



**UNAPPROVED
NO REDACTION REQUIRED
THE COURT OF APPEAL**

Court of Appeal Number: 2019/508

Whelan J.

Neutral Citation Number [2021] IECA 341

**Faherty J.
Pilkington J.**

BETWEEN/

KILDARE COUNTY COUNCIL

**PLAINTIFF/
APPELLANT**

- AND -

KIERAN MORRIN

**DEFENDANT/
RESPONDENT**

Judgment of Ms. Justice Faherty delivered on the 21st day of December 2021

1. This is the plaintiff's (hereinafter "the Council") appeal against the judgment (31 July 2019) and Order (8 November 2019) of the High Court (McDermott J.) striking out the Council's claim that there was established between 1991 and 2012 or 2016, or in the alternative before 1991, a public right of way over certain lands situate at Corban's Lane, Naas, County Kildare which abut the defendant's premises at no. 2 and no. 3 Dara Court, Corban's Lane, Naas. In respect of the defendant's counterclaim, the trial judge granted a declaration that the parking area abutting the defendant's said lands at Corban's Lane was at all times prior to its compulsory purchase by the Council in the ownership and use of the

defendant and/or his predecessors-in-title. The defendant was granted the costs of the action and the counterclaim. The Council appeals from the entirety of the Orders made by the High Court on 8 November 2019.

2. To best understand the issues arising on the appeal, it is necessary to outline the events giving rise to the within proceedings.

Background

3. The proceedings arise from a Notice to Treat served on the defendant relating to plots reference numbers 106a.202 (hereinafter “plot 202”) and 106b.201 (hereinafter “plot 201”) in respect of the Naas Town Council Compulsory Purchase (Corban’s Lane/Friary Road Improvement) Order No. 2, 2009.

4. The acquisition by the Council of plots 201 and 202 had its genesis in the decision of An Bord Pleanála on 28 June 2006 to grant planning permission for the development of Naas Town Centre and which imposed as a condition to that permission, *inter alia*, “the widening of Corban’s Lane with footpaths on either side”.

5. At the public hearing which took place in the context of the Council’s Compulsory Purchase Order (“CPO”) made on 25 June 2009, part of the Council’s case was that the defendant’s lands were located in the vicinity of a well-known traffic “pinch point” which was thereby required to be compulsorily acquired. It was conceded on behalf of the Council that “compensation will be paid by TC for loss of car parking spaces”. The Inspector’s Report that followed, dated 12 February 2010, described plot 202 and plot 201 as occupying a corner location in the vicinity of a “well-known pinch point” along the road network “for which the Town Council has had a long-term objective to address...” The Inspector opined that “it would not be possible to implement a safe and effective improvement scheme at this location without acquiring these lands and the compulsory purchase of the objector’s lands at this location is justified”. It was acknowledged in the

Report that the proposed CPO for a Part 8 Road Improvement Scheme “will involve the loss of car parking spaces to the front of [the defendant’s] premises...” Earlier in the Report, the Inspector stated that “the number of car parking spaces should be determined on the basis of the planning permission granted under Reg. Ref. 23774/538 which provided for a total of 11 spaces”.

The defendant’s acquisition of the properties and their pre-acquisition planning history

6. No. 2 Dara Court was acquired by the defendant on 24 April 1990 from a Ms. Maureen Cullen. Ms. Cullen had acquired ownership of No. 2 Dara Court in November 1975 in turn from a Mr. Daniel Donnelly. At the time of the purchase of this property by the defendant, it was a two-storey building laid out in bedsit units.

7. By Indenture dated 24 January 1977, Mr. Donnelly sold the property adjacent to no. 2 Dara Court, which subsequently became no. 3 Dara Court with stores and offices on the corner of Corban’s Lane, to Radio TV Rentals Limited who thereafter sold it to ETV Limited on 27 October 1993. ETV Limited in turn conveyed no. 3 to Mr. Alex Shields on 12 March 1997 who sold it on to Mr. Edward Ennis on 25 February 2003. Mr. Ennis then sold no. 3 to the defendant under Indenture dated 19 May 2007. Each conveyance described the property by reference to the map annexed to the indenture of conveyance from Mr. Donnelly to Ms. Cullen of no. 2 Dara Court dated 24 November 1975.

8. No. 2 and no. 3 Dara Court are both situate on Corban’s Lane with no. 3 located at the junction of Corban’s Lane and the roadway hereinafter referred to as “Lough Buí”.

9. When nos. 2 and 3 Dara Court were in the ownership of Mr. Donnelly he made planning applications for a change of use for the properties. Evidence of this planning history was tendered in the court below on behalf of the Council by Mr. George Willoughby, a chartered engineer employed by the Council since 1982.

10. On 2 February 1973, in support of a then planning application for the erection of a store and garage, Mr. Donnelly submitted a drawing which indicated an existing boundary wall running in front of his property adjacent to Corban's Lane. The application was refused on 26 March 1973 because the proposed development was deemed to be premature in that the road layout for the area had not been determined and the proposed development would prejudice the Council's future plans for public roads in the area.

11. Mr. Donnelly made a further planning application in May 1974 proposing a changed use from a house to flats and from a garage to a shop. The drawing he submitted, date stamped 17 May 1974, again showed an existing boundary wall adjacent to Corban's Lane.

12. On 14 May 1974, a Mr. Ellis lodged an objection to the proposed change of use on the basis that Corban's Lane was narrow and overused by traffic seeking to avoid the main street. In response to his objections, and to a request for additional information from the Naas UDC Town Clerk, Mr. Donnelly in a letter of 23 July 1974 indicated that he had "now renovated the corner at Corban's Lane". On 23 July 1974, he submitted a further drawing outlining the proposed change of use of the property and which denoted that the existing boundary wall adjacent to Corban's Lane had been removed and which showed 11 car parking spaces at the front of the property.

13. On 26 August 1974, Naas UDC notified Mr. Donnelly of a decision to grant permission subject to conditions. The said conditions provided, *inter alia*, that the development was to be completed strictly in accordance with the plans submitted on 23 July 1974. This was appealed by Mr. Ellis to the Secretary of the Department of Local Government on 9 September 1974 on the grounds, *inter alia*, that the proposed development was situate in the vicinity of a dangerous corner over which heavy traffic passed and which would increase "if flats and a shop was allowed with the resultant parking these will inevitably cause".

14. In a letter dated 4 October 1974 to the Secretary, Mr. Donnelly stated that with the introduction of new traffic lights on the Main Street, the junction of Corban's Lane and South Main Street had now been closed to motor vehicles and was open only to pedestrians. He did not accept that Corban's Lane was a heavy traffic area or that the development would cause a traffic hazard. He advised that a twelve-foot high boundary wall at the junction of Corban's Lane and Lough Buí had been removed which had improved the sight lines at the corner. He enclosed a site map showing the extent of the wall that had been removed. He stated that "[t]he removal of this wall and the provision of an open tarmacadam forecourt in front of my premises substantially improved the access to [Lough Buí]". He further advised that an extensive new carpark had been provided for at the front of the residential property and the proposed shop.

15. As clarified in the court below both in oral testimony and by reference to photographic evidence, the twelve-foot wall that Mr. Donnelly referred to in his letter was a different wall to the boundary wall that had abutted Corban's Lane, and which was also removed in 1974.

16. In his letter to the Secretary dated 4 November 1974, Mr. Ellis accepted that the sight line had been improved by the removal of the wall referred to in Mr. Donnelly's letter but that the positioning of large stones on the tarmacadam forecourt presented a greater danger. He complained that parking near the corner would be a hazard particularly since, following the erection of traffic lights at South Main Street, the volume of traffic using Corban's Lane as a bypass had increased. In his reply to that objection on 11 December 1974, Mr. Donnelly stated that the stones were placed on the tarmacadam "merely to denote that it is private property" and "to discourage persons from being in and about the dwelling house".

17. Following further correspondence from Mr. Ellis, under cover of a letter dated 28 August 1975, the Minister for Local Government confirmed approval of the grant of

planning permission (dated 25 August 1975) to Mr. Donnelly for the conversion of a house into flats and the garage into a shop at Corban's Lane.

Confirmation of the CPO, the Notice to Treat and the arbitration proceedings

18. The CPO on plot 201 and plot 202 was confirmed by An Bord Pleanála on 14 June 2010. On 20 February 2012 the Council served a Notice to Treat on the defendant advising that it was willing to treat with him for the purchase of his interest in the lands in both plots. As observed by the defendant's counsel in his oral submissions to this Court, albeit the Council regarded plot 202 as "public road", it was still willing to treat to purchase it.

19. Mr. Michael Neary, Property Arbitrator, was nominated to hear and determine the defendant's claim for compensation under the Statutory Compensation Code in respect of the acquired lands. The defendant contends that the acquired lands must be valued on the basis that in order for a developer of third-party lands to complete a major town centre development nearby, the developer would have no choice but to purchase the acquired lands at "ransom value". In the course of the hearing before the Arbitrator in January 2015 and February 2016, a legal dispute arose between the Council, as the acquiring authority, and the defendant in respect of the existence or extent of the public road and/or road and/or roadway on the plots the subject matter of the compulsory acquisition.

20. The Council claims that the carriageway on Corban's Lane is a roadway and thereby part of the public road which services and permits vehicular traffic to pass and repass over the entirety of plot 202 as of 20 February 2012 and that the roadway constitutes a public right of passage, a highway and a public road. In essence, the dispute revolves around the extent, if any, the forecourt of no. 2 Dara Court and no. 3 Dara Court constitutes a public right of way.

21. The Council's contention is that the reality of the situation is that the defendant has a claim for compensation in respect of plot 201 (to be determined by the Arbitrator) but that

the extent of compensation for plot 202 is confined to the nominal value of the road bed underneath the road surface of plot 202. It is claimed that this is because of the prolonged user of two-way traffic passing in both directions along Corban's Lane (including plot 202) without objection from the defendant. It is submitted that this change in status is reflected in the Schedule to the confirmed CPO, and in the Notice to Treat in which plot 202 was categorised as "public road" and plot 201 categorised as "road" *simpliciter*.

The commencement of the proceedings

22. The plenary summons issued on 24 June 2016 on the basis of what the Council say is strong evidence of continuous two-way traffic across Corban's Lane passing through plot 202.

23. The case made by the Council in its statement of claim and in evidence to the court below was that the area in dispute became a public road because it was used by the public and became a public right of way over which vehicles and pedestrians had the right to pass and repass. Moreover, the disputed area was repaired, maintained and cleaned by the Council in subsequent years. The Council's case was that once the boundary wall that abutted Corban's Lane was removed in 1974, the whole of plot 202 between the defendant's buildings and Corban's Lane became part of the public road or roadway such that by 1991 a public road and a public right of way had been established as a matter of fact, and by reference to Corban's Lane having been taken in charge by the Council sometime before 1978. The Council's argument in the latter regard was based on the contents of a Roads Schedule from 1978.

24. More particularly, the Council claimed that following the construction of a footpath on the northern side of Corban's Lane in or about 1991, the carriageway used by vehicles was pushed towards the other side of the Lane in the direction of the defendant's property. In other words, the construction of the footpath on the opposite side of the street gave rise

to public use of part of the open space in front of the defendant's premises (plot 202) such that over time a public right of way was created over that area.

25. Accordingly, the Council claimed a declaration that a public right of way exists at common law on the entirety of plot 202 and a declaration that the road described as Corban's Lane constitutes a roadway and a public road within the meaning of the Roads Act 1993 (as amended) ("the 1993 Act") over the entirety of plot 202 and that the same road encompasses a public road right of passage over the entirety of plot 202.

26. The defendant put in a full defence and a counterclaim. Therein, he asserted that until certain of his land was acquired by compulsory purchase by the Council pursuant to the CPO, his properties enjoyed the amenity of the parking area in front on no. 2 and no. 3 Dara Court as it was located entirely within his lands. He denied that the area in issue could as a matter of fact or law be described as a roadway, road or public road within the meaning of the 1993 Act. He claimed that he, his servants or agents and/or tenants or licensees parked vehicles on a regular basis on his lands at Corban's Lane up to the time of the CPO and that he and his predecessors-in-title had maintained the parking area for their own benefit and for the benefit of their servants, agents, tenants, licensees and/or invitees and assigns, and had thereby asserted ownership of the area. He specifically pleaded that neither he nor his predecessors-in-title ever dedicated the parking area or any part thereof to use as a public right of way or "public road".

27. The defendant's case in the court below (and in the appeal) was that both his title documents, and the planning documentation from 1974, show that there is an area for car parking which accommodates 11 cars parked "nose to kerb" (i.e. perpendicular to the buildings) to the front of no.2 and no.3 Dara Court. He denied that a public right of way existed over any or the entirety of plot 202 at any time prior to the CPO. He accepted

however that a small portion of plot 202 (in respect of which no claim for compensation has ever been made) constituted public road as defined in the 1993 Act.

28. In his counterclaim, the defendant sought declaratory orders that he is the lawful owner of lands at Corban's Lane comprising buildings at the junction of Corban's Lane and Lough Buí and (prior to the CPO) sufficient land to accommodate parking for eleven motor vehicles perpendicular to those buildings up to the corner with Lough Buí.

Additionally, the defendant sought damages for slander of title.

29. In its reply, the Council denied that it has slandered the defendant's title. It further denied that the defendant had maintained the parking area. It pleaded that the defendant did not object to or challenge the making of the CPO, or the Notice to Treat which issued in February 2012.

The hearing of the action

30. The trial of the action took place over six days between March and June 2018. The trial judge heard evidence from some fourteen witnesses, most of whose testimony is directly referenced in his judgment. As is apparent from the judgment, various reports, maps, drawings and photographs were produced by each of the parties, regarding, *inter alia*, the width of Corban's Lane and the extent of car parking on the forecourt of the defendant's properties. This material included a map dated 6 February 2015 which had been agreed by Mr. Seamus MacGearailt of Roughan Donovan Consulting Engineers, on behalf of the Council and Mr. Michael Moran, the defendant's then engineer, for the purposes of the arbitration. A Schedule to a Roads Register compiled in 1978 and which recorded that the width of Corban's Lane was 4.57m was also produced in the High Court. There was evidence given by Mr. MacGearailt in relation to the evolution of the road layout at Dara Court/Corban's Lane over several decades. The trial judge also had the testimony of Mr. Conor Furey, consultant engineer, on behalf of the defendant in this

regard. Mr. Furey produced a number of drawings, including drawings A100-1, A1-001A, A1-002A and A1-005. He clarified in evidence that all of his drawings were based on the dimensions that had been agreed by Mr. MacGearailt and Mr. Moran in February 2015. Evidence in relation to the width of Corban's Lane was also given by other witnesses, including by Mr. Willoughby of the Council who estimated the width of the carriageway on Corban's Lane at 6 metres, but possibly 5 to 5.5 metres at the location of no. 1 Dara Court (the Ellis residence) because of the protrusion of what will be referred to as "the Ellis garden".

The High Court judgment

31. After setting out the relevant background to the case and the nature of the claims made by each side, the trial judge commenced his analysis by noting that whether Corban's Lane may be regarded as a public road was to be considered by reference to the 1993 Act and the common law.

32. It is useful to have regard to the various definitions set out in the 1993 Act, some of which were referenced by the trial judge. Section 2 of the 1993 Act provides that "road" includes, *inter alia*, "(a) any street, lane, footpath, square, court, alley or passage". "Roadway" "means that portion of a road which is provided primarily for the use of vehicles". A "footpath" is defined as "a road over which there is a public right of way for pedestrians only, not being a footway". A "footway" is defined as "that portion of any road associated with a roadway which is provided primarily for use by pedestrians". A "public road" is a "road over which a public right of way exists and the responsibility for the maintenance of which lies on a roads authority".

33. Section 11(1)(a) of the 1993 Act provides that a road authority may by order declare any road over which a public right of way exists to be a public road, and, if so declared, it

will be deemed to be a public road, with the responsibility for the maintenance of the road, thereafter, on the road authority.

34. Section 11(6) provides that “[e]very road which, immediately before the repeal of any enactment by this Act, was a public road shall be a public road”. Section 11(7) provides that any road constructed or otherwise provided by a roads authority after the commencement of the section shall, unless otherwise decided by such roads authority, be a public road without the necessity for an order under s.11(1).

35. As noted by the trial judge, prior to the CPO, there was no statutory machinery invoked by the Council to take Corban’s Lane in charge. Neither Corban’s Lane nor plot 202 were the subject of a declaration by the Council under s.11(1)(a). There was no Town Hall declaration of dedication such as occurred in *Smeltzer v Fingal County Council* [1998] 1 I.R. 279. It is indeed common case that it was not until the commencement of the within proceedings in June 2016 that the Council asserted that there was a public right of way over plot 202.

36. The Council’s submission in the court below was that Corban’s Lane must be deemed to be a road under s.11(6) of the 1993 Act because plot 202 was a public road prior to the enactment of s.11. The trial judge thus considered the common law concept of a public road, quoting from Keane on “Local Government” (2nd Ed.):

“Historically in Ireland, a public road came into existence in two ways. The first is by dedication, when the owner of the land dedicates to the public a right of passage over it and the public accepts the right thus offered to them. The second is by express grant whether by conveyance or transfer. In practice, positive evidence rarely exists of dedication by the owner of the land in the form of deed or other instrument. User by the public normally proves dedication and user by the public is

also evidence of their acceptance. Repair and maintenance by the road authority was also evidence of the dedication and acceptance of the road...”

37. At common law everything between fences or structures acting as boundaries to properties adjoining the public road including footpaths, cycling tracks and grass margins constitute public road unless there is evidence to the contrary. The trial judge noted that the 1993 Act did not specifically address the precise area of ground to which a local authority’s authority extended.

38. As observed by the trial judge at para. 15, the concept of an express grant of a public right of way of any part of plot 202 by the defendant did not arise in the instant case, and, thus, the burden lay on the Council “to establish user by the public and a dedication by the defendant of the area...” At para. 17, he opined that the history of the forecourt area in issue in the proceedings and the removal of boundary walls from the perimeter of the defendant’s property and its subsequent use were of importance in the determination of whether a public right of way has been established over plot 202.

Alleged public user of plot 202

39. The trial judge made a number of findings of fact in respect of user of the disputed area. In the first instance, he was satisfied on the evidence adduced that between 1974 and 1990 planning permission had been given to Mr. Donnelly to develop his property. He was satisfied on the balance of probabilities that the boundary wall to the defendant’s properties located at the edge of Corban’s Lane still existed up to 1974 (as evident from Mr. Donnelly’s planning history). He was satisfied that this wall was removed by Mr. Donnelly between 17 May 1974 and 23 July 1974. (at para. 25)

40. The trial judge duly noted that a further change had occurred in the area in October 1974, when a narrow carriageway up to what was described as Murtagh’s Corner, which to that point in time had provided vehicular access to Nass town centre, was closed off to

vehicular traffic and became a pedestrian route. As a result, the traffic flow through the junction of Corban's Lane and Lough Buí increased, but the trial judge found that this was never very substantial in the 1970's. The trial judge also took note of the sharp corner at the junction of Lough Buí and Corban's Lane and the restricted visibility at that location that had pertained until the works done by Mr. Donnelly in 1974 in removing a side wall that had extended into the junction (as evident from an aerial photograph from 6 June 1973) which had improved the sight lines. He further noted that an Ordnance survey map from 2000 "does not indicate a physical boundary between the defendant's properties and the roadway". The photograph did show a protuberance (the Ellis garden) from no. 1 Corban's Lane which caused a "pinch" effect on the carriageway at that point.

41. The trial judge found that there was no suggestion or evidence that the property which Mr. Donnelly owned, or any part of it, was being used or had in any way been dedicated as a public right of way up to 1974, (at para.29). There is no issue taken by the Council with this finding of fact in the appeal.

42. At para. 30, the trial judge noted the evidence given by Mr. David Reel, an engineer employed by the Council between 2000 and 2014, that the Schedule of the Roads Register for Naas Urban District Council date stamped 2 February 1978 listed Corban's Lane as a road in the charge of the Council pursuant to a Statutory Instrument dating from 1946. The Schedule listed the length of the road as 558m and its width as 4.57m. In the same Schedule, the road width at Lough Buí is recorded as being 7.01 metres. The Council relies on the 1978 Road Schedule as an important factor in this case on the basis that it is indicative that the area in dispute in the within proceedings forms part of a roadway that connects at either end of its passageway with existing public roads or rights of way. In evidence, Mr. Reel was unable to say whether the width of 4.57m as recorded in the Schedule had been measured from boundary to boundary and/or included footpaths. He

was, however, satisfied that the road as described in the Schedule did not include the car park spaces on the forecourt of the defendant's properties and that, therefore, the carpark area had not been taken in charge by 1978.

43. The trial judge duly found that Corban's Lane was taken in charge by the then Naas Town Council some time before 1978. The taking in charge, as a matter of probability, was found to have been confined to the area between the boundary of the properties on either side of the carriageway which was then extant but did not include any element of Mr. Donnelly's properties within the walled boundaries which were clear from the title map, (at para. 31). The court was not satisfied that the area "taken in charge" sometime pre-1978 was simply extended by the removal by Mr. Donnelly in 1974 of the boundary wall that abutted Corban's Lane.

44. The trial judge was satisfied that following the grant of planning permission in 1974, Mr. Donnelly had developed his properties, including providing for car parking and that the car park spaces were used by patrons of Mr. Donnelly's premises or tenants occupying the premises. He was further satisfied that the forecourt of the buildings was open and unfenced for this period and that vehicles parked regularly in the forecourt area. The court was satisfied that the passing of traffic was difficult at the point where Corban's Lane met Lough Buí and that this difficulty was heightened on occasion by the parking of cars on the forecourt. The trial judge found that the fact that the open area in front of the defendant's premises could be traversed by local people when there were no cars there did not necessarily connote that the public had a right of way, or that the area may be deemed a road or a roadway. He was not satisfied on the evidence that the owners of the property intended to dedicate or dedicated any part of the property to a public right of way between 1974 and 1991. He stated, at para.36:

“The owners continued to exercise control over and permit access to the area by customers and tenants using the two premises. I am not satisfied that their acquiescence to use of the surface by others whether by walking, parking or driving over it gave rise to a public right of way as claimed by the plaintiff up to 1991”.

45. The next issue which fell to be determined, given that the trial judge was not satisfied that as a matter of law or fact the area in issue was the subject of a right of way before 1991, was whether the use made by the public of the disputed area in the years that followed, and the facts and circumstances of the case, established as a matter of probability that there was such public use, and whether the landowner/defendant had by inference dedicated any part of his land to such public use so as to constitute a public right of way.

46. The trial judge took note of the fact that in 1991 a footpath had been constructed as part of a development on the northern side of Corban’s Lane. The footpath was part of the planning permission granted by the local authority to the owner of premises on the opposite side of the road from the properties now owned by the defendant.

47. It is not in dispute but that the footpath encroached on the carriageway for vehicles and pushed the carriageway towards the properties now owned by the defendant, in effect compelling vehicles travelling along Corban’s Lane towards Naas to drive over the tarmacadam area (plot 202) the subject of the within proceedings. The trial judge found that the planning authority must have granted the planning permission for the development on the northern side of Corban’s Lane in the knowledge that that would happen and without any adequate consideration of the effect of the construction of the footpath on the flow of traffic in the vicinity of the corner of Corban’s Lane and Lough Buí, or the rights of property owners on the opposite side of the road.

48. The trial judge considered the evidence of Mr. MacGearailt, a civil engineer with considerable experience in road traffic works in urban areas. In 2013, Mr. MacGearailt

undertook an assessment of the road and traffic aspects of the CPO arbitration case on behalf of the Council. Mr. MacGearailt believed that the footpath installed in or about July 1991 on the northern side of Corban's Lane was two metres wide and that the western side of that footpath was constructed on what was originally part of the roadway. As a result, the roadway was displaced southwards by two metres. In its submissions to this Court, the Council accepts (as it did in the court below) that the footpath was an encroachment on the roadway. It was also accepted by the Council in the court below, that if the trial judge held (as he duly did) that the establishment of a public right of way pre-1991 had not occurred, that the right of way being asserted would not have accrued between 1991 and the date of the commencement of the 1993 Act: the period of time being too short. The Council's submission, therefore, was that the public right of way must have come into existence between 1991 and the commencement of the proceedings on 24 June 2016. Its principal submission was that there was a public right of way and road on Corban's Lane which changed its width after 1991 following the installation of the footpath on the northern side of Corban's Lane, and, that at common law, the changed width must be regarded as having been incorporated into the public right of way and road thereafter.

49. In his evidence to the court below, Mr. MacGearailt appeared to be satisfied that the original width of the roadway on Corban's Lane before the construction of the footpath was five metres wide. He stated that if one made an allowance for the extra two metres of footpath into that area, one would be left with only a three-metre surface for two-way traffic on the carriageway. He opined however that well in excess of that width was available as a carriageway beyond the footpath since 1991. He was further of the view that since a planning condition for a footpath had been imposed by the local authority, it was evident that those concerned believed that the footpath would not cause an obstruction on the carriageway for traffic. Mr. MacGearailt thus concluded that a public roadway must

have evolved by that stage to a point where it included the width of the proposed extended footpath plus the width of a two-lane road of approximately six metres. He stated that the road evolved from a width of approximately five metres to eight metres approximately at least from the time when the footpath was inserted. This, in his view, was indicated by a central white line on the carriageway of Corban's Lane which was evident in an aerial photograph from December 1996 albeit Mr MacGearailt accepted that this road marking did not appear in a later aerial photograph from 2007.

50. In respect of Mr. MacGearailt's evidence, the trial judge concluded that prior to the installation of the footpath at the northern side of Corban's Lane in 1991 there had been an adequate carriageway for the carriage of two-way traffic albeit that that traffic passed with some difficulty at the intersection of Corban's Lane and Lough Buí. This difficulty may have been heightened both by the installation of the footpath and when cars were parked at the location of the defendant's properties. However, the trial judge was not satisfied "that this justifies an assumption by the local authority that it could simply treat this area, which the defendant's tenants and the shop's customers used for parking, as a public roadway, thereby effectively constituting a new carriageway heading west on the Lane created in effect by the construction of a footpath", (at para. 41).

51. At para. 42, the trial judge was satisfied that the owners of the properties at Dara Court "continued to exercise and assert their rights over the parking areas which I am satisfied extended up to the area of the old boundary wall" notwithstanding that "traffic veered into and over the defendant's property to take advantage of the safer negotiation of the bend at Lough Buí when cars were not parked at the corner".

52. Mr. MacGearailt had given evidence of his observation of double yellow lines laid by way of parking restriction on Lough Buí and the northern end of Corban's Lane in front of the footpath opposite the defendant's property and which were visible in the aerial

photograph from 2007. The restrictive yellow lines were not continued however into the area of the defendant's property in front of no.2 Dara Court or on the corner where Corban's Lane met Lough Bui (no. 3 Dara Court) notwithstanding the existence of a potential hazard caused by vehicles parked at no. 3 Dara Court. Mr. MacGearailt accepted that it was possible that the authorities had no entitlement to put double yellow lines on the defendant's property. From this the trial judge concluded that "if the authorities believed that the area was a public roadway and/or had been taken in charge, the double yellow line would have continued into this area", (at para. 43).

53. The trial judge also found that the recorded width of the road at 4.57 metres at the time of the taking in charge in 1978 "must be regarded as an average width for the length of the Lane but also as defining a much narrower road than the one now claimed to exist", (at para. 45).

Parking on the forecourt

54. The trial judge next turned his attention to the issue of parking on the forecourt of nos. 2 and 3 Dara Court.

55. One of the drawings which Mr. Furey, the defendant's engineer, produced was map A1-005 which he stated contained the exact dimensions of the defendant's property and proposed parking spaces as had been identified in the defendant's predecessor-in-title Mr. Donnelly's 1974 application for planning permission. These dimensions were superimposed on top of the defendant's title deeds map that had been originally prepared by Mr. Colin Hasset, engineer, and the baseline drawing that had been agreed between Mr. MacGearailt and Mr. Moran on 6 February 2015. Overall, Mr. Furey was satisfied as to the accuracy of the map he prepared within one percent. On Mr. Furey's analysis, the car parking spaces provided for in the 1974 planning permission were all accommodated within the boundary of the wall that had been demolished in 1974 save for a small section

of car park space no.1 which protruded slightly outside the boundary as demarked on the title deeds.

56. On behalf of the Council, Mr. MacGearailt also produced a drawing (DC-CPO-12) which he contended was a map of the parking activity on the forecourt as observed from, *inter alia*, a series of historical aerial photographs. Mr. MacGearailt's drawing showed a variety of sizes of motor vehicles parked tight to the buildings, approximately ten to fifteen centimetres clear of the walls. Eight vehicles were shown in all, parked nose in to the wall at no. 2 Dara Court. The last three of those vehicles protruded over a green line on the map over what was described as the carriageway. The final vehicle was shown parked parallel in front of no. 3 Dara Court. Mr. MacGearailt testified that there was reasonable capacity for the parking of nine vehicles albeit there were no delineated car parking spaces. He stated that the consequences of parking in the manner suggested by Mr. Furey's map would mean the protrusion of vehicles onto the public road.

57. The trial judge was not satisfied that either Mr. Furey's mapping exercise demonstrating the spaces in which cars were more likely parked or intended to be parked as a result of planning permission, or Mr. MacGearailt's alternative exercise of producing a drawing said to demonstrate that cars or vehicles parked tightly to the wall were unlikely to protrude into the disputed area, should be regarded as determinative of the matter. He considered that like much of the evidence adduced in the course of the hearing concerning historical photographs and tarmacadam lines, the conclusions sought to be drawn from the maps and drawings in question involved "a number of underlying propositions and/or variables which cannot be definitively established or indeed eliminated and are produced on the basis of propositions which are not necessarily or uniformly consistent with the reality of the use of the area for parking as described [by] other credible witnesses", (at para.48).

58. At para. 49, the trial judge made a number of observations, in respect of, *inter alia*, the evidence adduced by the Council as to the cleaning and maintenance of the disputed area:

“There was very little reliable evidence from the plaintiff’s staff as to the works, maintenance and cleansing carried out by [its] various departments over the area in dispute: no records were produced in that regard. There was no attempt by the plaintiff to impose any parking restrictions in particular, on the corner to address the frequent obstructions or hazard created by vehicle parked there: indeed it seemed to be accepted by Mr. McGearailt that this was because of a possible issue as to the ownership of the area in which such restrictions might be placed. These restrictions were present on the northern side of the Lane. I am satisfied to accept the evidence of the plaintiff (sic) and the witnesses called on his behalf concerning the continued use of the area for parking as described by them. I do not accept that the parking was an incidental and unauthorised intrusion by third parties on an established right of way. I am not satisfied that the evidence adduced is sufficient to establish that the local authority accepted responsibility for the maintenance, repair or resurfacing of the area in dispute from which the court should infer a dedication by the defendant of the area as a public right of way: such evidence as was advanced in that regard must be assessed in the context of the entire circumstances and evidence in the case.”

User of the forecourt

59. The findings arrived at by the trial judge followed his consideration of the respective testimonies of the witnesses called by each side. A number of witnesses gave evidence on behalf of the Council in respect of user of the area in front of the defendant’s properties. Mr. Declan Kirrane, who held the position of Town Clerk from 1995 to 2005, testified that

plot 202 was always regarded as part of the public road network by the then Naas Town Council over which there was unhindered access. Moreover, the area formed part of the Council's cleaning and maintenance programme. He testified that it was used by motorists, pedestrians, cyclists and trucks-all two-way traffic in respect of which there were no restrictions. He stated that the cleaning of litter was done on a weekly basis by Council staff, both in respect of the roadway and the footpath, and that the staff only cleaned Council property.

60. He testified that he walked the town regularly. He did not recall car parking spaces being delineated but had a memory of cars parked in the forecourt area of Dara Court. Under cross-examination, he accepted that photographic evidence from 1995 to 2009 showed cars parked outside No. 2 and no. 3 Dara Court. He did not recall any signage indicating private property on the defendant's property during his time with the Council. He considered that parking in the disputed area was not regulated because it was not causing any obstruction to the free flow of traffic.

61. Mr. Bill Cleere, a resident of Naas since 1996 and a volunteer with Naas Tidy Towns, recalled the footpath on Corban's Lane opposite the defendant's property. He testified that he and others would pick up litter from the forecourt of the property on a regular basis during the months of May, June, July and August. He recalled that cars were parked on the forecourt area from time to time and saw persons walking across the area when it was not obstructed by cars.

62. Mr. Colm Flynn, a Senior Executive Engineer with the Council since 1998 and whose responsibilities included the provision of technical guidance in relation to traffic management and maintenance, gave evidence that there had always been free unrestricted two-way movement of traffic along Corban's Lane and Lough Buí. He was a resident of Naas until two years before the trial. He had always viewed the open space in front of Dara

Court as public space which was unrestricted. He stated that the Council was aware that pedestrians, in particular school children and parents, passed over the forecourt area. He believed that if there was any trip hazard along the forecourt that the Council would treat it in the same way as any normal roadway in terms of maintenance. Moreover, potholes on the forecourt were maintained by the Council. As observed by the trial judge, there was, however, no direct evidence that such maintenance had been carried out by the Council in the forecourt area, and no documentation to this effect was ever produced. Mr. Flynn testified that he expected Council workers to sweep the area and that no one had ever objected to a "sweeper" being sent in. Had an objection been made, however, it would have been considered.

63. In cross-examination, Mr Flynn stated that the defendant's ownership of the disputed area was not in issue, but he nevertheless asserted that no one had ever objected to the works that were carried out by the Council in the way of cleaning and maintenance. He had no recollection of any complaint made by the defendant regarding an encroachment onto his property by the digging of an ESB duct by the developers of a nearby shopping centre.

64. The trial judge also had the evidence of Ms. Veronica Lyons, a consultant engineer who had previously worked for the Council from 1991 to 2004 and who was a resident of Naas for forty years. She testified that she was a regular user of Corban's Lane which had a two-way traffic system without restriction. She did not recall any demarcation of parking spaces at the charity shop at no. 3 Dara Court and the corner of the road jutting out onto the bed of the road. She stated that one would travel around the bend at Lough Buí at a slow pace and keep to the kerb to facilitate oncoming traffic. She recalled a number of parking spaces in front of no. 2 Dara Court and stated that there was safe parking for one parallel space outside the charity shop at no. 3. If persons parked in another way at that location it

would be at their peril as the spaces were not standardised spaces. In evidence, she pointed to photographs she had taken in 2009 where two different types of pavement were visible. She pointed to a joint along the road between the forecourt area and the area that public traffic was using as a carriageway and stated that the joint represented the edge of the carriageway: anything inside the joint could be characterised as used for parking and anything outside was an established public right of way. She stated that as far as she could remember people had been using plot 202 as a public right of way for two-way traffic for over forty years. She herself had observed cars passing and re-passing over plot 202, but not over plot 201. She stated that traffic had started to encroach on plot 202 over thirty years ago. It appeared to Ms. Lyons that the defendant's predecessor-in-title Mr. Donnelly may have ceded plot 202 to the public road and she noted that the defendant was not claiming that two-way traffic did not pass and re-pass over plot 202.

65. Ms. Lyons also testified that Council "would have" paved and tarmacadamed over plot 202. She believed that the Council would not have paved an area in private ownership. She agreed with Mr. MacGearailt's view (as expressed in the drawing prepared by him in response to the drawing done by the defendant's engineer Mr. Furey) that there was safe space for the parking of eight cars nose in in plot 201 i.e. not encompassing any part of plot 202.

66. Mr. Jack Devlin, a chartered surveyor, was engaged by the Council as a professional valuer to attend a site meeting in relation to the defendant's property on 11 December 2014. Mr. Devlin was satisfied that yellow aerosol type dots on the roadway to which he was directed by the defendant at the site meeting represented the original wall on the property that was demolished in the 1970s. These dots were approximately in the middle of the carriageway at the most western point of Corban's Lane. He agreed that the drawing of the forecourt prepared by Mr. MacGearailt showing eight nose-to-kerb parking

spaces and one parallel space was a fair description of the capacity of the forecourt without encroaching on the public road. Under cross-examination, Mr. Devlin believed that Mr. Furey's map representing eleven car parking spaces only arose in the 1974 planning permission and did not reflect the reality on the ground. He was of the view that since the demolition of the boundary wall in the 1970s, traffic on Corban's Lane had travelled over the disputed area so the extra car parking spaces contended for by the defendant did not exist and could not be allocated or occupied contrary to what was suggested in Mr. Furey's map.

67. Mr. Devlin stated that the forecourt could only have accommodated nine car parking spaces and that carpark spaces one to five or six to seven as shown on Mr. Furey's map could not have been used for car parking because that would have encroached on traffic flow. He testified that there were no markings for eleven car parking spaces on the defendant's property. He further stated that if as asserted by the defendant (with reference to a drawing done by the defendant's engineer, Mr. Furey) cars were parked in the spaces which Mr Furey had indicated on his drawing, half of each car would be on that part of plot 202 said by the Council to be public road.

68. In the course of his evidence, Mr. Reel recalled that roadworks had been carried out on Corban's Lane in 2011 and 2012 which comprised localised patching and improvements to certain sections of the roadway and that they were paid for by the Council. In 2011, this work was carried out by Stanley McAdam contractors on behalf of the Council. To this end, the Council produced two invoices both dated 30 May 2011 which stated that the contractors were paid sums of €15,891.83 and €16,073.85 for these works. The invoices refer to the works carried out on Corban's Lane Lower and Corban's Lane Upper. Part of the works involved resurfacing a section of the roadway on the defendant's side of the road. Some potholes inside plot 201 were filled in and resurfaced.

Albeit that these were in the defendant's forecourt area they may have been repaired because people were passing and re-passing over the area: they were next to the road resurfacing works. In cross-examination Mr. Reel acknowledged that the defendant had complained to him about the encroachment of the works onto his property. Mr. Reel did not accept that plot 202 was comprised of car parking spaces. He considered the disputed area to be a public road. The Council had swept, salted and resurfaced plot 202. Mr. Reel's experience was that from 2000 onwards one could travel across plot 202 without impediment.

69. Mr. Reel also testified that in his capacity as a private citizen he had driven along plot 202 over the years when bringing his children to school. He stated that on travelling back from the secondary school he was always able to traverse the area and pass cars coming in the opposite direction without difficulty. In eighteen years, he had never seen encroachment of the traffic flow in Corban's Lane by cars parked in the manner depicted in Mr. Furey's map. Mr. Reel conceded that the 1978 Roads Schedule did not show whether the defendant's property had been taken in charge by 1978. Nevertheless, he contended that plot 202 over which the defendant's paper title extends was a road on which the public passed and re-passed on a continuous basis.

70. In response to cross-examination about photographs which showed cars parked nose in at Dara Court, in aid of the suggestion that cars could not have passed and re-passed over plot 202 when those cars were so parked, Mr. Reel's response was that the cars were parked on plot 201, not plot 202. It was, however, put to Mr. Reel that the photographs in question depicted that the cars were parked some way over plot 202 and thus Mr. Reel's assumption that plot 202 was public road was mistaken.

71. The High Court transcript discloses that brief evidence was also given on behalf of the Council by Mr. Noel Merrick, a principal of one of the schools in the area from 1973 to

2014. This evidence was not referred to specifically by the trial judge. Nothing turns on that, in my view. Mr. Merrick testified to the use made of the area in front of Dara Court in earlier years when half of the population of the school walked up and down that area. He recalled Corban's Lane generally as accommodating two-way traffic without obvious difficulty. The use made by pupils of the forecourt had fallen off in later years when more children were driven to school. He believed that traffic flow on Corban's Lane had become more regulated in the 1990's than it had been previously. He considered it a public road. Under cross-examination, with reference to photographs from May 1994, December 1995, December 1996 and October 2012, he acknowledged that parking took place on the forecourt to no. 2 and no. 3 Dara Court, stating that he did not regard where the cars were parked as the public road.

Testimony on behalf of the defendant

72. The defendant testified that he was familiar with the properties in question since the late 1960s. His recollection was that there was continuous parking nose in outside what is now no. 2 Dara Court, and that, likewise, the customers and staff of what is now no. 3 Dara Court parked their cars both nose in and parallel to that property. He had purchased no. 2 Dara Court, then a two-story property consisting of six bed sits, in 1990. He converted the building into three apartments which eventually became offices. At the time of acquisition of no. 2 Dara Court, he understood (with reference to Mr. Furey's 2018 drawing A1-005) that seven of the eleven car park spaces (namely car park spaces numbered 5-11 on Mr. Furey's drawing) were applicable to no. 2 Dara Court as had been provided for in the 1974 planning permission, and were used by his tenants (albeit he conceded that these car park spaces were not delineated or marked out on the ground). He purchased the adjoining premises, no. 3 Dara Court, in 2007. He stated that post 2007, when the building became a charity shop, parking at the premises had intensified due to people both delivering

donations and availing of what the shop had to offer. At the time of the purchase of no. 3 in 2007, he had checked the planning status of the property and the parking spaces allocated. He considered spaces 1, 2, 3 and 4 on Mr. Furey's drawing as applying to no. 3 Dara Court. He testified that there was no interference by the public authority in respect of the parking at no. 3 Dara Court. The defendant alluded to the extent of car parking on his property by reference to a series of photographs of varying quality from 1991 to 2013.

73. The defendant recalled the work done on the footpath on the northern side of the lane in 1991. He stated that no works were done on his property in the 1990's or the 2000's. The defendant testified that he had carried out repair works on his property, employing a company to resurface the tarmac in front of no. 2 Dara Court in or about August 2010, as evidenced in a letter dated 24 March 2016 from the contractor he employed.

74. Both no. 2 and no. 3 Dara Court were located between two paid parking areas and there were yellow lines all along the laneway except at his property. According to the defendant, the area was heavily patrolled by traffic wardens and none of the defendant's tenants or clients were ever given a ticket or asked to move on by anyone from the local authority, or a member of An Garda Síochána. The defendant also employed a company, Nationwide Controlling Parking Systems Limited, to patrol the car parking at night from 2006. In 2006, he also erected signage in relation to parking.

75. The defendant testified to a number of letters he wrote to the Council objecting to Part 8 of the Friary Road/Corban's Lane Improvement Scheme which was being carried out by Naas Town Council in or about 2008. In a letter of 25 March 2008, he raised an objection on the grounds that his property was included in the Scheme without his consent. He objected on the basis that "the ground will be taken from outside my front door". In evidence, he clarified that the reference to twelve car parking spaces in his letter should have been to eleven spaces. In February 2009 and March 2009, he sent letters of complaint

to Marshalsea Developments in respect of the digging of an ESB duct or trench which encroached on his property at car park spaces 1 and 2 as depicted on Mr. Furey's drawing. The duct was not removed, and, at the time, a query had been raised in relation to his title. On 1 February 2011, in a letter to the Naas Town Clerk, the defendant complained that the Town Council were trespassing on his property outside the charity shop at no. 3 Dara Court and carrying out resurfacing works without his permission.

76. The defendant disputed that the Council cleaned the forecourt area, stating that cars were parked there constantly. He stated that he did not dedicate his forecourt area to public use. He maintained his property and he and his tenants parked cars on his property. At all material times he considered the disputed area (plot 202) to be his private property. While there may have been people crossing the property when it was not occupied by parked cars this was not done with his specific acquiescence or consent.

77. He never had a conversation with or saw people from Tidy Towns cleaning his property. He recalled telling unauthorised persons parked on the property to leave. He would not, however, have complained about pedestrians walking across the areas when there were no cars.

78. Under cross-examination, the defendant acknowledged that after the footpath had been constructed on the northern side in 1991 traffic difficulties occurred at the junction of Corban's Lane and Lough Buí when cars were parked on his property resulting in traffic on one side of the road having to yield to oncoming traffic.

79. Mr. Paul Murphy, a retired army officer who had lived in Naas for over thirty years, gave evidence that he was familiar with Corban's Lane. He stated that he would have parked outside the charity shop at no. 3 Dara Court frequently as his children attended the local schools. When he was socialising at night he parked his car there, collecting it the following day. He frequently saw cars parked nose in at the corner over the years and also

in front of No. 2 Dara Court. Sometimes, if there was space, cars would park parallel to the buildings. Sometimes, at the corner, cars would not park at the very edge but would park at the shop window located some distance from the edge of the corner at Lough Buí. He stated that cars passing in both directions took great care at the corner. If there were cars parked there, cars could not pass simultaneously. A driver would have to slow down approaching the corner and take it with care. The amount of caution required depended on the manner cars were parked at the corner.

80. The trial court also heard the evidence of Mr. Adrian Thomas who operated a rental agency at no. 2 Dara Court. He testified to the parking on the forecourt, stating that cars would park nose in, reverse in or park parallel to the charity shop, including right up to the corner of the window of the shop. He was aware of the company retained by the defendant to clamp cars who blocked access to the buildings and which had no permission to be there.

81. Evidence was also given by Mr. Mark Hilliard (not specifically referenced in the judgment of the trial judge) who testified that as a schoolboy attending one of the schools in the area in the 1980's he had occasion to walk by the subject properties across the forecourt. He recalls cars parked both nose-in and parallel on the forecourt. He stated that when cars were parked nose-in, when negotiating the corner at Lough Buí he had to proceed with care. In later years when driving in the area, he would have to proceed slowly around the corner when cars were parked nose-in at the corner (i.e. at no. 3 Dara Court).

The trial judge's overall findings as to user

82. The trial judge accepted the evidence given by the defendant, Mr. Murphy and Mr. Thomas. He stated that insofar as there was conflict between their evidence and that of other witnesses concerning the history and use of the disputed area, the evidence of the

defendant, Mr. Murphy and Mr. Thomas was to be preferred. He went on to state, at para. 64:

“I am satisfied that there was a considerable area within the boundary defined by the title held by the defendants in which parking habitually occurred during the relevant period. The parking of vehicles in this area became more difficult and created more difficulties for traffic when the carriageway was moved southwards following the construction of the footpath on the northern part of the lane. Nevertheless, I am satisfied on the evidence that notwithstanding the difficulties caused by the increased flow of vehicles over this area after 1991, vehicles continued to be parked there with the permission of the owner whether by tenants or by customers of the shop. I am also satisfied that this on occasion must have given rise to an obstruction of and hazard to traffic within the area and negotiating the bend using that side of the carriageway. Of course this difficulty was lessened when no cars were parked there.”

83. The trial judge concluded at paras 65 and 66, as follows:

“The court is not satisfied that the plaintiff has proven as a matter of probability based on sufficiently cogent evidence that there was established, between 1991 and 2012 or 2016 or from before 1991, a public right of way over the area in dispute or its dedication as such by the property owners who were still exercising their rights over it. By 1991 Mr. Morrin was the owner of the property at Dara Court. By 2007 he was also the owner of the T.V. rental shop which was operating on the corner. I am satisfied that tenants and patrons of these premises were permitted by the respective owners of the premises to park their vehicles, whether perpendicularly, in a herringbone fashion or sideways outside the premises. On occasion I have no doubt that this caused difficulties for traffic negotiating the corner and that parking

particularly at or near the corner may on occasion have caused a hazard. This was an inevitable consequence of the construction of the footpath which should have been anticipated by the local authority. However, I am satisfied that the owners were exercising control over the area in issue having obtained their title by reference to the map which outlined that it was vested in them. This did not prevent vehicles from driving over the area or pedestrians from walking over it when there were no vehicles parked there. I am not satisfied that their acquiescence in the flow of traffic onto their land which was forced upon them by circumstances created by the local authority could in any sense be regarded as a dedication of parts of their property as a public right of way.

For its part the local authority took no steps to make a declaration in respect of this area under section 11 of the Roads Act 1993 following its enactment and commencement.”

84. Consequent on his findings, the trial judge held that the defendant was entitled to a declaration “that the area in suit was at all times prior to its compulsory purchase...in the ownership and use of the defendant and his predecessors in title”. He found, however, the claim for slander of title had not been made out.

The appeal

85. The Council appeals on the grounds that the trial judge:

- Erred in failing to find that any part of plot 202 was land over which there was an established public right of way;
- Erred in taking undue or any account of the indicative depiction of eleven car park spaces in a 1974 drawing in assessing the evidence of the previous use of the defendant’s property in circumstances where there was never any

demarcation or delineation of car park spaces in the forecourt of the defendant's property;

- Erred in taking undue or any account of the history of the removal of a boundary wall in or about 1974 as establishing a perimeter of the defendant's property in circumstances where the route of the public road and carriageway changed from an east-west in the direction of Murtagh's corner to a perpendicular direction at the corner of the defendant's property in or about 1974;
- Erred in failing to take any or any proper account of the existing use and dimensions of the roadway at the front of the defendant's property when assessing his evidence regarding the previous use of the forecourt for parking purposes in circumstances where there was never in existence any demarcation of parking spaces and/or any right to parking conferred on occupiers of the defendant's property;
- Erred in failing to take any or any proper account of the plaintiff's case that the number of car parking spaces in the forecourt of the defendant's property had effectively diminished by dint of the increased dimensions of the roadway which occurred between 1992 and the date of the Notice to Treat (20 February 2012);
- Erred in failing to take any or any proper account of the fact that the defendant's title documents showed his title encroaching only to a partial extent over plot 202;
- Erred in failing to take any or any proper account of the fact that the forecourt of the defendant's property was at all material times open and unfenced with sufficient carriageway width for two-way traffic in each direction;

- Erred in failing to take any or any proper account of the fact that the construction of a footpath and the subsequent use of part of the forecourt as a carriageway on plot 202 is evidence of user of the public road so as to establish a public right of way;
- Erred in failing to find that parking on the forecourt was an incidental occurrence that did not displace the establishment of the public right of way and/or that such incidental parking was not inconsistent with the establishment of a public right of way;
- Erred in failing to take any or any proper account of the evidence of the plaintiff that parking in the forecourt at the front of the defendant's property was not regulated because it was not causing any obstruction for two-way traffic on the carriageway;
- Erred in failing to take any or any proper account of the defendant's admission that there was a flow of traffic in both directions and/or failing to reconcile this to the evidence that a minimum width for a two-way carriageway established the existence of a public right of way on plot 202;
- Erred in failing to take any or any proper account of the distinction made by the plaintiff as to the use of plot 202 as a public right of way and plot 201 for parking;
- Erred in failing to take any or any proper account of the evidence of the carriageway and public right of way in front of no. 3 Dara Court and the existence and dimensions of the two-way carriageway immediately adjacent to the defendant's property;
- Erred in failing to take any or any proper account of drawing A1-001A which incorporated measurements previously agreed between Mr. McGearailt (the

consultant engineer for the plaintiff) and Mr. Moran (the consultant engineer previously engaged by the defendant) on which Mr. McGearailt gave evidence at the trial of the case;

- Erred in failing to take any or any proper account of Mr. McGearailt's evidence:
 - (a) that a width of six metre carriageway (at least) is required for two-way traffic to pass in opposite directions along Corban's Lane;
 - (b) that the standard length of a car parking space is 4.8 metres; and
 - (c) that on the basis of measurements on map A1-001A, the width of the carriageway between the footpath on the northern side of Corban's Lane and the buildings on the defendant's property was 11.2m, and that the measurement of available carriageway between the kerb footpath and the north border of plot 201, or, alternatively, the southern border of plot 202 was 7m-8m metres decreasing as one moves eastwards to 6m-7 m;
- Erred in failing to conclude on the basis of Mr. McGearailt's evidence in regard to the measurements previously agreed by the parties and which were subsequently contained in map A1-001A that (a) the boundary of the defendant's title or planning documents was erroneously measured so as to encroach partially into plot 201 (sic) or, (b) if the boundary of the defendant's title documents had previously protruded (partially) into plot 202 that a public right of way had been established across this area constituting part of the defendant's lands by reason of regular vehicular traffic passing simultaneously in both directions on Corban's Lane between 1992 and 20 February 2012;
- Erred in determining the case mainly on the basis of preferring to rely on the testimony of the defendant's witnesses particularly where the determination of

the case did not hinge on making binary decisions: (a) where the plaintiff's evidence was based on usage of the road surface/carriageway at Corban's Lane from 1974 to 1992 and from 1992 onwards by contrast with (b) the defendant's evidence which was largely based on either examination of measurement taken from his title and planning documents or else the evidence of parking of cars on the forecourt of his property;

- Erred in failing to take any or any proper account of the fact that the defendant's consultant engineer, Mr. Furey, largely confined his technical evidence to the examination of title and planning documents;
- Erred in disregarding (at para. 48) the technical evidence of Mr. McGearailt and Mr. Furey (the engineers respectively called on behalf of the plaintiff and the defendant) which involved a presentation of drawings showing the likely layout of cars parked on the land at the forecourt from 1992 onwards;
- Erred in not taking any or any proper account of the shortness or absence of any credible evidence of car parking on the forecourt which actually involved simultaneous parking of eleven cars in a perpendicular position at this location on any regular basis after 1992;
- Erred in failing to take any or any proper account of the position taken by the defendant in the trial that it was accepted at all material times that vehicles travelled in both directions across the carriageway/roadway at Corban's Lane;
- Erred in failing to find on the evidence that the augmentation of the footpath on the northern side of Corban's Lane which was constructed in 1992 had the result or effect of road traffic making regular and continuous use of the defendant's land at the forecourt of a said premises so as to constitute the

operation of two-way traffic at this location constituting an establishment of a right-of-way on plot 202;

- Erred in failing to take any or any proper account of the testimony of Mr. Reel who described that in his experience from 2000 to the present, two-way traffic on Corban's Lane "*could pass each other reasonably along that section of a road and around the corner*" and that "*in his experience from 2000 to the present, one could travel across the area encompassed in Area 202 without impediment*" and that "*in his experience of eighteen years living in Naas had never experienced encroachment of traffic flow in Corban's Lane by cars parked in the manner contended for in the eleven spaces outlined in Map A1-002*", or his evidence that "*if that situation pertained...it would have amounted to a major traffic hazard at that location which was not his experience...*", which evidence was not discounted by any or any reliable evidence adduced by the defendant of any traffic hazard or blockage occurring on any regular basis or at all at the front of the defendant's property during the relevant period of time;
- Erred in failing to distinguish between the use of plots 201 and 202 in circumstances where the plaintiff sought to establish a public right-of-way over plot 202;
- Erred in failing to take adequate account of the fact that parking of cars on the defendant's property was haphazard and open to members of the public such that no established right to park occurred since 1992;
- Erred in failing to take account of the change in the road layout in the period from 1994 in relation to plot 202 and from 1992 to the date of the Notice to Treat on 20 February 2012;

- Erred in failing to take any or any proper account of the evidence that at the date of the Notice to Treat plot 201 at the front of the defendant's property could not accommodate eleven cars;
- Erred in failing to find that the continuous use of the carriageway at Corban's Lane involving the passage of two-way traffic over a prolonged period between (a) 1974 and 1992, and, (b) 1992 to date, was sufficient to establish a public right-of-way across plot 202;
- Erred in taking any or any proper account that the granting by the plaintiff of planning permission for the development of land on the northern side of Corban's Lane and which included a condition for an increased area of footpath ought in some way give rise to a basis for criticising the plaintiff, or for ignoring or discounting the effects of such development involving the generation of prolonged road traffic usage on part of plot 202 at the forecourt of the defendant's property which otherwise had the effect of creating public right of way across the side plot of land;
- Erred in failing to take any or any proper account of the plaintiff's evidence of works done by the Council and third parties to the forecourt of the defendant's property;
- Erred in taking any account of evidence of car parking in the forecourt of the defendant's property where (a) there was no evidence of individual car parking spaces having been marked out or delineated at the same location; (b) there was no evidence that the said car parking was exclusively used by customers or staff of the business operations at the said location; (c) there was evidence that members of the public with no business connection with the defendant made use of the said location for parking their cars; and (d) there was evidence of

servants or agents of the plaintiff from time to time cleaning up and repairing part of the surface of the said forecourt.

86. By his notice, the defendant opposes the plaintiff's appeal in its entirety.

Discussion

Alleged lack of locus standi on the part of the Council to maintain the proceedings

87. In its submissions in the High Court on Day 6 of the hearing, the Council asserted that it was "taking up the issue on behalf of the public" which, it was said, was its role under s.73(11) of the 1993 Act as a road authority. That assertion was met by counsel for the defendant observing that no explanation had been proffered by the Council as to why it did not since 1993 invoke its entitlement under the 1993 Act to seek a declaration that there was a public right of way over plot 202. Counsel further stated that "[n]obody from the Council even asserted on behalf of the council that a right of way had been created" and that "it is not very clear at all who asserts the public right of way".

88. In his written submissions to this Court, the defendant repeats his assertion that the action here is not one to protect a public right of way but rather one to establish such a right. He says that the action has been brought in circumstances where no witness on behalf of the Council held themselves out as asserting the right of way on behalf of the public. It is submitted that the Council is the wrong party to assert a public right of way, and that the Council had not pursued the path which was open to it under s.11(1)(a) of the 1993 Act, namely to declare part of the defendant's lands as a public road. In oral submissions, the defendant points to the fact that some of the witnesses who gave evidence in the High Court on the part of the Council, notably Mr. Reel and Mr. Flynn, specifically stated in evidence that they would not assert a public right of way.

89. The defendant's concern, as expressed in submissions in the High Court, and in this Court, is the entitlement of the Council to assert a public right of way in the particular context of this case.

90. The Council maintains that there is no basis for the defendant's contention that it has no standing to maintain the within proceedings. It says that it brought the proceedings exercising its statutory functions under s.73(11) of the Road Act 1993 i.e. seeking the requisite declaration on behalf of the public that the prolonged activity by the public over a period of years over plot 202 gave rise to the public right of way. Hence, the proceedings were brought by the Council *qua* its function as the statutory road authority and in circumstances where the reliefs sought are *in rem* to protect a public right of way in its functional area, as provided for in s.73 of the Roads Act 1973. It is submitted that that function is not confined to the protection of an established public right of way which has been determined by third party litigation.

91. In respect of the defendant's objection to the Council's entitlement to pursue the proceedings, the first thing to be observed is that the *locus standi* argument which the defendant now purports to raise (albeit in a somewhat half-hearted manner) was not the subject of any pleading by him. Secondly, as appears from his oral submissions to this Court, the defendant now seeks to recharacterise his argument as one not so much concerning the question of *locus standi* but rather that the Council is the wrong party to assert a public right of way.

92. Whatever way one looks at the argument advanced by the defendant, I am satisfied that he has left it far too late to question the entitlement of the Council to pursue the issue of the asserted right of way in the manner it has. Even if I were not satisfied that the defendant has left it too late to question the Council's standing or assert that it is the wrong party to advance the claim being made, I consider that support for the Council's position

can be gleaned from the *dicta* of the Supreme Court in *Walsh v. Sligo County Council* [2013] IESC 48, [2013] 4 IR 417. In that case, the defendant Council submitted that it had no power to claim public rights of way existed over the land in question, or that if it was asserting such right, any declaration made would benefit the defendant but not the people of the locality and that therefore, those individuals could be excluded until such time as those individuals brought an action, which would have to be at the *fiat* of the Attorney General. In addressing that argument, the Supreme Court noted that the action had been defended “*and more importantly, the counterclaim brought by that defendant, on the basis of the function conferred upon it by s. 73(11) of the Roads Act 1993, and that the counterclaim was defended by the plaintiffs on the assumption that the section empowered the defendant to claim formally in legal proceedings that public rights of way existed...*” (at para. 187) At para. 192 it went on to state:

“*While s. 73(11) confers a function on a road authority without imposing a duty, it is a public-law function. It confers a statutory power on the authority...*”

The counterclaim had been brought “*in order to establish rights in favour of the public. The action was conducted exactly as if it had been brought by the Attorney General or at his or her relation.*”

93. Moreover, it was satisfied that:

“*...The counterclaim must be treated as having been brought by the defendant for the purpose of seeking declarations that public rights of way exist over the roadways in Lissadell. It cannot have been the contemplation of anyone involved in the case that the defendant was seeking a declaration which would benefit it, and it alone.*” (at para. 194)

94. In *Walker v. Barry* [2018] IECA 132, where the litigants in dispute over the asserted public right were private individuals, Whelan J. had cause to opine (at para. 21) that “*the*

decision of the parties not to seek the fiat or otherwise take steps to have the public law aspect of this claim appropriately determined, whether by joinder of Wicklow County Council as the relevant highway authority or otherwise, placed significant limitations on the nature of the orders ultimately available to the trial judge at the conclusion of the trial.” In my view, this *dictum* also lends support to the Council’s position that its function pursuant to s.73(11) of the 1993 Act is not confined to the protection of an established public right of way which has been determined by third party litigation. As I have said, however, I do not consider that the issue of the Council’s standing to maintain the proceedings falls for determination in this appeal. It was not pleaded. Nor can it be said that it was argued in any acceptable manner in the court below such as the trial judge would have been obliged to address the matter.

The substantive issues in the appeal

95. Before addressing the substantive issues in the appeal, it is apposite to have regard to the function of an appellate court in a case such as the present. That function is succinctly explained by MacMenamin J. in *M.C. (A Ward of Court) v. F.C.* [2013] IESC 36, [2014] 1 ILRM 1:

36: “This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As Hay v. O’Grady makes clear, if the findings of fact made by the trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with the findings of the High Court where primary findings of fact are not supported by evidence, or cannot in all reason be supported by the evidence...Furthermore, in Hay v. O’Grady. McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the

trial judge, where such inference depends upon oral evidence or recollection of fact. In the drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge...”

96. It is with this role in mind that the Council’s contention that the trial judge erred in concluding that it had not established that a public right of way exists over plot 202 now falls to be addressed.

97. As is clear from his judgment, the salient issue which arose for determination by the trial judge was whether the use made by the public of plot 202, and the facts and circumstances of the case, established as a matter of probability that the defendant had by inference dedicated his land to such public use as to constitute a public right of way.

98. The trial judge prefaced his assessment of this question by reference to the relevant jurisprudence. He quoted the *dictum* of Costello P. in *Smeltzer v Fingal County Council* [1998] 1 I.R. 279, at page 287:

“The law relating to highways and the creation of public rights of way is a very ancient one and the relevant principles are well-established. A distinction is made between a permission granted by an owner of land to members of the public to walk on pathways on his land and the dedication to the public of those pathways. To establish a public right of way what has to be proved is an intent on the part of the owner to dedicate his land to the public, an actual dedication, and acceptance by the public of the dedication.”

99. As cited by the trial judge, in *Walsh v. Sligo County Council* [2013] IESC 48, [2013] 4 IR 417, the Supreme Court, at para. 57, characterised the “*essential requirements*” for such dedication to arise, in the following terms:

“...The first step is proof of the use, as of right, by the public of the way over the owner's land. The second step is that, depending on the duration, frequency, or

intensity, of that user, an inference may be drawn that the landowner has dedicated the way. Such an inference, sometimes called a presumption, can be drawn only after consideration of all the facts. The third step is that it may be concluded that the public has accepted the dedication.”

100. The Supreme Court went on, at para. 62 to cite the seminal statement of Parke B. in *Poole v. Huskinson* (1843) 11 M &W 827:

“In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate-there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon the question of intention, than many acts of enjoyment.”

101. The defendant here relies in no small part on the latter part of the statement of Parke B, a matter to which I shall return.

102. It is also the case, as noted by the trial judge quoting from para. 79 of *Walsh v. Sligo County Council* that “[p]art of the evidence of dedication, in combination with user, may be the fact that public money has been spent, with the consent of the landowner, on the repair or maintenance of the route”, a view that echoes the approach of Ó’Dálaigh C.J. in the earlier decision in *Connell v. Porter* (1972) [2005] 3 I.R. 601:

“When there is no direct evidence as to the intention of the owner, an animus dedicandi may be presumed either from the fact of public user without interruption, or from the fact that the way has been maintained and repaired by the local authority”. (ap p.605-606)

103. As said by Lord Diplock in *Suffolk County Council v. Mason* [1979] AC 705, dedication by inference is the most common method of establishing the existence of the highway. This concept is discussed by Whelan J. in *Walker v. Barry* [2018] IECA 132

where she carefully and comprehensively distils the essential components for the establishment of a public right of way by reference to established case law. At para. 75, she quotes the classic description of dedication by inference given by Lord Blackburn in *Mann v. Brodie* (1885) 10 App. Cas. 378 to wit:

“... where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.”

104. It is for the judge of fact to determine whether the inference can be drawn. As put by Whelan J. in *Walker*, “[w]hether or not there has been dedication is a question of fact to be decided upon a consideration of all the evidence adduced. The burden of proof of dedication lies upon the party alleging it. The issue cannot be determined without consideration of the entire corpus of evidence. *Animus dedicandi* can be inferred or presumed from evidence of long uninterrupted user as of right.” (at para. 78)

105. At para. 85, Whelan J. continued:

“85. At issue is whether the appellants established a public right of way which can be inferred from indirect evidence of dedication. The onus rests with the appellants to show that the evidence adduced was sufficient to lead the trial judge to a conclusion that on the balance of probability the owner of the property dedicated a right of way over his lands to the public.”

86. There are three distinct elements to be satisfied;

- i. Evidence of user by the public as of right of the way over the owner's land.*

- ii. *Evidence from which an inference of dedication to the public can be made. Dedication is implied where an intention to devote the way over the land is clearly manifested by the conduct of the owner. The animus dedicandi is the vital element of every dedication.*
- iii. *Evidence must be adduced to entitle the court to infer and find acceptance by the public of the dedication of the way.*

User alone does not establish or prove the creation of a public right of way rather dedication is the fundamental proof.

87. The trial judge had to determine whether the cumulative effect of all the evidence advanced on behalf of the appellants entitled him to conclude that some owner in fee, being a predecessor in title to the respondent had the requisite intention or animus dedicandi to dedicate the way to the public across his landholding. This is clear from texts such as 'Irish Land Law', Wylie, Fifth Edition, at para. 7.20.

88. Proof of 'user as of right' does not require that the users believe subjectively that they have a right to use the way. The test is objective. In Bright v.

Walker (1834) C.M. & R. 211, a judgment frequently cited in the jurisprudence of England and Wales on this point, at page 219, Parke B. said that the right must be enjoyed 'openly and in the manner that a person rightfully entitled would have used it.' Lord Scott of Foscote in R (Beresford) v. Sunderland City Council [2004] 1 A.C., 889 at page 904 suggested that it is sufficient if the user by the public is 'apparently as of right.'”(emphasis added)

106. As explained by Whelan J. at para. 91, it is not necessary for the claimants to point to any express act of dedication:

“The process is one of inference, drawn from the strength of the probative evidence of user, and the fact that the user was as of right. It is relevant to have regard as to whether the landowner took any steps to, as was stated in Folkestone, ‘disabuse’ the public of their belief that it was dedicated as a public right of way and that they had a right to use the way.”

It is also the case that “[n]o particular duration of user is necessary to establish the dedication of a way as a public right of way”. (at para. 92)

107. In *Bruen v. Murphy* (Unreported, High Court, 11 March 1980), [1980] 3 JIC 1101, McWilliam J. emphasised that *“a public right-of-way cannot be acquired by prescription, although user may provide sufficient evidence to support a presumption of dedication. The user need not be for any particular length of time but it is only evidence of dedication and must be such as to imply the assertion of the right with the knowledge and acquiescence of the owner of the fee.”* Here, the Council do not make the case of long uninterrupted user of plot 202, or that a public right of way existed since time immemorial.

108. At para. 93 of her judgment in *Walker*, Whelan J. cautions that:

“...as a matter of law, the intensity of user or actual numbers availing of the way is not the material test with regard to proof of either user as of right by the public or acceptance by the public of an implied dedication. Rather it must be shown that the way was available to and availed of by the public at large and not merely to a closed category or class of individuals linked to an identified propositus nexus or other personal nexus such as family, employment, servants or tenants of the landowner. Provided a way is proven to be accessible to and used for the benefit of the public generally though the numbers actually availing of the way be low does not preclude a finding of implied dedication of a public right of way.”

109. At para. 98, she describes the judgment of Ó'Dálaigh C.J. in *Connell v. Porter* as “*illustrative of the probative value of adducing clear evidence of maintenance of a lane or pathway at public expense particularly where other evidence in support of an implied dedication is weak, inconsistent or not forthcoming.*” Part of the Council’s case here is that it spent public monies on the repair and maintenance of plot 202 without objection from the defendant. I will return to this issue in due course.

The application of the relevant legal principles to the present case

110. It is against the established jurisprudence on the topic that this Court must assess the Council’s assertion that the trial judge erred in failing to find that, on the balance of probability, the defendant dedicated by inference a right of way over plot 202 to the public.

111. As is clear from its oral submissions, the Council does not vigorously assert on appeal that there was an established public right of way over plot 202 pre-1991. Indeed, it was effectively conceded in the High Court that the relevant time frame commenced post 1991. The Council asserts, however, that what occurred between 1974 and 1991 is relevant in terms of the development of the public right of way now being asserted. It argues that the evolution of the right of way is readily discernible from the changes that occurred in and around Corban’s Lane from 1974 to 20 February 2012. The reason the Council harkens back to 1974 is because of the re-configuration of Corban’s Lane that occurred at that time, namely the pedestrianisation of the narrow carriageway leading to Murtagh’s Corner, and the removal of the boundary wall that ran in front of no. 2 and no. 3 Dara Court. It submits that while not decisive about the establishment of a public right of way, these events evidenced the beginning of the enabling of the public right of way over plot 202 to be acquired. In this regard, the Council points to Mr. MacGearailt’s testimony that the change in the roadway that occurred between the mid-1970s and 1991 was part of the enabling that allowed for the encroachment of traffic over plot 202 that ensued following the

augmentation of the footpath on the northern side of Corban's Lane in 1991 and the consequent narrowing of the roadway.

112. Essentially, the Council advances the following propositions: Firstly, the removal of the boundary wall in 1974 removed a physical barrier that hitherto impeded access onto the defendant's lands. Secondly, the pedestrianisation of the carriageway leading to Murtagh's Corner in the same year inevitably meant that vehicular traffic on Corban's Lane travelling in the direction of Naas had to pass closer to the defendant's property when negotiating the "dogleg" corner at the junction of Corban's Lane and Lough Buí. Thirdly, the construction of the footpath on the northern side of Corban's Lane in 1991 pushed or pivoted vehicular traffic southwards by 2m, thereby causing vehicular traffic to pass routinely over plot 202. The Council's case is that, effectively, the establishment of a public route over plot 202 from 1991 onwards was the inevitable result of the various changes that had taken place in and around the Corban's Lane from 1974 to 1991 (including the construction of the footpath on the northern side).

113. It is submitted that the route trajectory that evolved and developed as a result of those changes accords with the necessity for a member of the public to be able to discern the route that he or she must follow as intrinsic to the exercise of a public right of way, as referred to in *Bland on Easements* (2nd Ed.). Moreover, the Council contends that the public right of way in issue here meets the requirement, as described in *Bland on Easements*, (3rd Ed), that it is a public right of passage "created by actual or inferred dedication by the owner and acceptance by the public..." (at para. 1-69)

114. It argues that there is strong evidence on which this Court can determine that there was, in reality, an *animus dedicandi* on the part of the defendant. It is contended that the defendant's *animus dedicandi*, in part, has its origins in 1991 when the planning permission for the development of an apartment scheme at a location opposite the

defendant's property was granted and which led to the resultant augmentation of the footpath at the northern side of Corban's Lane by two metres. When that augmentation occurred, it resulted in the "creeping" or shift of the flow of the traffic southwards away from the outer boundary of the northern footpath and *per force* encroached onto the subject property. It is the Council's case that in order for the necessary six-metre carriageway width for the passing and re-passing of traffic to operate at that point of the roadway by 1991, the traffic flow had to (and did) migrate southwards and, necessarily, onto, across and over the area of plot 202. In other words, the Council contends that if the two-way traffic capacity that was there up to 1991 was to continue post the augmentation of the footpath, and it had, that two-way traffic would have to (and did) thereafter move southwards and thus traverse plot 202 on an ongoing, prolonged and regular basis thereby establishing the public right of way contended for. The Council specifically points to the fact that the defendant never objected to vehicular traffic passing across his property in this fashion.

115. The Council argues that the two-way vehicular traffic passing across the road at Corban's Lane at plot 202 was regular and not occasional or sporadic, as evidenced, *inter alia*, by the location of two schools in the immediate vicinity of Dara Court.

116. I accept (as clearly did the trial judge) that there was regular two-way vehicular traffic passing and repassing on Corban's Lane both pre-and post-1991 and that that traffic was necessarily pushed southwards towards the defendant's property (plot 202) after the construction of the footpath on the northern side of the Lane. Indeed, it was acknowledged by the defendant himself that vehicular traffic passed over plot 202 when cars were not parked there.

117. That occurrence of vehicular traffic passing over plot 202 of itself of course was not decisive in order for the trial judge to find in favour of the Council. What was required to

be established was the requisite *animus dedicandi* on the defendant's part. It is well established in the relevant case law that the issue is not one of competing use of the lands. The question is whether the defendant's ownership has been displaced. Thus, it is not the case that it is sufficient for the assertor of a public right of way to frame the claim by reference to the use of the relevant lands by the public compared to that of the landowner. The *dedication* to the public must be inferred from the actions of the owner of the fee.

Actions of the defendant contra- indicative of an implied dedication

118. Albeit that there was undoubtedly public user of plot 202 as testified to by a number of witnesses called on behalf of the Council, the trial judge found, essentially, that that evidence did not trump the defendant's assertion of ownership of plot 202 which he found was manifest by the provision by the defendant (and the defendant's predecessor-in-title Mr. Donnelly) of parking for the tenants of nos. 2 and 3 Dara Court and for other patrons of the respective premises and the utilisation of that parking by those persons, as attested to by the defendant and other witnesses, including witnesses called on behalf of the Council and which is borne out by certain photographic evidence. The trial judge also had the defendant's direct evidence of the maintenance works he carried out to the forecourt area, his employment of a security company to patrol and monitor parking in the area on his behalf and the erection of signage on the forecourt. Moreover, the trial judge had evidence of complaints made by the defendant in 2011 about the Council, *via* contractors employed on its behalf, carrying out works on his land. He also had the defendant's evidence that on 17 February 2009 he sent a letter of complaint to Marshalsea Developments, the developers of a shopping centre being built further along Corban's Lane, in respect of an ESB duct or trench that had encroached onto his property. Additionally, he had the letters sent by the defendant to the Council in March 2008.

119. To my mind, the use which the defendant made of his lands up to the CPO/Notice to Treat (and beyond), and his efforts to enforce his beneficial rights to use and enjoyment of his lands and that of his tenants and patrons, call to mind the words of Parke B. in *Poole v. Huskinson* that “*a single act of interruption by the owner [of the fee] is of much more weight, upon the question of intention, than many acts of enjoyment.*” Here, the defendant’s acts were most decidedly not in the singular. The car parking that was constructed on the forecourt of no. 2 and no. 3 Dara Court, the defendant’s efforts to monitor and control that parking, together with the complaints he made in respect of what he considered was unauthorised entry or encroachments onto his property by the Council and others, are entirely consistent with “*steps*” taken by the defendant to “*disabuse*” the public that there was a dedication of plot 202 by the owner, in the manner envisaged by Lord Blackburn in *Mann v. Brodie*, as quoted with approval by Whelan J. in *Walker*.

120. All of this is in the context where it must be borne in mind that the burden of establishing dedication by inference lies on the Council, something that was decidedly to the forefront of the learned judge’s mind as we see from para. 15 of his judgment.

Alleged maintenance and repair of plot 202 by the Council

121. It is of course the case that *animus dedicandi* may be inferred “*from the fact that the way has been maintained and repaired by the local authority*” as per Ó’Dálaigh C. J. in *Connell v. Porter*. Bearing this in mind, I turn now to the trial judge’s treatment of the evidenced adduced by the Council in this regard.

122. At para. 49 of his judgment, the trial judge found that “there was very little reliable evidence” of the Council having carried out cleaning and maintenance works in respect of plot 202. He noted that “no records were produced in that regard”. The trial judge so concluded having heard the evidence of a number of Council employees (past and present), notably Mr. Kirrane, Mr. Reel, Ms. Lyons and Mr. Flynn. It will be recalled that there was

no direct evidence of any maintenance of the forecourt by the Council at any stage. While Stanley McAdam contractors, on behalf of the Council, carried out repairs on plot 202 in 2011, and filled in potholes on plot 201 at that time, Mr. Reel in his evidence accepted that in 2011 the defendant had complained about these works and the encroachment of the works on his property.

123. Notably, insofar as limited real evidence of road maintenance/resurfacing works was given by the Council, the works post-dated the CPO by two years, albeit I acknowledge that the works were done prior to the Notice to Treat, in other words, carried out “in the pre-scheme world”, as described by the Council in its oral submissions. Remarkably, however, no records or documentation were produced in respect of maintenance or repair works having been carried out between 1991 and 2009/2010.

124. In its oral submissions to this Court, the Council described the Stanley McAdam tarmacadam works as “compelling evidence that ought not have been excluded by the trial Judge”. I do not accept that the trial judge excluded the evidence. Rather, he was not satisfied “that the evidence adduced is sufficient to establish that the local authority accepted responsibility for the maintenance, repair and resurfacing of the area in dispute from which the court should infer a dedication...”, (at para. 49). In my view, the trial judge was well entitled to conclude that there was very little reliable evidence from the Council as to works, cleaning and maintenance carried out by its various departments over plot 202 from which the court should infer a dedication by the defendant, in the absence of any direct evidence regarding such works. I see no frailty in the decision of the trial judge in electing not to prefer the Council’s evidence over that of the defendant, in particular where it was accepted by witnesses for the Council that the defendant had complained about the Council carrying out works on his property, and in circumstances where the defendant himself was found to have carried out maintenance works on his property and indeed

employed others to control and patrol the parking of vehicles on the forecourt, all actions which the trial judge was entitled to conclude belied the suggestion that the defendant evinced the requisite *animus dedicandi*.

125. In my view, it cannot be said here, unlike in *Connell v. Porter*, that the maintenance works being relied on here by the Council “*was such a notorious and obvious fact that it would require strong evidence on the part of the owner of the fee to displace the presumption that he must have been aware of it.*” In *Connell v. Porter*, there was evidence spanning some thirty years, including actual records of the work done by the local authority in terms of the paving, lighting, cleaning and the provision of refuse services from which the inference of dedication could be drawn. That is in marked contrast to the present case where the real evidence was confined to two invoices from May 2011.

126. I am satisfied that it was well within the trial judge’s function to assess such evidence as to maintenance and repair as was adduced by the Council “in the context of the entire circumstances and evidence in the case”. His approach in this regard is entirely consistent with the guidance provided by the relevant case law.

127. The trial judge further took account of the fact that there was no attempt by the Council to impose parking restrictions by way of yellow lines or otherwise on plot 202 or any part of it. This was in circumstances where double yellow lines had been laid at Lough Buí and at the northern end of Corban’s Lane in front of the footpath opposite the defendant’s property. Yet no attempt was made pre-2012 to lay such yellow lines in front of no. 2 or on the corner of Lough Buí (i.e. in front of no. 3 Dara Court). On Day 4 of the trial, in the course of Mr. MacGearailt’s cross-examination, in response to a question put by the trial judge as to why double yellow lines were not extended into the area in front of the defendant’s property likely to be considered hazardous for parking, Mr. MacGearailt responded as follows:

“...There possibly was some uncertainty as to the status of that...area...which is probably relevant to...this case...And one would have thought that parking immediate to the left of the end of those double yellow lines would be just as hazardous as parking where the lines are...and I believe on the opposite side of the road, if you were to look at photograph number nine, for instance, that the double yellow line...carries around the corner and continues for some distance. So there is a bit of a disparity there. Normally, if there’s a restriction placed on parking on a bend, one would expect it to be on both sides of the road for more or less the same distance”.

128. In response to the defendant’s counsel’s proposition that the laying of double yellow lines had to stop short of the defendant’s property because the local authority had no entitlement to put double yellow lines over his property and had to stop where it did because that was the boundary to the defendant’s property, Mr. MacGearailt responded *“that’s a possible explanation”*.

129. It is of some considerable import that Mr. MacGearailt testified that he would normally expect restrictions placed on parking on a bend to be placed on both sides of the road. The trial judge noted Mr. MacGearailt’s acceptance that the absence of such double yellow lines on the defendant’s property indicated a possible issue as to ownership of the area in question. In light of Mr. Mr. MacGearailt’s evidence in this regard, it was more than open to the trial judge to conclude that it was likely that “if the authorities believed that the area was a public roadway and/or had been taken in charge, the double yellow line would have been continued into [plot 202]”.

Toleration by the defendant of the public on his lands

130. The Council relies on the fact that the defendant did not complain about or prohibit pedestrians passing along the forecourt and on the fact that he took no steps to prohibit the vehicular traffic that veered onto his lands.

131. The fact that the defendant tolerated intrusions onto his property by either vehicular traffic or pedestrians passing across it is not determinative of the issue in dispute here. As said by the Supreme Court in *Sligo County Council v. Walsh*:

“User by permission of the owner is not user as of right. At the same time, user without express permission is not necessarily user as of right. Whether particular acts of user are to be described as being as of right requires account to be taken of all the circumstances. Acts may be tolerated or indulged by a landowner vis a vis his neighbours without being considered to be the exercise of a right.” (at para. 95)

132. After reference to the *dictum* of Lord Hoffman in *Reg. v. Oxfordshire C.C., Ex. P. Sunningwell P.C.* [2000] 1 A.C. 335 the Court went on to state, at para.96:

*“The cases concerning toleration contain several indications that owners should not be constrained to be ‘churlish’ in the insistence in their own property rights. It would be undesirable and inconsistent with a policy of good neighbourliness if the law were so readily to infer dedication of public rights of way from acts of openness and tolerance that landowners were induced to adopt a fortress mentality. Boen L.J. in a passage in his judgment in *Blount v. Layard* [1891] 2 Ch. 681, (approved by Lord Macnaghten in *Simpson v. Attorney-General* [1904] A.C. 476 at p. 493 and by Lord Atkinson in *Folkestone Corporation v. Brockman* [1914] A.C. 338, at p. 369), proclaimed that:-*

‘...nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and

to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others, under the fear that their good nature may be misunderstood.’’

133. Here, the intrusion in issue related to vehicular traffic on the carriageway veering onto the defendant’s lands when endeavouring to negotiate a difficult bend at the junction of Corban’s Lane and Lough Buí, or pedestrians availing of the forecourt as they made their way to wherever they were going (be it schoolchildren and their parents going to and from school) or other pedestrian use. The use made by pedestrians, as testified to in this case, to my mind, falls into the class of user in respect of which it would be “*churlish*” to suggest that an inference of dedication arose on the part of the defendant, having regard to “*all the circumstances*” of this case. I would make the same observation about the defendant’s toleration of vehicular traffic passing and repassing across plot 202 when no vehicles were parked nose-in on his property at the corner with Lough Buí, particularly having regard to the entire factual matrix in this case and in circumstances where I have upheld the trial judge’s findings regarding the defendant’s continued provision of parking on the forecourt of his premises and the paucity of evidence of the Council having repaired or maintained the area in dispute.

Specific complaints made by the Council

134. Before concluding that the findings made by the trial judge were open to him to make, I had regard to specific grounds of complaint advanced by the Council concerning the trial judge’s treatment of certain evidence. It is to these complaints that I now turn.

Undue reliance on the 1974 planning permission

135. The Council takes issue with the trial judge’s findings regarding the planning permission granted to the defendant’s predecessor-in-title Mr. Donnelly in 1974. It disputes the defendant’s contention that there was planning permission granted on 23 July

1974 for eleven car parking spaces on the basis that the planning permission itself did not refer to car park spaces. It asserts that this is because what was sought by way of development consent was a change of use from a house to flats and a garage to a shop.

136. In its submissions to the Court, the Council concedes that Mr. Willoughby (for the Council) acknowledged in evidence in the court below that Mr. Donnelly had been granted planning permission for eleven cars. The Council submits, however, that it was wrong for the High Court (and would be wrong for this Court) to interpret the planning permission in terms of the subjective view of Mr. Willoughby given that the planning permission itself does not refer to car park spaces. It is submitted that the height of the matter was that the planning permission merely indicated that eleven car park spaces were available. The Council relies on Ms. Lyons' characterisation of the 1974 planning permission application drawings as "schematic drawings" which did not bear out the reality on the ground as far as car parking is concerned. She testified that the reality accorded with what Mr. McGearailt had indicated on the drawing done by him, namely that there was car parking space on plot 201 for eight vehicles parked nose in at no. 2 Dara Court and for one car parked parallel at no. 3, all of which car parking was entirely outside of plot 202 over which traffic was regularly running.

137. The Council's position is that the indicative drawing of eleven parking spaces provided in support of the application for planning permission in 1974 for change of use of the Dara Court property made by the defendant's predecessor-in-title was not a grant of planning permission authorising such an area as a car parking area, and no individual car parking spaces ever existed except as an open unregulated area available for car parking.

138. The defendant submits that the Council is incorrect in asserting that the 1974 planning permission did not provide for eleven car parking spaces and says there is no merit in the Council's observation that the parking at the front of nos. 2 and 3 Dara Court

is unmarked: the fact that it is unmarked does not make it any less the defendant's land. It is submitted that these spaces were in fact conditioned in the planning permission.

139. I am satisfied, contrary to the Council's submission, that it was open to the trial judge to proceed on the basis that the planning permission provided for car parking. As is clear from the judgment, the trial judge had the benefit of the relevant planning file (albeit it was somewhat incomplete) including the planning application sent in May 1974 and the drawings which accompanied it which provided for 11 car park spaces. Moreover, the request for additional information made in the planning authority's letter to Mr. Donnelly on 15 July 1974 included, *inter alia*, a request for "one block plan, plans, and elevations showing the various proposals in relation to each other and showing clearly parking proposals and other ancillary requirements". (emphasis added) The planning permission granted by Naas UDC on 26 August 1974 was on the condition, *inter alia*, that the development was to be completed strictly in accordance with the plans and particulars lodged with the application. While the planning permission that was granted by order of the Minister for Local Government on 25 August 1975 was subject to a different condition (namely restricting the number of dwellings in the house to six) than the conditions that had pertained to the 26 August 1974 permission, the recital to the grant dated 25 August 1975 clearly references "the plans and particulars" which had been lodged with the Council. In my view, there was sufficient material before the trial judge for him to conclude, insofar as he did, that car parking for eleven cars had been sanctioned by the terms of the planning permission that had been granted to Mr. Donnelly.

140. In any event, the case was never made by the Council that car parking did not take place on the forecourt of no. 2 and no. 3 Dara Court. Furthermore, the trial judge had the direct evidence of the defendant and witnesses called on his behalf in relation to such parking. He was satisfied that that parking entitlement was exercised by the defendant and

his tenants and others within the perimeter of the defendant's title boundary, irrespective of how haphazard that parking may have been on occasions on the tarmacadamed area, and irrespective of the fact that the parking had never been delineated in the manner originally suggested in the drawing which accompanied the 1974 planning application.

Alleged failure of the trial judge to take proper account of photographic evidence

141. The Council submits that this Court can glean from aerial photographs taken over a period of time the extent of the two-way traffic over plot 202 by members of the public such that the Court should then conclude that the trial judge erred in his treatment of the aerial photography which the Council tendered in evidence. Reliance is placed by the Council on a number of such photographs as indicative of two-way vehicular traffic passing and re-passing over Corban's Lane, including plot 202 and the extent to which parking occurred on the forecourt of the defendant's properties, in particular at no. 3 Dara Court.

The aerial photographs

142. It is common case that the aerial photographs adduced in evidence in the court below capture both vehicles travelling on the carriageway and indeed vehicles parked on the forecourt of no. 2 and no. 3 Dara Court.

143. An aerial photograph from 1973 shows two schools in the vicinity of the disputed area which, the Council says, necessarily indicates a degree of public traffic to and from the schools. This photograph also shows the wall on the outer limit of the defendant's property the removal of which by Mr. Donnelly, the defendant's predecessor-in-title, in 1974 improved the sight line at the junction of Corban's Lane and Lough Buí. It is not possible, however, (possibly due to the quality of the photograph) to identify the boundary wall to the defendant's properties which abutted Corban's Lane and which, it is accepted, was in existence until its removal in 1974 by Mr. Donnelly. A photograph from 1986

depicts the change in the direction of the roadway which occurred in 1974 when Murtagh's Lane was closed off to traffic, the result of which was a change in the configuration of Corban's Lane by dint of the coming into being of the "dogleg" at the corner of Lough Buí and Corban's Lane. Prior to that, traffic had moved along Corban's Lane in a straight line onto the narrow carriageway that led to Murtagh's Corner. After the latter was closed off in 1974 (and the carriageway became a pedestrian route into the centre of Naas), the traffic along Corban's Lane was then confined to traversing the "dogleg" bend at Lough Buí. This change is referred to by the trial judge at para. 26 of his judgment.

144. A photograph from July 1991 shows the garden at no. 1 Dara Court (the Ellis garden) the walls of which protruded outwards, the latter location being regarded consequently as a "pinch point"

145. A photograph from May 1994 depicts Dara Court and again shows the protrusion of the Ellis garden. Two cars can be seen in this photograph one of which is parked parallel to no. 3 Dara Court. As we have seen, it was accepted that if a car was parked nose in at no. 3 Dara Court it would diminish part of the carriageway available for two-way traffic at the corner of Lough Buí. This photograph also shows a central white line visible beyond the Lough Buí corner which, the Council maintains, is an indicator that the entirety of the carriageway on Corban's Lane was capable of allowing for vehicular traffic in both directions. The Council's position is that given the existence of the central white line beyond Lough Buí, albeit there was no similar white line on Corban's Lane at that point in time, there is no reason to suppose that there was not a similar capacity for two-way traffic on Corban's Lane itself, especially given the fact that there are two schools situate in the area.

146. In photographs from June and December 1995, respectively, cars can be observed parked nose-in at the front of no. 3 Dara Court. There are also cars parked nose-in at no. 2.

The central white line is again visible beyond Lough Buí, indicating that the road was intended for two-way traffic. It is again submitted by the Council that there is nothing to suggest that as one comes from the Lough Buí corner onto Corban's Lane that the road is anyway less narrow than the roadway beyond Lough Buí on which the central white line appears.

147. A photograph from December 1996 shows the continuing presence of the Ellis garden protruding outwards. Six cars are shown parked nose in at no. 2 Dara Court with no cars visible at no. 3. This photograph now shows a central white line extending somewhat from the Lough Buí corner onto Corban's Lane. Again, the Council submits that this is an indication of traffic management on behalf of the Council including the traffic which was then passing across plot 202.

148. A photograph from August 2001 shows three cars parked nose in at no. 2 Dara Court and a van parked parallel outside no. 3. In a photograph from September 2002, the garden at the Ellis property (no. 1 Dara Court) can again be observed. There is no longer any central white line visible on Corban's Lane itself albeit there is a remaining white line visible on the carriageway beyond the Lough Buí corner. The photograph depicts a vehicle parked parallel to no. 3 Dara Court. An aerial photograph from February 2003 (largely in shadow) shows a vehicle parked at no. 2 Dara Court and another parked nose-in at no. 3 some distance from the corner. In the course of his evidence, with reference to the aerial photographs, Mr. MacGearailt opined that parking at no. 3 Dara Court "*if it happens...is occasional and it is often parallel*".

149. Photographic evidence from April 2007 (one month prior to the defendant's acquisition of no. 3 Dara Court) shows five cars parked nose in outside no. 2 Dara Court and one car parked nose in at no. 3 Dara Court at its eastern corner. There is no centre white line visible on Corban's Lane in this photograph. In his evidence Mr. MacGearailt

surmised that it was reasonable to assume that a decision had been made by the Council not to reinstate the centre white line. However, the trial judge (quite properly in my view) noted that he had no direct evidence to suggest why it was not re-instated. A photograph from September 2009 shows a couple of cars parked nose-in outside no. 2 Dara Court.

150. A photograph of the locus in 2013 shows that by this stage the front garden in front of no. 1 Dara Court has been removed. A series of yellow lines now appear on the roadway in front of all three properties i.e. nos. 1, 2 and 3 Dara Court and hatched yellow lines are visible in front of all the properties. This is, of course, the post both the CPO and the Notice to Treat.

Other photographic evidence

151. The Council also produced a series of photographs which were taken by Ms. Lyons in September and November 2009. They show various “Private Parking” type signs on the wall of the buildings at Dara Court. (The evidence of the defendant in the High Court was that there were such signs on the wall prior to 2009). Some of these photographs show cars parked parallel to no. 3 Dara Court and number of cars parked nose-in outside no. 2.

152. The Council further rely on a series of “google” photographs from 2009 – 2011 which, it asserts reflect, by dint of the varying shades of tarmac that the photographs depict, the outer reaches of the defendant’s property, the width of the carriageway and the footpath on the northern side of Corban’s Lane. It is said that photographs from 2011 show the works carried out in the area by Stanley McAdam Contractors in 2011 on behalf of the Council.

153. Various other photographs were also produced at the trial by the parties. Photographs from January 2007 depict cars parked nose-in in front of no. 2 Dara Court Photographs from November 2008 and from 2009 show six cars parked in the same manner at no. 2 Dara Court and one car parked parallel at no. 3 Dara Court. The

defendant's properties are depicted with "No Parking" and "Private Parking" signs. A photograph from February 2013 shows the area post the removal of the Ellis garden in 2012 and shows a series of hatched yellow lines running across the front of Dara Court on the northern side of Corban's Lane.

154. Photographs dating from June 2018 were also presented by the defendant at the trial of the action. They show a central white line then visible on Corban's Lane. They depict the defendant with hoarding placed at or about the middle of the carriageway in the vicinity of nos. 2 and 3 Dara Court, the point which the defendant maintains is the outer boundary of his property as per his title. The outer boundary is some 4.8 metres from the face of the buildings located at nos. 2 and 3 Dara Court. The Council regards this as an artificial exercise on the part of the defendant. It contends that while it may reflect his title and that of his predecessor-in -title, it does not reflect the reality on the ground.

155. At para. 4.4 of its written submissions the Council claims that the trial judge erred in deciding the case by preferring the defendant's eye witnesses and in failing to give any proper regard to the "real evidence" contained in the aerial photographs. It is submitted that in the manner he treated such evidence, the trial judge "ignored the stark reality that there was continuing two-way traffic on Corban's Lane over prolonged periods of time from 1974 and more particularly from 1991 up to February 2012 on plot 202..." Citing the *dictum* of Edwards J. in *The Leopardstown Club Limited v. Templeville Development Limited* [2010] IEHC 152 that "...real evidence is evidence that the Court or other Tribunal of Fact can scrutinise or examine for itself..." , the Council submits that this Court is in as good a position as the trial court to examine the photographs. The defendant does not gainsay that this Court can scrutinise "real evidence" but submits that caution must be exercised when the Court is invited to accept that an aerial photograph "speaks for itself" as an indication of road use in relation to moving vehicles.

156. The defendant rejects the Council's claim that the trial judge failed to properly assess the aerial photographic evidence. He submits that insofar as the Council asserts that these constituted "real evidence", that is not necessarily the case.

157. It will be recalled that the trial judge did not place any great weight on the representational drawings that had been submitted on behalf of the parties in the parking available on the forecourt of nos. 2 and 3 Dara Court. At para. 48 of his judgment he opined that as with "historical photographs and tarmacadam lines" placing reliance on the drawings involved "a number of underlying propositions and/or variables which cannot be definitively established or indeed eliminated and are produced on the basis of propositions which are not necessarily or uniformly consistent with the reality of the use of the area for parking as described by other credible witnesses". While the trial judge made that observation he did in the course of so doing allude to photographic evidence, I do not consider, from a reading of the judgment as a whole, that he was necessarily dismissive of all the aerial photographs that were tendered at trial. He certainly had regard to aerial photographic evidence (and indeed mapping evidence) when he concluded that it "was clear from the evidence, the maps and the photographs that the traffic using Corban's Lane faced a difficult junction where it met Lough Buí ..." (at para. 36) That observation by the trial judge referred, of course, to the continuing *physical* impediment that the junction constituted to smooth traffic flow.

158. The trial judge also took account of an aerial photograph from 2007 when noting Mr. MacGearailt's observation that the double yellow lines that the Council had placed on Corban's Lane further along from and opposite the defendant's properties and which had not been continued into the area in front of the defendant's properties notwithstanding the traffic hazard at no. 3 Dara Court where Corban's Lane met Lough Buí. From Mr. MacGearailt's expert testimony aided by the photographic evidence, the trial judge had a

reasonable basis to conclude at para. 43 that “if the authorities believed [plot 202] was a public roadway and/or had been taken in charge, the double yellow lines would have been continued into this area”.

159. As referred to earlier, the Council relies, *inter alia*, on the aerial photographs to show the presence of two schools in the vicinity of Corban’s Lane in aid of its submission that it was a busy traffic area. Adducing the aerial photographs for this purpose is not problematic. However, the Council’s reliance on the photographs in aid of its submission that there was continuous two-way traffic passing and repassing over Corban’s Lane (including plot 202) is not as straightforward as putting the photographs forward as evidence of physical structures on the ground. In the case of the vehicular traffic on the carriageway, the photographs capture only a moment or period in time. They were taken at 5,000 feet above ground on unnamed times of the day and at various intervals of months or years over a time span of forty years. Indisputably, as far as traffic flow or the volume of traffic is concerned, each photograph captures only a moment in time. Furthermore, in my view, these photographs cannot reasonably be considered as evidence of the actual width of the carriageway or indeed indicative of the outer limits of the defendant’s boundary. Presumably, this is what the trial judge had in mind on when he made his remarks about “historical photographs” at para. 48 of his judgment. What the aerial photographs do not show (either in respect of two-way traffic on the carriageway, or indeed in relation to parking on the forecourt of Dara Court) is what is happening when photographs were not being taken. They could not therefore be said to speak for themselves, to paraphrase Edwards J. in *The Leopardstown Club Limited v. Templeville Development Limited*.

160. I agree with the defendant’s submission that what is represented by the aerial photography is not sufficient for this Court to arrive at a different conclusion to that of the trial judge on the issue of a public right of way over plot 202. Specifically, the

photographs do not prove that there was no parking at no. 3 Dara Court, and, most decidedly, do not prove the asserted public right-of-way. Indeed, it is noteworthy that some of the photographs adduced in evidence show cars parked nose in at no. 3, a scenario consistent with both the defendant's title, and his evidence that parking was availed of in front of both his properties. Indeed, it is accepted by the Council in its submissions to this court that cars did park nose-in at the corner with Lough Buí albeit the Council says this mode of parking was infrequent.

161. To my mind, there is no question but that the trial judge carefully assessed the evidence of all witnesses who gave evidence by reference to photographs. He concluded, however, that certain photographic evidence was not determinative of the issues he had to decide. As already referred to, the trial judge clearly found certain photographic evidence of assistance albeit this evidence *of itself* may not have been determinative. I am also satisfied that the the trial judge was entitled to afford preference to certain other evidence including oral testimony be that in conjunction with photographic evidence or otherwise when he came to the weighing exercise he clearly engaged upon.

The alleged “complete discounting” of Mr. MacGearailt’s evidence

162. One of the complaints the Council makes in the appeal is that the trial judge did not take any proper account of Mr. MacGearailt’s evidence. It contends that when the trial judge discounted the drawings done, respectively, by Mr. MacGearailt and the defendant’s engineer, Mr. Furey, in relation to car parking spaces on the defendant’s property the discounting of that evidence “appears to have the unwarranted effect” of the trial court completely discounting the expert testimony of Mr. MacGearailt in relation to map A1-001A which was based on agreed dimensions on a map dated 6 February 2015 as had been agreed between Mr. MacGearailt and the defendant’s then engineer, Mr. Moran. The Council further contends that the trial judge, unwittingly or otherwise, also discounted Mr.

Mac Gearailt's analysis of the aerial photography. I have dealt above with the issue of the aerial photographs.

163. While it is the case, as I have already alluded to, that the trial judge discounted both Mr. MacGearailt's and Mr. Moran's "parking maps" for the reasons he stated at para. 48 of his judgment, I am not persuaded that that had the consequence of the trial judge completely discounting other testimony adduced by Mr. MacGearailt.

164. Mr. MacGearailt's evidence, both in respect of the Corban Lane carriageway and the footpath installed in 1991 and the volume of traffic on Corban's Lane, is carefully summarised by the trial judge at paras. 38-45 of his judgment.

165. At para. 45, the trial judge clearly references map A1-001A. He also clearly understood the tenor of the evidence given by Mr. MacGearailt based on that map, namely that the available carriageway between the kerb of the footpath on the northern side of Corban's Lane and the northern border of plot 201 (synonymous with south border of plot 202 on map A1-001A) was some 7-8m decreasing to 6-7m as one moved eastwards. As noted by the trial judge at para. 45, that evidence contrasted with the defendant's contention that the area was used for car parking. The trial judge also had Mr. Willoughby's estimated width of Corban's Lane of 6m, tapering to between 5 and 5.5m at no. 1 Dara Court. He also noted that Mr. Reel had claimed that the "metalled carriageway" was 6m. He further noted that the Schedule to the 1978 Roads Register had given the width of Corban's Lane as 4.57m (which the trial judge took as indicating the average width of the Lane at that time). The trial judge therefore had myriad evidence regarding the capacity of Corban's Lane for two-way traffic. It would appear that he did not find the various maps and measurements decisive of the issue before him save to the extent that he concluded from the measurements recorded in the Schedule to the 1978 Roads Register that "the width of 4.57metres as recorded in the schedule of what was said to have been taken in

charge must be regarded as an average width for the length of the lane but also as defining a much narrower road than the one now claimed to exist” and his conclusion, at para. 41, that before the insertion of the footpath at the northern side of Corban’s Lane “there was adequate carriageway...for the carriage of two lanes of traffic with some difficulty which required caution at the intersection of Corban’s Lane and Lough Buí” and which was heightened when parking took place on the defendant’s property.

166. At the end of the day the trial judge preferred the testimony of the defendant, and the defendant’s witnesses, Mr. Murphy and Mr. Thomas on the issue of user of plot 202, albeit he accepted that that user “did not prevent vehicles from driving over [plot 202] or pedestrians from walking over it”. (at para. 65) As already discussed earlier in this judgment, the trial judge did not find the defendant’s acquiescence in the flow of traffic onto his lands which was forced on him by the actions of the local authority in constructing the footpath on the northern side of Corban’s Lane “could in any sense be regarded as a dedication ...as a public right of way”. (at para. 65), a finding which I am satisfied was open to him to make for reasons earlier set out.

167. To return to the Council’s complaint about the trial judge’s treatment of Mr. MacGearailt’s evidence. For the reasons set out above (including the findings I have earlier made in relation to the trial judge’s treatment of photographic evidence), I am satisfied that Mr. MacGearailt’s evidence was duly weighed and considered by the trial judge, including the conclusions Mr. MacGearailt drew from his analysis of map A1-001A. The fact that the trial judge drew his ultimate conclusions by relying on other preferred evidence does not, on any reasonable analysis, lead to the conclusion that the trial judge did not properly consider Mr. MacGearailt’s evidence in relation to the map in question or the other evidence he gave. Incidentally, I note that on Day 3 of the hearing in the High Court, Mr. MacGearailt himself queried the value of the exercise he and Mr. Moran had undertaken in

February 2016 based as it was on measurements that were taken “post the widening works” that had taken place since the CPO/Notice to Treat.

Alleged failure of the trial judge to distinguish between plot 201 and plot 202

168. Another of the Council’s appeal grounds is that the trial judge failed to draw any distinction between plot 201 and plot 202. It is submitted that this is in circumstances where the Council’s witnesses’ testimony clearly distinguished between the two plots albeit that the defendant’s witnesses did not address that distinction.

169. I do not consider that the trial judge’s failure to distinguish between plot 201 and plot 202 is of any consequence. It is undoubtedly the case that the Notice to Treat distinguishes between the two plots and that Mr. MacGearailt (using historical aerial photographs and the 1974 planning permission) sought to distinguish between the two plots by way of the provision of drawing DC-CPO-12, which was adduced in aid of the Council’s contention that such parking spaces as were available on the defendant’s lands were located within plot 201. As we have seen, the trial judge rejected Mr. MacGearailt’s drawing in this regard on the basis that it was dependent on “underlying propositions and/or variables which cannot be definitively established...and are produced on the basis of propositions which are not necessarily or uniformly consistent with the reality of the use of the area for parking...”, (at para. 48).

170. Indeed, I would observe that the frailties in Mr. MacGearailt’s exercise are in any event evident from his concession, under cross-examination, that some of the vehicles (where he took the average length of vehicles as 4m to 4.8m) represented on his drawing as located in plot 201 nevertheless protruded onto plot 202. He also accepted that the length of motor vehicles could differ. Thus, even on Mr. MacGearailt’s representational drawing, car parking on the forecourt of no. 2 and no. 3 Dara Court at plot 201 necessarily occupied plot 202.

171. The issue for determination by the trial judge was whether the requisite *animus dedicandi* on the defendant's part could be inferred in respect of user of that portion of his lands which the Council labelled plot 202. The defendant testified to his user of plot 202 by dint of the provision of parking for his tenants at no. 2 and no. 3 Dara Court. The trial judge accepted that evidence and was satisfied "that there was a considerable area within the boundary defined by the title held by the [defendant] in which parking habitually occurred during the relevant period" (at para. 64), a finding he was entitled to make, in my judgment, once he accepted the evidence tendered by the defendant, Mr. Murphy and Mr. Thomas. The trial judge rejected the Council's claim that an inference of *animus dedicandi* could be drawn merely because vehicles passed over plot 202. Moreover, the issue of user apart, the trial judge, for the reasons he set out (and which I have upheld) was not satisfied that sufficient evidence of maintenance and repair of the disputed area had been adduced by the Council such as might have offset any deficiencies in user, or otherwise infer the requisite *animus dedicandi*.

Summary

172. As I have already observed, it is clear from his judgment that the trial judge listened carefully to the witnesses. It is also clear that he understood the substance of each witness's evidence and that he summarised the evidence given at the trial in a manner which is entirely appropriate. He weighed the respective witness testimonies and, where he felt it appropriate, took account of "real evidence". In my view, he gave clear reasons as to why he came to his decision and he had a sufficient evidential basis upon which to arrive at that decision. That being the case, it is therefore no function of this Court to deconstruct the judgment of the High Court and to reconstruct it to reflect what the Council submits should be the findings on the asserted public right of way. For the reasons explained in *Hay v. O'Grady*, this Court is precluded from so doing.

173. Here, there was not any huge volume or weighty testimony against the defendant's testimony as to how he used plot 201 and plot 202. Rather, there was a succession of recollections by witnesses called by the Council, including past and present employees of the Council and a couple of members of the public. As can be seen from a perusal of the High Court transcripts (and the judgment under appeal) some of these witnesses gave qualified evidence and indeed some retreated under cross-examination in certain regards in respect of aspects of their testimony.

174. There was very little real evidence adduced by the Council. The key evidence in this case was oral recollection all of which was weighed against the oral evidence given by the defendant and his witnesses. As said by McCarthy J. in *Hay v. O'Grady*, "*an appellate Court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial Judge.*"

175. I am satisfied that the findings and conclusions of the trial judge accord with the observations of Clarke J. (as he then was) in *Doyle v. Banville* [2012] IESC 25, [2018] 1 IR 505. As he was required to do, the trial judge engaged with the key elements of the case made by both sides and explained why one or other side was preferred, and, in the words of Clarke J. in *Doyle v. Banville*, came to "*a reasoned conclusion as to why one version of those facts is to be preferred*". To further quote Clarke J.:

"It is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever

terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides”.

176. Here, there was no “*significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts*” which might warrant the intervention of an appellate court. Rather, “*the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason.*”

177. For all of the reasons set out above, I would dismiss the appeal and affirm the High Court Orders.

Costs

178. As the Council has not succeeded in the appeal on any ground, it follows in my preliminary view that the defendant should be entitled his costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

179. As this judgment is being delivered electronically, Whelan J. and Pilkington J. have indicated their agreement therewith and the orders I have proposed.