mention of any liability in favour of the plaintiff, despite the existence of her alleged 2009 agreement.

#### **Plaintiff's Evidence**

60. During her examination in chief, the plaintiff said that the money for the purchase of the site for 7 Victoria Lane came from the sale of her house in Canada. She said that the house at 7 Victoria Lane was completed in 2002. She stated that it was her house and that there was no mortgage on it.

61. She said that she assumed that Victoria Lane was her laneway and that she erected a gate on it in 1999, which remained until 2004. She said that numbers 1 & 2 Victoria Lane, which have always been owned and occupied by other families, were not affected by this gate as it was beyond their houses. She erected the gate in such a way so as to not interfere with them. Later in cross examination, the plaintiff was shown a photograph of the gate. At that point, she said that she erected the gate in 2007, which was contrary to the dates given in her earlier direct evidence. She gave evidence that the gate was taken down in 2012 to allow Paddy Doherty build a new house. She said she kept the gate locked a lot of the time.

62. The plaintiff said her husband, the first named defendant went into partnership with John Archibold, the second named defendant, in about 2004/05, but that he was already a family friend at that point.

63. She said that they had been trying for a long time to perfect title to the house at 7 Victoria Lane and had instructed another firm of solicitors at that time to assist with this. She said that she had engaged O' Grady Solicitors in 2005, to whom they were referred by the second named defendant. The plaintiff maintained that she had planned to perfect the title to their home alone; that her husband was doing the leg work on this project and the second named defendant was merely acting in his capacity as a friend of the family in helping her realise this end.

64. The plaintiff said that the issue of services arose in September 2009. She stated that the first and second named defendant came to her to see if they could run services under the laneway. Counsel referred her to a copy of a 2009 written agreement in which she is described as owning:

*"All of Victoria Lane from the point where Victoria Lane abuts Victoria Road to the point where Victoria Lane meets the site".*

It was put to the plaintiff that at the time the contract was signed in 2009, she did not own Victoria Lane. The plaintiff acknowledged that at the time, she believed she had ownership of the laneway, as she exercised control over it.

65. The plaintiff in her evidence said that she did not know where the original copy of this 2009 contract was. She said this copy came from her brother and was written in the second named defendant's handwriting. It was later put to the plaintiff that in the Notice for Particulars, she was asked to furnish full and detailed particulars of the alleged agreement entered into with the first and second defendant. The plaintiff in her Replies answered that an oral agreement was entered into *"in or around May 2009"*. In cross-examination, it was put to the plaintiff that there was no mention of the written agreement of September 2009 in her Replies to Particulars. The plaintiff stated that: *"I just thought there was one but I couldn't find it"*. Counsel put to the plaintiff that she did not disclose to the third named defendant that there was in fact another, albeit misplaced, written agreement in existence; that only the oral agreement was disclosed and the first time that the written agreement's existence was mentioned was in 2017, in the plaintiff's Affidavit of Discovery.

66. The plaintiff maintained in her evidence that the written agreement to lay services underneath the laneway was only valid for 1 year and that nothing in the agreement could oblige her to grant permission to install services that extended longer than that period. The plaintiff contended at first, that in return for her consent to the temporary installation of services, she would receive €1.3 million from the first and second named defendants. It was put to the plaintiff that the agreement provided otherwise:

*"In the event that JA and GW wish to negotiate the services installation on VL to be a permanent solution, they shall first pay to IW the sum equal to the net sale proceeds of one of the houses being constructed on the site, subject to the payment being capped at €1.3 million."*

The plaintiff was vague in her retort. On the issue of payment after the one year period, she said that:

*"I would have been looking for something but I just presumed that would be the case."*

67. Later, in cross examination, it was put to the plaintiff that the abovementioned condition made no sense from the first and second defendants' point of view. It is an agreement by them to pay the plaintiff €1.3 million as a precondition to negotiation; a negotiation for the permanent establishment of services, for which the plaintiff could conceivably demand even more money. The plaintiff acknowledged that the written agreement was therefore a very valuable document, but that she did not retain even a copy of same herself.

68. The plaintiff asserted that after a year, the permission to lay services would expire if a permanent solution could not be reached. She was asked whether that meant that, after a year, the first and second defendants were obliged to dig up the services installed. The plaintiff was unsure of same but stated that she thought the first and second defendants were agreeing to *"relook at the situation in a year"*.

69. The plaintiff acceded that the written agreement further states that:

*"Irene Walsh will own all works upon completion of the contractor's work."*

70. The plaintiff acceded that as per the written agreement, the first and second defendants were not entitled to assign the benefit of said agreement to any other party. It was put to the plaintiff that this provision would make it even more difficult for the first and second defendant to sell the houses, which was their intention all along.

71. The plaintiff was asked why the abovementioned agreement, made in 2009, referred to the plaintiff as the owner of the laneway, when it must have been known at the time that Ground Rent Assurances Ltd. were the rightful owners of same. The plaintiff clarified that at the time she thought she was the owner of the laneway. It was highlighted to her that in 2008, the second named defendant was actively pursuing the purchase of the laneway and that by 2009 Ground Rent Assurances Ltd, had been identified and therefore she was on notice that said company owned Victoria Lane. The plaintiff explained that at the time, the second named defendant thought she alone was entitled to purchase the laneway. She stated that she now understands that she did not have the right to grant the first and second named defendants a right of way over Victoria Lane or to permit them to install services under same.

72. It was put to the plaintiff that the written agreement states:

*"Net sales proceeds are calculated by taking the gross sale proceeds achieved by the appointed sales agent and deducting the sales agent fee and the vendor solicitor's fee, calculated at 1 per cent of the gross sale price and no other costs shall be deducted."*

She conceded, however, that the compensation she is claiming to be entitled to under the written agreement could only be paid out from what is left of the sale proceeds after the Bank has been paid.

73. It emerged that Mr. O'Grady was not informed about this written agreement in 2009.

74. Reference was made to the two-inch sewer servicing the plaintiff's house. The plaintiff agreed that the new sewer that was laid under the laneway is much better than the original. She stated she would not like the first and second named defendants to dig up the sewer which is now servicing her house at 7 Victoria Lane. She also acknowledged that the road surface is now much better than it had been previously. It was put to the plaintiff that she is proposing to assume all the benefit of the services' installation, and be further compensated €1.3 million for "putting the sewers under [her] lane".

75. The plaintiff stated that in 2017, she issued a Plenary Summons, the object of which was to have the laneway closed off until she got her compensation. The plaintiff accepted that under the alleged 2009 agreement, no money could be paid to her until the three houses on the Orchard site were sold and that in reality, a right of way over the laneway would have been required to sell said houses.

76. It was put to the plaintiff that in 2016, on foot of her first Plenary Summons, she pleaded that she permitted the first and second defendants to lay their services and have access over the laneway in return for an indeterminate sum. The plaintiff stated that she did not specify the amount she expected to be paid under the agreement in the grounding affidavit but that in a later affidavit, €1.3million was mentioned as the figure, payable out of the net proceeds of sale. Again, she acknowledged that the word 'net' here meant that the bank would be paid first from the proceeds of any sale and that the plaintiff would exact €1.3 million from the profit remaining.

77. She confirmed that she paid €4,500 to Ground Rent Assurance Ltd for the purchase of the laneway and the long leasehold title for 7 Victoria Lane.

78. It was put to the plaintiff that the first and second named defendants' contract with George Corcoran was subject to planning permission for the construction of houses on the Orchard site. She accepted that the first and second named defendants needed access over Victoria Lane for the development site. She knew that they were going to build three houses and did not object to planning permission. She was also aware that Victoria Lane was to be resurfaced as part of the development. She further accepted that she paid no solicitors fees for work done on the perfection of the title to 7 Victoria Lane. She said invoices were paid for by the first and second named defendants. It was put to the plaintiff that the idea that the first and second named defendants would assist her in purchasing the laneway by paying her bills, so that she could put "a gun to their head" was simply not credible.

79. Although the plaintiff pleaded that by reason of the unlawful acts of the first and second named defendants she has suffered loss, damage, inconvenience and distress, she was unable give a figure for same. The damage was never repaired and she did not obtain an estimate for it. She alluded to a verbal agreement between parties, that the first and second defendant would give her €100,000 "when they have it". It was put to the plaintiff that in 2008/2009, the second named defendant, Mr. Archibold conducted all negotiations with Ground Rent Assurances Limited vis-à-vis purchasing the laneway and the superior long leasehold title in 7 Victoria Lane. It was put to her that the price was struck by the second named defendant and his development company paid the solicitor's fees. The plaintiff acknowledged the verity of all of these statements. She was asked why at that stage, Mr. Archibold elected to substitute her as purchaser. The plaintiff explained that she was told that under the Landlord and Tenant Act, that only she was entitled to buy both the laneway and the superior interest in 7 Victoria Lane. It was put to the plaintiff that under the Landlord and Tenants Act:

*"A householder has a right... to buy out the superior interest if he owns the lease in the house and the land on which the house is built".*

As the laneway was not part of the land on which 7 Victoria Lane was built, it was put to the plaintiff that she had no statutory right to buy it.

80. It was put to the plaintiff that because the houses built on the Orchard site could not be sold, the first and second named defendant let them out for approximately €15,000 a month between the three. The plaintiff acknowledged knowing about the fact of the lettings.

81. It was put to the plaintiff that her direct evidence- that the route for services (through 6 and 7 Victoria Lane) was shown on the planning drawing- was not correct. The plaintiff did not remember if the route was indeed displayed on the drawing, but asserted that it had been so agreed, before Dublin City Council changed their mind and decreed that services would not be permitted to go through that route. It was put to the plaintiff that services had to be laid in consultation with the Engineering Department of Dublin City Council.

82. Counsel referred the plaintiff to the alleged assignments executed on 24th September 2005, pertaining to 7 Victoria Lane. These deeds were first mentioned in the plaintiff's Affidavit for Discovery in 2017. The plaintiff gave evidence that she remembered them but

was not sure who prepared the deeds. She then went on to say that she thought the originals were drawn up by her former solicitors. She did not know where these original documents were. She stated that the second named defendant advised her that no stamp was required for same. She said that she was sure Mr. O'Grady had said he had seen the assignment documents.

83. In re-examination, the plaintiff stated that in 2009, she understood the valuation of the three houses on the Orchard site to be €3.9 million

## **LEGAL SUBMISSIONS**

84. Both the plaintiff and the third named defendant made written submissions and put forward legal argument subsequent to the pleadings.

### **Plaintiff**

85. The plaintiff says that the third named defendant has not acquired any greater interests than that held by Ulster Bank Ireland Limited. She contends that the third named defendant cannot lay claim to having acquired any greater interest than that held by Ulster Bank and that Ulster Bank never acquired, sought or received any rights of mortgage or otherwise over the laneway.

86. The plaintiff goes on to argue that when the second and third defendant entered into their mortgage agreement with Ulster Bank Ireland Limited, in July 2008, said defendants did not have the capacity to grant any rights over, or indeed to mortgage the laneway.

87. The plaintiff asserts that in July 2008, a third party, Ground Rent Assurances Ltd was the owner of the laneway. No grant of any description was obtained by Ulster Bank from Ground Rent Assurances Ltd. The plaintiff says that the evidence suggests that Ulster Bank had no dealings whatsoever with Ground Rent Assurances Ltd.

88. The plaintiff says that the development site never enjoyed any right of way over Victoria Lane. Further, the lands were not connected to any of the services when the mortgage was entered into and as such the defendants do not have a right of way or easement over the plaintiff's property.

89. The plaintiff identifies four grounds upon which she says the third named defendant, bases its claim that it enjoys a right of way and rights of conduit in respect of the laneway. She answers each of these grounds as follows:

### **Ground 1- A right of way exists, as granted in the Indenture of Assignment, dated 17th September 1923**

The third named defendant claims a right of way, which stems from the 1923 deed. The plaintiff argues that this deed did not, in fact, provide access of the type they describe. The plaintiff refers to Bland, Easements (3rd Edition, Roundhall 2015), which states at page 97:

*"In construing a particular conveyance to determine the intention of the parties as to the scope of the right created by grant or reservation, there are three guiding principles:*

*i) The scope of the right is primarily determined by the wording of the instrument.*

*ii) Regard is to be had to the circumstances at the time of the grant.*

*iii) Where there is ambiguity, the rule that a grantor may not derogate from his grant is applied and a grant is in general construed against the grantor.*

*The grant may also be construed in appropriate cases to create implied rights that supplement or amplify the express rights."*

The plaintiff asserts that the wording of the deed in this case is clear. While claims are made as to the existence of a right of way based on a 1923 deed, the plaintiff contends that the width and camber of what is described in the 1923 deed would never be sufficient for vehicular access.

The plaintiff argues that the subsequent assignment under a 2006 deed makes no reference to any right of way, presumably because it was understood at the time that there was no right of way.

She further says that the Orchard site was sold for €500,000 on 19th of December, 2006, which, she contends, is an extremely low price for such a site and as such reflects the fact that it was landlocked.

The plaintiff maintains that the 1923 deed grants no rights of conduit and that the third named defendant has not identified where in the document such a grant is made. The plaintiff argues that even if the third named defendant did enjoy a right of way over the laneway (limited and express), this does not grant, by implication or otherwise, a right to lay, use and maintain pipes under the laneway. It is concluded that this is an impermissible expansion of the law of easements. Further, it is highlighted that the third named defendant does not identify whether it is claiming that it owns the pipes in the laneway or the basis for any such claim or indeed, whether it is claiming a right to lay pipes on the laneway, a right to use pipes in the laneway, a right to maintain services by accessing and repairing such pipes or all three such rights.

### **Ground 2- There exists an implied grant of easement under the doctrine of Necessity**

The plaintiff quotes Gale, *Easements*, (16th Edition, Sweet & Maxwell 1997) at para 3.86:

*"A way of necessity, strictly so called, arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained, is left without any legally enforceable means of access. In such a case, the part so left inaccessible is entitled, as of necessity, to a way over the other part."*

The plaintiff contends that the doctrine of necessity concerns rights of way only and not other property rights, such as rights of conduit. This is reflected in Bland, *Easements* at para 5.41:

*"This category of implied right is exceptional, consisting only of rights of way."*

The plaintiff refers to para 5.39 and 5.40 of same which sets out the parameters in which a right of way may be granted under the doctrine of necessity:



*"Necessity is strictly construed, and inconvenience or difficulty in access is not sufficient. There must be true necessity. Any access to the dominant tenement will prevent the implication of a way of necessity, even where that access involves a 20-foot cutting."*

*"An implied right of grant of way of necessity is created when the grantor of land grants the landlocked tenement and retains the surrounding lands."*

The plaintiff argues that as the third named defendant has claimed a limited and specific right of access under the 1923 deed, any claim under necessity must fail. The third named defendant is bound by its own title as regards access. Further, the plaintiff highlights that the current dispute does not arise in circumstances where a grantor granted the landlocked Orchard site and retained the servient tenement (the laneway) for himself. As such, it is argued that the doctrine of necessity does not arise. The plaintiff also opens the judgment of McGovern J in *Byrnes & Neylon v. Meakstown Construction Ltd* [2009] IEHC 123 to emphasise this point:

*"It is quite clear that the plaintiffs cannot use their apartment without a right of way from the public roadway to the development site. If the developer owned the land surrounding the development site... then an easement of necessity would seem to arise. But the adjoining land is owned by a third party, namely, Kildare County Council. Therefore, I do not think an easement of necessity can arise."*

The plaintiff opens O' Connor LJ's judgment in *Maguire v. Browne* [1921] IR 148 which mentions:

*"In the absence of an express grant, a right of way of necessity rests upon the intention of the parties"*

The plaintiff argues that since the third named defendant claims a right of way under the mortgage deed, it must follow that it was the intention of Ulster Bank and the first and second named defendant to grant rights over the laneway. The plaintiff emphasises that neither the first nor second defendant owned the laneway when the mortgage was entered into and therefore, it could not be the intention of the parties to grant a right of way over the laneway.

### **Ground 3- That the third named defendant has a right of conduit over the laneway because otherwise there would be a derogation from their grant**

The plaintiff opened *William Bennett Construction Ltd v. John Greene* [2004] IESC 15, which concerned rights of conduit under the defendant's land and which serviced the plaintiff's land. In this case, the Supreme Court held that as there was no easement in existence being used at the time of the grant by the grantor, there was no room for the application of the doctrine that the grantor cannot derogate from his grant.

The plaintiff in the instant proceedings argues that as there were no rights of conduit in existence for the benefit of the Orchard over the laneway at the time the mortgage was entered into by the first and second named defendants, the doctrine is not triggered.

### **Ground 4- The plaintiff is estopped denying the existence of a right of way and rights of conduit over the laneway**

The plaintiff opened the judgement of Charlton J in *National Asset Loan Management Ltd v. McMahon* [2015] 2 IR 385 and concludes, following consideration of the case law and the facts of this case, that the third named defendant has failed to establish the existence of a promise or assurance made by the plaintiff to grant it a wayleave over the retained land. The most, it is argued, that the third named defendant can say is that a number of years after the mortgage was created and the services laid, the plaintiff promised the first and second named defendant that she would grant a wayleave for the pipes and a right of way in return for payment. As such, it cannot rely on the doctrine of estoppel.

90. The plaintiff also notes that the third named defendant fails to come within the sphere of protection that Section 40 of the Land and Conveyancing Law Reform Act, 2009 affords.

### **Defendant**

91. The third named defendant argues the following:

- a) Any claim by the plaintiff is a contingent money claim against the first and second defendants, which is contingent in the first place on a sale for which rights of way and conduit over the laneway are required and in the second place on the properties achieving more than the amount required to redeem the mortgage; and
- b) The laneway is held by the plaintiff on a constructive trust for the first and second defendants and the third defendant as their mortgagee; and
- c) The plaintiff is estopped from relying on her paper title to prevent or impede the letting or sale of the houses; and
- d) The plaintiff has been guilty of laches and acquiescence and does not come to equity with clean hands; and
- e) The court in exercise of its discretion ought not to grant the injunctions sought.

92. Among the most pertinent arguments that the third named defendant makes are the following:

93. The third named defendant argues that if the plaintiff did agree in 2009 to grant wayleaves to the first and second named defendants, the fact that she was not in a position to do so does not mean that she was not bound. Unless and until the plaintiff had a sufficient interest in the laneway, the first and second defendant had a remedy in damages, in the event of a breach. It is further argued that from the time when, on 14th October, 2011, the plaintiff did have a sufficient interest, she was in the position to specifically perform.

94. The third named defendant highlights that the plaintiff agreed to provide the necessary rights of way and conduit in return for a payment out of the net proceeds of sale. The property, it is contended, is unsaleable without performance by the plaintiff of the agreement she relies on. Her right to be paid is contingent upon a sale realising more than is necessary to redeem the mortgage.

95. It is argued that the services were laid and houses built with the plaintiff's consent/acquiescence and it would be grossly inequitable for her to be allowed to now resile from said consent.

96. The third named defendant notes that by the time that the plaintiff entered the transfer with Ground Rents Assurance Ltd, the houses on the Orchard site had been built and occupied and the laneway resurfaced. Vehicles used the laneway to access the site

and services were installed.

97. It is argued that the first and second defendants mortgaged the property with a Certificate of Good Title from Mr. O' Grady. On his feet, counsel for the third named defendant argued that: "access was always to have been over this laneway as it by then stood".

98. The third named defendant addressed the court on the law surrounding estoppel, injunctions and constructive trusts.

### **Prescriptive Rights**

99. Prescriptive rights may be prescribed by the court under Section 35 of the Land and Conveyancing Law Reform Act 2009. Subject to Section 38, acquisition of an easement by prescription at common law and under the doctrine of lost modern grant is abolished and after 2009, acquisition by prescription has and will be in accordance with Section 35 only. Equitable easements remain unaffected by the 2009 Act.

100. Section 35 of the Act provides:

*S. 35(1)- An easement or profit a prendre shall be acquired at law by prescription only on registration of a court order under this section;*

*S. 35(2)- Subject to subsection (3), in an action to establish or dispute the acquisition by prescription of an easement or profit a prendre, the court shall make an order declaring the existence of the easement or profit a prendre if it is satisfied that there was a relevant user period immediately before the commencement of the action;*

*S. 35(3)- The court may make an order under subsection (2) where the relevant user period was not immediately before the commencement of the action if it is satisfied that it is just and equitable to do so in all the circumstances of the case.*

*S. 35(4)- An order under subsection (2) shall be registered in the Registry of Deeds or Land Registry, as appropriate.*

As per section 33 of the Act, "relevant user period" may be understood as the following:

*S. 33- "relevant user period" means a period of user as of right without interruption by the person claiming to be the dominant owner or owner of profit a prendre in gross-*

*a) where the servient owner is not a State authority, for a minimum period of 12 years.*

The relevant user period under the Prescription Act 1832, as extended to Ireland under the Prescription (Ireland) Act 1858, is 20 years.

Section 38 of the Act, as amended, provides the following:

*S. 38- In relation to any claim to an easement or profit à prendre made after -the commencement of this Chapter, sections 34 to 37-*

*(a) apply to any claim based on a relevant user period notwithstanding that it is alleged that an additional user period occurred before that commencement.*

*b) do not apply to any claim based on a user period under the law applicable prior to the commencement of this Chapter and alleged to have commenced prior to such commencement where the action in which the claim is made is brought within 12 years of such commencement.*

The applicant must therefore show that he is the user of the easement as of right, meaning that he or his predecessors have/had, for the requisite period, used the dominant land "without force, secrecy and without the oral or written permission of the servient owner". The "without interruption" contingent requires that there has been no cessation of use, lasting for one year or more.

### **COURT FINDINGS**

101. From 1993 to 2003, the first named defendant, Mr. Gerard Walsh, concluded a number of transactions with various parties to acquire various parcels of land on Victoria Lane. All discovered material opened at trial shows that said parcels were purchased in Mr. Walsh's sole name. As such, there is no evidence to support the plaintiff's assertion that the property at 7 Victoria Lane, built in 1999, was always in her name.

102. The court is not satisfied as to the provenance of the 2005 copy-deeds which purport to transfer title to 7 Victoria Lane from the first named defendant to the plaintiff. The court notes the timing of their first production and the fact that no originals have been produced. The copies show no evidence of registration or adjudication by the Revenue Commissioners. Mr. O' Grady cannot confirm how he came into possession of said documents, but says that he did not prepare them. He cannot say whether they were lodged as part of the plaintiff's first registration application. The previous firm of solicitors make no reference to these transfers in their letter of 2008, wherein they painstakingly set out the title of 7 Victoria Lane and relevant transactions. The third named defendant formally objected to the production of these copy transfers into evidence at trial. The court agrees that these copy-transfers are insufficient to evidence any purported transfer and finds no sufficient evidence of an effective transfer of the property set out in these transfers to the plaintiff in 2005.

103. Discovered documentation shows that at least by February 2008, services had been laid under Victoria Lane, but that by June of 2008, concerns were being raised as to the sufficiency of the first and second defendant's title to lay these services. It is clear, from oral evidence, that there were protracted enquiries carried out by the first and second named defendants and by William O' Grady, solicitor, to track down the owner of the superior title to the laneway, to include the site on which the Walsh family home was built. The court is satisfied that all efforts made to track down the superior interest in the laneway by the second defendant and his solicitor were primarily for the benefit of the development site, which had already been certified as having good title by the solicitor. By June 2009, the second defendant had identified the superior interest holders as being Ground Rent Assurance Ltd and by September 2009, he advised his solicitor to expect contact and to proceed with urgency. The court does not find the evidence of either the plaintiff or Mr. O' Grady credible that all efforts to purchase the freehold were to perfect title of 7 Victoria Lane alone and were unrelated to the site.

104. A contract was prepared by O' Grady Solicitors for the purchase of the superior long leasehold title. The typed contract shows Gerard Walsh, the first defendant, as the purchaser. At some point, Irene Walsh's name was hand written in substitution for same and she signed the contract, dated the 14th of October, 2011. The court notes that title was taken by the plaintiff and a new folio created without any burdens registered against it. This is despite the fact that the plaintiff's solicitor would have known about the existence of the right of way attached to the Orchard site by virtue of the 1923 deed, the right of access over the laneway granted to the Representative Church Body and the fact that services had already been laid under the laneway.

105. Against this backdrop, the court is not satisfied as to the provenance of the copy of the 2009 written agreement between the plaintiff and the first and second defendant. What was laid before the court was a handwritten copy of a purported original. The court has been told that no original is available. Despite specific questions being raised in connection with the alleged agreement in the third defendants' Notice for Particulars, it was not until 2017 in her Affidavit of Discovery that the plaintiff confirmed that the written agreement existed. By September 2009, the date of this purported agreement, the second defendant and his solicitor had succeeded in tracing the owner of the superior long leasehold title and would have been aware that the plaintiff was not in a position to enter an agreement to negotiate a right of way and rights of conduit, as she did not hold title to the laneway at that time. Further, given the first and second defendants' development plans and the circumstances of their acquisition and mortgage of the site, the court finds it difficult to comprehend why they would have agreed to enter an agreement in these terms. Given, however, that the court finds that no effective transfer of title was made to the plaintiff in 2005 and that the plaintiff did not have the necessary title in 2009 to enter into this agreement, the court does not consider it necessary to consider further the enforceability of this agreement.

106. The court rejects the plaintiff's contention that there is no right of way in the deed of 1923 and the contention that said easement did not pass with the 2006 assignment. An express right of way is set out in the Assignment of 1923 and the benefit of that right of way would have passed to the first and second defendants when they purchased the site in 2006.

107. With regard to the adequacy, width and camber and route of the right of way, the court notes from the maps attached to the title documents that it is clear that the track of the express right of way in the 1923 deed had altered on the ground some considerable time ago. As far back as 1994, the laneway had changed to its current trajectory, running in front of the garages purchased by the first named defendant, along a considerably wider carriageway than that marked on the 1923 deed, between the end of the now acquired Vicar's Sliver and where the laneway turns for the road.

108. The court agrees that the express right of way in the 1923 deed does not include a grant of conduit.

## **DECISION**

109. The third named defendant contends that the true purpose of these proceedings is to devalue and prevent the use of the three houses 3,4 and 5 Victoria Lane, which on the plaintiff's own case, were constructed with her consent and for which she envisaged providing a formal grant of rights. Further, it is asserted that the bringing of the proceedings is vexatious and an abuse of process designed to prevent the exercise by the third named defendant of its rights as mortgagor over the property. It is argued that that the plaintiff has not come to equity with clean hands and is guilty of laches.

110. The court does not find the plaintiff to be a credible witness. In her oral testimony, she sought to assert a number of significant matters to support her claim which the court finds are not reflected in or supported by the evidence. In particular, the court does not accept her evidence that the house at 7 Victoria Lane was at all times in her name, or that she always exercised control over the laneway. The court does not accept that the efforts to trace the superior title holder in the laneway was for the benefit of 7 Victoria Lane alone and was unconnected with the site. Neither does the court accept the plaintiff's evidence that there was any transfer of title to her by her husband of property in 2005 and finds that there was no such transfer. Further, in respect of the 2009 copy-agreement produced at trial, while the evidence establishes that she had no entitlement to enter into this agreement, the court goes further. It does not accept her evidence that she entered into this written agreement with the first and second defendants at the time or in the circumstances contended by her. Equally, the court does not find the evidence of Mr. O' Grady credible in his support of the plaintiff's contention that the purchase of the superior title was at all times for the benefit of the house at 7 Victoria Lane and was unconnected with the site.

111. The site was mortgaged in July 2008, on foot of a Solicitor's Certificate of Title. Any subsequent concerns with regard to title in respect of the laneway could have been resolved had the first and second defendant proceeded to purchase the title themselves from Ground Rent Assurances Ltd or if the required easements were registered as a burden on the new folio opened. Instead, despite clear opportunity for the first and second defendants to execute the purchase in their own name and with the knowledge of all parties, the superior long leasehold title was purchased by the plaintiff and a folio was opened in her name free of any burdens.

112. The court contends that at all material times the plaintiff was aware of the first and second named defendants' intention to develop the Orchard site and was aware that that necessitated a right of way and right of conduit over the laneway.

113. The court also notes that it was only following the making of the requisite demand to the first and second named defendants for repayment of the loan, and the appointment of receivers by deed dated 23rd August, 2016, that the plaintiff issued a Plenary Summons, record number: [2016] 8988P. The plaintiff refused to serve same, but did register a *lis pendens* for the purpose of interfering with any sale.

114. In these circumstances, the court looks to the law and seeks to do justice between the parties.

115. An express right of way across the laneway is as set out in the 1923 deed and accompanying map. The benefit of this express right of way passed to the first and second named defendants when they purchased the site in 2006. No evidence was produced to underpin the plaintiff's argument that the purchase price at that time was indicative of a land locked site and oral and documentary evidence opened at trial similarly fails to underpin that argument.

116. The track, width and camber of that right of way has changed somewhat over the years, as explained by Mr. Hamm, in his evidence. It is clear that the right of way- as it passes from the entrance to the site, in front of number 7 Victoria Lane, to the corner, where it turns to run straight to the main road - has widened and changed track somewhat since 1923. This can be seen even as far back as the 7th of February, 1994, when Circuit Court proceedings were commenced between Alice Griffen and Michael Blehein. Accordingly, when the site was assigned to the first and second defendant in December, 2006, this altered right of way had been in use since at least 1994. This was the position when the first and second defendant obtained planning permission for three houses, two years later, in February, 2008 and when they mortgaged the site in March 2008. In 2008, the only party with a superior interest in the laneway was Ground Rent Assurances Ltd. In the meantime, in 2003, the garage was acquired and in 2006, the Vicars Sliver was acquired to enhance accessibility of the laneway. No objection was received from Ground Rent Assurances Ltd to the

aforementioned planning permission. No objection was received from Ground Rent Assurances Ltd to the use of the laneway for access to and from the site.

117. The express right of way in the 1923 deed does not include a right of conduit. The evidence supports the finding that services were laid at the laneway at least by February 2008. The owners of the superior interest in the laneway at that time were Ground Rent Assurances Ltd. No objection was received from Ground Rent Assurances Ltd to the laying of services in 2008. The installation of services was made openly and without secrecy. The planning permission was appealed to An Bord Pleanála by third parties, which expressly considered the laying of services as set out in its final decision to grant planning permission for the three houses in February, 2008. No objection was received from the plaintiff to the planning permission granted. Nor did the plaintiff seek the removal of the services. While in her direct evidence, the plaintiff confirmed that she is happy for the services to remain, she seeks to deny the defendants a *right* of conduit. She continues to benefit from the services. The houses on the Orchard site, benefitting from the services, were built and leased before the plaintiff acquired a right of ownership over the laneway. Her behaviour subsequent to said transaction, amounted in the court's view, to tacit acquiescence as to the first and second defendants' continuing to lease the houses with the benefit of the services mentioned. It would be grossly unconscionable for her to resile now, from said consent.

118. The third named defendant is seeking a declaration that they are entitled for the benefit of the said premises, for themselves, their servants, agents, and licensees at all times with and without vehicles to pass and re-pass over that part of the lands comprised in Folio DN 147858 L, known as Victoria Lane, and the free and uninterrupted passage of services below the said laneway.

119. It is clear that the right of way in question has been in use by the first and second named defendants and their predecessors since at least 1994. Under the Prescription Act 1832, if an easement enjoys 20 years continuous user, it may be formally recognised by the court and prescribed in such terms. Section 38(b) of the Land and Conveyancing Law Reform Act 2009, as amended, provides for the occasion where a 20 year user period had been accrued by or was close to ripening before the commencement of the 2009 Act, but where the requisite court action is not brought until after said commencement. In such circumstances, the applicant can rely on the old law, provided the action is brought within 12 years of the commencement date. While the court is convinced that the right of way in question was in use since 1994, there is not sufficient evidence before it to rule that said user was continuous and without interruption for 20 years.

120. As such, and in considering this relief, the court looks to equity. The court must decide the extent of any equitable easement having regard to the facts of the case, to include the conduct of the parties, to arrive at an equitable solution which is just for all parties; a just balancing of rights being the very essence of any decision in equity. The court finds that the plaintiff through her representations and acquiescence, fostered a reliance in the first and second defendants and encouraged them to act to their detriment. She was, at all times, fully aware that the Orchard site was unsaleable without a right of way over the laneway. It is clear that the plaintiff's solicitor worked to trace the previous owner of the laneway for the benefit of the development site as well as 7 Victoria Lane. The plaintiff knew of her husband's plans for the site and of the site's requirements vis-à-vis rights of way and conduit. She is therefore estopped from denying the third named defendant or the owners of number 3, 4 and 5 Victoria Lane, for themselves, their servants, agents, and licensees, at all times with and without vehicles to pass and re-pass over that part of the lands comprised in Folio DN 147858 L, known as Victoria Lane, and free and uninterrupted passage of services below the said laneway, and therefore, finds that an easement arises in equity.

121. With regard to the rights of conduit for the benefit of the services laid under the laneway the court finds:-

- a) The services were laid, at the latest, by February 2008;
- b) That a period of at least 9 years has passed since the services were laid running up to the issuing of these proceedings in April of 2017;
- c) This length of this user falls short of the "relevant user period" under the 2009 Act.

122. However, for similar reasons as set out in paragraph 120, above, this court finds that the plaintiff through her representations and acquiescence, is estopped from denying the third named defendant or the owners of number 3, 4 and 5 Victoria Lane, for themselves, their servants, agents, and licensees, free and uninterrupted passage of services below the said laneway, and therefore, finds that an easement arises in equity.

Accordingly in considering each relief sought the court orders as follows:

123. The court refuses the plaintiff's claim against the defendants for the declarations and orders listed 1 to 7 below: -

- (1) A declaration that the defendants have not acquired and do not enjoy any right of easement for electricity, gas, water or in respect of any services under Victoria Lane;
- (2) A declaration that the defendants have not acquired and do not enjoy any rights of way over Victoria Lane giving access to or egress from the three dwelling houses constructed on the premises known as the Orchard to and from Victoria Road via Victoria Lane;
- (3) A declaration that the plaintiff is entitled to remove and otherwise render inoperable any electricity, gas, water, or other services installed in or under the premises Victoria Lane by the defendants;
- (4) An injunction prohibiting and restraining the defendants or each or any of them, their servants, or agents from trespassing upon Victoria Lane or any part thereof;
- (5) An injunction restraining the defendants or each or any of them, their servants, or agents from using the services now in and under Victoria Lane.
- (6) If necessary, an injunction requiring the defendants or each, or any of them, their servants, or agents to restore the said laneway to its property and former condition.
- (7) If necessary, an interlocutory relief in terms of subparagraphs d, e, and f.

124. The court accedes to the third named defendant's counterclaim as set out in 1 2 , 3 and 4 below.

- (1) A declaration that the plaintiff is estopped from denying the right of the third named defendant and the owners of number 3, 4 and 5 Victoria Lane for the benefit of the said premises for themselves, their servants, agents, and licensees at all times with and without vehicles to pass and re-pass over that part of the lands comprised in Folio DN 147858 L known as Victoria Lane;
- (2) An order for the registration of such declaration as a burden on Folio DN 147858 L.
- (3) A declaration that the plaintiff is estopped from denying the right of the third named defendant or the owners of number 3, 4 and 5 Victoria Lane for the benefit of the said properties for themselves, their servants, agents, and licensees at all times free and uninterrupted passage of services below the said laneway.
- (4) An order for the registration of this declaration on Folio DN 147858 L.