

THE HIGH COURT

[2010 No. 4669P.]

BETWEEN

MARK PIGOTT

PLAINTIFF

AND

JAMES DELANEY, SHAWCROSS LIMITED, VICO ROCK  
PROPERTY MANAGEMENT LIMITED AND TRACY DELANEY

DEFENDANTS

THE HIGH COURT

[2016 No. 335 MCA]

IN THE MATTER OF PLANNING AND DEVELOPMENT ACTS

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE  
PLANNING AND DEVELOPMENT ACT (AS AMENDED)

BETWEEN

MARK PIGOTT

APPLICANT

AND

JAMES DELANEY, TRACY DELANEY AND SHAWCROSS LIMITED

RESPONDENTS

THE HIGH COURT

[2017 No. 89 P.]

BETWEEN

JAMES DELANEY AND TRACY DELANEY

PLAINTIFFS

VICO ROCK MANAGEMENT LIMITED, MARK PIGOTT  
AND SOLRENTO HEIGHTS MANAGEMENT COMPANY LIMITED  
BY GUARANTEE

DEFENDANTS

**JUDGMENT of Ms. Justice Faherty delivered on the 21st day of May, 2019**

1. Before the Court are three sets of proceedings the first in time of which are proceedings bearing record no. 2010/4669 P brought by Mr. Mark Pigott wherein he claims a declaration that he is entitled to a right of way at all times and for all purposes over an area of land which will be more particularly described hereafter and which is hereafter referred to as the disputed or turning area. Mr. Pigott also seeks an order restraining the defendants, their servants or agents or licensees from parking motor cars, boats or vehicles of any kind or leaving any obstruction on the turning area together with orders restraining the defendants from placing or maintaining any obstruction on the said area and an order requiring the removal of any obstruction present on the disputed area. He further seeks an order that he is entitled to remove any obstruction present on the disputed area including a pillar structure located thereon. He further claims damages for trespass and nuisance.
2. The second proceedings are the proceedings bearing record no. 2016/335 MCA commenced by Mr. Pigott pursuant to s. 160 of the Planning and Development Act, 2000 (as amended) wherein he seeks:

- An order prohibiting the respondents (James Delaney, Tracy Delaney and Shawcross Limited) from using the apartment development located at Skyview House, Vico Rock, Vico Road, Dalkey, Co. Dublin unless and until planning permission for the aforesaid development has first been obtained;
  - An order directing the removal of the unauthorised car parking spaces together with associated markings and delineations located to the south east of Skyview House, namely on the turning area;
  - An order restraining the respondents their servants or agents from parking cars, jeeps, boats and other vehicles placing any obstruction in or over Mr. Pigott's right of way; and
  - An order directing the removal of unauthorised gas canisters located on the lands in the disputed area immediately adjoining Mr. Pigott's dwelling house, again located south east of Skyview House.
3. The third proceedings bearing record no. 2017/89 P were instituted by way of plenary summons on 6th January, 2017 by James Delaney and Tracy Delaney wherein they seek a declaration that they are entitled to be registered as freehold owners of the turning area.

***A more particular description of the relevant parties in the proceedings***

4. Mr. Pigott is the owner of a house "Cassini" located at Vico Rock, situate off Sorrento Road, Dalkey, County Dublin. Mr. Pigott purchased the site upon which Cassini is built in 2000 from Krish and Leila Naidoo who are the owners of a property "Ravello", also situated off Sorrento Road, Dalkey.
5. It is not in dispute that Mr. Pigott's right to his property, "Cassini", includes a right of way at the entrance to the property. The right of way is over a small plot of land circa 120 square metres. As previously indicated, this plot of land is referred to in this judgment as the disputed area or the turning area. It is this plot of land over which the Delaneys' claim ownership although, as I have already stated, they do not dispute Mr. Pigott's right of way. Mr. Pigott does not assert ownership of the turning area. Rather, the Delaneys' claim to ownership of the said plot of land is disputed by Vico Rock Property Management Limited (hereinafter "Vico") the first named defendant in the 2017 plenary proceedings. These proceedings are hereinafter referred to as "the title proceedings".
6. James and Tracey Delaney are the owners of Apartment 20 Vico Rock/Skyview House (hereinafter Apartment 20 Skyview House) situated at Vico Rock, off Sorrento Road, Dalkey. Their property comprises one of two units in a residential block developed by Shawcross Limited between 1989 and 1994.
7. Vico is a company mandated with the ownership of the common areas of the Vico Rock Estate (a development consisting of four apartment blocks) also situate off Sorrento Road, Dalkey.

## **The title proceedings**

### ***The history of the relevant parties' land ownership***

8. In order to understand the dispute between the Delaneys and Vico, it is necessary to set out in some detail how each of the relevant parties acquired their respective properties.
9. By Deed of Conveyance dated 31st January, 1986, UDT Bank and others conveyed lands to Brian Gill Contractors Limited (hereinafter "Brian Gill Contractors") which lands comprised, effectively, the old Khyber Pass Hotel and certain grounds located at Sorrento Road Dalkey. For the purpose of the within title dispute, this conveyance, for all intents and purposes, can be described as the common root of title. The map attached to the 31st January, 1996 Deed includes the turning area.
10. By Agreement dated 6th November, 1987 between Brian Gill Contractors and Vico, Vico agreed to purchase within 21 years of the date of the Agreement, units (namely blocks A, B, C, D and E) then being constructed by Brian Gill Contractors on the lands Brian Gill Contractors had acquired from UDT Bank and others.
11. The Agreement also made provision that the common areas would be transferred to Vico. The map which attached to that Agreement was signed by Mr. Edmund Burke, Architect for Brian Gill Contractors. The map included the turning area. Whilst the map bears a facsimile date of 19th May, 1993, in the course of his cross-examination, Mr. James Mackey, Vico's solicitor, testified that he believed that the map in question was contemporaneous with the Agreement. As a matter of probability, I accept this to be the case.
12. On the lands conveyed by UDT Bank and others to Brian Gill Contractors in 1987, there now stands four blocks of apartments (Blocks A, B, C and D) which are now under the management of Vico. It is noteworthy that the 1987 planning permission for the construction of the Vico Rock Apartment Development (which then included Block E/Skyview House) was granted subject to eleven conditions, including that the unit originally intended to be Block F was to be suitably paved and designated as a turning area for service vehicles.
13. Brian Gill Contractors' intention in acquiring the Khyber Pass Hotel in 1986 was to construct six blocks of apartments on the site, namely blocks A, B, C, D, E and F. As stated, Brian Gill Contractors duly constructed Blocks A, B, C and D. These buildings comprise three storeys with each block containing six units of accommodation.
14. The planning file in respect of the Vico Rock apartment development showed that in 1987, Brian Gill Contractors' then architect, Mr. Burke, had made provision for the turning area, as later specified in the 1987 planning permission, and that provision had been made for two carpark spaces north of the turning area but which were not on the turning area.
15. It appears that either prior to or in the course of the construction of the said apartment blocks an issue arose between Brian Gill Contractors and Mr. Pigott's predecessors in title, the Naidoos, the outcome of which was the grant of a right of way to the Naidoos for the

purpose of access to the gateway of their property "Ravello". This right of way was effected by a Deed dated 9th April, 1987 with a map attached thereto upon which the right of way was marked in yellow.

16. On what was initially designated by Brian Gill Contractors as Block E, a re-orientated new block was built by Shawcross Limited, a company owned for all intents and purposes by Mr. James Delaney.
17. Shawcross acquired the entitlement to construct this new block on 21st March, 1989 on foot of a Licence Agreement between Brian Gill Contractors and Shawcross on foot of which, for a consideration of the payment of £45,000, Shawcross obtained a licence to erect no more than three residential units on the site the subject of the Licence Agreement, with the parties further agreeing that upon completion of the building, Brian Gill Contractors would convey the properties to Shawcross or its nominees.
18. In 1989 Shawcross sought an adjustment of the 1987 planning permission in respect of Block E. That permission was refused by An Bord Pleanála on 21st August, 1989.
19. In December, 1989, Mr. Delaney sought retention planning permission for adjustments made to Block E/Skyview House to accommodate two apartments. That permission was granted on 20th September, 1990. The planning permission provided inter alia that the units "shall comprise:
  - (a) A single unit occupying the basement or lower level; and
  - (b) a single unit occupying middle and top floors as an independent unit."

It was further provided that:

"No sub division of these units shall take place without the planning permission first being obtained from the Planning Authority, or on appeal from An Bord Pleanála."

Condition number 8 of the permission provided as follows:

"The wall indicated on the submitted plans dated 23rd July, 1990... which forms the enclosed garden area, shall be amended so that the car parking and turning area, agreed with the Planning Authority by way of the submission of the 27th March, 1987, pursuant to Condition No. 1 of PR65/86, can be accommodated. This entails the reorientation of the wall which is already partially constructed to run in a north easterly direction."

The upshot of that condition was that the turning area as provided for in the 1987 planning permission had to remain the same, as had the car parking provision referred to in the 1987 planning permission.

20. Shawcross duly constructed a building (Skyview House) on the former Block E of nearly the same size and scale as Blocks A – D. In all, Shawcross constructed two units of

accommodation. Mr. Delaney's intention, as the principal of Shawcross, was that he and his wife would reside in one of the units of Skyview House. Therefore, the ground and top floor of Skyview House (Apartment 20 Skyview House) were set out as one accommodation for the Delaneys, with the lower ground floor (no. 19 Skyview House) set out as a separate accommodation unit.

21. Pursuant to the terms of the Licence Agreement entered into on 21st March, 1989 between Brian Gill Contractors and Shawcross, on 13th December, 1994, Brian Gill Contractors conveyed Block E/Skyview House to Shawcross in fee simple. Two maps, Map 1 and Map 3, were attached to the said Deed.
22. It is accepted by all concerned in the within proceedings that Maps 1 and 3 as attached to the 13th December, 1994 Deed did not include the turning area.
23. In the course of his evidence, Mr. Mackey, Vico's solicitor, advised the Court that it was his understanding from circa 1988 that Block E, howsoever it would be built by Shawcross, would come back by way of reversionary interest to the "motherhip", Vico, and that it would be incorporated into the structure of the Vico Rock Estate apartment complex and that it would pay service charges in like manner as Blocks A to D. In this regard, Mr. Mackey referred to para. 18 of the Licence Agreement between Brian Gill Contractors and Vico. Mr. Mackey also pointed to the Licence Agreement made in 1994 between Brian Gill Contractors and Shawcross which, Mr. Mackey stated, clearly envisaged that the freehold in the car parks spaces being assigned by Brian Gill Contractors to Shawcross on foot of the Licence would be transferred to Vico.
24. It is common case, however, that no service charges have ever been paid by Shawcross or the Delaneys.
25. The 13th December, 1994 Deed between Brian Gill Contractors and Shawcross makes reference, *inter alia*, to an Agreement dated 4th September, 1989 between Brian Gill Contractors and Vico. Paragraph 3.4 of the 13th December, 1994 Deed states:

"By Agreement dated 4th September 1989 made between the Grantor of the one part and Vico Rock Property Management Limited, for the consideration specified therein the Grantor agreed that on completion of the Assurance of the last of the Units in the Mansion to be sold to convey the Mansion to Vico Rock Property Management Limited, excepting and reserving thereout such of the Units as were or were to be sold by way of Freehold Conveyance and the rights and easements granted therewith, and subject to the Leases of such of the Units as were to be sold by way of Lease (which lands to be assured to Vico Rock Property Management Limited are hereinafter sometimes referred to as ("the Reserved Lands"))".
26. Mr. Mackey testified that he has never had sight of the 4th September, 1989 Agreement made between Brian Gill Contractors and Vico.

27. Mr Delaney testified that his understanding as of 13th December, 1994 was that Shawcross was acquiring the turning area. He stated:
- “From the time I bought [Block E], I had a map when I bought it from fence to wall and I regarded all the time that I owned that. But Pigotts had a right-of-way through it and I couldn’t block their driveway, which I never did.”
28. He testified that after acquiring and constructing his property, he had built a wall between his garden and the turning area and had provided for access to the turning area by building steps up into it. He had also paved the turning area and installed a gas tank in the corner of the turning area to service his apartment. He constructed a four-foot-high wall to shield the gas tank. He also constructed the kerbing on the turning area. According to Mr. Delaney, all these works were completed in 1994. He further stated that it was he who kept and maintained the turning area for some twenty years from 1994, including spraying it twice a year.
29. Mr. Delaney testified that the first time that he became aware that the 13th December, 1994 Deed did not cover the turning area was in or about 2010.
30. Under cross-examination by counsel for Mr. Pigott, Mr. Delaney reiterated his belief that he and his wife became the owners of the turning area when Shawcross acquired Block E in December, 1994. He reiterated that testified that as far as he was concerned, he bought from “the fence to the wall”.
31. Mr. Delaney further claimed that at the time Shawcross acquired Block E in December, 1994 he had sight of a map of the lands which included the turning area. Mr. Delaney did not produce this map to the Court.
32. Mr. Delaney also testified that the boundary line on Map 3 as attached to the 13th December, 1994 Brian Gill Contractors/Shawcross Deed “might be a mistake”.
- Albeit that he acknowledged that Shawcross had bought Block E from Brian Gill Contractors subject to the right of way then in favour of the Naidoos (now in favour of Mr. Pigott), Mr. Delaney could not account for why there was no reference in the 13th December, 1994 Brian Gill Contractors/Shawcross Deed to the right of way.
33. Under cross-examination by counsel for Vico, Mr. Delaney agreed that the 13th December, 1994 Brian Gill Contractors/Shawcross Deed anticipated that there would be a conveyance by Brian Gill Contractors of the common areas to Vico. In the course of his evidence, Mr. Mackey, Vico’s solicitor, regarded the absence of any reference in the December, 1994 Brian Gill Contractors/Shawcross Deed to the Naidoos right of way as significant, as had the disputed/turning area been conveyed to Shawcross by virtue of that Deed there would have had to have been reference to the right of way. He further testified that whatever map Mr. Delaney claimed to have seen in 1994, this was not the map that was incorporated into the Brian Gill Contractors/Shawcross Deed dated 13th December, 1994 which Mr. Delaney himself had signed on behalf of Shawcross.

34. When cross-examined by counsel for Mr. Pigott, Ms. Fiona McAlister of Partners at Law, solicitors for the Delaneys, agreed that there was no ambiguity about the contents of the 13th December, 1994 conveyance by Brian Gill Contractors to Shawcross. She agreed that the maps attached to the Deed showed that Shawcross did not purchase the turning area.
35. It is common case that in 1995 Shawcross sold the lower ground floor of Skyview House, no. 19 Skyview House, to James Deegan and Susan Deegan, with Shawcross retaining no. 20 Skyview House. The sale was effected by Indenture of Lease dated 3rd February, 1995. Map 1 as attached to the 3rd February, 1995 Lease outlined what was being sold to the Deegans. Map 2 as attached to the Lease showed the lands that were being retained by Shawcross. Map 2 does not include the disputed/turning area.
36. On the same day as Shawcross conveyed no. 19 Skyview House to the Deegans, by Licence dated 3rd February, 1995 between Brian Gill Contractors and the Deegans, Brian Gill Contractors, as Licensor, agreed to grant a licence to the Deegans (the Licensees) of two car park spaces. Pursuant to the Licence, the Deegans agreed to enter into a Licence Agreement with Vico on the same terms as other car park agreements pertaining to the Vico Rock Development. The Licence Agreement also provided that Brian Gill Contractors, as Licensor, agreed to convey freehold interest in the car park spaces to Vico subject to and with the benefit of the agreement entered into between Brian Gill Contractors and the Deegans.
37. The two car park spaces granted to the Deegans were described "X" and "Y" on a map which attached to the Licence Agreement of 3rd February, 1995. The car park space marked "Y" is on the turning area.
38. Under cross-examination, Mr. Delaney could not account for why Brian Gill Contractors were granting a licence to the Deegans in respect of car park space "Y" when, according to Mr. Delaney, the turning area on which "Y" stood had been conveyed to Shawcross on 13th December, 1994.
39. With regard to the 3rd February, 1995 Licence Agreement, Mr. Mackey, on behalf of Vico, testified that it is quite clear from the terms of the Licence that as of 3rd February, 1995, ownership of the turning area continued to vest in Brian Gill Contractors. This, he stated, belied any suggestion that ownership had been conveyed by Brian Gill Contractors to Shawcross on 13th December, 1994. Mr. Mackey contended that it was only on 26th January, 1999 that Brian Gill Contractors became divested of the turning area, when it was then conveyed to Vico.
40. Shortly before the sale of no. 19 Skyview House by Shawcross to the Deegans on 3rd February, 1995 and the Licence Agreement entered into between Brian Gill Contractors and the Deegans of the same date, Shawcross's architect, Mr. Pierce Fitzpatrick, executed a Declaration of Identity dated 12th December, 1994. For the purpose of his Declaration Mr. Fitzpatrick prepared a map which attached to the Declaration. Block E/Skyview House was delineated on Mr. Fitzpatrick's map. The map also includes two car park spaces

marked "X" and "Y" and a storage unit marked "S". I am satisfied that the car park spaces marked "X" and "Y" are those which were duly assigned by Brian Gill Contractors to the Deegans on 3rd February, 1995. Mr. Fitzpatrick's Declaration also refers, *inter alia*, to the right of way conveyed on 9th April, 1987 to the Naidoos by Brian Gill Contractors, which right of way is coloured yellow on Mr. Fitzpatrick's map. Mr Fitzpatrick declared that the right of way did not affect the car park space marked "Y" on the map and which was on the turning area.

41. In the course of cross-examination, Mr. Delaney acknowledged that the area delineated by Mr. Fitzpatrick as encompassing Block E/Skyview House did not include the turning area. Mr. Delaney could not account for why, if the turning area was owned by Shawcross, Mr. Fitzpatrick had not included it in his map.
42. Mr. Fitzpatrick executed a further Declaration on 6th February, 1995, again with an attached map particularly referable to "Skyview House Upper floors" (no. 20 Skyview House) the property retained by Shawcross following its Leasehold Agreement with the Deegans of 3rd February, 1995. Again, albeit that the map prepared by Mr. Fitzpatrick purported to be an indicator of the property owned by Shawcross, it did not include the turning area as in the ownership of Shawcross. Two car park spaces were delineated on the map as located in front of Block E/Skyview House. I am satisfied that they indicated the car park spaces allocated for the Shawcross/Delaney property, no. 20 Skyview House
43. By Indenture dated 26th January, 1999 between Brian Gill Contractors and Vico, for a consideration of one pound Brian Gill Contractors, as beneficial owner, granted and conveyed to Vico in fee simple Blocks A – D together with the common areas, subject to and with the benefit of leases, conveyances and easements referred to in the Deed. The First Schedule to the Deed described the "Mansion" (effectively Blocks A – D) as comprising "two roods, thirty-one and a quarter perches or thereabouts statute measure". The Second Schedule to the Indenture excepted the Shawcross lands.
44. Although two maps are referred to in the Indenture of 26th January, 1999, no maps are attached to the Indenture.
45. Mr. Mackey told the Court that the Deed of Transfer to Vico executed by Brian Gill Contractors on 26th January, 1999 was a Deed that had been initially drafted in 1994, shortly after the Brian Gill Contractors/Shawcross Deed dated 13th December, 1994 was executed. Mr. Mackey maintained that the reason the Brian Gill Contractors/Vico Deed was not executed in 1994 was that Brian Gill Contractors either had been or were about to be struck off the Companies Register at that time and that it had then taken a few years for Brian Gill Contractors to be reinstated in the Register. Mr. Mackey stated that in or about 1999, Brian Gill Contractors were again about to be struck off the Companies Register. Accordingly, because of this impending event, on 26th January, 1999, the Brian Gill Contractors/Vico Deed was executed by the Directors of Brian Gill Contractors, albeit without the maps referred to in the Deed having been attached thereto.



46. As previously referred to, Mr. Pigott bought the lands upon Cassini is built in June, 2000 from the Naidoos. The acquired site was largely vacant save some small outhouses and a greenhouse. The site was acquired with the benefit of planning permission. It also had the benefit of a right of way coloured yellow on the map which is attached to the Deed of Conveyance of 12th June, 2000. Access to the site was via the said right of way. Mr. Pigott stated that he also understood from the map attached to the Deed that he was acquiring the walls around the lands (save that which separated Ravello from Mr. Pigott's site). He believed the right of way he acquired to be that which was the subject of the Agreement between Brian Gill Contractors and the Naidoos dated 9th April, 1987. In Mr. Pigott's view, this is consistent with a map which was attached to the Declaration of Identity sworn by Shawcross's architect, Mr. Fitzpatrick, on 12th December, 1994/13th December 1994.
47. On 19th November, 2003, the Deegans granted and assigned no. 19 Vico Skyview House to Martin Kelly and Caroline Kelly. Some four years later, by Indenture dated 25th October, 2007 made between Martin and Caroline Kelly of the one part and Caroline Kelly of the second part no. 19 Skyview House was transferred to Caroline Kelly.
48. It is common case that in respect of both those transactions of 19th November, 2003 and 25th October, 2007, the respective purchasers acquired the two car park spaces which the Deegans had acquired from Brian Gill Contractors on 3rd February, 1995, one of which, "Y", was located on the turning area.
49. Mr. Delaney was cross-examined in respect of two Deeds of Conveyances both dated 4th October, 2012 which were executed between Shawcross and the Delaneys. The first of those Deeds shows Shawcross selling the disputed/turning area to James and Tracy Delaney for a consideration of ten euro. By virtue of the second Deed, Shawcross conveyed no. 20 Skyview House to James and Tracy Delaney. The maps which attached to the two October 2012 Deeds are each dated 21st May, 2013.
50. Under cross-examination, Mr. Delaney disputed the suggestion that Shawcross had no entitlement to sell the disputed/turning area to himself and his wife, again claiming that Shawcross had purchased the turning area in 1994.
51. By Indenture dated 21st July, 2015, entitled "Deed of Rectification and Conveyance" made between Brian Gill Contractors ("the first Vendor") on the one part and Shawcross ("the second Vendor") of the second part and James and Tracy Delaney (the purchaser) of the third part, Brian Gill Contractors conveyed and confirmed the turning area to Shawcross in fee simple, with Shawcross then conveying and confirming the turning area to the Delaneys in fee simple.
52. The Recitals to the Indenture of 21st July, 2015 read as follows:
  - "1. By Indenture dated 13th of December 1994 and made between the First Vendor of the one part and the Second Vendor of the other part ... the First Vendor assured

- the property described in the schedule thereto to the Second Vendor to hold in fee simple free from encumbrances.
2. It has come to light that the map attached to the Original Conveyance was incorrect as it did not correctly reflect the boundaries of the lands intended to be conveyed.
  3. By Indenture of Lease dated 3rd of February 1999 and made between Shawcross Limited of the one part and James and Sandra Deegan of the other part (hereinafter called "the Lease"), the property outlined in the schedule thereto was assigned to the said James and Sandra Deegan for a term of 900 years from the 1st of January 1994 subject to the yearly rent therein reserved in the covenants of the part of the Licensee and the conditions therein contained.
  4. By Indenture dated the 4th of October 2012 and made between the Second Vendor of the one part and the Purchaser of the other part the property contained in the Original Conveyance was assured to the Purchaser to hold in fee simple (hereinafter "the First 1994 Conveyance")
  5. By a Second Indenture also dated the 4th of October 2012 and made between the Second Vendor of the one part and the Purchaser of the other part (hereinafter "the Second 1994 Conveyance"), the lands which had been omitted from the Original Conveyance and more particularly outlined in the First Schedule hereto ("the Omitted Land") were assured for all estate title and interest held by the Second Vendor to the Purchaser to hold in fee simple.
  6. The First Vendor has agreed to enter into these presents to correct the error contained in the Original Conveyance.
  7. The Second Vendor has agreed to enter into these presents to formally assure the Omitted Lands to the Purchaser and to confirm the conveyance of the property described in the Second Schedule thereto ... as being vested in the Purchaser in fee simple."
53. Mr. Delaney acknowledged that the 2015 Deed was executed in the face of the dispute between himself and Vico as to ownership of the turning area, which has been ongoing since in or about 2010.
54. It is common case that for a number of years prior to February, 2015 Brian Gill Contractors had been struck off the Register of Companies. It was acknowledged by Mr. Delaney that the restoration of Brian Gill Contractors to the Register, which was effected by Order of the High Court (Cregan J.) of 23rd February, 2015, was orchestrated by his solicitors for a purpose that would show that Shawcross had properly acquired the disputed area on 13th December, 1994.
55. The petition by Brian Gill Contractors to be restored to the Register was grounded on an affidavit sworn 19th January, 2015 by one of its directors, Mr. Tom Hefferon. He avers as follows:

- "4. I say that the Company failed to file its annual returns with the Companies Registration Office for the years 1993 to date inclusive. I am advised and so believe that as a consequence of the Company's failure to file its annual returns for the aforementioned years, on 23rd April 1999, the Registrar of Companies struck the Company's name off the Register ... whereupon the Company was dissolved...
5. I say that the failure of the Company to file the said Annual Returns was as a result of oversight on the part of myself and my fellow directors to direct our Accountants to file the necessary returns as the company was not trading. I say that it is a matter of great regret to myself and my fellow director that we have failed to file the annual returns on behalf of the Company...
6. I further say that the restoration of the Company is necessary in circumstances where in 1989, and prior to the Company being dissolved, the Company conveyed lands to Shawcross Limited. I say that it has recently been discovered, as a result of a dispute between Shawcross Limited and its neighbour, that this conveyance was defective and that the said lands were not properly transferred to Shawcross Limited as the intended purchaser of same. I have been advised and believe that if the Company is not restored, the said property, which is currently vested in the State pursuant to Section 28 of the State Property Act, 1954, will not re-vest in the Company and the Company will not be in a position to rectify or resolution (sic) the defective conveyance. I say that this in turn will leave Shawcross Limited in a precarious position with no proper title to the said lands. I have been advised and believe that, in the circumstances, it would be just for this Honourable Court to restore the Company to the Register of Companies as sought herein."
56. Consequent on its restoration to the Companies Register, Brian Gill Contractors duly entered into the aforesaid Deed of Rectification and Conveyance dated 21st July, 2015.
57. Under cross-examination by counsel for Vico, Mr. Delaney could not say why the dispute between the Delaneys and Vico relating to the ownership of the disputed/turning area was not made clear to the High Court in the course of the restoration application.
58. On 24th September, 2015, Mr. Mackey made two parallel applications to the Property Registration Authority ("PRA") in 2015 in respect of the Vico Rock Estate. The first ("non-contentious") application was made in respect of Blocks A, B, C and D and common areas. The second ("contentious") application was in respect of two discrete areas, one of which was the turning area which was marked as "B2" on the map which attached to that application.
59. In his letter of 24th September, 2015 to the PRA, Mr. Mackey advised that Vico's title to the two separate registration applications was comprised in a "Deed of Conveyance of Common Areas" to Vico, executed by Brian Gill Contractors on 26th January, 1999. It was explained that while there was no formal requirement for Vico to make the registration application, the purpose in so doing was to quieten the title to the Vico Rock Estate for the reason advanced in the letter, namely that the Deed of Conveyance of 26th

January, 1999 was executed in less than ideal circumstances, not least the fact that the Deed had been executed only a matter of days before Brian Gill Contractors were to be struck off the Register of Companies. Mr. Mackey advised the PRA that subsequent to Brian Gill Contractors' execution of the Deed dated 26th January, 1999, "all title which remained in the Developer [Brian Gill Contractors] at the time of the execution in respect of Vico Rock Estate then vested in the Applicant [Vico] pursuant to the All Estates Clause as then set out in the Conveyancing Act, 1981 and which has subsequently been re-enacted in the Land and Conveyancing Law Reform Act 2009".

60. With regard to the "contentious" Land Registry application, Mr. Mackey set forth, *inter alia*, the following explanation:

"The lands as set out in B2 is a turning area and viewing platform and was meant to serve as an essential utility area serving the estate so as to enable, inter alia, motor vehicles, including emergency vehicles, to be able to turn and exit the Estate. It also serves and is subject to a pre-existing grant of right of way the benefit of which now vests in a Mr. Mark Pigott who is the owner of a private residence, Cassini, to enable him access and egress from his property onto the spine Road, and the Applicant's application for ownership of the lands at B2 are recognised as being subject to this clear right of way.

In addition, ownership of the lands at B2 are asserted by James Delaney and Tracy Delaney upon the basis that the lands in B2 were conveyed to their predecessor in title, Shawcross Limited by the Developer [Brian Gill Contractors] in December, 1994... After a period of sixteen years, the Developer (Brian Gill Contractors) was recently restored to the Register, following an application to the High Court which was moved by the solicitors for Shawcross Limited and James and Tracy Delaney and we understand that a Deed of Rectification has purportedly been executed seeking to, inter alia, remedy the alleged mapping error which would vest ownership in James Delaney and Tracy Delaney on a retrospective basis. The Applicant is, of course, not a party to this Deed of Rectification and Partners at Law have not furnished a copy of this Deed to us. Again I assert the Applicants title in this instance on the basis that the lands comprised in B2 were also vested in the Developer as of the date of the Deed of Transfer of Common Areas and have vested in the Applicant on that basis."

61. Mr. Mackey also made reference in his letter to the fact that he had filed a Caution in the Land Registry on 30th September, 2014 in relation to an application for first registration made by the Delaneys in respect of no. 20 Skyview House and the turning area. This application was made by way of a joint affidavit sworn by the Delaneys on 26th August, 2013.
62. At para. 5 of their affidavit, the Delaneys averred as follows:

"We are not aware of any question, affecting [my] title to the property or any part of it, or of anything whereby the title is or may be affected have called in question in any manner whatsoever".

63. In the course of his evidence, Mr. Mackey stated that until he ultimately learnt in 2015 of the application to restore Brian Gill Contractors to the Companies Register, no one had brought to his attention that Shawcross were maintaining that a mistake had been made in the 13th December, 1994 Brian Gill Contractors/Shawcross Deed.
64. Mr. Mackey testified that albeit that Vico's Caution was not lodged with the PRA until October, 2014, it remained the case that when the Delaneys swore their affidavit of 26th August, 2013 they were aware that Vico claimed ownership of the turning area, yet this information was not disclosed to the PRA contrary to the Land Registry rules.
65. As part of Mr. Mackey's preparation in 2015 for the drafting of Vico's applications for first registration, he had cause to consult the Register of Companies in order to ascertain the precise date in 1999 that Brian Gill Contractors had been struck off. He testified that to his surprise he found that Brian Gill Contractors had been recently re-instated to the Register. Having taken up a copy of the High Court Order of 26th February, 2015, he saw that the application for the company to be restored to the Register had been processed by Partners at Law, solicitors for Shawcross and the Delaneys in the within proceedings. Vico, however, had not been put on notice of the restoration application notwithstanding Vico's undoubted interest in the matter, which had been evidenced as far back as 3rd October, 2014 via Mr. Mackey's letter to Partners at Law notifying them that Vico had filed a Caution to the Delaney application for first registration.
66. Mr. Mackey took issue with Mr. Hefferon's reference in his affidavit grounding the petition to restore to "a dispute between Shawcross Limited and its neighbours" in circumstances where no specific reference was made to Vico or to the fact of the ongoing dispute between Vico and the Delaneys as to ownership of the disputed/turning area. Mr. Mackey also took issue with the averment made by Ms. Ethna Ryan, solicitor with Partners at Law, in her affidavit sworn 17th February, 2014, that the Minister for Finance, the Register of Companies and the Revenue had no objection to the Court making an order restoring Brian Gill Contractors to the Register.
67. Mr. Mackey stated that the Minister for Finance and Revenue's non-objection to the restoration of Brian Gill Contractors to the Register was on the basis that the sole purpose of the application was to transfer lands from Brian Gill Contractors to Shawcross, yet the Deed of Rectification that was duly executed on 21st July, 2015 had transferred the disputed/turning area to the Delaneys, and not Shawcross.
68. Mr. Mackey queried the validity of the restoration of Brian Gill Contractors to the Register by virtue of the failure of Shawcross/the Delaneys to put Vico on notice of the application to restore Brian Gill Contractors to the Register. He agreed, however, in cross-examination, that notwithstanding the reservations he expressed in his direct evidence with regard to the validity of the restoration of Brian Gill Contractors to the Companies

Register in 2015, Vico had not sought to set aside the company's restoration to the Register.

69. For the purpose of the within proceedings, the Court did not consider it necessary to make any specific findings regarding the deficiencies alleged by Mr. Mackey that pertain to the restoration application.
70. Mr. Mackey testified that Vico has never denied Mr. Pigott's right of way over the turning area. To this end, Vico does not dispute the reliefs being claimed in the Pigott plenary proceedings in relation to the right of way. Vico however disputes the Delaneys' claim to ownership of the disputed area.
71. The Court heard evidence from Mr. Martin O'Donnell, an apartment owner in the Vico Rock development and Chairman and a Director of Vico. Mr. O'Donnell testified that he was the first purchaser of an apartment in the development. It was his understanding from the outset that the turning area was to be in the common ownership of Vico. Mr. O'Donnell testified that consequent upon the 1999 Brian Gill Contractors/Vico Deed, at the behest of Vico, he had discussions with Mr. Delaney with a view to obtaining from Mr. Delaney a copy of the 1994 Brian Gill Contractors/Shawcross Deed so as to assist Vico in its understanding of the extent of the lands Shawcross had received in 1994. While Mr. Delaney was agreeable to this it never, however, came to pass.
72. Mr. O'Donnell testified that his understanding that Vico owned the turning area was on the basis that the Deed transferring the common areas to Vico in 1999 made a very explicit reference to a measure of the surface concerned for the overall mansion and the common areas. He stated that this measurement was precisely the same measurement of land as had featured in the Deed under which Brian Gill Contractors acquired the lands in 1986. It was Mr. O'Donnell's understanding that it was those lands that Brian Gill Contractors transferred to Vico in 1999, minus only the portion which had been transferred to Shawcross in 1994.
73. The Court heard from Ms. Margaret Ryan, a director of Paramount Estates, the entity that manages the Vico apartment complex. She testified that Paramount maintains the lighting and the common areas and also looks after the insurance for these areas. Furthermore, gardeners are retained to maintain the common areas. She recounted one meeting with Mr. Delaney which took place in 2012 when Mr. Delaney put it to her that he owned the turning area. She testified that this was contrary to her understanding as she had been informed in 2005 that it was part of the common areas which had been transferred to Vico.

***Submissions on title on behalf of the Delaneys***

74. On behalf of the Delaneys it is submitted that they are not seeking an order of rectification from the Court in relation to the 13th December 1994 Deed; that has been achieved by the Deed of Rectification effected on 21st July, 2015. What is sought is an order of the Court declaring that they are entitled to be registered as the owners of the disputed turning area on foot a chain of conveyances, namely:

- (a) The Deed of 13th December, 1994 whereby Brian Gill Contractors conveyed certain lands to Shawcross;
  - (b) The Deeds of 4th October, 2012 between Shawcross and the Delaneys; and
  - (c) The subsequent Deed of Rectification of 21st July, 2015 between Brian Gill Contractors, Shawcross and the Delaneys.
75. It is submitted that the dilemma for the Court is what title can be set up against the chain of title which the Delaneys hold. It is contended that all of Vico's entitlements to the disputed/turning area rest in contract. These are entitlements Vico has to assert against Brian Gill Contractors and not the Delaneys. Insofar as Vico asserts that Brian Gill Contractors hold the turning area in trust for Vico, Vico has not sought to engage with Brian Gill Contractors in that regard, even since the company has been restored to the Register.
76. Counsel submits that the 13th December, 1994 Brian Gill Contractors/Shawcross Deed creates two issues. Firstly, it is accepted that the 13th December, 1994 Deed did not convey the turning area to Shawcross. Secondly, it confirms that the turning area was not then part of the common areas to the Vico Estate apartment development. It is submitted that the failure to include the turning area in the 1994 Deed was a mistake as the intention was to convey this land to Shawcross. Counsel points out that it is undisputed that Mr. Delaney constructed what became the disputed /turning area without any financial input from Vico.
77. Insofar as Vico asserts title to the turning area by reliance on the Brian Gill Contractors/Vico Deed of 26th January, 1999, it is submitted that that is an incomplete Deed, having been furnished to Vico pending an agreement between Brian Gill Contractors and Vico in respect of which maps were to be agreed. It is submitted that given its incomplete nature and the fact that no maps were agreed, the Court should not embark on an interpretation of the 1999 Deed.
78. The only legal construction is that Vico received the 1999 Deed in escrow. In this regard, counsel cites Halsbury's Laws of England-Vol.32 (2012) at p. 239:
- "When an instrument is delivered as an escrow it cannot take effect as a deed pending the performance of the condition subject to which it is delivered, and if it is not performed the writing remains entirely inoperative."
79. Counsel submits that the present position is that the Delaneys have a title to the turning area which may or may not be subject to challenge by some party. Counsel argues that that can only come about through either a joinder of Brian Gill Contractors, or Brian Gill Contractors itself taking a stance on the matter. This has not occurred to date. It is submitted that it is not sufficient for Vico to cast aspersions on the restoration of Brian Gill Contractors to the Register without Vico itself having properly set up its own transactions.

80. In all the circumstances, it is submitted that it is in order for the Court to declare that the Delaneys have a chain of title and that they are entitled to be registered as owners of the turning area on foot of that chain of title.

***Vico's submissions on title***

81. Counsel for Vico submits that there is no basis for the declarations sought by the Delaneys in the title proceedings. In order to grant such relief, the Court would have to infer the following:
- (a) That the description of the parcels and the map attached to the 13th December 1994 Brian Gill Contractors/Shawcross Deed was a mistake or oversight, without the Court hearing or testing any evidence from Brian Gill Contractors or their original conveying solicitors, and without evidence that there was at all times a continuous intention on the part of Brian Gill Contractors to transfer the disputed/turning to Shawcross;
  - (b) That the Licence Agreement between Brian Gill Contractors and Shawcross was a mistake, without the Court hearing any evidence from the company or their original conveyancing solicitors;
  - (c) That the Declarations of Identity made by Brian Gill Contractors' architect, Mr. Fitzpatrick, were mistakes or oversights, again without the Court hearing evidence from Mr. Fitzpatrick clarifying or refuting his certificates.
  - (d) That the car park space Licence Agreement entered into on 3rd February/July, 1995 between Brian Gill Contractors and the Deegans was a mistake and by logical inference that the subsequent assignments of that Licence of 28th November 2003 and 25th October, 2007 were also mistakes or oversights;
  - (e) That the 1999 Deed of Conveyance of Common Areas between Brian Gill Contractors and Vico, which included the turning area and the right of way now attaching to Cassini, was a mistake or oversight;
  - (f) That there was no requirement for Vico as the owner of the common areas (including the /turning area) on foot of the 1999 Deed to be made a party to the purported Deed of Rectification of 21st July, 2015 or that the failure to have Vico enjoined in that Deed was a mistake or oversight;
  - (g) That Mr. O'Callaghan was incorrect in his unchallenged expert evidence as to his understanding, measurements and descriptions of the lands described in the 26th January, 1999 Brian Gill Contractors/Vico Deed; and
  - (h) That Mr. Mackey was mistaken in his understanding of the reserved rights, easements, exclusions, licences, and covenants in the relevant Deeds, when no expert or alternative professional witness was called to refute his evidence.



82. Counsel further submits that as far as the title proceedings are concerned, the Delaneys have not established that there was a continuous intention on all relevant parties to rectify the anomaly said by the Delaneys to attach to the 13th December, 1994 Deed, an anomaly now said by the Delaneys to have been cured by the 2015 Deed of Rectification. In particular, the Delaneys have not called any evidence from the original conveyancers concerning the 1994 Deed, save Mr. Delaney.
83. It is further contended that the purported Deed of Rectification, on which the Delaneys rely, cannot assist them. It is beyond belief some 21 years after the 1994 Brian Gill Contractors/Shawcross Deed that a continuing intention to transfer the turning area was relied upon. This is so given the myriad transactions that occurred after the 1994 Deed, and given that Brian Gill Contractors was struck off the Register from 1999 onwards, until its restoration in 2015.
84. It is submitted that Vico has established its title to the turning area, title having been obtained on 26th January, 1999. Counsel contends that the absence of a map attaching to the 1999 Deed is not fatal as the parcels of land are easily identifiable in the Deed. It is also clear that the lands acquired by Shawcross under the 13th December, 1994 were excluded from the 1999 Deed. Moreover, the 1994 Deed provided car park spaces for Shawcross on lands in front of Block E/Skyview House and not on the turning area. More significantly, the Brian Gill Contractors/ Deegan Licence Agreement of 3rd February/July 1995 provided for one car park space for the Deegans on the turning area which is in express contradiction of any continuing intention on the part of Brian Gill Contractors to convey this piece of land to Shawcross.
85. In the absence of any evidence from Brian Gill Contractors, or their original conveyancing solicitors and architect, the Delaneys have not established the burden they shoulder in order to prove their title.
86. It is submitted that Vico is entitled to a declaration that it is the owner of the turning area.

***The Pigott submissions on the title issue***

87. By and large, counsel for Mr. Pigott's submissions on the title to the turning area echoed those of Vico. As with counsel for Vico, counsel for Mr. Pigott submits that for the Delaneys to succeed in the title proceedings they must establish that a mistake occurred in the 1994 Deed. Counsel contends that there is no evidence of such a mistake before the Court.
88. As outlined in Wylie's Land Law (5th Ed. Bloomsbury Professional) at para. 3.183, and in *McCormack v. McCormack* (1887) 1LR 119, a Court has to be extremely cautious in making an order rectifying a deed where there is no evidence of mistake in respect of those title documents.
89. It is contended that the legal authorities require evidence adduced in testimony that an error or mistake has occurred and that any such testimony must be assessed by the

Court with vigilance and caution, especially where there are no written documents from the time of the alleged mistaken deed recording the alleged intention of the parties.

90. Counsel further submits that the purported transfer of the turning area by Shawcross to the Delaneys of 4th October, 2012 is a false document. If the disputed area was not transferred to Shawcross in 1994 then Shawcross could not have passed it to the Delaneys in 2012.
91. Counsel referred the Court to the evidence given by Mr. O'Callaghan in relation to the 1999 Brian Gill Contractors/Vico Deed.
92. It is further contended that the circumstances giving rise to the 2015 Deed of Rectification are suspicious, particularly where no notification of the restoration application was given to either Vico or Mr. Pigott.

**Considerations on the title issue**

93. Based on the evidence, and the parties' submissions, the first issue to be decided is whether there is evidence before the Court to show that a mistake occurred in 1994 insofar as the 1994 Brian Gill Contractors/Shawcross Deed did not provide for the transfer of the turning area to Shawcross
94. As regards his and Mrs. Delaney's title to the turning area and the alleged mistake which occurred in 1994, the height of Mr. Delaney's evidence was as follows:

"Q. ...it is the case that you make in these proceedings...that [the map attaching to the 1994 Deed] constitutes a mistake. Are you saying it's a mistake?"

A. No, the line might be a mistake because I bought towards the wall but the wall wasn't there, that wall that's there wasn't there at the time. There was no wall, it was all one piece of land from the main wall down to the railing."
95. No evidence was given by or on behalf of Brian Gill Contractors that there was an error or mutual mistake in the 1994 Deed. In the absence of evidence from Brian Gill Contractors, their original conveying solicitor and other experts (including Mr. Fitzpatrick), I cannot find that there was some form of mutual mistake between the parties to the 1994 Deed.
96. Counsel for Mr. Pigott submitted that even if evidence of a mistake had been called the absence of contemporaneous documents from 1994 evidencing a mistake should make the Court cautious about changing the 1994 Deed or accepting the Deed of Rectification. Counsel also pointed out that no evidence has been heard from the solicitor who acted for Shawcross in 1994 that there was an error in the 1994 Deed. It is the case that no evidence has been adduced, either by way of solicitor's memorandum or otherwise, evidencing the intention to convey the turning area to Shawcross in 1994.
97. Insofar as the recitals contained in the 2015 Deed of Rectification are sought to be relied on by the Delaneys, I find those recitals vague in the extreme. They state only that "it

has come to light that the map attached to [the 1994 Deed] was incorrect as it did not correctly reflect the boundaries of the lands intended to be conveyed." To my mind, that is not remotely sufficient to substantiate the claim that a mistake occurred in relation to the 1994 Deed.

98. Counsel for Vico and counsel for Mr. Pigott also submitted that even if there had been some evidence of an error or mutual mistake having occurred on 13th December, 1994, it was noteworthy all of the transfers, assignments and licences entered into post 13th December, 1994 are inconsistent with the claim now being advanced by Mr. and Mrs. Delaney.
99. As previously referred to, on 3rd February/July, 1995, Brian Gill Contractors entered into a Licence Agreement with the Deegans which gave them permission to use a car park space on the turning area. It was contended on the part of Vico and Mr. Pigott that this Licence Agreement is not consistent with the turning area having been or intended to be conveyed to Shawcross on 13th December, 1994. I accept this argument. Additionally, I note that in the 1995 Deed between Shawcross and the Deegans (a Deed signed by Mr. Delaney on behalf of Shawcross) there is no reference to the lands being retained by Shawcross as including the turning area.
100. The case is also made by Vico and Mr. Pigott that there are other irreconcilable problems with the Delaneys' title claim, not least that the maps which attached to the Declarations of Identity sworn, respectively, on 13th December, 1994 and 6th February, 1995 by Shawcross' architect, Mr. Fitzpatrick, and which delineated the lands belonging to Shawcross, did not include the disputed area. Counsel for Mr. Pigott submitted that all of the foregoing factors speak to the truth of the matter, namely that Shawcross never purchased the turning area in 1994 and that there was no intention in 1994 that the turning area would be transferred to Shawcross. Based on the documentary evidence before me, I am constrained to agree with counsel's submissions in this regard.
101. In summary, in the context of the dispute between Vico and the Delaneys as to ownership of the turning area, I am satisfied that the 1994 Brian Gill Contractors/Shawcross Deed is an extremely important document in that it represents what was transferred to Shawcross in 1994. It is common case that the turning area was not included.
102. I am also satisfied that the Deed of 3rd February, 1995 between Shawcross and James and Susan Deegan, and the Licence Agreement dated 3rd February, 1999 between Brian Gill Contractors and the Deegans, are instructive in determining that ownership of the turning area was never intended to vest in Shawcross. These documents strongly belie any suggestion that the intention in 1994 was to transfer the disputed area to Shawcross. I also consider the later transfer between the Deegans and Martin and Caroline Kelly, and the subsequent transfer between Martin and Caroline Kelly and Caroline Kelly as equally important in refuting the claim now made by the Delaneys.
103. Of the aforementioned five documents, the 1995 Licence Agreement between Brian Gill Contractors and the Deegans is perhaps the most salient document given that it almost

immediately post-dated the Brian Gill Contractors/Shawcross Deed of 13th December, 1994.

104. The question which now arises is where the findings the Court has made leave the 2015 Deed of Rectification upon which the Delaneys rely as part of their chain of title? I am satisfied that having found no evidence of a mistake having occurred in relation to the 1994 Deed, the Court cannot attach any weight to the 2015 Deed. Similarly, in light of the Court's finding that no persuasive evidence was adduced to establish that an error or mutual mistake occurred in 1994, it follows that the Deed of 4th October 2012, wherein Shawcross purported to transfer the turning area to the Delaneys, has no legal effect since as of 4th October, 2012 Shawcross did not own the turning area. Furthermore, given that the Court has impugned the 2015 Deed of Rectification, that Deed cannot be called in aid to save the 2012 Deed. In all the circumstances of this case, I am satisfied that the Delaneys' claim to ownership of the turning area has not been made out.
105. I turn now to Vico's claim to ownership of the turning area. Their claim is based on the contents of the 1999 Brian Gill Contractors/Vico Deed. This Deed lay in abeyance for some 25 years or so until Vico's application for first registration was made in September, 2015. Mr. Mackey accepted that albeit signed by the Directors of Brian Gill Contractors on 13th December, 1999, the Deed was not signed by Vico until in or about the time of Vico's application for first registration in 2015.
106. It is common case that the Brian Gill Contractors/Vico Deed is incomplete in that it lacks the map referred to in the body of the Deed.
107. In the course of his evidence, Mr. Mackey acknowledged that the 1999 Deed is not a perfect Deed. Under cross examination, he accepted that the Deed had been drafted in a manner such as required a map to make sense of it. However, in asserting Vico's title to the turning area he relies on the maps prepared by Vico's architect, Mr. O'Callaghan, which attached to Vico's two applications for first registration as made to the PRA in September, 2015.
108. The Court had the benefit of evidence from Mr. O'Callaghan. Mr. O'Callaghan testified that the map prepared by him dated 25th August, 2015 and which includes the turning area (described as B2 on the map) is consistent with the contents of the Declaration of Identity sworn on 22nd September, 1987 by Mr. Burke, architect for Brian Gill Contractors, and with the map attached to that Declaration. In effect, Mr. O'Callaghan testified that the lands acquired by Brian Gill Contractors in 1986 included the turning area.
109. With reference to the description of "the Mansion" set out in the First Schedule in the 1999 Deed as comprising "two roods thirty-one and a quarter perches or thereabout statute measure", Mr. O'Callaghan testified that he had done a computer calculation which converted the statute measure to square metres and had found that it was unquestionably the case that the balance of the lands (which include the turning area) exclusive of the Mansion area were conveyed to Vico under the 1999 Deed.

110. Mr. O'Callaghan gave the following evidence:

"Q. And the calculation you've done on the description of the mansion, and then you've looked at the common areas what's left, your calculation is that under this Deed, the 1999 one, that it is unquestionably the case that the turning area was conveyed to Vico Rock?

A. It would be. When you do the calculation and so forth they came up broadly similar when you do them on the ordinance survey map and so forth. They're not dissimilar."

111. Cross-examined by counsel for Mr. Pigott with reference to the 1994 Brian Gill Contractors/Shawcross Deed, Mr. O'Callaghan stated that Map 1 as attached to the 1994 Deed clearly showed that the turning area was not conveyed to Shawcross in 1994.

112. Overall, based on the calculations carried out by Mr. O'Callaghan, and notwithstanding the absence of the map referred to in the Deed, I am satisfied that the common areas which were conveyed to Vico under the 1999 Deed include the turning area. I am also satisfied that this is the case given that the disputed area was not transferred to Shawcross in 1994, and in light of Brian Gill Contractors' dealings regarding the provision of car park spaces over the course of 1994 and 1995, as referred to earlier in the judgment.

113. I am satisfied that Vico is entitled to a declaration of ownership of the turning area.

***The boundary wall issue***

114. When the Delaneys applied to the PRA in August 2013 for first registration for no. 20Vico Rock/Skyview House (and the turning area), Mr. Pigott filed an observation to the effect that he had a right of way over the disputed area and stated that he was the owner of the boundary walls to the east and north of the property in respect of which the Delaneys sought first registration. In this regard, Mr. Pigott made reference to the Naidoos/Pigott Deed of 9th April 2000 as the source of his title to the said boundary walls.

115. In his Defence to the title proceedings, Mr. Pigott repeats his claim of ownership of the said boundary walls.

116. As the basis of his claim of ownership, Mr. Pigott relies on the aforementioned Naidoos/Pigott Deed and on the map attached thereto. He asserts that the map shows that the boundary walls in question are shown as within the scope of the lands conveyed to him under the Deed.

117. In the course of his evidence, Mr. Delaney outlined his claim to the boundary walls in the following terms:

"Well the wall and the railing, the wall is retaining the car park, and any engineer will tell you if you-a wall is there, the person who has the highest ground owns it because that's what it is supporting, and if the wall fell down tomorrow I would be responsible for it. But that's what I was told by an engineer."

118. In written submissions and oral submissions, counsel for the Delaneys argued that there was no valid basis for Mr. Pigott's claim of ownership of the boundary walls in issue in these proceedings. In the first instance, counsel pointed to the fact that the map upon which Mr. Pigott relied was described in the Naidoos/Pigott Deed as "for identification purposes only" albeit that counsel acknowledged that the Second Schedule to the Deed referred to the premises being acquired as premises "more particularly described and delineated on the Plan [Map] annexed [to the Deed] and thereon edged in red". Undoubtedly, this map shows the boundary as walls within Mr. Pigott's take.
119. Counsel for the Delaneys, however, points to a Deed of 21st December 1970 under which Kyber Pass Hotel Limited acquired the Kyber Pass Hotel and land annexed thereto from a Mr. Kennedy. Mr. Kennedy had previously acquired the lands by Indenture of Lease dated 17th January, 1958 from one William Gaw for a term of 999 years.
120. The lands the subject of the 21st December, 1970 Deed are described as "ALL THAT AND THOSE the hereditaments and premises known as The Kyber Pass Hotel together with being part of the lands of Dalkey...and more particularly described on the map annexed hereto and thereon surrounded by a red verge line..."
121. Counsel contended that it was clear from the Naidoos/Pigott Deed of 12th June, 2000 that title to the site sold by the Naidoos to Mr. Pigott derived from the following:
- An Indenture of Conveyance dated 1st December 1960 between Brian Gaw and William Gaw and Claus von Pauer;
  - A Conveyance between Claus Von Pauer and James Kerr dated 16th August, 1965;
  - A Conveyance between James Kerr and Peter Foster Verschoyle dated 22 October, 1993; and
  - A Conveyance dated 31st July, 1984 between Peter Foster Verschoyle and the Naidoos dated 31st July, 1984.
122. The Delaneys' case is that since the boundary walls were clearly contained in the lands acquired by Kyber Pass Hotel Limited from Mr. Kennedy on 21st December, 1970 (Mr. Kennedy having acquired the lands on 17th January, 1958) Kyber Pass Hotel Limited therefore acquired the said boundary walls in precedence to the chain of conveyances recited in the Naidoos/Pigott Deed, the earliest of which was a Conveyance dated 1st December, 1960. Counsel thus contends that the boundary walls could not then have travelled with the 1960 Conveyance which is, in effect, the root of Mr. Pigott's title to Cassini.
123. Counsel pointed to the map which attached to the Deed of Conveyance dated 21st December, 1970 under which the Khyber Pass Hotel Limited acquired the relevant lands (subsequently transferred to Brian Gill Contractors). He contended that the map clearly shows the boundary walls within the lands which were being conveyed to Khyber Pass Hotel Limited. I accept this to be the case.

124. It is common case that portion of the lands which Kyber Pass Hotel Limited acquired in 1970 were the subject of the Indenture made on 31st January, 1986 between UDT Bank Limited and others (including the liquidator of Kyber Pass Hotel Limited) and Brian Gill Contractors. From the map which attached to the said Indenture, it is clear that the lands acquired by Brian Gill Contractors included the turning area and the two boundary walls in issue in these proceedings.
125. Based on the documents referred to above, and being satisfied that the map which attaches to the Naidoos/Pigott Deed should be afforded less force than the map attached to the 21st December, 1970 Deed, I am not satisfied, on balance, that Mr. Pigott's claim to ownership of the boundary walls has been made out such as to grant the declaration sought.
126. I am also satisfied, however, that my conclusions in the above regards cannot assist Mr. Delaney in his claim to ownership of the boundary walls. The walls in question surround the turning area. This Court has determined that ownership of the turning area vests in Vico. It therefore follows that as the boundary walls stand on lands owned by Vico, ownership of the walls vests in Vico.

**The Pigott plenary proceedings – alleged obstruction of the Pigott right of way by the Delaneys**

127. Following the acquisition of his site, Mr. Pigott commenced building Cassini in or about 2002. The house was completed in early 2005. The Pigotts had no immediate plans to relocate to the house post construction. At the time they were living in Wexford with their four children. Mr. Pigott was commuting abroad on a regular basis in the course of his job as a computer programmer. The house was not occupied until in or about 2009 when it was let out to tenants.
128. Evidence was given by Mark Pigott and Joan Pigott in respect of the alleged obstruction of their right of way. Mr. Pigott testified that following the letting of the house he became aware of complaints being made by the tenants regarding their ability to access and egress Cassini. The tenants were unable to drive forward onto the right of way on the turning area in order to prepare for the necessary reversing manoeuvre into Cassini. This was due to the presence of a boat and four cars which had been placed on the turning area and which encroached on the right of way. The boat (and the trailer hitch in front of it) stretched almost to the entrance gate to Cassini.
129. Mrs. Pigott testified that she came to Dublin in the Autumn of 2009 to address the situation. She pointed to photographic evidence from October 2009 of a boat and four cars parked in the turning area and which encroached on the right of way.
130. Mrs. Pigott did not know in 2009 who owned the turning area save that she was aware that she and her husband had a right of way for the purpose of accessing and egressing Cassini. She ascertained that the boat was owned by a Mr. Cluskey. She had made contact with Mr. Cluskey who had advised her that he did not have to move the boat as Mr. Delaney had told him that he could place the boat on the turning area.

131. Both Mr. and Mrs. Pigott testified that they had ascertained, via the gardaí, that the four cars which were placed alongside the boat were at the time being advertised for sale on the website of a Mr. Kavanagh, a local car dealer. Mrs. Pigott stated that her solicitors had investigated this and duly wrote to Mr. Kavanagh who had advised that he was selling the cars on behalf of Mr. Delaney.
132. Mr. Pigott stated that between 2009 and July, 2010, his solicitors sought the removal of the boat. It was ultimately removed in July, 2010. As a result of the presence of the boat and cars on the right of way Mr. Pigott instituted his plenary proceedings in May, 2010.
133. Mr. Pigott and his family moved into Cassini in August, 2014. Shortly thereafter, a large storage type container was moved onto the turning area and positioned in the same spot on which the boat had previously stood. The presence of this container gave rise to the same problems for Mr. Pigott and his wife as those caused by the presence of the boat for the Pigotts' tenants in 2009. Mr. Pigott testified that he and his wife were unable to drive sufficiently forward onto the right of way in order to execute their reversing manoeuvre for access to their driveway. He stated that when requested, Mr. Delaney refused to move the container stating that it was there to facilitate works that were then ongoing at Apartment 20 Skyview House.
134. Mrs. Pigott testified that the container which had been deposited on the turning area from in or about August 2014 had been left there for a number of months until it was moved. She described the container as being some 6 – 7m in length and that it came up almost to the entrance gate to Cassini. She stated that when, in January 2015, she queried Mr. Jim Delaney Jr. about the container she had been told by him to get used to it. She testified that 60% of the container was parked on the right of way.
135. Mr. Pigott outlined the difficulties which vehicles parked on the turning area presented for himself and his family. He stated that the right of way was necessary in the following circumstances: approach to his property is from a tarmac road. Upon entering onto the turning area he is required to drive deep into the right of way so as to manoeuvre his motor vehicle into a position to complete a reversing manoeuvre into the entrance to Cassini. He stated that reversing into the property is the easiest way of accessing his home. Whilst driving forward into the property can be done, there are a number of obstacles to this, not least a plinth located on the left as one enters the turning area, and the two posts which sit either side of the entrance gate to Cassini. He stated that driving forward would bring his vehicle close to all of these structures. Moreover, if he were to drive forward into his property, there remains the problem of reversing out of Cassini as it is not possible to turn his motor vehicle around once it is driven forward into his driveway. The driveway is wide enough to accommodate one car only.
136. Mrs. Pigott told the Court that in 2014 she drove a Mercedes Viano. Her mode of accessing Cassini was to firstly drive forward deep into the turning area using her right of way and then reverse into the entrance to Cassini. This was so that when egressing the premises, she would be in a position to drive straight out.



137. Mrs. Pigott stated that in 2014 she had four children of national school age. The demands of family life necessitated taking the children to school and to their hobbies such as dancing, swimming and sports. This was particularly so on Saturday mornings. On Saturdays, her day would commence at 8am and she would be driving in and out of Cassini on a number of occasions, typically until 2pm.
138. She testified that the container which was on the turning area between 2014 and 2015 was parked in such a way that it encroached on the right of way. This meant that she could not drive forward deep into the right of way so as to be able to then reverse into her driveway. As a consequence, she had to undertake her reversing procedure by driving her car outside of the right of way.
139. She pointed to photographic evidence of one of the many incidents of damage to her car which had been caused by her having to undertake difficult manoeuvres in order to try and access Cassini. She stated that albeit that the container was ultimately removed in 2016, problems still persisted because cars continued to be parked on the right of way. In this regard, she referenced a drawing which was done on 8th October, 2016 by Mr. Julian Keenan, an engineer retained by herself and her husband, which showed four cars parked on the turning area, all of which to a greater or lesser extent encroached on the right of way.
140. Mrs. Pigott also testified to what confronted her on 3rd September, 2016 as she was returning home having collected her son from his Saturday activities. When she came to the turning area, she was confronted with four cars, all of which to a lesser or greater extent were impinging on the right of way. In addition, there was a car parked outside of the plinth. Ms Pigott described the plinth as standing a foot and a half in height and very difficult to negotiate. As a result of the impediments she was met with on 3rd September, 2016, Mrs. Pigott was unable to access Cassini and had to park her car away from her home and then walk to the house with her son. On that occasion, she had encountered Mr. Delaney and told him that she could not access her driveway. Mr. Delaney's response to her (in rude language in front of her son) was that she had plenty of room to access her driveway. On that particular occasion, she made a complaint to the gardaí. Mrs Pigott stated that two of the cars (a Kia and a Fiat 500) which were encroaching on the right of way on the date in question belonged to Mr. Delaney. Another "Smart" car which was also encroaching on the right of way belonged to Mrs. Delaney.
141. Mrs. Pigott could not identify the owner of a BMW 3 which was parked alongside the Fiat 500 on 3rd September, 2016, nor the Mazda vehicle which was parked along the plinth.
142. Mrs Pigott testified that on another occasion, on 8th October 2016, again at a time when she was bringing her son back from his sports activities, she was confronted with a similar impediment to that which presented on 3rd September, 2016.
143. It was also her evidence that once there were cars encroaching upon the right of way, it necessitated her using the balance of the turning area (i.e. the area outside of the right of

way). However, she could never be sure whether she could use this space to manoeuvre her vehicle as she did not know from day to day what vehicles would be parked on that part of the turning area over which there was no right of way serving Cassini. If the right of way was blocked, the biggest problem was the number of manoeuvres she would have to engage in in order to try and access her home. This was a much more difficult situation than the one which presented when using the right of way without impediment. If the right of way was clear she was able to drive forward deep into the turning area and then reverse into the driveway of Cassini. However, it was twice as difficult to undertake this manoeuvre when the right of way was blocked as it was very much dependent on whether or not cars were parked on that part of the turning area outside of the right of way.

144. Mrs. Pigott also recounted a particular occasion in 2017 when the presence of Mr. Jim Delaney's truck on the right of way effectively blocked her from driving out of her driveway. She stated that on another occasion a BMW car belonging to a neighbour in Sorrento Heights had been parked on the right of way. When asked by Mrs. Pigott why he was parking on the turning area, the neighbour had advised that he had been given permission by Mr. Delaney to do so.
145. Mrs. Pigott further testified that the obstruction of the right of way caused by the container and the other cars gave her concern that in the event of an emergency, for example if one of her children injured themselves, she would not herself be able to drive them to hospital.
146. She testified that if the right of way was left clear, she had no difficulty in driving forward from the public road onto the right of way and then reversing into Cassini. She confirmed that since 2018, when the right of way was hatched out in yellow on the turning area on foot of an Order of the High Court (Gilligan J.), she has had no trouble in accessing or egressing Cassini.
147. Under cross examination, Mrs. Pigott denied in engaging in deliberately difficult manoeuvres in order to try and access her home. She accepted that the Delaneys have no control over third parties who may park their vehicles on the turning area including on the right of way.
148. She did not accept the proposition that even if the right of way was obstructed that she could drive forward on the right of way further away from the boundary wall. She stated that this was not a feasible option since the gateway to Cassini constituted a particularly narrow space which necessitated her driving forward on the right of way close to the boundary wall so as to be able to manoeuvre her vehicle to a position from where she could then reverse into her driveway.
149. In the course of his evidence, Mr. Pigott alluded to a particular occasion in October, 2014, when a blue van was also parked alongside the container. Mr. Pigott stated that when he advised the owner of the blue van that it presented a problem for him and his wife, the owner advised that he had parked his van in this spot in question at the invitation of Mr.

Delaney. Mr. Pigott testified that the presence of the blue van alongside the container was the worst possible outcome for himself and his wife as it rendered it impossible for them to get their respective vehicles into a reversing position in order to access their home. He stated that the only option left to them was driving forward into the driveway of Cassini which meant navigating the plinth on the turning area and the posts on either side of the entrance gate to Cassini.

150. Mr. Pigott also testified that if he drove into Cassini in forward gear then exiting the property became a problem. If there was a car parked on the turning area in the space opposite their entrance gate in addition to the presence of the container and blue van on the turning area, this meant that he and his wife would not be able to exit their home by car. That this situation could confront them on any given day had caused difficulty and anxiety as neither Mr. Pigott nor his wife knew what vehicles, in addition to the container, would be on the turning area when they sought exit their premises by car.
151. Mr. Pigott stated that even if the space opposite the entrance to Cassini was free of cars as he sought to exit, by reversing out of Cassini and onto that particular space it meant that he and his wife would be driving their respective cars onto private property over which they had no right of way.
152. He testified that on a particular date in October, 2015, as well as the container and a painter's van which were encroaching on the right of way, Mr. Delaney's son, Mr. Jim Delaney, had also parked his truck alongside the painter's van.
153. A particular problem for Mr. Pigott was that the nature of his business meant that he had to take early flights. Thus, if on a particular day he was to drive forward into his driveway because of the presence of vehicles on the right of way and other vehicles parked on the turning area, it meant that he would not be able to drive his car out of his driveway. That meant having to make alternative arrangements to get to the airport, effectively having to park his car elsewhere than on his own grounds so that he would be able to drive to airport in the mornings.
154. Mr. Pigott told the Court that in January, 2016 he had occasion to speak to one of the residents in the Vico Rock apartment complex who had parked his van on the right of way, namely in the spot where the container had previously stood. The resident advised Mr. Pigott that Mr. Delaney had given him permission. When asked by Mr. Pigott to move the van he refused and indicated that Mr. Pigott's right of way was only for a piece of ground in front of the entrance to Cassini. Mr. Pigott stated that this van was only moved after contact was made with the resident by Mr. Pigott's solicitor.
155. Mr. Pigott stated that in April, 2016, Mr. Delaney had marked out the turning area for car parking. In October, 2016, because of ongoing obstructions to the right of way, Mr. Pigott brought an application for interlocutory relief. On 28th October, 2016, the Delaneys gave an undertaking to the Court to remove their vehicles from the right of way. Mr. Pigott stated that as a result of this, he and his wife were able to access their property by reversing into their driveway using the right of way.

156. By further order of the High Court of 11th January, 2017 (Faherty J.), it was agreed that the aforesaid undertaking was to continue pending the hearing of the full action. On that occasion the Delaneys further undertook to remove the car parking delineation which had previously been marked out by Mr. Delaney, and to erect "No Parking" signs of specific dimensions at designated locations on the turning area.
157. It is accepted that between January, 2017 and April, 2017, the Delaneys did some works in compliance with the said undertakings. Mr Pigott testified, however, that in May, 2017, Mr. Jim Delaney Jnr. began parking his truck in the area of the right of way and that on a particular occasion it was parked in such a way as had prevented Mr. Pigott's wife from leaving Cassini by car. Photographic evidence of this obstruction was produced to the Court.
158. In the course of his evidence, Mr. Pigott stated that not all of the obstructions which he and his wife had encountered had been photographed by him or his wife.
159. He stated that because of ongoing difficulties in 2017 he had to seek further interlocutory relief.
160. By Order of the High Court (Gilligan J.) of 16th June, 2017, Mr. Pigott was given liberty to outline his right of way in yellow crosshatching on the turning area and to remove car park space delineations which had previously been drawn on the turning area by Mr. Delaney.
161. Mr. Pigott testified that the right of way remains hatched in yellow. He stated that whilst the Delaneys still park on the turning area, they are not now encroaching on the right of way. According to Mr. Pigott, the interlocutory order granted by Gilligan J. on 16th June, 2017 has resolved the issue. Mr. Pigott was anxious however that this order would be made permanent.
162. The Court heard evidence from Mr. James Delaney and Mr. Jim Delaney.
163. Mr James Delaney testified that between 1994 and 2000, he did not particularly use the turning area for car parking as his apartment (no. 20 Vico Rock/Skyview House) had two car park spaces located in front of block E/Skyview House. The occupier of apartment 19 Vico Rock/Skyview House also had one car park space in front of the building and one on the turning area. He stated that he himself only used the turning area as a car park space when he wanted to get something out of his back garden. Mr. Delaney stated that anyone who wanted to use the turning area as a car park used it as such.
164. Mr. Delaney stated that when Mr. Pigott acquired his site in 2000 his architect, Mr. Kennedy, had sought Mr. Delaney's permission to park a crane on the turning area for six months while Cassini was being constructed. Mr. Delaney had not objected to this. He testified to having cordial relations with Mr. Pigott. However, relations between himself and Mr. Pigott deteriorated in or about 2010 when Mr. Delaney had advised Mr. Pigott that he had no entitlement to park a hiace truck and trailer in the turning area and that

his only entitlement vis-à-vis the turning area was to exercise his right of way to access and egress Cassini.

165. Under cross-examination by counsel for Mr. Pigott, Mr. Delaney accepted that in November, 2009 he had facilitated placing of a boat (which he said he part owned) on the turning area. He denied, however, that the boat obstructed Mr. Pigott's tenants access to Cassini.
166. Mr. Delaney was cross-examined about an email received by Mr. Pigott's solicitors on 2nd December, 2009 from a Mr. Kavanagh advising that he had been requested by Mr. Delaney to sell a vehicle bearing registration 98 D 77836 (and other vehicles) which had been placed on the turning area in November, 2009. Mr. Delaney denied ever having dealings with Mr. Kavanagh and stated that he knew nothing about Mr. Kavanagh.
167. Mr. Delaney accepted that in 2014 he had placed a container on the turning area which remained in situ for five months while he was refurbishing his apartment. He denied that the container infringed upon Mr. Pigott's right of way. While acknowledging photographic evidence which showed the presence on the turning area in January, 2015 of a white Kia car owned by him and a Red Smart Car owned by his wife, Mr. Delaney refuted any suggestion that these vehicles blocked access to Cassini.
168. Mr. Delaney accepted that in October, 2015, his son's truck was parked on the turning area but maintained that the truck was only parked there on the day in question for the purpose of effecting deliveries to Mr. Delaney.
169. Questioned about the presence of his Kia and Mrs. Delaney's Smart car on the turning area in April, 2016 alongside which was parked a BMW, Mr. Delaney could not account for why his and his wife's cars were parked there on the date in question and not on the two car park spaces in front of Skyview House.
170. Mr. Delaney denied having told the tenant of number 16 Vico Rock apartments that he could park his BMW on the turning area.
171. He acknowledged that on the 28th October, 2016 he and his wife undertook to the Court not to place or maintain or give permission to place and maintain any obstruction on Mr. Pigott's right of way. He acknowledged the further undertaking on 11th January, 2017 to continue the previous undertaking and to remove the car park delineation spaces previously marked by him on the turning area. He also acknowledged that he undertook to place "No Parking" signs in the area.
172. Notwithstanding the aforesaid undertaking, it was put to Mr. Delaney that on 17th May, 2017 Mr. Jim Delaney truck was in situ on the turning area effectively blocking the entrance to Cassini. Mr. Delaney again denied this contention stating that his son's truck was only in the area for a short few minutes on the day in question.

173. It was further put to Mr. Delaney that ongoing interference with Mr. Pigott's right of way necessitated a further court application in June, 2016 the result of which was the order of Gilligan J. permitting Mr. Pigott to outline his right of way in yellow cross hatching.
174. Mr. Jim Delaney testified that in or about 2014/2015 he carried out works on apartment 20 Skyview House, at the behest of his father. Other than the aforesaid works, he stated than that his presence at apartment 20 would only occur if his father required his attendance. This happened perhaps once per month.
175. Mr. Jim Delaney stated that for the purposes of the works being carried out in 2014 a container had been placed on the turning area. Additionally, Mr. Jim Delaney's own pick-up van had been parked on the turning area in 2014 whilst he was carrying out the renovation works on apartment 20. He stated however that he had only parked on the turning area if the car park space in front of Block E/Skyview House was full.
176. Under cross-examination by counsel for Mr. Pigott, Mr. Jim Delaney stated that when he was carrying out the works to his parents' apartment in 2014 he had told his contractors not to park their vehicles on the turning area. He could not say whether the container which was on the turning area for a number of months in 2014 blocked Mr. Pigott's right of way as he did not know of the right of way or its dimensions.
177. Mr. Jim Delaney could not account for the presence on occasions of other vans on the turning area, stating that they were not the vans owned by the contractors, plumbers, or plasterers he had employed in connection with the refurbishment of Apartment 20 Skyview House.
178. He acknowledged, however, the presence on the turning area in 2017 of a blue pick-up van owned by him and acknowledged that photographic evidence suggested that on the day in question the truck was over-hanging the entrance gate to Cassini. He surmised that on the day in question his truck only had been on the turning area for as long as it took him to deliver something to his parents' apartment.
179. The Court heard conflicting engineering testimony as to the extent of the difficulties for Mr. and Ms Pigott in accessing and egressing Cassini when vehicles encroached on their right of way.
180. Evidence was given on behalf of Mr. Pigott by Mr. Julian Keenan, a civil engineer specialising in traffic and transportation planning. Mr. Keenan's company, Trafficwise, is principally involved in road design and transportation planning including, *inter alia*, traffic modelling analyses.
181. Mr. Keenan testified that he visited the turning area on 14th September, 2016 for the purposes of commencing an assessment of the vehicular accessibility to Cassini. Mr. Keenan's visit was at a time when cars were parked on the turning area. After being briefed by Mr. Pigott as to the difficulties he had encountered in accessing his property, Mr. Keenan took measurements for the purposes of verifying a typographical survey

mapping exercise undertaken by Techsol, commissioned by Mr. Keenan and which formed the basis of his assessment. Mr. Keenan's conclusions are contained in a report dated 17th October, 2016.

182. Mr. Keenan stated that he himself had done some manoeuvring on the turning area in his own car to experience first-hand the difficulties encountered by Mr. and Mrs. Pigott. Having done the manoeuvres, Mr. Keenan's view was that the turning area constituted a very confined environment in which to manoeuvre a vehicle. He found that the plinth did not facilitate vehicle overhang and that it was at least as restrictive to manoeuvring a car as a wall. Furthermore, the plinth had disadvantages over a wall in that a car driver had little or no vision to the plinth. It was thus very difficult for a driver to gauge distance to the plinth relative to the vehicle. Mr. Keenan also testified that despite his own vehicle being six and half inches shorter than Mrs. Pigott's Mercedes CLS Class, he found it very uncomfortable to try to access Cassini, both in forward and reverse gear. He stated that he had to give up on a few manoeuvres as he was not confident that his vehicle would not be damaged. In his report, Mr. Keenan puts the matter thus:

"From my experience and considering the locations of the parked cars on 3rd September 2016, I believe that the vast majority of drivers when faced with a similar degree of the challenge would see an attempt on accessing the driveway as foolhardy and likely to result in vehicle damage and failure to achieve access. Broken indicator and stop light lens on the ground attest to previous failures and serve to affirm that manoeuvring on the turning area is difficult."

183. As already ready referred to, for the purpose of his technical assessment, Mr. Keenan commissioned land surveyors Techsol Limited to undertake a detailed topographical survey. The scenarios which were the subject of this assessment took account of parked cars on the turning area on specific dates as had been presented to Mr. Keenan by way of photographic evidence. For the purpose of replicating the positions of those vehicles for the assessments Mr. Keenan obtained various technical specifications from the manufacturers of the vehicles. For the purpose of the exercise carried out, these vehicles were placed on the turning area by reference to the relevant photographs of a given date. Thus, the static parked vehicles chosen for the assessments were based on cars which had been at particular points in time parked on the turning area, including a BMW 5, a Mazda, a Kia Soul, a BMW 3, a Fiat 500 and a red Smart car.
184. Mr. Keenan then used a priority assessment tool "Autotrack" – a programme which simulates vehicle movement on digital mapping. He selected a model that was exceptionally close in its size and geometry to simulate Mrs. Pigott's Mercedes CLS He then calibrated that vehicle so that its steering dynamics matched those of the assessment vehicle.
185. With regard to the cars which were in situ on the turning area on Saturday, 3rd September, 2016, namely a Smart car, a Fiat 500, a BMW 3 and a Kia Soul, Mr. Keenan attempted a number of specific assessments, four of which are outlined in his report as follows:

"03021-TR-02 Entering Turning Area in Forward Gear – Reverse into Property; 03021-TR-03 Entering Turning Area in Reverse Gear – Forward into Property; 03021-TR-04 Entering Turning Area in Reverse Gear – Forward into Property; 03021-TR-05 Entering Turning Area in Forward Gear – Reverse into Property."

186. Mr. Keenan testified that the actual manoeuvres for 3rd September, 2016 outlined in his report and attendant drawings were those that actually resulted in his being able to access Cassini.
187. As detailed in his report and evidence, for the purposes of the first assessment (entering the turning area in forward gear and reversing into Cassini), Mr. Keenan found that accessing Cassini would require a complex thirteen point manoeuvre. He described this as a "tortuous" undertaking in any case. He found that at all points of the manoeuvre in question the off side of the vehicle would be close to the raised plinth which would not be visible to the driver. He found the manoeuvre in question to be "practically impossible for the average driver".
188. The second assessment (entering the turning area in reverse gear and driving forward into Cassini) required an eight point manoeuvre. Again, this manoeuvre required vehicle movements close to the raised plinth on the off side. Again he concluded that this option was practically impossible for the average driver.
189. The third assessment, whereby the design vehicle reversed into the turning area from the roadway at an acute angle, was considered "particularly challenging" given the relative location of the plinth, boundary wall and the parked Kia car. Whilst not considered impossible for a skilled driver experienced at such close manoeuvring, Mr. Keenan nevertheless considered it unlikely to come to mind as a viable means of access for the average driver.
190. Mr. Keenan's fourth assessment involved entering the turning area in forward gear, driving forward into the south east corner of the turning area and then doing a series of small forward and backward movements to orientate the vehicle so that it could enter Cassini in forward gear. This was found by Mr. Keenan to be "torturous" and involved repeated blind reversing towards the plinth and was thus considered "infeasible in practice".
191. Mr. Keenan also undertook a technical assessment with regard to what actively presented on the turning area on 8th October, 2016, again, in this regard, aided with photographic evidence from Mr. Pigott. On 8th October, 2016, four motor vehicles (a Kia Soul, a Smart, a BMW 3 and a BMW 5) were parked on the turning area all of which encroached on the right of way. Mr. Keenan's assessment was carried out on the basis of (a) the Pigotts entering the turning area in forward gear in order to reverse into Cassini and (b) entering the turning area from the public roadway in reverse gear and then going forward into Cassini. Mr. Keenan testified that the first assessment required a complex ten point manoeuvre with the second involving a five point manoeuvre. With regard to the latter, it was considered that this would not be an option for the vast majority of drivers.



192. Mr. Keenan testified that it was "extremely difficult" to gain access to Cassini on 8th October, 2016 based on the positioning of the cars that were present on the turning area on that date. He stated that the primary difficulty was the position of the two BMW cars.

193. Mr. Keenan's overall conclusions, as detailed in his report, were as follows:

"3.1 the objective of the assessments has been to investigate the theoretical means by which a design vehicle might potentially have achieved access to the site given the physical environment and the arrangement of the parked cars in the separate scenarios.

3.2 The assessments show that in the absence of the potential vehicle damage and with considerable trial and error in the digital environment a small variety of options technically achieve access to the property. Adapting a problem solving approach of the options shown on the attached drawings are the result of an extensive two-day investigation into a myriad of unsuccessful alternatives and the series of optimisations and refinements of the final options in order to successfully achieve access with the design vehicle.

3.3 Having undertaken the digital assessment for the Mercedes CLS and having undertaken practical manoeuvring exercises on site I am of the opinion that the Cassini property on both occasions was not accessible. In practice the manoeuvres required to achieve access would have been so challenging and so torturous as to render them practically impossible for the average motorists."

194. Mr. Keenan further testified, as set out in the report prepared by him on 14th March, 2017, that following an inspection of the turning area on 13th March, 2017 he found a car parked well out of position on the turning area in the space directly opposite the entrance to Cassini. Furthermore, he observed and photographed the delineations made by Mr. Delaney in 2016.

195. He stated that these markings were evident despite Mr. Delaney's evidence that he had removed the markings with a blow torch. In Mr. Keenan's view, the lingering evidence of car park markings remains an indicator to third parties that the area is marked out as a car park space and not the prescribed turning area that it is.

Mr. Keenan also testified that he was instrumental in employing a contractor for the purposes of hatching the right of way in yellow pursuant to the Order made by Gilligan J. on 16th June, 2017. He testified that he attended at the site on 30th June, 2017 with the contractor already on site. On that date, he observed a white Kia car registration 142 D 1994 parked in the northern corner of the turning area. As a result of the presence of this vehicle the contractor was unable to begin the relevant works. Mr. Keenan stated that the owner of the Kia had then approached without identifying himself and indicated that he did not want works to begin and that he was the owner of the land. Mr. Keenan told the Court that he understood that person to be Mr. James Delaney.

196. It was put to Mr. Keenan by counsel for the Delaneys that the second and third assessments done by Mr. Keenan with regard to the scenario which presented on 3rd September, 2016 were not required and that the fourth assessment (described in Mr. Keenan's report as involving nine manoeuvres) required just a three point manoeuvre, as found by Mr. Tim Murnane, the Delaneys' engineer. Mr. Keenan's response to this suggestion is that Mr. Murnane had not used a suitably calibrated model of Mrs. Pigott's Mercedes CLS "in terms of steering dynamics and manoeuvrability".
197. It was further put to Mr. Keenan that the area just inside the plinth had been a designated car park area since 1994/1995. Mr. Keenan was nevertheless of the opinion that parking in that particular part of the turning area could, under various scenarios, cause difficulties, particularly if a vehicle parked in that area trespassed on the right of way, similar to what presented on the ground on 29th October, 2019.
198. Mr. Murnane, an engineer with Punch Engineers, testified on behalf of the Delaneys. Mr. Murnane stated that he had replicated the assessments which Mr. Keenan had done on behalf of Mr. Pigott. Like Mr. Keenan, Mr. Murnane utilised the Autotrack simulation programme.
199. With regard to the first assessment done by Mr. Keenan and which was based on the scenario which presented on the ground on 3rd September, 2016, Mr. Murnane testified that a large Mercedes car entering the turning area on that day in forward gear and then reversing into the entrance to Cassini took four manoeuvres, as opposed to the thirteen point manoeuvres referred to in Mr. Keenan's report. Mr. Murnane also found that it was possible to drive forward from the public road into Cassini in one manoeuvre if the Mazda car was not on the public road. Allowing for the presence of the Mazda car, Mr. Murnane stated that it was also possible to gain access to Cassini, albeit it necessitated a three-point turn. As far as Mr. Murnane was concerned, it was a matter of choice as to whether one drove into Cassini in forward gear and then reversed out or vice-versa.
200. With regard to the scenario which presented on the turning area on 8th October, 2018, Mr. Murnane testified that he was able to simulate entering the turning area in forward gear and then reversing into Cassini in four manoeuvres as opposed to Mr. Keenan's ten-point manoeuvre. Mr. Murnane testified that he had achieved this by concentrating on his first manoeuvre, which involved taking a wide sweep in order to put the rear of the car as close to the Cassini entrance gate as possible. He stated that this was in contrast to Mr. Keenan's methodology which was to keep his vehicle parallel to the entrance gate, which then necessitated multiple further moves on Mr. Keenan's part before he could reverse into Cassini.
201. In cross-examination, Mr. Murnane reiterated that contrary to the findings of Mr. Keenan, Cassini was accessible by vehicular access on 3rd September, 2016 and 8th October, 2016, albeit access presented a "challenge". He agreed, however, that access was difficult once the right of way was interfered with.

202. Mr. Murnane was of the view that even if there were cars parked on the turning area in the space opposite the entrance to the turning area (which, it was acknowledged, constituted an encroachment on the right of way) Mr. and Mrs. Pigott would still be able to use their right of way to gain access to Cassini. He stated that they could do so both by driving forward and reversing into the Cassini entrance or by reversing on the public roadway and then driving forward into Cassini.
203. According to Mr. Murnane, these moves would involve, respectively, a three-point manoeuvre and a five-point manoeuvre. He also stated that this simulation took account of the impact of a car parked on the public road.
204. Mr. Murnane also testified that he had explored an alternative right of way option for Mr. and Mrs. Pigott. He stated that he carried out an auto tracking exercise to assess this alternative proposal. He was of the opinion that the alternative right of way would make access to Cassini easier and would require less car manoeuvres.
205. Mr. Murnane accepted that the boat, with the trailer tow bar attached, which had been placed on the turning area in November, 2009 interfered with the right of way. He agreed that photographic evidence of a van placed on the turning area showed that it interfered with the right of way. He also agreed that the placement of three cars (two of which are in the ownership of the Delaneys) side by side on the turning area on a particular date encroached on the right of way, as did, in all probability, the presence of Mr. Jim Delaney's truck on another date.

Albeit it encroached on the right of way, Mr. Murnane did not believe that the presence of the container on the turning area in 2014 had any impact on the Pigott's ability to access their property.

206. Questioned about access to and egress from Cassini, Mr. Murnane agreed that it was difficult given the restricted space. Mr. Murnane was of the view that the existing right of way did not make sense and that it had been put in place to reflect the then location of the entrance gate to the Cassini site.

**The Pigott planning permission and the changing of the entrance to Cassini**

207. The site which Mr. Pigott acquired from the Naidoos in 2000 came with the benefit of a planning permission which the Naidoos had obtained in 1999. The planning permission provided for a rounded split corner gate access to the site. In the course of his evidence Mr. Pigott acknowledged that his own planning application in 2001 (which was refused in February, 2001) had also provided for a rounded split corner gate access. He agreed that a further planning application made by him (which was granted on 30th November, 2002 by An Bord Pleanála) again provided for a split rounded corner gate access to the property.
208. In 2002, Mr. Pigott sought planning permission for alterations to Cassini. The planning permission which was subsequently granted provided for the same rounded corner gate access as had been provided for in the earlier planning permission.

209. Mr. Pigott accepted that when constructing Cassini he had squared off the rounded corner gates which had been provided for in the planning drawings and instead installed an entrance gate with a different configuration. Mr. Pigott reiterated that this change came about after he had tested the efficacy of the rounded corner gates for the purposes of egressing his property and found that they would not work.
210. He testified that the location of these round entrance gates meant that he would have to reverse out of his driveway onto Bothar Sorrento, a public road. In exercising such a manoeuvre he would not be able to see traffic coming from the direction of Sorrento Heights. Moreover, having reversed onto the road, he would not then be able to immediately turn his car and would have to reverse down the road to a point where it was possible for him to turn his vehicle. Accordingly, Mr. Pigott had contacted his architect, Mr. Kennedy, who advised that the only solution to this difficulty was to put the entrance gate to Cassini on the corner, at right angles to the wall fronting the road, which would then enable him to reverse from Cassini onto the right of way and then drive forward onto the public road.
211. It was put to Mr. Pigott in cross-examination that had he kept the rounded corner gate entrance as provided for in the planning permission (one portion of which was intended to open onto the turning area) this would have him with sufficient space, using his own property and the right of way, to execute a turning manoeuvre so that he would not have to reverse out of his property onto the public road. Mr. Pigott rejected this suggestion on the basis that if he were to carry out that manoeuvre he would still be obstructed by the concrete plinth which surrounded part of the turning area.
212. Mr. Pigott denied any suggestion that the changes which had been made to the configuration of the entrance gate had contravened his planning permission.
213. Mr. Murnane told the Court that he had had reviewed the planning permission file in relation to Cassini. He was of the view that the change in the location of the Cassini gate rendered the Pigott vehicles when exiting the locus less visible to other neighbours and that, accordingly, this presented a road safety issue. This was in circumstances where the wall of the Pigott residence had been built out to the front to create a right angle corner and had not been trimmed back as envisaged by the drawing which attached to the planning permission. In Mr. Murnane's view, Mr. Pigott had breached his planning permission.
214. Mr. Kennedy did not concur with Mr. Murnane's suggestion that the reconfiguration of the entrance gate to Cassini breached the Pigott planning permission. He accepted that the drawings which had been submitted in connection with this planning permission had identified that the entrance gate was to straddle the corner of the property. However, in Mr. Kennedy's view, the construction of a gate located solely on the side of the property facing onto the turning area did not constitute non-compliance with planning permission. It was Mr. Kennedy's evidence that Cassini was in substantial compliance with its planning permission, as defined by the Law Society/RIAI agreement. He stated that the deviation made in respect of the entrance gate was to ensure that Mr. Pigott and his wife could

drive safely to and from their home without ever having to reverse onto the public roadway. Mr. Kennedy did not believe that any planning consultant or architect would take the view that the change made constituted a material difference to the planning permission which had been granted for Cassini.

**Considerations re. the right of way issue**

215. There is no dispute between the parties but that Mr. Pigott enjoys a right of way over the turning area. The right of way is described in the Brian Gill Contractors/Naidoos Deed and on the map which attached to the Naidoos/Pigott Deed. More recently, it has been described on the map which Mr. Kennedy prepared for the purpose of Mr. Pigott's s objection to a retention planning permission application made by Mr. Delaney in 2015.
216. Overall, there was substantial agreement between the parties, including the expert witnesses, about the general magnitude of the right of way, albeit Mr. Murnane had some minor quibbles in this regard. There is also no dispute but that the general purpose of the right of way is to facilitate access to and egress from Cassini.
217. The issue to be determined by the Court is whether Mr. Pigott's right of way has been interfered with and obstructed by the Delaneys.
218. The Court has heard evidence from Mr. and Mrs. Pigott as to obstructions which occurred in 2009. In the course of his evidence, Mr. Delaney denied that he had any arrangement with a Mr. Kavanagh with regard to the selling of cars which had been placed on the turning area in 2009. He denied inviting Mr. Kavanagh onto the lands and stated that he did not know Mr. Kavanagh.
219. Counsel for Mr. Delaney submitted that the Court had to accept Mr. Delaney's evidence in this regard as neither Mr. Kavanagh nor the author of the November 2009 email had been called by Mr. Pigott to give evidence. I accept that without testimony from Mr. Kavanagh the Court cannot come to a conclusive finding as to how or at whose instigation the vehicles in question came to be parked on the turning area in 2009.
220. Mr. Delaney, however, accepted that he was the person who facilitated a Mr. Cluskey placing a boat (which was on top of a trailer) on the turning area in late 2009. I am satisfied from the photographic evidence before the Court that this boat encroached on the right of way. Indeed, in evidence, Mr. Murnane, Mr. Delaney's expert, accepted that this was the case.
221. Counsel for Mr. Delaney made the case that albeit the boat was in situ in 2009/2010, it did not create a problem for Mr. Pigott's tenants, rather, the problems had been created by the cars which had been placed by Mr. Kavanagh. To my mind, as the boat was clearly encroaching on the right of way, it was a contributing factor to the obstructions to the right of way which occurred between 2009-2010.
222. Furthermore, whatever the relative merit of counsel's argument that the impact on Mr. Pigott in 2009-2010 was limited given his then reversionary interest in the right of way

(by reason of having let Cassini), the position was certainly different post August, 2014 when Mr. Pigott and his family took up residence in Cassini.

223. Thus, the question is whether there is evidence before the Court of encroachment on the right of way by the Delaneys post August, 2014 such that their ability to access and egress from Cassini was compromised. I am satisfied that this has been established in evidence.
224. The Court heard a great deal of evidence about a container which Mr. Delaney caused to be placed on the turning area in the Autumn of 2014. It remained in situ for a number of months.
225. Mr. Delaney denied that it encroached on the right of way, stating that the container was some seven feet or so back from the entrance gate to Cassini. There is no doubt but that the container encroached on the right of way. Even taking Mr. Delaney's contention at its height, it is undoubtedly the case that on a date in January, 2015, at a time when the container remained in situ, Mr. Delaney's white Kia motor vehicle and Mrs. Delaney's red Smart car were also parked on the turning area. Moreover, there was also photographic evidence of another occasion when Mr. Jim Delaney's blue truck was parked on the turning area as well as the aforementioned container. All of these vehicles encroached on the right of way. There was also photographic evidence of Mr. and Mrs. Delaney's respective vehicles on the turning area in April, 2016. Evidence was also given of Mr. Delaney having delineated at least three car park spaces on the turning area in 2016.
226. There was photographic evidence of the presence of Mrs. Delaney's Smart car on the turning area in January, 2017.
227. It is more than clear from Mr. Kennedy's map (on foot of which the right of way was subsequently hatched out in yellow on the turning area) that any vehicle parked on the spaces which Mr. Delaney had delineated in 2016 constituted an encroachment of the right of way. This was accepted by Mr. Murnane to be the case. Moreover, Mr. Murnane accepted that Mr. Delaney's container encroached on the right of way. He also agreed that the placement of three motor vehicles (two of which belonged to the Delaneys) which were on the turning area on a particular date constituted an encroachment of the right of way. Mr. Murnane also acknowledged that the presence of Mr. Jim Delaney's truck on the turning area on a date in 2017 constituted an interference with the right of way, as a matter of probability.
228. Much of the engineering evidence heard by the Court centred on the level of difficulty which the aforementioned encroachments (and indeed other encroachments not necessarily attributable to the Delaneys) caused Mr. and Mrs. Pigott in accessing and egressing Cassini.
229. Before turning to the engineering evidence, it is apposite to refer to counsel for the Delaneys' submission that in the first instance the Court should take account of the fact that the right of way in issue here originally served a gateway that was permanently

blocked up in or about 2004/2005 when Cassini was being constructed. It is common case that the planning permission allowed for a new entrance to be constructed. Given the new entrance, counsel posed the question of how much of the area marked yellow on the relevant maps was still required to remain unobstructed.

230. Gale on the Law of Easements 20th Ed., Para. 13-06, writes, in relation to obstruction of a right of way:

*“As regards the disturbance of private rights of way, it has been laid down that whereas in a public highway any obstruction is a wrong appreciable, in the case of a private right of way the obstruction is not actionable unless it is substantial. Again it has been said that for the obstruction of a private right of way the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved. In Hutton v. Hamboro (1860) 2 F. & F. 218 where the obstruction of a private right of way was alleged, Cockburn J. laid down that the question was whether practically and substantially the right of way could be exercised as conveniently as before.”*

231. Gale also states, in the same paragraph:

*“It must not be forgotten that the grant of a private right of way ordinarily speaking confers only a reasonable use of the right of way by the grantee in common with others.”*

232. Counsel for the Delaneys submits that the question for the Court is whether Mr. Pigott's right of way can be substantially and practically exercised notwithstanding encroachments on the right of way by vehicles parked in the manner depicted by the photographic evidence of 3rd September, 2016 and 8th October, 2016.

233. In this regard, counsel referred the Court to *B & Q Plc v. Liverpool & Lancashire Properties Ltd* [2001] 1 EGLR 92. In that case, B & Q had a lease of a retail unit with a right to pass and re-pass over a service yard at the rear of another unit. The landlords proposed to construct an extension which would reduce the area of the yard and the turning circle available to B & Q's vehicles, albeit that turning facilities were available to B & Q within their own demise. Blackburn J. stated:

*“(1) The test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue to the use of the whole of what he contracted for is reasonable...”*

234. Of course, I note that the submission advanced on behalf of the Delaneys was in the context of their asserted ownership of the turning area. The Court has, however, determined that ownership of the turning area vests in Vico (the servient tenement) and not in the Delaneys. Mr. Mackey, Vico's solicitor testified that Vico has always respected Mr. Pigott's right of way and Mr. Pigott accepts this to be the case.

235. To return to the question of whether Mr. Pigott's right of way can be substantially and practically exercised in the event of vehicles being parked on the turning area.
236. It is certainly the case that the expert evidence given by Mr. Murnane was to the effect that whilst there was a degree of obstruction to the right of way by virtue of motor vehicles being parked on the turning area, there nevertheless remained a sufficient passage to allow Mr. and Mrs. Pigott access Cassini using the restricted right of way.
237. Overall, I am not persuaded by Mr. Murnane's conclusions as to the relative accessibility to Cassini on 3rd September, 2016 and 8th October, 2016. I prefer Mr. Keenan's evidence, in the absence of Mr. Murnane have made the same calibrations to his model vehicle to reflect the design of Mrs. Pigott's vehicle as made by Mr. Keenan. More particularly, unlike Mr. Keenan, Mr. Murnane did not supplement the Autotrack exercise he carried out by himself testing the locus.
238. Moreover, in evidence, Mr. Murnane accepted the general proposition that even if access to Cassini was achievable in conditions such as presented on 3rd September, 2016 and 8th October, 2016, it remained the case that if there were cars parked on the turning area, then reversing out of Cassini would be challenging, as indeed would be driving out of Cassini in forward gear.
239. On balance, I am satisfied that the presence of vehicles on the turning area renders it substantially more difficult and less convenient for Mr. and Mrs. Pigott to access and egress Cassini. I accept their evidence in this regard. I also accept Mr. Keenan's testimony that albeit access to Cassini was ultimately achieved in the face of the conditions which presented on 3rd September, 2016 and 8th October, 2016 respectively, access could only be achieved by very complicated and numerous car manoeuvres.
240. I also find no basis to accept the suggestion that Mr. and Mrs. Pigott could undertake their necessary reversing procedures further away from the boundary wall. Much of the evidence suggests that on many occasions there were more than one vehicle parked side by side encroaching on the right of way. Therefore, the suggestion that they could drive onto the right of way at a point further out from the boundary wall is not a feasible option.
241. In the course of his submissions, counsel for Mr. Pigott referred the Court to *White v. Porter* (Unrep., Dixon J., 23rd March, 1956). The facts of that case were as follows: the defendant erected a timber framework of what was intended to be a garage or shed in a courtyard the subject matter of an express grant of a right of way. It was asserted that the structure considerably restricted the freedom of driving or manoeuvring a vehicle in the courtyard. The court held that although there was sufficient room for a car to drive into the courtyard and reverse out, the uprights considerably impeded and delayed the process of reversing the motor vehicle to turn into the courtyard, rendering it a difficult and troublesome operation. In the course of his judgment, Dixon J. stated:



*"It is well settled that anything which renders the use of a right of way less convenient or more difficult may constitute an obstruction of the way or a derogation from its grant."*

242. Counsel for Mr. Pigott contends that the Delaneys' approach in the present case, namely that despite the difficulties access to Cassini is achievable, is precisely what Dixon J. rejected in *White v. Porter*. I agree with counsel in this regard.
243. In his report and in his evidence, Mr. Murnane opined that it was possible to create an alternative right of way on the turning area for Mr. Pigott so that the turning area could accommodate the parking of vehicles without encroaching on the right of way. I cannot, however, accept that there is any feasibility in this suggestion in circumstances where, in the first instance, the offer of an alternative right of way is not within the gift of the Delaneys, and in light of the evidence given by Mr. Keenan.
244. In all the circumstances, the Delaneys' argument that parking on the turning area did not substantially or practically obstruct Mr. Pigott's right of way is rejected.
245. As part of the case made by the Delaneys in opposition to Mr. Pigott right of way proceedings, they assert that there has been a variation created by Mr. Pigott of the access onto the right of way and that it is such as to afford them a defence to Mr. Pigott's claim of obstruction and interference with the right of way.
246. In the course of his evidence, Mr. Delaney pointed to Mr. Pigott's treatment of the Cassini planning permission. Mr. Delaney stated that by not adhering to a rounded corner entrance for Cassini, as had been provided for in the planning permission, and constructing in its stead an entrance gate at right angles with the wall, Mr. Pigott had breached his own permission. Mr. Delaney also claimed that as a result of Mr. Pigott's actions service vehicles were now unable to turn on the turning area.
247. The position adopted by the parties' experts to this line of defence is set out in the judgment. Overall, I find no basis to accept the position put forward on behalf of the Delaneys. The Court has heard evidence from Mr. Kennedy that Cassini was built in substantial compliance with the terms of Mr. Pigott's planning permission. As Mr. Kennedy is a qualified architect, I am constrained to prefer his evidence to that of Mr. Murnane. I also note that to date there has been no finding by the planning authority, or An Bord Pleanála, that the Cassini entrance breaches the planning permission.
248. Furthermore, the Court has regard to *Bland on Easements*, 3rd Ed., where the learned author states that in the general run of things where a right of way benefits a piece of land it benefits the whole of the land and each part of it so that in principle the dominant owner can choose from which part of his land he can access the way. In this regard, *Siggery v. Bell* (2007) EWHC 2167 is cited. The learned author goes on to state that the dominant owner is not necessarily limited to the access or accesses existing at the date of the grant, but may be entitled to open up additional accesses that are reasonably

required by him in the access of the right he has been granted provided that there is no unreasonable interference with the rights of other people entitled to use the right of way.

249. As far as present case is concerned, Mr. Pigott clearly applied for and obtained planning permission for Cassini based on an entrance gate at a different location to the entrance gate which was in situ on the ground at the time of the planning application. To my mind, based on the principle outlined by Bland on Easements, he was entitled to do so and indeed he received planning permission for the entrance gate at this different location. It is acknowledged by Mr. Pigott that he did not construct the round corner entrance gate as had been detailed in his planning application. As already referred to, the Court has accepted Mr. Kennedy's evidence that notwithstanding the different type of gate which Mr. Pigott duly constructed, there is substantial compliance with planning permission.
250. The Court has heard the evidence of Mr. Pigott and Mr. Kennedy as to why it was felt necessary to construct the present entrance gate. I accept this evidence. Moreover, the Court had the benefit of M. Keenan who testified that the make-up of present entrance gate allows Mr. Pigott to either reverse or drive forward onto the right of way on the turning area, thus removing any need for him to reverse straight onto the public highway, which exiting his property via the aforementioned rounded entrance gates would have entailed.
251. For all of the foregoing reasons, I do not find merit in the argument that Mr. Pigott's actions *vis-a-vis* his entrance gate affords Mr. and Mrs. Delaney a defence to the right of way proceedings. Nor can I accept, in the absence of any corroborating evidence, Mr. Delaney's bare assertion that the configuration of Mr. Pigott's entrance gate prevents service vehicles from using the turning area to turn.
252. In all the circumstances, the Court is disposed to grant Mr. Pigott declaratory and injunctive reliefs sought at paragraph 23 of the Amended Statement of Claim, as amended by Order of the Court on 5th April, 2016. I will hear the parties as to the extent, form and substance of the necessary Orders, having regard to the findings the Court has made in the title proceedings.

### **Mr. Pigott's s. 160 proceedings**

#### ***Background***

253. It is common case that over the course of 2014/2015 Mr. Delaney subdivided Apartment 20 Skyview House. He testified that the reason for the subdivision was because the apartment had become too large for himself and his wife, particularly in circumstances where they were residing there only two months of the year. It was only after the subdivision of his apartment that Mr. Delaney applied for retention planning permission. He did so after it was made clear to him on 17th April, 2015 by Dun Laoghaire Council that planning permission was necessary.

254. On 3rd June, 2015, Mr. Delaney made a retention planning permission application in respect of the subdivision of Apartment 20 Skyview House.

255. Both Mr. Pigott and Vico objected to the retention application.
256. Mr. Pigott lodged an objection to the retention application on 25th June, 2015. He advised the planning authority that Apartments 19 and 20 (which comprised Skyview House) each had two car park spaces and that, presumably, any extra apartment created by the subdivision would also attract two car park spaces. In his objection, Mr. Pigott alluded to obstructions which had been placed by Mr. Delaney to Mr. Pigott's right of way. He further alluded to the presence of a gas tank on the turning area.
257. Mr. Pigott's principal concern, if the subdivision was allowed to go ahead, was the issue of car parking for the newly created apartment. He stated that his particular concern in June, 2015, related to the map which Mr. Delaney's architect, Mr. Fitzpatrick, had lodged with the retention application. Six car park spaces were shown on the said map four of which were marked on Mr. Pigott's right of way.
258. Vico lodged an objection to the retention application on 6th July, 2015. In the course of its objection, it referred, *inter alia*, to the competing claims over the ownership of the turning area which Vico alleged Mr. Delaney had sought to appropriate for himself. Vico also objected to the gas tank which Mr. Delaney had placed on the turning area (erroneously referred to as an oil tank).
259. A request made by Dun Laoghaire/ Rathdown Council as to what provision was to be made for carpark spaces for the sub-division was answered by Mr. Delaney's architect, Mr. Fitzpatrick, by letter of 7th August, 2015, with a drawing attached. Mr. Fitzpatrick advised that Apartments 20 and 21 were to be serviced by four carpark spaces located on the turning area, with Apartment 19 Skyview House to be serviced by two carpark spaces in front of Block E/Skyview House. Mr. Fitzpatrick attached a letter dated 31st July, 2015 from Mr. Delaney's solicitors, Partner's at Law, confirming the Delaneys' title to the turning area pursuant to a Deed of Conveyance of 4th October, 2012.
260. Under cross-examination by counsel for Mr. Pigott, Mr. Delaney agreed that the drawing which Mr. Fitzpatrick had attached to his letter was misleading given that no reference was made thereon to Mr. Pigott's right of way.
261. The Court heard that in September, 2015, Mr. Kennedy prepared a map for the purpose of Mr. Pigott's objection to Mr. Delaney's retention planning permission application for Apartment 20 Skyview House. Mr. Pigott's right of way was outlined on the map. For the purposes of depicting the right of way, Mr. Kennedy had access to, *inter alia*, a map which had been prepared by Mr. Burke, architect, in 1987 on behalf of Brian Gill Contractors.
262. On the map Mr Kennedy prepared he superimposed the four car park spaces which had been marked out on the map prepared by Mr. Fitzpatrick, Mr. Delaney's architect, and which was submitted to Dun Laoghaire Rathdown County Council in connection with Mr. Delaney's retention application. It is common case that the four car park spaces which were marked on Mr. Fitzpatrick's map all encroached upon Mr. Pigott's right of way. Mr. Kennedy testified that these car park spaces once filled would make it almost impossible

for Mr. Pigott to safely drive in and out of Cassini. Mr. Kennedy was also of the view that the two car park spaces designed to serve Apartment 20 Skyview House, as set out on Mr. Fitzpatrick's map, were not of themselves capable of serving as car park spaces by reason of their design. In this regard, Mr. Kennedy opined that if there was a car parked in the right hand number 20 space then the left hand number 20 car space could not be used.

263. Mr. Keenan concurred with Mr. Kennedy's view that the four car park spaces which had been delineated on the turning area for the purposes of the retention planning application trespassed upon Mr. Pigott's right of way. He was also of the view that even ignoring the difficulties presented by the car spaces for access to Cassini, the four spaces did not operate safely as stand-alone car park spaces.

As set out in Mr. Keenan's supplementary report of 28th November, 2016:

- "2.1 The layout of the unauthorised parking area is significantly substandard and provides insufficient space for vehicles to manoeuvre on the confined turning area.
- 2.2 The proposed parking spaces trespass significantly onto the right of way. By way of practical example, we have shown that when the unauthorised spaces are occupied the parked vehicles overhang the marked spaces, thereby encroaching further upon the right of way in shrinking even further manoeuvring space available for Cassini vehicles.
- 2.3 The occupation of the unauthorised parking spaces significantly impacts upon the amenity of the Cassini property which is rendered inaccessible due to the occupation of the right of way and the effective blocking of the entrance."

264. To return now to the progress of Mr. Delaney's retention application. On 1st September, 2015, Dun Laoghaire Rathdown Council granted Mr. Delaney planning permission for the subdivision.
265. This was appealed by Vico and Sorrento Heights Management Limited to An Bord Pleanála. In the course of the appeal, Mr. Fitzpatrick made representations to An Bord Pleanála that the turning area was in the ownership of Mr. Delaney and that since Mr. Delaney's presence on the site since 1987 the area had never been used as a turning area.
266. The Inspector's report duly compiled for the purposes of the planning appeal noted that Mr. Delaney had six car park spaces. The report referred to four car park spaces in front of block E/Skyview House and two further spaces in the "disputed parking turning circle".
267. Mr. Pigott testified that when he saw the Inspector's Report he concluded that the Inspector had made a mistake in that he had mixed up the planning spaces in front of Skyview House with the four planning spaces which Mr. Delaney wanted to have in the turning area (and which had been displayed on the map Mr. Fitzpatrick prepared for the retention application).

268. On 6th January, 2016, An Bord Pleanála granted Mr. Delaney retention planning permission for the subdivided Apartment no. 20. One of the conditions attaching to the commission was as follows:
- “3. Within three months of the date of this Order, the applicant shall mark out on site the two car park spaces shown on drawing no. 156042/10 submitted to the planning authority on the tenth day of August, 2015.”
269. On 12th February, 2016, by order of the High Court (Noonan J.), Mr. Pigott obtained leave to seek judicial review of the Board’s decision together with an order staying condition 3 of the planning permission until the determination of the judicial review.
270. Mr. Pigott testified that Mr. Delaney did not comply with the Order staying condition 3. He stated that by April, 2016 Mr. Delaney had marked out the car park spaces on the turning area. This duly led to the interlocutory application in the Pigott plenary proceedings in late 2016 in respect of which the Delaneys gave undertakings to the Court on 26th October, 2016 and 11th January, 2017.
271. It is common case that by order of the High Court (McDermott J.) of 20th July, 2016, the decision of An Bord Pleanála of 6th January, 2016 was quashed with the matter remitted to the Board for re-consideration.
272. Mr. Pigott instituted the within s. 160 proceedings in October, 2016. The principal objective in commencing the s. 160 proceedings was to ensure prevent the use of the turning area for car parking. Another of Mr. Pigott’s concerns in 2016 was with the large gas tank which Mr Delaney had placed on the turning area (and which was later replaced by a number of smaller cylinders).
273. On 21st May, 2017, An Bord Pleanála refused Mr. Delaney’s retention application:
- “The Board were not satisfied on the basis of the information submitted that the Applicant has demonstrated sufficient legal interest to make this application and/or carry out the proposed development. In the absence of such legal interest the proposed development would be deficient in the provision of car parking and they would, therefore, endanger public safety by reason of traffic hazard, having regard to the existing constrained nature of circulation and parking for the residential development in the overall area.”
274. As a result of the Board’s decision, there is no provision for the subdivision of Apartment 20, Skyview House.
275. Mr. Jim Delaney testified that in August, 2017 he had occasion to attend at Apartment, 20 Skyview House in the presence of an officer from An Bord Pleanála. He stated that the official was satisfied with the outcome of the visit and that no action has been taken by the planning authorities since that visit. Mr. James Delaney testified that at present Apartment 20 Skyview House is “all one” and that Dun Laoighaire/Rathdown Council were

satisfied that that was the case. He acknowledged however that the subdivision remains in place.

276. As of the date of within hearing, Mr. Pigott confirmed that he was satisfied with An Bord Pleanála's decision to refuse planning permission for the sub division of Apartment 20 Skyview House. The refusal meant in effect that no extra car park space would be provided for on the turning area. He confirmed that he had no issue with Mr. Delaney's use of the apartment as a single unit, as originally provided for in the planning permission granted to Shawcross in the 1990s.
277. Mr. Pigott also stated that he had no issue in principle with the Delaneys subdividing Apartment 20 provided that any car parking spaces which would attach to the sub-divided unit were not on his right of way, and provided that they remove the eight gas canisters that have now been installed on the turning area in lieu of the gas tank.

### **The gas tank issue**

278. In Mr. Pigott's letter of objection of 21st June, 2015 to Dun Laoghaire Rathdown Council in respect of Mr. Delaney's retention application he pointed out that despite Shawcross having been refused retention planning permission in 1993 for an LPG storage tank, Mr. Delaney had placed such a tank on the turning area. The basis of the 1993 refusal was that the location of the storage tank "would endanger the safety of persons occupying the adjoining structures". It would also result in the loss of car parking spaces in the immediate vicinity.
279. Mr. Delaney acknowledged that he had removed LPG tank from the turning area at the behest of the Council after Mr. Pigott had objected to it. Mr. Delaney replaced the gas tank with eight small gas canisters.
280. In July, 2016 Mr. Pigott's solicitors received correspondence from Dun Laoghaire Rathdown Co. Council which stated that the Council had investigated the issue of the gas canisters on 26th April, 2016. The Council advised as follows:

"The issue relating to the replacement of a singular liquid petroleum tank 8 No. gas bottles. It is considered that the act of replacing an existing singular liquid petroleum tank with 8 No. individual gas bottles will not constitute development in accordance with [the 2000 Act]."

The Council's view was repeated in July, 2016.

281. Mr. Pigott also wrote to the Health and Safety Authority ("HSA") in respect of the matter. He received a reply on 29th June, 2016, to the effect that the 8 canisters were not considered "a high risk installation" and were "quite common in domestic and commercial installations throughout the country". It was also considered by the HSA that the area on which the 8 canisters stood was well ventilated and that the wall behind the cylinders provided an effective fire barrier. The HSA noted that the safety issue pertained to the proximity of cars to the gas cylinders at the gate end of the enclosure where the cylinders

were housed. The HSA noted that Mr. Delaney had agreed to ensure the cylinders would be kept at least 1.5 metres from the parked cars.

282. Mr. Pigott's evidence to the Court was that the Delaneys could accommodate the smaller eight gas cylinders in the garden of their own property. Alternatively, they could accommodate a larger gas tank buried on their own property, as Mr. Pigott himself had done in respect of a gas tank for Cassini.

***Mr. Pigott's submissions on the s.160 proceedings***

283. It is submitted that the planning proceedings were issued in October, 2016 because of the use or attempted use of unauthorised car parking in the turning area. The reliefs sought in the s. 160 notice of motion include an order prohibiting the Delaneys from subdividing their apartment in the absence of planning permission and order directing the removal of unauthorised car parking spaces on the turning area.

284. Counsel submits that it is clear from the evidence that the sub-division has remained in place although only one of the apartments is being used. The development however has been laid out and is capable of being used for two residential units; thus the capacity to generate a requirement for four car park spaces remains.

285. Additionally, Mr. Pigott has serious concerns regarding the eight unauthorised gas canisters in situ on the turning area, particularly given their location which adjoins the boundary to Mr. Pigott's property. Counsel submits that the capacity of these tanks is equivalent to that of the previous LPG tank for which Mr. Delaney was refused planning permission in 1993. It is submitted that the construction of these tanks constitutes development and is not exempted development.

286. Counsel also points to the fact that the Delaneys have not put in a replying affidavit to the s.160 proceedings and have not produced a planner's report to defend the proceedings.

***The Delaneys' submissions***

287. Counsel for Delaneys submits that there is no basis for the s.160 relief sought by Mr. Pigott in respect of Apartment 20 Skyview House. It is submitted that Mr. Pigott's application to restrain the use by the Delaneys of their home is a complete departure from any notion of reasonableness. It is submitted that there is no user of Apartment 20 Skyview House in being that would justify the relief sought by Mr. Pigott. The evidence before the Court is that there was a subdivision for which retention planning permission was sought and ultimately refused. There is no evidence before the Court that the Delaneys are using Apartment 20 as two dwellings. They have converted it in a very simple way back to a single residential unit. Moreover, the Council has not seen to bring enforcement proceedings against the Delaneys in relation to the current lay out and use of Apartment 20.

288. It is further submitted that in light of the correspondence from Dun Laoghaire/Rathdown Council, in May and July, 2016 there is no basis for the relief being sought by Mr. Pigott in relation to the eight gas cylinders.

289. It is submitted that the planning proceedings were brought without good and sufficient reason and were wholly unnecessary. Counsel contends that the s.160 proceedings effectively asked the Delaneys to defend the same proposition as was being advanced in Mr. Pigott's plenary proceedings.

**Considerations re. the s.160 proceedings**

290. With regard to the relief sought by Mr. Pigott at para. 1 of the s.160 proceedings (as relates to Apartment 20 Skyview House), I am satisfied that there is no sufficient basis on which to grant this relief. I take note of the fact that Dun Laoighaire/Rathdown Council appear satisfied with the present state of affairs as far as user of Apartment 20 is concerned. Moreover, I also have regard to Mr. Pigott's testimony that he had no particular issue with the Delaneys having subdivided Apartment 20, his issue concerned what that subdivision might entail vis-a-vis the issue of the provision of car parking spaces in the turning area. Mr. Pigott's concerns in this regard are well rehearsed in the part of this judgment which deals with the Pigott plenary proceedings. In those proceedings, the Court intends to grant Mr. Pigott, *inter alia*, a permanent injunction restraining the Delaneys from interfering with or obstructing his right of way over the turning area. As far as the reliefs sought at paragraphs 2 and 3 of the s. 160 Notice of Motion are concerned, Mr. Pigott can obtain the equivalent orders in the plenary proceedings; there is therefore no requirement for the Court to consider granting relief in this regard under s. 160 of the 2000 Act.

291. There remains the issue of the gas cylinders. Having regard to all the circumstances of this case and the correspondence which the Court has seen from Dun Laoghaire/Rathdown Council and the HSA, the Court is not persuaded that the grant of the relief sought at para. 5 of the s. 160 Notice of Motion is merited or necessary.

292. The Court notes that the eight gas cylinders are situate on lands which the Court has determined is in the ownership of Vico. The question of the continuation of that state of affairs is a matter for Vico and the Delaneys to resolve.