

THE HIGH COURT

[2025] IEHC 47

Record No. 2021 3673P

Between

**PATRICK HARNETT, OLIVE HARNETT, LUKE HARNETT, BELINDA HARNETT, NEIL
HARNETT and FRANCIS J MURPHY**

Plaintiffs

and

BROADREACH INVESTMENTS LIMITED

Defendant

Judgment of Mr. Justice Conor Dignam delivered on the 30th day of January 2025

INTRODUCTION

1. These proceedings concern a claimed right of way in favour of the plaintiffs' lands over the lands of the defendant.

2. The defendant is the owner of a property called Bellinter House. It has operated as a hotel for a number of years (approximately eighteen years). Prior to that it was owned by the Sisters of Sion religious order since 1966, who operated it as a retreat and education centre. It has a number of acres of land attached to it and has a gated entrance and a driveway. It was originally part of a much larger holding (Bellinter estate) before the estate was divided by the Land Commission in 1965. The plaintiffs are the owners of parcels of lands which were originally part of the estate before it was divided. They are all members of the same family. The first and second-plaintiffs are a married couple. The third and fifth-named plaintiffs are their adult children. The fourth-named plaintiff is married to the third-named plaintiff. The sixth-named plaintiff is the executor of the estate of Mr. Luke Harnett Senior, the first-named plaintiff's father. For ease of reference, where necessary, I will refer to the first to fifth-named plaintiffs by their first names.

3. The background to the dispute is as follows. From 1954 to 1965 Luke Harnett Senior was the steward of Bellinter estate. He lived in the Steward's House. In 1965, the Land Commission divided up Bellinter estate into several folios under the provisions of the Land Purchase Acts. Luke Harnett Senior purchased 32.435 hectares of lands by way of a Purchase Agreement. The lands consisted of agricultural land with yards and outbuildings together with the Steward's House and its outbuildings. The plaintiffs were put on proof of this purchase in the Defence but this was not pushed at trial. These lands were contained in Folio 4496F ("the Original Folio").

4. The defendant's lands are contained in Folio MH47334F. For convenience I will refer to them as "Bellinter House".

5. On the 21st April 1978, Luke Harnett Senior carved approximately 0.84 hectares out of the Original Folio and transferred them to the first and second-named plaintiffs. They now contain the first and second-named plaintiffs' home. The lands are contained in Folio MH6853F. The first and second-named plaintiffs are the registered owners. I will refer to them as "Patrick and Olive Harnett's lands", "Patrick and Olive's lands", or "Patrick and Olive's house".

6. On the 3rd March 1983, Luke Harnett Senior transferred the farm to Patrick Harnett. The farm formed the bulk of the lands in the Original Folio but were carved out of that Folio and are now contained in Folio MH14190F. These lands are essentially the agricultural lands together with yards and outbuildings adjacent to the Steward's House. They consist of approximately 31.57 hectares. Patrick Harnett is the registered owner. I will refer to these lands as "Patrick Harnett's lands", "Patrick's lands", or "the farmlands".

7. On the 24th February 2009, Patrick Harnett carved approximately 0.4 hectares out of the farmlands and transferred them to Luke and Belinda Harnett. They were carved out of Folio 14190F and are now contained in Folio MH6279F. They contain the third and fourth-named plaintiffs' house. I will refer to them as "Luke and Belinda Harnett's lands", "Luke and Belinda's lands" or "Luke and Belinda's house".

8. Finally, on the 7th April 2009, Folio MH64459F was carved out of the farmlands, i.e. Patrick Harnett's lands, and transferred to Neil Harnett. These lands comprise approximately 0.41 hectares. Planning permission was granted for the construction of a house. I will refer to this as "Neil Harnett's lands" or "Neil's lands".

9. Patrick Harnett appears to be the beneficial owner of the Steward's House under the will of Luke Harnett Senior. I refer to this further below. I proceed on that basis.

10. Thus, the effect of these dealings is that the Original Folio consists only of the Steward's House (and stables and outhouses attached to it), and there are now four other Folios, one consisting of most of the original agricultural lands including yards and agricultural buildings

(those yards and agricultural buildings are on Patrick Harnett's lands but are adjacent to the Steward's House), one consisting of Patrick and Olive Harnett's house, another consisting of Luke and Belinda Harnett's house and the fourth consisting of Neil Harnett's lands.

11. As noted above, the Steward's House lands have stables and outbuildings. I will simply refer to it as the Steward's House. It is now rented to tenants.

12. The plaintiffs refer to all of these parcels of lands collectively as the "Harnett Family Land".

13. The relevant point of contact between the lands owned by the plaintiffs and Bellinter House is the Steward's House.

14. The Sisters of Sion transferred ownership of Bellinter House to Mr. Jonathan Bourke, Eoin Foyle and John Reynolds on the 20th May 2004 and, following renovations, it opened as a hotel, known as Bellinter House Hotel in late 2006. They transferred ownership to the defendant on the 31st March 2016 and the defendant was registered as owner of Bellinter House on Folio MH47334F.

15. I will deal with the evidence in greater detail below but, in summary, the plaintiffs claim that prior to the subdivision of Bellinter estate there were three entrances to the Steward's House and the farmlands: one through the main gate and along the main avenue of Bellinter House; another from essentially the other side of the estate at Bellinter Bridge; and a third which was closed by the Land Commission. The entrance from Bellinter Bridge runs through the farmlands which were transferred to Luke Harnett Senior by the Land Commission (and subsequently to Patrick Harnett).

16. All of the above facts are agreed or, in the case of the original purchase by Luke Harnett Senior, are not seriously disputed.

17. The plaintiffs also claim that prior to the sub-division of the estate, the entrance along the main avenue of Bellinter House was used for all purposes both domestic and agricultural and the Bellinter Bridge entrance was solely used for agricultural purposes.

18. They claim that since the purchase by Luke Harnett Senior the main avenue of Bellinter House has always been the primary means of access to the Steward's House and, through it, the adjoining agricultural yard and outbuildings on Patrick Harnett's lands used by the plaintiffs and visitors to the properties. They also claim that it has been one of the means of access to the rest of the farmlands and the four folios and that the owners of those lands enjoy a right of access (paragraph 4 of the Statement of Claim).

19. The following is also not in dispute.

20. In August 2019, issues arose about the entrance into the Steward's House being blocked by the cars of guests attending weddings in the hotel. This was raised with the general manager of the hotel.

21. In January 2020, solicitors on behalf of the defendant wrote to Patrick Harnett expressing concern about, inter alia, the use by him and the tenants of the Steward's House of Bellinter House's main avenue to access the Steward's House. The letter also stated that they did not have permission to enter any part of Bellinter House lands unless they were visiting the hotel. The letter called on them to cease and desist. The suggestion that there was no right of way was challenged by the sixth-named plaintiff acting in his capacity as solicitor for Patrick Harnett in February 2020.

22. Then in late August/early September 2020 there was an exchange of correspondence between solicitors for Patrick Harnett and solicitors for the defendant in which a right of way over the main avenue of Bellinter House was asserted and was disputed by the defendant's solicitor.

23. On the 5th September 2020, the defendant commenced installing a metal barrier at the gateway to the Steward's House. After some discussion, the defendant did not proceed with its installation, pending discussion between the solicitors. There was then a further exchange of correspondence, with both sides reserving their rights.

24. On the 1st April 2021, the defendant placed a chain and two locks on the gates of the main entrance to Bellinter House. There was reference to this being in order to secure a temporary discount on insurance premium in light of the fact that the hotel was in Covid-19 lockdown. In any event there was further correspondence between the solicitors and, ultimately, the code to the lock was provided to the plaintiff on a temporary basis pending advice from Senior Counsel in respect of the existence of a right of way. Again the parties reserved their rights.

25. On the 7th May 2021, solicitors for the defendant wrote to confirm that they had received an opinion from Senior Counsel to the effect that there was no right of way in favour of the first-named plaintiff and that the temporary consent to user was being revoked and that all use of Bellinter House was to cease including for '*access, walking and exercising dogs and leaving refuse bins for collection*'. The solicitor for Patrick Harnett had previously obtained a joint opinion of Junior and Senior Counsel which concluded that the first-named plaintiff had a right of way of necessity or by prescription and had provided that to the defendant.

26. On the 11th May 2021, the defendant erected a wooden shed across the gate leading into the Steward's House. This had the effect of blocking the use of this gate.

27. The plaintiffs instituted these proceedings on the 12th May 2021 and applied for an injunction. It appears that the injunction application was compromised between the parties without prejudice to their respective positions and the proceedings then progressed to hearing.

THE SUBSTANTIVE PROCEEDINGS

28. The proceedings were instituted by Plenary Summons and a Statement of Claim was delivered on the 25th June 2021. I understand that proceedings had earlier been issued on behalf of Patrick Harnett only.

29. In their Statement of Claim, the plaintiffs claim they have right of way pursuant to section 34 of the Land Law (Ireland) Act 1896, by prescription, pursuant to the rule in *Wheeldon v Burrows*, pursuant to the doctrine of non-derogation from grant and/or as an easement of common intention, or as an estoppel easement. These were dealt with in their written submissions. A claim to an implied grant under section 40 of the Land and Conveyancing Law Reform Act 2009 and a claim to an easement of necessity were also raised in the written submissions. These were not expressly pleaded in the Statement of Claim but no objection was raised by the defendant. However, at the hearing no arguments were made in respect of implied grants under the rule in *Wheeldon v Burrows* or section 40 of the 2009 Act or in respect of a right of way through non-derogation from grant. Senior Counsel for the plaintiffs framed the plaintiffs' case as follows:

- (i) that the plaintiffs have a right of way pursuant to section 34 of the 1896 Act;
- (ii) if they do not enjoy a right of way pursuant to that section then they have an easement of necessity or by common intention; and
- (iii) if they do not enjoy a right of way on either of those bases then they have acquired a right of way by prescription.

30. In those circumstances, I will adopt this framework and will only consider the claim under those headings.

31. A Defence was delivered on the 5th August 2021 which is, in effect, a full defence. A number of preliminary objections were also made.

32. At the hearing an issue arose in respect of precisely what right of way was being claimed by the plaintiffs or, more particularly, whether more than one was being claimed. In paragraph 4 of the Statement of Claim a right of way "over the avenue or driveway...from the Harnett Family Land to the public highway L2201" is claimed. A map showing the avenue was attached

to the Statement of Claim. That avenue essentially runs from the main gate of Bellinter House up to Bellinter House, then swings to the right, loops to the left, passes an old schoolhouse and runs to the Steward's House gate. This is the gate that was going to be blocked by the metal barrier and was blocked by the wooden shed. The issue that arose at the hearing was that a claim was then made by the plaintiffs that there was also a right of way off this route, through the courtyard of Bellinter House and in through another gate to the Steward's House lands. Before or just after the avenue swings to the right, a person can turn left into the courtyard of Bellinter House and then through another gate into the Steward's House. While the majority of this route is over the avenue, that part of it which goes to the left and into the courtyard would, if a right exists, be a separate right of way. That is not expressly claimed in the Statement of Claim and the defendant objected to the claim being advanced in circumstances where it was not pleaded. The Statement of Claim only refers to "right" singular. For example, paragraph 4 refers to *"a right of access over the lands comprised in the Folio and, in particular, the avenue or driveway over which said right of way gives access from the Harnett Family Land to the public highway..."* The map attached to the Statement of Claim and referred to in paragraph 4 only marks one route. In paragraph 8 of the Statement of Claim, when dealing with the blocking of the gateway with the metal barrier and the shed, it is pleaded that *"During that time the access to the Steward's House and the adjoining outhouses could only be reached via the rear entrance..."* (i.e., the Bellinter Bridge route) and no reference is made to an alternative route through the courtyard. In the affidavit grounding the application for an injunction Patrick Harnett also only refers to one route. For example, in paragraph 13 Mr. Harnett states *"On the 11th May 2021, the Defendant has erected a wooden shed right across a section of the Avenue just outside the gate entering Harnett Family Land which now blocks the Plaintiffs, the tenants and invitees from coming and going to and from the Harnett Family Land..."* If a right of way through a different gate was also being claimed then it would not be correct to say that the shed *"blocks the Plaintiffs, the tenants and invitees from coming and going to and from the Harnett Family Land"* because, while that right of way might be blocked, the other one would still be available. There was evidence given during the course of the hearing in relation to the use of this other route. However, I am satisfied that the plaintiffs' claim as set out in the pleadings does not include a claim to a right of way through the Bellinter House courtyard. This judgment therefore deals solely with the right of way along the main avenue and around to the right then left to the gates of the Steward's House. I refer to this as "the main avenue". This is not fully accurate as I think it is more correct to describe the main avenue as running from the main gates to Bellinter House itself and then it continues as a roadway or laneway around to the Steward's House. Nonetheless, I will refer to it all as "the main avenue" or "the main avenue of Bellinter House".

33. Two preliminary objections are raised in the Defence. The first is that *"[T]he Plaintiffs' claims in the alternative are such that they obscure and serve to confuse the plaintiffs' claim. The Plaintiffs' claim fails to point to the source of the right of way claimed in respect of each of*

the Plaintiffs' individual Folios." The second is that the Statement of Claim *"fails to identify with any sufficient degree of particularity the basis of the Plaintiffs' claim in respect of each of the Plaintiffs' individual Folios."* Related to these preliminary objections are the pleas in paragraphs 13, 14 and 20 of the Defence that:

"13. The Plaintiffs' have failed to plead with any adequate or appropriate specifically the ownership or occupation of the Plaintiffs' Land for the 50 year period claimed and/or the duration or frequency of the alleged right of way for upwards 50 years both vehicular and by foot for domestic and business purpose without interference or interruption.

14. The Plaintiffs omnibus claim that for upwards of 50 years they collectively, together with their tenants, agents assigns have openly and regularly traversed the Defendant's Property is a pleading which discloses no reasonable cause of action or answer in circumstances where Folio MH6853F was created on 21st April 1978, Folio MH14190F was created on the 3rd March, 1983, Folio MH62792F was carved out of Folio MH14190F on the 24th February, 2009 and MH64459F was carved out of MH14190F on the 7th April 2009.

20. The Plaintiffs have failed to particularise continuous user on behalf of the Plaintiffs' Lands and any such continuous user as is alleged is denied."

34. The factual basis of the plaintiffs' claims could have been stated with greater particularity and certainty, particularly in respect of the Folios which were carved out of the Original Folio, and, most particularly, Patrick and Olive's lands, Luke and Belinda' lands and Neil Harnett's site. The plaintiffs have dealt with all of the lands collectively rather than with the individual Folios. However, it seems to me that if the defendant was not satisfied that it could properly deal with the plaintiffs' claims they could have brought an appropriate motion. Furthermore, the legal bases upon which the right of way is claimed are pleaded in paragraphs 5, 7, 9 and 10 of the Statement of Claim. A right of way by prescription under the Prescription Act is not expressly pleaded in those terms but the facts giving rise to the claim are set out in, inter alia, paragraph 7. It is tolerably clear that the plaintiffs' claim is that all of the Folios which were carved out of the Original Folio benefit from the right of way, if any, attaching to the Original Folio (under section 34 of the 1896 Act, the doctrine of necessity or the doctrine of common intention). That is the primary basis for the claim. It is also tolerably clear that they are making the claim that those other Folios also have a right of way by prescription, either on the basis that the lands from which they were carved had a right of way by prescription before they were carved out and that they therefore continue to enjoy that right of way, or on the basis of their separate continuous user of the access route for the requisite period. I agree that the factual basis for this element of the claim is not adequately pleaded in the Statement of Claim but, as I say, the defendant chose not to bring a motion and, I am satisfied, was perfectly able to address these claims at the hearing.

35. The Defence also denies that the plaintiffs access their lands in the manner pleaded, that there was continuous user (and that the plaintiffs have failed to particularise continuous user), that the Land Commission and Luke Harnett Senior could have shared an intention that the plaintiffs' lands be used for the current purposes, or that section 34 of the 1896 Act applies. It is also pleaded that: (i) the defendant's actions in 2020 and 2021 were by way of an objection to any use by the plaintiffs or their tenants of the defendant's property; (ii) any use by the plaintiff or their tenants "*has at all times been on the basis of consent of the Defendant's predecessors in title and any user is therefore not "as of right"*"; (iii) the defendant also pleads that any right of way enjoyed for the benefit of the Steward's House since 1965 (i.e. section 34, necessity or common intention) has been abandoned and/or impliedly released owing to the substantial alteration and radical change in character or identity of the Original Folio which has resulted in a substantial increase or alteration upon the burden on the Defendant's Property such that any right of way is now extinguished; and (iv) that any right of way "*enjoyed for the benefit of the Steward's House has been abandoned owing to excessive and colourable user*".

36. I will adopt the framework laid out on behalf of the plaintiffs and will consider the claim under those headings. I will then consider the defendant's claims of substantial alteration/radical change, and excessive or colourable use.

SUMMARY OF THE EVIDENCE

37. Evidence was given on behalf of the plaintiffs by Patrick Harnett, Luke Harnett, Carol Cassidy, Raymond Hayes, Gareth Keoghan, Frank Murphy and Brendan Steen. Evidence was given by Bill Landis, Philomena Conroy, Jonathan Bourke, Orla Murphy, Bernadette Everett, Denise O'Brien and Val O'Brien on behalf of the defendant. I have considered all of the evidence given by each of these witnesses. I will deal with aspects of the evidence in greater detail later in this judgment but for now give the following summary of the substance of their evidence.

Patrick Harnett

38. Mr. Harnett said that when he was three years of age his family moved from Limerick to Bellinter when his father took up a position as land steward for Bellinter estate. They lived in the Steward's House at that time and he lived there with his parents until 1977.

39. The Land Commission divided the estate in 1965 and his father bought a farm (83 acres). He said that this consisted of the Steward's House itself, stables, cow byres, haysheds, yards and old buildings, and the farmlands. He did not dispute that in the original Purchase Agreement there was no express mention of a right of way along the main avenue of Bellinter

House notwithstanding that other rights of way or easements had been expressly dealt with in the agreement.

40. The Sisters of Sion arrived in Bellinter House in 1966.

41. Mr. Harnett moved out of the Steward's House in 1977 when he and his wife built a house. This was built on a site (folio MH6853F) carved out of the Original Folio. He and Olive Harnett were registered as owners on the 21st April 1978. He accepted that in Land Commission maps at the time of his site being carved out the only right of way expressly marked on the map was from his site to the Bellinter Bridge entrance.

42. His father farmed the lands up to the early 1980s when he took over the farm. (This involved the creation of a new folio, Folio 14190F, which encompassed all of the lands from the Original Folio, including stables, cow byres, haysheds, yards and old buildings, and the farmlands, other than the Steward's House and its stables and outbuildings and Patrick and Olive's house. This is reflected in Folio 14190F which registers Patrick Harnett as owner on the 3rd March 1983).

43. It was a dairy farm for a good few years after Mr. Harnett took over the farm and they then got into beef farming. He also used to stable some horses for third parties.

44. In addition to the farm they currently operate boarding kennels and a cattery business from the buildings on the lands in Folio 14190F adjacent to the Steward's House. This business started in 1986.

45. He said that there are two routes to the Steward's House: the main avenue and the Bellinter Bridge route. When they moved in and he was living there the Steward's House was always accessed by coming along the main avenue of Bellinter House. He said that over the years the family has improved the Bellinter Bridge roadway but at the time it was really only suitable for agricultural traffic.

46. His evidence was that when his father was farming the lands and later when he took over the farm the Steward's House and the farmlands were accessed by the Bellinter House avenue for domestic and agricultural purposes and the Bellinter Bridge route was also used for agricultural purposes. Mr. Harnett explained that they do not drive a tractor out by Bellinter House anymore and he agreed that the primary access point for agricultural machinery is the Bellinter Bridge entrance but said that they still use the Bellinter House entrance for agricultural uses such as bringing in supplies to the farm and the store. He said that when they originally started the kennels business (in 1986) clients would come in along the main avenue of Bellinter House and that they use both routes now. Under cross-examination, Mr. Harnett confirmed that it was his case that the primary means of access to the Steward's House and the kennels and cattery in the yards of the farmlands is via the front gate and main avenue of Bellinter House.

He confirmed that at the Bellinter Bridge entrance there is a large sign saying "Bellinter Kennels and Cattery" but denied that this is the only access for the kennels and cattery and that both routes were used and they sometimes directed clients to go through Bellinter House

47. His and Olive's house since 1977/78 is approximately half way between the Steward's House and the Bellinter Bridge entrance. Mr. Harnett said that they can access their house either from Bellinter House or from the Bellinter Bridge entrance and that which one they use depends on where they going to or coming from. He also explained that there are a number of gates on the roadway between the Bellinter Bridge entrance and the Steward's House as it goes up through the farm so using this route would involve opening and closing a number of gates.

48. He was asked to deal with a statement by one of the defendant's witnesses that the entrance of the Steward's House was overgrown. He stated that there was never overgrowth prohibiting access in and out.

49. Various photographs were adduced in evidence showing various members of the Harnett family using the main avenue. One photograph showed a sign placed by the hotel on the Bellinter House lands wishing Luke and Belinda Harnett best wishes on their wedding as they left the Steward's House. There were also photos of 'No Parking' signs.

50. His evidence was that he never had a discussion with the nuns of the Sisters of Sion about the use of the main avenue and was never told by anyone to stop using that route.

51. He gave evidence of a conversation with the nuns when they were thinking about selling Bellinter House in which he said to them "*will you make sure that the people that are buying the place know that we have a right of way down through.*" He said that the nuns did not really say anything in response.

52. As discussed above, Bellinter House was sold by the Sisters of Sion in 2004. Mr. Harnett said that he met the new owners around the place several times a year and that he never had a discussion with them about the use of the main avenue though he later said that he told Mr. Bourke about the right of way. He said that he never asked them for permission and that they never told him that he needed permission. He also said that after the works to convert the building into a hotel were completed the owners put 'No Parking' signs approaching the entrance to the Steward's House.

53. He accepted that the owners of Bellinter House had fishing rights on the River Boyne and a right of way across Mr. Harnett's lands for that purpose.

54. Mr. Harnett explained how the defendant renovated an old schoolhouse to convert it into accommodation. This was adjacent to (or jutting into) the Steward's House lands. Between the corner of this building and the claimed entrance way into the Steward's House lands there

was a wall with a farm gate. This ran alongside the route which is claimed as the route of the right of way. During these conversion works this wall and gate were removed and replaced with a wooden fence and a wooden gate. The gate leads into the Steward's House lands.

55. A supplemental affidavit of discovery was delivered by the defendant at the beginning of the hearing. It contained a statutory declaration sworn by a Sister Patricia O'Sullivan on the 15th November 2003, which appears to have been made in the context of an intention to sell the property. She stated:

"1. The property to which this Declaration relates is the property known as Bellinter House, Navan, County Meath (the "property") shown outlined in red on the map attached.

2. I am one of the joint owners of the property and am duly authorized to make this Declaration by the remaining joint owners (together called the "Owners"). The property was acquired by the Owners in 1966.

3. I refer to the driveway outlined on the map attached and coloured yellow (the "driveway"). I say that the Owners of the property have given licence to the Harnett family who own adjoining property (the "adjoining owners") to use the driveway to gain access to their adjoining property since 1966.

4. I say that such use by the adjoining owners has been by arrangement and with the consent and acknowledgement of the Owners. Such use was not continuous and uninterrupted. The Owners closed the main gate at the entrance to the driveway every year at Christmas time.

5. I make this solemn Declaration from facts within my own knowledge and by virtue of the Statutory Declarations Act, 1938, and for the benefit of intended purchasers of the property."

56. It seems this was sent to solicitors acting for Mr. Harnett under fax cover sheet of the 28th November 2003. Mr. Harnett said that he was not aware of this statutory declaration at the time and that it was not brought to his attention by his solicitor.

57. Mr. Harnett also dealt with correspondence between his solicitor and solicitors acting for the Sisters of Sion in 2004. He denied that he ever asked Sister O'Sullivan or any other nun for consent or that the land was used by arrangement as suggested in a letter from the Sisters' solicitor. He also said that nobody ever took issue with their use of the land. He also said that he never found the main gate locked.

58. He said that he was not saying that the main route of access for all of the folios on the Harnett Family Land is along the Bellinter House driveway. When it was put to him that the appropriate route of access for his house, Luke's house and Neil's site is via the Bellinter Bridge entrance he said that that route is in use.

59. Mr. Harnett accepted that the only right of way expressly provided for in respect of the three parcels of land that were carved out of the farmlands (Folio 14190) across those lands was from the respective lands to the Bellinter Bridge entrance and no right of way from the sites to or through the Steward's House was registered.

60. He did not dispute that in the original Land Commission agreement there was no express mention of a right of way along the main avenue notwithstanding that other rights of way or easements had been expressly dealt with in the agreement.

61. Mr. Harnett said that he had never seen the gates locked. When it was put to him that Mr. Bourke, Sister Philomena and a Ms. Bernie Everett would say that the gates were locked every Christmas Day and that Ms. O'Brien would say she has locked them on Christmas Day since 2019 he said that neither of those happened. He said that they used go in and out through the gates on Christmas Day. He also said that the residents in the Steward's House always go in and out through the gates on Christmas Day.

62. He explained that the nuns held a midnight mass on Christmas Eve followed by a social gathering every year and all the neighbours from the area would attend. They would leave at 2 or 3am.

63. It is common case that after an incident happened when the tenant in the Steward's House was blocked from exiting the property by parked cars of patrons of the hotel in 2019 a meeting was held between Mr. Bill Landis, one of the new directors of the defendant, and at least two other directors, Ms. Denise O'Brien, the general manager, and Patrick and Olive Harnett in January 2020. It was agreed that the subject of the right of way into the Steward's House was discussed, and that Mr. Harnett stated that "*We have been using this right of way*". Mr. Harnett denied saying that he would get his lawyers to put the documents together to prove their claim or that Mr. Landis said he would like to see those documents. Mr. Harnett said that they had a general discussion about the right of way and Mr. Landis said that "*we'll let our solicitors sort this out*". It was also put to him that Ms. O'Brien asked whether it was a registered right of way and that he said yes. He did not recall Ms. O'Brien saying this and said that he would not have said "yes" because it is not a registered right of way.

Luke Harnett

64. Mr. Harnett was born in 1976. He grew up in his parents' house (Patrick and Olive's house) and stayed with his grandmother in the Steward's House at weekends and holidays after his grandfather died in 1986. He said that growing up the majority of trips to and from his parents' house were through the Bellinter Bridge gates but that sometimes they went through Bellinter House.

65. He explained that when growing up he worked on the farm. At that time they were dairy farming and that continued until about 2000 when they went into beef farming. He gave evidence of the use of the main avenue in connection with the farm. He said he continues to help out on the farm at weekends, during holidays and after office hours.

66. He said that there were tenants in the Steward's House from 1993 to 2004. He, his wife and their three children lived in the Steward's House from 2004 until 2010 when they moved into their house on the lands in Folio MH6279F. The access route to and from the Steward's House while they were living there was along the main avenue. They used it multiple times a day. He also explained a system which the hotel had in place to keep the access clear, including 'No Parking' signs. He said he had no discussions with anyone about the right of way from 2006 onwards and there was no issue about their use of it. Another tenant lived there for eight or nine months after he and Belinda moved out and then the current tenants moved in.

67. His evidence was that the main gates were never locked including on Christmas Day and rejected the suggestion that they were locked, including by Ms. O'Brien between 2019 and 2021. He said they drove through the gates every Christmas Day.

68. He also explained how the nuns used hold a midnight mass (at midnight) and a social gathering and everyone would leave through the main gates after it and he never saw anyone locking the gates after it.

69. He accepted that when he was given the site for his house a right of way across the farmlands to the Bellinter Bridge entrance was registered and that no other right of way was created at the time. He also accepted that when they applied for planning permission for their house they referred to access from Bellinter Bridge and did not refer to any other access.

70. He said that there was no problem between 2016 and 2019 and that nobody asked them to stop using the route. He had no discussion with the hotel manager about the right of way between 2016 and 2019 when Ms. Denise O'Brien became general manager.

71. Mr. Harnett's evidence was that he first became engaged with the issue of the right of way when one of the tenants in the Steward's House contacted him in late October 2019 to say that there were continuing issues with her accessing the property as she was getting blocked in by patrons of Bellinter House. He said that after Ms. O'Brien arrived as general manager in July 2019, the system which the hotel had had in place since 2006 was no longer followed and the tenants and they themselves were being blocked. He said he spoke with Ms. O'Brien in November 2019 and she said she was going to investigate the matter.

72. Mr. Harnett dealt with the attempted installation of the metal barrier on the 5th September 2020 and the installation of the wooden shed on the 11th May 2021. He said that no warning had been given in either instance. In relation to the metal barrier he said that he

objected to this when the workmen were discovered on site and there were some discussions which led to an agreement that the barrier would not be put up and the solicitors would talk about it further. In relation to the installation of the shed, he said that this had the effect of completely blocking the entrance and that it precipitated these proceedings and the application for an injunction.

73. There were ongoing exchanges between Mr. Harnett and Ms. O'Brien and Mr. Landis in 2020 and 2021. Transcripts and screen grabs of text messages were adduced in evidence. The witnesses also gave evidence of conversations between them. I have considered all of these but it is not necessary to set them all out in full at this stage. I return to them below. In summary, during the course of these exchanges Mr. Harnett was asserting a right of way and also acknowledging that this should be dealt with "*properly and legally*" between the solicitors and was requesting that in the meantime the system which had been in place for keeping the route clear, including the 'No Parking' signs, be reinstated. The hotel was refusing to do so "*without an established legal and documented right of way*". The contacts also dealt with specific issues such as the closure of the gates during lockdown (including in April 2021) and whether or not the Harnetts and their tenants should be given the combination of the lock.

74. He said that he was claiming that the Harnett lands enjoy two rights of way: one through the courtyard and the other around the avenue and in the gate of the Steward's House just past the schoolhouse.

75. A significant amount of time was spent with a number of the witnesses in relation to the question of the provision of documentation by the Harnetts to prove the right of way. It was put to Luke Harnett that he knew that the defendant was waiting for documentation concerning the right of way and that Ms. O'Brien said in a telephone conversation with him in April 2021 that "*if we don't get the documents back from your solicitor, we will block the gate.*" Mr. Harnett rejected both of these assertions. He was recalled in order for it to be put to him that in a conversation with Mr. Landis, Mr. Landis had told him that he spoke with Mr. Patrick Harnett in January and he, Mr. Landis, was waiting for documentation. Mr. Harnett did not recall that.

76. He said that he goes up and down to his house by the Bellinter Bridge entrance the majority of the time.

Carol Cassidy

77. Ms. Cassidy was a tenant in the Steward's House from November 1993 to May 1995. She said that she accessed it along the main avenue of Bellinter House and then either by following the main avenue around by the schoolhouse or by going through the courtyard of Bellinter House.

78. She said that she never saw the gates locked and specifically said that they were not locked on Christmas Day 1993 because she drove through the gates that morning to visit her brother-in-law and came back through them that evening.

79. She said that occasionally she saw people coming to leave dogs off at the kennels on the Harnett lands (i.e. Patrick Harnett's lands). She also said that the postman and the bin men came along the main avenue.

Raymond Hayes

80. Mr. Hayes has lived in Bellinter for fifty-four years. He worked for the Sisters of Sion as maintenance man in Bellinter House for around ten years in the 1980s. He later set up a building firm and carried out maintenance and building work on the Steward's House and the farmyard and carried out works for Mr. Bourke and Mr. Reynolds in the conversion of the house into a hotel.

81. He said that the Harnetts were the only people in the area with a phone at one stage and that if people wanted to phone for a doctor or the vet they would go to the Harnetts. He said that the postman, the bread man, the AI man and the vet accessed the Harnetts land this way. His evidence was that when he wanted to access the Harnett lands he went up the main avenue past Bellinter House and normally took the entrance through the courtyard but sometimes went past the schoolhouse. He also said that when he was accessing the Steward's House and the farmyard (Patrick Harnett's lands) to carry out works as a builder he would come up along the main avenue.

82. He said that the main gates were never locked or closed.

83. He also said that the route into the Steward's House was never overgrown.

84. In cross-examination he said that after the conversion of Bellinter House into a hotel he was often in the property to do bits and pieces of work such as maintenance work.

Gareth Keoghan

85. Mr Keoghan is one of the tenants in the Steward's House, having moved in in February 2011.

86. His evidence was that he has always got in and out of the property through the main gate of Bellinter House and that he has never seen that gate locked or closed.

87. He said that he puts their bin out on the avenue from Bellinter House as one heads towards the schoolhouse.

88. He said that whilst he has been a tenant he has seen tractors, agricultural machinery, people going to the kennels, and all types of deliveries going to the Harnetts' land through the Steward's House.

89. He also explained the system which had been in place to keep the access clear and said that this did not operate under the new owners.

90. He said that they were given no advance notice of the installation of the metal barrier or the shed in front of their gateway.

91. In cross-examination Mr. Keoghan was asked about a separate claim that he and his partner have brought against the defendant for false imprisonment arising from the gateway being blocked by the wooden shed. I, of course, make no findings whatsoever in relation to that claim. In that context, Mr. Keoghan said that the route from the Steward's House, out past the schoolhouse and along the main avenue was the one they always used. When asked whether there was no other way out, he referred to the route through the courtyard of Bellinter House but said that they never really used it. When asked whether they could have used it he said they could but that there were bollards there at some stage and they would have prevented them from going in and out.

92. He did not accept that the gates were ever closed at Christmas by Mr. Bourke or Ms. O'Brien.

Francis Murphy

93. Mr. Murphy is a solicitor of very long standing. He has been an acquaintance or friend of the Harnett family since 1969 and has also acted as their solicitor, first while in another firm and then in his own practice. He is the solicitor for the first to fifth-named plaintiffs in these proceedings. He is also executor of Mr. Luke Harnett Snr's estate and is the sixth-named plaintiff in that capacity. In this latter regard, he explained that the will had not been administered until 2020 because there was no need to do so. He also gave evidence that the Steward's House was left to Eugene Harnett and he disclaimed it and his sister also disclaimed it which had the effect that it would pass to Patrick Harnett.

94. He said his family comes from the same area as the Harnetts in Kerry/Limerick and that Ms. Ellen (Nellie) Harnett, Patrick Harnett's mother, was Mr. Murphy's first cousin. He first met the Harnetts when he and his mother stayed with them in Bellinter for a week for his graduation

from university in 1969. Subsequently he visited them very regularly during the 1970's and 1980's.

95. He said that when he visited them he used go up the main avenue and then through the courtyard of Bellinter House. Mr. Murphy's evidence was that he has continued to visit the lands and he has never seen the main gates closed or locked. He has never been there at Christmas time.

96. Mr. Murphy dealt with an exchange of letters in 2004 between his former firm and solicitors acting for the Sisters of Sion in the sale of Bellinter House. I set these out below. He believed that these came about because the nuns were selling Bellinter House and there had been some contact with the Sisters' solicitors about an agreement in respect of a water pipe way-leave across the farmlands. He believed that the information contained in his letters came from Patrick Harnett. He rejected the suggestion in the Sisters' solicitors' letter that he (or Mr. Harnett) had waited until the very last minute to opportunistically raise the issue of the water supply. He said that they had no idea what the progress of the negotiations between the Sisters and the purchaser was.

97. He confirmed that, notwithstanding the statement in his letter during this exchange that they would inform the purchasers of the right of way if the vendors' solicitor did not, he did not in fact inform the purchasers. He gave evidence as to why he did not. There was an objection to an element of this and I have not had any regard to his evidence in this specific respect. He also gave evidence that he understood the final sentence in the Sisters' solicitors' letter of the 26th April 2004 that "*The purchaser's solicitors are aware of all matters between us*" as meaning that the purchaser's solicitors had been told of the right of way or the claim to such a right. He said this in explanation as to why he did not see this letter and the rejection of a right of way as a "bombshell".

98. Mr. Murphy was asked about Objections and Requisitions on Title dated the 10th February 2004 between the Sisters of Sion and a solicitor acting for the purchasers. I do not believe that it is necessary to deal with this in any detail other than to note that Mr. Murphy was critical of how some of the Objections and Requisitions were dealt with.

99. It was also put to Mr. Murphy that Sister Philomena will say that it was an opportunistic approach in respect to the water supply. He rejected this but Sister Phil did not in fact say this.

Brendan Steen

100. Mr. Steen is a retired solicitor. He previously acted for Mr. Luke Harnett Senior and for the Sisters of Sion. He has been familiar with the properties and with the Harnett family since at least the mid-1970s.

101. He gave evidence that he used the services of the dog kennels when he was going away. He said that to gain access to the Harnetts' dog kennels he went up through the main gates at Bellinter House, past the House, into the courtyard and through the gate that separated the courtyard and the Harnett's property. He said that he did this in 1993, 1994, 1995, 1996, 1997 and 1998. He said that at some stage the Harnetts sold their milk quota and redeveloped the kennels and at that stage he came up through the Bellinter Bridge entrance up to the Harnett's yard.

102. In cross-examination Mr. Steen confirmed that he had acted for Patrick Harnett in relation to the transfer of his site where he now lives and that the only right of way that he created over the farmlands was from that site to Bellinter Bridge.

Bill Landis

103. Mr. Landis is a director of the defendant company.

104. He said that he was unaware of the use that was being made by the Harnetts of the main avenue until he received a call from Ms. O'Brien that one of the tenants was in reception during a wedding saying that they could not get out of their driveway. (This must have been in 2019 because, while the defendant had bought the property in 2016, Ms. O'Brien took over as general manager in 2019). Mr. Landis said that he asked their original solicitors to get all of the information to review it and understand it.

105. He referred to the meeting with Mr. Harnett and Ms. Olive Harnett in January 2020 and said that he, Mr. Landis, brought up the issue of the right of way. Mr. Landis said that Mr. Harnett said at the meeting that "*We have a right of way through the gate by the schoolhouse to access the main laneway, the main driveway for the hotel.*" Mr. Landis told Patrick and Olive Harnett that the defendant had no evidence of that, they had looked at their title policy and no burden was mentioned other than the defendant's fishing rights. He said that Mr. Harnett said that they have the right and had the documentation and Mr. Landis asked Mr. Harnett to send it to them and Mr. Harnett said they would. He said that Ms. O'Brien asked whether it was a registered right but he was not clear what Mr. Harnett's response was because he was focused on the fact that Mr. Harnett was going to give the relevant documentation.

106. Mr. Landis also gave evidence that in a conversation with Luke Harnett he told Mr. Harnett that they had been promised documentation and had requested it a number of times and Mr. Harnett said their solicitors were working on it. He said that he was left with the impression that "*somewhere out there was a document that would evidence a right of way, and we would have it, and we could read it, and that would resolve the matter.*"

107. He said that it became evident to them that the Harnetts were 'stalling and delaying' and that nothing was being provided and because it was Covid and there were "*people wandering all over the property, we are going to close the gates*". He said that they decided to put the metal barrier up to try to move things forward to get the Harnetts to produce the documentation "*And when it didn't show up and we have this ongoing liability with their tenants coming across our property, we blocked it.*"

108. In cross-examination Mr. Landis said that he viewed the property before the defendant bought it, saw the gates going into the Harnetts property and that they were accessed by a laneway coming up from the main gate of Bellinter House, and it seemed clear to him that they were a pathway to the next door property but did not ask whether it was in use. He said that it was not a question one would ask on due diligence and that it did not look serviceable because he did not see tyre tracks. He said there was no evidence that it was an active laneway or driveway. He described his response when he first became aware that the gateway was being used as one of surprise.

109. He said that he never saw "No parking" signs. Mr. Landis said that he had not given specific instructions that the signs be taken down but accepted that they were probably taken down when they decided to limit access.

110. Mr. Landis accepted that the Harnetts were not specifically notified of the intention or plan to install the barrier or the wooden shed but said that the Harnetts were notified that if the defendant was not satisfied with proof of the right of way they were going to block access. He also said that the decisions to block access were made because, as he put it, they were not being provided with correspondence, assistance, documentation of the right of way or proof that the Harnetts were working to try to resolve it.

111. Mr. Landis was asked for an explanation as to why, when the wall and gate between the schoolhouse and the entrance to the Steward's House was replaced with a wooden fence, a gate was put into the fence. He said he did not know and suggested it was because they were good neighbours.

Philomena Conroy

112. Ms. Conroy (Sister Philomena or Sister Phil) is a member of the Sisters of Sion.

113. She spent time in Bellinter House between 29th September 1990 and April 1991, July 1992 and July 1993, and January 2001 and May 2004 (when the order sold the property). In the first two periods she lived in Dublin from Monday to Friday and went to Bellinter House on Friday evening and returned to Dublin on Sunday evening or Monday morning. In the third period she resided full time in Bellinter House.

114. She said that in the first two periods she was aware that the Harnetts were neighbours but did not have any dealings with them and would not have had a clue who was going over the Bellinter House driveway.

115. Her evidence was that the main gates were closed every Christmas Day and that she was told that this was to ensure that the Harnetts did not gain an unrestricted right over the driveway and that Christmas Day was chosen because it would be the least disruptive to both parties. She did not accept the evidence given by the witnesses for the plaintiffs that the gates were not locked at Christmas.

116. Sister Philomena confirmed that the nuns met Patrick Harnett in September 2003 and they discussed the wayleave for water over the farmlands and the claimed right of way over the main avenue. She said that the reason they wanted to meet Mr. Harnett was that they were aware that there was some confusion over the right of way and to see if it could be sorted out. (It will be noted that this is inconsistent with the letter from the Order's solicitor of the 27th April 2004 in which it is stated "...*The meeting..arose due to the fact that your client indicated that he might be interested in selling his adjoining property at the time that Bellinter House was being marketed...*") Sister Philomena denied that the nuns acknowledged that Mr. Harnett had a right of way over the main avenue. She did not dispute that Mr. Harnett had asked the Sisters at the end of the meeting to tell the purchasers that the Harnetts had a right of way.

117. Sister Philomena said that as far as she is aware, the Order's solicitor kept the purchasers of Bellinter House updated on any issues.

118. Sister Philomena said that she is not aware of any arrangement being made by the nuns with the members of the Harnett family in respect of the use of the avenue. She accepted that there is a world of a difference between closed and locked but said that she believed that when the statutory declaration says closed it meant locked.

Jonathan Bourke

119. Mr. Bourke was one of the parties who bought Bellinter House from the Sisters of Sion in 2004 and converted it into a hotel.

120. He said that he was aware from his solicitor that the farmer next door had permission to use the drive and that his solicitor and the nuns made it clear to him that he had to lock the gate on Christmas Day to make sure it was permission and not a right.

121. He said that while the hotel was being developed (between the purchase and December 2006 when it opened) he visited the property several times a week and met the Harnetts on occasions.

122. In relation to locking the gate he said that he allowed his manager to stay in the hotel with her family over Christmas 2006 on the condition that she locked the gates on Christmas Day. He said that he drove down to the hotel on Christmas Day 2007, 2008 and 2009 and locked the gates. He later said that he thinks he did so. They leased the hotel out in 2009 or 2010.

123. He described the relationship with the Harnetts in the period 2004 to 2010 as friendly and cordial with occasional issues. One of these issues was that sometimes the cars going to and from the Steward's House were going too fast. He said that Luke and Belinda lived in the Steward's House and then a tenant moved in and they used go up and down the driveway. He later confirmed that Luke and Belinda used the driveway to go up and down to the Steward's House. He said his solicitor had advised him that they had a permission and not a right.

124. Mr. Bourke was asked about a map attached to a planning permission application in 2015. It showed car parking spaces and left the approach to the entrance to the Steward's House vacant of any parking. He was asked why that was the case. It is important to note that this application was made in 2015 when Mr. Bourke was no longer involved in running the hotel. Nonetheless he answered that Luke and Belinda used to drive that way to get out and he would have liked them to be able to get out of their house and that perhaps they were being good neighbours.

125. Mr. Bourke did not recall putting 'No Parking' signs up.

126. Mr. Bourke said that he was approached in relation to this case in the two to three weeks before the hearing.

Orla Murphy

127. Ms. Murphy was initially the food and beverage manager and was involved in setting up the property and the food and beverage aspect of it. She became general manager shortly after the hotel opened in December 2006.

128. She does not recall any specific instructions about the neighbours' access over the avenue but understood that the Harnetts used the avenue to come and go to their property. She does not know specifically who was using it other than Belinda. She remembers Belinda because there were occasions when Belinda would call into the reception to say that guests' cars were blocking her in. On those occasions the hotel would try to find the guest to get them to move their car.

129. Ms. Murphy explained that she and members of her extended family stayed in Bellinter House at Christmas 2006 because it was not open to the public and would have been vacant. She said that the owners agreed and said that the only condition was that they had to lock the main gates on Christmas Day. She said that she did so along with her sister. She denied being mistaken about locking the gates.

130. Two caretakers were living on the property.

Bernadette Everett

131. Ms. Everett worked for the Sisters of Sion as a cook from 1979 to 1986.

132. She said that she used to have lunch with the Sisters every day and her understanding of the Harnetts' use of the driveway was that it was a matter of courtesy from the Sisters.

133. She confirmed that she used to bring lunch to Ms. Nellie Harnett in the Steward's House. She was not asked which route she used (despite it being put to Mr. Luke Harnett that she walked around the driveway past the schoolhouse rather than the shorter route through the courtyard).

134. It was put to Patrick Harnett that Ms. Everett would say that the gates were locked every Christmas Day. In fact Ms. Everett did not give that evidence.

Denise O'Brien

135. Ms. O'Brien became general manager of the hotel on the 19th July 2019. She is also a director of the defendant company.

136. She says that she only became aware of the Harnetts' property on the 8th September 2019. She had not seen anybody coming from the Steward's House prior to this. She explained that on that date there was a wedding in the hotel and she received a call from reception informing her that there was a woman in reception saying that the guests' cars were blocking her right of way and she could not get in or out. Ms. O'Brien asked the receptionist to get the registration numbers. They were obtained and Ms. O'Brien got the guests to move their cars. This is the extent of the direct evidence in relation to what occurred on that date. Mr. Landis gave evidence but he was not present on that occasion.

137. Ms. O'Brien said that she investigated subsequently and established where the Steward's House was (as she did not know prior to that) and where the tenant was trying to get in and out. She described the route past the schoolhouse and down the main avenue. She

described the driveway where it entered the Steward's House as "*Not totally overgrown, but very poor condition.*" She said there were tyre tracks on the road.

138. Ms. O'Brien referred to the meeting with members of the board and Patrick and Olive Harnett on the 29th January 2020. Her evidence of that meeting was that Mr. Landis raised the issue of the right of way from the Steward's House and made a general inquiry as to where it came from and how long it had been used for and asked if there was any evidence. Mr. Harnett said that he and all his family have been using it for a long time to access the farm and he had a right of way. He also said that he has documented evidence. Ms. O'Brien said that she asked him if it was a registered right of way and he said yes and she said that she could not find it. Mr. Harnett said that he would get his solicitor to send the evidence to the defendant's solicitor.

139. Ms. O'Brien also gave evidence of telephone conversations with Luke Harnett alongside the text exchanges referred to above and set out in more detail below. She gave evidence that she had numerous conversations with Luke Harnett in which she said they needed proof of the right of way and Mr. Harnett said that he would get it to them. She also said that she told Mr. Harnett that the tenant was consistently trespassing and that unless they had proof that they had a right of way the defendant would have to take action, i.e. they would close up the access. She could not remember when she said this to Mr. Harnett but said there numerous conversations about it.

140. Ms. O'Brien explained that the reason they locked the main gates on 1st April 2021 was because the hotel was closed due to lock-down and they were benefitting from reduced insurance premium and the insurers instructed them that the gate must be locked.

141. Ms. O'Brien accepted that the attempted installation of a barrier across the gateway was a dramatic thing to do. She said it was done because they had engaged with the Harnetts quite a few times to try to resolve matters and had made no progress and meantime the tenant was trespassing on the land by, for example, walking her dog. She said that following interactions on that morning an agreement was reached that the barrier would not be installed. She gave evidence that this was on the basis that Luke Harnett would get the documentation to the defendant and promised that he would speak to the tenant regarding the use of the land. This was not put to Mr. Harnett.

142. Ms. O'Brien also accepted that the installation of the wooden shed or hut across the gateway was a dramatic thing to do. She said she did that because the tenant was continuously using the land to access the Steward's House and walk her dog. She believed that there had been solicitors letters exchanged to the effect that if documentation was not received the defendant would close up the access and she said that she had spoken to Mr. Harnett on many occasions and said the same thing.

143. Ms. O'Brien was cross-examined at length about the defendant's insistence that the Harnetts provide documentation in respect of the right of way (which was part of the justification given for blocking the gateway by the installation of the barrier and the shed/hut) in light of the fact that she knew that a right of way could be acquired without there being any documentation, and that the plaintiffs' Senior Counsel had given an Opinion that a right of way had been acquired, and in light of a failure by the defendant's solicitor to reply to correspondence from Mr. Harnetts' solicitor between February and August 2020. She explained that delay on the basis that it was Covid times and other matters had to be prioritised. In relation to the question of their insistence on documentation, she said (i) that it was Patrick Harnett who had said that documentation would be provided and, therefore, they were only looking for what had been promised, and that Luke Harnett said it was being attended to, and (ii) she had spoken to Sister Philomena and Sister Terese and that they had assured her that no right of way was acquired during their ownership as they had locked the gate religiously every Christmas to prevent the Harnetts getting a right of way. This was not contained in any solicitors letter because she did not tell the defendant's solicitor. She later said that she could not recall if she told the defendant's solicitor. She accepted that it was an important thing and that she probably told the solicitor but she does not recall doing so. Ms. O'Brien said that she told Luke Harnett. He did not accept that she told him this.

144. Ms. O'Brien said that she never saw 'No Parking' signs up at the Steward's House. She went further and said the 'No Parking' signs were not there when she started.

145. Ms. O'Brien said that she knows for a fact that the Harnetts are not using the avenue at all and that it is only the tenants. She did not accept the evidence of Patrick Harnett, Luke Harnett or Mr. Hayes and said that she has never seen any of the Harnetts on the avenue unless they are coming to the hotel.

146. Ms. O'Brien confirmed that the bins from the Steward's House are put on the avenue just past the schoolhouse and collected by the bin lorry which comes up the main avenue.

147. In relation to the injunction that was sought by the plaintiffs Ms. O'Brien said that the parties reached an agreement that the shed would be removed and that the tenant would cease engaging in her objectionable behaviour.

148. Ms O'Brien accepted that works were done along the hotel's right of way to the river across the Harnett lands without permission during the hearing.

Val O'Brien

149. Mr. O'Brien is a chartered building surveyor and prepared a map and photographs.

150. He described the entrance at Bellinter Bridge as an extremely grand entrance with fantastic masonry pillars and ornate cast iron gates and winged walls. He said that the driveway from there to the Steward's House is passable. He confirmed in cross-examination that he did not examine the Bellinter Bridge entrance in 1965.

151. In relation to the gateway between the courtyard and the Harnetts' property he said that was blocked up but accepted that it could be opened readily and that it is a gate that can be opened

DISCUSSION AND CONCLUSIONS

152. Before dealing with the specific bases upon which a right of way is said to have been acquired, it is necessary to deal with three issues. The first arises from the correspondence in 2004 between Patrick Harnett's solicitor and the solicitor for the Sisters of Sion. The second is a suggestion arising from the exchanges referred to above between Luke Harnett and Mr. Landis and Ms. O'Brien in 2020 and 2021 that the only right of way being asserted was in respect of the Steward's House. The third is the parties' respective positions in relation to the provision of documentation and the reasons for blocking the entrance to the Steward's House. Unfortunately, in respect of the latter, the examination of witnesses on these issues at times focused on whether the parties had acted appropriately rather than on the issues which have to be determined. However, the correspondence is also relevant to the parties' positions on the substantive issues.

153. Firstly, the exchange of correspondence with the solicitors for the Sisters of Sion in 2004 began with a letter from solicitors acting for Patrick Harnett on the 26th April 2004. This letter was the subject of extended cross-examination and it is therefore worth quoting it and the reply from the Sisters of Sion's solicitor at some length. The first letter was written in the context of previous correspondence and recent telephone conversations. It seems these were primarily concerned with the wayleave for the water-pipe referred to above. The letter stated, inter alia:

"... In the course of dealing with our clients in this matter, a number of facts have come to light. Your clients, the Sisters of Our Lady of Sion, advised Mr. Harnett early in September 2003 of their intention to dispose of Bellinter House and stated that they wanted to discuss the matter with him. He met with them on 5th September 2003 during which the the wayleave for the water and our client's right of way over the main avenue was discussed. Mr. Harnett brought Sister Phil down to the road where the pipe is connected to the mains and showed her where the pipe went up to Ballinter House through his farm. She said that they would sort it amongst themselves. Then on 10th October 2004, Mr. Harnett phoned Sister Phil and she said her solicitor, [...] would be looking after it. Your clients initiated this discussion and readily acknowledged what they both knew, namely that the wayleave in respect of the water required

to be "sorted out" and that our client had a right of way over the main avenue of your clients' property. Implicit in this conversation was that our client's old house, where he was born and which virtually adjoins Bellinter House, also enjoyed a right of way over the main avenue. This house was owned by our client's late father and passed under his will to his son (our client's brother) Eugene Harnett from whom we have also received instructions and have made you aware of this.

In earlier discussions between our respective firms, you appear either to be unaware or alternatively unable to recognise or confirm the rights of way of both our clients over the main avenue.

Please be advised that both our clients have such a right of way and we require you to confirm that you have specifically, in writing, advised the proposed purchasers of Bellinter House of this fact. If you fail to do so, we will contact them without further reference to you and make them aware of it..."

154. Mr. Harnett did not recall giving instructions for this letter but supposed that he must have. Mr. Murphy confirmed that he must have got instructions from Patrick Harnett and I am satisfied that he did.

155. The Sisters' solicitors replied by letter of the 27th April 2004 in which they wrote:

"... We understand that you are correct in saying that relations between parties have always been friendly. Our clients are also at a loss as to understand your client's present position. The meeting you refer to last September between our respective clients arose due to the fact that your client indicated that he might be interested in selling his adjoining property at the time that Bellinter House was being marketed. There were issues discussed at that meeting, including the fact that your client wished to take legal advice. Our clients encouraged him to do so, and advised him that we would be acting in the transaction.

However, we did not hear from you until 3 March last, two days before the proposed closing of the sale of our client's property, when you wrote to us about the water supply. This was the first correspondence we received from you in relation to your client. The question of your client's access to his property was only raised in the week prior to Easter. Your client was well aware that the sale of Ballinter House was proceeding towards completion and chose to wait until the last moment to raise the issue of the water supply. You will appreciate that this could be viewed as opportunistic.

Our client confirms that general discussions between our respective clients took place, but we are advised that our clients did not at any stage acknowledge or agree any matters with your client...

We would refute your comments regarding what you refer to as your client's "right of way" over the driveway of Bellinter House. Your client is entitled to use the driveway to gain access to his adjoining property by way of licence from our clients only. Such use has been by arrangement and with the consent and acknowledgment of our clients and has not been

continuous or uninterrupted. Our clients close the main gate to the driveway every year at Christmas time. We cannot put this matter any further..."

...The purchasers' solicitors are aware of all matters between us."

156. Patrick Harnett was cross-examined on the contents of the letter. It was put to him that the subject line of the letter identified him as the client and therefore the phrase "*our client's right of way over the main avenue was discussed*" could only refer to him and therefore to his right of way or, more particularly, a right of way for the benefit of his lands (the farmlands). Mr. Harnett responded that he understood that the family had a right of way. I do not believe that the letter can be read in the way suggested in circumstances where it goes on to say that the solicitors also have instructions from Eugene Harnett in respect of the Steward's House and also goes on to say that "*both our clients have such a right of way*".

157. It was also put to Mr. Harnett that the sentence "*Implicit in this conversation was that our client's old house, where he was born and which virtually adjoins Bellinter House, also enjoyed a right of way over the main avenue*" meant that there was no express claim by Mr. Harnett at the meeting with Sister Philomena of a right of way from the Steward's House over the avenue. Mr. Harnett did not accept this. Sister Philomena said in evidence that she not believe that a right of way to and from the Steward's House was implicitly claimed. He said that he asked the Sisters to tell the new buyers that they (the Harnetts) had a right of way over the avenue.

158. In my view, the fact that a right of way from the Steward's House was not explicitly mentioned at the meeting is not entirely surprising. Both parties were very familiar with the lands and were aware that the link between the farmlands and Bellinter House was the Steward's House. They were also aware that the residents of the Steward's House had been using the main avenue.

159. He was also referred to the passage in his solicitor's letter dealing with the house where he grew up (the Steward's House) and it was put to him that all that was being claimed at that stage was a right of way attaching to Patrick Harnett's lands and the Steward's House. It is difficult to see the significance of that in circumstances where Luke and Belinda's and Neil's folios only came into existence in 2009. It was perhaps suggesting that Patrick and Olive's house was excluded from the claim of a right of way. However, in my view, the reference to Patrick Harnett's right of way would have been understood to refer to that house also.

160. In relation to the reply from the Sisters' solicitors, Mr. Harnett said that they never had any intention of selling their lands and that he did not say that they had such an intention when talking with Sister Philomena. It was also put to him that Sister Philomena was going to say

that Mr. Harnett waited until the last moment to opportunistically raise the issue of the water supply. Mr. Harnett denied this and in fact Sister Philomena did not give that evidence.

161. The second issue arises from ongoing exchanges between Luke Harnett and Ms. O'Brien and Mr. Landis in 2020 and 2021.

162. There was an exchange between Mr. Harnett and Ms. O'Brien in late March 2020, after the country had been placed in lockdown due to Covid. There had obviously been some conversations prior to this. Mr. Harnett asked for a meeting with the owners. He said *"...Obviously the legal matters re rights of way will still need to be formally sorted and we will let the solicitors work away on that item..."* On the 28th March 2020, Mr. Harnett texted *"No problem Denise, I will ensure Amanda closes the gate everytime. Take care of your self."* On the 4th August 2020 (it seems the hotel had reopened) he texted Ms. O'Brien *"Hi Denise, could you do me a favour please? The tenants are blocked in again and were also blocked in a couple of weeks ago. Could you erect a sign informing guests that a clear way is needed for access purposes..."* On the 10th August he texted *"...Following on from our conversation on Saturday, can you send the contact details of your new solicitor in Navan who is now dealing with the right of way matter. My solicitor was unaware that you had changed solicitors. I need to get this sorted, so that a sign can be put up to ensure the access is kept clear for my tenants."*

163. In August 2020, there was also an exchange of texts between Mr. Harnett and Mr. Landis. Mr. Harnett texted:

"Hi Bill, I hope you are keeping well, this is Luke Harnett, your neighbour from Bellinter, Ireland. I am sure Denise has filled you in, but I would appreciate it, if we could have a quick chat. I am hoping that we can find an interim solution between us to the access issues my tenants are experiencing at the moment – while the solicitors work out the official paperwork etc. I hope this is OK with you. Let me know what suits you best, this Wednesday would be good for me..."

164. They missed each other and Mr. Harnett then texted:

"...I am sure Denise has filled you in, but basically, my tenants access to their house is regularly being blocked by the hotels customers cars, which has become extremely frustrating for them, but not only that, it is also a safety concern, god forbid if there was an emergency situation and emergency services needed access. They have been there for 7 years and are very good tenants, but they have now informed me that they are considering moving out if I don't get this matter resolved – I can understand their frustrations, and I certainly don't want to lose them as tenants. Denise has explained to me that effectively there is not much she can do and she is stuck in the middle and that she has been instructed not to erect any signs. So that is why I asked to speak with you directly."

Firstly, I am in full agreement that we need to get the right of way issue dealt with properly and legally – it should have been done years ago, especially since the family have been there since the early 50's. I have started the ball rolling again on this now that we have the details of your new solicitor who is dealing with this matter, so hopefully this will be officially resolved soon.

In the meantime I wanted to ask If you can authorize Denise to put back in place the original procedure that had been in place and worked very well up until it was stopped i.e. there were signs erected to notify customers as to the clearway and their car registration was noted when they checked in. Also on busy days, such as weddings, Paul, the previous manager used to have a staff member do a check to make sure the access was open – it all worked really well and there never any issues for the tenants or the hotel..."

165. Mr. Landis replied:

"Hi Luke I wanted to circle back with you on a couple of our discussion points. Having checked with our solicitor and insurance advisors, we are not able to accommodate your request for signage on our property. Unfortunately without an established legal and documented right-of-way the liability falls to us..."

166. On the 1st April 2021, Ms. O'Brien texted Mr. Harnett saying *"Hi Luke we have been told by our insurance that the gate must be locked, so Amanda will need to contact reception to get gate opened there is someone on site all of the time Denise."* At the hearing, the parties were agreed that this was at a time when there were Covid-related restrictions in place. Mr. Harnett replied:

"Hi Denise, responding to your text which I have included above. I have tried to reach you on your phone and left two voice mails for you. I spoke with Cathal and he informs me that he is instructed to not give me the combination to the lock on the entrance gate. We must be able to enter and leave as we wish. Please provide the code so that my tenants can come and go freely. The lock will be reapplied to the gate each time they pass while this temporary measure is in place. This is illegal, not mind the fact, were there an emergency and a fire brigade or ambulance were required, they will be held up at the end of a long Avenue waiting – what if the phone was not answered! The tenants have pursued their own independent legal advice and they have been instructed to call out the garda. Again, we must be able to come and go as we wish and to do so we required the combination to the chain and lock that you have applied. I need you to please respond with the code as this is now very urgent."

167. Ms. O'Brien replied to explain why she had not replied earlier and went on to say *"We need to lock gate no problem opening on request but being told not to give out code."* Mr. Harnett replied:

"Hi Denise I and my family and my tenants have an unqualified right of way to come and go as we please and Bellinter is preventing us from exercising our rights which they and you know

have been unequivocally established. You and those directing you to refuse to allow us exercise our rights is totally unacceptable and will be brought to the attention of the Court. Your sudden blocking of our rights during Level 5 of the pandemic restrictions on the eve of Good Friday and the Easter Holiday to access and go in and out of our homes and premises is a calculated and disgraceful act of bullying. Unless our full and free unimpeded access is immediately restored we will have no choice but to seek the protection of the High Court to protect our rights..."

168. Mr. Harnett explained that from the 6th April to the 9th April 2021 they were refused access through the gateway and on the 9th April the solicitors for the defendant said that they had sought Senior Counsel's Opinion and in the meantime they would give the code for the lock.

169. The reason it was necessary to set these contacts out at length is that it was put to Mr. Harnett that most of these texts referred to the tenants and not to the Harnetts' right of way. The suggestion was that the only right of way being asserted was the tenants' right of way, i.e. a right of way in favour of the Steward's House. Insofar as the point was that I should conclude that this means that a right of way to the other parcels of land, including the farmlands, was not being asserted or does not exist, I do not accept this. Mr. Harnett explained in evidence that this was to take some of the references in the texts out of context because it disregarded the fact that the reason he was raising the issue was because the tenants were complaining to him. He also said that it disregards the fact that they are simply texts, meaning that they are not complete or formal communications. Mr. Harnett's response in substance was that he was concerned about the family's and the tenants' right of way, he was referring to the tenant because it was the tenant who was raising the issue with him and he felt that it was the most polite and amicable way to set the matter out. This makes sense. Furthermore, Mr. Harnett expressly refers to the family's rights and that the defendant's actions were preventing them from exercising their rights and the actions were blocking their "*access to go in and out of our homes and premises*". The texts must also be read in the light of the parallel correspondence between the solicitors, to which I return, and in which a right of way to other lands is consistently asserted.

170. At the same time as the texts and conversations referred to above, there was also correspondence between the parties' solicitors. This gives rise to the third issue, i.e. in relation to the provision of documentation, but the letters are also relevant to the substantive issues. The letters from Mr. Murphy identified Patrick Harnett as the client. This correspondence was put to, inter alia, Patrick Harnett, Mr. Murphy, and Sister Philomena. I do not propose to refer to every item.

171. On the 10th January 2020, solicitors for the defendant sent a cease and desist letter to Patrick Harnett calling on him and “a current tenant” of his to desist from using the hotel grounds and driveway in the manner described in the letter. The letter stated, inter alia:

“We are instructed that [our client] have grave concerns that you and a current tenant of yours are using the driveway belonging to the Hotel to access one of your properties. We further understand that one of your tenants is walking her dogs on other parts of the grounds of the Hotel without permission.

Please note that neither you or your tenants have any rights or permission to enter any part of the lands belonging to the Hotel or to use any part of Hotel’s driveway unless you are strictly on a visit to the Hotel.

We now call upon you to confirm in writing that you will immediately cease and desist from using our clients driveways and access roads and will further refrain from entering on any part of our clients property save upon occasions when visiting the Hotel.

Please also confirm that you will ensure that your tenants are made aware that they are not entitled to use the driveway as an access road to your property and nor are they entitled to walk their dogs on the Hotel grounds.”

172. Mr. Murphy replied on the 18th February 2020 (the board meeting in January had already taken place):

“...I had been endeavouring to take up a copy of the Instrument during which Jonathan Bourke acquired the property on the 12th January 2005, namely Instrument Number D2004XS015163V. Under that Instrument the property was acquired by Jonathan Bourke, Eoin Foyle and John Reynolds and then the property was acquired and registered to your client, Broadreach Investments Limited, on the 27th March 2016, but I have been unable to do so as I have no privity in that regard with the PRA.

As discussed in our telephone conversation it is unlikely that it was registered when it was acquired by Jonathan Bourke, but if that was a First Registration then an examination of the documents of title lodged for First Registration might show whether or not there actually was a Grant of Right of Way...

...I will set out, in the next day or so, the history of the ownership which is known to me personally, and I can if necessary furnish you with a detailed Affidavit in relation to the use of the property.

One possible solution to this problem may very well be that if it was part of a property that was vested in the owners by the Land Commission, and having regard to the fact that 89% of land passed under the Land Purchase Acts, the Land Law (Ireland) Act 1896 may help us resolve the problem...”

173. Mr. Murphy wrote again on the 21st February 2020, He once again referred to his wish to examine the Instrument and expressly sought the consent of the defendant to do so. He went on:

"...If such a search does not throw any light on the subject, then our client will make an Affidavit setting out the history of the use of the Right of Way over the entrance to Bellinter House, and I am quite satisfied that that Right of Way has been in existence for decades.

There is another possible solution to this problem. Section 34 of the Land Law (Ireland) Act 1896 reads as follows:...

I would need to inspect the Vesting Order, and again in so far as it applies to the Land registered on your clients Folio, I would need your clients consent to carry out that inspection, and investigation, and that might give you the answer.

I shall be grateful if you would take your clients instructions and as a first step let me have your clients Consent to inspect the Instrument and I will take it from there.

The other alternative is that I will make a Declaration, which you will accept, and Consent to the registration of the Right of Way on your client's Folio, and that may be the simplest and most economical way to resolve the matter.

My client has spoken with the tenants in relation to walking the dog(!)"

174. There was no reply to this letter.

175. The defendant changed solicitor and on the 21st August 2020 Mr. Murphy wrote to them, referring to the contacts with the previous solicitor and stating that no reply had been received to the letter of the 21st February 2020. He also stated:

"Our client has a long established Right of Way over the driveway to Bellinter House – for upwards of 70 years. Your client is the owner of the property, which is registered on Folio 47334F County Meath. The Right of Way is not registered on the Folio. As already pointed out to your client's previous Solicitors, the non-registration does not in any way prohibit the use of the Right of Way by our client's exercising his long established Right of Way."

176. By letter of the 2nd September 2020 the defendant's new solicitor rejected that a right of way existed. The letter went on:

"...your client or their tenants have only commenced entering our clients land in this fashion since our client acquired it in or about 2016. Effectively trespassing.

They have made enquiries with the previous owners who advise neither your client nor his tenants exercised any right of way during their tenure. In fact they advised that anytime your client did in fact use the laneway he asked permission of them. Hardly the actions of the beneficiary of a right of way. For the record our clients never gave such a consent.

Your client and his tenants are to cease their incursions onto our clients property forthwith. We have advised our client to close the historical access point permanently to prevent your client, his servants or agents from trespassing on our client's property."

177. By letter of the 4th September 2020 Mr. Murphy emphatically rejected the allegation that Mr. Harnett and the tenant had only commenced entering Bellinter House since 2016 and stated *"Our client, and his predecessors in title, have been entering their property, and leaving from it, through the main entrance to Bellinter House for upwards of 70 years without interruption. Our client emphatically denies that he asked permission, and neither has any member of his family."* He also stated that if the access was closed injunctive relief would be sought.

178. Following the attempt to install the metal barrier on the 5th September 2000, Mr. Murphy emailed the defendant's solicitor on the 6th September 2020 and he made the point that this had occurred without notice and despite the contacts between the solicitors. He once again asserted that *"our client has a full right of way over the main entrance to the hotel to enable him, his family, servants, invitees, agents and tenants to access his home and farm without interruption..."* He invited the defendant's solicitor *"to engage with us to satisfy yourself and your client in that regard."* The defendant's solicitor replied the following day saying that a letter stating that the access was going to be closed was sent the previous week. It went on to say:

"Your client does not have any right of way and have only attempted to assert this in recent times.

In fact the access your client has started to use was overgrown until about 2 years ago when our clients tidied it up. It is only since that time your client begun to use the access.

It is clear that your client has access to the entire of their property via an entrance at Bellinter Bridge. Bellinter House and the adjoining lands were subdivided decades ago. The title has been the subject of a first registration in the PRA and no burden of this nature was registered on our clients folios. Equally I take it no appurtenant right appears on your clients folio.

If your client has any definitive evidence of an easement in their favour (which we believe they do not) then they should adduce it.

Your clients and in particular their tenant has been using our clients property as a dog walking facility despite our clients requests to cease and desist. Our client is entitled to protect the integrity of their property which includes erection of fencing and barriers.

Therefore unless your client adduces actual evidence of an easement within 7 days of this mail our client will proceed to erect the barrier.

Your client should forthwith cease all incursions into our property in the absence of any such evidence."

179. By letter of the 11th September, Mr. Murphy rejected the contents of that email and indicated that he was obtaining Senior Counsel's Opinion.

180. On the 18th September 2020, Mr. Murphy furnished a joint Opinion of Junior and Senior Counsel in which they concluded that Mr. Harnett had a right of way of necessity and/or a right of way by prescription.

181. It seems that correspondence recommenced by a letter from the defendant's solicitor of the 1st April 2021. It concluded with a warning that proceedings would be issued against Mr. Harnett in respect of trespass on the Bellinter House grounds and alleged interference with the hotel's right of way down to the river.

182. On 6th April 2021 Mr. Murphy wrote to say:

"It has been brought to our attention that on the evening of Maundy Thursday, 1st April 2021, your client, its servants or agents, impeded our Client's long-established right of way from his home over lands comprised in Folio MH6853F by placing two locks and a chain on the gates situated at the main entrance to the Hotel and our clients right of way from the public road.

This unilateral action was taken without any prior notice to our Client and despite previous provision of Senior Counsel's Opinion to your offices on 18th September 2020, wherein said right of way was shown to have benefitted the adjoining lands comprised in folios MH4496F, MH14190F and MH6853F for upwards of 40 years.

We understand that the purported reason for locking the gates is to avail of a reduction in your Client's insurance premium. This does not warrant your Client's refusal to provide our Client with the requisite codes or keys to ensure unimpeded passage over the lands in question. We formally call on you to confirm that unimpeded access will be reinstated by close of business tomorrow, the 7th April 2021..."

183. The defendant's solicitor replied the following day, the 7th April 2021 stating, inter alia:

"...we repeat there is no evidence whatsoever provided that your client actually has a right of way of any kind over our client's property. This has been our position on the matter from the outset...

...Given that your client's claims for an easement are not proven, their and their tenant's behaviour as outlined and the fact that your client has another perfectly viable access to their property, I respectfully suggest that any application for interlocutory relief will be unsuccessful. In the event you should bring such we will defend them vigorously and seek costs for same.

We have engaged Senior Council (sic) to obtain an opinion...

In the meantime, our client is entitled to protect the integrity of their property and their business. The gates shall remain closed.”

184. However, by email of the 9th April 2021, the defendant’s solicitor indicated that they were now willing to provide Mr. Harnett with the code for the lock on the basis that the defendant denies the right of way asserted and that the accommodation was subject to review by the defendant on fair and reasonable notice being given to Mr. Harnett in advance of such review.

185. On the 13th April, the defendant’s solicitor emailed to indicate that unless the tenant ceased and desisted from certain behaviour (posting on Facebook, walking her dogs on the lands, being on the lands, leaving her waste bin on the driveway for collection, making nuisance complaints to An Garda Síochána and the local authorities) the accommodation would be withdrawn.

186. On the 7th May 2021, the defendant’s solicitors wrote to confirm that they had received an Opinion from Senior Counsel advising that there is no right of way existing in favour of Mr. Harnett and:

“...Accordingly, all access to our client’s property by your client and their tenants is to cease forthwith and our clients will be taking steps to ensure the integrity of their property is maintained.

In particular your client their tenant, servants or agents are to cease and desist from using our clients property for:

1. Access.
2. Walking and exercising dogs.
3. Leaving refuse bins for collection...”

187. By a separate email of the same day, the defendant’s solicitor stated, inter alia:

“We have made substantial enquiries with previous owners associated with the property – they all categorically state no easement existed.

In addition, your client’s tenant has made a nuisance of herself in several ways and as such all goodwill and tolerance on my client’s part has evaporated...

Any attempt to enter or use our client’s property by your client or their tenant after that time is not permitted and is an act of trespass.”

188. I return to some of these letters in the discussion later in this judgment. One thing that it clear is that neither side accepted the other side’s position in relation to the substantive issue

of whether there was a right of way. For present purposes, these letters and the evidence of conversations between the parties became the focus of challenges to the reasonableness of the parties' respective approaches and conduct. The defendant says that Patrick Harnett and Luke Harnett said that there was documentation to prove the right of way and that they would provide it; the defendant was repeatedly inviting or calling on them to provide that documentation and they did not do so; and therefore the defendant had to take the step of closing the access to prompt the plaintiffs to provide the documentation and to protect the defendant's property and it was reasonable to do so. For the plaintiffs' part, they say that it was clear from Mr. Murphy's letters of February 2020 that there may not be any documentation, that Mr. Landis and Ms. O'Brien knew this and therefore the repeated demands (or invitations) for documents were unreasonable and, more importantly, the action of closing the access because documentation was not provided when they knew there might not be any was particularly unreasonable and was not a proper justification for their actions. The plaintiffs also challenged Mr. Landis' explanation for installing the barrier, i.e. that they had heard nothing for months about documentation, against the background that Mr. Murphy had written to the defendant's solicitors on the 21st February 2020 seeking consent to access documents and there had been no reply to that letter. Mr. Landis simply said that he could not explain why there was a delay in replying and suggested it may have been because they were trying to gather their own information. He later said that there was plenty of dialogue going on between the parties. Mr. Landis was also asked why such an aggressive stance was taken as installing a hut right across the gateway when he knew at that stage that it was possible to acquire a right of way without documentation. He said that it was because of the incident in September 2019 when one of the tenants came into reception to complain about cars blocking the entrance into the Steward's House. Mr. Landis sought to give evidence of this incident. However, he was not present on that occasion and in fact his account did not reflect Ms. O'Brien's evidence.

189. My view of this correspondence is that the parties did not really engage with what the other was saying. For example, even if Patrick Harnett said at the meeting in January 2020 that there was documentation, Mr. Murphy suggested as early as February 2020 that the right of way may have arisen in a manner which would not give rise to documentation. Therefore, it is difficult to see how the defendant could have persisted in looking for the documentation or could have formed the view that, as Mr. Landis put it, the plaintiffs were 'stalling and delaying'. Furthermore, Mr. Murphy had expressly asked for the defendant's consent to him taking up documentation to explore the issue and this request was never answered. However, equally, at no stage did the plaintiffs simply state that in fact there is no documentation and that they were relying on prescription or section 34, for example. These were of course mentioned as possibilities but there was never a clear statement in response to the defendant's demands for documents that none existed. Furthermore, while the possibility of an affidavit was mentioned as early as February 2020, the step was never taken of addressing the defendant's demands for proof by providing that affidavit. However, I do not have to resolve this issue. The

reasonableness of the parties' approaches may have been relevant to the injunction application but the reasonableness of the parties' actions and whether they could have gone about things differently is not particularly relevant to the core substantive issues.

190. I turn now to the bases which were laid out at the hearing upon which a right of way is claimed to exist. The plaintiffs refer to the different parcels of land collectively as "the Harnett Family Land". However, it seems to me that Patrick and Olive's House, Luke and Belinda's house and Neil's site have to be considered separately from the Steward's House and the farmlands (Patrick Harnett's lands).

Section 34 of the Land Law (Ireland) Act 1896

191. Section 34 of the 1896 Act provides:

"1. A holding vested in a purchaser by a vesting order under this Act shall continue to have appurtenant thereto and be subject to, as the case may be, any previously existing easements, rights, and appurtenances; and any privilege previously in fact enjoyed, whether by permission of the landlord or otherwise, in such manner and for such time that, if the holding had belonged to a different owner from the rest of the Estate, it would have been an easement or right, shall be an easement or right within the meaning of this section and shall be appurtenant to or exercisable over the holding as the case may be.

2. The Vesting Order may if the Land Commission think fit declare that the sale is made subject to or free from any particular easement, right or appurtenance, and such declarations shall have full effect.

3. This Section shall extend to any sale or declaration of a title made by the Land Judge in pursuance of the Landed Estate Court (Ireland) Act 1858, in like manner as if it were herein re-enacted with the necessary modifications."

192. A Vesting Order was not adduced in evidence and initially this was raised as a point by the defendant but at the hearing Senior Counsel for the defendant indicated this this was not in issue. He pointed to section 32 of the 1896 Act and to a handwritten and stamped note on the 1965 Purchase Agreement (which was adduced in evidence) which stated, *inter alia*, "*Fiat and the Apportioned Advance of £3087.50 applied for having been made it is ordered by the Land Commission pursuant to the powers vested in them by the Land Purchase Acts that the holding described in Schedule A to the Certificate opposite with the appurtenances Do Vest and the same are hereby vested in Luke Harnett...*" He accepted that this was deemed to be a Vesting Order.

193. The plaintiffs submitted that they have a right of way pursuant to section 34 on the basis that the means of access to the lands in the Original Folio (which subsequently became the different parcels making up the Harnett Family Land) was along the main avenue of Bellinter House and that it was either a previously existing appurtenance to those lands or was a privilege previously in fact enjoyed. For the purpose of this part of the discussion it is not necessary to deal with the different parcels because we are concerned with whether the lands in the Original Folio in 1965 obtained a right of way upon the lands vesting in Mr. Luke Harnett Senior.

194. The plaintiffs do not necessarily accept the interpretation of section 34 advanced by the defendant that section 34(1) consists of two distinct parts, i.e. before the semi-colon and after it, and that the applicable part is the part after that semi-colon. They argued that the access was a previously existing appurtenance to the lands in the Original Folio. However, they accepted in paragraph 17 of their written submissions that "*Given that prior to the division an easement could not have arisen in the context of the Bellinter demesne then in common ownership, the Act specifically states that the holding when subdivided should be treated as if having been in a different ownership*" and argued that if they are not correct on the point that it is a previously existing appurtenance, the means of access along the main avenue was a privilege which became an easement or right on the division and vesting of the overall holding. In light of that submission the real focus was that the use of the main avenue became an easement when the estate was divided. In those circumstances, I do not need to resolve the interpretation point other than to observe that the part before the semi-colon and the part after it deal with different things. Gordon J held in *Callinan v M'Mahon [1918] 52 ILTR 77* that "[T]he first part of this sub-section only deals with easements, rights, and appurtenances which have a legal existence at the date of the vesting..." Kenny J said in the same case "*It provides for two classes of rights and appurtenances – namely, those that were in actual legal existence previously to the vesting order, and certain others which, prior to the vesting order, had been in the category of mere "privileges", without legal status. There is no difficulty in defining the characteristics of the former class. They must have been, before the vesting, legal, enforceable rights or appurtenances, and whether they were reserved or not by the vesting order, it seems to me that the section recognises their continued existence, and saves such of them as were not reserved by the order from the destruction that might have resulted from their omission...*" The second part is concerned with where the holding being vested is part of a larger holding in common ownership where the use was not a legal right or did not have a legal existence.

195. In any event, I do not believe that this makes any difference to the outcome in this case because there was no evidence that there was "*an easement, right or appurtenance*" which had a legal existence in 1965. I therefore consider the matter by reference to the part of the sub-section after the semi-colon.

196. There was a suggestion by the defendant that the second part of the sub-section only applies to matters such as turbary rights or profits-a-prendre. This was not pushed vigorously.

In any event I do not accept that it is correct. The second part of the sub-section is, in its express terms, concerned with, inter alia, the creation of easements or rights. A right of way is a species of easement or right. Furthermore, the defendant relied on a passage in Bland on 'Easements' (3rd Ed.) (paragraph 3.05), *Cootte v Phelan (1901) 35 ILTR 196* and the *Estate of King-Harman [1908] 1 IR 202*. I do not believe that these cases lead to the conclusion that the second part of the sub-section applies only to the likes of turbary rights (or more properly that it does not apply to rights of way). Those cases dealt with turbary rights because that was what was in issue between the parties and they did not decide that the section was limited to such rights.

197. The defendant also submitted that a right of way over the main avenue was not vested by the 1965 Purchase Agreement. The defendant pointed to features of the Purchase Agreement and to Luke Harnett Senior's initials beside certain clauses, deletions and amendments, to show that Mr. Harnett was actively involved in the conclusion of the terms of the Agreement.

198. Clause 3 of the Purchase Agreement provides:

"The said parcel shall, subject as hereinafter mentioned, and as provided by the Land Purchase Acts [deletion] be vested in the Purchaser in fee-simple, and shall have appurtenant thereto and be subject to, as the case may be, such easements, rights and appurtenances as are set forth in the Appendix hereto in addition, so far as not included therein, to those provided for by Section 34(1) of the Land Law (Ireland) Act 1896."

199. The defendant placed particular emphasis on the inclusion of Clause (C), (E), (F) and (G) and the deletion of Clause (D). Clause (C) is headed "RIGHT OF WAY Servient" and reserves to the Land Commission a right of way over the plot being sold "*on foot and with animals, vehicles, machinery and goods of all kinds for the purpose of maintaining and relaying the existing sewer pipe marked B-S on ... map.*" Clause (E) reserves over Mr. Harnett's lands a right of way for the owners or occupiers of Bellinter House for the purpose of fishing on the River Boyne and Clause (F) reserves the right to the Land Commission to go on to the lands for the purpose of demolishing and removing a hayshed. Clause (D), which is deleted, provided that "*There shall be vested in the Purchaser rights of way shown coloured brown on the Map over the holding.*" The substance of the defendant's reliance on these matters was that the Purchase Agreement, notwithstanding that it dealt with matters such as rights of way and reservation of rights, did not deal with a right of way over the main avenue and therefore (i) the plaintiffs failed to adduce any or any sufficient evidence of "*any previously existing easements, rights, and appurtenances*" or "*any privilege previously in fact enjoyed*" (see paragraphs 3.1 – 4.11 of the defendant's written submissions), and (ii) it showed that the agreement was not intended to vest a right of way over the main avenue.

200. It is clear from section 34 that its effect is automatic once it is established that the privilege was enjoyed in such manner and for such time that, if the holding had belonged to a different owner from the rest of the Estate, it would have been an easement or right. Furthermore, Clause 3 of the Agreement expressly refers to section 34(1). Thus, the absence of any express grant or reference to a privilege or a right of way or an access route across the main avenue can not be taken as meaning that section 34 does not operate in this case. In fairness to the defendant, the real substance of the point is that if there was such a right, privilege or route prior to 1965 one would expect to see a reference to it in the Purchase Agreement, particularly where Luke Harnett Senior was active in the completion of its terms, and that the absence of any such reference undermines the claim that there was such a right, privilege or route and tends to show that Luke Harnett Senior, the plaintiffs' predecessor in title, did not believe that there was such a right, privilege or route. I accept that such an absence has to be taken into account in weighing up all of the evidence as to whether or not there was a privilege but it is only one piece of the evidence. It certainly can not in itself be determinative because otherwise in very many cases the purpose and effect of section 34(1) would in fact be frustrated. Section 34 operates even where there is no reference to the right or privilege in the vesting order. It can not be the case, therefore, that the absence of a reference can be determinative of whether or not there was such a right or privilege.

201. Thus, I am satisfied that the fact that there is no express reference to access along the main avenue, or even that the standard term in respect of a right of way is deleted, is not fatal.

202. There are a number of ingredients of the second part of subsection 34(1) which are of relevance. The "privilege" may have been enjoyed with the permission of the landlord. This contrasts with one of the requirements of the acquisition of a right of way by prescription. Most important is that it must have been enjoyed "*in such manner and for such time that, if the holding had belonged to a different owner from the rest of the Estate, it would have been an easement or right within the meaning of this section*". *Callinan v M'Mahon [1918] 52 ILTR 77* concerned a claim by one tenant (the defendant) of a landlord to turbary over the holding of another tenant (the plaintiff) of the same landlord. Gordon J noted that if the turbary had remained in or was reserved to the landlord the defendant would, under the second part of sub-section 34(1), have been entitled to get turf upon some area of the bog in the three holdings so reserved because he and his predecessors had for forty years enjoyed the privilege of cutting turf on such part of the area as the landlord pointed out to him and therefore "[T]he time was sufficient, and so also was the manner of enjoyment..." However, the turbary had not been retained by the landlord and the defendant had only been allowed to take turbary on the plaintiff's holding for fourteen years before the holding vested in the plaintiff and "[T]his was not such a length of time as would, if the holding had belonged to a different owner from the rest of the estate, have created an easement or right..." Gordon J went on to say:

"The section was not intended to fix purchasing tenants with new burdens, which either did not exist in point of law at the date of vesting or were not privileges previously in point of fact enjoyed as against them in such manner or for such time that if the holding had belonged to a different owner from the rest of the estate they would have been burdens recognised by law. Lord Justice Holmes, in King-Harman's Estate [1908] 1 IR 202, says that the meaning of s.34 is clear. It was intended to include privileges – not strictly rights – which would have been rights but for the effect of the decision in Bright v Walker, 1 C.M. & R. 211..."

203. Kenny J said in the same case:

"The privileges which the section converts into rights in favour of the dominant tenement...are – (1) privileges previously in fact enjoyed in connection with the holding, whether by permission of the landlord or otherwise – whatever those last two words may mean; (2) **privileges, the enjoyment of which by the owner of the dominant tenement for a period of time that would be necessary for the creation of a legal easement or right;** (3) privileges, the enjoyment of which by the owner of the dominant tenement was in the manner that was essential to the creating of a legal right in all its features except "permission." If the enjoyment of the privilege fulfils these several conditions, it becomes an easement or right appurtenant to the holding." [emphasis added]

204. He went on to say, inter alia:

"...the section shows very clearly that, as to "time" and "manner," the enjoyment of the privilege in order to come within the section must have been such that if the holding "had belonged to a different owner from the rest of the "estate," the privilege would have been an enforceable easement or right."

205. Thus, it is clear that in order for a privilege to be converted to a right of way by the operation of section 34(1), it must have been enjoyed for the requisite period (twenty years) under the Prescription Act 1832.

206. I am satisfied that the evidence establishes that access to and from the Steward's House was via the main avenue of Bellinter House whilst Luke Harnett Senior was steward of the estate and I am satisfied that this is a privilege within the meaning of section 34(1). Evidence was given by Patrick Harnett that after they moved in to the Steward's House they always accessed the house by coming along the main avenue. This is also supported by his evidence of the condition of the other route, i.e. to Bellinter Bridge. He described this route as coming up through woodland which came up around the farmyards. He said that at the time for the most part only agricultural vehicles used that route and that while he could have driven along that route in 1970 in a car, it would have been with difficulty and that it would be tough going. He said there would be no problem using a tractor on it. He described the current condition of

the route as very good but in previous years it was not and explained that the family had improved it over the years. Mr. Harnett was three years of age when they moved into the Steward's House and I have had regard to that fact when assessing the reliability of his evidence. He was fourteen when the estate was divided. I am therefore satisfied that his evidence as to how they used to get to and from the Steward's House before the estate was divided is reliable. Furthermore, he was not seriously challenged on this evidence.

207. However, that only accounts for eleven years before the lands were vested in Luke Harnett Senior (1954-1965). This, in itself, is insufficient for the operation of the second part of section 34(1). There is no direct evidence as to the means of access to the Steward's House for the nine years before 1954 which would make up the required twenty years.

208. I have considered whether I can make a presumption or conclude on the basis of the surrounding evidence that the means of access to the Steward's House in the nine years prior to 1954 was along the main avenue. While there is some support in the evidence for that, I do not believe that it is sufficient to allow me to safely reach such a conclusion.

209. The evidence supporting such a conclusion is that if the condition of the Bellinter Bridge road was only suitable in 1954 for agricultural machinery then it is likely that it was in that condition for a long period before that and it is possible that the main avenue was therefore the means of access for domestic traffic to the Steward's House. It is possible, of course, that the condition of the road was deteriorating over the years preceding 1954 but it seems unlikely that it would have been in a much worse condition in 1954 than in the few years before that. Furthermore, it is also entirely possible that if Luke Harnett Senior and his family were permitted to use the main avenue so also were their predecessors. Some support is also offered by the fact that there is a gateway between the Steward's House and the rest of the estate which is clearly very old. Even if the gate itself does not pre-date 1954, the gateway clearly does.

210. However, there is no evidence whatsoever as to whether there was somebody living in the Steward's House in the period prior to the Harnetts moving in and therefore I can not conclude that the main avenue was used by residents of the Steward's House to access the house. I also believe that no great weight can be given to the fact that there was a gateway between the Stewards House and Bellinter House because it is perfectly understandable that there would be a gate to allow the steward of the estate to get from his house to the main house and for estate traffic to pass from the front of the estate, past the Steward's House and into the rest of the estate. It seems to me that against that background, notwithstanding the indirect evidence, the burden of proving that the Steward's House was used by residents of the Steward's House to access the house for the nine years prior to 1954 has not been discharged.

211. I should also say that the evidence (which I address below) shows that the estate's farmlands were also accessed along the main avenue from 1954 to 1965 (together with along the Bellinter Bridge entrance). However, I do not believe that this gives rise to the operation of the second part of section 34(1) because those lands were being farmed by or on behalf of Bellinter estate. Thus, in using this as a means of access, a privilege was not being exercised.

212. It must also have been enjoyed in such manner as, if the holding had been in separate ownership, would have been required to acquire a right. I do not have to consider this in the context of section 34(1) in circumstances where the user for the required period of time prior to 1965 has not been established.

213. Thus I am not satisfied that a right of way arises by operation of section 34(1) of the 1896 Act.

Easement of Necessity or Common Intention

Easement of Necessity

214. The plaintiffs also claim an easement of necessity. They do so on the basis that the Bellinter Bridge road was not suitable for anything but the roughest of agricultural machinery when the lands were vested in Luke Harnett Senior. That is the relevant time. The plaintiffs submit at paragraph 33(i) of their written submissions that *"...in 1965, the Bellinter driveway was the only practical means of access for all purposes to the Steward's House, outbuildings and agricultural land adjacent thereto"* and *"[H]e described the Bellinter Bridge entrance as being a rough track accessible only to very limited traffic, and not the route which was used for ordinary, domestic and agricultural purposes."*

215. The evidence of Patrick Harnett in relation to the Bellinter Bridge route is set out above and in substance it is that at that time the condition of that road was really only suitable for tractors and other agricultural machinery. He said that a car could drive along it but with difficulty and that it would be tough going.

216. That is insufficient to establish an easement of necessity. It was held in *Maguire v Browne (1921) 1 IR 148* that:

"...the right of way of necessity rests upon the supposed intention of the parties; that the law presumes that the man owning a parcel of land, and granting away all of the lands surrounding it, would not be so foolish as to leave himself entirely landlocked and cut off for more

communication with the outside world; that, accordingly, it was taken that in such a case the parties would have understood or agreed that the owner of the otherwise landlocked land ought to have a right of way..."

217. This was reflected in Clarke J's judgment in *Palaceanne Management Ltd v AIB plc* [2012] IEHC 182:

"A right of way of necessity is a long-established legal concept which, although limited in scope, is designed to prevent a party from being landlocked at least in certain circumstances. In general terms a way of necessity arises when a landowner sells part of his land holding to a purchaser such that the purchased lands have no means of access other than through the retained lands."

218. In *Zopitar Ltd v Jacob* [2018] 1 IR 657, Hogan J (on behalf of the Court of Appeal) held (per the headnote) that "*an easement of necessity could generally arise only where the dominant tenement would otherwise be landlocked or otherwise unusable. There was no basis for implying an easement of necessity simply because the dominant tenement had access arrangements that were less than perfect or because such an easement of necessity might be thought to be convenient for its occupants.*"

219. Bland on *Easements* (3rd Ed.), to which I was referred by Senior Counsel for the defendant, writes at paragraph 5-39 that "*Necessity is strictly construed, and inconvenience or difficulty in access is not sufficient. There must be a true necessity. Any access to the dominant tenement will prevent the implication of a right of way of necessity...*" At paragraph 7.54 Wylie (Irish Land Law) (6th Ed.) writes:

"...Such means of access must be a necessity at the date of the grant and no implied right will arise if there is an alternative route available to the grantor. The grantor will succeed in establishing a way of necessity in the last situation only if he can show that the alternative route is not really open to him, because he has no legal right to it as opposed to permission or a licence which may be revoked at anytime, or he has not even permission to use it. The grantor will certainly not succeed if he can show only that the alternative route is inconvenient. The view has been taken in England that a claim to an easement of necessity must be based upon the presumed intention of the parties and not on public policy. This is also the view of the Irish courts."

220. The lands in question here were not landlocked. On the evidence, the main avenue was undoubtedly more suitable and more convenient than the Bellinter Bridge road and, indeed, that road was not in a suitable condition to be used conveniently for certain purposes relating to the lands. However, the lands could be accessed by that road and the road could be

developed (as indeed it was, though this is irrelevant to the current discussion). There was therefore no true necessity.

221. The plaintiffs relied on, inter alia, *Maguire v Browne* [1921] IR 148 and *Maude v Thornton* [1929] IR 454 to submit that the court can consider the purpose of the lands to determine whether there is a right of way of necessity; in other words whether a right of way arises because it is necessary in order for the lands to be used for a particular purpose. However, it seems to me that these cases are correctly read as meaning that the purpose of the access can be considered in order to determine the nature, extent and limits of the right of way but only when it is first established that there is a necessity and therefore a right of way of necessity. In *Maguire v Browne*, the defendant bought a moat which was accessed by a path leading across the plaintiff's lands. The moat had never within living memory been used for ordinary agricultural purposes and had been preserved as an object of antiquarian interest. The defendant proceeded to cut down timber growing on the moat and to remove it by the pathway across the plaintiff's lands including by cart, claiming that he had a right to so use the pathway as a way of necessity. Importantly, it was not disputed that the pathway was a way of necessity (it being the only means of access to the moat) but the dispute was as to whether the right extended to using the pathway for the purposes of carting felled timber with horses and carts. Thus, the court was not concerned with whether there was a right of way of necessity but rather the extent of that right.

222. In *Maguire v Browne* [1921] IR 418 Powell J in the High Court held that the defendant did have a right of way to remove the timber. This was overturned by the Court of Appeal, though that Court did not disagree with the principles set out by Powell J.

223. In the Court of Appeal, Sir James Campbell C. said at page 163 -164:

"Again, I agree with him in holding that when the owner of this rath close demised the adjoining lands to the plaintiff's predecessor in title, a re-grant of this road or laneway to the owner should be implied as a way of necessity to his land-locked close and that the defendant is now entitled to it by virtue of his conveyance of 11th February 1919; but the doubtful and difficult question remains as to the nature and extent of this way of necessity. As to this, I think, the law has been correctly stated by Powell J., when he says upon the authority of the well-known case of *London Corporation v. Riggs* (1), that the right is limited to such a way as was suitable or necessary for the enjoyment of the close in the condition in which it happened to be at the date of the original severance. This principle seems to me to be inherent in every such right, and was admitted by counsel for the defendant without prejudice to their right to challenge the decision I have just cited, in the event, which we were told was a certainty, of this case being taken to the House of Lords. Assuming this principle to apply the real issue between the parties in this appeal is as to its application to the facts; counsel for the defendant contending that this rath close was at the date of the original severance agricultural land, and that the way of necessity must be held to exist for all purposes reasonably consistent with its user as

such, including the cutting and removal of timber for sale by horses and carts; while for the plaintiff it was argued that the purposes for which such a way of necessity can be used must be limited to and measured by the necessity existing at the time as proved by its previous and continuous user. Powell J. adopted this contention by the defendant; but I have come to the conclusion that the plaintiff's view is correct, and more in harmony with the dimensions which have been quoted, and which have been fully discussed by the learned Judge in his careful summary."

224. O'Connor LJ said at page 169-170:

"If I were directing a jury in a case such as this, where a right of way of necessity is practically admitted, but the nature and quality of it are at issue, I should do so in the following fashion: I should tell the jury that in the absence of an express grant a right of way of necessity rests upon the supposed intention of the parties; that the law presumes that a man owning a parcel of land, and granting away all the land surrounding it would not be so foolish as to leave himself entirely land-locked and cut off from all communication with the outer world; that accordingly, it was to be taken that in such a case the parties understood or agreed that the owner of the otherwise land-locked land was to have a right of way; that the question in the case was not the existence of a right of way (for that was conceded) but the extent and quality of it; that as to such extent and quality all the facts should be taken into account in ascertaining the intention of the parties; that the jury should not approach the case with a view of determining what at the present time and in the present circumstances they would themselves think a reasonable right of way, for that would be to manufacture an agreement, whereas their function was to get an actual agreement or intention of the parties at the time the two tenements were severed; that the owner of the dominant tenant could have made an express reservation or taken an express grant of a right of way had he so chosen, and that, as he neglected or chose not to do so, nothing should be intended in his favour, that amongst the circumstances which would enable them to determine the extent and quality of the right were – 1, the nature and quality of the servient tenement; 2, the nature and quality of the dominant tenement; 3, the actual user since the severance of the tenements; that inasmuch as the nature and quality of the tenements were, as a rule, lost in the mists of antiquity, they should infer it as best they could from the present nature and quality of the tenements and the proved history of both; that a like inference should be drawn from the proved history of the user; that of all of the circumstances of the case, the user of the right was by far the most powerful piece of evidence, because it was reasonable to assume that it was the parties' own measure of the right at the time it accrued; and that, in the absence of very strong indications to the contrary, it would be unsafe to infer a right more extensive or more generous than that actually exercised.

225. In *Maude v Thornton* [1929] IR 454, the plaintiffs claimed a right of way of necessity over the defendants' lands on the basis that there was a well-defined route across those lands which was the regular way used for ingress and egress to the plaintiff's lands and that without

such a right of way their lands would be land-locked. Meredith J applied the principle in the passage just quoted from O'Connor LJ on page 169 – 170 of *Maguire v Browne*. Meredith J was satisfied on the evidence that if the plaintiff did not have the right of way claimed he would be land-locked and therefore a right of way of necessity arose.

226. In circumstances where I have concluded that there was no right of way of necessity because there was a means of access, then it seems to me that I do not need to consider the purpose of the access in order to determine the scope and limits of that right. However, even if I am wrong on this, a consideration of the purpose of the access does not lead to the conclusion that there was a right of way of necessity over the main avenue. The lands and access were for agricultural purposes and domestic purposes. For the reasons set out above, neither required, of necessity, access along the main avenue. The difficulty and inconvenient of using the Bellinter Bridge road due to its condition does not establish necessity.

227. I accept the point made by the plaintiffs that where a right of way of necessity arises, it does not cease if an alternative means of access is subsequently developed. In this instance, if a right of way of necessity had arisen, which I find it did not, the improvements to the Bellinter Bridge route would not mean that the right of way over the main avenue ceased.

Common Intention

228. It was held by Parker LJ in *Pwllbach Colliery Company Ltd v Woodman [1915] AC 634* at 646 - 647 that:

“My Lords, the right claimed is in the nature of an easement and apart from implied grants of ways of necessity, or what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim “*Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res esse non potuit.*” Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants’ mining operations.

The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See *Jones v. Pritchard (1)* and *Lyttleton Times Co. v. Warners (2)*. But it is essential

for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.”

229. Bland (3rd Ed) at 5.52 notes that there are two limbs to the test for an easement of common intention:

(1) the parties must, at the time of the grant, have shared an express or implied intention that the land granted or retained should be used for a particular purpose; and

(2) the easement is necessary to give effect to that intention.

230. In *Shrewsbury v Adam* [2006] 1 P & CR 27, Neuberger LJ, on behalf of the Court of Appeal, (at paragraphs 25 – 29) noted that the law in connection with the grant of implied rights of way was set out authoritatively by Lord Parker in the second paragraph from *Pwllbach Colliery Company* quoted above and went on to say that:

“26. More recently in *Stafford v. Lee* [1992] 65 P. & CR 172, Nourse L.J., after quoting Lord Parker’s observations said this at p. 175:

“There are therefore two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give effect to it.”

27. *Stafford’s case* was unusual, in that the only relevant information available to the court was the contents of the relevant conveyance, together with a copy of the conveyance plan. In the present case, of course, there is far more information available. However, although each case inevitably turns on its facts, the significance of *Stafford’s case* is that it emphasises that the question of whether the test, laid down by Lord Parker, is satisfied is to be determined in the normal way in a civil case, namely by reference to the balance of probabilities.

28. In my judgment, therefore, the resolution of the issue raised on the present appeal turns on the proper analysis of the common intention of the parties, as gathered from the terms of the conveyance, the position on the ground, and the communications passing between the parties before the execution of the conveyance, which would include the provisions of the contract...

29. Although the four cases I have so far referred to were all concerned with the transfer or grant of an interest in land (a lease in *Pwllbach’s case*, a transfer in *Scarfe’s case*, the grant of an easement in *Partridge’s case*, and a conveyance in *Stafford’s case*), it seems to me important to bear in mind that the principles relating to the construction and effect of such

documents should not, at least as a matter of principle, differ from the principles applicable to the interpretation of bilateral contractual documentation generally. That point is supported by the fact that, in *Partridge's* case, Peter Gibson LJ specifically relied on guidance given by Lord Hoffmann in *ICS Ltd. -v- West Bromwich Building Society* [1998] 1 WLR 896 at p.912 to support his conclusion that what might be called extrinsic evidence should not be excluded when interpreting a conveyance or deed of grant. However, I accept that that approach must not be adopted indiscriminately, because documents granting or transferring interest in land will often have been drafted on the basis of principles, or approaches, laid down by courts and referred to and relied on in textbooks, over the years. An obvious example in the field of conveyancing is *Pwillbach's* case itself."

231. Thus, in ascertaining the common intention of the parties, the Court must have regard to all the relevant surrounding circumstances, including the terms of the conveyance, the position on the ground and the contract and other communications passing between the parties before the execution of the conveyance.

232. The doctrine of common intention and, in particular, the consideration of the terms of the conveyance and of the circumstances on the ground in order to identify the intention of the parties, sits somewhat uncomfortably with a purchase under the Land Purchase Acts. In relation to a consideration of the deed of conveyance outside of the 1896 Act, the absence of an express reference to a right of way or the deletion of a clause referring to such a right would undoubtedly be a matter of significance in construing the deed. However, that approach sits uneasily with section 34 which envisages that there might not be a reference to a right or privilege in the agreement. Secondly, the provision that a privilege which is exercised with the permission of the landlord/owner shall become a right is somewhat inconsistent with the notion that the parties had an intention to confer a right. Thirdly, it seems to me that the notion of common intention arises more readily in the case of a normal relationship of the direct owner of land conveying it to a purchaser. That owner will be more familiar with the circumstances on the ground than a body such as the Land Commission and therefore a common intention can more readily be identified on the basis of the circumstances on the ground.

233. However, it was not argued that the doctrine of common intention does not apply in the case of a transfer from the Land Commission. I therefore proceed on the basis that it does.

234. The terms of the transfer document give support for the conclusion that the parties did not intend a right of way over the main avenue. As discussed above, it is clear from the fact that Mr. Luke Harnett Senior, the purchaser, was an active participant in the completion of the Purchase Agreement (which contains the fiat) in the sense that he initialled changes and deletions to the standard form agreement and the specific clauses in the appendix. Importantly, the deletions included a standard clause identifying any right(s) of way in favour of the lands being vested. The Purchase Agreement also dealt with any easements or rights over the lands

being vested and some of these had been amended, showing that the parties did address their minds to matters such as rights of way and yet did not specify a right of way over the main avenue.

235. However, this must be balanced against the fact that the Purchase Agreement expressly referred to section 34 and that the effect of section 34 is to automatically vest any pre-existing rights or privileges (provided the requirements are satisfied) in the lands being vested, whether they are expressly referred to or not.

236. Therefore, if the Purchase Agreement is construed without reference to this legislative background it would offer significant support for the conclusion that the parties did not have a common intention that a right of way would be granted. However, it would not be proper to construe the agreement without reference to the statutory background. It would not be proper to do so because it would disregard the fact that section 34 is expressly referred to in the Agreement and would be a failure to interpret the text of the Agreement in its context.

237. The Court also has to have regard to the position on the ground.

238. As discussed above, the parties must have shared an express or implied intention that the land granted should be used for a particular purpose and the easement must be necessary to give effect to that intention. The evidence is that the main avenue was used to access the Steward's House and the farmlands and that the Bellinter Bridge route was only really suitable for agricultural traffic. There can be no doubt, both from the nature of the land at the time of the grant and the fact that this was land which was transferred by the Land Commission under the Land Purchase Acts, that the land was granted to be used for farming or agriculture and for Luke Harnett Senior and his family's dwelling. In light of the evidence that the Bellinter Bridge route was used for agricultural purposes it can not be said that an alternative route was necessary. The question that arises is whether, in circumstances where the Bellinter Bridge road was not really suitable for domestic purposes, another means of access, i.e. over the main avenue, was necessary to give effect to the intention that the lands would be used for Mr. Harnett's dwelling. I was referred to Laffoy J's judgment in *Conneran & anor v Corbett and Sons Ltd [2004] IEHC 389* to suggest that a right could be implied under the doctrine of common intention if otherwise the lands would be "ineffective" for the purpose for which they were intended. However, this case is of limited assistance because it turned very much on the facts and the term of the relevant lease. Laffoy J concluded that a right had to be implied because without it, the express right in the lease would be "ineffective". I am not satisfied that a right over the main avenue was necessary, or that the lands would have been "ineffective" for the purpose for which they were purchased without such a right of way, in circumstances where the Steward's House could be accessed by domestic traffic, albeit with difficulty, and where that roadway could be improved.

239. A right of way of common intention therefore did not arise.

Prescription

240. The plaintiffs do not specify the legal basis for the claim in prescription in the pleadings. However, they rely on the Prescription Act 1832 in their written submissions. This section is applicable in light of the provisions of the Land and Conveyancing Law Reform Act 2009, the Civil Law (Miscellaneous Provisions) Act 2011 and the Land and Conveyancing Law Reform Act 2021.

241. In order to establish that they have acquired a right of way by prescription in accordance with the provisions of the Prescription Act 1832, the plaintiffs have to establish continuous user for a period of twenty years and that the user was "*nec vi, nec clam, nec precario*", i.e. without force, without secrecy and without permission. The real dispute between the parties, at least in respect of the Steward's House lands and the farmlands, is whether the main avenue route was used for a continuous basis for the required period of time, whether it was being used with the landowner's permission including whether the main gates were closed or locked on Christmas Day each year, and whether, if they were closed or locked, this is sufficient to prevent the acquisition of a right of way by prescription.

242. It is necessary to treat Patrick and Olive's, Luke and Belinda's and Neil's lands separately from the Steward's House and the farmlands.

243. I am satisfied that the latter two enjoy a right of way by prescription. I deal with these first and then return to the other two parcels.

Continuous User

244. Patrick Harnett gave evidence that he lived in the Steward's House from 1965 (in fact he lived there from 1954 but 1965 is the relevant date) to 1977 and then lived on his and Olive's lands which was the site carved out of the Original Folio from that date to the present. His father farmed the lands from 1965 to 1983 when the farmlands were transferred to him and he took over the farm.

245. In respect of user, he gave evidence that when he lived in the Steward's House they, and visitors to the house, always accessed it by the main avenue of Bellinter House. He also said that the Steward's House bin was left outside the gate on the avenue from Bellinter House and the bin lorry used come up the main avenue to collect it. He said that after he moved into his own house in 1977, he sometimes drove through the Steward's House and down the main

avenue and out the gates and sometimes used the Bellinter Bridge route. His house is about half way between the Steward's House and the Bellinter Bridge entrance and which route he used depended on where they were going to or coming from.

246. His evidence was that much, if not most, of the traffic relating to the farm came up along the main avenue also. He explained that while his father was farming and when he took over the farm, the milk was brought down the main avenue and collected by the co-op at the main gates of Bellinter House and the churns (and latterly, the tank) were brought back to the farm along the main avenue. He also said that they brought calves out to the mart using the same route. He said that he used to drive agricultural machinery down the main avenue, as did neighbours who sometimes came in tractors. He accepted in cross-examination that he no longer drives a tractor out by Bellinter House and that the primary access point for farm machinery is the Bellinter Bridge entrance but said that they still use the Bellinter House entrance for agricultural uses such as bringing supplies into the farm and the store.

247. The doctor, vet and the AI man used to access the house and the farm by coming up the main avenue.

248. For some period, he had stables rented out and the owners of the horses came in and out along the main avenue with horse boxes.

249. He also said that when they started the kennels business (in 1986) clients would use the main avenue. He confirmed that there is a large sign for the kennels and cattery at the Bellinter Bridge entrance but he said that both routes are used and they sometimes direct clients to go through Bellinter House.

250. Various photographs were adduced in evidence and he confirmed that they showed various members of the family using the main avenue.

251. The substance of much of this evidence, at least in relation to the earlier years, was not seriously contested by the defendant. It is supported by the evidence of Luke Harnett, Raymond Hayes and Gareth Keoghan. It is also in some respects supported, at least in relation to more recent years, by the evidence of Mr. Bourke, Sister Philomena and Ms. Murphy who were called by the defendant. It is also supported by the contents of correspondence exchanged between the parties since 2019.

252. Luke Harnett grew up in Patrick and Olive's house. He said that most of the trips from that house used the Bellinter Bridge route but that sometimes they would go out the Bellinter House avenue and gates. Whilst growing up, he stayed with his grandmother in the Steward's House at weekends and holidays after his grandfather died in 1986. He then lived in the Steward's House with his wife and three children from 2004 to 2010 when they moved to their own house. From 1993 to 2004 there were tenants in the house. Whilst he and his family were

there, he said, they went in and out along the Bellinter House driveway and that it was clear they were using it. He said that they were in and out multiple times a day because the children had to be brought to and from school.

253. He explained that when he was growing up he worked on the farm and that he continues to help out at weekends and during the holidays or after office hours. He said that the farm was a dairy farm until 2000, when they switched to beef farming. They used to go to the mart in Trim on a Friday and that the calves were loaded into a calf trailer and they drove out along the main avenue because that was the way to Trim. He also said that while hay was mostly brought into the farm from the Bellinter Bridge entrance, some was brought through the main avenue of Bellinter House because the Harnetts rented fields just outside the gates of Bellinter House.

254. He also said that when the hotel opened in 2006, the hotel put "No Parking" signs to prevent parked cars blocking them in and that there was a system that the hotel would have a member of staff present when wedding guests were arriving all at the same time to ensure they kept the route from the Steward's House clear and that the hotel took registration numbers of cars so they could identify the patron who might have blocked the way. That would not be necessary unless the route was being used. The defendant's witnesses said that they did not see any such signs but the plaintiffs' witnesses were not challenged on their evidence that these signs were erected. He also referred to a photograph of a sign expressing best wishes to him and Belinda on their wedding day and confirmed that the hotel had placed it just beside the main steps of Bellinter House so it was visible when they were passing by on their wedding day. This suggests that the hotel knew that they would be passing that way because it was their normal route in and out of the Steward's House.

255. Ms. Cassidy, the tenant in the Steward's House from November 1993 to May 1995 gave evidence that she accessed the house along the main avenue. She also said that she occasionally saw people coming to leave dogs off at the kennels and that the postman and the bin men came along the main avenue.

256. Raymond Hayes is very familiar with all of the properties. He said that when he wanted to access the Harnett lands including the Steward's House he always went up the main avenue past Bellinter House and normally took the entrance through the courtyard but sometimes went past the schoolhouse. This was both long before and after he set up a building firm which was sometime after the 1980s. He also described that the Harnetts were the only people in the area with a phone at one stage and that neighbours used to go their house to use the phone. They accessed the house by using the main avenue, as did, he said, the postman, the bread man, the vet and the AI man. The vet and AI man must, of course, have been going to the farmlands.

257. Gareth Keoghan is one of the current tenants in the Steward's House. He has been there since February 2011. His evidence was that he has always got in and out of the property along

the main avenue. He also confirmed, as was referred to by Patrick Harnett, that he puts their bin on the avenue outside their gate and it is collected from there. He also explained the system that the hotel previously had in place to prevent them being blocked in (as described by Luke Harnett).

258. He said that whilst he has been a tenant he has seen tractors, agricultural machinery, people going to the kennels, and all types of deliveries going to the Harnetts' land through the Steward's House.

259. Frank Murphy has been familiar with the Harnetts for many years (since 1969) and has visited them over those years. He said that he accessed the lands by the main avenue of Bellinter House and then turning left through the courtyard.

260. Brendan Steen is also familiar with the properties since the mid 1970's, having acted for both Mr. Luke Harnett Senior and the Sisters of Sion. He gave evidence that he used the services of the dog kennels when he was going away. He said that to gain access to the Harnett's dog kennels he went up through the main gates of Bellinter House, past Bellinter House, into the courtyard and through the gate that separated the courtyard and the Harnett's property. The maps show this led into the Steward's House and on into the farmlands. He said that he did this in 1993, 1994, 1995, 1996, 1997 and 1998. He said that at some stage the Harnetts sold their milk quota and redeveloped the kennels and at that stage he came up through the Bellinter Bridge entrance up to the Harnett's yard.

261. He also gave evidence that in an interaction with representatives of the nuns (the details of which are not important) around the time of the proposed sale he raised the issue of a possible right of way and said that the reason he did so was because he had gained access to and from the Harnett's property and was aware that other people had also done so because he came across them when he was going to and from the property. Of course, the fact that Mr. Steen raised the possibility of a right of way can not be evidence of such a right. The only relevance of this is Mr. Steen's reason for raising it, ie. that he had come through Bellinter House to access the Harnetts' property and he had seen other people do so also.

262. Sister Philomena, Mr. Bourke and Ms. Murphy gave evidence that in some respects supports the plaintiffs' evidence of the use of the main avenue.

263. Sister Philomena said that she had no clue who was going over the Bellinter House avenue when she was there in 1990-1991 and 1992-1993 but the whole substance of her evidence was that she was aware that it was being used by the Harnetts when she was there in 2001-2004 because her evidence was that the gates were closed *"to ensure that the Harnetts did not gain an unrestricted right over the driveway and that Christmas Day was chosen because it would be the least disruptive to both parties."* She also said that they met with Mr. Harnett in September 2003 when they were thinking of selling because *"...they were aware that*

there was some confusion over the right of way and to see if it could be sorted out". This could only arise if the Harnetts or their tenants were using the main avenue.

264. Mr. Bourke told the Court that his solicitor told him that the farmer next door had permission to use the drive. While they were developing the hotel he visited Bellinter House several times a week and met the Harnetts on occasions. He also said that Luke and Belinda lived in the Steward's House and then a tenant moved in and they used to go up and down the driveway. He described becoming friendly with the nuns and having many interactions with them but could not remember specifically talking about the use of the driveway. He did not recall putting 'No Parking' signs up.

265. Ms. Murphy said that she understood that the Harnetts used the avenue to come and go to their property but does not know specifically who was using it other than Belinda.

266. Furthermore, the exchanges of correspondence support the evidence that the main avenue was being used, though the emphasis in some of the correspondence was on Patrick Harnett. In the letter of the 27th April 2004 from the solicitors for the Sisters of Sion, which was put to Patrick Harnett by the defendant, they accepted that he was using the driveway of Bellinter House. They stated, inter alia:

"We would refute your comments regarding what you refer to as your client's "right of way" over the driveway of Bellinter House. Your client is entitled to use the driveway to gain access to his adjoining property by way of licence from our clients only. **Such use has been by arrangement and with the consent and acknowledgement of our clients and has not been continuous or uninterrupted.** Our clients close the main gate to the driveway every year at Christmas time. We cannot put this matter further..." [emphasis added]

267. I have previously referred to the exchange of correspondence between the parties' solicitors in 2020/2021. In relation to user, Mr. Murphy wrote in his letter of the 21st February 2020 on behalf of Mr. Harnett that "*...If such a search does not throw any light on the subject, then our client will make an Affidavit setting out the history of the use of the Right of Way over the entrance to Bellinter House, and I am quite satisfied that that Right of Way has been in existence for decades*". The defendant's solicitor wrote on the 2nd September 2020 saying:

"...your client or their tenants have only commenced entering our clients land in this fashion since our client acquired it in or about 2016. Effectively trespassing.

They have made enquiries with the previous owners who advise neither your client nor his tenants exercised any right of way during their tenure. **In fact they advised that anytime your client did in fact use the laneway he asked permission of them.** Hardly the actions of the beneficiary of a right of way. For the record our clients never gave such a consent.

Your client and his tenants are to cease their incursions onto our clients property forthwith. We have advised our client to close the historical access point permanently to prevent your client, his servants or agents from trespassing on our client's property." [emphasis added]

268. The defendant's solicitor wrote on the 7th September 2020, inter alia:

"Your client does not have any right of way and have only attempted to assert this in recent times.

In fact the access your client has started to use was overgrown until about 2 years ago when our clients tidied it up. It is only since that time your client begun to use the access..."

269. There is significant inconsistency in these letters in that the one of the 2nd September acknowledges that the previous owners had advised that Mr. Harnett used the avenue but in both the first and second letter it was also stated that the he only started to use it in 2018. The letters were perhaps seeking to convey that he was using the route in a manner to claim a right of way only since 2018. The significant point for the current discussion is that the previous owners were recorded as stating that Patrick Harnett did use the avenue.

270. This was also reflected in Ms. O'Brien's evidence. She said that she rang Mr. Bourke early in 2020 and he informed her that the main avenue was only used with his permission. She also said that she had conversations with the nuns and they informed her that the Harnetts did not have a right of way because it was used with their permission and they locked the gates at Christmas. Some of the contents of the affidavit which she swore to oppose the interlocutory injunction were put to her. At paragraph 17 she said "*The Previous Owners have informed me that during their period of ownership between 2005-2016 the Plaintiffs at all times sought permission to access the Defendant's Property*". Implicit in all of this is that the plaintiffs were using the main avenue. However, at paragraph 18 of her affidavit she said that it was only after the schoolhouse was renovated in 2019 that the plaintiffs' tenants began using the access point. It is difficult to understand how Ms. O'Brien could have given evidence as to what the tenants were doing prior to her arrival. In relation to use, Ms. O'Brien said that she knows for a fact that the Harnetts are not using the main avenue and that it is only the tenants of the Steward's House who are using it. She did not accept the evidence of Patrick or Luke Harnett or of Mr. Hayes. Of course, Ms. O'Brien could only give evidence in relation to 2019 onwards. She said that in that period she has never seen any of the Harnetts on the avenue unless they are coming to the hotel. She confirmed that the bins from the Steward's House are put on the avenue just past the schoolhouse and collected by the bin lorry which comes up the main avenue. She said that she never saw 'No Parking' signs at the gate and then said that they were not there when she started. Again, it is very difficult to understand how she could give

that evidence in circumstances where, on her own evidence, she was not even aware of the existence of the Steward's House until two months after she started.

271. Mr. Landis also gave evidence on behalf of the defendant. He is based in the United States so his evidence in relation to user is of very limited assistance. He said that he was unaware of the use that was being made by the Harnetts of the main avenue until 2019. He confirmed that he viewed the property before the defendant bought it, saw the gates going into the Harnetts property from the roadway/laneway coming up from the Bellinter House avenue, and understood them to be an access to the next door property but did not ask whether it was in use. He said that it did not look as though it was in use because there was no evidence of use, such as tyre tracks.

272. The evidence on behalf of the plaintiffs in respect of user was very clear. I have to approach Mr Keoghan's evidence with a degree of caution because he is involved in litigation with the defendant. However, in circumstances where use was acknowledged in the letter of the 27th April 2004 by Sister Philomena, Mr. Bourke and Ms. Murphy (at least in relation to the periods for which they were able to give evidence) I have no difficulty whatsoever in accepting the plaintiffs' evidence of user. I do not accept the evidence of Ms. O'Brien or the statements in the letters quoted above that the Harnetts or the tenants only started using the main avenue after the defendant bought the property and in particular some time in 2019 or that Patrick Harnett increased his use of the route when the property was being sold. That is inconsistent with the evidence of Sister Philomena, Mr. Bourke and Ms. Murphy, all of whom gave evidence of use long pre-dating 2016.

273. I am therefore satisfied that the main avenue of Bellinter House has been used as a means of access to Patrick Harnett's lands for the required period of twenty years. The evidence is that it has been used to access the farmlands since 1965 but, more importantly, since 1983, for agricultural purposes and for access to the kennels business since 1986. The evidence is that the Bellinter Bridge entrance is in more recent years the main access for agricultural purposes but the use of the main avenue continues for some purposes associated with the farm. The kennels are accessed using both routes.

274. I am also satisfied that it has been used as a means of access to the Steward's House for the required period. One issue which had to be considered is the period 1995 to 2004 as there was no express evidence dealing with user in connection with the Steward's House during that period. Nonetheless, I am satisfied that when the evidence is taken as a whole, the plaintiffs have discharged the burden of proof in respect of user. Luke Harnett gave evidence that there were tenants in the Steward's House from 1993 to 2004. The tenant who was therefore from 1993 to 1995 gave evidence that she accessed the Steward's House by the main avenue. Luke Harnett gave evidence that it was the means of access prior to 1995 and from 2004 to 2010, when he was living there, and one of the current tenants gave evidence that it

has always been their means of access. I can safely conclude that it was the means of access and used as such between 1995 and 2004. Perhaps more importantly, I am satisfied that it was used as a means of access to the Steward's House from 1965 to 1995 (and therefore, subject to the other conditions being satisfied, a right of way would already have been acquired) and used as such from 2004 to when the defendant took issue with its use. Even if I could not safely conclude that it was used as a means of access to the Steward's House between 1995 and 2004, I am satisfied that its non-use between 1995 and 2004 would not have been sufficient to interrupt the continuous user which had been enjoyed up to 1995 or to amount to an abandonment of a right of way which might have been acquired.

275. I am also satisfied, subject to the discussion below about the main gate of Bellinter House being locked, that the user was continuous. In this respect, it is not necessary for the user to be incessant or unceasing. Herbert said in *Orwell Park Management Limited v Henihan 2004 IEHC 87* that "*Continuous use is not, however to be equated with incessant use; what the law requires is that the use be such that would clearly indicate to a servient owner that a continuous right to do what would otherwise amount to trespass was being asserted. A right of way is a non-continuous easement; a right to pass and re-pass over the property of another whenever the person claiming that right has occasion to do so.*" I am satisfied that continuous user for the required period has been established whether the two parcels of land are viewed as one block or two.

276. It seems to me that it is most correct to view them as two separate parcels because they were divided in 1983, before any right of way by prescription could have been acquired (the period having started in 1965), and the farmlands went into separate ownership at that stage. Approaching it this way, I am satisfied that the evidence establishes that the main avenue has been the means of access to the Stewards House for all purposes since 1965. I am satisfied that it has also been used as a means of access to the farmlands for agricultural and business purposes since 1965, but more particularly, since 1983 when they became Patrick Harnett's lands, and for the purpose of the kennels and cattery since 1986.

Permission

277. As noted above, the user must be *nec vi, nec clam, nec precario*. In the context of this case, the third is the real source of dispute and the notion of permission is central. Charleton J stated in *Leopardstown Club Limited v Templeville Developments Limited [2013] IEHC 526* that "*what is clear is that the essential quality of prescriptive rights must arise by reference to right and not by reference to permission.*" He also said that "*consent is completely incompatible in respect of rights unless that consent has been given so far in the past as to be rendered irrelevant.*"

278. In *Zopitar Limited v Jacob* [2015] IEHC 790 Gilligan J said at paragraphs 85 – 87 that:

“85. The important question is whether the use would suggest to a reasonably careful and prudent owner of the land that a casual use only of the land was being made dependant for its continuance upon the tolerance and good nature of such servient owner, or would it put such servient owner on notice that an actual right of way was being asserted. It cannot therefore be secret, clandestine or surreptitious. The use also cannot be forced upon the servient owner, for prescription theory demands acquiescence in order for a right to be established. Finally, for the Court to be satisfied that there has been acquiescence to the establishment of a right, the necessary use cannot be referable by consent, permission or licence. **It cannot be precatory, in the sense of being precarious, that is, subject to the will of the servient owner and capable of being interrupted...**” [emphasis added]

279. Herbert J had earlier said in *Orwell Park Management Limited v Henihan* (Unreported, Herbert J, 14th May 2004) that:

“The important question is whether the use ... would suggest to a reasonably careful and prudent owner of the [land] that a casual use only ... was being made dependent for its continuance upon the tolerance and good nature of the servient owner, and would put such owner on notice that an actual right to these things was being asserted.”

280. ‘Permission’ is not limited to express permission and may include where use is tolerated by the owner. Gilligan J went on in *Zopitar Limited* to say:

“87. The requirement that the use be *nec precario* goes beyond express permission that is sought by the dominant owner and given by the servient owner. It includes circumstances of licensed access and tolerated access, where the permission to enter can be tacit, born of conduct or particular circumstances or otherwise subject to the exigencies of the servient owner.”

281. Gilligan J’s judgment in *Zopitar Limited* was appealed. Hogan J gave judgment for the Court of Appeal (*Zopitar Ltd v Jacob* [2018] 1 IR 657). He referred to *Walsh v Sligo County Council* and quoted extensively from the judgment of Lord Rodger of Earslferry in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889. At paragraphs 58 and 59 of his judgment Lord Rodger said (quoted at paragraph 50 of Hogan J’s judgment):

“58. In *De legibus et consuetudinibus Angliae* Bracton took over the noun *precarius* and its congeners from the vocabulary of Roman law and used them in a number of contexts, but always with reference to a gratuitous grant which is revocable at any time at the grantor’s pleasure. See, for instance, lib 2 ff 52 and 52b. In lib 4 f 221 Bracton discusses the acquisition of easements by use for some time *nec vi nec clam nec precario*—the last being, the author

says, the same as *de gratia*, of grace. Under reference to the second of these passages, in speaking of the use of a watercourse in *Burrows v Lang* [1901] 2 Ch. 502, 510, Farwell J asked 'What is precarious?' and answered his own question: 'That which depends, not on right, but on the will of another person.' Some years before, in *Sturges v Bridgman* (1879) 11 Ch D 852, 863, Thesiger LJ had indicated that, if a man 'temporarily licenses' his neighbour's enjoyment, that enjoyment is precarious in terms of the civil law phrase 'nec vi, nec clam, nec precario.' It is important to notice that, in this regard, English law distinguishes between an owner who grants such a temporary licence or permission for an activity and an owner who merely acquiesces in it: *Gale on Easements*, 17th ed (2002), para 4-83. Someone who acts with the mere acquiescence of the owner does so *nec precario*.

59. ... **The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land.** Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. **But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances.**" [emphasis added]

282. The question whether user is permitted or tolerated and therefore not "as of right" or is being exercised as of right with the acquiescence of the owner is to be determined by reference to all of the circumstances.

283. Bland at paragraph 6-44 says:

"The most difficult question in the law of prescription is the distinction between acquiescence and the establishment of a right and the mere toleration of use. Every claim of prescription could be defeated if the evidence from the servient owner that he tolerated the use was always accepted; every incident of toleration would be converted into a right if his evidence was always rejected. It will also be difficult to distinguish something asserted as a right from something enjoyed as a privilege, particularly when something could be described either way. This is particularly so because of the particular intimacy of the law of easements, where the conflict will always be between neighbours and so it is often easy to claim to be a good neighbour."

284. In *Walsh v Sligo County Council* [2013] 4 IR 417 at para. 95, the Supreme Court held:

"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 in exercise of a right."

285. The Supreme Court went on to say that there is no requirement for permission to be communicated for the use to be considered to have been tolerated rather than exercised as of right but that the question of whether permission was expressed goes to the weight of the evidence as to proof of toleration.

286. Gilligan J in *Zopitar Limited* said that the Court must arrive at its decision based on the particular facts and circumstances of each individual case (paragraph 90). He went on in paragraph 85 (quoted above) to say that "*...The determination as to whether a case falls on either side of the acquiescence/toleration divide depends on its particular facts.*"

287. In *Zopitar Limited*, Hogan J, having reviewed the authorities, then examined the evidence "in the round" and concluded that the user by the defendant was no more than precario. He said at paragraph 61:

"If, then, one applies these principles to the present case can it be said that the user of the access through the factory premises was otherwise than precario? In my view, taking the evidence in the round, it points overwhelmingly to the existence of an admittedly consistent user which was nonetheless at all times no more than precario. Several factors impel me to this conclusion."

288. Of course, this is consistent with the approach of determining whether or not a right of way exists by reference to the particular facts and circumstances. In the paragraphs that followed Hogan J identified the factors which led him to this conclusion. While Hogan J cited with approval the judgment of Lord Rodger in which he said "*...the arrangement does involve a positive act of granting the use of the property, as opposed to mere acquiescence in its use...*" and "*...The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land*", Hogan J did not identify any specific positive act on the part of the plaintiffs. The defendant in this case placed some importance on this.

289. The defendant's case in relation to permission or toleration was set out in paragraph 19 of the Defence, in correspondence prior to delivery of the Defence, and in the affidavit of Ms. O'Brien opposing the injunction.

290. The defendant pleads at paragraph 19 of the Defence that "*...any use by the Plaintiffs and/or their tenants (which is denied) has at all material times been on the basis of consent of the Defendant's predecessors in title and any user is therefore not 'as of right'*".

291. Prior to the delivery of the Defence, it was stated in correspondence from the solicitors for the Sisters of Sion in 2004 that "*Your client is entitled to use the driveway to gain access to his adjoining property by way of licence from our clients only. Such use has been by*

arrangement and with the consent and acknowledgement of our clients and has not been continuous or interrupted. Our clients close the main gate to the driveway every year at Christmas time." The Statutory Declaration says "...the Owners of the property have given licence to the Harnett family who own adjoining property...to use the driveway to gain access to their adjoining property since 1966...such use by the adjoining owners has been by arrangement and with the consent and acknowledgment of the Owners. Such use was not continuous and uninterrupted. The Owners closed the main gate at the entrance to the driveway every year at Christmas time."

292. In the correspondence from the defendant's solicitor in 2020 and 2021 they stated, inter alia *"They have made enquiries with the previous owners who advise neither your client nor his tenants exercised any right of way during their tenure. In fact they advised that anytime your client did in fact use the laneway he asked permission of them."*

293. Ms. O'Brien said that she had spoken to Sister Philomena and a Sister Terese and they had assured her that no right of way was acquired during their ownership because they had locked the gate religiously every Christmas to prevent the Harnetts getting a right of way. Sister Philomena did not give any evidence of these conversations. Ms. O'Brien said in portions of her affidavit that were put to her that the previous owners told her that between 2005 and 2016 the plaintiffs *"at all times sought permission to access the Defendant's Property"* and that she rang Mr. Bourke in early 2020 and *"he confirmed to me that they only used it with his permission."*

294. Thus, the defendant's case was two-fold – (i) permission was positively given, and (ii) use was permitted or tolerated and this was signified by the main gate being locked on Christmas Day each year.

295. In relation to the first of these, I am satisfied that permission was not positively given. Patrick Harnett confirmed that he knew Sister O'Sullivan (who made the statutory declaration) and that she had been in Bellinter House from the mid-1960's for approximately ten years. He denied that he ever asked Sister O'Sullivan or any other nun for consent or that the land was used by arrangement. He also said that nobody ever took issue with their use of the land.

296. Luke Harnett said that from 2006 onwards, when Bellinter House became a hotel, he had no discussion with anybody about the right of way and there was no problem. He also said that there was no problem between 2016 and 2019 and that nobody asked them to stop using the route.

297. There is simply no evidence of permission being positively given or any arrangement being made with the Sisters or their successors in relation to the use of the main avenue. Neither Sister Philomena nor Mr. Bourke gave any evidence of the giving of such permission or indeed of the making of any such arrangement. Indeed, Sister Philomena, when asked about

the statutory declaration, said that she is not aware of any arrangement being made by the nuns with the members of the Harnett family in respect of the use of the avenue. The statement in the letter from the defendant's solicitor that the previous owners "*...advised that anytime your client did in fact use the laneway he asked permission of them*" is inconsistent with the evidence of user given on behalf of the plaintiffs (which I have accepted) and is not at all supported by the evidence from either Sister Philomena or Mr. Bourke. Indeed, it is entirely inconsistent with Mr. Bourke's description of the use of the main avenue. The statement in the letter is to the effect that each time the Harnetts wanted to use the main avenue they sought permission. That is not the effect of Mr. Bourke's evidence, or indeed, of Sister Philomena's evidence. Mr. Bourke said that "*Luke and Belinda lived in the Steward's House and then a tenant moved in and they used to go up and down the driveway.*"

298. In fact, as it emerged at the hearing, the defendant's case was really that the user was tolerated and permitted and that the precario nature of the user was evident from and established by the main gates being locked every Christmas Day rather than that there was any express permission or arrangement, notwithstanding what was said in the affidavit and correspondence and Ms. O'Brien's oral evidence.

299. I deal firstly with whether the gates were locked and, if so, how often, and then with whether this was a sufficient exercise of ownership by the defendant's predecessors and a sufficient interruption with the plaintiffs' use of the main avenue to establish that the use of the route was with the permission or toleration of the owners of Bellinter House and to prevent a right of way arising.

300. There is an acute conflict on the evidence in relation to the locking of the main gates.

301. Patrick Harnett's evidence was that he never found the main gates locked including on Christmas Day. He said that he used to go in and out through the gates on Christmas Day. He would collect his mother (presumably in the Steward's House) to bring her to mass or visit his father's grave and the gates were always open. He also said that the residents in the Steward's House always go in and out by the gates on Christmas Day. It was also put to him that Sister Philomena, Mr. Bourke and Ms. Bernie Everett would say that the gates were locked every Christmas Day. He said that was not the case. It was also put to him that Ms. O'Brien would say that she locked the gates every Christmas since 2019. In fact Ms. Everett and Ms. O'Brien did not give that evidence.

302. Luke Harnett said that the gates were never locked. He was absolutely clear that they were never locked on Christmas Day because their family tradition when they were living in the Steward's House from 2004 to 2010 was to allow the children to open their presents and then they went to his parents-in-law's house and they drove in and out of the main gates. He did not accept the evidence that would be given by Sister Philomena, Mr. Bourke and Ms. Murphy. He was also told that Ms. Everett would give evidence that the gates were locked on

Christmas Day but, as already noted, she did not do so. He also rejected the suggestion that Ms. O'Brien locked the gates in 2019, 2020 and 2021 because he drove through the gates.

303. Both Patrick and Luke Harnett referred to the fact that the Sisters held a midnight mass (at midnight) each year followed by a social gathering and that guests left through the main gates at 2 or 3am and that they never saw anyone locking the gates after it.

304. Ms. Cassidy, who was a tenant in the Steward's House from November 1993 to May 1995 and gave evidence that she accessed the Steward's House along the main avenue of Bellinter House, said that she never saw the gates locked and specifically that they were not locked on Christmas Day 1993 because she drove through them that morning to visit her brother-in-law and came back through them that evening.

305. Mr. Hayes said that the main gates were never locked or closed. He did not specifically deal with Christmas Day.

306. Mr. Keoghan's evidence was that he always got in and out of the Steward's House through the main gates and that he never saw them locked or closed. He did not accept that the gates were ever closed at Christmas by Mr. Bourke or Ms. O'Brien.

307. Sister Philomena, on behalf of the defendant, said that the gates were locked every Christmas Day. However, Sister Philomena had extremely limited personal knowledge of the gates in fact being locked. Her evidence was two-fold.

308. She said that she never locked the gate to Bellinter House herself but recalled one occasion (1990) when she had seen the gates locked. She later qualified her answer that she had never locked the gate herself and said that while she can not remember doing so she probably did in 2003 and 2004 because at that stage there were only three nuns, two of whom were elderly. However, she later agreed that she had never locked them. She said when asked whether she had any personal memory of that happening she said *"Probably in the last two years, probably 2003, 2004, I remember the – I can – I do – and while I was there in Bellinter I do remember that that was one of the jobs that we had to do at Christmas and the Sisters were very faithful in doing it and I saw I think Carmel or Sister ... going down to lock the gate. It was one of the jobs on the list to do."* She said that she thinks the gates were closed by chains being put on them with a padlock.

309. Sister Philomena said that she knew the gates were closed on Christmas Day every year because she trusted the Sisters to do it because they were faithful to their duties. When asked how she knew the gates were closed on Christmas Day 2002 she said it was because the gates were closed every year and because some of the sisters went down to close the gates. She could not say who closed them but that some of the sisters who were there could have gone down to close them and then said they did. She said that they probably would have said they

were going down to close the gates and that they would have told somebody that they were going to close them. When asked whether she asked the Sisters if they had closed the gates she said *"No but I knew that they had closed the gates"* and that she did not go down to see if they were closed *"...because we trust the sisters to do whatever they were going to do."*

310. Mr. Bourke said that he was informed by his solicitor towards the end of the conveyancing process that there was a farmer next door who had permission to use the drive and that when the conveyance was completed his solicitor and the nuns made it clear to him that he had to lock the gate on Christmas Day to make sure it was a permission and not a right. He also said that he discussed the statutory declaration with his solicitor and he was told that if he continued what the nuns had been doing he should be okay and that his solicitor was firm about locking the gate once a year. There was no objection to Mr. Bourke's evidence as to what he was told by his solicitor or the nuns.

311. He gave evidence that he allowed his manager (Ms. Murphy) to stay in the hotel over Christmas 2006 (shortly after the hotel opened for business) on condition that she locked the gates on Christmas Day. He said that he locked the gates on Christmas Day 2007, 2008 and 2009. He described driving to the hotel with his son and wife on Christmas morning, going for a swim or just spending time there, having tea with the security staff, then locking the gate and going home.

312. It was put to the plaintiffs' witnesses that Ms. Bernie Everett would say that the gates were locked on Christmas Day. She in fact did not give that evidence.

313. Ms. Orla Murphy explained that she and members of her extended family stayed in Bellinter House at Christmas 2006 because it was not open to the public and would have been vacant otherwise. I do not quite understand this because she referred to two caretakers living on the property and Mr. Bourke referred to having cups of tea with the security staff on Christmas Day. She was allowed to stay there by the owners on condition that she lock the gates on Christmas Day. She said that on Christmas morning, while their mother was cooking, she and her sister got into buggies and went down the avenue and locked the gate with a chain and a padlock. She was certain that she locked it. She said that she was asked to take a photograph of the locked gates and she remembers asking her sister to stand beside a brown sign with Bellinter on it and taking a picture with her sister and the sign. This photograph was not produced.

314. Denise O'Brien only arrived in Bellinter House in July 2019. It was put to Patrick Harnett that Ms. O'Brien would say that she locked the gates every Christmas since 2019 and it was put to Luke Harnett that Ms. O'Brien would give evidence that she locked the main gates on Christmas Day. In fact Ms. O'Brien did not give that evidence. Ms. O'Brien did give evidence in

relation to locking the gates in April 2021. However, the case made on behalf of the defendant was that it was the closure on Christmas Day that establishes that there was no right of way.

315. Having regard to all of the evidence, I find that the gates were locked on Christmas Day 1990 and 2006 and I accept the evidence on behalf of the plaintiffs in respect of the other years that the gates were not locked.

316. In relation to 1990, Sister Philomena gave evidence of her first Christmas in Bellinter and she went for a walk. She said that she was accustomed to going for a walk out through the gates and them being locked that day struck her because it meant that she could not get out. One can readily understand how this would have stuck in her memory. As against that, there was no evidence from the plaintiffs about 1990 specifically.

317. In relation to 2006, Ms. Murphy was adamant in her recollection that she locked the gates and I believe her recollection is reliable for a number of reasons. Firstly, this appears to have been the only time she stayed and was required to lock the gates and it is therefore understandable that she would remember it. Secondly, Ms. Murphy and her family had a very personal reason why they wanted to stay in Bellinter House that particular year and that makes it more likely that she would specifically remember it. Thirdly, she was able to provide detail surrounding going down to the gate to lock it, ie. that her mother was cooking and that she and her sister took buggies to go down to the gate. Finally, Ms. Murphy gave evidence of having worked for Mr. Bourke for a number of years. It seems very unlikely that he would have allowed someone he did not trust to stay in the hotel. Thus, it seems to me to be very likely that if he asked or directed Ms. Murphy to do something, she would have done it. As against those points, it is noteworthy that Ms. Murphy said that she had taken a photograph of the locked gates. No photograph was produced in evidence. I do not believe this is sufficient to outweigh those other factors. Luke Harnett gave evidence that they always went out through the gates at Christmas. However, I am satisfied that it is more likely that Ms. Murphy would remember this specific occasion.

318. I find that the gates were not locked on Christmas Day of the other years.

319. The plaintiffs' witnesses were very clear in their evidence and were able to give detail as to their use of the gates on Christmas Day over the years. Patrick Harnett described how he would pick up his mother (from the Steward's House) and bring her to mass or to Luke Harnett Senior's grave. I have already determined that access to and from the Steward's House was along the main avenue. Luke Harnett was also able to describe his and Belinda's tradition on Christmas morning. Furthermore, he gave evidence that he and Belinda always came and went from the Steward's House by the main avenue (and Mr. Bourke confirmed their use of it). It would therefore stick in his mind if, as a matter of routine on Christmas Day, they had to take a different route to the one they always took on other days. Alternatively, I would have to

conclude that he was wrong or not telling the truth about his use of the main avenue on other days. I see no basis upon which I could properly reach either conclusion, particularly where his evidence in relation to his use of the main avenue was supported by Mr. Bourke's evidence.

320. As already noted, Sister Philomena had very limited personal knowledge of the gates in fact being locked. As noted above, she said that she had never locked the gates herself though later qualified this to say that does not recall doing so but she probably did so in 2003 and 2004 because at that stage there were only three nuns and the other two were elderly. However, she later agreed that she had never locked them. Furthermore, the possibility or probability of her locking the gates is inconsistent with the thrust of her evidence. The second aspect of her evidence was that the gates were locked because it was one of the things to be done and the Sisters were faithful in their duties. She said that she knew the gates were locked on Christmas Day 2002, for example, because the gates were locked every year and because some of the Sisters went down to close the gate. This, of course, is circular. In essence, it is that the gates were locked that year because they were locked every year but she had no personal knowledge of them being locked any year except 1990. She could not say who locked them in 2002 but said that one of the two Sisters who were there could have done so. She then said they did but did not know who had done so. She could not give evidence that any Sister said they were going to lock the gate and the furthest she could go was to say that they would probably have said they were going down to close the gates. Sister Philomena did not give any evidence of the detail surrounding the gates being locked such as, for example, when they were locked, i.e. on Christmas morning itself or later in the day or immediately after the guests had left after midnight mass. This is significant in light of the evidence given on behalf of the plaintiffs that they never saw anyone lock the gates immediately after that occasion. If it was the practice, for example, that the gates were locked at that point that could have been put to Mr. Harnett, or it could have been put to him that he would not have seen the gates being locked then because they were not locked until after breakfast. In all of those circumstances, Sister Philomena's evidence was to the effect that the gates were locked every year because they were meant to be locked. In my view, that is not sufficient to displace the clear evidence given on behalf of the plaintiffs.

321. The defendant accepted that the statutory declaration in itself was not evidence of the gates being locked or closed but submitted that it could be used to corroborate other evidence and that it in fact corroborated the evidence of Sister Philomena. I do not accept that it sufficiently corroborates Sister Philomena's evidence. The statutory declaration presumably was prepared with the benefit of expert legal advice as it was prepared in the context of a proposed sale of the lands and indeed was referred to in the Contract for Sale. One must presume therefore that the language was carefully chosen. It only goes so far as to say that the gates were closed every year at Christmas time. Sister Philomena accepted that there is a world of a difference between closed and locked. She also said that she thinks the gates were closed with

a chain and a padlock. However, she believed that when the word "closed" was used in the statutory declaration, it meant "locked". It seems to me that if this is what was meant it would have been clearly stated. The statutory declaration also does not say that they were closed or locked on Christmas Day every year but rather uses the more general "Christmas time". Thus, I am not satisfied that the statutory declaration is sufficiently consistent with Sister Philomena's evidence to be corroborative of it.

322. No other witness with direct knowledge of the gates being locked over the years 1966 to 2003 gave evidence.

323. Mr. Bourke gave evidence in respect of 2006, 2007, 2008 and 2009. He said that he drove down to Bellinter House in 2007, 2008 and 2009 because he was advised by his solicitor to lock the gates on Christmas Day each year and that the nuns made it clear to him that he had to lock the gates on Christmas Day to make sure it was a permission and not a right. However, I am not satisfied that I can conclude that Mr. Bourke did in fact lock the gates. Firstly, Mr. Bourke, under cross-examination showed some uncertainty. When asked about his evidence that he locked the gates in 2007, he said that he thinks he did and said "*...we were in the middle of the recession. So, things got a bit foggy then. So I don't remember a lot about then...*" He went on to say that "*but I remember having to go down and make sure the protocol was followed.*" He rejected that he might be faulty in his recollection. Secondly, Mr. Bourke said that he took a photograph of the locked gates. However, no photograph was produced in evidence despite it presumably being taken as evidence or proof that he locked the gates. Thirdly, there is an inconsistency in Mr. Bourke's evidence in relation to his conversations with the nuns. He said that he does not recall whether he had any conversation with the nuns about the use of the main avenue but also said that they made it clear to him that he had to lock the gate on Christmas Day to make sure that the Harnetts' use of the avenue was a permission and not a right. Those statements are mutually inconsistent. Furthermore, Sister Philomena did not give evidence of any such conversation with Mr. Bourke. Finally, there was no evidence from Mr. Bourke that he locked the gates or ensured that they were locked in 2004 or 2005 or from 2010 to 2016. This is significant because if the issue was so important to Mr. Bourke he would have ensured that they were locked in all of those years. While Mr. Bourke was not operating the hotel in 2010-2016, he was still the owner of the property.

324. There was no evidence of the gates being locked in 2016, 2017 and 2019. Ms. O'Brien did not give evidence of locking the gates on Christmas Day 2019, 2020 or 2021. In any event, at that stage, continuous user had been enjoyed for more than twenty years.

325. The only direct evidence before me in relation to the years 1965-1989, 1991-2005 and 2010-2019 is that the gates were not locked on Christmas Day. I qualify this by noting that the plaintiffs did not deal with each individual year in those periods. I do not believe that this is necessary to discharge the burden of proof. In relation to 2007-2009, I prefer the evidence of

Luke Harnett to that of Mr. Bourke in circumstances where, on Mr. Bourke's own evidence, things got a bit foggy and he does not remember a lot about that period and where he did not give evidence in respect of Christmas Day 2004 and 2005 or 2010 to 2015.

326. It now falls to be considered whether the gates being locked in 1990 and 2006 is sufficient to establish that the user was a permitted or tolerated user rather than user as of right. The burden, of course, is on the plaintiffs to prove that it is not.

327. It is clear from the authorities that the locking of gates is a relevant and very significant consideration.

328. In "*Highways*", Round Hall Thomson Reuters 2020, Bland writes:

"The typical indicator of tolerated access is the existence of gates that are locked at the will of the owner. The presence of gates is an over signifier, which indicates a desire for security and privacy, and communicates the right to exclude. The closing of the gates is the positive assertion of that right. Closed gates are a feature of the assertion of ownership. They indicate that any use is precatory or subject to the will of the owner. The closing of the gates by the owner therefore vitiates the claim that the user is of right.

A common practice that is adopted to manifest an intention not to dedicate a way that is generally open to the public use by permission is to exclude the public for one day a year. The practice of closing gates for one day a year was particularly familiar to the bench, as it has been long adopted by the Inns of Court, and has been recognised as effective."

329. In *Walsh v Sligo County Council*, the Supreme Court, in concluding that a public right of way did not exist, said at paragraph 136 that "...it is significant that the main gate was closed and locked at least on the occasion of shoots on the estate..." The Court did not consider that the reason for locking the gate was important, holding that it did not have to be shown that the purpose was to prevent the public from coming onto the lands: "*That is not necessary. The very act of closing the gate showed that rights of ownership were being exercised*".

330. Bland was writing about public rights of way and the right at issue in *Walsh v Sligo County Council* was a claimed public right of way. Thus, the Court was concerned with "dedication." In the instant case, concerned with a private right of way, the focus is on whether the user was "as of right." MacMenamin J said at paragraph 41 – 43 of his judgment in *Walker v Leonach [2012] IEHC 24* (which was concerned with a public right of way):

41. "The process of analysis is assisted by identifying the difference between rights acquired by prescription; (which do not apply here) and, by contrast, those acquired by dedication..."

42. In the case of prescription, the focus is on the "right user". He or she acquires the right by use, frequently long use; it becomes vested in the user by lapse of time, and in circumstances where there has not been "force, secrecy or consent"...

43. But by way of distinction, a public right of way is created by the dedication of the way as a public right of way by a landowner. What did the landowner do? That act of dedication need not be formal. Sufficiently unequivocal conduct by an owner, evincing an attention (sic) to dedicate will suffice..."

331. Gilligan J emphasised in *Zopitar Limited* that *Walsh v Sligo County Council* and to *Walker v Leonach [2012] IEHC 24* were both concerned with the assertion of a public right of way over private lands and that there is a fundamental distinction between an action for a private right of way and an action for a public right of way.

332. The significance of a gate being locked may not be the same in a case concerning a private right of way as in a case concerning a claimed public right of way because what has to be established in the former is a sufficient interference with the user to establish that the owner is permitting or tolerating the user rather than acquiescing in it. In relation to a public right of way the question is whether there has been dedication. Thus, the fact that a gate is locked is to be assessed in a different context. Nonetheless, the existence of a gate and it being locked is one of the factors to be taken into account and is a very significant factor in the assessment of whether a right of way has been acquired. As Gilligan J put it in his judgment in the High Court in *Zopitar Limited* (paragraph 92) "[A]n issue which deserves close scrutiny in any claim made in prescription, such as the present case, is that of the existence, or lack thereof, of gates on the alleged servient premises and whether or not these gates were locked at the will of the alleged servient landowner..." As in *Zopitar Limited*, it has to be taken along with all of the other evidence. In *Zopitar Limited*, Hogan J noted that gates were erected at the servient tenement's entrance and that this fact, together with the fact that the gates were closed at night and at weekends was an assertion of ownership rights in the lands. Hogan J took this into account along with other factors in order to decide whether the use of an access route was precarious.

333. There are a number of factors in this case in addition to the fact that the gates were locked on Christmas Day 1990 and 2006.

334. First Patrick Harnett gave evidence of meeting with the nuns, including Sister Philomena, in September 2003 when the Order was talking about selling Bellinter House. He said that at the conclusion of that meeting he asked them, when they were selling, to tell the buyers that the Harnetts had a right of way over the avenue. His evidence was that the nuns who were present did not really reply to this. Sister Philomena did not dispute Mr. Harnett's evidence that he asked the nuns at the conclusion of this meeting to tell the purchasers that

the Harnetts had a right of way. Nor did she dispute his evidence that the nuns did not really reply. One would expect that if the Sisters were of the view that they were simply permitting the Harnetts to use the main avenue and that they had been locking the gates every year since 1966 specifically to prevent a right of way, they would immediately have countered by saying that there is no right of way. There is no evidence of them having done so. This is particularly striking where Sister Philomena's evidence was that the reason they wanted to meet Mr. Harnett in September 2003 was because "*they were aware that there was some confusion over the right of way and to see if it could be sorted out.*" I accept that the nuns did not acknowledge the right of way and that its existence was subsequently disputed in the letter of the 27th April 2004 from their solicitors but it is of significance that it was not disputed there and then.

335. Second, the evidence is of extensive use of the main avenue from 1965 for domestic and agricultural uses. The extent of this use is more suggestive of user as of right rather than a tolerated use.

336. Third, Patrick Harnett said that he told Mr. Bourke of the right of way during a conversation about the wayleave for the water pipe to Bellinter House. It was put to him that Mr. Bourke would deny that he told Mr. Bourke about the right of way. However, Mr. Bourke did not do so.

337. Fourth, as noted above, Mr. Bourke gave evidence that he sometimes had an issue with people coming from or going to the Harnetts/Steward's House going too fast along the main avenue. This was not put to the plaintiffs so I make no finding in relation to it. However, while this was an issue for Mr. Bourke, he did not give evidence of doing anything about it. If the use was a tolerated use he could have informed the Harnetts that use would no longer be permitted or tolerated unless vehicles slowed down.

338. Fifth, when the hotel applied for planning permission in 2015 including for car parking spaces, the maps accompanying the application showed the approach to the Steward's House being left clear of parking. Mr. Bourke said that this was because they knew the avenue was being used by the Harnetts and they wanted to make sure it was being left clear for them.

339. Sixth, when the defendant took down a wall and gateway between the schoolhouse and the remaining gate into the Steward's House and replaced the wall with a wooden fence the defendant also installed a gate into the Steward's House. This was a pedestrian gate rather than the farmgate which had been there but nonetheless it was a gate from the defendant's lands into the Steward's House (and vice versa). The only explanation for installing this gate (given by Mr. Landis) was that the defendant was being a good neighbour. This is strange because he had also said that there was no evidence that the avenue was being used to access the Steward's House. It was put to Mr. Landis that installing a gate is inconsistent with saying that the Harnetts are not allowed into Bellinter House. He replied that they had never said that

the Harnetts are not allowed into the Bellinter property. This is clearly inconsistent with the letter sent on behalf of the defendant in January 2020 in which it was stated that Patrick Harnett had no permission or right to be on the property unless he was visiting the hotel and called on him to cease and desist from entering the property. The other striking feature of this gate is that Patrick Harnett gave uncontroverted evidence that he has a key to the lock on this gate.

340. Seventh, the evidence is that prior to 2019/2020, the hotel had placed 'No Parking' signs on the Steward's House entrance to keep it clear and that the hotel had a system that on wedding days they would have a member of staff at the area of the Steward's House entrance to ensure that guests did not block the entrance and that the hotel would take registration numbers so they would be able to ask guests to move if they were blocking the entrance. When planning permission was being sought by the hotel in 2015 it showed car parking spaces and left the approach to the Steward's House clear of any parking. Mr. Bourke said that he did not recall putting up 'No Parking' signs. Mr. Landis said that he never saw 'No Parking' signs. Ms. O'Brien said that she never saw the signs and that they were not there when she started. However, It was not put to any of the plaintiffs' witnesses that their evidence that the hotel put up 'No Parking' signs was incorrect. As noted above, it is difficult to see how Ms. O'Brien could give evidence that the signs were not there (at the entrance to the Steward's House) when she started when, on her own evidence, she was not even aware of the Steward's House until September. Finally, photographs of 'No Parking' signs on the avenue approaching the Steward's House were adduced in evidence. There was no challenge to the plaintiffs' evidence that the hotel had a system in place to keep the entrance clear. I therefore accept the plaintiffs' evidence on these points

341. Eighth, the issue of neighbourliness is very important. In their joint judgment in *Walsh v Sligo County Council*, Fennelly, McKechnie and MacMenamin JJ referred to a number of English cases. At paragraphs 94 – 97, they said:

"94. The cases concerning toleration contain several indications that owners should not be constrained to be "churlish" in the insistence of 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. Bowen 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 493 and by Lord Atkinson in *Folkestone Corporation v Brockman*, at page 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 besides the owners, under the fear that their good nature may be misunderstood."

95. Furthermore, Lord Dunedin at page 375 of the report in Folkestone said:

“But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. But from that house there leads another avenue to the north which connects with a public road different from that from which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up the one avenue and down the other - perhaps without actually calling at the house - raise a presumption that the landholder had dedicated his private avenues as highways? The user would be naturally ascribed to good nature and toleration.”

96. In the same vein, Farwell J., in *Attorney-General v Antrobus* [1905] 2 Ch. 188 at 199, in the context of a claim that there was a trust permitting public rights of access to Stonehenge, wrote of “the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property...” He added, at page 199, that:

“It would indeed be unfortunate if the Courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property.”

97. On the other hand, where there is clear and uncontradicted evidence of extensive public user for a long time, the landowner will not easily resist the inference of dedication by proof of purely subjective and uncommunicated objection.”

342. As previously noted, *Walsh v Sligo County Council* was concerned with public rights of way. So also were the cases quoted in that passage. Nonetheless, the concept of neighbourliness is extremely important in the context of private rights of way also. Significant damage could be done were acts of goodwill, toleration and neighbourliness too easily interpreted or treated as acquiescence giving rise to a right of way against a good neighbour. The courts must be very careful not to find the existence of a right of way from acts of good will.

343. However, it seems to me that the features set out above go far beyond good neighbourliness. The extensive use of the avenue over a long number of years by domestic traffic and agricultural traffic, including trailers with milk churns or a tank, calf trailers, tractors, and the transportation of hay, the devotion of resources by the hotel to keeping the entrance clear and the erection of ‘No Parking’ signs, the fact that when a planning application was made in 2015 the avenue approaching the Steward’s House was left clear of parking in order not to block access, the fact that there is no evidence of the Harnetts or the tenants being warned that if cars did not stop going too fast permission to use the avenue would be withdrawn, and the installation of a new gate in the wooden fence for the benefit of the Steward’s House and the farmlands, are significantly more consistent with user of the main avenue as of right. In Herbert J’s formulation (*Orwell Park Management*), such extensive user over a long number of years, would put a reasonably careful and prudent owner on notice that an actual right to do

these things was being asserted rather than a casual use dependent on the tolerance and good nature of the owner. The defendant also submitted that nothing was done at any important time by the plaintiffs and that a right of way was not reserved in 1965 and that these were factors to be considered. In relation to the first of these, the plaintiffs in fact raised the issue of the claimed right of way at the important time when the Sisters indicated an intention to sell Bellinter House. It was raised by Patrick Harnett in person with the nuns and was then raised in correspondence by his solicitor. Patrick Harnett's evidence is that he raised it with Mr. Bourke and this was not denied by Mr. Bourke. There is a dispute as to whether the plaintiffs were correct to understand from the last line of the Sisters' solicitors' letter of the 27th April 2004 that the purchasers had been told and it is correct that the plaintiffs did not formally tell the purchasers, but in circumstances where the right of way had clearly been asserted in person and in correspondence it can not be concluded that nothing was done by the plaintiffs. The second point can not be relevant to whether a right of way was acquired by prescription in the years since 1965.

344. Thus, taking account of all of these factors, or as Hogan J put it in *Zopitar Limited*, 'taking the evidence in the round', with particular weight on the gates being locked on Christmas Day 1990 and 2006, I am satisfied that the main drive was being used by the Steward's House and the farmlands as of right and not with permission or toleration.

345. The right of way that has been acquired is a right for all domestic purposes for the Steward's House and a right for agricultural purposes and for the use of the kennels and cattery for the farmlands.

346. I turn now to the other three parcels of land.

347. Patrick and Olive's lands were carved out of the Original Folio in 1977. The lands in the Original Folio had not acquired a right of way by prescription by then. Therefore, Patrick and Olive's lands could only have a right of way if they acquired it independently of the Original Folio. I am satisfied that there is sufficient evidence of continuous user of the main avenue in respect of Patrick and Olive's house, particularly having regard to what Herbert J says in *Orwell Park Management*:

"To establish an easement by way of Prescription, the party claiming that right, either by virtue of Section 2 of the Prescription Act 1832 or under the doctrine of Lost Modern Grant, must provide evidence of continuous use of the way for the prescription period. Continuous use is not, however to be equated with incessant use; what the law requires is that the use be such that would clearly indicate to a servient owner that a continuous right to do what would otherwise amount to trespass was being asserted. ***A right of way is a non-continuous easement; a right to pass and re-pass over the property of another whenever the person claiming that right has occasion to do so.*** In my judgment where the evidence establishes that there has been an open uninterrupted and continuous use of land as a right

of way, in the instant case for 35 years, the court should presume that the owner of the land was aware of this use and acquiesced to it. The important question is whether the use... would suggest to a reasonably careful and prudent owner of the [land] that a casual use only... was being made dependant for its continuance upon the tolerance and good nature of this servient owner, and would put such servient owner on notice that an actual right to do these things was being asserted." [emphasis added]

348. Patrick Harnett said that they can access the house either from the Bellinter Bridge entrance or Bellinter House and that which route they used depended on where they were going to or coming from. There was a slightly different emphasis in Luke Harnett's evidence. Luke Harnett said that when he was growing up in that house the majority of trips to and from that house were in fact through the Bellinter Bridge route. Nonetheless, his evidence was to the effect that they sometimes used the Bellinter House route. I also have to have regard to the reality that Patrick Harnett operates the farm. Common sense would dictate that if he sometimes uses the Bellinter House route in connection with the farm, on occasions he must leave his house to work on the farm and go from there along the main avenue for reasons unconnected with the farm. That in itself can not be determinative but it reinforces my view. I am therefore satisfied that continuous user for the required period has been established in respect of Patrick and Olive's house.

349. Luke and Belinda's lands and Neil's lands were carved out of Patrick Harnett's lands (the farmlands – Folio MH14190F) in 2009. By that stage there was continuous user of the main avenue for the benefit of the farmlands for more than twenty years (1983 to 2009). I do not believe that these parcels enjoy the right of way attached to the farmlands purely on the basis of having been carved out of the lands after that period for the following reasons. The right of way to the farmlands is for agricultural purposes. In carving out the sites for domestic uses, and in putting the site to such use, use of the right of way to the farmlands for that purpose would be excessive and colourable. I return to this further below. I am reinforced in this view by the fact that those parcels do not enjoy a right of way over the farmlands to the Steward's House. Thus, they have no right of way to cross the farmlands to the Steward's House or through the Steward's House to the entrance to the main avenue. I appreciate that this is somewhat artificial where the individuals involved are all members of the same family and where, as Patrick Harnett, the owner of the farmlands, said in evidence, he could give them a right of way immediately. However, the right of way attaches to the lands and not to the particular owners or occupiers at a given point in time. It is also significant that when the sites for Patrick and Olive's house, Luke and Belinda's house and Neil's house were carved out the only right of way in respect of them across the farmlands (Folio MH14190) was from the respective sites to the Bellinter Bridge entrance and no right of way from the sites to or through the Stewards House was registered. Patrick Harnett accepted that and explained that the bank insisted on the right of way to Bellinter Bridge being registered when he and Olive got a loan.

It is also relevant that when planning permission was being sought for Luke and Belinda's house, the only means of access identified in the planning application was the Bellinter Bridge route. Luke Harnett said that when they were applying for planning permission they just had to show where the land was coming in and out and he believed there was no need to mention their right of way through Bellinter House to the planning authority.

350. Finally, if these parcels had to establish a right of way by prescription in their own right, they do not enjoy a sufficient period of user as they were only created in 2009, and there was little or no evidence of the continuous use of this route in respect of Luke and Belinda's house or Neil's site. Luke Harnett said that the Bellinter Bridge route is how he goes up and down to his house the majority of the time.

Abandonment/release – radical alteration and excessive or colourable use

351. As noted at paragraph 35 above, the defendant pleads in the Defence that:

"21. Any right of way enjoyed for the benefit of the Steward's House since 1965, which is denied, has been abandoned and/or impliedly released owing to the substantial alteration of the Original Folio such that any right is now extinguished. The Original Folio has undergone a radical change in character or identity which has resulted in a substantial increase or alteration upon any burden, which is denied, on the Defendant's Property.

22. Further, any right of way enjoyed for the benefit of the Steward's House has been abandoned owing to excessive and/or colourable user.

23. In the premises, any enjoyment of a right of way for the benefit of the Steward's House, which is denied, has been impliedly released and extinguished."

352. These paragraphs focus on any right of way which might be enjoyed for the benefit of the Steward's House. Thus, on a strict reading, they do not apply to the right of way which is enjoyed by the farmlands (or the lands which were carved out of the farmlands) and therefore if I were to hold in favour of these pleas, any right of way to the benefit of those lands would not be affected. However, that would be to read them in an entirely artificial way and would not be consistent with the way the issues arose at the hearing. It was also not raised on behalf of the plaintiffs. The Steward's House is the access point to the main avenue for the farmlands, and Patrick and Olive's, Luke and Belinda's, and Neil's lands.

353. I deal with each of the pleas in turn, though they are to a large extent conflated in the defendant's written submissions. The focus in the submissions is on the alleged excessive and colourable use and no authorities were cited in relation to the abandonment or implied release owing to the substantial alteration of the dominant tenement.

Radical alteration

354. In order for the easement to be impliedly released on the basis of the alteration of the dominant tenement the development/alteration must (i) represent a radical change in the character or a change in the identity of the site as opposed to a mere change or intensification in the use of the site, and (ii) the use of the lands as redeveloped would result in a substantial increase or alteration in the burden on the servient land. Both conditions must be met (per *McAdams Homes Ltd v Robinson [2005] 1 P & CR 30*).

355. The defendant relies on the transfers of sites to Patrick and Olive, Luke and Belinda, and Neil, the use of buildings for commercial purposes and the use of the avenue to afford access to customers to those commercial premises, the generation of rental income from the Steward's House, and the substantial felling of trees in the 1970s. The defendant does not rely on the division of the Steward's House and the farmlands.

356. I am satisfied that these, whether taken separately or cumulatively, do not constitute a radical change in the character or a change in the identity of the site as opposed to a mere change or intensification in the use of the site and even if they do they have not resulted in a substantial increase or alteration in the burden on the servient land.

357. The transfers to Patrick and Olive, Luke and Belinda and Neil for the purpose of building their houses has not led and would not lead to a substantial increase or alteration in the burden on the servient land. The extent of any increase on the burden is three extra households using the main avenue. That is not a substantial increase. In any event, in the context of the history of land ownership in Ireland, the transfer of sites to children of the family to build a family home is in no way unusual and therefore does not constitute a radical change in the character or identity of the site.

358. The generation of rental income from the Steward's House is not a radical change in the character of that dominant tenement. Nor does it lead to a substantial increase or alteration in the burden on the servient land. The Steward's House continues to be used as a residence, which has always been its use. If the generation of rental income is to be determinative, the question arises whether if the house had, for example, been rented to Luke Harnett in 2009, that would amount to a radical change in its character. In my view it would not and I see no difference in principle between generating rent from a member of the family and generating rent from a third party.

359. The Original Folio contained the Steward's House and farmlands, significant parts of which comprised woodlands. There is nothing unusual about felling trees to create further fields on agricultural lands and I do not accept that doing so constitutes a radical change in the character of the lands in the Original Folio.

360. I am also not satisfied that the use of the outbuildings for the particular commercial purposes in question here constitutes a radical change or use or a substantial increase of the burden which would have been on the servient land if they were not put to that use. The commercial purpose in question is the operation of the kennels and cattery business. In my view, this is not a radical departure from the use of the Original Folio for agricultural use, particularly having regard to the fact that the outbuildings comprised stables in which animals may be kept. There is no evidence that this business was large enough to result in a substantial increase or alteration in the burden on the servient land.

Excessive Use and Colourable Use

361. Slightly different considerations apply to the consideration of excessive and colourable use than to the question of whether there has been a radical change leading to abandonment or implied release, though there is, of course, some overlap. Given the way the case is pleaded, essentially the case that is made by the defendant is that the use by tenants of the Steward's House of the main avenue (rather than Harnetts), the use for commercial purposes of the farmlands, and the use of the main avenue for Patrick and Olive's, Luke and Belinda's and Neil's lands is excessive and colourable because they involve the use of the right of way from the Steward's House.

362. Bland J provides a useful summary of the principles in relation to excessive use at paragraph 10-33 of Easements (3rd Ed.). He writes:

"10-33 An exercise of the right of way by the dominant owner which exceeds the limitations of the grant is called excessive user. Excessive in this context means improper and unlawful. Where a right of way is for a particular purpose, it cannot be expanded into a different or broader purpose, although it has been suggested that such a broader purpose could be acquired over time by prescription. In assessing whether or not a particular use of a right of way could have been in the contemplation of the parties, the court is entitled to take into consideration the circumstances of the case, the situation of the parties, and the situation of the land at the time when the grant was made. Even if a grant is stated to be for all purposes, that does not mean that the dominant owner may use it for something that is obviously outside the contemplation of the grant..."

363. McGovern J held in *Byrnes v Meakstown Construction Limited [2009] IEHC 23* that:

"Where a right of way is established for a particular purpose, it cannot normally be expanded into a different or broader purpose although such a broader purpose could be acquired over time by prescription."

364. Bland also provides a useful summary of the principles relating to colourable user in paragraph 10-35. He writes:

“Use of a right of way for the purpose of accessing land other than the dominant tenement will be restrained as colourable user under the rule in *Harris v Flower & Sons*. The rule in *Harris v Flower & Sons* is simply stated:

“If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B.”

The effect is that a right of way for the benefit of A cannot be exercised to go straight to B, nor can it be so used to go to B via A. The rationale was explained by McMahon J in *Victory v Galhoy Inns Ltd*:

“When a right of way exists over private property, it has the effect of restricting the servient tenement’s property rights and this interference cannot be further extended without authorisation of the owner of the servient tenement.”

365. McMahon J in *Victory v Galhoy Inns Ltd* [2010] IEHC 459 also accepted the statement of principle in *Macepark (Whittlebury) Ltd v Sargeant*:

50. “(1) An easement must be used for the benefit of the dominant land. (2) It must not ‘in substance’ be used for the benefit of non-dominant land. (3) Under the ‘ancillary’ doctrine, use is not ‘in substance’ use for the benefit of non-dominant land if (a) there is no benefit to the non-dominant land or if (b) the extent of the use for the benefit of the non-dominant and is insubstantial, i.e. it can still be said that in substance the access is used for the benefit of the dominant land and not for both the benefit of the dominant land and the non-dominant land. (d) ‘Benefit’ in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, e.g. as a result of an arrangement with the dominant land.

51. The application of these principles can involve potentially difficult questions of fact and degree.

52. One significant factor, identified by the Court of Appeal in *Peacock v Custins* [2002] 1 WLR 1815, 1823-1824, para. 24, is whether the benefit to the non-dominant land is likely to have its own ‘commercial value’. It seems to from *Peacock v Custins* that it is not necessary to prove that separate value if it can be regarded as self-evident.”

366. For largely the same reasons as set out above, I do not believe that the use by the tenants of the Steward’s House or the use of the route to access the kennels and cattery business is excessive in the sense of being for a purpose which exceeds the purposes for which

the right of way was acquired, or is colourable. They are within the purposes for which the right of way to the Steward's House and to the farmlands has been acquired. It is also clear that even if the use for the kennels and cattery business was in excess of the original purpose or was colourable, an expansion of the right of way can be acquired by prescription. For the reasons set out above, i.e. the use of the route for the kennels since 1986, I am satisfied that such an expanded right of way has been acquired.

367. I am satisfied that the use of the route for the purpose of accessing Luke and Belinda's and Neil's lands would be excessive and colourable. I do not have to consider whether the use of the route to access Patrick and Olive's house is excessive or colourable as, even if it is, the right of way along the main avenue, through the Steward's House and into the farmlands has been expanded by prescription to include access to Patrick and Olive's house in circumstances where it has been used since 1977.

368. The purpose of the right of way from the Steward's House that had been acquired when Luke and Belinda's and Neil's lands were carved out in 2009 is to access that property for domestic purposes related to the Steward's House and the purpose of the right of way to the farmlands through the Steward's House is to access the farmlands for agricultural purposes and for the kennels and cattery. The use of the right of way to the farmlands for the purpose of accessing houses on sites which were carved out of the farmlands is therefore for a different purpose for which the right to the Steward's House and the farmlands was acquired. It is therefore excessive and colourable.

369. The plaintiffs submit that colourable user has no application to the Steward's House. They submit that the carved out folios are not newly-acquired properties adjacent to the boundary with the Harnett Family Lands but are merely new folios carved out of the original lands and were all part of the original Bellinter estate prior to its division in 1965. They also submit that the Harnett Family Lands remain solely for the domestic and commercial benefit of the Harnett Family, as has been the case since 1965. I have previously dealt with the first of these. The second is not persuasive as any right of way attaches to the lands rather than the current owners of occupiers.

370. The defendant claims that the colourable use of the lands means that the right of way has been abandoned. It seems to me that if there is user amounting to colourable (or excessive) use then the appropriate way of dealing with this is for the Court to declare the proper extent of the right of way or for the owner to restrain the colourable or excessive use. This means that there is no right of way to those parcels, or more particularly that the right of way to the Steward's House and the farmlands can not be used for the purpose of accessing those parcels, or that the defendant could restrain the excessive or colourable use.

371. This has the possibility to give rise to practical issues where the different parcels, including the farmlands and the Steward's House are owned by members of the same family. However, that arises from the fact that a right of way attaches to the lands rather than to the owner or occupier of those lands.

SUMMARY

372. For the reasons set out above I am satisfied that there is:

- (i) a right of way along the main avenue in favour of the Steward's House (Folio 4496F) for domestic purposes;
- (ii) a right of way along the main avenue to the Steward's House for the benefit of the farmlands (Folio MH14190F) for agricultural purposes and for the purpose of accessing the kennels and cattery;
- (iii) a right of way along the main avenue to the Steward's House for the benefit of Patrick and Olive's house (Folio MH6853F) for domestic purposes.

373. In light of some of the allegations that were made in correspondence and during the course of the evidence about the use to which the lands of Bellinter House were being put, in particular by one of the tenants, I should make clear that the right of way in respect of those folios is limited to the purposes identified in the previous paragraph. I, of course, make no findings in respect of those allegations.

374. Because this judgment is being delivered electronically I will give the parties an opportunity to address me in relation to the terms of any Orders.