Neutral Citation No: [2021] NICh 15	*Ref:*	**COL11463**
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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**06/08/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

COLM McATEER

Plaintiff;

and

JOHN KEELEY

First-named Defendant;

and

GERALDINE KEELEY

Second-named Defendant.

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Mr Michael Lavery (instructed by McKeowns Solicitors) for the plaintiff
Ms Laura King (instructed by Paul Campbell Solicitors) for the defendants

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COLTON J

Introduction

[1] The plaintiff seeks a declaration that he has the benefit of a right of way for all times and for all purposes along a laneway leading from the Windmill Road, Newry to his lands at No.3 Windmill Road. The plaintiff also seeks an injunction to restrain the defendants who reside at 5 Windmill Road from obstructing the right of way he claims by reason of their consistently parking cars along the laneway in question.

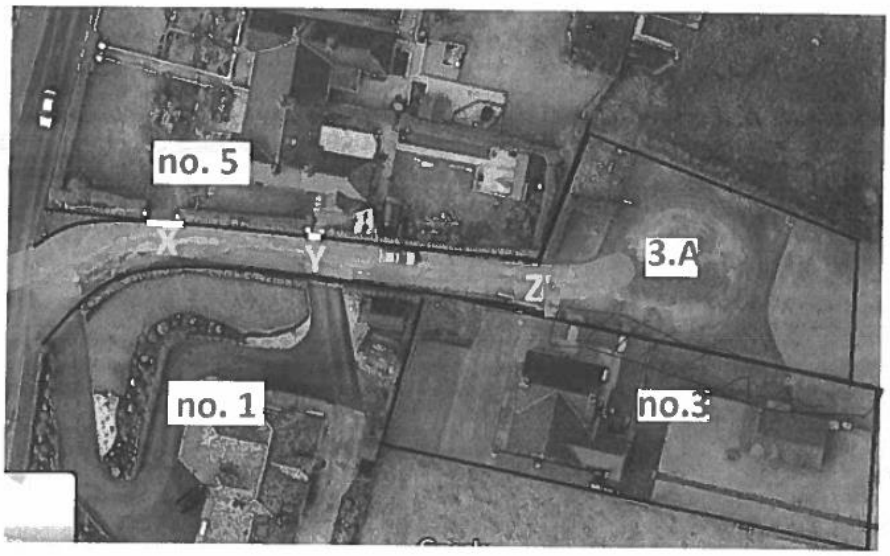
[2] The defendants reside at 5 Windmill Road. Although their property fronts the main Windmill Road the laneway in dispute runs alongside this property before reaching the plaintiff's property. The defendants have both vehicular and pedestrian access to their property from the laneway. One gateway leads to a driveway where two vehicles can be parked within their property. Another gateway further away from the Windmill Road and closer to the plaintiff's property provides pedestrian access to a back/side entrance to the house situated on the property. The

defendants and visitors are in the habit of parking their car on the laneway which the plaintiff says substantially interferes with the enjoyment of his right of way.

[3] The locus is best illustrated in the aerial photograph set out below:

FACTUAL BACKGROUND

6. The following outline map will be useful in referring to the different arguments in this case.



7. In relation to this diagram:

X	Entrance to number 5's driveway
Y	Number 5's pedestrian gateway
Z	Gateway where lane ends
Number 1	Property belonging to McAnuffs
Number 3	Property belonging to the Plaintiff
3.A.	Property transferred to the Plaintiff under 2018 deed
Number 5	Property belonging to the Defendants

[4] The house at No.3, along with 2 acres of land was purchased by the plaintiff's grandparents James and Catherine McAteer on 7 December 1953. They had been tenants of the property and surrounding lands since the end of the First World War.

[5] The plaintiff's parents inherited the house at No.3 in 1979. In 1980 the house was renovated and the McAteer family commenced living there. Gates were constructed at the entrance to No.3 and the plaintiff's father continued to farm the lands previously farmed by his grandparents.

[6] The plaintiff's mother died in 2013 and his father in 2015. Thereafter the house was put on the market for sale but for various reasons which have undoubtedly contributed to some of the acrimony in this dispute the sale was frustrated. Ultimately the plaintiff bought the property from his brother in April 2017.

[7] The plaintiff obtained ownership of a strip of land within 3.A in the photograph by way of a Deed of Transfer in 2018, which means he now owns all of the lands shown in the photographs at 3 and 3A.

[8] In 2020 the plaintiff obtained planning permission to build a replacement dwelling adjacent to the house at No.3. He appointed a builder who was due to commence works in the week commencing 30 November 2020.

[9] The plaintiff says that from 2017 onwards he has had issues with the defendants and visitors to the defendants' property arising from their habit of parking cars on the laneway and also driving up to his gate and using it as a turning point before exiting the laneway. Matters came to a head because of the plaintiff's requirement for access to his property by large vehicles and delivery lorries for the purposes of the building works. His case is that there has been an ongoing obstruction of his right of way by the defendants.

[10] He issued proceedings on 4 December 2020 and obtained an interim injunction on 11 December 2020 which in effect restrained the defendants from obstructing the laneway save for an entitlement to park at weekends and weekdays from 7.00pm to 7.00am and on certain identified days over the holiday period.

[11] The case was heard by the court on 21 January and 22 January 2021. The court received further written submissions from the parties after the conclusion of the evidence. The matter was listed for further submissions on Friday 26 March 2021.

The Plaintiff's Right of Way

[12] Originally the plaintiff pleaded his case for a right of way on the basis of legal title relying on the Deed of Transfer in August 2018 referred to at paragraph [7]

above. The Deed purported to grant the plaintiff a right of way for access to and egress from the strip of land he purchased within 3A for all purposes. The defendants contended that the plaintiff could not rely on this right of way inter alia because there was not a proper root of Title. At the hearing the plaintiff did not rely upon this deed, but rather argued that he enjoyed a right of way by way of prescription, user and/or necessity. After the evidence had been completed, in the course of his written submissions the plaintiff also sought to rely on the rule in **Wheeldon v Burrows** and section 6(1) of the Conveyancing Act 1881, which required further amendment to the pleadings and further submissions.

[13] The plaintiff accepts that the defendants have a right to use the laneway for vehicular and pedestrian access to their property. He disputes any entitlement they assert to park vehicles along the laneway which he says clearly constitutes a substantial interference with his right of way.

The Defendants' Case

[14] The defendants do not dispute that the plaintiff enjoys a pedestrian right of way to No.3 Windmill Road.

[15] Whilst the defendants do not oppose the plaintiff using the laneway by car to access No.3 they argue that the plaintiff does not have such an easement in law. In short they argue the plaintiff has no vehicular right of way.

[16] They further assert that they have an easement by prescription to drive up the laneway and park along the side of the laneway in single file. They argue that this does not conflict with any right of way obtained by the plaintiff, by prescription or otherwise. If it does conflict with any such right of way their easement ranks in priority to the plaintiff's right of way, being created first in time and the plaintiff having notice of such an easement.

Summary of the Evidence

[17] The plaintiff in his affidavit and oral evidence confirmed the general history set out in the introduction. He explained that in addition to the properties owned by the parties there was also another property adjacent to the laneway, namely 1 Windmill Road, which is occupied by John and Carmel McAnuff, who is a sister of the first defendant. That property was built in 1990 after they bought a plot of land from the plaintiff's father. In the relevant conveyance the plaintiff's father purported to grant a right of way to the McAnuffs along the laneway in dispute. Given that he did not own the laneway the granting of the right of way is clearly problematic. Nonetheless, it is indicative of his understanding in relation to the rights of way at that time. Thus, in the relevant deed of 20 April 1990 the plaintiff's father granted "a right of way by foot or vehicles for all purposes" to the McAnuffs for that part of the laneway giving access to their property. The McAnuffs now use the laneway for

access to the driveway to their property, although they also have access from the main Windmill Road.

[18] Relations between him and the McAnuffs are reasonably cordial and, in fact, he is currently residing in an Annex to their home.

[19] He gave evidence that the house in which his grandparents resided was originally built in the 1800s and served as a caretaker's house for Chandlers Quarry which at that time was situated to the east of the property.

[20] The plaintiff confirmed that from the time his grandparents occupied the lands the only means of access to No.3 was via the lane in dispute. Neither his grandparents or parents had a car but he recalls that his grandparents had a donkey and cart and later after 1953 a cattle truck. Later again horse boxes were used a couple of times a year on the laneway. The donkey and cart was used to move produce such as cheese, milk, eggs and butter. Items were stored in an outbuilding on the premises. Whilst his grandparents and parents may not have owned motor vehicles, visitors to the premises used cars and his siblings regularly drove vehicles to the property. He could recall cars being there as a child.

[21] He gave evidence to the effect that after the house was renovated in the 1980s when his parents lived there his father constructed gates at the entrance. Generally the gates were left open to accommodate visitors and, in particular, care workers who used to visit the house to look after his parents in their later years. He said that his father had raised the issue of the Keeleys parking a vehicle on the laneway on many occasions. After the gates were constructed he did consent to the Keeleys using the gateway for the purposes of turning.

[22] Much of the evidential dispute between the parties related to the extent of any easement which the defendants enjoyed to park vehicles on this laneway and the extent of any obstruction caused by so doing.

[23] I propose to deal with the latter issue first. It is clear from the dimensions of the laneway and from the evidence received by the court from the surveyors retained by the parties that there is room for two ordinary motor vehicles to pass on this laneway, albeit with care. Equally, it is clear that it is not possible for heavy vehicles such as lorries, plant hire, delivery vehicles, work vehicles, ambulances and fire engines to gain access to the plaintiff's property in the event that a vehicle is parked on the laneway.

[24] The plaintiff gave evidence about a history of ongoing disputes about the use of the defendants and family members of the laneway to park vehicles adjacent to No.5.

[25] A further point of conflict was the use by the defendants of the area at the gateway to the premises for the purposes of turning their cars and exiting the

laneway. The plaintiff gave evidence that as far back as April 2017 he confronted Geraldine Keeley about this and according to him she said that she would keep the lane clear in the future. Despite this his evidence was that the defendants, in particular one of their daughters, continued to use the gateway as a turning point. As a result he secured the gates with a lock.

[26] He gave evidence about an occasion in October 2017 when Michelle Keeley, the defendants' daughter, actually parked the car in front of his gates in such a way that he was not able to open them to access his own property. He had to call at the defendants' house to have the car moved. A couple of weeks later he again noticed tyres tracks in the open area of his garden at the top of the lane just in front of the gates.

[27] In November 2017, he gave evidence that he saw cars parked towards the middle of a lane to enable the passenger doors of the vehicle to be opened to permit the defendants' daughter's children to access No.5 with the result that he scraped his own car on a telegraph pole as he attempted to squeeze past them. In 2018 he ordered top soil for the purposes of landscaping the gardens to his house but they were unable to deliver this because of cars parked on the laneway. Things were particularly difficult during the summer of 2020. In May 2020 he asked the first defendant to move his and his daughter Michelle's car off the laneway as he was expecting a delivery. They did move the cars into the driveway of their home but they were moved back out again shortly afterwards. When the lorry duly arrived one car was on the lane preventing it proceeding to the plaintiff's property. He had to reverse back down the lane to permit the second defendant to move the car into their own driveway. The plaintiff said that friends of his had been unable to get up the lane due to cars parked on it – including a valuation officer from Land and Property Services in her car in June 2020.

[28] As a result the plaintiff started to take photographs showing the extent of the obstruction and I have seen photographs dated 16 June 2020, 17 June 2020 and 18 June which clearly show the extent of the obstruction presented by the parking of cars on this laneway. This included cars being double parked on 16 June 2020, a van parked in front of his gates on 7 June 2020 and two vehicles parked in front of his gates on 18 June 2020.

[29] Since the summer and prior to the plaintiff commencing his anticipated building works the situation has deteriorated and relationships between the parties has broken down.

[30] From the evidence of both parties in the case it is clear that there were some initial attempts to resolve this matter. Both parties took legal advice, at one stage from the same solicitor, in the hope that the matter might be resolved.

[31] In particular, the plaintiff gave evidence about discussions aided by Carmel McAnuff. The plaintiff's version of events on this issue is that in August

2020 Mrs McAnuff told her that the defendants accepted they should not be parking on the laneway and had agreed to widen their own driveway to accommodate more cars. He gave evidence that he was told that this could be done for about £1,500. This was consistent with the defendant's behaviour in that Michele Keeley, their daughter, was using the driveway to park her vehicle but after a short period of time the second defendant starting parking her vehicle on the laneway again in front of his gates.

[32] The defendants disputed the plaintiff's version of events. It was accepted that Mrs McAnuff did discuss the matter with them and as a result they decided to obtain legal advice. It was whilst they were doing this that they temporarily stopped parking their vehicles on the laneway. Mr Keeley explained that this was because he was unsure of the legal position and this was a sensible and understandable response to the letter they had received on behalf of the plaintiff from his then solicitor. Mrs McAnuff gave evidence supported by the first defendant that they never discussed widening the driveway and there had never been any discussion of a figure of £1,500 to do this work. The plaintiff was adamant that such a discussion took place and he actually recalled saying to Mrs McAnuff that she should get the Nobel Peace Prize. The discussions arose when he told Mrs McAnuff that he was going to send a solicitor's letter to the Keeleys. They were initiated in June or July and it was the plaintiff's understanding that the matter could be resolved in August 2020. At this stage the plaintiff was expecting planning permission to carry out the renovation works to his property.

[33] In her affidavit evidence Mrs McAnuff confirmed that she had lived in 5 Windmill Road with her parents until 1981, having been born in 1957. She married in 1980 and initially lived with her husband in her parents' home until 1981. They returned there in 1989 and in or around 1990 bought a site from the plaintiff's late father and built their new home at 1 Windmill Road at that time. They continued to live with their late father until he passed away in 1995 at which stage they moved into their newly built home.

[34] She supports the evidence of the defendants that the Keeleys, including herself, parked vehicles on this laneway without objection from the plaintiff's father. She was unaware of any dispute about the right of way until the summer of 2020.

[35] In relation to the alleged discussions in August 2020 with the Keeleys she accepted that she had a discussion with them after the plaintiff had told her he had taken legal advice and would be sending a solicitor's letter to them. She was simply advising them of this. She specifically denied that the Keeleys had agreed to widen their driveway and to stop parking their vehicles on the laneway. She accepted that she did speak to them to see if any legal dispute could be avoided but there had never been any agreement along the lines suggested by Mr McAteer. She told Mr McAteer that she had spoken to the Keeleys. When asked about Mr McAteer's comment that she deserved the Nobel Peace Prize during a discussion which took

place while they were sharing a glass of wine, she said she had no memory of this. She did not recollect such a discussion.

[36] The plaintiff by way of supporting evidence has exhibited a statement from a Nicola Johnson, who did not give evidence. She is a nurse and confirms that she has known the plaintiff for over 25 years. She also knows the family well and was a regular visitor to the plaintiff's parent's home particularly in their later years.

[37] She confirms that the blocking of the laneway was an issue for the plaintiff's parents and that they had complained to the defendants about parking there.

[38] She corroborated the plaintiff's account of an incident on 13 November 2020 when he was measuring the laneway at his solicitor's request. The second defendant drove up and down the laneway repeatedly laughing at the plaintiff and her and waving at them. She deliberately interfered with their efforts to measure the laneway and made rude gestures. As a result they had to abandon what they were doing.

[39] The main witness for the defendants was Mr Keeley.

[40] His evidence was that his parents lived at No.5 from 1955 onwards. Initially they rented the property but bought it in and around 1980. He lived there during his childhood. He moved out of the property when he married in 1981 but continued to visit his parents regularly, as did his siblings.

[41] His mother passed away in 1988 and his father in 1995. On his father's death he inherited the property and it was transferred into his name on 15 September 1995. He and his wife have lived in the property since 1995. They have three daughters one of whom, Michelle, lives with them but his two other daughters visit frequently.

[42] As set out earlier he confirmed that there is access to the premises from the main Windmill Road. In terms of the laneway which is in dispute there is a pedestrian gateway leading from the laneway to the back door of the premises. In addition, there is an entrance off the driveway which he believes was installed in the mid-1970s. This driveway can accommodate two ordinary motor vehicles as can be seen from photographs produced in evidence to the court.

[43] He says that visitors to his property would park on this laneway. His father started driving in the mid-1960s and, in particular, parked outside the pedestrian gateway which was in existence prior to the driveway for the motor vehicles.

[44] He says that his parents and the plaintiff's parents were very close neighbours. He and his wife held the spare key to the plaintiff's property because they were the first point of contact for his parents in response to their emergency panic buttons. On numerous occasions they called ambulances for them. They also

gave lifts to them to and from town if they ever required them. He kept in regular contact with the plaintiff's brother lest any emergency should arise.

[45] He disputed the plaintiff's evidence that the plaintiff's father had raised the issue of parking on the lane with his mother. He says it was simply never an issue either in relation to his parents, himself or any of his children.

[46] In relation to the use of the driveway at No.3 for turning purposes his evidence was that shortly after his youngest daughter, Fiona, passed her driving test in April 2008 the plaintiff's father left his gates open and allowed them to enter his property to turn their cars for their convenience. Prior to then he had closed his gates at night and during the summer when his nephew kept horses on the land behind his house. However, this stopped in 2008. He says that in fact the use of the laneway for turning the cars was something that was actually offered by the plaintiff's father to the family.

[47] He disputes that the plaintiff actually raised any issue about the parking of the cars other than a particular incident in June 2020 which related to double parking which was in fact Fathers' Day. He acknowledged that his daughters should not have double parked their vehicles on that particular occasion but felt there was no harm in doing so when no-one was residing in No.3 and if any access had been required it would have been immediately facilitated.

[48] He accepted that in August 2020 he was approached by his sister, Carmel McAnuff, who wanted to give them advance warning that the plaintiff was intending to send a solicitor's letter in respect of the laneway. His response was that he wanted to seek legal advice as to his rights and whilst he was in the process of doing so he and his family decided that until they knew where they stood they would not park any vehicles on the laneway.

[49] He completely denied any suggestion that he told Carmel McAnuff that he accepted that they should not park in the laneway or that they would widen their driveway.

[50] Upon receipt of legal advice they resumed parking in the same way they previously had.

[51] His evidence was that on any occasion when it was necessary or a request was made to move the vehicles this was complied with.

[52] In relation to photographs the plaintiff produced showing vans on the laneway he points out that the van shown on the photographs on 17 June was, in fact, a van belonging to a son-in-law of John and Carmel McAnuff and therefore had nothing to do with him. A blue van shown in one of the photographs was in fact a replacement van for a Royal Mail postman, again something over which the defendants had no control.

[53] Mr Keeley's evidence was to the effect that as far as he was concerned the plaintiff did have a right of way to access his premises at No.3 but that equally he had a legal easement to park his vehicle on the laneway which was acquired by prescription. He generally disputed the extent of any obstruction claimed by the plaintiff.

[54] The court did not receive an affidavit or hear evidence from the second defendant.

[55] The defendant and Mrs McAnuff accepted that since the McAnuffs built their home the defendants' vehicles have been parked further up the laneway so as to ensure that access to the McAnuff property was not blocked. Thus, the vehicles about which the plaintiff complains tended to be parked further up the laneway, beyond the immediate pedestrian entrance to the defendant's back door and closer to his gates.

[56] A regrettable feature of this action has been the affidavits served by the plaintiff's siblings and, in particular, Jim and Tony McAteer the plaintiff's brothers, together with the plaintiff's response.

[57] Sensibly this evidence was not led at the hearing. Suffice to say that there has been a significant falling out between the plaintiff and his two brothers. The truth behind those fallouts would involve an action in itself with several days of evidence. For the purposes of this action I have formed the view that there is considerable ill-will between the plaintiff and his siblings and the defendants which has fed into the intensity of the dispute between the parties concerning the use of this laneway. In the past circumstances were such that the parties could get by even if the issue of the car parking lurked in the background. The plaintiff's intention to settle and construct a new dwelling has clearly brought matters to a head. In the absence of agreement "on the ground" the court is compelled to determine the respective legal rights and entitlements of the parties.

[58] Tony McAteer, a brother of the plaintiff, testified to the good relationship between the McAteers and the Keeleys going back to the time of both his grandparents and parents. He confirms that when returning from university he was able to visit his parents by using the laneway in question. He knew that the Keeleys parked vehicles there and had no difficulty passing them. His earliest memory was that the Keeleys parked their vehicles on the laneway and that there never had been any issue about this. He suggests that any reluctance by others to drive up the lane was because of the state of its repair rather than any car parking by the Keeleys. He averred that his late father allowed his nephew, Seamus Fitzpatrick, to keep horses in the field behind the house. His recollection is that Seamus Fitzpatrick was able to drive up the laneway while the Keeleys parked in the lane towing a horse trailer without any issue. He also produced two photographs one taken in 1991 and another in 1993 in which the first-named defendant's father's car can be seen parked

on the laneway. It was a burgundy coloured Ford Orion. On both occasions the gates to his parents' house were open.

[59] Jim McAteer supports the affidavit of his brother Tony to the effect that there had never been any difficulties between the Keeleys and his parents. He disputes that there was any issue about the Keeleys parking or obstructing the laneway prior to his father's death. Such was the relationship between the Keeleys and the McAteers that the defendants had a key to the McAteers' premises and kept an eye on them during their later years.

[60] The McAteer brothers were supported to an extent in their contentions by an affidavit from Anne O'Hagan (nee Fitzpatrick) who was the daughter of the plaintiff's father's sister. She was someone who had an interest in the property at No.3 and because of the family dispute to which I have referred the plaintiff agrees that he refused to contemplate selling the house to her for reasons he explained. She along with the McAteer brothers suggested that people seeking to visit the plaintiff's mother could not get up the laneway because of its poor condition. She also suggests that her brother/father was able to get a horse box up the laneway without any difficulties notwithstanding vehicles being parked on the laneway.

[61] That the first-named defendant's father parked his car on the laneway is also supported by an affidavit from Michelle Keeley, daughter of the first defendant, who recalled visiting her grandparents. She has parked her car on the laneway since passing her driving test in 2005. She continues to reside with her parents. She was close to the plaintiff's parents and regularly gave them a lift into town for various purposes. She expressly denied any suggestion by the plaintiff that she drove the vehicle at speed up the laneway almost striking him on one occasion. She did recall the occasion when she parked out from the wall at the side of the laneway when the plaintiff complained to her. She pointed out that this was only for a short period of time and that she did not think that it would have caused any inconvenience. She accepted that she could have been more careful but did not think this was a major issue. This was the only time the plaintiff has ever spoken to her about parking on the laneway. She gives the impression that any conversations she had with the plaintiff were entirely pleasant and remarked that he had complimented her on her new car in July 2020.

[62] Ciaran Hanna swore an affidavit to the effect that his father was in the oil delivery business since 1973. His business was close to the disputed laneway. Since he was a teenager he assisted delivering fuel and he is now a joint owner of the business with his brother. The plaintiff's late parents and the Keeleys have been customers of the family business for as long as he can remember. His business delivered coal and later oil to the Keeleys at 5 Windmill Road. He also delivered to No.3. His recollection is that the Keeleys parked their cars on the laneway and that he has never had any difficulty passing the parked cars using a 7½ tonne lorry. He was also able to manoeuvre the 18 tonne lorry past the Keeleys' car. The 18 tonne lorry is approximately one foot wider than the 7½ tonne lorry. He averred that the

Keeleys were very obliging and if they heard the lorry in the laneway would come out and offer to move their cars although in his view this was not needed. On the rare occasions when it was necessary to move the car to permit access the Keeleys were happy to do so. This person has been delivering oil to the premises for over 20 years during which time he has observed the Keeleys parking their vehicles on the laneway.

[63] Nuala Price, the first defendant's sister, describes in an affidavit how she lived with her father at 5 Windmill Road. She recalls that in the early 1960s her father got his first car and his practice was to drive up the laneway, turn in the space in front of the McAteer's house and park on the laneway facing towards the Windmill Road. There was never a problem with this and the McAteers and the Keeleys got on very well.

[64] She describes how the driveway at 5 Windmill Road was made at a time where cars were smaller. She describes the entrance as narrow and difficult to negotiate. The entrance is on a slight bend. It could be improved but this would involve significant costs in her view. She describes how over the years all of the families assisted in repairing the laneway.

[65] She left 5 Windmill Road in 1966 and moved to Dungannon. After she did so she visited her parents weekly and often stayed at weekends. During this time she parked her car on the laneway and there was never an issue with this.

[66] In addition to the various photographs exhibited by the parties and the descriptions of the laneway the court had the benefit of a professional survey on behalf of the plaintiff from Wright and Partners, Chartered Surveyors. This was based on an inspection carried out on 21 December 2020. The report describes the topography in the following way:

> "The laneway is accessed from Windmill Road and is of a relatively steep upwards incline from Windmill Road up to the access point at 3 Windmill Road. Upon entry to the laneway it immediately bears left and then bears right and straightens. The laneway comprises a number of uneven Bitmac surfacing (broken/worn out in places) and gravel finish. Stone work walls line the edges of the laneway with a grassed area located to one side at the bottom. The driveway access point to 5 Windmill Road is located off to the left-hand side of the laneway at the head of the grassed area. The driveway access point to 3 Windmill Road is located square on at the top of the laneway. One driveway access point to 1 Windmill Road located of the right hand side at the bottom of the laneway and a second driveway access point located off

> the right-hand side approximately half way up the laneway.
>
> At the time of the survey (approximately 10am) Windmill Road appeared to have a low to moderate volume of traffic. The access point to the laneway from Windmill Road is at the top of a crest curve."

[67] The plan of the laneway with measurements confirms that the average width of the laneway is approximately 5.40 meters wide. This would mean it would be extremely difficult to carry out a 3-point turn in the average sized car.

[68] The report also confirms that reversing out of the laneway on to Windmill Road may prove hazardous.

[69] The report confirms that an alternative to parking on the laneway would be on-street parking on Windmill Road at a safe and legal location. Parking directly opposite the entrance point to the laneway would not be advisable. The driveway of 5 Windmill Road appears to be level from the access point of the laneway and at the time of the survey was accommodating two average size cars (one in front of the other). There appeared to be adequate width for opening of car doors on both sides. The site does possess potential for widening/extension of the driveway although ground retention works would be required due to the nature of the site.

[70] If average sized cars are parked along the laneway it would reduce the average width to approximately 3.40 meters. In the opinion of the surveyor this would cause accessibility issues to any larger vehicles attempting to reach 3 Windmill Road. Furthermore, if vehicles are parked at the top of the laneway in close proximity to the gate at the access point to 3 Windmill Road, gaining access through the gates would prove difficult due to the gateway being partially impeded.

[71] On behalf of the defendants, Mr Finn Sherry, Consulting Engineer, confirms that the average width of the laneway is 5.4 meters in the vicinity of house No.3. He says that the average width of a car including the wing mirrors is around 2 meters. He therefore concludes that two cars should be able to pass without incident. He confirms that the driveway in to the house at No.3 is 12m x 3.6m and can accommodate two cars.

[72] Finally, in relation to the evidence, the court referred earlier at paragraph 6 to the fact that the house at No.3 was put on the market for sale but for various reasons the sale was frustrated. On this issue the plaintiff's evidence was that when the house was initially put on the market after 2015 he was informed by the estate agent dealing with the sale, a Mr John Collins of Collins and Collins, that the second-named defendant had confronted him on the lane when he tried to put up a "For Sale" sign and claimed that she owned the lane and also the telegraph pole on the lane. He said that the estate agent told him that he was legally obliged to tell

prospective buyers that there was a dispute over the laneway. This had caused a problem with prospective buyers. In the course of the proceedings the defendants filed a statement from John Young who said he was the estate agent within Collins & Collins who agreed the property at No.3 Windmill Road, Newry, for sale. He said that neither he nor John Collins were aware of being approached by the second defendant, Geraldine Keeley.

[73] In rebuttal Mr McAteer confirmed that he had been told this and pointed out the court had not heard from either Mr Collins or the second defendant on this issue. He also referred to correspondence from a prospective purchaser to his then solicitors on 13 February 2017 which raised the issue that there was no legal right of way from the public road to the property on the relevant land certificates and title deeds. This, of course, does not bear on the alleged conversation between the plaintiff and Mr Collins but it is clear that at that stage there was an issue identified about the right of way which inevitably was detrimental to any sale. On balance I accept the plaintiff's evidence on this issue, but in truth, it does not help or assist in the determination of the issues in the case.

[74] Obviously, the court would have preferred if the parties could come to some sort of accommodation. The interim injunction granted was a potential way forward. The court is disappointed to learn that the injunction did not have the desired effect and that issues remain between the parties. The court notes that since the injunction was granted it was the practice of the defendants to move vehicles already parked in their driveway out on to the laneway after 7pm. Whilst this was obviously permitted under the terms of the injunction it does not in court's view reflect well on the defendants. It suggests that a determination to assert what they claim to be their entitlement in circumstances where vehicles were already safely and adequately parked on the driveway.

Legal Analysis

Does the plaintiff enjoy a right of way along the laneway, and if so, what is the nature and extent of that right of way?

[75] The plaintiff claims that he has a right of way over the entire width of the laneway at all times, for all purposes and for all vehicles. The onus is on the plaintiff to establish that he has acquired such a right of way.

[76] There is no doubt that the plaintiff in the course of these proceedings has put forward different grounds to support his argument that he has acquired such a right of way.

[77] Initially, the Writ of Summons which was issued on 4 December 2020 relied on a legal title to a right of way. The background to this is that when the plaintiff became aware that there was no express right of way in the title to his property he sought to rectify this. He thought he had done this when he had purchased the

small strip of land adjacent to No.3 which did expressly provide such a right. The grantor was M.O.R.N.E. Limited. At the time the proceedings were issued the plaintiff did not have access to the deeds which were in the possession of his previous lawyers. It emerged that M.O.R.N.E. Limited had acquired the land from Kilmorey Estate who had previously owned all of the lands at 3 and 3A. When the plaintiff sought to register the 2018 right of way it emerged that the deed between Kilmorey Estate and M.O.R.N.E. Limited did not evidence any consideration passing between the two. As a consequence M.O.R.N.E. Limited did not have a valid title in order to pass a valid right of way to the plaintiff.

[78] At the substantive hearing the plaintiff accepted that he did not have an express right of way by deed but sought to argue that he had acquired the right of way by either necessity or prescription. After the hearing when the parties made written submissions the plaintiff also sought to rely on the rule in **Wheeldon v Burrows** and section 6(1) of the Conveyancing Act 1881 and sought to amend his pleadings accordingly.

[79] I propose to consider each of the headings in turn.

Necessity

[80] The evidence establishes that the plaintiff's lands were not landlocked until 1990 when the plaintiff's father sold No.1 to the McAnuffs. Thus, in reality, the plaintiff's predecessor's in title landlocked themselves. This is problematic for the plaintiff as the remedy he seeks would require imposing rights and obligations on a third party's land.

Prescription

[81] I accept the plaintiff's evidence that this laneway was used by the plaintiff's predecessors in title at the very least going back to the 1920s when his grandparents farmed the lands. Since that time this laneway has provided access to the plaintiff's property and has been used by the occupiers for that purpose. Initially, access was for agricultural purposes and in accordance with the times donkey and cart and subsequently other agricultural vehicles used the laneway. It was also used by the occupiers and visitors to the property for access to the dwelling, although this did not involve motor vehicles until the 1980s. Motor vehicles included cars used by visitors to the plaintiff's parents', delivery vehicles and on occasion a camping trailer.

[82] The court accepts that the plaintiff cannot establish a right of way by prescription prior to 1953 as prior to that date the dominant and the servient was within the same ownership. The facts of the matter are that this laneway has provided a means of access to the plaintiff's premises for all purposes going back to the 1920s and certainly for the purposes of this case since 1953. Between 1953 and the 1980s any agricultural use was pursuant to the lease under which the plaintiff's

predecessor in title occupied the premises which permitted use for agricultural purposes. On the evidence I am satisfied that the reality is that since 1953 the plaintiff and his predecessors in title have enjoyed an unrestricted use of this laneway for the purposes of access to the plaintiff's lands. I therefore consider that the plaintiff has established a right of way by prescription or user for all purposes from at least 1973 onwards and certainly in excess of the 20 years preceding the proceedings in this action. I accept the evidence of the plaintiff that any interference with this right of way by the defendants by parking on the laneway was with the permission of his parents and since he has acquired ownership of the relevant property he has disputed the defendants' entitlement to park on the laneway.

[83] The court considered whether it could determine that such a right of way existed without putting the owners of the laneway on notice of the proceedings. The court has concluded that this is not necessary. First of all, it is not clear who the actual owners of the laneway are. At one stage it was the Kilmorey Estate but when the lands at 3A were conveyed to the plaintiff the lands previously owned by the Kilmorey Estate had been transferred to M.O.R.N.E Limited. It was clear from the 2018 conveyance to the plaintiff that M.O.R.N.E Limited were content to grant a right of way for all purposes to the plaintiff. In the circumstances it is not considered necessary to put either the Kilmorey Estate or M.O.R.N.E Limited on notice of these proceedings.

Section 6(1) of the Conveyancing Act 1881 and the rule in Wheeldon v Burrows

[84] In light of the court's finding that the plaintiff has established a right of way by prescription it is not necessary to determine whether the plaintiff can rely on section 6(1) of the Conveyancing Act 1881 and/or the rule in **Wheeldon v Burrows**. The reliance on section 6 is unlikely to succeed as the plaintiff does not point to any general words in an express grant which he seeks to extend to imply the right of way argued for argued for in this case.

[85] In relation to **Wheeldon v Burrows** Mr Lavery argues that when the lands were divided in 1953, it was patently obvious that the parties would have intended to formally establish a right of way but simply omitted/forgot to declare it in the deeds. The Kilmorey Estate who owned the laneway and the house needed to retain a right of way to the lands in their ownership which were tenanted to the plaintiff's grandparents. They would not have relinquished their right of way to their lands which the lane accessed until the plaintiff purchased the last remaining strip of ground by express deed in 2018.

[86] I consider that the principle in **Wheeldon v Burrows** would be problematic as a legal basis for the plaintiff's claimed right of way.

Have the defendants established an easement to park?

[87] An easement to park vehicles is not a traditionally recognised easement and it is only in recent years that the courts have recognised such a concept. In the case of **Batchelor v Marlow** [2003] 4 All ER 78 the defendants operated a garage business and parked cars on land belonging to the claimant. No more than six cars could be parked on the land. In proceedings between the parties the defendant asserted that they had an easement to park and store cars on the land. The judge at first instance held that they had acquired an exclusive prescriptive right to park six cars on the land between 8:30am and 6pm Monday to Friday in connection with their business. In so holding, the judge concluded that such a right was capable of subsisting as an easement since, being limited in time, it did not, as a matter of degree, amount to such exclusion of the claimant as to preclude the right from subsisting. The claimant appealed. The Court of Appeal held that the right to park vehicles for 9.5 hours on working days was not an easement as the intensity of the use would deprive the landlord of any reasonable use of his land. It was held the claimant had no use of the land for parking during the whole of the time that parking space was likely to be needed. Moreover, his right to use his lands for any other purpose was curtailed altogether for intermittent periods throughout the week. Such a restriction would have made his ownership of the land illusory and the appeal was allowed.

[88] The defendants claim that they have an easement to park along the entire northern side of the laneway. They say that this easement has been established by prescription. There was much debate in the course of the hearing about whether the defendants had the permission of the plaintiff's parents and grandparents to park on the laneway. Mr Keeley accepted that the permission to which the plaintiff referred was to use the plaintiff's gateway at the top of the laneway for the purposes of turning. The plaintiff's predecessors in title did not own the laneway. However, they had a right of way on the laneway under the tenancy from 1953 to 1980 and thereafter, as I have found, acquired a right of way by prescription. Any interference by parking on the laneway was, as I have found, with the permission of the plaintiff's predecessors in title and as such would be insufficient to establish an easement to park in law. At best the defendants' predecessors in title and the defendants had a licence to park on the laneway.

[89] There is no evidence before the court as to the landowner's attitude to the defendants parking on the laneway. It appears the practice first emerged to enable the defendants to gain access to the pedestrian entrance to the back/side of the house and subsequently to the driveway in which they can park vehicles. I consider it is significant that after the McAnuffs built the house at No.1 the defendants commenced parking their vehicles further along the laneway so as to ensure easy access for the McAnuffs to their property by way of the driveway which adjoins the laneway and provides access to their property. This is consistent with the plaintiff's father's purported grant of a right of way to the McAnuffs on the laneway to the access point of their property. It further suggests that the defendants in effect extended their previously claimed easement to facilitate the McAnuffs.

[90] It seems to the court that to establish an easement to park there needs to be much greater definition than that suggested by the defendants in this case. If they are right they claim an easement to park as many cars as they or their visitors to their premises please along the entire northern boundary in single file. I am not satisfied that there is sufficient evidence before the court to establish such an easement.

Does the parking of cars by the defendants on the laneway constitute a substantial interference with the plaintiff's right of way?

[91] Essentially this is a matter of degree. Whilst it is correct to say that it is possible for the plaintiff, sometimes with difficulty, to pass parked vehicles on this laneway in an ordinary motor vehicle it seems to the court that on any showing the parking of cars on this driveway does involve a substantial encroachment on the plaintiff's right. An average sized car parked along the laneway reduces the average width from 5.40 meters to 3.40 meters. The court has seen photographs which demonstrate the extent of the obstruction presented by vehicles parked on the laneway. From the plaintiff's point of view such obstructions are greater the closer the vehicles are parked to the gateway to his lands.

[92] Mr Lavery referred me to a useful summary of the law set out by Briggs J in **Zieleniewski v Scheyd** [2012] EWCA Civ 247. At paragraph 11 he cited the dicta of Blackburne J in **B&Q Plc v Liverpool and Lancashire Properties Limited** [2001] 81 P and CR __:

> *"(1) Not every interference with a right of way is actionable. The owner of the right may only object to activities, including obstruction, which substantially interfere with the exercise of the defined right as for the time being is reasonably required by him.*
>
> *(2) The question whether the owner reasonably requires to exercise his right in a particular way is to be addressed by reference to convenience, rather than necessity or even reasonable necessity.*
>
> *(3) Thus, if an obstruction interferes with a particular mode of exercise of the right which it is neither unreasonable nor perverse of the owner to insist upon, then the obstruction will be an actionable interference even if there remain other reasonable ways of exercising the right which many, or even most, people would prefer."*

Briggs J continued:

> *"As Blackburne J put it:*

> *'The test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence on being able to continue the use of the whole of what he contracted for is reasonable.'*
>
> *In the context of an easement acquired by prescription rather than by contract or written grant, it is common ground that Blackburne J's phrase 'the whole of what he contracted for' may be substituted by the phrase 'the whole of that which he has obtained by prescription.'"*

[93] Briggs J added:

> *"… It is well established that a vehicular right of way acquired by prescription does not confine the owner to enjoyment only by the types of vehicle in current use during the period when the easement was acquired. Thus, in* ***Lock v Abercester Ltd*** *[1939] 1 Ch 861, a vehicular right of way had been acquired by long use with horse-drawn carts. It was held to be legitimately enjoyed, much later, by mechanically propelled vehicles. In my judgment, the converse is also true. Where, as in the present case, developments in agricultural machinery have led to a situation where machinery used during the period of acquisition of an agricultural right of way by prescription have been largely replaced by more modern types, the owner is not thereby deprived of the right to continue to use the right of way for what has become an old-fashioned type of machinery, at least for as long as his use of it cannot be characterised as unreasonable or perverse."*

[94] Having heard the evidence in this case I am satisfied that this case falls on the side of the line supporting a substantial interference with the plaintiff's right of way.

[95] Whilst not determinative of the issue the court does look to the consequences of its decision bearing in mind that it is a court of equity. It does seem to the court that it should be possible for the parties to come to a working arrangement whereby vehicles could be parked on the laneway by prior arrangement with the plaintiff. However, this has not proven possible. It is the court's view that the purchase of the property by the plaintiff, and his intention to construct a dwelling here, together with the dynamics of the relations between the parties has caused a degree of resentment against the plaintiff. My impression of the plaintiff was that he was particular about detail and about his legal rights. Essentially, the court found him to be a truthful witness. In relation to the disputed "agreement" in August 2020 brokered by Carol McAnuff the court preferred the evidence of the plaintiff on this issue. I do not for one moment say that there was some sort of enforceable agreement reached. However, I do accept that there was a discussion about

improving the driveway and that the plaintiff was left with the impression that this would be a way of resolving the ongoing dispute between the parties.

[96] Whilst it is undoubtedly convenient for the defendants to park their vehicles on the laneway it is clear that they have reasonable and convenient options in terms of parking their vehicles, both on the main road and in the driveway which was presumably expressly constructed for that very purpose and which currently can accommodate two cars. It remains open, if the defendants so wish, to improve or expand that driveway for parking purposes.

[97] The alternative scenario put forward by the defendants is, in my view, a recipe for further conflict not only between the existing parties but for future parties who may reside at numbers 1, 3 and 5.

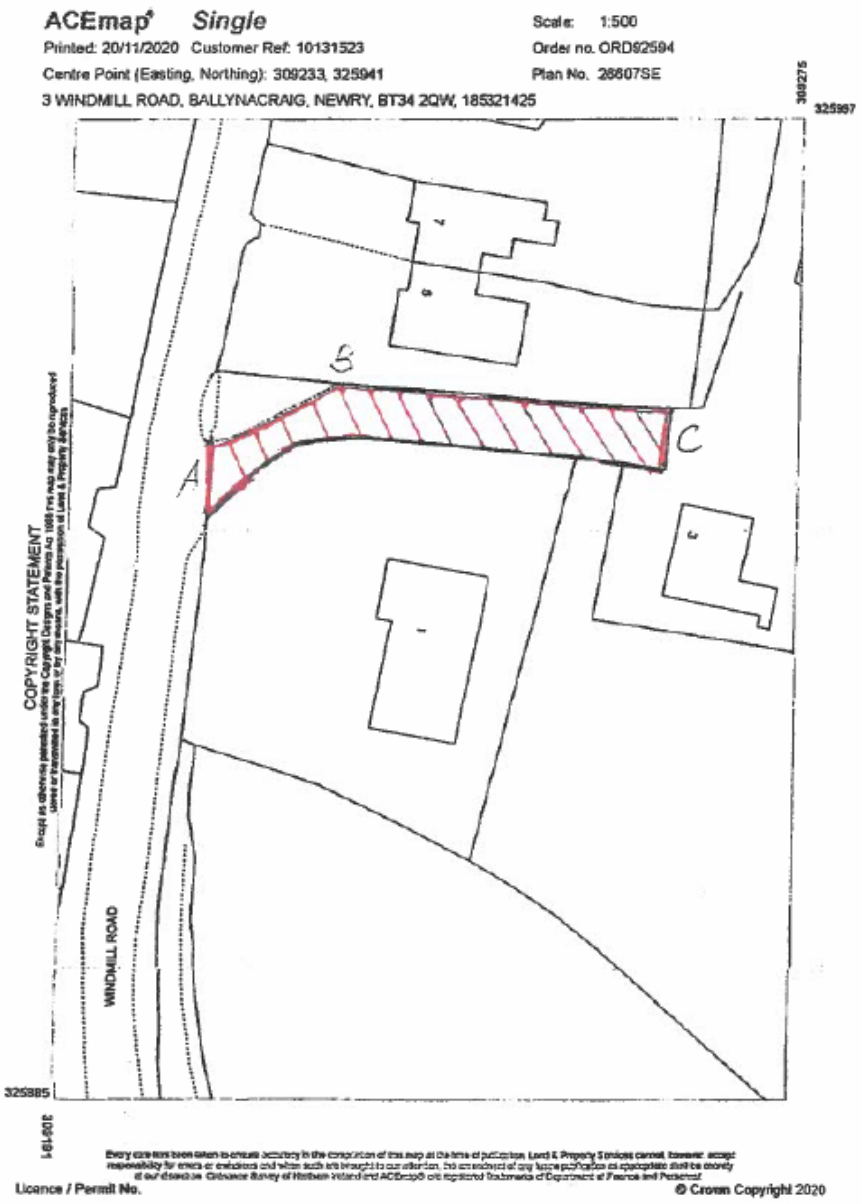
[98] The outcome is therefore not only legally correct but also in my view the best way of providing finality to the issues raised in this litigation.

[99] The court has therefore determined that the plaintiff does enjoy a right of way for all times and for all purposes along the laneway in question. It has determined that the defendants do not enjoy an easement to park on the laneway. In the circumstances of this litigation it does not propose to make any declarations in relation to past obstruction of the right of way or award any damages for the interference with the right of way. The court considers that the plaintiff's rights can be vindicated by the making of declarations.

[100] The court therefore determines:

(i) The plaintiff enjoys an unobstructed right of way for all times and for all purposes from points A to C and over the entire area hatched in red on the map attached hereto.

(ii) The court grants an injunction restraining the defendants whether by themselves and/or their servants and agents including family members from obstructing the laneway either by parking vehicles, loading and unloading vehicles on any part of the said laneway and further from driving beyond the point marked B on the said map save with the express permission/consent of the plaintiff.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