APPROVED **[2023] IEHC 257**

THE HIGH COURT

Record No.: 2023/1905P

Between:

KIERAN DOWDALL and DONAL SPRING

Plaintiffs

-AND-

RONAN O'CAOIMH, LOWICK DEVELOPMENTS LIMITED and MOUNT COLLINS HOMES LIMITED

Defendants

JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 19th day of May 2023

Introduction

1. In this application the Plaintiffs seek interlocutory Orders restraining the Defendants from trespassing on lands within the Plaintiffs' ownership, and Orders requiring the Defendants to restore the Plaintiffs' lands to their former condition, *i.e.* the condition that the lands were in prior to the Defendants carrying out works on those lands in April of this year.

2. The Plaintiffs are owners of land registered in Folio 21744F County Wicklow. The lands comprise a roadway with an area populated by trees to the side of the roadway. They claim that the Defendants, their servants or agents, entered on to the lands on 24 April 2023 without any permission to do so and carried out works, including the removal of vegetation and the laying of a sewer pipe which remains *in situ*. They say that this is an ongoing trespass and that they are entitled to an injunction to restrain that trespass.

3. The Defendants accept that the Plaintiffs are the registered owner of the lands but claim that the lands are a public road which has been taken in charge by the local authority, Wicklow County Council ("**the Council**"), and that accordingly Irish Water is empowered by section 41 of the Water Services Act 2007 (**"the 2007 Act**") to lay pipes under the road for the purpose of providing water services. They say that the works they carried out were for Irish Water, the works are required to connect the Defendants' development, which is nearing completion, to public water infrastructure, and that the consent of the Council to carry out works under the public road had been obtained. They say that in those circumstances the consent of the Plaintiffs was not required and argue, therefore, that there has been no trespass.

Background

4. The Plaintiffs have been registered owners of Folio 21744F since 6 June 2000. The Folio is subject to four burdens being rights of way afforded to neighbouring landowners.

5. The Defendants are together the developers of the site adjacent to the lands owned by the Plaintiffs comprised in Folio 21744F. Those lands are comprised in Folio 30383F County Wicklow. The first Defendant is the registered owner of that Folio.

6. The second Plaintiff avers that he met with the first Defendant on at least four occasions between February 2015 and November 2016 to discuss whether the Plaintiffs would be willing to facilitate access to the Defendants' proposed development through the Plaintiffs' lands. Initially, the proposed access included vehicular access but latterly the discussions regarded access across the Plaintiffs' lands for services only. The second Plaintiffs confirmed that they were willing to negotiate, and all the meetings were cordial. Ultimately, however, no agreement was reached.

7. In July 2020, the first Defendant applied to the Council for planning permission to develop the lands in Folio 30383F. The proposed development consists of 99 two and three storey dwellings. On 25 August 2020, the Council exercised its powers under Article 33 of the Planning and Development Regulations 2001, as amended, and wrote to the first Defendant requesting further information. The Council's letter included the following request:

12. In relation to foul water drainage you are requested to submit justification for your current proposals which include the need for a pumping chamber and rising main and to demonstrated that the pumping of effluent as proposed is the optimal solution for this development in terms of practicality and sustainability

In relation to the above it should be noted that it would appear that a gravity sewer connection would be feasible from manhole F14 within the development to manhole F43 on Chapel Rd. in this regard it should be noted that the open space and road immediately adjacent to the South of the proposed development site are currently going through the taking in charge process by the Planning Authority and so will be under the control of the Road Authority by the time the development is underway and prior to any occupation. A simple recalculation of internal invert levels is all that will be required to redirect the wastewater in this direction. Individual packet pumping stations for single housing developments is not in keeping with the principles of sustainability.

Where is it shown that a gravity sewer connection is not feasible and that the pumping of effluent is the optimum solution for this development you are requested to:

a) Demonstrate that the required infrastructure (pumping chamber/ rising main etc) has been designed and located appropriately so that it would cater for the catchment area and not just the proposed development - in order to ensure that the number of pumping station and rising mains in the area are kept to a minimum.

b) Submit confirmation in writing from Irish water that they will be willing to take the required infrastructure (pumping chamber / rising main etc) in charge.

8. Agents for the first Defendant, BBA Architecture ("**BBA**"), responded to this request by letter dated 26 February 2021. The response, in relevant part, was as follows:

BBA Response: please refer to BBA Drawings C2 and C2-1 for the revised file and surface water drainage layouts. since the request for Further Information was issued, the residential access road to the South of the proposed development was taken in charge by the Local Authority.

The revised drainage layout shows a gravity sewer leaving the site at the southern boundary and flowing in an easterly direction along Deerfield Road and entering into the existing public infrastructure on Chapel Road at the Junction of Chapel Road and the Nurseries.

It is no longer proposed to pump any foul drainage. All sewers will fall by gravity.

The proposed works will include a failed water crossing under the existing culvert in Deerfield Road to the South of the development. Refer to BBA

> drawing C9 for the proposed section detail through the proposed foul drain crossing under the existing culvert. The exact methodology for the crossing works is to be agreed with the Local Area Engineer prior to commencement of works on site.

9. It is not in dispute that the road to the south of the planning application site referenced in these documents is the road on the Plaintiffs' lands comprised in Folio 21744F. As set out below, the Plaintiffs contend that they do not recognise the description of the road as Deerfield Road, or the description of the neighbouring houses as the Deerfield estate.

10. Planning permission was granted for the proposed development by the Council on 7 May 2021 ("**the permission**"). The permission provided, at Condition 1, that it relates to the development as described in the documents lodged *"as revised by the plans and particulars submitted on the 02/03/2021 and 10/03/2021, save as the conditions hereunder require"*. It appears that the reference to plans submitted on those dates refers to the letter from BBA dated 26 February 2021, which was two working days before the 2 March date. In any event, the Defendants contend that the permission requires that the development be serviced by the gravity sewer traversing the Plaintiffs' lands and this is not disputed by the Plaintiffs.

11. In May 2021, the first Plaintiff contacted the second Plaintiff to let him know that the first Defendant had been granted planning permission which, as the second Plaintiff puts it in his affidavit "*was predicated upon the first named defendant traversing the plaintiffs' property and accessing the services constructed by the plaintiffs*." Insofar as the first Plaintiff avers that the permission was predicated on traversing the Plaintiffs' property, this appears to be correct. However, there does not appear to be any proposal to connect to services constructed by the Plaintiffs. There is no suggestion of such connection in the Preliminary Report of Mr Peter Johnston, Chartered Engineer of David L. Semple & Associates, prepared on behalf of the Plaintiffs.

12. The second Plaintiff avers that he was surprised that the first Defendant had sought planning permission in the absence of such an agreement and that he contacted the first Defendant by telephone. He was told by the first Defendant that the Council had taken the roadway in charge. He avers that he told the first Defendant that he was not aware

of that and that, in any case, this did not entitle the first Defendant to trespass on his lands. In his second affidavit, he states that he advised the first Defendant that if he proceeded as *per* the permission, it would be a trespass and could ground an action by the Plaintiffs.

13. Neither Plaintiff appears to have taken any further steps regarding this issue prior to the events leading to this application. In particular, they did not seek to challenge the permission granted (whether by appeal or otherwise) and did not investigate the first Defendant's assertion that the road had been taken in charge, still less seek to challenge any decision to take the road in charge.

14. Construction of the development commenced in March 2022 and, as appears from the Defendants' affidavits, is now at a very advanced stage. The Defendants state that the first phase of the development consists of 42 houses, and 30 contracts for sale have issued. Of those 30, 10 units are due to complete by the end of the month and the remaining units are due to be completed by the end of July.

15. It is not disputed that contractors engaged by the Defendants entered on to the Plaintiffs' lands on 24 April 2023 and carried out works including the temporary diversion of a stream, the clearance of vegetation and the installation of a wastewater pipe or sewer leading from a manhole on the Defendants' lands, under the stream and on to the Plaintiffs' lands. That pipe remains *in situ*.

16. The Plaintiffs' solicitor, by letter dated 25 April 2023 called on the Defendants' to remove themselves, their machinery and material from the lands failing which an injunction would be sought. Although the first Plaintiff avers that there was no reply to this letter, he also avers that Mr Ben Curtin, of the third Defendant, sent an email to the Plaintiffs' solicitor at 10.02 am on 26 April 2023 stating that he had removed his workers and material from the site.

17. The Plaintiffs' inspected the site that day, noted that the workers and material had been removed from the site, but that fencing remained *in situ*. The Plaintiffs' solicitors wrote that day, seeking an undertaking that none of the Defendants would enter on to the Plaintiffs' property without the Plaintiffs' consent, proposals for the immediate reinstatement of the property, including the removal of the pipe, and proposals in

respect of damages payable to the Plaintiffs. The letter noted the Plaintiffs' agreement to leave the fencing in place as an interim measure, for safety reasons.

18. Solicitors for the second Defendant replied by letter dated 26 April to say that they would take their clients instructions and "revert shortly".

19. On 28 April 2023, the Plaintiffs were granted short service of a motion seeking the interlocutory reliefs referred to at paragraph 1 above, returnable to 4 May 2023. In this regard, it is noteworthy that the Plaintiffs, at paragraph 1 of their Notice of Motion, seek an injunction restraining the Defendants "*together with any other persons having notice of the Order of this Honourable Court*" from trespassing on the lands, the significance of which I address below.

20. Further affidavits were exchanged. In their affidavits, the Defendants explain their position which is that the lands on which they have carried out the works have been declared to be a public road which has been taken in charge by the Council. They say that Irish Water, or persons acting on its behalf, is therefore entitled to lay pipes under the road notwithstanding that the road remains within the ownership of the Plaintiffs, by virtue of section 41 of the 2007 Act and that the Plaintiffs consent to such works was not required.

21. The Defendants explain that the works they carried out were carried out at the request of Coffey Northumbrian Limited (**"Coffey**"), contractors appointed by Irish Water and that Coffey had the necessary consent from the Council, as roads authority to carry out these works. They therefore deny any trespass. They say that the Defendants have completed the works they were requested to carry out and that Coffey will complete any further works required. This will involve laying a pipe from the point at which the Defendants have left a connection and running it along the road in question to connect to the main wastewater line on Chapel Road. The Defendants say that the Coffey works will be on the lands which, on the Defendants' case, are in charge of the Council.

22. As noted above, the Defendants rely on the fact that the roadway in question is now a public road, having been taken in charge by the Council. Before considering the arguments of the parties regarding the injunction application, it is necessary to consider

the statutory procedures regarding 'taking in charge' and the declaration of public roads and the evidence available in respect of this particular roadway.

Taking in Charge / Declaration of a Public Road

23. Section 180(1) of the Planning and Development Act 2000, as amended ("**the 2000 Act**") provides for the following procedure where a development of 2 or more houses has been completed to the satisfaction of the relevant planning authority:

> (1) Subject to *subsection (7)*, where a development for which permission granted under *section 34* or under Part IV of the Act of 1963 includes the construction of 2 or more houses and the provision of new roads, open spaces, car parks, sewers, water mains or service connections (within the meaning of the Water Services Act 2007), and the development has been completed to the satisfaction of the planning authority in accordance with the permission and any conditions to which the permission is subject, the authority shall, where requested by the person carrying out the development, or, subject to *subsection (3)*, by the majority of the owners of the houses involved, not later than 6 months after being so requested, initiate the procedures under section 11 of the Roads Act, 1993.
>
> ….
>
> (4) (*a*) Where an order is made under section 11(1) of the Roads Act 1993 in compliance with *subsection (1)* or *(2)*, the planning authority shall, in addition to the provisions of that section, take in charge—
>
> > (i) (subject to *paragraph (c)*), any sewers, watermains or service connections within the attendant grounds of the development, and
> >
> > (ii) public open spaces or public car parks within the attendant grounds of the development.
>
> (5) Where a planning authority acts in compliance with this section, references in section 11 of the Roads Act, 1993, to a road authority shall be deemed to include references to a planning authority.

24. Section 180 also includes a third mechanism by which section 11 can be invoked where an estate has *not* been completed to the satisfaction of a planning authority.

25. The term 'take in charge' in sub-section (4) is not defined in the Act. In one text, Peter Bland, ***Highways*** (Round Hall, 2020), the author explains (at p. 230) that "*the term 'to take in charge' has long enjoyed a non-statutory meaning of adopting a public right of*

way as a public road" and that meaning has been extended by section 180 to include what he describes as "*the juristic novelties*" of the 'public open space' and the 'public car park'.

26. Section 11 of the Roads Act 1993, as amended ("**the 1993 Act**") sets out a procedure by which a roads authority may declare a road to be a public road. It provides, *inter alia*:

> (1) (*a*) A road authority may, by order, declare any road over which a public right of way exists to be a public road, and every such road shall be deemed to be a public road and responsibility for its maintenance shall lie on the road authority.
>
> (*b*) Where a road authority proposes to declare a road to be a public road it shall—
>
> (i) satisfy itself that the road is of general public utility,
>
> (ii) consider the financial implications for the authority of the proposed declaration,
>
> (iii) publish in one or more newspapers circulating in the area where the road which it is proposed to declare to be a public road is located a notice indicating the times at which, the period (which shall be not less than one month) during which and the place where a map showing such road may be inspected and stating that objections or representations may be made in writing to the road authority in relation to such declaration before a specified date (which shall be not less than two weeks after the end of the period for inspection),
>
> (iv) consider any objections or representations made to it under *paragraph (iii)* and not withdrawn.

27. Section 11(5) provides:

> (5) A certificate of a road authority that a road is a public road shall be *prima facie* evidence thereof.

28. The two Acts must be read together to understand what is involved. Where a development consists of the construction of two or more houses, and the development

has been completed to the satisfaction of the planning authority, then the planning authority can be required to initiate the procedure in section 11 of the 1993 Act to declare any new road in the development to be a public road. The planning authority is required to initiate the procedure if so requested by the person carrying out the development, or by a majority of the owners of the houses involved. By allowing for these alternative means of triggering the procedure, the Oireachtas has ensured that neither the developer nor the majority of owners can stymie the other in seeking to have 'estate' roads declared to be public roads.

29. The procedure under section 11 requires, *inter alia*, that notice be published in a newspaper circulating in the area of the proposal to declare the road a public road and advising that objections or representations can be made on the proposal within a specified timeframe.

30. Section 11(2) of the 1993 Act provides that the consideration of any representations and the making of an order declaring a road to be a public road are reserved functions, *i.e.* it is a decision which must be made by the elected members.

31. Once a road is declared a public road pursuant to section 11 of the 1993 Act in accordance with section 180(1) of the 2000 Act, then the planning authority must take in charge any public open space or public car parks within the attendant grounds of the development in question.

32. As explained in ***Highways*** at p. 233:

> *"[..] the elected members must first declare the roads of the estate to be public roads under s.11(1) and the "taking in charge" of the land and infrastructure referred to in section 180(4) is conditional on that order being made. The taking in charge of the land and infrastructure under section 180(4) is mandatory following the section 11(1) order in the circumstances of section 180(1) and (2)."*

33. Insofar as the road itself may be described as having been 'taken in charge' this seems to reflect its original non-statutory meaning, *i.e.* that it has been declared to be a public road.

34. The significance, for present purposes, of whether the roadway in question is a public road lies in the provisions of section 41 of the 2007 Act which provides:

> (2) A water services authority, or other person acting jointly with it or on its behalf, may, for the purpose of providing or assisting in the provision of water services, carry pipes through, across, over, under or along any public road, or place intended for a public road, or under or over any cellar or vault which may be under the pavement or carriageway of any public road, or from time to time repair, alter, remove or replace the same, subject to the consent of the relevant road authority where the water services authority is not the road authority for that road or place intended for a road.

35. The Water Services (No. 2) Act 2013 transferred the functions of water services authorities to Irish Water.

36. Accordingly, Irish Water, or any person acting on its behalf, may for the purpose of providing water services, carry pipes under any public road, subject to obtaining the consent of the relevant road authority. Whether it is subject to obtaining *only* that consent, or whether the consent of the owners of the public road is also required is in dispute between the parties.

37. The Defendants contend that the road in question is now a public road and has been taken in charge by the Council. In this regard, they point to correspondence from the Council clearly stating that the road (which for these purposes includes the attendant lands) has been taken in charge and to correspondence stating that it is a public road.

38. The Plaintiffs say that they were never made aware of any proposal to take the road in charge or declare it a public road and that insofar as the Council purport to have done so, the statutory procedures have not been complied with and therefore any such declaration is ineffective. The Plaintiffs have elected not to join either the Council or Irish Water to these proceedings and therefore the question of whether the road is a public road must be considered by reference to the materials exhibited by the parties.

39. In this regard, I note that, in his second affidavit, the second Plaintiff avers that he has *"endeavoured to obtain the documentation available relating to this issue but the relevant files are not available."* There is no further detail of what steps were taken in this regard.

40. In the context of his averment that he has never known the lands in question to be referred to as "Deerfield" the second Plaintiff refers to online research and then exhibits three documents which he says are the only references to "Deerfield" external to the proceedings which he has come across. He does not specify where he came across the documents.

41. The first of them, however, is a petition by the owners of houses in Deerfield, Delgany to have that estate taken in charge. Seven separate properties appear to be identified on the petition, which has eight signatories. The petition is stamped, with a Wicklow County Council date stamp, 21 January 2019.

42. Chronologically, the next relevant document available is the request for further information referred to above. It will be recalled that that request from the Council dated 25 August 2020 refers to the fact that the "*open space and road immediately adjacent to the south of the proposed development are currently going through the taking in charge process by the Planning Authority and will be under the control of the Road Authority by the time the development is underway*".

43. If correct, this would be consistent with the Council having initiated the procedure pursuant to section 11 of the 1993 Act on foot of the petition, in accordance with the provisions of section 180 of the 2000 Act.

44. The next relevant document in time, also exhibited by the second Plaintiff in his second affidavit, is the minute of an ordinary meeting of the Council held on 11 December 2020. The minute records that the Council "agreed to take in charge housing estate Deerfield, Delgany, Co. Wicklow."

45. Shortly thereafter, on 16 December 2020, Mr Ruairi O'Hanlon, an engineer with the Council sent the Defendants' consultants, BBA, an email stating "Public road since 11/12/20" with a map attached. The map is dated August 2020 and entitled 'Taking in Charge Roads and Open Spaces Site Layout Plan'. The legend refers to 'Estate boundary shown', 'Roads / pavement shown', and 'Public Open Space shown'. The estate boundary appears to contain the entirety of the lands comprised in Folio 21744F, all of which is highlighted in yellow as 'Roads / pavement shown'. No area is shown as 'Public Open Space'. As recorded above, in BBA's response to the Council's request

for further information, dated 26 February 2021, it was stated that since the request in August 2020, the roadway had been taken in charge by the Council. This assertion seems likely to have been informed by the email of 16 December 2020 from the Council to this effect.

46. At the hearing of the injunction application, I queried whether this email represented evidence of something having gone wrong with the process if the decision of the Council recorded in the minute simply reflected the initiation of the section 11 procedure and section 180 procedures. If that were so, how could the road have been a public road since the date of the Council meeting? On reflection, however, I do not believe that the email suggests any error. The declaration of a public road is a reserved function, but the decision to initiate the process is not. Accordingly, *per* section 149 of the Local Government Act 2001, as amended, it is an executive function. Insofar, therefore, as the minute records a decision by the elected members, it seems to reflect a decision *at the end* of the process, *i.e.* the agreement to take in charge the Deerfield estate seems to reflect the exercise of the reserved function in section 11. There was no requirement for the elected members to have made any decision to start the process.

47. Permission was granted in May 2021 and, as explained by the second Plaintiff in his affidavit, the first Defendant advised him in May 2021 that the road had been taken in charge.

48. Thereafter, there are a number of items of correspondence from the Council stating that the road was a public road or had been taken in charge. These include letters of 22 August 2022, 4 May 2023 and 8 May 2023, all to solicitors for the Defendants. The letter of 22 August 2022 appears to be a response to a request for confirmation of the legal status of the road and states that the roads highlighted black on the map attached to that letter are "in the charge of" the Council. The map seems to include the roadway the subject of these proceedings. Both the 4 May and 8 May letters append the same map as attached to the 16 December 2020 email. The 4 May letter states that the roads marked in yellow are "in the charge of" the Council. The 8 May letter states that the road marked in yellow is a public road and known as L-01283-0.

49. The final document of relevance is a Roadworks Licence, commonly called a road opening licence, granted on 21 April 2023 to Irish Water by the Council. The requirement for such a licence is contained in section 254 of the 2000 Act:

> (1) Subject to *subsection (2)*, a person shall not erect, construct, place or maintain—
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> (*a*) a vending machine,
>
> (*b*) a town or landscape map for indicating directions or places,
>
> (*c*) a hoarding, fence or scaffold,
>
> (*d*) an advertisement structure,
>
> **(*e*) a cable, wire or pipeline,**
>
> (*ee*) overground electronic communications infrastructure and any associated physical infrastructure,
>
> (*f*) a telephone kiosk or pedestal, or
>
> (*g*) any other appliance, apparatus or structure, which may be prescribed as requiring a licence under this section,
>
> on, under, over or along a public road save in accordance with a licence granted by a planning authority under this section.
>
> *emphasis added

50. The licence references section 41 of the 2007 Act and authorises Irish Water to carry out works at "*Lands to rear of Melwood, and Drumbure, Chapel Road, Wicklow*". In this regard, it is noted that the address of the lands on which the Defendants' development is located is Chapel Road.

51. The licence is valid from 21 April 2023 to 13 September 2023. The purpose of the works is described as "*Water: New Service Connection – Conventional Methods | Foul Sewer: New Service Connection – Conventional Methods*." It is issued to Irish Water and the contact name is given as Coffey Northumbrian Limited.

Arguments

52. Unsurprisingly, there was no dispute between the parties as to the relevant principles to apply. In order to obtain an interlocutory injunction, the Plaintiffs must show –

i. That there is a serious issue to be tried;
ii. That damages are not an adequate remedy;
iii. That the balance of convenience or balance of justice lies in favour of granting the injunction.

53. In addition, insofar as the Plaintiffs seek a mandatory injunction regarding the removal of the pipe and the reinstatement of their lands, the Plaintiffs must establish a strong case, likely to succeed (see **Maha Lingam v HSE [2005] IESC 89, (2006) 17 ELR 137**).

54. As made clear in the more recent cases, the question of the adequacy of damages should be addressed as part of the assessment of the balance of convenience. In **Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited [2019] IESC 65, [2020] 2 IR 1**, the Supreme Court set out a series of steps which might be of assistance in deciding whether an injunction should be granted:

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
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> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the* American Cyanimid *and* Campus Oil *approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*
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> *(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;*

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

55. The Plaintiffs' argument is straightforward: they contend that they are the owners of the lands, that the Defendants had no consent to enter their lands and that there is no consent for the sewer pipe which is on their lands.

56. They argue that there is no proof that the road is a public road or that it has been taken in charge and state that they were never notified of any proposal in that respect and any such purported declaration or taking in charge is clearly, therefore, defective. In any event, they say, that the works on their lands were not carried out by Irish Water but by the Defendants who are not entitled to rely on the powers in section 41 of the 2007 Act. They further contend that even if the lands have been taken in charge and section 41 can be relied on, that section does not permit Irish Water to carry out works on a public road without the owners' consent. They submit, therefore, that they have established at least an arguable case.

57. Insofar as the Plaintiffs seek an injunction requiring the removal of the pipe which remains on their lands, they say that that they have also met the threshold for the grant

of a mandatory injunction, a strong case likely to succeed at trial. They argue that the Court, in considering the grant of a mandatory injunction should have regard to the fact that the Plaintiffs are only seeking mandatory relief because the Defendants have already committed a trespass and that the Defendants should not be permitted to benefit from this unlawful conduct. They express concern that if the sewer pipe is left in place, it will be used by Irish Water to connect to the services in the Defendants' development, as envisaged in the Defendants' development, thus further prejudicing the Plaintiffs' position. They say that the balance of convenience, therefore, lies in favour of the grant of the injunction.

58. The Plaintiffs argue that the Defendants' reliance on the fact that any injunction may delay the completion and sale of much needed housing stock is misplaced. Firstly, insofar as any urgency has been created in this regard, this urgency has been created entirely by the Defendants' actions in organising the works as they have, *i.e.* constructing the services for the housing development after the houses near completion, and by not taking steps to determine the entitlement to carry out the works prior to starting those works.

59. In addition, they contend that damages are not an adequate remedy to compensate for a trespass. They rely in this regard on the principles regarding the exercise of a Court's discretion when asked to restrain a trespass stated in **Patterson v Murphy [1978] ILRM 85**:

> "*The defendants have submitted that even if an infringement of the plaintiffs' rights has been established the Court has the discretion to award damages in lieu of an injunction and that it should do so in this case. I agree that relief by way of injunction is a discretionary remedy. There are, however, well established principles on which the Court exercises this discretion. The relevant ones for the purposes of this case can be summarised as follows:-*
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> 1. *When an infringement of the plaintiffs' right and a threatened further infringement to a material extent has been established the plaintiff is prima facie entitled to an Injunction. There may be circumstances however, depriving the plaintiff of this prima facie right but generally speaking the plaintiff will only be deprived of an Injunction in very exceptional circumstances*
>
> 2. *If the injury to the plaintiffs' rights is small, and is one capable of being estimated in money, and is one which can be adequately*

compensated by a small money payment, and if one which can be adequately compensated by a small money payment, and if the case is one in which it would be oppressive to the defendant to grant an Injunction, then these are circumstances in which damages in lieu of an Injunction may be granted.

3. *The conduct of the plaintiff may be such as to disentitle him to an Injunction. The conduct of the defendant may be such as to disentitle him from seeking the substitution of damages for an Injunction.*

4. *The mere fact that a wrong-doer is able and willing to pay for the injury he has inflicted is not a ground for substituting damages. (See: Shelfer v. City of London Electric Company 1895 1 Ch.322; and Kerr on Injunctions 6th Edition, 656, 657).*"

60. The Defendants contend that the Plaintiffs have not made out even an arguable case. They say that the works were carried out in accordance with section 41 and the consent of the Plaintiffs to the works is not required where that section is operative.

61. In any event, they say that damages are an adequate remedy. They accept that typically the remedy for trespass is an injunction but argue that there are circumstances where it is appropriate to award damages in lieu of an injunction. They refer to **McKeever v Hay [2008] IEHC 145**, a case which also involved the laying of pipe, albeit not pursuant to any purported statutory authority, for the purpose of a group water scheme. The Court (Feeney J) described the jurisdiction to withhold an injunction as arising in "*very exceptional circumstances"* (at para. 50), and having referred to **Patterson v Murphy**, stated (at para. 52):

> *"If a Court comes to the conclusion that the plaintiffs' property will remain substantially as useful to the plaintiff as before the act complained of, and does not take the property away from him and the injury can be compensated by money, then an injunction need not necessarily be granted. The Court may still grant an injunction if the facts are such as to indicate that the Court should exercise its discretion to do so. This is a case in which the injury to the plaintiff's rights is small and it is one capable of being estimated in money and is one which can be adequately compensated by the payment of a relatively small amount of money. It is also the case that if the injunction sought was granted, that such injunction would be oppressive to the defendants and would cause them real and substantial damage."*

62. The evidence in **McKeever** was that the lands in question were subject to a compulsory purchase process which would, in effect, render lawful that which was at that point unlawful. The Court found that although the harm to the Plaintiff was small, in the circumstances where the trespass was deliberate and continuing, it was appropriate to grant the injunction. However, the injunction would only come into effect if the compulsory purchase process was not completed.

63. The Defendants note that both **Patterson** and **McKeever** involved final determinations where the trespass was admitted or proved and contend that where, at an interlocutory stage, a defendant asserts a right to do what would otherwise be a trespass – as the Defendants do here – then the ordinary principles applicable to an application for an injunction should apply (see **Keating & Co. Ltd v Jervis Shopping Centre Ltd [1997] 1 IR 512**).

64. The Defendants say that this is one of the exceptional cases where damages would be an adequate remedy even if trespass was established as the damage is slight and any trespass proved would not have been deliberate; the Defendants say that they have acted in good faith on the basis of the Council's statements that the road is a public road.

65. Finally, the Defendants say that the balance of convenience is against the granting of the injunction and there is a greater risk of injustice in the injunction being granted than if it is refused. In this regard, they rely on their expenditure of almost €11 million to date and the potential adverse impact on the buyers of the houses which are nearing completion. Against that, they say, any potential injustice the Plaintiffs may suffer is minimal, being caused to suffer the unobtrusive presence of pipes on their lands. They say that even if there is an infirmity in the 'taking in charge' process, this is likely to be rectified. Moreover, if the Plaintiffs wish to try and restrain Irish Water or Coffey from carrying out further works, that option is open to them.

Discussion

66. In circumstances where the Plaintiffs seek both prohibitory and mandatory injunctions, it is necessary to consider whether they have satisfied the lower threshold of arguability required for a prohibitory injunction, as well as considering whether they have

established a strong case likely to succeed at trial. It is helpful to consider those two questions together. For the reasons explained below, I am satisfied that the Plaintiffs have made out an arguable case but not one which, on the basis of the evidence presented, could be described as a strong case likely to succeed.

i. Is there an arguable case / strong case likely to succeed?

67. The Plaintiffs are the registered owners of the lands in Folio 21744F. The Defendants entered on to those lands and carried out works without the Plaintiffs consent. This is *prima facie* a trespass. The Defendants rely on section 41 of the 2007 Act as providing statutory authorisation for their actions and thus a full defence to the claim of trespass.

68. The Plaintiffs refute this reliance on three bases. First, they say that section 41 only authorises Irish Water to carry out works, and cannot be relied on by the Defendants. Second, they say that, in any event, section 41 does not dispense with the requirement to obtain the consent of the owner of a public road. And thirdly, they say that the conditions for the exercise of the statutory power under section 41 do not exist. In other words, the lands in question are not a public road and/or have not been taken in charge. If the Plaintiffs prove correct in any of these assertions, the Defendants defence to the claim of trespass falls away. I propose to consider each in turn.

a. Can the Defendants rely on the powers in section 41?

69. In my view, the Plaintiffs have not made out an arguable case that the section 41 powers can only be exercised by Irish Water itself. Such a contention is in the teeth of the terms of the statute which expressly provides that Irish Water *"or other person acting .... on its behalf"* may exercise the powers provided for in that section. It is clear, therefore, that insofar as the Defendants were acting on behalf of Irish Water, then section 41 was capable of applying to their actions. There are no formal requirements in the Act for the purpose of establishing that a person is acting on behalf of Irish Water.

70. The uncontradicted evidence is that the works in question are works for which Irish Water has applied for a road opening licence and that Coffey is its agent. The further uncontradicted evidence is that the Defendants were requested by Coffey to carry out

the works at issue in these proceedings, which are part of the works for which the road opening licence was granted to facilitate.

71. It may, of course, emerge at hearing that the works have gone outside those requested by Coffey or contemplated in the road opening licence or indeed, that they are not the works contemplated in the road opening licence at all: there is no map appended to the exhibited licence. However, the Plaintiffs have not at this stage identified any basis for doubting the Defendants' averments regarding the scope of works and the fact that they were requested by Coffey to carry them out. Moreover, the Plaintiffs accept that the works carried out are the works contemplated by the permission.

72. In the circumstances, the Plaintiffs have not at this stage made out an arguable case that the Defendants have trespassed because section 41 could not apply to any actions taken by it.

b. Is the exercise of the power under section 41 subject to the landowners' consent?

73. Although this is a question of law which, in principle, is capable of being finally determined even in an interlocutory application, I am reluctant to do so in circumstances where Irish Water, who clearly has an interest in the determination of that issue, is not a party to these proceedings and has not been heard on the question. Of course, it is not a party because the Plaintiffs have chosen not to join them.

74. Section 41 confers on a water services authority, now Irish Water, the power to lay pipes for the purposes of providing or assisting in the provision of water services along or under a public road, subject to the consent of the road authority. There are three features of note.

75. Firstly, the work involved in laying the pipes is clearly within the general functions of Irish Water set out in section 32 of the 2007 Act, *i.e.* the *vires* to carry out the works is separately provided for in the Act and therefore that was no necessity to provide that *vires* again in section 41. It must be assumed that the Oireachtas intended that section 41 would have some additional purpose.

76. Secondly, the Act expressly provides that the consent of the road authority is required for the work but no reference is made to requiring the consent of the landowner.

77. And thirdly, the section does contemplate that ownership of the public road may be in the hands of persons other than the road authority.

> "*(11) For the purposes of this Act, where a person (other than a road authority) claims an interest in or under any road—*
>
> *(a) it shall be for the person concerned to prove such interest, and*
>
> *(b) the value of such interest shall be taken to be nil unless it is shown to be otherwise by the person.*"

78. Having regard to the provisions of the 2000 Act, sections 180 and 254, section 11 of the Roads Act 1993, and section 41 of the 2007 Act, in the circumstances, and strictly provisionally pending the full hearing of the action, it seems to me that the statutory scheme permits the responsibility for a road which is on privately owned lands to be transferred to the road authority by having it declared a public road. Thereafter it becomes the road authority who is responsible for maintaining the road, but also for determining who may carry out works to that road. There is, in my view, not a strong case likely to succeed that section 41 requires the consent of the owner of the public road – where that owner is not the road authority – as a pre-condition to the exercise of the statutory power. Such an interpretation would appear to undermine the purpose of section 41.

79. That said, section 41 is silent on the requirement for landowner consent, rather than expressly dispensing with such requirement. And there may be some complexity in a scheme which allows for a statutory undertaker to enter lands without seeking consent notwithstanding the presumption in section 41(11) that the presumption is that the value of lands is nil (see, for instance, **ESB v Gormley [1985] IR 129**).

80. However, in light of my conclusion on the next issue, it is not necessary to analyse whether the Plaintiffs have made out an arguable case on this point.

c. Have the Plaintiffs' lands been declared a public road / taken in charge?

81. The preponderance of evidence is that the lands in question have been declared to be a public road pursuant to section 11 and have been taken in charge pursuant to section 180(4). All of the evidence available makes clear that the Council considered that the lands were subject to such a process in 2020. By the end of 2020 and at all times thereafter, the Council's position has been clear, that this is a public road and has been taken in charge. The evidence includes evidence of the necessary step to commence the process. The Plaintiffs complain that they were never notified of any intention to declare the road as a public road, but that signifies nothing. There is no requirement under the 2000 Act or the 1993 Act that an affected landowner be notified. The only requirement is for a notice in a newspaper circulating in the area.

82. The Council issued a road opening licence which is only consistent with these lands being a public road and even after the commencement of these proceedings have confirmed in correspondence its view that road is a public road and has been taken in charge, although it is not clear whether the Council are aware of the proceedings.

83. What is missing, however, is unequivocal evidence that the necessary Order declaring these lands to be a public road has been made. Section 11(2) provides that an "order" under sub-section 1 shall be a reserved function. Section 11(5) provides that a certificate that a road is a public road shall be *prima facie* evidence thereof. If there were evidence of the elected members having made an order declaring the road to be a public road, or if there were a certificate to the effect that it was a public road, then those would, in my view, be presumptively valid decisions which this Court would be required to treat as valid unless and until they were successfully challenged in judicial review proceedings. That would be so even if it could be shown that there was or might be some infirmity in the decision-making process. No such challenge has been brought.

84. However, the only evidence of the elected members' decision is a minute of a meeting in which it is recorded that the members agreed that the housing estate Deerfield, Delgany, Co. Wicklow be taken in charge. In the absence of evidence of the making of a formal order by the elected members that the particular lands the subject of these proceedings had been declared a public road, it seems to me that there is room for argument that the lands have not been declared a public road at all. In this respect, I think a distinction must be drawn between the possibility of an infirmity in the decision-

making process and a failure to make a decision at all; if no decision was made declaring this a public road, then there is no decision which is presumptively valid.

85. The Defendants say that the letter of 8 May 2023 which states in unequivocal terms that the road is a public road is a certificate for the purpose of section 11(5). I am not persuaded that that is correct. Whatever a certificate is for the purpose of that section, it could not, it seems to me, be comprised in a letter from a Council official to a solicitor representing a particular individual or company.

86. In the circumstances, and on the basis of the evidence available to the Court, I think that there is sufficient room for doubt that the necessary Order was made under section 11(1) that the Plaintiffs have made out an arguable case that their lands have not been declared to be a public road or taken in charge. However, having regard in particular to the clear position of the Council, at least as evidenced in the documents before the Court, it could not be said that that is a strong case likely to succeed. The more comprehensive evidence likely to be available at trial may clarify the position.

87. In circumstances where the Plaintiffs have not made out a strong case likely to succeed, I am not satisfied that the Plaintiffs are entitled to an injunction requiring the removal of the pipe and the reinstatement of the lands at this interlocutory stage.

88. In determining whether the Plaintiffs are entitled to an Order restraining trespass by the Defendants or any person having notice of the Order, it is necessary to consider the adequacy of damages and the balance of convenience. In addition, lest I am wrong about the conclusion that the Plaintiffs have not made out a strong case, I will also consider the balance of convenience in respect of the Order seeking the removal of the sewer pipe.

ii. Adequacy of damages

89. As made clear in the authorities, damages are typically not an adequate remedy for trespass. However, it seems to me that there is some force in the Defendants' contention that this may be one of those exceptional cases contemplated in **McKeever** where

damages in lieu of an injunction for trespass could be appropriate if the Plaintiffs ultimately succeed in their action.

90. The potential interference with the Plaintiffs' property rights seems to be very slight. Some landscaping will be required to make good the lands, but the only ongoing trespass will be a subterranean pipe. It was not suggested that its presence would have any impact on the Plaintiffs, *e.g.* restrict their own enjoyment or use of the lands.

91. In **McKeever**, the Court granted an injunction, subject to a stay, notwithstanding the slightness of the injury, because the trespass had been deliberate and continuing. On the basis of the evidence at this interlocutory stage, it seems to me that the Defendants were entitled to rely on the assurances given by the Council that this was a public road for their *bona fide* belief that they were entitled to carry out these works. Put otherwise, even if their actions are found to be a trespass, I am not prepared to conclude at this stage that it was a deliberate trespass.

92. Moreover, the Plaintiffs fairly acknowledged that they have always been prepared, in effect, at the right price, to afford access over their lands. This strongly suggests that damages may prove to be an adequate remedy for the Plaintiffs.

93. Any damage to the Defendants may, therefore, be quantifiable. However, in view of the exceptionality of an Order granting damages in lieu of trespass, it could not, in my view, be said at an interlocutory stage that damages are a sufficient remedy to justify refusing relief on that ground alone. That is particularly so, in circumstances where recent case law makes clear, that the adequacy of damages is merely one factor, albeit an important factor to consider when considering the balance of convenience.

iii. Balance of Convenience / Interests of Justice

94. In my view, the balance of convenience or the interests of justice lie in favour of refusing all of the reliefs sought.

95. With respect to the application for a prohibitory injunction, there does not seem to be any basis for apprehending that the Defendants will enter on to the Plaintiffs' lands without their consent. The Defendants say that the work they were asked to do is

complete. The Plaintiffs do not dispute this. There may be an issue about landscaping once the Irish Water works have been completed, but there is nothing in the affidavits which suggests that an injunction is required to regulate that position. Injunctive reliefs are an equitable remedy and the equitable maxim that "*equity will not act in vain*" must be recalled: the Court will not grant an injunction to no purpose.

96. Nor can I see any basis upon which the balance of convenience would favour granting an injunction against any persons on notice thereof. Any such Order, whether this was intended by the Plaintiffs or not, would clearly have the effect of restraining Irish Water from carrying out the works which the evidence makes clear it proposes to carry out, but without giving Irish Water an opportunity to be heard. If the Plaintiffs believe they are entitled to restrain Irish Water, then the appropriate step is for them to be joined to these proceedings or for the Plaintiffs to issue separate proceedings against them.

97. In light of that conclusion, it follows that I propose refusing the Order for a prohibitory injunction in this case. As noted above, I will for completeness consider the question of the balance of convenience in respect of the mandatory injunction sought.

98. If the mandatory injunction is refused, the prejudice to the Plaintiffs of the sewer pipe remaining in place pending the determination of these proceedings is negligible. The only prejudice identified is that the Defendants will, on the Plaintiffs' case, be able to capitalise on their unlawful acts. That is a point not without merit, but in truth is an argument which could almost invariably be made when asking a court to consider the consequences of wrongly withholding interlocutory relief.

99. Moreover, the Defendants will only gain that benefit pending the hearing of the action, and only if the Plaintiffs elect not to seek to restrain any further works by parties other than the Defendants.

100. It is worth bearing in mind that the clear intention of the Council is that these lands be declared a public road. If the Plaintiffs are correct that this has not happened, or this process has not been completed, that does not rule out it happening at some future point. It will be recalled the value of the Plaintiffs' interest in the lands if declared to be a public road is, *per* section 41(11) of the 2007 Act, presumptively nil.

101. As noted above, the Plaintiffs were always prepared to negotiate in relation to access to the lands. Their attitude may have changed in light of what they consider to be the Defendants' unlawful conduct, but it could not be said that the presence of a sewer pipe on their lands pending the determination of the proceedings could be of any great inconvenience to them.

102. By contrast, the potential inconvenience to the Defendants could be very significant. It may be, as the Plaintiffs say, that in light of these proceedings, the houses being built will not be capable of being sold and the adverse consequences apprehended by the Defendants will not arise. I cannot be certain that that is so. In those circumstances, it seems to me that the potential to interfere with the completion and sales of almost completed homes, and the affect that that may have on third parties, overwhelmingly tips the balance of convenience, or the balance of justice against the grant of the injunction.

103. I am not persuaded that, as the Plaintiffs contend, this is a situation of the Defendants' own making, that they have expended money and progressed construction and the sale of houses in advance of completing services to, in effect, force the Court's hand. There is no evidence that the construction of the houses has been scheduled in any unusual way. And insofar as complaint is made that the Defendants have allowed things to progress so that the issues in these proceedings are only addressed at the eleventh hour, that cuts both ways. The Plaintiffs have known the Defendants' position that the road was a public road for two years. They have known that the permission required access for services over that road. And construction has been progressing since early 2022. The Plaintiffs have thus delayed in asserting their rights, which has enabled the rights and interests of third parties – the purchasers – to become engaged.

104. In all of those circumstances, the Plaintiffs cannot contend that the balance of convenience lies in their favour and for the reasons stated above, I refuse the reliefs sought.

Decision

105. The Plaintiffs have made out an arguable case that the Defendants trespassed on the Plaintiffs' lands when they entered on to them on 24 April 2023 and carried out works.

However, the uncontested evidence is that, save for the sewer pipe which remains on the lands, that trespass is at an end. In those circumstances, no purpose would be served by granting an injunction to restrain that historic trespass and so that aspect of this application is refused.

106. Insofar as the Plaintiffs' seek to bind third parties on notice of the making of an Order restraining trespass, such an Order has the potential to affect other parties – Irish Water and its agents – who could have been but were not joined to these proceedings. In those circumstances, the balance of justice is against the grant of an injunction in the terms sought.

107. Insofar as the Plaintiffs seek mandatory Orders requiring the removal of the sewer pipe and reinstatement of their lands, I am not satisfied that the Plaintiffs have made out the strong case likely to succeed necessary for the purpose of obtaining such relief. Even if am wrong about that, I consider that the balance of convenience strongly weighs against the grant of any injunction at this stage.

108. Accordingly, I refuse the Plaintiffs' application for the reliefs sought in their Notice of Motion.