THE HIGH COURT

[2023] IEHC 479

[2023/1610P]

BETWEEN

MARY MUNNELLY

PLAINTIFF

AND

KEVIN COOKE AND EAMONN COOKE

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 21st day of July, 2023

Introduction

1. This is an application by the plaintiff for an injunction restraining the defendants from using a right of way in respect of a shared entrance to and from the public road. The plaintiff is seeking an injunction to prevent the defendants, their tenants and/or licensees from using the plaintiff's mother's part of the shared entrance to prevent the defendants from housing up to 30 Ukrainian refugees in a domestic dwelling. The plaintiff has no objection to the defendants housing up to 10-12 people in the said property but says that the increased traffic of 30 people will be a nuisance for her and her mother and will also be a breach of the right of way granted by the plaintiff's mother to the defendants in or about 2010.

Background

2. The plaintiff resides in Castlekealy, Caragh, Naas, County Kildare. The first defendant is a local businessman who also resides in Naas. The second defendant is a son of the first defendant and is also a local businessman.

3. The property in dispute is called Castlekeely Manor. The first defendant's son, Sean Cooke, and his wife, Helen Cooke, acquired this property (and 1.3 hectares of surrounding land) in 2007 from Mr. Patrick Munnelly, the plaintiff's brother.

4. Access to the plaintiff's mother's property and to Castlekeely Manor from the public road takes place across a small joint entranceway. Part of this entrance way is owned by the plaintiff's mother; the other part is owned by the defendants or Mr. Sean and Ms. Helen Cooke. Both parties have granted each other reciprocal rights of way over each other's portion of the joint entrance. Both the Munnelly family and the Cooke family have been using this joint entrance for the last fifteen years, without dispute – until the events at the centre of this application.

5. Mrs. Munnelly, in her grounding affidavit, states that in or about 2010, Mr. Kevin Cooke, the first defendant, approached her and told her that he had discovered that an error had been made in the sale of the land in 2007 and that he had been left with no right of way over the plaintiff's mother's land at the entrance onto the road. Mrs. Munnelly said that she was sympathetic to his dilemma and she spoke to her mother and they arranged, in good faith, that this error would be corrected. The first defendant was subsequently granted a right of way over that portion of the plaintiff's mother's land which leads onto the public road.

6. The plaintiff states at para. 9 of her affidavit:

> *"In November 2010 when myself and my mother made that agreement with Mr. Kevin Cooke for a right of way on the entrance driveway, it was on the understanding that it was to facilitate his son, Sean and daughter in law Helen, and their family vehicles as well as Kevin Cooke to be able to travel in and out to Castlekeely Manor and the fields around it by car or tractor <u>for farm and domestic purposes</u>".* (Emphasis added).

7. However, the right of way which was granted was a right of way "for all purposes" over the plaintiff's strip of land, between the plaintiff's gate and the public road.

8. I have been shown a map of the area in dispute. There is a strip of land coloured green called “B” which is land owned by the defendants and a strip of land coloured yellow called “C” owned by the plaintiff’s mother. Both small strips of land lead onto the public road and also lead into a laneway leading to the plaintiff’s property and a laneway leading to the defendant’s property.

9. The plaintiff’s mother granted a right of way to the defendants to pass over the plaintiff’s land at land “C” and the defendants granted a right of way to the plaintiff’s mother to cross over the defendant’s land coloured in “B” on the said map.

10. Of course as counsel for the defendants submitted, it is obviously the case that the defendants do not need a right of way to pass over their own lands. It is clear therefore that the defendants have an absolute right to go from the public road onto their own land (i.e. to use their own part of the joint entrance) and then onto the lane leading to their property. The problem which arises is that if one were travelling from the east, and turning right into the joint entrance, one could cut a corner and pass over the plaintiff’s mother’s lands. However even if that were the case, the defendants have a right of way over the said lands so they would not be trespassing.

The defendant’s plans to rent out the house for the purpose of housing Ukrainian refugees

11. Although the plaintiff and the defendants appear to have lived side by side as neighbours in peaceful co-existence for a number of years, recent developments have given rise to a dispute between them. In particular the defendants intend to rent out their property – Castlekeely Manor – to a company or a government agency for the purposes of housing Ukrainian refugees.

12. It appears that as the property is a large five bedroomed property, the proposal is that the defendants will house approximately 29-30 Ukrainian refugees in this house. The proposed rent will be approximately €16,000 per month.

13. The plaintiff objects to this proposal on the basis that she says that this is a major intensification of the amount of people who will live in Castlekeely Manor. The plaintiff's essential complaint is that whilst she has no objection to eight or ten Ukrainian people living in the house, she is of the view that if 29-30 people live in the property, there will be an enormous amount of traffic on the joint entrance -to such an extent that it will interfere with her - and her mother's - right to peaceful enjoyment of their land and that it amounts to a nuisance and/or breach of contract. She says the defendants will be using the premises for commercial purposes.

14. I think it is fair to say from the plaintiff's submissions that her objection is not to refugees per se; it is instead to the number of persons living in the property which she says will result in an enormous increase in traffic along the joint entrance to both their properties and will cause a nuisance.

15. The plaintiff's claim in breach of contract is made because she says that when her mother granted the right of way to the defendant in 2010, it was at all times her intention, and indeed she believed it was the defendant's intention, that the right of way over their property would only be for normal domestic and agricultural use. She said she never envisaged what she says is now being proposed by the defendant i.e. that the house will now become, what the plaintiff calls "a migrant transit hub". The plaintiff says that to use the right of way granted by her mother in good faith to the defendants in this way is a breach of their agreement in 2010.

16. This claim for breach of contract is fully contested by the defendants who point out that the phrase in the deed granting the right of way - "for all purposes" - is unambiguous and

includes the purposes for which the defendants are now proposing to use them. The defendants also state that they will in fact only be using the house and the right of way for the purposes of residential accommodation, that it will not be a "migrant transit hub" and that it will not be a commercial venture.

17. The plaintiff also in her affidavits states that:

(a) there has been no change of planning permission to permit this commercial enterprise;

(b) there are issues with fire safety which could require a fire escape to be constructed;

(c) there are issues with the septic tank/sewage for a house with up to 30 people in an area of some ecological sensitivity.

18. The plaintiff contacted Kildare County Council who, she says, informed her that Castlekeely Manor is only registered as a domestic dwelling house and therefore only a small number of Ukrainian refugees would be allowed to live there. The plaintiff estimates that as it is a five bedroom house, it should only accommodate approximately ten to twelve people.

19. The plaintiff also states on affidavit that she understands that the defendants have entered into an agreement with Tetrarch Capital Ltd, the company that is providing Citywest Hotel as a migrant transit hub.

20. The plaintiff alleges she "will be severely prejudiced in regard to her privacy and quiet enjoyment of her lands and property" if an injunction is not granted.

21. The plaintiff also says that since March 2023, she has observed numerous vans and lorries carrying equipment driving in and out of the shared entrance and causing damage to it.

22. Mr. Kevin Cooke, in his replying affidavit, said that Castlekeely Manor was leased to tenants up until October, 2022 when the tenants left and it became vacant. He said he initially approached the Ukrainian Accommodation Procurement Team and the Irish Red Cross

offering Castlekeely Manor as accommodation. This approach however did not result in an agreement. Subsequently Mr. Cooke entered into discussions with a third party – Nethergate Ventures – with a view to renting out the property (when suitably adapted) to a number of Ukrainian refugees but not – Mr. Cooke emphasised – as a "migrant transit hub".

23. Mr. Cooke also says that he has carried out works costing €56,000 to adapt the property and the property is now suitable for accommodating seven Ukrainian families in seven adapted bedrooms.

24. The defendant accused the plaintiff of "whipping up discontent" on social media in the locality about the defendants' actions.

25. The defendants submit, correctly in my view, that it is a matter for the defendants to acquire planning permission - if it is required - and to comply with all of the fire safety, septic tank and other planning regulations, if any, imposed by a planning authority. The defendants say that the current application before the court is not a planning injunction which has a particular statutory regime and procedural rules which are not present in this case.

26. More fundamentally, the defendants submit that all such issues which might arise in relation to planning are matters between the defendants and the local planning authority (i.e. Kildare County Council). They say that the plaintiff's proper course of action is to make objections to the planning authority and/or the other departments within the local authority in relation to fire safety and septic tank regulations. They say that the plaintiff cannot, and should not ,make such objections to the High Court in relation to seeking an injunction. I agree with this submission.

Legal principles applicable to an interlocutory injunction

27. In *Merck, Sharp and Dohme Corporation v. Clonmel Health Care Ltd* [2019] IESC 65, the Supreme Court re-stated the legal principles applicable to the grant of an interlocutory injunction. In summary, and insofar as they are relevant to this case, they are as follows:

(1) First, the court should consider whether if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not then it is extremely unlikely that an interlocutory injunction seeking the same relief will be granted;

(2) The court should then consider whether there is a fair question to be tried;

(3) If so, the court should consider the balance of convenience/balance of justice;

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

(5) However other factors may also be considered and weighed in the balance of justice.

28. In relation to the first of these principles, I have considerable doubt as to whether the plaintiff would obtain a permanent injunction, even if she were successful at the trial, for reasons set out below in my assessment of the balance of convenience.

Is there a fair question to be tried?

29. The plaintiff's claim as set out in her plenary summons is in nuisance and breach of contract. The claim in breach of contract has been outlined above. The plaintiff submitted that if the defendants' plan goes ahead, there will be a large increase in traffic at the entrance to her mother's house – in which the plaintiff also lives – and it will result in a nuisance to the plaintiff and her mother in the enjoyment of their property.

30. The defendants submit however that there is simply no evidence before the court that this will happen, that the plaintiff is only anticipating what might happen in the future, that her application for an injunction must be regarded as an application for a *quia timet* injunction and that there is a higher standard demanded of a plaintiff before a court will grant a *quia timet* injunction.

31. I agree with this submission. The plaintiff's application is, in substance, an application for a *quia timet* injunction.

32. The defendants rely on the decision of *Attorney General (Boswell) v. Rathmines and Pembroke Joint Hospital Board* [1904] IR 161 where Fitzgibbon L.J. stated as follows:

> *"The projected Hospital has not been built, but we are not altogether without experimental evidence of its probable effects, because a temporary iron hospital was erected in January, 1903, and either in it or in an adjacent building six or eight smallpox patients had been treated before the trial, of whom two were then still upon the premises. To sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury—proof of actual and real danger—a strong probability, almost amounting to moral certainty, that if the Hospital be established, it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justifiable—certainty that the Hospital will be disagreeable or inconvenient—proof that it will abridge a man's pleasure, or make him anxious—the inability of the Court to say that no danger will arise—none of these, even accompanied by depreciation of property, will discharge the burden of proof which rests on the plaintiff, or can justify a precautionary injunction, restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours. These propositions, quoted from cases of authority, define the issue. The decision depends upon the facts proved in the particular case, with due regard to the opinions of experts so far as they are founded upon facts; but with due regard, also, to the decisions of other Courts pronounced upon similar evidence in other cases."*

33. At p. 173 Fitzgibbon L.J. states:

> "*in a quia timet action, mismanagement or overcrowding is not to be assumed."*

34. The defendants submit that in the present case, the plaintiff has not provided any evidence before the court as to the level of traffic which might arise over her mother's land over which the defendants have a right of way. The defendants submit that the plaintiff has

not provided any proof to the court of *"a well-founded apprehension of injury – proof of actual and real danger – a strong probability almost amounting to moral certainty*" that the traffic over this right of way will be an actionable nuisance. I agree with this submission.

35. The plaintiff is concerned about what might happen in the future; however there is no evidence before the court as to exactly what the level of traffic would be or whether or not that might amount to an actionable nuisance in law. Much will depend on whatever planning permission the defendants obtain (assuming one is required) or the conditions laid down by any fire safety regulations or septic tank regulations.

36. It appears that the defendant has had to carry out certain works to the house to render it habitable for a larger number of people. This has resulted in trucks going over the joint entrance. This has created potholes. However the defendants have at all times filled in these potholes swiftly to ensure that there has been no interference to the right of way. In addition the defendants have also said, not unreasonably, that potholes often appear after a hard winter, as the property is located in a relatively isolated rural area near Naas in County Kildare.

37. The plaintiff has complained in her affidavits about the lorries going up and down the laneway and the damage they have done to her property but as the plaintiff's mother has granted a right of way over the said property and as the defendant has repaired any damage which has been done it is difficult to see what that dispute is.

38. I am satisfied that the plaintiff has not established a fair issue to be tried at this time on this matter that the defendants' actions will cause a nuisance or a breach of contract.

Balance of convenience

39. I am also satisfied that the balance of convenience is in favour of the defendants. The defendants have established that they have a right of way over the plaintiff's mother's entrance. Indeed that is not disputed. The plaintiff's fear is that it might be subject to a

significant amount of increased traffic. However as submitted above, that has not happened yet and it might not happen.

40. Given that no increased traffic has occurred as yet, I am satisfied that the balance of convenience is in favour of the defendant.

41. The defendants also state in this regard that five sixths (⅚) of the width of the joint entrance is in fact their property. Therefore the majority of traffic will go over their part of the joint entrance. They can access their land directly from the main road. To that extent therefore, the plaintiff cannot complain about how they use their own property and how they use their entrance to their own property and how many vehicles go up and down the lane each day. They have a right to use that property as they wish.

42. Moreover, it also appears that a white line could be drawn down through the joint entrance to clearly signal to incoming/outgoing traffic, which part of the joint entrance belongs to the defendants (and which to the plaintiff) and directing all traffic to Castlekeely Manor to keep to the defendant's side of the line. Whilst that might be difficult to monitor in reality, it would reduce any traffic on the plaintiff's side of the entrance. Again, this is a factor to be considered in the balance of convenience.

43. In addition, given that the plaintiff has also accepted that she has no objection to ten to twelve people residing in the house, which will of itself clearly bring about a significant increase in traffic, I am of the view that any additional increase from ten to twelve to 29-30 people using the right of way might be remediable in damages even if the plaintiff is successful in her case.

44. The defendants also say that they will suffer significant losses if such an injunction were granted.

45. The defendants also relied on *Szabo v. Esat Digifone* (6th February 1998) where Geoghegan J. in the High Court referred to Spry on Equitable Remedies (4th edition, p. 459) where the authors stated:

> *"It should not be thought, however, that it is never material that no breach of the rights of the appellant has taken place at the time of the hearing of the application of the plaintiff. On the contrary, the fact that no breach has yet taken place is a matter of relevance, the precise weight of which varies according to all the circumstances. So if no breach has taken place it may be more difficult to establish, as a matter of evidence, that there is a sufficient risk of future injury to justify the immediate grant of an injunction; and in exercising its discretion the Court is found here to be 'balancing the magnitude of the evil against the chances of its occurrence'. If in all the circumstances the likelihood that an injury will take place is not sufficiently high, quia timet relief will be refused, and the applicant will be left either to avail himself of such other remedies as may be open to him or else to renew his application should subsequently the likelihood of an injury increase sufficiently to render equitable intervention appropriate."* (Emphasis added).

46. On the facts, Geoghegan J. held that he was doubtful if there was a serious issue to be tried in that case but even if there was, he had no doubt that the balance of convenience required that he should refuse an interlocutory injunction sought. Likewise, in this case, it is clear that no breach of the plaintiff's rights has yet taken place and that is a factor to which some weight should be given.

Conclusion

47. I am of the view that the plaintiff has not established a serious issue to be tried. But even if she had, I have no doubt that the balance of convenience is in favour of refusing the relief sought.

48. I will therefore refuse the application for an injunction.