THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

[2021] IECA 216
Appeal Number: 2018/305

Whelan J.
Collins J.
Pilkington J.

BETWEEN/

THOMAS CONDRON

RESPONDENT

- AND –

GALWAY HOLDING COMPANY LIMITED AND DANMAR CONSTRUCTION LIMITED AND STEPHEN TREACY AND MAUREEN TREACY

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of July 2021

Introduction

1. This is an appeal against the decisions of McDermott J. delivered on 17 April 2018 ("the principal judgment") and 19 June 2018 ("the costs judgment") and order made on 26 June 2018 wherein for the reasons set out in the principal judgment the appellants were ordered to restore the grass verge on the southern side of Seamount Road for the length of the road-facing boundary of the respondent's property ("the disputed grass verge"), to reverse any changes which they had effected to same and to pay the respondent €10,000 in damages for trespass. For the reasons set out in the costs judgment, the respondent was awarded costs at the Circuit Court scale with a certificate for Senior Counsel.

2. The background facts are set out in significant detail in the judgments of the High Court and, apart from the key issues of relevance in this appeal, are not rehearsed in this judgment.

19 April 2016

3. The precipitating event which led to the institution of the within proceedings occurred on the morning of 19 April 2016 when workmen retained by the appellants acting on foot of a road opening licence granted by Fingal County Council moved onto the disputed grass verge in front of the respondent's home and without notice to the respondent removed the verge - along with some cobble-lock surface and concrete kerbing previously installed by the respondent - and proceeded to incorporate same into a footpath which was laid out as part of the accessway to service the appellants' Seamount housing development. The respondent immediately sought interim interlocutory injunctions.

4. The trial judge heard the case over eleven days in February and October 2017.

5. The claim of the respondent was succinctly characterised by the trial judge as follows: -

> "…The plaintiff claims that since 1952 the grass verge abutting the road surface has always been treated by himself and his family members as their property and no other party has lawfully entered upon it for the purpose of maintenance or otherwise. He denies that the grass verge has been taken in charge by the local authority, Fingal County Council." (para. 2 of principal judgment)

6. The respondent denied that the disputed grass verge had ever been taken in the charge of the local authority. The trial judge observed at paras. 31 and 32 of the principal judgment: -

> "The plaintiff claims that while the map attached to the deed of conveyance of 1952 from which he derives his title does not include any portion of the road, the boundary of the lands are indicated by a hedge. The plaintiff claims that he enjoys a presumption that his ownership of land extends to the middle of the road running alongside his property; a presumption which the defendants have not rebutted.

> The plaintiff also accepts that a portion of the area beyond the hedge was taken in charge by the local authority and acknowledges that there is a presumption that a roadway, if taken in charge, is normally to be regarded as taken in charge from hedge to hedge. It is accepted that this presumption applies to the roadway on Seamount Road. However, counsel for the plaintiff submits that the facts necessary to give rise to this presumption must be proved by the person who is alleging that the lands have been taken in charge. The plaintiff concedes that the blacktop surface of the road was taken in charge of the county council but maintains that the grass verge was not and that there is no or no sufficient evidence to establish that it was."

7. Fingal County Council was not a party to the proceedings. No application was brought that they be joined as notice parties or as co-defendants.

Seamount Road

8. Seamount Road, Malahide, Co. Dublin appears on maps dating from 1845. It is a *cul de sac* situate off the R124. The Condron and Treacy families reside at the furthermost end of the *cul de sac* from the R124. The respondent's property is situate on the southern side of the road. The title is unregistered. It was acquired by the respondent's father as part of a land exchange transaction with Baron Talbot de Malahide and others on foot of a deed of conveyance dated 21 April 1952. The respondent inherited the holding, which operated as a farm, in or about 1979 and constructed a dwelling house wherein he resides. He has lived on the road since 1952 and is now retired.

9. Seamount Road is considerably wider where it commences at the turnoff from the R124 road and narrows progressively along its length, particularly as it approaches the terminus or dead end of the *cul de sac* where the respondent's and appellants' properties are situate.

10. Seamount Road dead-ends at the entrance to Seamount House which is situate on extensive grounds. The third and fourth appellants (the Treacys) purchased the property in 1978. It has a

common boundary with the respondent's property. The third named appellant, Mr. Treacy, now deceased, was a property developer and builder.

11. Mr. Treacy made a number of unsuccessful planning applications in respect of the Seamount lands including in 1997 for a residential development. Again in 2003, permission was refused for a residential development on the north-western part of the Seamount site. The reasons for refusal related, *inter alia*, to traffic congestion on Seamount Road (*per* Inspector's Report, An Bord Pleanála, 16 March 2010).

12. The earlier planning applications of 1997 (F97A/0512) and 2003 (F03A/0076) were, as the trial judge observed:-

> "…refused for reasons including the unsuitability of Seamount Road to service such a development and the fact that the road surface available was limited to 3.5m with no footpaths. There has not been any challenge by way of judicial review to any of the planning decisions made or conditions imposed including that of 2009." (para. 8 of principal judgment)

13. In 2009 a third application (Planning Register Reference No. F09A/0015) for planning permission on the Seamount lands was lodged by Mr. Treacy. On this occasion permission was granted on or about 7 October 2009 and, following appeal, a decision to grant permission was made by An Bord Pleanála on 14 May 2010 for the construction of 159 dwellings on the Seamount lands – more than double the number of dwelling units sought in the earlier unsuccessful applications.

14. Subsequently, the development site on the Seamount lands came to vest in the first appellant company. The second appellant is a building development company and previously developed nearby lands, constructing a housing estate known as Knockdara Estate, which is accessed from Seamount Road, on same. The Treacys were directors of the companies and retained the dwelling Seamount House and its curtilage.

15. The width of the black top surfaced, metalled road or *via trita* at the relevant *locus* on Seamount Road is 3.5 metres where it runs parallel to and alongside the respondent's property. The respondent's contention is that the disputed grass verge in front of his dwelling house, lying outside his hedgerow and abutting same, comprises part of his property. He advanced two alternative propositions in support of that contention. Firstly, that it was acquired on foot of the deed of conveyance of 1952 or, in the alternative, that his entitlement arises by way of a legal presumption that the ownership of his lands extends to the middle of the road abutting the property. In the course of the appeal he placed greater reliance on the latter proposition.

16. The trial judge acknowledged that an outline of the history of the planning issues relating to the Seamount site and the roadway "has been a central feature of the evidence in the case and is of some assistance in understanding the history of the roadway and the plaintiff's claim" (para. 8).

Events of 2003

17. Certain events in 2003 took on a particular importance from a planning perspective in the course of the hearing and were the subject of detailed consideration by the trial judge.

18. On 28 February 2003, as the High Court noted, the respondent wrote to the Council objecting to the 2003 planning application lodged by Mr. Treacy. At that time the respondent's grounds of objection included asserting the lack of capacity of Seamount Road to accommodate the increased traffic arising from the proposed development: -

> "The road itself is very narrow and would not be able to accommodate large vehicles…
>
> The public road is not an adequate width. As the road goes up it gets narrower and there are also no footpaths on either side of the road in the affected area where the building plans to commence."

The respondent did not explicitly assert his ownership of the disputed grass verge in February 2003. The court noted that: –

"62. During cross-examination it was established that Mr. Condron Jr had drafted the letter dated 28th February 2003 objecting to the planning application reference no. FO3A.0076 for the plaintiff. It is clear that the plaintiff's education was very limited and it is not surprising that his son assisted him in formulating his objection. It was put to Mr. Condron that in this letter he raised no claim to owning out to the middle of the road, including the grass verge. The witness responded that the 2003 planning permission application did not envisage any changes to the road which would intrude on the grass verge, the implication being that it was unnecessary to raise ownership of the verge on that occasion."

7 August 2003

19. The appellants placed particular reliance on a letter of 7 August 2003 sent to Mr. Treacy by an official in Fingal County Council and contended that same constituted *prima facie* evidence pursuant to statute that the roadway, including the disputed grass verge, at Seamount Road had been taken in charge by Fingal County Council from centre of hedge to centre of hedge for its entire length and that in consequence the requisite width of road for the planning design submitted in the context of the planning application by Mr. Treacy in 2009 lay within the charge of Fingal County Council as the roads authority.

20. The letter was addressed to Mr. Treacy, who is now deceased and is set out in full in para. 5 of the High Court judgment. The letter was headed "Cert No. TIC/88/2003" and stated: -

"RE: PREMISES: SEAMOUNT ROAD MALAHIDE

Dear Sirs

I wish to refer to your letter dated 31st July 2003 and to state that the roads, footpaths, sewers, watermains and public lighting abutting Seamount Road are in charge of the County Council from The Hill, Malahide up to the entrance of Seamount House. Between Knockdara and the entrance to Seamount House the width of the Road in Charge is 7.5 m."

The trial judge observed: –

"The relevance of the certificate number was never established in evidence. One might infer that it was a certificate number 88 issued in 2003 in respect of a taking in charge (TIC). No evidence was led from the council that the numbering had any significance or that there was a register of such certificates. The defendants submit that as a matter of evidence the certificate is *prima facie* evidence that Seamount Road is a public road by virtue of s. 11(5) of the Road Traffic Act 1993." (para. 5 of principal judgment)

21. Salient events leading up to the generation and issuance of the said document by the Council in August 2003 were identified by the trial judge in the principal judgment at paras. 70 to 73:-

"**Evidence for the defendants**

70. Ms. Maureen Treacy stated in evidence that in July 2003 she telephoned the Roads Department in Fingal County Council for clarification on the width of road that had been taken in charge at the relevant part of Seamount Road. The first time she telephoned, she was told that the area taken in charge was 9m in width. She recalls that when she told her husband this he said that it would not be 9m. He asked her to call again and ask for the width of the road taken in charge between Knockdara estate to the entrance of Seamount House. During the second telephone conversation with a council employee, she was told that if she wanted the exact measurements she would have to write a letter enclosing a fee of €90.00. She stated that she wrote the letter of 31st July, 2003 requesting that 9m of road be taken in charge, and recalls that two people from the council measured the road some days later. She and her husband then received the document of 7th August, 2003. At that time she was aware that the plaintiff was objecting to the 2003 application for planning permission but that he had not said anything about owning any portion of Seamount Road. She states that she did not have any discussions with the plaintiff at this stage regarding the road and does not believe that her husband had either.

71. Under cross-examination Mrs. Treacy stated that she had never spoken to anyone in the council prior to the initial phone conversation in which she was told the area taken in charge was 9m in width. She agreed that the width of Seamount Road was not consistently 7.5m and narrows in parts but stated that overall it would be 7.5m. She initially spoke to a male official. She was asked about her letter of 31st July in which she requested that 9m of roadway be taken in charge. She said that she made the request in the letter adopting the wording which the official told her to use: he had said they had 9m in charge so she wrote down 9m. She states that she was told that if she wanted to know the exact measurements of the road that was taken in charge she would have to send the letter with a €90 fee and that somebody would come out and measure the road and provide the exact measurements. The witness denied that the letter of the 31st July, 2003 was part of a pre-ordained agreed campaign with a council official and maintained that she only made two phone calls to the council. She simply did what the council officials with whom she spoke instructed her to do."

22. The trial judge had noted earlier at para. 6 that the Council's letter had issued: -

"…as a very prompt response to a short letter typed by the fourth defendant at the instigation of her late husband on 31st July, 2003 to Ms. Kathleen Power of the Roads Department, Fingal County Council making what she described as an application for the taking in charge of a 9m wide section of roadway outlined in an attached map and accompanied by a fee of €90 which the official had requested accompany the application.

7. The purported 'Cert' was signed by Ms. Bridget Gilbert, Senior Executive Officer, Fingal County Council. The nature and effect of this document is in issue between the parties. In particular the width of 7.5m is questioned by the plaintiff who claims that the distance from hedge to hedge at the relevant section of Seamount Road was 4.6m on average. It is claimed that a width of 7.5m would require the council to not only take in

charge the grass verge, but also encroach significantly past the hedge into the plaintiff's property, the Nolan's property on the opposite northern side of Seamount Road or both in order to provide a carriageway and footpath of the dimensions required…"

23. In considering and evaluating the purported certificate of 7 August 2003, the trial judge made the following observations at para. 7 of the principal judgment: -

"…Witnesses from the council were unable to clarify to the court's satisfaction the status of the document or the basis for the assertion that a 7.5m width of roadway was taken in charge. Neither Ms. Power nor Ms. Gilbert gave evidence in these proceedings. Mr. William McClean, a senior executive engineer in the Council from 2001 to 2010, stated that on receipt of the letter he sent an unidentified technician out to the location to check the length and width of Seamount Road which gave rise to the measurement of a width of 7.5m. No documentation was produced to establish these measurements which if made must have given rise to some form of internal paperwork having regard to the undoubted importance of the matter. He had no recollection of the personnel who dealt with the query or with whom he engaged concerning the query. He did not draft, write or sign the letter in response…"

The court noted that Mr. James Cleary: –

"…a recently retired Senior Engineer with the Council confirmed in evidence that Ms. Power was a member of the administrative staff in the Roads Department in August 2003 but he was unable to give any explanation for the assertion in the document that a 7.5m wide area had been taken in charge and in effect rejected it as an accurate measurement: there is nothing to support it…"

The trial judge concluded: –

"…The court is not satisfied because of the absence of relevant documentation, the fact that those directly involved in the exchange of correspondence are not available as

witnesses and what I regard as the unsatisfactory nature of Mr. McClean's recollection of this event and the overall lack of cogency of the evidence advanced to accept the council's account of how this correspondence arose and was addressed."

Roads schedules

24. In the judgment at para. 23 the court noted that on 4 September 2015 Mr. Sean McGrath, a senior executive engineer with Fingal County Council, wrote to the respondent's solicitor stating:-

"…I have researched the question of the taking in charge of Seamount Road. I have been provided with an extract from a schedule of roads deemed to have been taken in charge. The schedule includes Seamount Road, listing its length as 680 linear yards and its average width as 15 feet. I attach a copy of this schedule for your information."

The court noted that the attachment was entitled "Roads in Charge – Excerpt from 1930 + 1952 Road Schedules" but that it did not include any maps and that it listed Seamount Road as having been taken in charge:-

"…The Court has heard that although the ledger in which the originals of these excerpts is kept by the council in 'safekeeping', the council was unable to locate the original ledger."

Key witnesses

Mr. James Cleary

25. The evidence of certain witnesses at the hearing assumed a critical importance. The trial judge noted that by an email of 22 October 2015 sent on behalf of the Council to the respondent's solicitor, Mr. James Cleary, then a senior engineer with Fingal County Council: –

"…stated his opinion that there was no basis for the issuing of a 'Cert' indicating that 7.5m of roadway had been taken in charge but that he was satisfied that the entire roadway boundary to boundary had been taken in charge:

'My opinion on some of the issues is as follows;

> The Council has taken the road outside your clients' property in charge. The road is taken by the Council to mean from boundary to boundary excluding the boundary itself. Accordingly, should the Council need to maintain the road in any manner, it will act to do so between the road boundaries, with due regard to the nature of those boundaries. It is probably unnecessary to state that these boundaries delineate the extent of the private ownership of the adjoining landowners.
>
> There are no extant maps showing limits to the taking in charge at Seamount. I see no basis for the statement, set out in the Council's letter of 7th August 2003, that the width of the road in charge is 7.5m.'" (para. 24 of principal judgment)

The email continued:-

> "As the Council has taken the road in charge, it follows that any work proposed on or under that road must have the approval of the Council. This normally takes the form of the granting of a licence to open the road, subject to relevant conditions with regard to the satisfactory restoration of the road and the lodgement of a suitable sum against which the costs of restoration works, carried out by the Council, should the need arise, would be offset.
>
> I am aware that approval for this development was granted with the usual caveat of section 34(13)."

26. Mr. Cleary in evidence had told the court that "he formed this opinion on the basis of a site visit he made from which it was clear that the stated width did not exist, rather than on the basis of documentary evidence in the council's possession" (para. 25). The court noted that no map of the road taken in charge existed. Further it was unclear as to when particularly Seamount Road had been taken in charge by the roads authority. It was clear from the evidence before the court that Mr. Cleary had never worked in the taking in charge section of the Council. He was a retired

senior engineer in the Capital Investments Department of the Council. The court noted at para. 64 of the principal judgment that: -

> "…Mr. Cleary states that he formed the view that the road outside the plaintiff's property was taken in charge between boundary to boundary from 'research' that he carried out which yielded the excerpts from the schedules of 1930 and 1952 referenced above. He averred that the schedule came from the administrative section of the county council which deals with roads that have been taken in charge, from records that the council maintains."

27. It would appear that by the time Mr. Cleary became involved in endeavouring to resolve the issue, the construction of 137 of the dwelling units was almost 90% completed by the appellants – notwithstanding s. 34(13) of the Planning and Development Act 2000 which provides that a person shall not be entitled solely by reason of a grant of permission to carry out any development. His evidence was that, as of 2015, the appellants were operating under an assumption - which, as he informed the court, he was satisfied had been established to be incorrect - that the width of the road taken in charge was 7.5 metres:-

> "…This assumption had been incorporated into the planning permission for the development while the Condrons were disputing the taking in charge of the grass verge." (para. 65 of principal judgment)

28. The judgment distilled the evidence of Mr. Cleary in regard to his attempts whilst employed by the Council to devise a solution to the impasse. The court noted that from this witness's perspective it was relevant that the northern side of the road, opposite the respondent's holding, was more or less a continuous straight line whereas on the southern side of Seamount Road, where the respondent's property was situate, "the road was of variable width" (para. 66). His evidence demonstrated that the Council was well aware of the access difficulties. It would appear that the Council had adopted as a long-term strategy to facilitate extending the width of the roadway in the upper section of Seamount Road leading into the appellants' development, the imposition of

conditions to planning permissions granted for developments along the southern side of the road which required the applicant to set back their front boundary by four metres. This would have the effect over time of enlarging the width of the highway and facilitating the installation of a footpath along the southern side of Seamount Road. It would also coincide with the appellants' access requirements for the Seamount development.

29. Mr. Cleary's evidence, cited in the principal judgment at para. 66, stated: -

> "With that in mind, then, having checked the width of the road at various cross-sections, it was proposed that we would accept a 4.8 metre wide road which is deemed to be sufficient to accommodate a vehicle travelling in each lane of that road and a footpath that varied in width from 1.6 down to 1.3."

30. The court observed of Mr. Cleary's evidence that the decision to install a footpath on the grass verge on the southern side of Seamount Road was arrived at by the county council in or about December 2015. The trial judge observed that:-

> "…This is somewhat at odds with correspondence in relation to applications for a road opening licence referenced above and a map dated June 2015 identifying the southern side of Seamount Road as the location for the proposed footpath." (para. 66 of principal judgment)

31. Mr. Cleary's position throughout and in his evidence was very clear. He had written by email to both parties on 22 October 2015 stating that the road was taken in charge from boundary to boundary namely from the root of the respondent's hedge to the root of the hedge on the northern side of the road directly opposite.

32. Having further reviewed the evidence, the trial judge had the following observations to make at para. 99 of the principal judgment: -

> "It is a curious feature of this case that the limitation of space on the public road available for traffic namely 3.5m of tarmacadam surface without footpaths was one of the reasons

given for the refusal of planning permission in 2003. This position was later abandoned by the planning authorities on the basis of a substituted measurement of 7.5m for the width of space available which though furnished by the council and relied upon in the 2009 planning decisions was later disavowed by Mr. Cleary. The measurement was given in the form of a purported certificate issued by the council as a road authority. Section 11(5) of the Roads Act 1993 states that such a certificate shall be *prima facie* evidence that a road is a public road. If this document was intended to be such a certificate its value has been considerably undermined by evidence in this case and I am not satisfied to consider it to be dispositive of the nature and extent of the area of Seamount Road that is a public road. Furthermore though the court does not base its decision on the sequence or nature of the planning decisions made in this case the abandonment by council officials of previously cited and accepted measurements of the road width in the 2003 and 2009 decisions has not, in the court's assessment, been adequately addressed or explained in the evidence or in terms of the council's rights and duties as a road authority on Seamount Road."

Mrs. Maureen Treacy

33. The appellants contend (ground 4 of the notice of appeal) that the trial judge did not explicitly reject the evidence of Mrs. Maureen Treacy concerning maintenance of hedges and grass verges by Fingal County Council which, it is argued, supported the claim that the disputed grass verge had been taken in charge by the Council and that the evidence of "occasional" trimming of the disputed verge by the respondent and his family did not rebut this "crucial" evidence.

34. The evidence of Mrs. Treacy was that the decision to change the location of the footpath from the northern side of the road, as granted in the 2009 planning permission to the southern side was made by Mr. McGrath from the Council in consultation with the appellants' expert, Mr. Goggins, the appellants having been advised "that it would be better from a planning perspective to install it on the Condron's side of the road." The court noted that:-

> "…she considered that it would be beneficial for Mr. Condron to agree to the installation of the footpath on his verge because if he was to apply to have his land rezoned he would be obliged to set back his land and install a footpath." (para. 78)

Mr. Martin Treacy

35. Mr. Martin Treacy, son of the third and fourth named appellants, claimed, *inter alia*, that the disputed grass verge had been used by pedestrians. He stated that "children used to walk across the fields from the local schools and walk down Seamount Road on the grass verge if there was a car coming" (para. 80). His evidence was that he had no recollection of the respondent maintaining the disputed grass verge and that the Council were "always up there maintaining it" (para. 81). He recalled that in the week prior to the hearing the Council had cleaned all the gullies and his evidence to the court was that there was an Eircom duct going from the pole outside some cottages further down the road on the southern side "all of the way to the pole between Condron's property and Bettyville" (para. 81). The latter property is adjacent to the respondent's property and had once been owned by the respondent's sister.

Mr. Tommy McCormack

36. Mr. Tommy McCormack, a retired employee of Fingal County Council, gave evidence for the appellants that he had been employed as a general operative in the road maintenance department of Dublin County Council, the predecessor of Fingal County Council, from 1966; that he had first worked on Seamount Road in June 1966, three days after he commenced employment with the county council. He recalled his co-workers sprayed the footpaths, scattered chips and cleaned the stopcocks and that this activity was on the right-hand side of the road "going straight up towards Seamount House" (para. 83). His evidence was that the council maintained the grass verge. Hedges were cut with a slash hook. His evidence was that the maintenance of the hedge would have been carried out once a year. He produced his 2008 work diaries, particularly relying on an entry of 4 August 2008. The entry indicated that there were a lot of briars on the left hand

side, *i.e.* the respondent's side of the road, and that the hedgerow along the respondent's property was trimmed back. His evidence was that a ledger was maintained recording the amount of materials used, the code they were working under and all of which "would have been documented and recorded by a clerk in the office of the county council." (para. 86). The court observed (para. 86) that "no such ledger was produced in evidence".

37. His evidence was that the activity of hedge trimming amounted to "trimming the briars along the road where they were protruding out into the road" (para. 87). They did not "dig into the hedge." His evidence was that they had "trimmed/flailed the briars that were protruding out over the tarmacadam on the Condron side of the road". He recalled that in or about ten inches would have been trimmed from those briars. Thus, as the trial judge noted, the witness clarified his earlier testimony and confirmed that "the maintenance of the hedging was confined to trimming briars that extended out over the surface top of the carriageway."

Mr. Ray Goggin

38. The evidence of Mr. Ray Goggin, engineer on behalf of the appellants, was that, based on a review of measurements previously taken together with his own measurements, the hedge to hedge width available for road surface and footpath in front of the respondent's property was a width of 7.5 metres (with a maximum of 7.84 metres at one point). The evidence of Mr. Goggin was that the width of road and footpath necessary for servicing the Seamount development for compliance purposes was 5 metres for the road surface together with 1.8 metres for the footpath on the southern side.

Assessment by trial judge of role of Fingal County Council

39. It is noteworthy that in the original grant of planning permission of May 2010 the proposed footpath was to be installed on the northern side of Seamount Road. The decision by the planning authority to vary the grant so that the footpath would instead be installed on the southern side of

Seamount Road was made without notice to the respondent. Having considered the circumstances whereby this transpired, the trial judge observed:-

> "67. The decision to install the footpath on the southern side of Seamount Road was executed by reference to the conditions of the planning permission but not in accordance with any prescribed protocol for engagement with those most affected. Rather, the decision was made following discussions between the defendants, their servants and agents, and officials of the county council. The court is satisfied that such a limited engagement concerning compliance with a condition and the agreement as to how a condition might be implemented does not require further public consultation with other interested parties under planning legislation. However, in this case the court is also satisfied that the process adopted and driven by the council which led to this decision effectively changed what the plaintiff hitherto understood to be the intended layout of the roadway and footpath during the planning process. The traffic and pedestrian issues identified post permission by Mr. Cleary's testimony and the property issue were clearly known during the earlier public phase of the planning application but were not addressed adequately or at all by the local authority."

40. The council's decision to proceed to facilitate the appellants with the installation of the footpath on the southern side of Seamount Road was executed by its granting a road opening licence to the appellants on 16 April 2016 which precipitated the institution of the within proceedings seeking interlocutory relief.

41. As stated previously, Fingal County Council is not a party to these proceedings. However the extent to which the said council's approach to the issue of the access way to the appellants' Seamount development contributed, over time, to the current impasse between the parties, culminating in the within litigation, is the subject of an acute observation by the trial judge at para. 69 of the principal judgment: -

"Mr. Cleary states that he and the council accepted that the plaintiff may enjoy private ownership of the grass verge. He maintains, however, that this verge was taken in charge of the council and that it was available for construction of a road or footpath as occurred following the granting of the Road Opening Licence to the first named defendant on 16th April, 2016. He based his opinion on the ledger maintained by the taking in charge section of the council. However he was not aware of maintenance records for the relevant section of Seamount Road having never worked in that section in the council. During cross examination, Mr. Cleary stated that he considered the grass verge to be taken in charge irrespective of its maintenance and the laying of kerbing stones on the basis of the excerpts from the schedules of 1930 and 1952. The court is satisfied that the council clearly led the defendants to believe that the width of the road taken in charge was 7.5m. Mr. Cleary subsequently disavowed this measurement but only after the planning permission which accepted that measurement as accurate had been granted. The council then maintained that regardless of that fact the entire width of the roadway whatever it was had been taken in charge from boundary to boundary. He was satisfied that there were no extant maps showing limits to the taking in charge of Seamount Road."

42. A central conclusion reached by the trial judge is to be found at para. 88 of the principal judgment where he determined: -

"I am satisfied that while some works were carried out by the council in or near the grass verge outside the Condron property it was of the most minimal and infrequent kind and largely focused upon keeping the surfaced carriageway in a reasonable state and free from material such as briars that might protrude from the verge onto the tarmacadam surface. Where council workmen trimmed grass in other locations, this was recorded in the diary entries. There is no such entry in respect of Seamount Road in the extract of diary produced

to the court. Indeed Mrs. Treacy's evidence confirms that such trimming as had occurred had ceased in recent years."

43. The trial judge stated at para. 90 that he was satisfied: –

"…that the grass verge beyond the hedge on the plaintiff's property comprises part of the plaintiff's property by operation of a legal presumption that the ownership of land extends to the middle of the road abutting his property."

The court observed that there is a legal presumption that the hedging on the edge of the respondent's property beyond which the grass verge lies defines the area of ground which has been dedicated as a public road. He further held that the said presumption also applied to the area of similar ground on the northern side of the tarmacadam surface bounded by the hedging on his neighbour's (Nolan's) property. The principal judgment continued:-

"92. There is therefore a presumption that the public roadway at the time of the planning application in 2003 consisted of the black tarmacadam surface of approximately 3.5m and the margins on either side thereof up to the hedges. The court is satisfied that the court must apply this presumption to the whole space between the hedging in the absence of clear evidence to the contrary and that the facts giving rise to the presumption may constitute sufficient evidence in itself that this space has been dedicated as the public road."

44. The trial judge was: –

"…satisfied that the grass verge was in reality an area of land to the side of the tarmacadam surface of which the plaintiff and his family made no use. However, the court is also satisfied that the plaintiff or some members of his family trimmed the grass on the verge occasionally. He did not believe in trimming his hedge. The court is also satisfied that the county council trimmed back elements of the hedge or briars that may have intruded upon the tarmacadam surface. However, I am satisfied that the council's work to remove intruding vegetation was very limited and sporadic." (para. 93 of principal judgment)

Evidential deficits

45. A number of crucial evidential deficits were identified by the trial judge in respect of the appellants' claim that the disputed grass verge had been taken in charge by Fingal County Council:-

> "94. The council does not appear to have any record of when or how the space was taken in charge as a public road. No maps have been produced or appear to exist of Seamount Road as a road taken in charge by Dublin County Council, Fingal County Council's predecessor as a road authority or at some earlier stage. No records were produced in relation to the works carried out on the grass verge apart from the diary entries produced by Mr. McCormack which reflect a minimal engagement by the council with the grass verge though it is accepted by the plaintiff that the council repaired the road surface. In fact the council's workmen were not seen by Mrs. Treacy to carry out any works on the verge for some eight years prior to these events."

Public pedestrian footway claim

46. The trial judge rejected evidence as to the user of the disputed grass verge as a public pedestrian footway, concluding: –

> "95. The court does not accept that the grass verge was used as some sort of public pedestrian footway over many years as a matter of right or otherwise by persons using Seamount Road including school children taking a shortcut. Up to the commencement of the development the tarmacadam surface would have carried very little traffic as there was only a few properties in the vicinity. I am satisfied that it was most unlikely that persons would be obliged to use the grass margin as opposed to the tarmacadam surface even if using that end of Seamount Road as a shortcut, quite apart from the fact that the physical obstruction of the overgrown hedge, the briars referred to and the long grass would likely discourage such use."

47. The trial judge held at para. 96: -

> "…whatever area of public road existed was taken in charge by the roads authority as set out in the schedule. This indicates that an average width of the entire of Seamount Road of 4.6m was taken in charge. This is clearly wider than the 3.5m of tarmacadam that existed in 2003. I accept Mr. Condron's evidence that he installed a kerb and gravel outside the entrance to his home in the 1980s at the time his house was completed and that he also installed cobble-lock paving and a kerb outside his sister's house in or about 2002 on the grass margin. While he says that he discussed this work with a council official prior to its execution it was by no means clear that this work was the subject of or required any permission from the council. These actions were clearly consistent with his assertion of ownership over this area of his property…"

48. In regard to certain installations placed on or under the grass margin, the judgment noted: -

> "…evidence was also adduced of telegraph poles and cable link facilities installed in the grass margin area. I accept Mr. Condron's evidence in relation to the private installation of water services works carried out by him and his brother, ultimately facilitating a supply to Seamount House in the vicinity of the grass margin. I am not satisfied that the evidence concerning the installation of poles and cable link facilities which was very limited in its nature and cogency negate the plaintiff's property rights over the grass verge or on the facts of this case offer sufficient evidence to enable me to conclude that the presumption should stand and that the grass verge was a public road or was taken in charge by the roads authority." (para. 96 of principal judgment)

49. In his evaluation of the evidence before him, the trial judge discounted testimony as to the unsatisfactory state of inter-personal relationships between the Tracey and Condron families, although he did observe: -

"…If relevant at all they might be said to impinge on the credibility of the various witnesses but I do not consider those issues to be central to my determination." (para. 97 of principal judgment)

50. The court concluded at para. 98: -

"…I am satisfied that the presumption of the existence [*sic*] public road or right of way extends to the whole space between the hedges but that the presumption has on the evidence been rebutted by the evidence of the plaintiff's continued exercise of control over his grass verge which he demonstrated by installing kerbing when enhancing his entrance, his decision to let the hedge grow and remain in its natural state, his and his family's members trimming the grass on occasion and his assertion of his property interest in the verge during the later planning process: it was an interest acknowledged in the Road Audit Report. I am not satisfied that any of the grass margin on his side of the space was on the balance of probabilities used by the public as a footway or otherwise as a matter of public right."

51. With regard to the certificate which issued on 7 August 2003 purporting to confirm 7.5 metres as the width of the roadway in the charge of the roads authority, the court firstly noted that the said measurement had been disavowed by Mr. Cleary in his evidence. The trial judge, as previously noted, rejected the proposition that in the circumstances of this case the certificate was determinative as to the nature or extent of the area of Seamount Road that was in charge notwithstanding s. 11(5) of the Roads Act 1993, which provides that such a certificate is *prima facie* evidence that a road is a public road.

52. A key conclusion as to fact is at para. 100 where the trial judge determined: -

"I am satisfied that the area of Seamount Road that was taken in charge at some stage was one of 4.6m in average width for the entire length of the road. Seamount Road narrows as it advances toward Seamount House which may explain the existence of 3.5m of hard surface in 2003. Alternatively, it may be that some of the verge in issue encroached

marginally over the hard surface over time. However, the actual accepted average width of the central band of hard surface in 2003 was 3.5m. This is consistent with though somewhat less than the average width designated in the schedule. It seems to me that this gives some further support to the plaintiff's case that the verge was not part of the public road and was not taken in charge."

The court accordingly held that the appellants were trespassing upon the respondent's property, the disputed grass verge, and had wrongfully interfered with it by digging it up and installing a footpath.

Notice of appeal

53. The appellants in their notice of appeal identified twelve grounds: -

(1) that the trial judge erred in finding that there was sufficient evidence to rebut the presumption that the grass verge between the respondent's hedge and the blacktop surface of the roadway formed part of the public road in circumstances where Seamount Road had been taken in charge by Fingal County Council;

(2) the trial judge erred in finding that the said presumption was rebutted and the grass verge was not taken in charge or did not form a part of the public road in circumstances where the judge had made three findings of fact at para. 93 of the judgment:

(i) the respondent and his family made no use of the grass verge;

(ii) the respondent or some members of his family trimmed the grass verge "occasionally" only; and,

(iii) the respondent "did not believe in trimming his hedge" (from which it may reasonably be inferred that he did not trim it);

(3) the trial judge took into account a number of irrelevant considerations in concluding that the said presumption had been rebutted by the respondent's evidence at para. 98 of the judgment, namely:

(i) the respondent's decision to let the hedge grow and remain in its natural state;

(ii) the respondent's assertion of his property interest in the verge during the later planning process;

(iii) the acknowledgment of the respondent's interest by the consultants who prepared the Road Safety Audit Report; and,

that the said presumption was not capable of being rebutted by any of these matters as taking in charge and ownership are not mutually inconsistent;

(4) the trial judge erred in not making any finding of fact as to the extent to which the Council had maintained the grass verge (as distinct from the respondent's hedge) by trimming the grass verge in circumstances where the fourth named appellant, Maureen Tracey, gave evidence that the Council maintained the hedges and grass verges every eighteen months or two years, although she had not seen the Council maintain Seamount Road in around seven or eight years: "The said evidence, which was not rejected by the judge, was crucial as it supported the taking in charge by the Council, and was not rebutted by the 'occasional' trimming of the grass verge by the plaintiff or his family which the judge found had occurred";

(5) the trial judge erred in making contradictory findings, namely that:

(i) the respondent and his family carried out maintenance of the grass verge occasionally (which the judge considered to be evidence relevant to the rebuttal of the presumption that the grass verge formed part of the public road); and,

(ii) the grass verge was incapable of use by the public as same consisted of an overgrown hedge, briars and long grass (para. 95);

(6) the trial judge erred in concluding that it was "most unlikely that pedestrians using Seamount Road would be obliged to use the grass margin (verge) as opposed to the tarmacadam surface without having regard to or giving any or any sufficient weight to the fact that the narrow width of the tarmacadam surface in or about the location of the plaintiff's property (being 3.5 metres in width) would render it necessary for pedestrians to use the grass verge for safety purposes where a motor vehicle was approaching";

(7) the trial judge failed to have regard to the fact and/or the reasonable likelihood that the grass verge "due to the narrow width (3.5 metres) of the tarmacadamed carriageway, must have been used of necessity as an area ancillary to the tarmacadam roadway or carriageway, for the safety of pedestrians, particularly when motor vehicles were approaching, and therefore formed part of the public road." In the alternative, the judge failed to have "regard to the fact that Fingal County Council had a statutory obligation, *qua* road authority, to provide for the safety of pedestrians using the public road by ensuring that there were adequate footpaths or verges. It therefore required very strong and clear evidence and/or findings of the court to rebut the presumption that the verge had been taken in charge for that purpose, and the evidence adduced by the plaintiff and/or findings of the court, were not capable of rebutting the said presumption in these circumstances";

(8) the trial judge erred in finding that the said presumption was rebutted by the respondent exercising "control" over the grass margin by installing kerbing in circumstances where the undisputed evidence established that Seamount Road had

been taken in charge prior to that and that the subsequent installation of the said kerbing was not capable of determining the extent of Seamount Road that was taken in charge at the relevant time;

(9) the trial judge erred in finding that the presumption was rebutted by the installation of kerbing by the respondent "in that the judge did not have any or any adequate regard in that context to his own finding that the plaintiff had consulted with an employee of Fingal County Council as to how to remedy a problem of water ingress from the grass verge to the plaintiff's property, and that it was arising out of that consultation and/or advice received from the said employee that he installed the cobble-lock, from which it was reasonable to infer that the plaintiff accepted that the Council, *qua* road authority, had statutory functions in relation to the verge and that the verge had therefore been taken in charge";

(10) the judge erred in finding that the width of the road that was taken in charge only extended to a width of 3.5 metres "despite the fact that the carriageway of Seamount Road was of variable width, and did not have any or any adequate regard to the fact that it would not be practical for a council to carry out its functions of maintenance and repair of the public road in respect of a road of variable width";

(11) the trial judge erred in failing to have any or any adequate regard to the fact that the register/ledger of public roads maintained by Fingal County Council or its predecessors in title established that Seamount Road had been taken in charge without distinguishing any area between the hedges that was not taken in charge, such as verges or footways and that, therefore, the evidence adduced by the respondent was incapable of rebutting the presumption that the full extent of the area between the hedges had been taken in charge; and,

(12) the trial judge erred in failing to have any or any due regard to the credibility of the respondent's evidence in resolving conflicts in the evidence adduced by or on behalf of the respondent and that adduced by or on behalf of the appellants and in particular failed to have any or any due regard to the failure of the respondent to disclose the fact that the appellants had obtained a certificate of taking in charge from Fingal County Council when he sought *ex parte* relief from the High Court in the within proceedings "which material non-disclosure went to the credibility of the plaintiff."

54. The appellants in their written submissions further refined the above grounds of appeal and contended that there are five discrete issues to be addressed by the court:

(1) whether the respondent's evidence of carrying out acts of maintenance of the grass verge and/or hedge is capable as a matter of law of rebutting the "hedge to hedge" presumption or of having the effect of extinguishing any public right of way;

(2) whether the assertion of ownership by the respondent in terms of installing kerbing/cobble-lock at the entrance to his property and the adjacent property, which was in the ownership of his sister, in the area of the grass verge is capable as a matter of law of rebutting the "hedge to hedge" presumption or of having the effect of extinguishing any public right of way;

(3) whether (a) the evidence that maintenance by the Council of the hedge along Seamount Road was only sporadic and/or (b) the fact that evidence of their maintenance of the grass verge was minimal and non-existent for a period of eight years prior to the date of the hearing are capable of rebutting the hedge to hedge presumption;

(4) whether there were certain matters of evidence which the High Court ought to have taken into account as supporting the view that a right of way existed over the grass

verge or which tended to support the view that it had been taken in charge, but were not considered to be relevant and/or were not given any weight by the trial judge;

(5) whether the court erred in law in failing to take into consideration the lack of credibility of the respondent's evidence particularly in the light of the failure to disclose significant matters in the context of the *ex parte* application brought by the respondent for injunctive relief.

55. The first and second main issues as identified by the appellants go beyond consideration of what is required to rebut the "hedge to hedge" presumption and explicitly seek a determination as to whether the acts in question had the effect of extinguishing any public right of way.

56. The extinguishment of a public right of way is not a point explicitly raised in any of the twelve grounds of appeal in the appellants' original notice of appeal. I observe in passing that the transcripts across the eleven-day hearing suggest that the issue of extinguishment of the right of way appears to have first arisen on day nine during cross-examination of the appellants' witness, Mr. McClean, by counsel for the respondent.

57. The respondent contended that the key issue in this appeal is whether there was any credible evidence to support the findings of the trial judge and if so, this court is bound by those findings.

The cross-appeal

58. The respondent opposed the appeal and in his notice of cross-appeal contended that the trial judge erred in finding that the appropriate jurisdiction in which to commence the proceedings was the Circuit Court. Reliance was placed on the state of the law at the date of the institution of the proceedings and the date of the hearing. It was further claimed that the trial judge erred in so finding where the decision of the Supreme Court in *Permanent TSB plc v. Langan* [2017] IESC 71, [2018] 1 I.R. 375 was not delivered until December 2017, some six weeks after the hearing of the action had finished and prior to the delivery of the judgment of the High Court judge. The trial

judge in particular had ordered the appellants to pay the respondent's costs at the Circuit Court scale with a certificate for Senior Counsel.

59. At the hearing of this appeal it was agreed that the issues in the cross-appeal pertaining to costs would be dealt with subsequent to the disposal of the appellants' appeal in the first instance.

The standard of review

60. An appellate court will only interfere with findings of fact in very limited circumstances. With regard to the legal status of the findings of fact on the part of the trial judge, the principles governing such findings have been set out in a number of judgments of the Supreme Court including *Northern Bank Finance v. Charlton* [1979] I.R. 149, *Hay v. O'Grady* [1992] 1 I.R. 210 and *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50, [2017] 3 I.R. 707.

61. O'Donnell J. in *Rosbeg Partners v. LK Shields (a firm)* [2018] IESC 23, [2018] 2 I.R. 811 characterised the import of *Hay v. O'Grady* thus:-

> "…The division of functions between appellate courts and trial courts means that appellate courts must respect and give due deference to a trial court's fact finding function. The corollary of this of course, which is perhaps less often adverted to, is the importance of the trial court approaching that task rigorously, conscientiously, and testing its preliminary conclusions, with an appropriate degree of scepticism, and thereafter setting out the facts found and the inferences drawn in a way which permits review." (para. 24)

62. The principles were reiterated by the Supreme Court in *Harlequin Property (SVG) Ltd. v. O'Halloran* [2019] IESC 76, a judgment of MacMenamin J. delivered on 1 November 2019, wherein he observed at para. 15: -

> "Such findings can be seen as falling into two categories: those the answer to which give a factual resolution of conflicting oral testimony, and those the answers to which do not resolve conflicts of such testimony, but are an evaluation of facts found or admitted (*Northern Bank, per* Henchy J., at p. 190). Another brief way of describing these two

categories is, in the first category, findings of fact, and in the second, inferences from facts. The legal authorities emphasise that an appellate court must proceed on the basis that it did not enjoy the opportunity of seeing and hearing the witnesses as did the trial judge who heard the substance of the evidence, and was able to observe both the manner in which it was given and the demeanour of the witnesses (*Hay v. O'Grady*, *per* McCarthy J. at p. 217).

16. It follows that, where such findings of a trial judge are supported by credible evidence, an appellate court will generally be bound by them no matter how voluminous and apparently weighty testimony to the contrary might be (*Hay v. O'Grady*, at p. 217). An appellate court will only set aside a finding of fact based on one version of the evidence when, on taking a conspectus of all the evidence, it appears to that court that, notwithstanding the advantages the tribunal of fact may have had in seeing and hearing the witnesses, the version of the evidence on which the judge acted…could not reasonably be correct (*Northern Bank, per* Henchy J. at p. 191). An appellate court should, therefore, be slow to substitute its own inferences from findings of fact where such inferences depend on oral evidence heard by the trial judge (*Leopardstown Club*, *per* Denham C.J. at para. 82). It may only do so for a very clear reason. Of particular relevance in this appeal is that a finding as to credibility of a witness giving evidence is a finding of fact (*Leopardstown Club, per* Denham C.J. at para. 39)."

63. Clarke C.J. in *Morrissey v. Health Service Executive* [2020] IESC 6 observed at para. 7.3:-

"The legal position is clear. The classic statement of the correct approach to be taken by an appellate court in respect of findings of fact made at first instance is as set out by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 at pp. 217-218. In particular, it was held that an appellate court is bound by the findings of fact made by the trial judge when they are supported by credible evidence. Further, McCarthy J. emphasised the importance of a

clear statement by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows.

7.4. This latter obligation on the trial judge underpins the case law which subsequently developed on the question of the appropriate engagement on the part of a trial judge with the competing arguments of the parties to litigation. Any party is entitled to a judgment which states why the party concerned won or lost. In *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505, this Court held that, to this end, it was important that the judgment of the trial court engages with the key elements of the case made by both sides and provides a reasoned conclusion as to why the case on the facts made by one or other side is preferred. In my judgment in that case, a distinction was drawn between circumstances in which there may have been a significant and material error in the way in which the trial judge reached a conclusion as to the facts, in respect of which an appellate court can and should intervene, and a case where the trial judge was simply called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case, it is not the function of the appellate court to revisit the trial judge's findings.

7.5 The obligation on the trial judge to engage with and adequately address the competing arguments of the parties on the facts was restated by this Court in *Wright v. AIB Finance & Leasing and ors* [2013] IESC 55 and *Ulster Bank v. Healy* [2015] IESC 106. Importantly, in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50, [2017] 3 I.R. 707, MacMenamin J. set out in clear terms the approach to be taken by an appellate court when reviewing the engagement of the trial judge with the arguments of the parties to litigation, at paras. 109-111:—

> '109. Save where there is a clear non-engagement with essential parts of the evidence, therefore, an appeal court may not reverse the decision of a trial judge,

by adverting to *other* evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.

110. "Non-engagement" with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, *and* where what was omitted went to the very core, or the essential validity, of his findings. There is, therefore, a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly "reasoned" at all. This would arise only in circumstances where findings of primary fact could not "in all reason" be held to be supported by the evidence (see Henchy J. in *V.C. v. J.M. and G.M.* [1987] I.R. 510, at p. 523, quoting his earlier judgment in *Northern Bank Finance v. Charlton* [1979] I.R. 149). "Non-engagement" will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion other than that of the trial judge, when there are primary facts, such as here. Each of the principles in *Hay v. O'Grady* [1992] 1 I.R. 210 is to be applied.

111. The task faced by the judges of our appeal courts is already too onerous. But the task would be made yet more onerous were appeals to be reduced to a piece-by-piece analysis of the evidence, in an effort to show, on appeal, that the trial judge might have laid more emphasis on, or attached more weight to, the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied.' (emphasis included in original)"

Clarke C.J. continued: –

"7.6 In the context of that case law, it is, however, important to emphasise a number of features which are of some relevance to the issues which arise on this appeal.

> 7.7 First, it is clear that what is spoken of as a lack of engagement in those authorities relates not so much to the way in which a trial judge conducted the proceedings but rather to the way in which the trial judge determined the issues in the judgment. A failure to engage, in the context in which it is used in the relevant case law, clearly refers to the failure on the part of a trial judge to set out the reasons why central or important aspects of the case of one or other party on the facts were not accepted."

He further observed: –

> "7.9 Second, it is worth adding that it is clear from that case law that it is far from sufficient for a party seeking to appeal a decision of a trial court to search through the undergrowth of the pleadings and evidence so as to find some tangential or minor aspect of the case which is not expressly referred to in the judgment. The test, therefore, involves, as MacMenamin J. pointed out in *Leopardstown Club*, a high threshold which requires the court to address the question of whether, taking that party's case as a whole, can it be fairly said that the trial judge has significantly failed to adequately address the reasons for rejecting the appellants' case on the facts?"

Public rights of way

64. The facts in the instant case typify one of the two situations where an individual is permitted to assert a public right of way; namely, where the user is sued and raises or asserts the right to exercise a public right of way as a defence. The determination in the instant case affects private rights of the parties only and has no application to any other party nor to the roads authority or planning authority. For an individual to otherwise bring a claim asserting a public right of way, it is necessary to apply to the Attorney General for consent to pursue a relator action which is an action *in rem*.

65. A public right of way must be open to the public at large and not to any limited section or subgroup. There was significant agreement between the parties with regard to the relevant legal principles governing the creation of a public right of way.

66. Two key common law presumptions are engaged on the facts of this case and will be considered in turn:

i. *usque ad medium filum viae*; and,

ii. the "hedge-to-hedge" presumption.

Usque ad medium filum viae

67. Landowners adjoining the public highway are each presumed to have contributed a portion of the land to the formation of the highway. Frequently, since a highway will have been created in the distant past, actual knowledge of the ownership of the subsoil is no longer capable of ascertainment.

68. There is long authority for the proposition that a strip of land lying between the highway and the enclosed land adjoining it is presumed also to belong to the owner of that land. In *Doe d. Pring v. Pearsey* (1827) 7 B. & C. 304 Bayley J. observed:-

> "Now it is a *prima facie* presumption, that waste land on the sides, and the soil to the middle, of a highway belongs to the owner of the adjoining freehold land. The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road. I think that rule applies not only to freehold but to copyhold lands also."

The decision of *Steel v. Prickett* (1819) 2 Stark 463 was considered by the court as an authority for the proposition.

69. Bland in *Highways* (1st ed., Round Hall, 2020) notes at paras. 5.17 and 5.18:-

> "…the owner of land adjoining a highway is presumed to be the owner also of the soil of one half of the highway up to the middle line…

> At common law it is presumed that the owner of land adjoining a public right of way owns the highway *ad medium filum viae* up to the centre point of the highway."

70. The respondent is thus *prima facie* the owner of the disputed grass verge. The trial judge so found at para. 90 and that finding is not under appeal.

71. I do not understand that there is any dispute between the parties regarding the operation of the above presumption in this case.

The title of the respondent

72. The respondent's title derives from an Indenture of 21 April 1952 made between the 7th Baron Talbot de Malahide (otherwise Lord Talbot de Malahide) and others, of the one part, and John Condron, the respondent's father.

73. Bland in *Highways* describes the cognate conveyancing presumption to *usque ad medium filum viae* which operates in favour of the landowner thus at para. 5.17:-

> "…where a conveyance of land adjoining a highway is made by a grantor owning land on one side of it only, then if he can prove, or is presumed, to own also the soil of the highway up to the halfway line, there is a presumption that the soil of one half of the highway is included in the grant. Both of these presumptions may be rebutted."

<u>Dedication and acceptance</u>

74. It is not in dispute between the parties that a public right of way or highway is a route over which the public have a right of passage. It is created by actual or inferred dedication by the owner and acceptance by the public or otherwise pursuant to statute. A public right of way is for the benefit of the public at large and is not appurtenant to land. As the Supreme Court observed at para. 54 of *Walsh v. Sligo County Council* [2013] IESC 48, [2013] 4 I.R. 417:-

> "A public right of way is not the same as a public road, but the common law treats it as a highway. It is a right available to any member of the public."

A public right of way may be adopted by the road authority whereupon it acquires a co-equal status as a "public road".

75. The public highway in question at this location is deemed to have come into existence pursuant to the principles of common law, namely, dedication and acceptance as a public highway and not by a process of grant. The common law doctrine of dedication and acceptance operates such that, once complete, they are conclusive of the creation of a public right of way and cannot later be repudiated by the relevant landowner or a successor in title. Inevitably, actual and express dedication, or proof of same is indeed rare. However, as the Supreme Court reiterated at para. 7 of *Walsh v. Sligo County Council*, "[d]edication may be inferred from a consideration of all the circumstances".

76. Both aspects - dedication by the owner and acceptance by the public - must exist to create a public road or a public right of way pursuant to common law. With regard to the burden of proof on a party who asserts the element of acceptance of a way as a public right of way, clearly no single individual can speak on behalf of the public. As Brett J. observed at p. 715 in *Cubitt v. Lady Caroline Maxse* (1872-73) L.R. 8 C.P. 704:-

> "Acceptance by the public is ordinarily proved by user by the public; and user by the public is also evidence of dedication by the owner. Both dedication by the owner and user by the public must concur to create a road otherwise than by statute."

It is accordingly necessary to show acts on the ground that amount to acceptance by the public generally of the portion of ground in question as part of the public highway by its user as such.

77. In *Hale v. Norfolk County Council* [2001] Ch. 717 Chadwick L.J. at para. 20 emphasised the clear distinction between public rights of way arising under common law and the creation of such rights pursuant to statute:-

> "I accept that, in many cases, it may well be possible to infer, from acts done by the landowner in the course of laying out a new street in accordance with existing byelaws,

that the owner intends to dedicate the land on which those acts are done to public use as part of the highway. And it may well be possible to infer acceptance by the public from user of that land as part of the highway; for example, where the dedicated land forms a continuation of an existing verge or walkway next to the carriageway. But the creation of public rights of way by that means is an example of the operation of the common law doctrine of dedication and acceptance. It is not an example of the creation of rights under statutory powers."

78. Dedication and acceptance can be inferred at common law from uninterrupted long user by the public. The decision of *R. v. The Inhabitants of the Tithing of East Mark* (1848) 11 Q.B. 877 at p. 884 has long been accepted as authority for the proposition that continual user over a very long period generates an almost irresistible presumption of dedication. In that case, 50 years user constituted evidence of intention to dedicate the way as a public highway *per* Erle J. However, as the Supreme Court made clear in *Walsh v. Sligo County Council*, having analysed the jurisprudence including the decisions of Scott L.J. and Slesser L.J. in *Jones v. Bates* [1938] 2 All E.R. 237, although evidence of long user is evidence from which dedication might be inferred, it will not compel a court to find that dedication of a public right of way has taken place. Rather dedication is a question of fact in each particular case.

79. At para. 59 of *Walsh v. Sligo County Council*, the Supreme Court distilled the 19th Century *jurisprudence* on the essential requirement for the establishment of a public right of way, stating:-

"…The first step is proof of the use, as of right, by the public of the way over the owner's land. The second step is that, depending on the duration, frequency, or intensity, of that user, an inference may be drawn that the landowner has dedicated the way. Such an inference, sometimes called a presumption, can be drawn only after consideration of all the facts. The third step is that it may be concluded that the public has accepted the dedication."

80. The Supreme Court at para. 57 in *Walsh v. Sligo County Council* considered that the "most complete consideration of the law regarding public rights of way" was to be found in *Folkestone Corporation v. Brockman* [1914] A.C. 338, noting at para. 58 that its effect was reversed in England and Wales by virtue of the provisions of the Rights of Way Act 1932. No similar statutory provision was ever enacted in this jurisdiction.

81. The Supreme Court in *Walsh* (*inter alia* at paras. 59, 69, 74, 94 and 222) reiterated the *dicta* of Lord Dunedin in *Folkestone Corporation v. Brockman* that where there is evidence of long uninterrupted user as of right by the public, the court, depending on the duration, frequency or intensity of that user may infer that the owner dedicated and intended to dedicate the way to the public and that the public accepted that dedication. Whether there was in fact dedication is a question of fact to be decided in the light of all the evidence and not a presumption of law, albeit that it is never necessary to point to any express act of dedication. The process is one of inference, same to be drawn from the strength of the evidence of user and the fact that the user was as of right. As noted at para. 68 of the judgment, "[t]he burden of proof of dedication lies on the person alleging it."

82. As to proof of dedication, the Supreme Court stated at para. 104 that the focus is on the intention of the landowner: -

> "…Parke B. said, in *Poole v. Huskinson* (1843) 11 M. & W. 827 that 'a single act of interruption by the owner is of much more weight, upon the question of intention, then many acts of enjoyment.' That may somewhat overstate the true position."

At para. 68 the Supreme Court observed: –

> "…The matter cannot be decided without consideration of the whole body of evidence. Lord Atkinson [in *Folkestone Corporation v. Brockman*], following extensive citation of authority, stated at p. 367 that he had been unable to 'find any case, in which there was even a suggestion that, when the evidence of user is of the strongest kind and is not

rebutted, the judge is entitled to direct the jury to find a verdict in favour of dedication'. He continued:-

> 'The crucial matter being the existence in the mind of the owner of an intention to dedicate, the inference of that fact, if drawn at all must be drawn by the judge as a fact.'"

83. At paras. 99 and 100 the court further elaborated on the intention to dedicate, focusing in particular on the actions of a landowner:-

> "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. Lord Blackburn in the passage from *Mann v. Brodie* (1885) 10 App. Cas. 378, implied that dedication would be inferred if the landowner took 'no steps to disabuse [the public] of that belief' that the way had been dedicated. The decision of the House of Lords in *R. (Godmanchester T.C.) v. Environment Secretary* [2007] UKHL 28, [2008] 1 A.C. 221 concerned the registration of a public footpath on a public map, which depended on whether, under s. 31(1) of the (English) Highways Act 1980, there was 'sufficient evidence that there was no intention during that [20 year] period to dedicate it.' This provision enables a public right of way to be established by 20 years of user, *i.e.*, by prescription, and places the burden on the landowner to negative intention. Clearly, this statutory provision represented a radical shift from the position at common law. The burden was shifted to the landowner to produce positive evidence of a lack of intention to dedicate. Nonetheless, the statements of the Law Lords concerning the nature of the evidence which would satisfy the section are helpful. Lord Hoffmann was of the view, at p. 96, that 'the evidence must be inconsistent with an intention to dedicate.' Like Lord Hope, he referred to *Mann v. Brodie* and the necessity to 'disabuse' the public. So far as the section was concerned, Lord Hope noted, at p. 101, that

the common law had not 'laid down fixed rules' but was of the view that 'the landowner must communicate his intention to the public in some way'.

Whether the landowner has communicated his intention not to dedicate is a matter of fact. Looking at all the circumstances, it has to be determined objectively whether, in spite of the evidence of user, the landowner has shown he resisted the dedication. If he has acquiesced in the user, it will normally be inferred that he has dedicated. Action to the contrary effect may take many forms."

Inference of dedication and public user

84. At para. 92 of its judgment, the Supreme Court in *Walsh* discussed the nature of public user which can lead to the inference of dedication: -

"The user which can lead to the inference of dedication of a public right of way must be user as of right. It must be exercised *nec vi* (without force), *nec clam* (openly, *i.e.*, not in secret), *nec precario* (not be based on permission). As was stated by Lord Kinnear in *Folkestone Corporation v. Brockman*…at p. 352:-

'public user…will be good for that purpose [proof of dedication] only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee.'

93. User as of right does not require that the users believe subjectively that they have a right to use the way. The test is objective."

85. The Supreme Court reiterated that prescription is not the test for the establishment of a public right of way, *ergo* user as of right is not automatically "right creating" nor does it dispense with the obligation to prove dedication of the way to public user by the landowner and consequent acceptance by the public.

86. At para. 79 the Supreme Court in *Walsh* reiterated the view of Ó Dálaigh C.J. in *Connell v. Porter* (1972) [2005] 3 I.R. 601 that expenditure of public money on the repair or maintenance of

the road, coupled with evidence of user, is strong evidence from which dedication may be inferred. However, it was made clear that that expenditure of public money alone does not establish dedication. Crucially, user and acceptance by the public must be demonstrated in addition.

Hedge-to-hedge presumption

87. This presumption is expressed thus by Bland in *Highways* (1st ed., Round Hall, 2020) at para. 4-03:-

> "Where there are fences, walls, hedges or other boundary features between which a metalled surface or *via trita* passes, a rebuttable presumption known as the 'hedge-to-hedge' rule can arise to the effect that the public right of way extends to cover the area so enclosed. Where there is a fence on one side only, the presumption is equally applicable to the space between the *via trita* and that fence."

It is common case that this rebuttable presumption does arise in the instant case.

88. At para. 4.09 the author observes:-

> "The hedge-to-hedge rule should not cloud the primary question of fact as to whether the boundary was erected to separate the highway from the land that is not subject to public right. It is important to distinguish the question of fact as to the purpose of the boundary from the presumption that may afterwards arise. There is no presumption involved in the determination of the primary fact of the purpose of the boundary."

89. The existence of strips of ground to the side of the metalled track or *via trita* does not necessarily mean that the public highway is confined to the said track. *Halsbury's Laws of England* (5th ed., vol. 55, Butterworths, 2019) at para. 232 at fn. 1 suggests:-

> "The existence of such strips is generally accounted for by the fact that before roads were properly surfaced additional space was required to permit of deviation in wet weather (*Steel v. Prickett* (1819) 2 Stark 463 at 469)…"

The authors note that: –

> "…in many cases strips of land alongside the metalled track form part of the dedicated highway and are equally subject to the right of the public." (para. 232)

Halsbury, in referencing *A-G (Cork County Council) v. Perry* [1904] 1 I.R. 247, Ir. C.A. and the earlier English authority of *Elwood v. Bullock* (1844) 6 Q.B. 383 at 409, notes:-

> "…It seems that in order to prove that land outside the metalled track forms part of the highway, regular user of it must be proved, and user confined to a reasonably narrow strip; user attributable to persons merely straying from a highway is of little value as evidence of dedication…" (fn. 2 at para. 232)

90. The leading Irish authority on the hedge to hedge presumption is *A-G (Cork County Council) v. Perry*. In considering the said judgment in this context, Bland in *Highways* (1st ed., Round Hall, 2020) at para. 4-05 observes:

> "…There was no evidence of public use of the area as a public thoroughfare, and evidence of casual public use such as the storing of materials by road contractors…could not establish a public right of way. Fitzgibbon L.J. stated that the onus of proving that a disputed area is subject to a public right of way rests on he who asserts the public right."

The approach to the onus of proof as to public user as set forth by Fitzgibbon L.J. in *Perry* was followed in subsequent authorities including *Holland v. Dublin County Council* (1979) 113 I.L.T.R. 1 at p. 2.

91. At issue in *A-G (Cork County Council) v. Perry* was the extent of a right of way along a roadway built along the seashore at Kinsale at the foot of a cliff. The defendant acknowledged the existence of a public right of way along the metalled road but disputed that the strip of land of varying width along the edge of the road formed part of the highway. The disputed portion was not metalled. The defendant claimed that it was part of his private property which adjoined the highway. The central issue accordingly was what constituted the boundary of the highway. The defendant had stored building materials on the disputed strip of ground. The evidence adduced

showed no use by the public of the disputed strip as a highway. Nor was there any evidence of obstruction by the defendant of the metalled road. Reliance was placed exclusively on presumptions and evidence of user because no documentary evidence of title to the highway was forthcoming.

92. At first instance the Vice-Chancellor considered at p. 251 that from the nature of the disputed strip of land it was, "incredible that it was used as part of this highway. I do not believe that there was ever a reasonable or *bona fide* attempt, or intention, or desire so to use it."

93. The plaintiff appealed to the Court of Appeal. Having cited earlier English authorities, including *Turner v. Ringwood Highway Board* (1869-70) L.R. 9 Eq. 418, *Nicol v. Beaumont* (1883) 53 L.J. Ch. 853 and *R. v. United Kingdom Electric Telegraph Co.* (1862) 31 L.J. (M.C.) 166, Fitzgibbon L.J. observed at p. 254 that: –

> "…where a highway has been set out, or fenced at each side by metes and bounds, and afterwards, for a length of time, or in course of time, part only of the space so defined has been metalled and used as a road, the public right of passage, *prima facie*, and unless there is proof to the contrary, extends to the whole space set out; in the absence of clear evidence to the contrary, or with slight evidence of user of the land fringing the actual road, by foot passengers, or for other public purposes connected with the highway, even the owner cannot appropriate or obstruct the more or less waste and useless land adjoining the metalled road. But in such cases the proof of original dedication of the whole space rests on the plaintiff, though such proof is sufficiently supplied by the evidence of the original setting-out or fencing of the space in question."

The above passage was cited with approval in *Holland v. Dublin County Council*.

94. Evidence was adduced on appeal in connection with the title of the defendant's predecessor in title in circumstances where there was no other visible boundary by which the extent of the property dedicated to the highway could be defined other than a water table. Fitzgibbon L.J. noted

at p. 257 that in such circumstances, "the relator is driven to proof of user, in order to extend the public highway beyond the visible roadway". He concluded at p. 257: –

> "…I can find no evidence of the actual user of any land outside the water table for any strictly highway purpose; *i.e.* no one ever used the place in dispute *as a thoroughfare*." (emphasis in original)

It was noted that the disputed ground was used for, *inter alia*, the drying of nets, repairing boats and storage of timber. Fitzgibbon L.J. concluded at p. 259 that no public right of highway had been established outside or beyond the metalled road.

95. Fitzgibbon L.J. emphasised that in cases of this kind: –

> "…regard must be had to the nature and character of the land in question, when considering evidence of user. The land here was of little use to anyone, it was incapable of profitable user to any substantial extent, it was open to trespass, and under such circumstances the casual use of it for such purposes as the standing of cattle, the temporary storage of stones, the deposit of rubbish, or the like cannot establish public rights of highway, or defeat private rights of ownership or occupation." (p. 259)

Reliance was placed by the old Irish Court of Appeal in *Perry* on the decision in *Neeld v. Hendon Urban District Council* (1899) 81 L.T. 405 as showing that "even the presumption arising from the existence of an ancient fence will not always prevail".

96. Walker L.J., concurring in *Perry*, noted that there was almost an absence of evidence of any actual highway use by the public of the strip in dispute (p. 260).

97. Holmes L.J. at p. 265 observed: -

> "That public right sought to be enforced does not depend on ownership of the soil. If the land in dispute be part of the highway, the defendant, however good his title to it, ought to be restrained from acts which admittedly obstruct its use by the public. If it is not part of

> the highway, the plaintiff's case is not advanced by showing that the defendant is not the owner."

He noted that with the exception of one unconvincing witness who said he had seen the disputed portion walked on, "but not often, many years ago, no one has testified to its user as part of the highway" (p. 267). He noted at p. 268 that the plaintiff had "failed to prove that it was ever used, or ever fit to be used, for any kind of public traffic."

98. With regard to evidence adduced by the County Council in *Perry* that contractors for the repair of roads in the district had from time to time used the disputed ground for depositing and preparing stones required for the roadworks, Holmes L.J. observed at p. 269: -

> "It is usual to have on the side of highways spots provided for storing and breaking road metal; and I have no doubt that they, like the rest of the way, are dedicated to the public, although no traffic passes over them. But the places I have referred to are of very limited extent, and easily recognised. It would be absurd to suppose that a strip of land of the length and breadth of the ground in question was ever intended for this purpose; and its occasional use, therefore, is of little weight."

99. Holmes L.J. at p. 270, in reviewing the testimony of the witnesses, concluded: -

> "There is a body of testimony, convincing and uncontradicted, showing that as long as memory goes back the disputed land has been used for purposes to which a public thoroughfare could not be legally applied."

He considered that the activities such as the user for the repairing of nets, construction of boats, gates and so forth did not constitute evidence of dedication to the public for the purpose of traffic nor on the other hand was it "capable of profitable use by a private owner" and that the ground in question had come "to be regarded by persons in the neighbourhood as a place that might be occupied for temporary convenience" (p. 270). The plaintiff thus failed to establish in evidence that the disputed portion of ground was part of the road and the appeal was dismissed.

100. The fence to fence presumption was stated by Martin B. in *R. v. United Kingdom Electric Telegraph Co.* in the following terms at p. 167: -

> "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way, *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the parts which may be metalled or kept in order for the more convenient use of carriages and foot passengers."

101. The precise ambit of that *dictum* and its import was considered by Goff J. in *Attorney-General v. Beynon* [1970] Ch. 1 at p. 12 where he stated: -

> "It is clear that the mere fact that a road runs between fences, which of course includes hedges, does not *per se* give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway, that is, to separate the adjoining closes from the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up." (emphasis added)

He continued at pp. 12 to 13: –

> "It seems clear to me, however, as a principle has developed, that one is to decide that preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary. This was the basis of the decision of Warrington J. in *Offin v. Rochford Rural District Council* [1906] 1 Ch. 342, where he said at p. 354: -

> ‘It seems to me that the result both of that case [that was *Needld v. Hendon Urban Council* (1899) 81 L.T. 405, C.A.] and of *Reg. v. United Kingdom Electric Telegraph Co. Ltd.* (1862) 31 L.J.M.C. 166; 6 L.T. 378, is this – that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway, and, therefore to be the boundaries of the highway, and, further, I think that having regard to the judgment of Vaughan Williams L.J., if you find a fence by the side of the highway, then *prima facie* that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose.’”

Goff J. commented at p. 13:-

> “This passage I confess puzzled me at first and appeared indeed to be self-contradictory, but carefully analysed I think its meaning is succinct and clear. Warrington J. said ‘You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway,’ because that preliminary finding may be rebutted by evidence of acts of ownership inconsistent with that conclusion, but then he says further ‘*prima facie* that fence is the boundary of the highway unless you can find some reason for supposing that it was put up for a different purpose.’”

102. Goff J. distinguished earlier authorities on their specific facts, finding for instance that in the case of *Belmore v. Kent County Council* [1901] 1 Ch. 873:-

> “…there were clear acts of ownership inconsistent with the public right to rebut the presumption, notably making access ways raised some three or four feet above the level of the ground.” (p. 13)

103. The court noted that, in the absence of a satisfactory explanation as to why the hedge was placed where it was, it was constrained to adopt the *prima facie* presumption.

104. Goff J. in *Beynon* noted that: –

> "…although the plaintiff has failed to prove any acts of public right over the strip other than its edge, the plaintiff has clearly shown that part of the verge was included in the highway since the council widened the road on that side without paying compensation, and afterwards made up a footpath." (p. 15)

In contrast with the facts in the instant case, in *Beynon* the defendant had conceded that part of the verge was a public highway and it was not possible to show any differentiation or boundary between that part and the portion that was not highway other than a notional line.

105. Goff J. emphasised that the "fence to fence presumption" has to be applied according to the facts as they are at the time of the action.

106. The appellants pray in aid Goff J.'s decision and further contend that *Beynon* is authority for the proposition that it is not necessary to show user by the public where the fence to fence presumption applies.

107. As is emphasised by Hale L.J. in *Hale v. Norfolk County Council* at p. 731:-

> "…The presumption of dedication of all the land running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground. In a conventional road running between hedges or fences, even if the verges are of varying widths and shapes, this may well be the obvious conclusion. It is not surprising, therefore, that the cases regard this as the *prima facie* position. <u>But that is not the same as elevating this preliminary factual question into a presumption of law</u>". (emphasis added)

108. It is in that context that one considers the *dictum* of Chadwick L.J. in the said case at para 32 which is relied on by the appellants:-

> "Warrington and Goff JJ. [in *Offin v. Rochford Rural District Council* [1906] 1 Ch. 342 and *Attorney-General v. Beynon*, respectively] were plainly correct, as it seems to me, to emphasise that the first question to be decided is whether the fence was erected (or the hedge established) in order to separate land enjoyed by the landowner from land over which the public exercised rights of way. In other words, did the landowner intend to fence against the highway? If that question is answered in the affirmative, then there is a presumption, which prevails unless rebutted by evidence to the contrary, that the land between the fence and the made-up or metalled surface of the highway has been dedicated to public use as highway and accepted by the public as such. It is unnecessary to prove an intention to dedicate; or to prove acceptance by actual user. Both dedication and acceptance will be inferred. And it follows that, where that question can be answered in the affirmative in relation to the fences or hedges on both sides of a made up or metalled surface used as a highway, there will be a presumption that the whole of the land between those fences or hedges has been dedicated to, and accepted for, highway use. That is the basis for the 'hedge to hedge' presumption." (emphasis added)

109. In summary, where it is contended that a public right of way over land has arisen under the doctrine of dedication and acceptance at common law, it will be generally presumed that, where a fence or hedge has been erected by the landowner in order to separate the land enjoyed by him from the land over which the public are exercising rights of way, that the land between the hedge and the made up or metalled surface of the road has been dedicated to public use as a highway and accepted by the public as such. It is a rebuttable presumption. Hence the burden of proof shifts to the respondent to demonstrate that dedication and acceptance of the disputed grass verge could not be inferred in all the circumstances of this case.

Acceptance by the public

110. The respondent having accepted that the hedge could be rebuttably presumed to have been intended to mark the boundary between his private lands and the public way (the so-called "preliminary question"), the rebuttable presumption arose that all the ground lying between the hedge and the metalled track formed part of the public right of way. I am satisfied that this was clearly rebutted by the respondent where no acceptance by the public of the disputed grass verge was shown, no probative evidence of any public user of the said part was found by the trial judge to have been shown and public expenditure was shown to have been minimal at best such as cutting back briars projecting from the disputed grass verge over or onto the metalled road.

111. Bland *opus cit.* at para. 2-25 contextualises the historic importance of actual acceptance as a prerequisite to the coming into existence of a public right of way thus:-

> "This requirement of acceptance by the public dates back to when the members of the parish were *prima facie* liable to repair highways. The doctrine of dedication and acceptance requires this liability to be accepted. Therefore, dedication of a highway does not crystallise in the creation of a right until the way is exercised. Without acceptance, an intention to dedication is only an intention."

Here, as the trial judge concluded on his assessment of the evidence, acceptance by the public by user of the disputed grass margin as a highway was not demonstrated or established by the appellants. Insofar as it was open to the trial judge to infer acceptance by the public from the evidence of user by the public of the dedicated land, as stated by Chadwick L.J. in the English Court of Appeal at para. 20 in *Hale v. Norfolk County Council* and by this court in *Walker v. Leonach* [2018] IECA 132 at para. 86, the basis for such an inference was not established by the appellants either.

Public Roads

112. A public road must first be a public right of way. The functions and duties of the road authority become operative when it adopts a public right of way as a public road whereupon the way enjoys a co-existent statutory status.

113. The statutory architecture governing public roads includes the Roads Acts 1993 and 1998. The implications flowing from the doctrine of dedication and acceptance are succinctly stated by Bland at para. 2-27 as follows:-

> "As a way cannot be taken in charge pursuant to s. 11 of the Roads Act 1993 unless it is first a public right of way, the taking in charge of a road cannot amount to acceptance on behalf of the public."

As discussed above, on the trial judge's assessment of the evidence, dedication and acceptance of the disputed grass verge as a public right of way was not established by the appellants in the High Court to the relevant standard of proof. Hence, arguments that the trial judge failed to take into account the evidence of Mr. James Cleary and other witnesses as to their understanding of the practice of the road authority of generally taking in charge the area between hedges are misplaced unless this crucial element of acceptance by the public was established, and I am satisfied that it was not.

114. Having failed to establish dedication and acceptance, for the disputed grass verge to be otherwise shown to be in charge of the road authority the appellants had to establish that it had been originally constructed as a public road. In my view, the appellants likewise failed to establish this in the High Court to the relevant standard of proof.

Rebuttal of presumption that disputed grass verge formed part of public right of way

115. In the appellants' written submissions, it was contended that the evidence on the basis of which the trial judge held that the hedge to hedge presumption was rebutted was not capable as a matter of law of rebutting that presumption. In particular, the appellants submitted that:

(1) the trial judge erred in finding that pedestrians were not likely to use the grass verges in circumstances where the narrow width of the tarmacadam surface would render it necessary to use the grass verges for safety purposes when a motor vehicle was approaching;

(2) there was conflict in the trial judge's finding that the grass verge was not capable of being used by pedestrians because it was overgrown and the finding that the respondent and his family carried out sufficient works on the grass verge to rebut the hedge to hedge presumption;

(3) the evidence of the carrying out by the respondent of acts of maintenance of the grass verge and/or hedge is not capable as a matter of law of rebutting the hedge to hedge presumption;

(4) the acts of maintenance by the Council, as road authority, tended to establish that the road had been taken in charge and were not capable of being rebutted by the "minimal actions" of maintenance by the respondent and his family;

(5) the assertion of ownership of the grass verge by the respondent in terms of putting down kerbing in the area of the grass verge does not amount to evidence capable of rebutting the hedge to hedge presumption as ownership is not mutually inconsistent with the grass verge having been taken in charge; and,

(6) the trial judge failed to take into account the evidence of Mr. James Cleary; the evidence of Council witnesses in relation to the practice of taking in charge the area between hedges; the evidence of maintenance by the Council including the evidence of Maureen Tracey; the necessity of taking the grass verge in charge in order to cater for the safety needs of road users; the fact that the respondent did not object to the installation of services and cables; and, the road opening licence granted to the appellants.

116. In the absence of evidence of an express dedication which clearly defined the width of the public right of way at this *locus* it was necessary for the court to make a determination as to its lateral extent. In the instant case, the net question was whether the respondent had rebutted the hedge to hedge presumption in relation to the disputed portion of the verge such that the trial judge was entitled to infer that it had never formed part of the public right of way. The boundary features on either side are hedges with a width of 4.6 metres from centre of hedge to centre of hedge. Between the hedges a metalled surface or *via trita* passes with the metalled blacktop surface measuring in width 3.5 metres as to its lateral extent. There is no dispute but that the public right of way extends to cover the area of the metal blacktop surface.

117. The question as to whether the width of the public right of way extends laterally across the entirety of the space hedge to hedge depends to a significant extent on the facts including a consideration of the nature of the area in which the road passes, the width of the margins, the regularity of the line of the hedges and the level of the lands adjoining the road.

118. No witness was called to attest to ever having used the disputed grass verge as a public right of way. The trial judge did not accept evidence called on behalf of the appellants on the issue of user, preferring the testimony of the respondent and his witnesses on the point. As I shall explain, it is not open to this court to interfere with that assessment of the evidence by the trial judge.

119. The acts of dedication and the acts of acceptance as pleaded in the defence and counterclaim are considered below.

User by the public

120. In this case, the issue arises as to the nature and quality of the evidence before the High Court of the actual user by the public at any time of the disputed grass verge. As was noted by Lopes L.J. and Kay L.J. in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, a highway is only used as a highway when it is used for passage. It is necessary to evaluate what evidence, if any, was before the court that the disputed grass verge was ever used by the public for such purpose.

121. The right of the public to go, pass and re-pass arising from an implied dedication of a public right of way is generally established by evidence of actual exercise by the public of the said right. Hence conventionally it is of importance that witnesses are called to confirm the user of the way for the purpose of passage for without it there is no evidence of acceptance by the public of the way which is a fundamental constituent element and prerequisite to establishing a public right of way by inferred dedication.

122. There was evidence from the respondent and his witnesses including Mr. Nolan which the trial judge accepted that pedestrians neither did nor could use the disputed grass verge as a public way. There was cogent evidence accepted by the trial judge that pedestrians at this location used the tarmacadam or metalled surface to traverse Seamount Road and not the disputed grass verge principally because the latter was impassable due to being uneven and blocked by the overgrown hedge maintained by the respondent. It is evident that the trial judge found the appellants' witnesses unconvincing on this key issue.

123. Until the appellants' development was undertaken, this part of Seamount Road served three dwellings; that of the appellant Tracey family, the respondent Condron family and the Nolan family.

124. An exceptional factor in this case is that the appellants failed to call a single witness to testify to having ever personally exercised a right of passage over the disputed green verge. No witness testified to having used the disputed grass verge "for safety purposes when a motor vehicle was approaching". Hypothesis is not a substitute for evidence.

125. It is clear that the evidence of Martin Treacy claiming the verge was used by pedestrians was not accepted by the trial judge. Neither Martin Treacy nor Mrs. Maureen Treacy gave evidence that they themselves had ever used the disputed grass verge as a pedestrian way. Crucially, other than Martin Treacy, not a single witness was called to support the assertion that children would walk upon the disputed verge "if there was a car coming". Beyond the scenario posited by Mr

Treacy there was simply no evidence to support a contention that the disputed grass verge was ever used as a pedestrian way. Whilst the appellants were critical of the trial judge for failing to have regard to "the reasonable likelihood that the verge must have been used of necessity" as an area ancillary to the tarmacadam roadway, it was significant that no witness testified to engaging in such user. "Reasonable likelihood" is in the realm of conjecture in light of the fact that no witness was called to testify ever having done so. The trial judge had the opportunity to hear and observe the witnesses at first-hand and could during this lengthy trial evaluate their objectivity and the quality of their recollection (insofar as their evidence was based on recollection, rather than speculation). There is no basis to disturb his finding that the disputed grass verge was not used by pedestrians as a public right of way.

126. The evidence of Paul Nolan who had resided in the dwelling opposite the respondent was that pedestrian user occurred only on the blacktop surface and not on the grass verge. His evidence of the uneven state of the verge was not disputed. His evidence regarding the hedge and the untrimmed state in which it was kept whereby it projected out from the hedgerow across the disputed green verge in a manner that would significantly impede pedestrian access supported non-user of the grass verge by pedestrians and was also not disputed.

127. The trial judge made a clear finding at para. 95 that he did not accept that the grass verge was used as some sort of public pedestrian footway over many years as a matter of right or otherwise by persons using Seamount Road including schoolchildren taking a shortcut – contrary to what the appellants' witnesses had contended.

Cul de sac

128. Keane observes in *The Law of Local Government in the Republic of Ireland* (1st ed., Incorporated Law Society of Ireland, 1982):-

> "One of the elements which has to be taken into account in determining whether there was an intention of dedication is the nature of the *locus in quo*. Thus, an inference of dedication

> is more difficult to draw in the case of a *cul de sac*, since a highway is normally expected to lead to a particular point. As a result it is difficult to establish that a *cul de sac* is a public road by evidence of user alone, without proof that public money has been spent on it." (p. 67)

However, in this case, in circumstances where it was accepted by both sides that the metalled part of the way to the extent of 3.5 metres is in charge of the roads authority, decisions in relation to *cul de sacs* in general are not of any material relevance or assistance in determining any of the germane issues in this appeal.

Acceptance on behalf of the public

129. As the Supreme Court has made clear in *Connell v. Porter* and *Walsh v. Sligo County Council*, the expenditure of public money on the repair or maintenance of a road, coupled with evidence of user, is strong evidence from which dedication may be inferred. However, expenditure of public money alone does not establish dedication; user and acceptance by the public must also be demonstrated.

130. The local highway authority, as the representative of the public, is competent to accept an express dedication by written agreement with a landowner though no such state of affairs arises in the instant case. Acceptance is generally evidenced by the assumption of a positive obligation to maintain the highway since acceptance imports such an obligation and the expenditure of public funds on the way generally connotes acceptance by or on behalf of the public.

131. Where the way has been maintained by the road authority the physical extent of the way so maintained is of central importance.

132. With regard to maintenance of the disputed strip there were material inconsistencies as between the appellants' evidence given by Maureen Treacy and Martin Treacy, on the one hand, and the retired Mr. Tommy McCormack, on the other, regarding the nature, extent and frequency of maintenance work being carried out to the disputed grass verge or the hedge. The trial judge

noted at para. 86 that Mr. McCormack's evidence of trimming of briars was confined to briars "protruding out into the road".

133. It can reasonably be inferred from the judgment of the trial judge that weight was not attached to the evidence of Maureen Tracey to the effect that the Council had maintained the hedges and grass verges. In particular, her evidence was at variance with that of Tommy McCormack and no witness was called from the Council to resolve the differences in view as between the appellants' own witnesses.

134. Since there was a clear conflict between the evidence of Paul Nolan, the respondent and his son on the one hand and the appellants' witnesses on the other, the necessary inference to be drawn from his conclusions is that the trial judge considered the respondent and his witnesses to have advanced credible evidence which he preferred over the testimony from the appellants on this specific and critical issue. In those circumstances bearing in mind the applicable standard of review, it is not open to this court to interfere with his findings and conclusions in that regard.

Acts of ownership

135. *Walsh v. Sligo County Council* is authority (para. 74) for the proposition that it is of relevance whether the landowner had taken any step to disabuse the public of a belief that they enjoyed a right to use the way.

136. The public right of way is created under common law by the proof, by either actual evidence or inference, of its dedication by the owner of the soil and acceptance of same by the public. The owner of the soil retains all of the rights of ownership subject to the public right of way. The owner of land subject to a public right of way has no obligation to repair and maintain it, or to keep it free and safe for users at common law.

137. The placing of kerbing by the respondent was a single factor which when taken with the totality of the other factors and evidence available to the trial judge, including the mowing of the grass occasionally, tended towards rebutting the hedge to hedge presumption even though if taken

alone it might not be dispositive of the issue. It was one of a number of *indicia* and acts of ownership that is consistent with a sustained position of asserting ownership over the disputed grass verge throughout a protracted period of time and represented a further act of ownership inconsistent with the existence of a public right of way over the disputed grass verge that had been taken in charge by the roads authority.

138. The acts of maintenance of the respondent were consistent with active acts of ownership of the disputed grass verge. Taken with all the other factors, including the complete absence of *any* credible evidence of the public ever exercising public rights of way over the disputed verge, such acts served as a factor in rebutting the hedge to hedge presumption. The limited maintenance of the grass verge by the respondent and otherwise his acts in relation to maintaining same in a state of exuberant overgrowth including causing the hedges and hedgerow to grow out extensively over the disputed grass verge so as to preclude the practical possibility of members of the public traversing the ground in question and the absence of any evidence of objection to this either by any member of the public or the road authority, Fingal County Council, combined to rebut the hedge to hedge presumption and were inconsistent with the existence of a public right of way over the disputed grass verge. There was ample evidence on which the trial judge was entitled to conclude that the hedge to hedge presumption had been rebutted by the respondent.

139. The works which the trial judge found on the evidence before him had been carried out by the respondent on the disputed grass verge were not rendered by the respondent for the purposes of making the said verge traversable by the public as part of a public right of way. Hence there was no conflict in the trial judge's findings in that regard. His conclusion that the said works went towards rebutting the hedge to hedge presumption was correct.

140. The fact that the respondent had telephoned an employee of Fingal County Council with regard to issues concerning ingress of water from the grass verge onto his property is not probative

of a claim that a public right of way existed over the disputed grass verge and that same had been taken in charge by the roads authority.

141. The presence of static installations in relation to utilities such as telephone cables, mains and other conduits may in a specific case be indicative of the extent of dedication but overall on the evidence before the trial judge in this case were not probative of user of the area in question for the purposes of passage by the public as a public right of way.

Excerpt from schedule of roads taken in charge

142. Sean McGrath, a retired senior executive engineer with Fingal County Council, gave evidence at the hearing. By letter of 4 September 2015, addressed to a solicitor who acted for the respondent, he stated: -

> "…I have researched the question of the taking in charge of Seamount Road. I have been provided with an extract from a schedule of roads deemed to have been taken in charge. The schedule includes Seamount Road, listing its length as 680 linear yards and its average width as 15 feet. I attach a copy of this schedule for your information".

The schedule does not include any map of Seamount Road.

143. It is noteworthy that Mr. McGrath did not work in the Roads Department of Fingal County Council. He does not, either in the said letter or in his evidence, identify definitively the provenance of the "extract from a schedule" and it is noteworthy that the roads were "deemed" to have been taken in charge. No witness was called from the Roads Department of Fingal County Council at the hearing of this action.

144. The excerpt annexed is unclear as to the date of its actual creation. It is headed in the handwriting of an unknown individual "Roads in Charge – Excerpt From 1930 + 1952 Road Schedules". The entry no. 133 states: -

> "'Seamount Road' from the three roads next north of Broomfield House on the main Malahide – Hazelbrook to Portmarnock Bridge east road east for 680 yards. (*cul de sac*)"

Its length is given as 680 yards long and 15 feet in width which equates to 4.5 metres.

145. In the instant case it was generally accepted by the parties that the copy of the roads schedule was evidence of the existence of a public road at Seamount Road.

146. The specific detail as to width in the roads schedule is supportive of the respondent's position and no sufficient evidence to rebut the width of 15 feet (4.5 metres) in the *locus* in dispute was advanced to the court.

147. With regard to the evidential value of the excerpt from the schedule of roads taken in charge, the trial judge dealt comprehensively with the relevant statutory provisions and in particular the Local Government Act 1925 and the relevant articles of the Public Bodies Order 1946 (S.I. No. 273 of 1946). Whilst the court noted that the extract produced "has some similarities to the road schedule from RO1 prescribed under Article 86 of the Public Bodies Order 1946", the court noted at para. 41 of the primary judgment: -

> "The maps prepared and records kept, if any, under the various articles of the Regulation concerning the identification of the road and the keeping of accounts in respect of its repair and maintenance as a road taken in charge were not produced in evidence. In fact there is no evidence that the maps which ought to have been prepared and updated by the road authority were ever compiled and updated."

In the circumstances, the trial judge did attach appropriate weight to the schedule of public roads albeit that it was lacking in key information and in particular a map.

The "certificate" of 7 August 2003

148. As the evidence of Mrs. Treacy made clear, on 31 July 2003, the third named appellant (now deceased) wrote a letter to Kathleen Power of the roads department at Fingal County Council:-

> "I would like to make an application for the taking in charge of 9 metre wide section of roadway at the upper end of Seamount Road…from the entrance to Knockdara Estate to the entrance of Seamount House as outlined on the attached map."

149. The parties are in agreement that the actual width of the roadway at the disputed area is 7.5 metres from the centre from the hedge on one side of the road to the centre of the hedge on the far side of the road. Hence in effect the request by Mr. Treacy if acceded to would have resulted in the roads authority taking in charge part of the curtilage and private gardens lying inside the boundary hedges on the northern and southern sides of Seamount Road at the relevant location. It appears that the addressee, Ms. Power, as of July 2003 worked in the Roads Department of Fingal County Council as a member of the administrative staff. Ms. Power was not called as a witness at the hearing.

150. The letter in response to that request was dated 7 August 2003 and was heavily relied upon by the appellants in support of their contention that the disputed grass margin was in the charge of the roads authority:-

> "I wish to refer to your letter dated 31st July 2003 and to state that the roads, footpaths, sewers, watermains and public lighting abutting Seamount Road are in charge of the County Council from the Hill, Malahide up to the entrance of Seamount House. Between Knockdara and the entrance to Seamount House the width of the road in charge is 7.5 m."

151. This letter is signed "pp. Bridget Gilbert Senior Executive Officer". Ms. Gilbert was not called at the hearing. The identity and status within the roads authority of the party on whose behalf and as agent she affixed her name to the letter *per procurationem* was not established in evidence.

152. As the trial judge noted, Mr. James Cleary in his evidence "in effect rejected" that the purported measurement of the width of the area taken in charge at the relevant location was "an accurate measurement" (para. 7 of primary judgment). As the trial judge noted, "there was nothing to support it". It was at fundamental variance with the excerpt from the roads schedule and with the reality on the ground and in the circumstances no evidential weight could be given to it.

153. I am satisfied that the trial judge was entitled to adopt the approach he did to the witnesses particularly in circumstances where the certificate of taking in charge from Fingal County Council

(referred to in ground 12 of the notice of appeal in relation to the respondent's credibility) was discredited by evidence before the High Court from Mr. Cleary who characterised it as "wrong" as regards measurements and no witness from the Roads Department of the Council gave evidence to address the key issues arising in relation to same at the trial.

2003 Planning Permission

154. It is noteworthy that Fingal County Council in its Notification of Decision to Refuse Permission of 24 March 2003 identified as its fourth reason: -

> "The proposed development is to access onto Seamount Road. The section of this road in the vicinity of the proposed development is substandard in a width (approximately 3.5 metres) and footpath provision. The increase of traffic generated by an additional 82 dwelling units and crèche would give rise to significant traffic congestion at this location resulting in the creation of a traffic hazard."

155. The inadequacy of the roadway in the view of Fingal County Council is independently corroborated by a document from its own Roads Department which formed an integral part of that decision and which stated: -

> "The proposed development has access onto Seamount Road. A section of this access road in the vicinity of the proposed development is substandard in width (approximately 3.5m) footpath provision. In the absence of a satisfactory proposal to upgrade this section of road to a minimum width of 5.5m and provide a 1.5 footpath, Roads Dept. recommend refusal as the increase in traffic generated by an additional 82 houses and crèche would give rise to significant traffic congestion at this location resulting in the creation of a traffic hazard."

This is signed by Ms. Helen Cuddy on 28 February 2003 and endorsed by Brendan Colgan on the same date - both of the Roads Department of Fingal County Council. The 2003 "certificate" was discredited and could not be relied on to contradict the clear findings and conclusions of the roads authority.

156. This is the only direct document emanating from the Roads Department setting out its actual understanding of the status, dimensions and width of the public way with access onto the development. In circumstances where a witness who had been in the employment of Fingal County Council repudiated and rejected the validity of the purported certificate dated 7 August 2003, it offers significant material evidence that it was the understanding of the Roads Department of Fingal County Council on 29 January 2003 that the width of the way was 3.5 metres. No evidence was adduced by the appellants and no witness was called from the Roads Department at trial to dispute or contradict that statement or to identify any development or occurrence between January 2003 and August 2003 that would have resulted in an accretion to the lateral dimension of the highway, public way, roadway or area taken in charge.

2010 Planning permission condition

157. It is noteworthy that in the grant of planning permission by An Bord Pleanála on 14 May 2010 (Planning Register Reference No. F09A/0015) Condition 3 provides: -

> "Prior to the commencement of development, the developer shall submit to, and agree in writing with, the planning authority, proposals for traffic calming measures, parking control measures and pedestrian crossings along Seamount Road as recommended in the 'Stage 1 Road Safety Audit' submitted to the planning authority on the 11th day of September, 2009. No dwelling unit shall be occupied prior to the construction and commissioning of these and other proposed road improvement works along Seamount Road, as confirmed in writing by the planning authority.
>
> Reason: In the interest of clarity, amenity and traffic and pedestrian safety."

158. Whereas the road schedule demonstrates that the average width of 15 feet was taken in charge and same is greater than the portion of the blacktop surface in the vicinity of the disputed grass verge, 15 feet would have been insufficient to permit the appellants to construct a road of the width envisaged by the terms of their grant of planning permission, as revised.

159. The evidence before the High Court, however, was that as of the hearing date the development had been substantially completed and the units in question were occupied. That is rather surprising given the clear terms of the condition set out above.

Evidence of witnesses

160. The evidence of the former Council employee who had never worked in the Roads Department of the Council as to his belief that the practice of the road authority is to take in charge the area "between the hedges" could not be probative of the appellants' contention that the disputed grass verge at the *locus* was subject to a public right of way and had been taken in charge of the local authority in circumstances where the hedge to hedge measurement was fundamentally inconsistent with the excerpt from a roads schedule which stated that a width of 15 feet (4.6 metres) had been taken in charge. No witness from the Roads Department was called to address this issue.

161. In that regard the observation of Bland in *Highways* at para. 2-27 bears repetition:-

> "As a way cannot be taken in charge pursuant to s. 11 of the Roads Act 1993 unless it is first a public right of way, the taking in charge of a road cannot amount to acceptance on behalf of the public."

162. The fundamental anterior requirement of proving that, prior to the purported taking in charge by the road authority of Seamount Road, the disputed grass verge was subject to a public right of way created at common law by dedication and acceptance which, as the Supreme Court in *Walsh v. Sligo County Council* made clear, is not a presumption of law but rather a question of fact to be decided by the trial judge in the light of all the evidence, was never established by the appellants in the instant case. That fact wholly undermines any entitlement on the part of the appellants to have the court attach any probative value to either the 7 August 2003 "certificate", the excerpt from the schedule of roads taken in charge or any other official document emanating from the local /roads authority including the road opening licence.

Mr. Cleary

163. The difficulty with Mr. Cleary's evidence is that he was a retired senior engineer with the Capital Investments Department of the Council at the time of the hearing and not in the Roads Department. Hence there was not a single witness giving evidence from the Roads Department of Fingal County Council. The court clearly (and correctly) found at para. 6 that, "Mr. Cleary was unable to assist the court on the taking in charge of the relevant portion of Seamount Road" .

164. Mr. Cleary had emphasised, as the trial judge noted at para. 63:-

> "…in the course of his evidence that there were many people in the Roads Department of the County Council who would know about the process for taking roads in charge, road maintenance, construction and planning, but that he worked in the Capital Projects Department within the Council and would therefore have no function in the above aspects of the Council's work and responsibility regarding roads. He stated he never worked in the taking in charge section of the Council and therefore could not assist the court on that matter."

165. Whilst Mr. Cleary's opinion was to the effect that the area between the hedges was taken in charge, his opinion on this issue had little or no evidential value and the other evidence adduced did not support that opinion and, in particular, the evidence of the respondent and his family, of Mr. McCormack and of Mr. Nolan contradicted it.

166. It follows from the above that the appellants are not entitled to exercise rights on foot of the road opening licence which was issued to them by Fingal County Council in April 2016 in or over any part of the disputed grass verge and such acts and works as have been carried out thereon constitute trespass.

The pleadings

167. The respondent's statement of claim was delivered on 16 June 2016.

168. The defence delivered on behalf of the appellants traversed the respondent's claims in all material respects. Trespass on the respondent's lands was denied at para. 13:-

> "…The [appellants] deny that the area where the works were carried out by the [appellants] …was on the [respondent's] property and/or that same resulted in trespass onto the [respondent's] property."

It was pleaded that the respondent was estopped from claiming ownership to the lands arising from objections made to a planning application of the appellants in the year 2003:-

> "…there was no reference in the [respondent's] objection to claiming ownership of the lands the subject matter of the proceedings herein. As a consequence of the foregoing the [respondent] is estopped from now claiming ownership to the lands." (para. 16)

169. The counterclaim placed fundamental reliance on the grant of planning permission made by An Bord Pleanála on 14 May 2010 as entitling the carrying out of works including the works effected on the disputed strip of ground: -

> "4. The [appellants] obtained planning permission to carry out works at their lands at or about Seamount House on the 7th October 2009. An appeal to same was lodged on the 27th October 2009 and a decision to grant permission was made by An Bord Pleanála on the 14th May, 2010 and the works commenced on the 2nd June, 2014."

It was pleaded that the works were significantly advanced, being building works in respect of 137 dwelling units on the Seamount site. Of relevance to the claim of a public right of way are the following declaratory reliefs sought:-

> "(1) A declaration that the [appellants] are entitled to proceed with their development in accordance with the planning permission granted;
>
> (2) An injunction preventing the [respondent], his servants or agents interfering with the [appellants'] right and ability to carry out the works in accordance with the planning permission"

170. It will be recalled that the grant of planning permission was explicitly subject to s. 34(13) of the Planning and Development Act 2000 which provides:-

> "(13) A person shall not be entitled solely by reason of a permission under this section to carry out any development."

Contrary to the appellants' assertions, neither the grant of planning permission nor the road opening licence constituted evidence that the disputed grass verge was subject to a public right of way. Neither did they confer any entitlement on the appellants to interfere with the respondent's private property.

Taking in charge pursuant to statute

171. Where a highway is created pursuant to statutory powers no act of the landowner or user by the public is needed to complete its creation and that has been established at least since the decision in *R. v. Inhabitants of Leake* (1833) 5 B. & Ad. 469. Furthermore, where a statute does no more than authorise the setting out of a public road by a roads authority, no public right of way comes into existence (absent adoption by user) until the road has been set out in substantial conformity with the statutory requirements *per Cubitt v. Lady Caroline Maxse* (1872-73) L.R. 8 C.P. 704. No such taking in charge was proven in this case and the certificate tendered in support of such a proposition was, on the facts of this case, correctly rejected by the trial judge as evidencing same.

Lack of candour

172. The appellants argued that the trial judge erred in law in failing to take into account the lack of credibility of the respondent's evidence, particularly in light of the failure to disclose certain matters at the *ex parte* application for injunctive relief including a letter from Sean McGrath of 4 September 2015 enclosing the excerpt from the 1952 roads schedule, an email from James Cleary dated 22 October 2015 and the "certificate" of 7 August 2003.

173. It would have been preferable had the respondent when moving *ex parte* an application for interim interlocutory relief disclosed the existence of the letter from the Roads Department dated

7 August 2003 as it was material to the matters in issue. However, I am not satisfied that it is relevant in determining any issue in this aspect of the appeal. Such omission could not be determinative in and of itself as to the existence or not of a public right of way over the disputed grass verge. It may however have a relevance in regard to the issue of costs, particularly the costs of the said *ex parte* application.

174. The evidence showed that on the date in question, being 19 April 2016, the disputed grass verge and existing hedge were removed and a concrete pavement installed in its place. The circumstances are relevant including that the respondent was a person of limited education. The exigencies confronting the respondent householder which precipitated the application for interim injunctive relief goes some way to explaining the oversight. The omission appears more consistent with oversight than any more sinister motive.

Extinguishment

175. The issue of extinguishment was belatedly raised in particular in the written submissions of the appellants advanced before this court. However, the issue of extinguishment of the right of way is not engaged in this case. It was not raised or argued in the High Court and does not assist the appellants having regard to the specific circumstances and facts of this case and having regard to all of the evidence adduced at the trial.

176. Once the respondent was in a position to rebut the hedge to hedge presumption that there had been a dedication of the entire width from centre hedge to centre hedge as a public way and, further, in the absence of probative evidence of the acceptance of the disputed portion of grass verge by acts of user thereon by members of the public consistent with an imputed dedication, the issue of extinguishment did not arise.

177. Further, the excerpt from the road schedule does not support the taking in charge of an area from hedge to hedge and indeed is inconsistent therewith. Therefore, a burden of proof that a public

right of way had been extinguished over a portion of the disputed grass verge did not arise in the instant case.

Conclusions

178. This court is bound by the findings of fact made by the trial judge when they are supported by credible evidence. There was ample cogent evidence before the trial judge, as outlined above, which entitled him to find on the facts that the respondent had rebutted the hedge to hedge presumption.

179. The trial judge had the opportunity over eleven days of hearing to hear and consider the various witnesses and form his own views as to their credibility, objectivity and soundness of recollection. This court necessarily proceeds on the basis that it did not enjoy the opportunity of seeing and hearing the witnesses as did the trial judge who heard the substance of the evidence at great length, and could observe the demeanour of the witnesses. The trial judge's preference of the respondent's witnesses on the key issues, including the rebuttal of the hedge to hedge presumption, the non-user by the public of the disputed grass verge and the limited nature of the maintenance effected by the Council at the *locus in quo* and the weight which he attached to recollections regarding, in particular, the cutting of grass, the cutting of briars and bushes and the trimming of hedges ought not be interfered with in circumstances where his judgment engaged with the key elements of the case as advanced by both sides and provides reasoned conclusions whereby he preferred the respondent and his witnesses' evidence in relation to the central issues.

180. With regard to the aspects of the evidence not rehearsed in the High Court judgment which, it is contended, ought to have been taken into account as supporting the appellants' contention that a right of way did exist over the disputed grass verge or which tended to support a view that the grass verge had been taken in charge by the roads authority, the findings of primary fact were made by the trial judge based on oral evidence. A careful evaluation was made by the trial judge and he clearly preferred the evidence of the witnesses, lay and expert, called on behalf of the

respondent. That is implicit from the judgment in its conclusions. The trial judge was entitled as the primary arbiter of fact in the case to carry out that evaluation. He disregarded evidence of the unhappy state of relations between the Treacy family and the Condron family and sundry issues that had arisen between them observing "if relevant at all they might be said to impinge on the credibility of the various witnesses but I do not consider those issues to be central to my determination." It is evident from para. 58 of the judgment that he accepted in full the evidence of the respondent:-

> "...I do not accept the proposition that his evidence is untruthful or otherwise tailored to procure recognition of such rights by the court."

181. It is a significant and unusual fact that no witness was called on behalf of the appellants to give evidence of having ever walked or passed and repassed along the disputed grass verge for the purposes of using it as a footpath or way. Direct evidence of actual exercise of rights and user by any witness of the disputed portion of ground as a footpath or as part of the public roadway at any time was not adduced. That omission, when taken with other evidence, had the result that the imputed dedication of the disputed grass verge as part of a public right of way created at common law was not proven and the fundamental constituent element of acceptance by actual user by members of the public as a right of way was not proven in evidence.

182. The fact that the hedge remained in its natural state and in such a manner that briars extended across the disputed portion of ground rendering it impassable together with evidence regarding the state of the verge were clearly relevant considerations given the duration during which the state of affairs obtained. Even leaving aside the view expressed by consultants in the Road Safety Audit Report, there was ample evidence on foot of which the trial judge was entitled to conclude that the presumption that the disputed grass verge ever formed part of the public road had been rebutted.

183. The trial judge was, on the evidence, entitled to reach a conclusion that it was improbable or unlikely that pedestrians traversing Seamount Road walked on the grass margin or verge and in

particular the disputed grass verge as opposed to the tarmacadamed surface. That was particularly so given that that property was located at the end of a *cul de sac*. There was no direct evidence by any witness that they had occasion to use the disputed grass verge of necessity in circumstances were the tarmacadamed metaled carriageway was not available to them due to vehicular activity at that point on the roadway as the appellants had surmised.

184. A "taking in charge" process could not have invested the disputed grass verge with the status of a public right of way in the absence of, at the very least, an imputed dedication and public acceptance of same by user being established as of the date of the taking in charge.

185. It was contended by the appellants that the trial judge should have given weight to "the fact that taking in charge the area between the hedges is necessary to ensure that the needs of road users are catered for, including their safety needs, which the road authority has a statutory obligation to cater for pursuant to s. 13(5) of the Roads Act 1993." However, the road authority is not a party to these proceedings and the appellants do not have any enforcement functions as agent for and on behalf of the road authority. The statutory obligations of Fingal County Council are not probative as to whether the disputed grass verge is subject to a public right of way and had been taken in charge as such. Any such obligations are subject to the property rights of the respondent. Section 13 does not empower roads authorities to acquire or exercise control over private property.

186. The 2010 grant of planning permission made clear that it was subject to s. 34(13) of the Planning and Development Act 2000, as amended, and that no works by way of development in the construction of dwellings, let alone the installation of tenants or occupiers into same, ought to have taken place pending the issue of the entrance/access way being addressed. The appellants elected to disregard that proviso at their own risk.

187. The issuing of a road opening licence does not have evidential value as to the status of the area of ground in respect of which the licence is directed. Neither could it confer an entitlement on the grantee to trespass on the private property of the respondent. Issues in regard to any

deficiency or invalidity in the licence are matters that rest between the appellants and Fingal County Council.

188. The trial judge heard the witnesses called on behalf of the appellants in regard to the cutting of the hedge or maintenance of the grass verge and I am satisfied that he was entitled to reach his conclusion that such activities, having regard to the totality of the evidence adduced in relation to same, were insufficient in themselves to demonstrate that the roads authority had taken the disputed grass verge in charge.

189. Furthermore, the very limited acts of maintenance contended for could not in and of themselves establish a public right of way over the disputed grass verge by the local authority in circumstances where an imputed dedication and acceptance of the disputed portion of the grass verge as a right of way was not established since there was an absence of probative evidence of user of the disputed grass verge as an integral portion or any part of the public highway at the *locus* in question.

190. The evidence of witnesses regarding maintenance which included clipping the hedge and verges particularly insofar as briars projected onto the 3.5 metre wide metalled surface spoke to the substantial impassibility of the area in question but did not establish the existence of a public right of way over the disputed ground arising by imputed dedication and acceptance by the public.

191. The trial judge was entitled to conclude at para. 93 on the evidence before him that the maintenance by the Council of the hedge or briars was merely sporadic and limited to trimming back elements protruding onto the tarmacadam surface. It is not correct to say that the trial judge failed to make a finding of fact as to the extent to which the Council had maintained the grass verge, as the appellants contended at ground 4 of their notice of appeal. It is implicit in the trial judge's conclusions that weight was not attached to the evidence of Maureen Tracey with regard to the extent of maintenance carried out by the Council.

192. The aspects of the evidence where the trial judge determined that the respondent had exercised control over the grass verge coupled with his presumptive ownership of the soil to the centre of the highway were significant factors in this case. While some were of greater duration and significance, cumulatively they entitled the trial judge to conclude that the hedge to hedge presumption was rebutted by the respondent's actions. Equally important is that there was no evidence beyond the bare assertion of Martin Tracey, whose evidence the trial judge did not accept, that anybody made use of the grass verge in question at any time as a public roadway or public path.

193. The installation of the kerbing and cobble lock was not determinative in and of itself of the issue. However, there was substantial other evidence in addition thereto and all the distinct evidential elements when combined operated in their totality to rebut the hedge to hedge presumption.

194. Engagement by the respondent with members of the roads authority regarding water ingress was not probative of the matter in issue and appears to have been precipitated by a wish to abate water run-off from the camber of the road surface into the curtilage of the respondent's dwelling.

195. The fact that there was evidence that the respondent did not object to the installation of services and cables in the verge by various undertakers is not relevant. The creation or facilitating of wayleaves in connection with services or utilities underground or as fixtures at the surface do not in and of themselves establish that the surface at ground level is subject to a public right of way. Statutory and non-statutory wayleaves or easements are frequently availed of in connection with the installation of infrastructure and the running of conduits servicing multiple holdings.

196. The findings of the trial judge cannot reasonably be categorised as contradictory. Occasional maintenance of the grass verge is not inconsistent with the fact that its ongoing state was overgrown with hedge, briars and long grass such as to be incapable of use by the public.

197. Whilst the roads authority "certificate" of 7 August 2003 enjoyed a status of being *prima facie* evidence that the roadway in question constituted a public road pursuant to s. 11(5) of the Roads Act 1993, the "certificate" was substantially discredited by the witness Mr. Cleary and was acknowledged by him to be "wrong". It was not verified or formally authenticated and the author of it was not called as a witness nor was any witness called from the Roads Department of Fingal County Council to prove its making. Its tenor was at variance with the evidence: it contradicted, without any explanation, the Roads Department report of February 2003. The trial judge accordingly was entitled to conclude that he could not safely rely on its terms in all the circumstances. Any issues arising in relation to the "certificate" fall to be resolved between the appellants and Fingal County Council.

198. With regard to the width of the road taken in charge it will be recalled that the roads authority was not a party to the proceedings. Of concern to the trial judge was whether the disputed grass verge was or was not subject to a public right of way and had been taken in charge by the roads authority. The determination of the trial judge that the width of the roadway taken in charge by the local authority at this point on Seamount Road only extended to 3.5 metres was consistent with the evidence and has no bearing on the nature and extent of Seamount Road that has otherwise been taken in charge by the roads authority. The determination does not bind the roads authority, this being an action *in personam*, neither does it bind any member of the public who was not a party to the proceedings. The judgment is specific to the matter at issue between the parties having due regard to the manner in which this case was pleaded including the counterclaim.

199. It is not, as the appellants deftly sought to frame their claim on appeal, that the respondent could only have succeeded at trial by establishing extinguishment of an existing public right of way over the disputed grass verge; by establishing that it ceased to be part of a public road. Rather there was no evidence that the disputed grass verge was ever actually part of or used as part of a

public road in the first place. The issue of extinguishment of a public right of way has no relevance whatsoever to the instant case.

200. The presumption - insofar as the disputed grass verge is concerned - that the entire width between the hedges was subject to a public right of way and was part of the public highway and had been taken in charge was rebutted by the respondent. No witness came forth to testify that they had ever personally walked upon the disputed grass verge as a public way or footpath at any time. Any taking in charge by Fingal County Council or its predecessor could extend only to the subsisting public right of way or roadway. It follows that the appellants are not entitled to install a footpath which incorporated the disputed grass verge.

201. Accordingly, I would dismiss the appeal.

Costs of this appeal

202. As noted earlier, the issues in the cross-appeal pertaining to costs will be dealt with subsequent to the disposal of the appellants' appeal in the first instance. As regards this appeal, in all the circumstances, the respondent having been "entirely successful" within the meaning of s. 169(1) of the Legal Services Regulations Act 2015 and having due regard to O. 99 (recast) of the Rules of the Superior Courts, it is appropriate that the appellants herein pay the costs of the respondent when ascertained. If either party wishes to contend for an alternative order with regards to costs of the within appeal, they should provide written submissions to the Office of the Court of Appeal and the other side within 28 days of delivery of this judgment, with the other side providing a written response within a further 28 days. Thereafter the matter will be dealt with concurrently with the respondent's cross-appeal above referred to.

203. Collins and Pilkington JJ. concur with this judgment.