APPROVED **[2023] IEHC 608**

THE HIGH COURT

Record No.: 2012/2173P

Between:

ATLANTIS DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

Plaintiff

-AND-

PATRICK CONSIDINE and LISCANNOR DEVELOPMENT COMPANY LIMITED

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 10 November 2023

Introduction

1. In these proceedings, the Plaintiff claims damages in relation to its 2005 purchase from the first Defendant of certain lands in Liscannor, County Clare. The main issue between the parties concerns the question of whether the first Defendant was the owner of all of the lands included in the sale and, if not, what the consequences are of the inclusion in the sale of lands of which he was not the owner.

2. In summary, the Plaintiff claims that a portion of the lands it acquired from the first Defendant were, in fact, through adverse possession, owned by the second Defendant. The second Defendant has, since the sale, been registered as owner of those lands. The

first Defendant claims that the second Defendant had not extinguished his title through adverse possession and that he was therefore entitled to include the lands in the sale.

3. A subsidiary issue arises should the Court conclude that the first Defendant did own all the lands comprised in the 2005 sale in light of certain representations made by the first Defendant in the course of that sale that there had been no prior claims in relation to the lands.

Factual Background

4. Most of the relevant facts are not in dispute.

5. By a Contract of Sale (**"the Contract**") dated 29 October 2005, the first Defendant sold a plot of land comprised in Folio 19446 County Clare ("**the Property**") to the Plaintiff for €1 million. The Plaintiff was, at that time, the owner of an adjoining plot of land in respect of which it made a planning application for 30 residential units in 2005. It was the Plaintiff's intention to develop the Property as a residential housing development comprising 16 sheltered housing units. The Plaintiff acquired the Property with the benefit of a loan from Anglo Irish Bank plc.

6. The Property was transferred by a Transfer ("**the Transfer**) dated 22 December 2005, pursuant to which the first Defendant transferred the Property "as beneficial owner and as a person entitled to be Registered Owner" to Bespoke Developments Limited in fee simple absolutely. Bespoke Developments Limited was the registered name of the Plaintiff prior to a change of name on 14 December 2007. The Plaintiff was registered as owner of the Property on 17 February 2007.

7. The Plaintiff submitted a planning application for a proposed development on the Property on 22 December 2006. The second Defendant wrote to Clare County Council ("**the Council**") in response to the planning application asserting that it was the owner of a portion of the Property. It is that portion of the Property which is the subject of the dispute in these proceedings ("**the Disputed Property**"). The Disputed Property had been included in the sale from the first Defendant to the Plaintiff.

8. Both planning applications submitted by the Plaintiff were refused by the Council and, on appeal, by An Bord Pleanála (**"the Board**"). The Plaintiff did not submit any further planning application for the Property and never developed the Property or the adjoining lands.

9. In 2010, the second Defendant submitted an application to the Property Registration Authority ("**the PRA**") pursuant to section 49 of the Registration of Title Act 1964, as amended ("**the 1964 Act**") in respect of the Disputed Lands, in other words, an application to be registered as owner of the Disputed Lands by reason of adverse possession. It was registered as owner on 3 November 2010.

10. The Plaintiff defaulted on its loan obligations, and it was placed in receivership in 2010. The receiver subsequently sold the Property, excluding the Disputed Property.

11. The Plaintiff issued proceedings by Plenary Summons dated 1 March 2012 and delivered a Statement of Claim on 21 May 2012. In its claim, the Plaintiff claimed recission of the Contract or, in the alternative, damages for breach of contract or breach of covenant. The Statement of Claim also pleaded that there were errors in the Replies to the Requisitions on Title ("**Replies to Requisitions**"). The damages claimed were the purchase price of *all* the Property, together with financing costs, as well as the loss of development opportunity and professional fees associated with the planning application.

12. The first Defendant delivered a Defence dated 4 October 2012 in which it denied any breach of contract or breach of covenant.

13. The Plaintiff delivered updated particulars on 15 December 2021 in which it made clear that it was no longer pursuing a claim for loss of opportunity or in respect of professional fees. Its claim was limited, at that stage, to a claim in damages for the balance on the loan account relating to the purchase of the Property, together with interest on the loan and stamp duty.

14. The Plaintiff served a Notice of Discontinuance in respect of the second Defendant on 20 February 2023. The case came on for hearing before me over three days commencing on 2 May 2023, and the parties delivered written submissions in July 2023.

The Dispute

15. The Plaintiff claims that it did not get what it contracted for and, therefore, is entitled to damages for breach of covenant. In particular, it argues that it contracted to purchase 1.22 acres of land, including the Disputed Property, but that it has not received all of those lands in circumstances where the second Defendant has since been registered as the owner of the Disputed Property by the PRA. In the alternative, the Plaintiff argues that, prior to completion of the Contract, the Plaintiff wrongfully represented that there were no claims in relation to the lands, notwithstanding that the second Defendant had previously asserted an entitlement to ownership of the Disputed Property.

16. Insofar as the Plaintiff argued that the second Defendant is the owner of the Disputed Property and that the first Defendant acted in breach of covenant in purporting to transfer those lands to the Plaintiff, it is important to emphasise that neither party sought to rely on section 31 of the 1964 Act as proving title to the Disputed Property. Although section 31 provides that the Register shall be conclusive evidence of the title of the owner as appearing on the Register, it seems to me that the parties were correct to regard it as irrelevant to the dispute in these proceedings. At the time of the Contract, that is, the date of the alleged breach of covenant, the second Defendant was not the registered owner of the lands. The Plaintiff could not, therefore, rely on the subsequent registration of the second Defendant as evidencing title at the time of the Contract.

17. Conversely, although the first Defendant *was* the registered owner at the time of the Contract, the first Defendant seems to have accepted, correctly, in my view, that this is not an answer to a claim that, at the time of the Contract, the second Defendant had acquired an entitlement to be registered as owner by adverse possession. This reflects the terms of section 72(1)(p) of the 1964 Act:

(1) Subject to subsection (2), all registered land shall be subject to such of the following burdens as for the time being affect the land, whether those burdens are or are not registered, namely—

(p) rights acquired or in course of being acquired under the Statute of Limitations, 1957

18. The Plaintiff's claim against the first Defendant is, in effect, a derivative claim, relying as it does on the second Defendant's purported entitlement to be registered as owner of the Disputed Property. In advancing the claim, the Plaintiff sought to rely on the same factual matters which grounded the second Defendant's application pursuant to section 49, which are detailed below.

19. Before dealing with the evidence regarding the claim for adverse possession or, more accurately, the Plaintiff's claim that the first Defendant had lost title to the Disputed Property by reason of the second Defendant's adverse possession of those lands, it is necessary to look at the title to the entire property the subject of the Contract.

20. The title documents listed in the Documents Schedule in the Contract commence (temporally) with a Deed of Conveyance of the Property dated 5 January 1943 from Catherine Agnes Considine to Patrick Gerard Considine and Daniel Considine. In addition, there are Deeds of Conveyance and a Deed of Surrender dated 11 November 1969 from Kathleen Considine to Patrick Gerard Considine, pursuant to which Kathleen Considine surrendered a yearly tenancy in the Property for a consideration of £1025. Although the Deed of Surrender is signed by Patrick Gerard Considine, the Deed of Conveyance is signed by James and Helena Considine, described as "purchasers".

21. The Patrick Gerard Considine referred to in these Deeds was the first Defendant's uncle, his father's brother. It was he who, until 2005, was registered as owner of the Property. It is the first Defendant's case that this was an error and that it was, in fact, his parents – James and Helena Considine – who were the true owners of the Property. The first Defendant's sister, Helen Lundy, was the personal representative of Patrick Gerard Considine, who died intestate in 2004. On 19 October 2005, Ms Lundy swore a Family Home Declaration. In it, she averred that the Property formed part of her parent's

property and had "*never been owned by Patrick Gerard Considine*". She explained that her parents paid the consideration for the 1969 conveyance and surrender and that they occupied the property thereafter to the exclusion of Patrick Gerard Considine. She also averred that it was her parents' intention to transfer the property to her brother, the first Defendant, in 1988 (when they transferred all their remaining property to him) and that he took possession at this time.

22. Ms Lundy's affidavit refers to an affidavit of her mother, Helena Considine, sworn on the same date. In that affidavit, Mrs Considine explains that she and her husband purchased the Property from Ms Kathleen Considine in 1969. In circumstances where the Property was already registered in the name of Patrick Gerard Considine, the contracts were drawn up in his name but with the intention that he would transfer the Property to James and Helena Considine. However, "*this aspect of the arrangement was never given effect*". Mrs Considine's affidavit avers that she and her husband went into beneficial use and occupation of the lands after the 1969 conveyance and continued to beneficially use and occupy it until they transferred their entire property holding to the first Defendant in 1988. Both the first Defendant and Ms Lundy gave evidence at the hearing of the action consistent with these sworn documents.

23. By Deed of Transfer dated 14 March 1988, James and Helena Considine transferred property comprised in Folio CE20852 to the first Defendant. The first Defendant and his sister, Ms Lundy, gave evidence that their parents also transferred the Property, comprised in Folio 19446, *i.e.* the Property the subject matter of the Contract, to the first Defendant at this time. However, there was no formal transfer of the Property to him. It is the first Defendant's case, therefore, that his parents were the beneficial owners of the Property from, at the latest, 1969 and that they transferred that beneficial ownership to him in 1988.

24. On 19 October 2005, Ms Lundy, in her capacity as personal representative of Patrick Gerard Considine, assented to the transfer of the Property to the first Defendant.

25. Unfortunately, James Considine died in 1999, Patrick Gerard Considine in 2004, and Helena Considine died shortly after she swore her affidavit in 2005. Therefore, none of those parties were able to confirm at hearing the matters set out in Mrs Considine's affidavit. However, in circumstances where the Plaintiff agreed to acquire the Property

from the first Defendant based on the first Defendant's title described above, no issue can be taken by it regarding any infirmity in that title. Although the Family Home Declaration sworn by Ms Lundy and the affidavit of her mother are not referred to in the Documents Schedule to the Contract, the former is referred to in the Replies to Requisitions. Mr Gearoid Williams, solicitor for the first Defendant, gave evidence that he was certain that it would have been provided to the Plaintiff's solicitor as part of the sales process. Having regard to the importance of such declarations in the context of any property conveyance, I have no doubt that Mr Williams' evidence on this point should be accepted. The Plaintiff was, accordingly, satisfied to accept that the first Defendant had sufficient interest to transfer the Property to it, notwithstanding any shortcomings in the title documents. It cannot, therefore, rely on any infirmity in the first Defendant's title to the entire Property to argue that he didn't have title to transfer the Disputed Property.

26. The only dispute, therefore, relevant to these proceedings concerns the title to the Disputed Property now in the registered ownership of the second Defendant.

The Disputed Property

27. The second Defendant is a community organisation. One of its Directors, Andrew Curry, gave evidence at the hearing of the action, to which I will turn in more detail below. In brief terms, the second Defendant owned a plot of land adjoining the Disputed Property and in 1978, it was in the process of building a community hall on its lands, the site of a former school, and decided that it required a larger site. Mr Curry's evidence was that the second Defendant, which was at that stage an unincorporated association, entered an agreement with James Considine in 1978, pursuant to which Mr Considine agreed to sell the Disputed Property to it for IR£300. Contemporaneous minutes of the second Defendant reflect this agreement, and the first Defendant and his sister, Ms Lundy, both confirmed in evidence that they were aware of the agreement. The fact that it was James Considine rather than Patrick Gerard Considine with whom the sale was agreed is, of course, consistent with the former rather than the latter being the true owner of the lands.

28. Following this agreement, there followed an exchange of correspondence between solicitors for the second Defendant and solicitors for Mr Considine. Initially, a delay seems to have been caused by the incorporation of the second Defendant and thereafter by the mislaying of a map. The correspondence tendered in evidence rested with a letter from Mr Considine's solicitor to the second Defendant's solicitor from 1981 referencing that the property "*intended for your clients must be out of a Freehold strip of ground, owned b/ Mr Considine.*" Mr Considine's solicitor said that he had therefore ordered a copy of the Land Registry Map and would be in communication in due course. No conveyance or transfer was ever completed.

29. Before addressing the evidence regarding what occurred thereafter, it is helpful to consider, at this juncture, the application made by the second Defendant to the PRA pursuant to section 49 of the 1964 Act. Section 49(2) provides:

> *(2) Where any person claims to have acquired a title by possession to registered land, he may apply to the Authority to be registered as owner of the land and the Authority, if satisfied that the applicant has acquired the title, may cause the applicant to be registered as owner of the land with an absolute, good leasehold, possessory or qualified title, as the case may require, but without prejudice to any right not extinguished by such possession.*

30. The second Defendant submitted an application to the PRA on 10 March 2010. The application was grounded on an affidavit of Mr Curry. His affidavit referred to the agreement to purchase the lands the subject of the section 49 application, in effect, the Disputed Property, and referred to the agreement on the purchase price. It did not indicate whether the agreed price had ever been paid. However, since the application was an application for registration on the basis of possession, this may not have been of central importance.

31. The affidavit referred to the fact that at the time of the agreement, the second Defendant was in the process of building a community centre and that the Disputed Property was required for the amenity of the community centre. It noted that the second Defendant had built a wall around the Disputed Property and extended the community

centre onto it. It claimed that there was no access to the Disputed Property "other than through the Community Centre". It asserted that the second Defendant had been in sole occupation since 1979 and that the second Defendant was not aware of any interest in the Disputed Property adverse to its interest or estate therein.

32. The Plaintiff, as registered owner of the Disputed Property, was notified of the section 49 application by registered post, but no one called to collect the registered letter. The second Defendant was duly registered by the PRA as owner of the Property. No appeal against that registration was lodged by the Plaintiff.

33. It is also worth noting that, during the course of these proceedings, the second Defendant brought an application seeking security for costs against the Plaintiff. Mr Curry swore an affidavit in the course of that application which suggested that the agreed purchase price of £300 had been paid by the second Defendant to James Considine.

34. Having regard to the nature of these proceedings, the Plaintiff was in the curious position of having to establish that it had *not* acquired an interest in the Disputed Lands or, put otherwise, that the first Defendant had not had any title in the Disputed Property to convey to it. The Plaintiff was, therefore, entirely reliant on the second Defendant's asserted interest in the Property and its evidence to support that interest. At the hearing of the action, the Plaintiff initially sought to rely on the affidavit grounding the section 49 application as evidence of the second Defendant's interest in the Disputed Property. The first Defendant objected to the admissibility of that affidavit. I ruled that the affidavit could not be adduced as evidence of the truth of its contents. In the event, the Plaintiff called Mr Curry to give evidence and his evidence proved to be of critical importance.

35. It appeared that there were two bases upon which the Plaintiff could assert that the second Defendant was entitled to be regarded as owner of the Property. Firstly, on the basis of a concluded agreement between it and Mr James Considine to purchase the lands, or, in the alternative, on the basis of adverse possession. The first Defendant, however, says that there was no concluded agreement to transfer the lands and that the second Defendant's possession of the lands was at all times with his or his father's consent and was not, therefore, such as to displace his title.

36. Before addressing the arguments advanced by the parties, I propose setting out a summary of the evidence given on each party's behalf insofar as is relevant to the issues in dispute.

Evidence in relation to ownership of Disputed Property

37. Mr John Flanagan, the director and principal shareholder of the Plaintiff, gave evidence regarding the contractual negotiations. He explained that at the time of the Contract the Plaintiff already owned the lands to the south of the Property and that it submitted a planning application for those lands in 2005. He described the potential benefits to the Plaintiff of being able to develop the southern lands and the Property together as the Property would facilitate access to the southern lands. In relation to the Disputed Property, he described discussions with officials of Clare County Council and, in particular, Mr Andrew Hersey, an executive planner with the Council. Mr Flanagan gave evidence that Mr Hersey had indicated that the Disputed Property could be provided by the Plaintiff to the Council, potentially for use as a public library, in lieu of transferring residential units in satisfaction of the Plaintiff's obligations pursuant to Part V of the Planning and Development Act 2000, as amended ("**the 2000 Act**").

38. Mr Flanagan described having met with the first Defendant at the property prior to the Contract. The first Defendant was known to Mr Flanagan as Mr Considine had done work for the Plaintiff in the past. They walked the lands together and noted that the Disputed Property was a field to the rear of the Community Centre surrounded by a well-built 5-foot wall. The first Defendant's horse was in the field at that time. Mr Flanagan said he was not too concerned about the fact that the Disputed Property was segregated from the rest of the Property since he intended that those lands would be given back to the community. He stated that the first Defendant had indicated that Ms. Maura Considine (no relation to the first Defendant), who worked in a playschool in the Community Centre, signed forms from time to time giving the playschool permission to use the field.

39. He referred to correspondence sent by the Plaintiff's solicitor prior to the sale regarding ownership of the Disputed Property. By letter dated 13 October 2005, M O'Shea & Co wrote to McMahon & Williams, solicitors for the first Defendant. The

letter raised an issue about a right to locate a treatment plant and also the Disputed Property. The letter stated:

> *"Secondly we require clarification in respect of the area we have marked with the letter B on the attached map. We acknowledge that this area is contained within your client's Land Registry Boundary in respect of Plan 15. However we are concerned as to whether or not the Community Centre might have any claim to said area or any part thereof. This area is immediately behind the Community Centre. There appears to be a wooden gate immediately at the left rear boundary of the Community Centre building. Can you comment on what the purpose of the wooden gate is?*
>
> *The foregoing two issues are vital to this proposed transaction."*

40. McMahon & Williams replied by letter of the same date. The reply was as follows:

> *"Mr Considine has asked me to confirm that he is in possession of this and that his cow has been grazing it for some time. However, it was proposed at one stage that the Community Centre would extend and would acquire some lands from Mr Considine's parents. However, this did not take place. The reason for the presence of the wooden gate is that the property is used by the playschool at the Community Centre during the summer months, ie. (the school summer) so that the children can go play out there. Mr Considine is asked to sign a form every year consenting to this and he does. However, at the moment there are no such rights in existence and when it comes up for renewal next year it will be a matter for Mr. Flanagan or whoever is acquiring it to deal with it. There is no entitlement to this."*

41. Mr Flanagan also referred to the Requisitions on Title and, in particular, the response to the query at 14(4) thereof, which stated that no adverse claim had been made by any person in respect of the Property.

42. Mr Flanagan then referred to correspondence received from solicitors for the second Defendant in July 2008, prompted by the Plaintiff's planning application for the Property. The letter stated as follows in relation to the Disputed Property:

> *"Our client has instructed us that it purchased this plot of ground more than 30 years ago from Mr Considine and since that time, the property has been fenced off and used in conjunction with the Community Hall. We assume that your client included this in error in the planning permission as he does not have access to the plot.*
> *We are further instructed that our client's Architect Alex Russell has written to Clare County Council in this regard and we would be obliged if you would confirm that your client now intends to amend its planning application to exclude this plot of ground."*

43. Similar correspondence was sent to solicitors for the first Defendant, and a submission was made to the Council on the planning application for the Property. Subsequent correspondence asserted that the Disputed Property could only be accessed through the Community Centre building and that it was "incomprehensible" that it could be viewed other than as belonging to the second Defendant.

44. Mr Flanagan described being surprised and shocked by this development as he thought that the question of ownership of the Disputed Property had been sorted out. This was, he said, the first he had heard of any purported purchase of the Disputed Property. He pointed out that it was incorrect that the Disputed Property could only be accessed through the building, as it could be accessed through the gate to the side of the building.

45. Mr Flanagan gave evidence that both planning applications, for the southern lands and for the Property, were refused by the Council and refused on appeal to the Board. He accepted that none of the reasons for refusal for either application related to the ownership of the Disputed Property.

46. He gave evidence of believing that the reasons for the refusal of permission could have been addressed and of speaking to a representative of the second Defendant to advise it that it shouldn't object to the planning application for the Property as the

Plaintiff was planning to transfer the Disputed Property to the community in any event. He gave evidence of the loan required to purchase the Property and described the financial difficulties which befell the Plaintiff and that it was unable to continue servicing its loans beyond 2008, ultimately leading to the appointment of a receiver on 7 October 2010.

47. In describing why he did not oppose the second Defendant's application to be registered as owner of the Disputed Property, Mr Flanagan said that he took the view that the second Defendant had been wronged and that he didn't want to cause them any more trouble.

48. Mr Flanagan gave evidence that he would have looked at the proposed purchase of the Property "in a completely different light" had he been aware of the second Defendant's interest in the Disputed Property. He did not suggest that he would not have gone ahead with the purchase had he been aware of the second Defendant's claimed interest.

49. Mr Andrew Hersey gave evidence of his involvement in the planning and his discussions with Mr Flanagan as part of pre-application consultations with the Council. He said that he would most likely have welcomed any suggestion that the Disputed Property could be provided for a community use, such as a library, but stated that any discussions regarding the lands being provided in lieu of the Plaintiff's Part V obligations were "above his pay grade". He confirmed that, in his role as executive planner, he recommended refusal of both planning applications.

50. Mr Andrew Curry was subpoenaed by the Plaintiff to give evidence. He gave evidence of the formation of the second Defendant as a community organisation established with a view to building a community centre on the site of a former national school. During the course of the project, the second Defendant sought to expand the proposed centre and entered what he described as a "gentlemen's agreement" to acquire the land to the rear of the community centre from the first Defendant's father for a price of £300. He said that the second Defendant built the wall around the field once the sale was agreed and that the construction of the hall, which was then in progress, extended a short distance onto the Disputed Property.

51. He indicated that the construction of the wall and the extension of the Hall onto the Disputed Property was with the agreement of the first Defendant's father and that the second Defendant would not have built on the Disputed Property without his agreement.

52. He acknowledged in evidence that the second Defendant had never paid the agreed purchase price and that the transaction was never completed. He said that they were waiting for the transaction to complete before paying the purchase price. Insofar as his affidavit sworn in the context of the security for costs application suggested otherwise, he accepted that this was an error. He also acknowledged that the first Defendant regularly used the field to graze his horse or pony and that the second Defendant never had any issue with this.

53. He was also asked about letters sent by the second Defendant's solicitor in 2000 and 2001 in which its solicitor complained to the first Defendant's father's solicitor about alleged trespass by the first Defendant (or his father). He could not recall the circumstances of those letters or what the trespass referred to in the letters was alleged to be.

54. The second Defendant's solicitors at the time of that correspondence (and these proceedings) were Chambers & Co. Ms Judith Foley, who had been a solicitor with Chambers & Co since the 1980s, gave evidence regarding her dealings with the Disputed Property. She was not involved in the original transaction regarding the proposed sale by the first Defendant's father but reviewed the office file. She was the author of the 2000 and 2001 letters.

55. The 2000 letter was dated 11 October 2000 but referred to another letter of the same date (which was not produced), and Ms Foley gave evidence that she believed that the 2000 letter had been misdated. It was addressed to McMahon & Williams solicitor and described McMahon & Williams' client as being James Considine, *i.e.* the first Defendant's father. Ms Foley gave evidence that she may not have been aware that James Considine had died in 1999. The letter stated:

> *"Our client requires to bring its title up to date in relation to the lands described in our previous letter and we would be obliged to hear from you as soon as possible. Having regard to the fact that our clients has been in*

possession of the plot of ground since 1978 when the surrounding wall was built by our client, we have been instructed to take out title in the matter."

56. Ms Foley was also the author of a second letter dated 13 June 2001. This letter also referred to Mr James Considine as being McMahon & Williams' client and stated:

"I refer to previous correspondence in respect of the above. Can you bring the matter any further?
We are instructed that your client is trespassing on lands which his father had sold a number of year ago to Liscannor Development Company. This is our client's land and has been fenced off and used by the Development Company for many years until the present trespass commenced."

57. Ms Foley gave evidence that she wrote these letters on instructions from Mr Paddy Guerin, a director of the second Defendant. She believed that the occasion of trespass involved the bringing of animals onto the lands. She said that there were no responses on file to these letters and that nothing further occurred until she was instructed to send the letters quoted above from July 2008. She processed the section 49 application and assisted the second Defendant with preparing the application for security for costs referred to above. She said that these were based on her understanding of her instructions which were consistent with her own knowledge of the Disputed Property. She said that she had never seen animals on the Disputed Property and that it would, in her view, be very difficult to get animals in and out. She said that she didn't notice the error in the affidavit grounding the application for security for costs in relation to the purchase price for the property having been paid.

58. The only other witness called on behalf of the Plaintiff was Mr Liam Browne, a valuer.

59. Evidence regarding the use of the land was given by the first Defendant and, on his behalf, by his sister, Ms Helen Lundy, and by two women who worked in the playschool run in the Community Centre, Ms Liz Bonito and Ms Maura Considine (no relation of the first Defendant).

60. Ms Bonito gave evidence that she was part of a voluntary group which used the Community Hall as a playschool between 1996 and 2009 when they moved to new premises. The playschool used the field to let the children play during the latter years of its operation, as the HSE had indicated that the playschool required the use of outdoor space. She said that she recalls the first Defendant grazing a horse there from time to time but that he would remove it when asked to do so to let the children play. She only had a clear recollection of the first Defendant using the field and being asked to remove his horse in the years immediately prior to the playschool moving to the new premises. She did not recall anything about being asked to sign forms or asking the first Defendant to sign forms regarding the use of the field. Ms Considine gave similar evidence to that of Ms Bonito. She said that it was the second Defendant from whom they asked permission to use the field. It emerged from Ms Considine's evidence that only a small portion of the field was used by the playschool, an area immediately to the rear of the hall, enclosed by plastic fencing.

61. Ms Lundy gave evidence that she had grown up on the Main Street in Liscannor and was, in fact, a member of the Board of the second Defendant, although she hadn't been made aware of the steps taken by the second Defendant regarding ownership of the Disputed Property. She said she was aware of her father's agreement to sell the land to the second Defendant but was also aware that the money was never paid, and therefore the lands were never transferred to the second Defendant. She said that the Disputed Property was intended to be transferred by her father to her brother in 1988 when he transferred all of his other lands to him.

62. She gave evidence that her brother regularly used the field to graze his horse and that an old cow, too old for milking, had been allowed to graze there too. She said that this continued after the wall was built around the lands. She said that using the land for grazing rendered the lands eligible for grants. In this regard, Mr Alan O'Brien, of the Department of Agriculture gave evidence that the Department's records showed that the first Defendant had obtained Area Aid grants as owner of the lands from 1996, meaning that he had completed the relevant pre-printed form in 1995, the earliest date for which records were available. In order to obtain the grant, the lands would have to have been in agricultural use, although Mr O'Brien accepted that with 130,000 applications and

one million parcels of land, there would likely not have been any checks or due diligence to confirm that the details on an application were correct.

63. Mr Patrick Considine's own evidence was that although his father had agreed to sell the Disputed Property to the second Defendant, the purchase price was never paid, and therefore the lands were never transferred, and the first Defendant and his family kept using them. He described the various horses he had owned, including an Irish draft mare called Lizzy he had bought in 1998. He used the horses because he liked to ride out. His evidence was that Lizzy was kept in the field apart from when weather conditions were so bad that she needed to be moved to sheds located on lands owned by the first Defendant's family nearby. He said that there was a cow, called Berry, who was also kept in the field with Lizzy, as company for each other.

64. He said that Lizzy could open gates and would wander out of the field to his home and that he had had to install gates at the field, to the side of the Community Centre. He said that they were tubular gates bought from the local farm shop, which were wedged such that the horse could not open them. He accepted that the gates in place at the field at the time of the Contract were child-proof gates which had been put in by the playschool. He said it was easy to bring animals in and out of the field. He said it was Lizzy that Mr Flanagan saw in the field when he inspected the Property.

65. He said that prior to 1998 he put other animals in the field, including a horse he sold to the renowned showjumper, Eddie Macken. He said that his father was a man for the horses, who would buy yearlings and sell them after 3 to 4 years. He said that they had as many as 13 horses at one time and that the field was used to graze them.

66. He agreed that the horses would be moved from the lands when the children were playing in the field. He said that the children only used a small portion of the enclosed field.

67. He said that he first became aware of the correspondence from 2000 and 2001 during the course of these proceedings. He was not notified of the section 49 application. In relation to signing consents, he said that he recalled signing documents for the playschool's insurance and that he believed he was giving the playschool permission to use the field.

68. Mr Gearoid Williams, of McMahon & Williams, also gave evidence. He said that he had no recollection of receiving the letters from Ms Foley in 2000 and 2001 and had checked his office and couldn't find them. He said he would have referred to them in the Replies to Requisitions had he been aware of them. Although he didn't recall receiving the letters, he accepted that they were sent and apologised for not having replied. He said that he was not aware of the proposed sale of the Disputed Property to the second Defendant in 1978 until the correspondence received in 2008.

69. He confirmed, consistent with the evidence of Ms Lundy, that when the first Defendant's father transferred his property to the first Defendant in 1988, it was intended that all his properties be transferred, but that the Property the subject of the Contract, apparently through inadvertence, had not been included.

70. He wrote the response to the Plaintiff's solicitors letter dated 13 October 2005 based on instructions he was given. He said the reference to there being a cow kept on the field (rather than a horse) may have been his mistake.

71. The first Defendant also called a planning consultant, Mr Gus McCarthy of MKO Planning and Environmental Consultants. He had reviewed the planning files and noted that both planning applications had proposed that the Part V obligations would be met by making a financial contribution rather than the transfer of lands. He confirmed that the reasons for refusal had nothing to do with the Disputed Property.

72. He accepted that at the relevant time, the transfer of lands in lieu of delivery of housing units was a permissible way for a developer to satisfy Part V obligations, but only where the lands to be transferred in lieu were zoned for residential development. He gave evidence that the Disputed Property was not zoned for residential development at the relevant time and, therefore, could not have been used to satisfy a Part V obligation.

73. Mr Tom Corr, Chartered Valuation Surveyor, gave valuation evidence on the first Defendant's behalf.

Arguments of the Parties

74. Following the hearing of the evidence in the case, the parties delivered written submissions. The Plaintiff's submissions refer to the four implied covenants for title incorporated by section 7 of the Conveyancing Act 1881. It quotes **Irish Conveyancing Law, Wylie and Woods (4th ed.)** at paragraph 21.15:

> *In a conveyance for valuable consideration, other than a mortgage, by a person who is expressed to convey "as beneficial owner", the following covenants are implied on behalf of the grantor: (1) that he has the right to convey the property; (2) that the grantee will have quiet enjoyment without lawful disturbance;(3) that the grantee will receive the property freed from incumbrances; (4) that the grantor will do anything reasonably requested in order further to assure the property to the grantee.*

75. The Plaintiff argues that these covenants apply as the first Defendant transferred the property as beneficial owner and purported to transfer a fee simple estate. It quotes **Wylie** at paragraph 21.12 to the effect that pursuant to the Conveyancing Act 1881, the covenants covered defects in title known to the grantee unless the conveyance was made subject to the defect. It notes that the position has changed under the Land and Conveyancing Act 2009 but that Act has no application to the conveyance in these proceedings. None of this is disputed by the first Defendant.

76. The Plaintiff contends that the first Defendant has breached the covenants for title by conveying property, a portion of which the second Defendant had become entitled to be registered as owner based upon possession. It refers in this regard to a decision of the House of Lords, **Eastwood v Ashton [1915] AC 900**.

77. In support of its contention that the second Defendant had become entitled to be registered as owner of the Disputed Property, the Plaintiff refers to the decision of Clarke J (as he then was) in **Dunne v CIE [2007] IEHC 314** and contends that the evidence supports its case that the second Defendant had dispossessed the first

Defendant or his father as owner of the Disputed Property such as to extinguish his title to those lands and that accordingly, the purported sale by the first Defendant of the Disputed Property was in breach of an implied covenant of title.

78. In addition, the Plaintiff argues that the Replies to Requisitions were inaccurate and misleading and that the Plaintiff was not provided with vacant possession of the Property as provided for under the Contract. It claims that this was a breach of the covenant for quiet enjoyment.

79. The Plaintiff claims damages on alternate bases. It seeks either damages equalling the full value of the loan taken out to purchase the Property together with interest and stamp duty. In the alternative, it seeks damages equivalent to the value of the Disputed Property.

80. The first Defendant argues that any claims based on tort, e.g. misrepresentation, are statute-barred and that the only claim that the Plaintiff can pursue is for breach of covenant. However, he argues that there has been no breach of covenant as his title to the Disputed Property had not been extinguished or vitiated by any claim of adverse possession. He claims that the evidence wholly undermines the Plaintiff's claim that the second Defendant had obtained a possessory title to the Disputed Property.

81. In the event that the Court concludes that there has been a breach of covenant, he argues that the correct measure of damages is the difference between the value of lands purported to be transferred and the lands actually transferred. However, he points out that the Plaintiff's claim has never included a claim for that difference in value, which was advanced for the first time at the hearing of the action and, accordingly, the Plaintiff should not now be allowed to pursue such a claim.

82. Arising from the arguments advanced at the hearing and in the written submissions subsequently delivered, it seems to me that the first issue to decide is whether the first Defendant had good title to the Disputed Property at the date of Contract or, put otherwise, whether his title to the Disputed Property had been extinguished by the second Defendant's adverse possession at that date.

Adverse Possession

83. Section 13(2) of the Statute of Limitations, 1957 (as amended), fixes the period within which an action for the recovery of land that is adversely possessed must be taken:

> *The following provisions shall apply to an action by a person (other than a State authority) to recover land—*
>
> > *(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;*
> >
> > *(b) if the right of action first accrued to a State authority, the action may be brought at any time before the expiration of the period during which the action could have been brought by a State authority, or of twelve years from the date on which the right of action accrued to some person other than a State authority, whichever period first expires.*

84. Section 18 requires that for a right of action to accrue to the holder of the title to land, there must be possession adverse to that by some other person:

> *(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.*
>
> *(2) Where—*
>
> > *(a) under the foregoing provisions of this Act a right of action to recover land is deemed to accrue on a certain date, and*

(b) no person is in adverse possession of the land on that date,

the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(3) Where a right of action to recover land has accrued and thereafter, before the right of action is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.

85. Section 24 sets out the consequences of adverse possession for the full limitation period:

Subject to section 25 of this Act and to section 49 of the Registration of Title Act, 1964, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.

86. Taken together, the foregoing means that if the owner of lands allows a period of twelve years to elapse with another party in adverse possession of those lands, then the owner's title will be extinguished, and the person in adverse possession will be entitled to be registered as owner of the lands.

87. As to what is meant by "adverse possession", the Plaintiff in his submissions refers to the decision of Clarke J in **Dunne v CIE [2007] IEHC 314.** That decision was, of course, affirmed on appeal by the Supreme Court in **Dunne v CIE [2016] IESC 47; [2016] 3 IR 167**. Charleton J stated (at p. 188) that Clarke J had "correctly encapsulated the relevant principle" in the following passage:

"4.9 … In Powell v. McFarlane[1979] 38 P. & C.R. 452 Slade J. noted, at p. 472, that '[a]n owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts

done by or on behalf of an owner in possession will be found to negative discontinuance of possession'. It is, therefore, important to emphasise that minimal acts of possession by the owner of the paper title will be sufficient to establish that he was not, at least at the relevant time of those acts, dispossessed. The assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will be taken to continue in possession with even minimal acts. A dispossessor will need to establish possession akin to that which an owner making full but ordinary use of the property concerned, having regard to its characteristics, could be expected to make. It is not, therefore, a question of weighing up and balancing the extent of the possession of an owner and a person claiming adverse possession. Provided that there are any acts of possession by the owner, then adverse possession cannot run at the relevant time."

88. Charleton J also noted that Clarke J had been correct in determining that mere possession is not sufficient, there must be an intention to dispossess (at p. 187):

"Clarke J. correctly identified that mere occupation is not enough to ground a claim of adverse possession and that what is also required is that the ostensible adverse occupier of the land does so with the intention of excluding the original owner. The matter is put thus in Halsbury's Laws of England (5th ed., LexisNexis, 2016), volume 68 at p. 317:-

> "1078 For there to be adverse possession the person claiming possession should have the necessary intention, that is, an intention to possess the land to the exclusion of all other persons including the owner with the paper title so far as is reasonable and so far as the process of the law will allow. An intention to use the land merely until prevented from doing so does not amount to the requisite intention.

[36] *Intention to possess may be proven by direct testimony but, given the tendency towards mistakes of memory and exaggeration in such cases, is*

perhaps more reliably established as an inference from the particular circumstances of a given case; in other words, intention to exclude the owner is best judged from the facts on the ground. That will be a matter for the trial judge. Where no, or minimal, use is made of land, it may be a simple matter not to draw an inference that there was an intention to exclude the title holder; an instance being Seamus Durack Manufacturing Ltd. v. Considine[1987] I.R. 677. An example of the absence of an intention to possess is Feehan v. Leamy (Unreported, High Court, Finnegan J., 29 May 2000) where the claimant had asserted that a farm, of which he later claimed occupation, was in fact owned by someone in America. The circumstances constituting possession will inevitably be various, but fundamental is that the new possessor takes occupation of the land or premises, or a defined portion thereof, with a view to the exclusion of all others. Such possession must not be by force, deception or with the permission of the owner of the legal title; nec vi, nec clam, nec precario. Hence, lands that are overheld but where there is a mortgage of the land to another party are a particular circumstance; Ulster Investment Bank Ltd. v. Rockrohan Estate Ltd.[2015] IESC 17, (Unreported, Supreme Court, 26 February 2015). Licensees are another special case. Thus, permission to occupy removes the adverse element from the use of land; Murphy v. Murphy[1980] I.R. 183 at p. 195.

89. It is thus clear that minimal acts of ownership will defeat or negative a claim that lands have been adversely possessed, but the question of whether lands have been adversely possessed must be determined by reference to the particular facts of any given case.

Application to this Case

90. As pointed out by Charleton J in **Dunne**, intention to possess may more reliably be established by inferences from particular circumstances than from direct testimony. However, the Plaintiff faced significant difficulties in establishing its claim here in circumstances where it was not arguing that *it* had dispossessed the registered owner but rather that another party, the second Defendant, had done so. In order to maintain its

claim, it was therefore necessary for the Plaintiff to establish that the second Defendant had the necessary intention to dispossess the first Defendant *and* that the first Defendant (or his predecessors in title) had not engaged in sufficient acts of ownership to defeat that claim. The Plaintiff has failed to establish that such an intention existed from 1978 onwards, albeit that such an intention may have formed sometime thereafter. However, I am satisfied that even if such an intention was formed at some point after 1978, the first Defendant engaged in sufficient acts of ownership to defeat any claim for adverse possession.

91. As noted above, there were two bases upon which the second Defendant might have sought to assert title to the Disputed Property, either by virtue of a concluded agreement to purchase the lands or by adverse possession of the lands. There seems little doubt that the first Defendant's father, James Considine, and the second Defendant agreed a price for the lands, in or about 1978, of £300. The affidavit sworn in the course of these proceedings, and in particular the suggestion that the agreed purchase price had been paid, might, if borne out, have been sufficient to establish that, notwithstanding that no conveyance had ever taken place, the second Defendant was entitled to the beneficial ownership of the Disputed Property: see, for instance, **Coffey v Brunel Construction Company Ltd [1983] IR 36**. However, the evidence at hearing from Mr Curry was unequivocal: no purchase price had been paid. And, of course, the second Defendant's application for registration as owner was not based upon any concluded agreement to sell the lands (again Mr Curry was unequivocal that there was no such concluded agreement) but rather on possession alone. Mr Curry's evidence on this point was consistent with the contemporaneous correspondence between the solicitors and also the recollection of the first Defendant and his sister that the agreement was never concluded.

92. Of equal importance was Mr Curry's evidence regarding the construction of the wall around the Disputed Property and the construction of a portion of the community hall on part of that Property. These acts, on their own, could no doubt be considered consistent with an intention to possess the field. The enclosure of a field by a wall is an example given by Charleton J in **Dunne** of an activity "*that speak[s] loudly of possession"*. However, Mr Curry made clear that the construction of the wall (and the building of the community hall) was done with the consent and the knowledge of James Considine and could not, in the circumstances of this case, be considered consistent with

an intention to possess to the exclusion of the owner, at least at the time of the construction works.

93. There were positive assertions of ownership by the second Defendant, in particular its solicitor's correspondence from 2000 and 2001. These letters assert ownership by the second Defendant to the exclusion of the first Defendant or his predecessors in title. Ms Foley gave evidence that the letters were sent on the instructions of her client, but no evidence was adduced regarding the circumstances in which instructions were given to send the letters. Mr Curry was not aware of this correspondence. It is noteworthy that the first of the letters purports to rely, for the second Defendant's title, on the fact that the second Defendant had been in possession since the wall was constructed in 1978, a wall which Mr Curry accepted was built with James Considine's agreement. The second letter purports to rely on a sale by James Considine which Mr Curry accepts was never completed.

94. Be that as it may, and notwithstanding a lack of any direct evidence of an intention to possess, the letters do enable an inference to be drawn that, at least by that time, the second Defendant had the requisite intention to possess the lands to the exclusion of the registered owner. However, there is no evidence of when this intention was first formed and therefore no basis on which it could be said to have existed for sufficient time to have been capable of displacing the title of the owners. Moreover, the evidence adduced does not suggest that the first Defendant or his predecessors in title were ever, in fact, excluded from the Disputed Property, or, at a minimum, does not establish that they were excluded for a sufficient period to enable the second Defendant to establish a claim for a possessory title.

95. The exchange of correspondence between the solicitors following the agreement to sell the lands is evidence of a positive assertion of ownership by James Considine after the wall was built around the field.

96. Mr Curry's evidence was that the first Defendant regularly grazed horses in the field and that the second Defendant had no issue with that. The first Defendant and his sister also gave evidence of consistent and uninterrupted use of the field for the grazing of horses and occasionally of cattle. The first Defendant gave evidence that he had erected gates to the side of the Community Hall for the purpose of preventing horses he

grazed there from escaping the field. This 'agricultural' use of the field by the first Defendant is also supported by evidence of the grant applications made to the Department of Agriculture in respect of the field from 1995 onwards.

97. It must be said that not all the evidence of the first Defendant and his sister regarding the first Defendant's use of the land was entirely convincing. There was plenty of colour but little precise detail, and it seems to me that they likely exaggerated the extent to which use was made of the field by the first Defendant. The evidence regarding consent being given by the first Defendant to the playschool for insurance purposes was not persuasive and contradicted by Ms Bonito and Ms Considine. Those witnesses also suggested that it was only in the later years that they worked in the playschool that they can definitely recall horses being grazed there. Ms Foley doesn't remember animals there at all. However, overall the evidence clearly suggests that in the years following the construction of the stone wall around the Disputed Property, there was occasional use by the first Defendant of the field to graze animals which constitute sufficient acts of ownership to defeat a claim for adverse possession. **Dunne** makes clear that more limited acts of ownership than actual use may defeat a claim for adverse possession. The first Defendant has done more than enough in this case to defeat the contention that the second Defendant had acquired adverse possession, such as to extinguish his title. There were clearly repeated acts of possession over many years by the first Defendant.

98. To succeed in its claim, the onus was on the Plaintiff to prove that the first Defendant's title in the Disputed Property had been extinguished at the time of the Contract. The obligation was on the Plaintiff to establish that there was an uninterrupted twelve-year period during which the second Defendant possessed the necessary intention to possess the Disputed Property and during which the first Defendant did not exercise sufficient acts of ownership such as to negative that intention. The Plaintiff has not discharged the onus of establishing either of those requirements.

99. The Plaintiff, in its written submissions, makes a faint suggestion that acts of ownership by the first Defendant – in grazing animals – are not relevant to the question of whether the second Defendant has, through adverse possession, defeated the title of the person who was registered owner of the lands up to 2005, i.e. Patrick Gerard Considine, the first Defendant's uncle. To the extent that any such argument is relied on

by the Plaintiff, it is, in my view, without merit. First, as pointed out above, the Plaintiff, in acquiring the Property, accepted that the first Defendant had sufficient title to transfer to it, notwithstanding that Patrick Gerard Considine was the registered owner, and therefore cannot at this remove look behind that acceptance. Second, even if Patrick Gerard Considine were to be regarded as the relevant 'owner' for the purpose of determining whether the second Defendant had established a possessory title, the evidence establishes that the acts of 'ownership' by the first Defendant were clearly done with the consent, or at least the acquiescence of Patrick Gerard Considine, and therefore can be regarded as his, the registered owner's, acts of ownership.

100. As noted above, the Plaintiff's claim derived from the second Defendant's asserted interest in the Disputed Property. In the event, the evidence of the second Defendant, given by Mr Curry, tended to undermine rather than support that claim. It follows from the foregoing that I am not satisfied that the first Defendant's title in the Disputed Property had been extinguished. He was thus able to convey good title to the Plaintiff and accordingly there has been no breach of covenant by reason of his failure to transfer good title to it. Of course, the second Defendant has since been registered as owner of the Disputed Property, a registration which the Plaintiff did not contest. But that does not alter the fact that, based on the evidence adduced in these proceedings, there was no defect in the title conveyed to the Plaintiff by the Contract.

101. I should record that I have no doubt that James Considine's agreement to let the second Defendant build the community hall on a portion of the Disputed Property and to enclose the field with a wall was an agreement given in anticipation of a transaction to sell the land. The evidence was that the Considine family was very supportive of the second Defendant and the project to construct a community hall. Ms Lundy was a director of the second Defendant. It is not difficult to understand how a community organisation could have used the field together with Mr Considine and his son without either party giving any detailed consideration to the ownership of the field, or perhaps, with each side considering that it owned the field but seeing no necessity to exclude the other. It is entirely possible that both would have considered that they were acquiescing in the other's use and occupation of the field. The conclusions above are merely those which flow from the evidence adduced in these proceedings and are not intended as any form of criticism of the second Defendant's assertion of ownership of the Disputed

Property. Indeed, Mr Curry, a director of the second Defendant, gave what I regard as clear and honest evidence in these proceedings, which was of significant assistance in resolving the dispute between the Plaintiff and the first Defendant.

102. The first Defendant, in his submissions, contends that if the claim that the second Defendant had obtained adverse possession of the Disputed Property is rejected, then that is the end of the Plaintiff's claim. However, the Plaintiff also argues that the failure to disclose that there had been a prior claim to an interest in the Property also constituted a breach of the implied covenants for title for quiet enjoyment and that the title being transferred be free from incumbrances. I now turn to address that argument.

Breach of covenants for quiet enjoyment/freedom from incumbrances

103. **Wylie** describes the purpose of the covenant for quiet enjoyment as being to protect the grantee from disturbance. The authors also state (at paragraph 21.31) that the *"generally accepted view is that [the covenant that the title is free from incumbrances] is really an extension only of the second covenant (quiet enjoyment), in that, in essence, the grantor is undertaking to provide with an indemnity in the event of disturbance."*

104. Central to both covenants, therefore, is the concept of protection from "disturbance". As **Wylie** points out, disturbance means not only disturbance of possession rather than disturbance by, for instance, nuisance, but also 'lawful' disturbance, citing the English cases of **Malzy v Eicholz [1916] 2 KB 308** and **Williams v Gabriel [1906] 1 QB 155**. The authors state that no action lies against the grantor for breach of the covenant for quiet enjoyment unless the disturbance is by the grantor or a person for whom the grantor is responsible.

105. In **Harrison and Ainslie v Lord Muncaster [1891] 2 QB 680**, Lord Esher MR described the scope of the covenant for quiet enjoyment (at p. 684):

> *"Now, a covenant for quiet enjoyment is, and always has been, framed in words so large that it might include every interruption to a beneficial enjoyment of the thing demised, whether accidental or wrongful, or in whatever way the interruption may be caused, even if it be caused by some extraordinary occurrence of nature; the words are large enough to embrace*

> *all these cases. From the time that the effect of that covenant was first discussed before the Courts until now, it has been held that it does not bear that large meaning, and that it does not embrace the case of eviction by a title paramount. It has been construed to mean that the covenantee shall have quiet enjoyment of the thing demised, not interrupted by any act of the lessor, or of any person authorized by him; to that it has hitherto been confined. Therefore, in an action upon this covenant, the plaintiff does not prove his case by merely proving an interruption of his enjoyment; he must further prove that it has been interrupted by an act of the defendant, the covenantor, or by the act of some person authorized by him."*

106. He clarified the scope further (at p. 685):

> *"I pause there for a minute. Not only must the enjoyment be interrupted, but it must be interrupted by the acts of the lessor or those lawfully claiming under him: the last words require some definition and limitation. Considering what was being discussed, I have no doubt that the proper meaning of those words is "by the acts of the lessor, or of those claiming under him the right to do the acts which caused the interruption."*

107. In order for there to be a breach of covenant for quiet enjoyment, therefore, the disturbance must be an act lawfully done by, or on the authority of, the person who transferred the title.

Application to this Case

108. It seems to me that the Plaintiff has attempted to shoehorn its complaint regarding an error in the Replies to Requisitions into a breach of covenant claim. Its complaint is that the Replies incorrectly asserted that there was no prior claim in relation to the Property.

109. Strictly speaking, this appears to be correct. The letters of October 2000 and June 2021 from Chambers & Co. undoubtedly constitute a prior claim in relation to the lands. What is less clear, however, is whether the first Defendant *knew* that there had been any

such prior claim. Although I entirely accept the evidence from Ms Foley that the letters were sent, I also accept the evidence of Mr Williams that he has no memory of having received them and could not find copies of them in his office. The first Defendant gave evidence, which I accept, that he wasn't aware of the 2000 and 2001 letters until late in these proceedings.

110. Mr Williams' evidence was entirely convincing on this issue. James Considine had just passed away when the letters were sent. It was only four years later that a query about the interest of the second Defendant was raised, in the context of the sale the subject matter of these proceedings, about the very party on whose behalf the earlier letters had been sent. Mr Williams replied, based on his client's instructions, in a manner which was inconsistent with that prior claim. I accept his evidence that he would not have replied as he did had he recalled receiving the earlier letters at that time. It seems to me more likely than not that, for whatever reason, the earlier letters never came to his attention. Even if they had, it is overwhelmingly likely that he had forgotten them by the time he was preparing Replies to Requisitions in 2005.

111. In any event, even though there had been a prior claim, it was, in light of the conclusions reached above, not a claim which could be said to give rise to a lawful disturbance. If the second Defendant had not obtained a possessory title, it had no title to the Disputed Property at all and, therefore, no claim or interest in the lands, save, possibly, that of an implied licensee. In the circumstances, the subsequent pursuit of that claim by the second Defendant could not be said to have given rise to a breach of covenant, nor did any error in the Replies to Requisitions contribute to such a breach.

112. It seems to me that the claim regarding the Replies to Requisitions is a claim based on misrepresentation rather than for breach of covenant. No such claim was pursued in the proceedings, at least in those terms, but leaving that issue aside and also the question of whether any such claim would be statute-barred, in circumstances where I have concluded that the second Defendant had not displaced the first Defendant's title, it does not seem to me that damage has been occasioned by any misstatement or misdescription. True it is that the Plaintiff has lost title to the Disputed Property, but that is only because it never contested the second Defendant's claim nor made any effort to rely on the implied covenant that the grantor will do anything reasonably requested to assure the

property to the grantee, *i.e.* it did not request the first Defendant to assist in meeting the second Defendant's section 49 application.

113. There is no evidence that any pending claim in relation to the Disputed Property caused any difficulty in relation to the Plaintiff's planning applications. Those lands were not a relevant factor in the Council's or the Board's decisions to refuse permission. Notably, despite the request in the second Defendant's letters that the Plaintiff amend its planning application to omit the Disputed Property, there is no evidence of the Plaintiff having done so, either before the Council or the Board.

114. Mr Flanagan explains his acquiescence in the second Defendant's claim by its conclusion that the second Defendant had been "wronged". In light of the valuation evidence, and particularly that of Mr Corr on behalf of the first Defendant, there must be a suspicion that that was not the only motivation. As Mr Corr makes clear, by the time the second Defendant's claim first came to the attention of the Plaintiff in 2008, the property market was already collapsing in Ireland. As was pointed out by counsel on behalf of the first Defendant, the Plaintiff may have been fortunate to have been refused planning permission as it thus avoided incurring additional design and construction costs, which it almost certainly wouldn't have recovered in a worsening market. By the time of the section 49 application, a claim for damages against the first Defendant would likely have seemed a more valuable asset than any value in the Disputed Property.

115. Irrespective of the Plaintiff's reasons for not contesting the second Defendant's application to be registered as owner, which I do not need to determine for present purposes, any loss which it suffered by losing its title to the Disputed Property was occasioned by its decision not to contest the section 49 application or appeal the PRA's determination. Had it done so, at least on the basis of the evidence adduced in these proceedings, the Plaintiff would likely have retained title to the Disputed Property.

116. In the circumstances, there has been no breach of the covenant for quiet enjoyment. Even had the Plaintiff pursued a claim for misrepresentation arising from the incorrect Replies to Requisitions, it would not have been entitled to damages equal to the value of the lands to which it has, in effect, relinquished title. In those circumstances, it is not necessary for me to assess the differing valuations given by the parties' respective

experts or the conflicting evidence regarding the intended use of the Disputed Property by the Plaintiff.

Conclusion

117. It follows from the above that I will dismiss the Plaintiff's claim in its entirety. My provisional view is that the first Defendant, having been entirely successful in his defence of the proceedings, is entitled to his costs. If either side wishes to contend otherwise, they should file written submissions in the Central Office of the High Court within ten days of today's date. A copy of the written submissions should be sent to the other side and to the Registrar. The other side will then have a further ten days within which to file written submissions in reply. In order to allow for such an exchange, I will list these proceedings for mention before me at 10.30 am on 8 December 2023.