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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 21/55777

Delivered: 24/11/2022

IN THE COUNTY COURT IN NORTHERN IRELAND

BY THE COUNTY COURT JUDGE

Between:

FERMANAGH AND OMAGH DISTRICT COUNCIL

Plaintiff:

and

GERARD O'NEILL AND OTHERS

Defendants:

HIS HONOUR JUDGE KINNEY

Introduction

[1] Fermanagh and Omagh District Council ("the Council") asserts under the provisions of the Access to the Countryside (NI) Order 1983 that a public right of way exists on a route between Greencastle and Rousky which runs for approximately 4.5 km eastwards from the Crockanboy Road to the Mullydoo Road near Greencastle. The defendants challenge that assertion.

[2] It is the Council's case that the asserted route originally formed part of a much longer public road linking Newtownstewart and Cookstown. By the time the matter came before the court for hearing the Council had refined its case to assert that a public right of way had been created and dedicated to public use by the unidentified owners of the land over which the asserted route ran and that such dedication had been accepted by the public. The defendants all refute the Council's position and say there has been effectively no user of the route by the public and that there is no evidence of any decision by the owners of the land when the route was created to dedicate a public right of way and no evidence that such dedication, if ever made, was accepted by the public.

[3] The court was provided with a considerable volume of reports, maps and legal authorities. The evidence from the Council which seeks to assert the public right of way under the statutory provisions was primarily delivered by Ms McCarron.

[4] Ms McCarron was at that time the countryside recreation officer and the person who was charged by the Council with investigating the potential assertion of a public right of way over the 4.5 km route between Rousky and Mullydoo. She gave evidence about the methodology of the investigation. Letters had been received from members of the public in January 2016 asking the Council to investigate the potential status of a public right of way. A request for further information was sent out to a number of individuals in the first phase, then subsequently to 22 landowners in the second phase and finally to 25 groups identified by Miss McCarron as potentially having some interest in the area. Ms McCarron also carried out investigations with other agencies and considered a series of maps.

[5] There were a number of problems with the investigation some of which included:

- (a) In the first correspondence sent out by the Council a map was attached showing the alleged route being investigated. Respondents were asked to mark on the map where they believed the public right of way would be. However, the line drawn on the Council's map did not in fact show the route over which the Council now wish to assert a public right of way. A number of those who responded told the Council it was not the correct route. Some of the responses marked a different road entirely, known as the 1854 New Road.
- (b) The second phase sent landowners a map showing two different potential routes, one of which reflected the 1854 New Road.
- (c) The third phase comprised of enquiries sent to a list of groups and individuals selected by the Council. The map which was sent to the phase one respondents differed from the map sent to the phase two respondents. The Council recorded that there were six responses from the 25 potential respondents in phase three. However, in evidence before the court Ms McCarron said that a number of those respondents contacted the Council orally to say it was their view that there was no right of way, but they didn't want to get officially involved in the issue. These responses were not reflected in the report.
- (d) The issue of a public right of way had been investigated by the Council through the then countryside management officer in the early 1990s. Ms McCarron said that no public right of way had been asserted by the Council at that time because there had not been a full investigation and there was no appetite to pursue it in senior management or the political parties at that time. The decision was made by the Council not to pursue this route as a public right of way at that time. The 1992 investigation was not included in Ms McCarron's report to the Council.

(e) In February 2016 Transport NI wrote to the Council to say that it proposed to abandon the Mullydoo Road. The Council responded in March 2016 to register an objection to the proposed abandonment and referred to the section of roadway concerned as the "Green Road." It would appear that the Council mistakenly believed that this section of the road was part of the asserted route. On the evidence before the court it would appear the Council never corrected their correspondence to Transport NI.

[6] Dr Hammond is an industrial archaeologist who was asked to compile a report on the asserted route. The report's purpose was not to consider a public right of way but to attempt to ascertain the history of the route. Dr Hammond used the term "Green Road" for the asserted route although it was clear from other evidence that this term has been used interchangeably for other roads in the vicinity.

[7] Dr Hammond was uncertain about the precise date of construction of the asserted route but it existed in the late 18th century as it is clearly marked on Taylor and Skinner's 1777 road map of Ireland. Its straight alignment suggested it was designed primarily for pedestrians, pack courses and those on horseback rather than wheeled vehicles. Dr Hammond noted that in the early 1800's a new road was laid between Rousky and Greencastle thus bypassing the Green Road. He said that the new route "would have quickly usurped the Green Road as the main thoroughfare between the neighbouring towns and villages." He went on to say, "since the mid-1800's the Green Road appears to have been used primarily for local access to fields and for turf cutting purposes rather than as a through route."

[8] Dr Hammond could find no reference to any roads between Newtownstewart and Cookstown in the public records office. Dr Hammond said:

"In the absence of specific documentation for the period preceding 1777, one can only speculate on the roads origins within the context of the general development of the provinces road network as a whole."

[9] There was no evidence of a sophisticated construction of the roadway other than a rudimentary spread of stone gravel on the surface and the existence of drains along either side to prevent water logging. Dr Hammond said:

"given the exposed upland environment, such a finish would have been very vulnerable to weathering and required constant maintenance."

[10] Dr Hammond said it was inconceivable that the local landowners through whose estates the road went would not have had a say in its planning and execution. Such landowners had a vested interest in the development of the road network as it facilitated the access of tenants to their fields, enabled them to travel to the local market towns more easily and also facilitated the opening up of the uplands for

cultivation and pasturage. These comments clearly applied to the road as a whole and not just to the short section under consideration in this application. Dr Hammond identified two local landlords in the area, being the Hamiltons and the Hopes.

[11] Dr Hammond said that he could not say who was behind the construction of the road, who financed it or who built it. He said that he did not know whether the landowner had any financial interest in building it on their land to facilitate access between Newtownstewart and Cookstown. It was his opinion that if the road had been publicly financed it would have been added through the local parishes or through the Grand Jury system. The Grand Jury was a body composed of members, primarily landowners or other important local personages. A landowner or anyone else could petition for finance to build a road. It would then be advertised and financed out of levies placed by the Grand Jury on the local landowners and, in turn, they would have recouped the money from their tenants. The Grand Jury presentment books in this area did not start until 1799.

[12] Dr Hammond then commented that though no records were held by the public record office it is probable that the road between Newtownstewart and Cookstown was instigated by the Hamilton family "and other prominent landowners in the district."

[13] Dr Hammond noted that from the mid-1700's onwards wheeled transport became increasingly common, and this necessitated the construction of contouring roads which endeavour to avoid hills by winding round them. The contoured road which is adjacent to the asserted route is the Crockanboy Road. Dr Hammond said that this road is not shown on William McRae's 1802 map of County Tyrone so the Crockanboy Road must have been constructed sometime between then and 1813. A later 1854 map also shows a second road, roughly in the same alignment as the Green Road, but with a more meandering course. This is the road referred to as the 1854 New Road.

[14] Dr Hammond said:

"It is possible that the Green Road was already obsolete by this time. A short stretch west of Rousky appears to have been abandoned, and its unsuitability for cars has already been noted in the vicinity of Greencastle. Even the realigned road between Newtownstewart and Cookstown was not a major highway and does not appear to have been served by any form of public conveyance."

[15] In his oral evidence Dr Hammond commented on the construction of the road. He said there was no evidence of any substantial section of made up surface. Dr Hammond said there was considerable vegetation now present and it may be that any gravel simply could not be observed. He could not say when any such

gravel would have been laid down or for what purpose. Dr Hammond said that the purpose of the route would be a usable track of some description. It was put to Dr Hammond that the Grand Jury presentment books commenced in 1799 and there was no evidence of any maintenance funding at all for the asserted route. It was also put to him that the Crockanboy Road did have records for maintenance and that this road was in existence sometime before 1813. There was evidence of the construction of buildings along the Crockanboy Road and indeed some of which were marked as derelict on the maps at the time. Dr Hammond said this is not a focus of his report. However, he said he would not disagree with any of the actual evidence. Dr Hammond also commented that he saw the Crockanboy Road in the 1813 map but couldn't see it in the 1802 map. He was curious as to why it was in the Grand Jury presentments of 1799, however, he said he did not doubt that it was there. He said that road was clearly there in 1799 because of the presentments and he had no argument about that.

[16] Mr Alan Reilly prepared a report on the asserted route. One of the aims of the report was to consider the construction date and the function of the asserted route. Other aspects of the report looked at wider archaeological and historical issues but they are not relevant to the issues that must be decided in this case. Mr Reilly set out the history of the area. He concluded, having considered the relative scarcity of information on the geographical region around the asserted route, that the area was probably part of a significant woodland which was gradually cleared between the mid 17th and late 18th centuries. Mr Reilly noted that all of the roads shown on contemporaneous maps appear to have been built at some point between the second quarter and the end of the third quarter of the 18th century. This was a major phase of road development in this region at that time. From the map evidence Mr Reilly concluded that the Newtownstewart to Cookstown Road, which includes the asserted route, must have appeared at some point between 1728 and 1777. Direct alignment roads such as the asserted route largely went out of fashion around 1760 to 1770 and contour roads became the norm.

[17] Mr Reilly also considered the history of Cookstown which he stated, "essentially did not exist beyond a hamlet in the century before 1750." Mr Reilly concluded that the road (of which the asserted route formed a part) was first constructed between the re-founding of Cookstown in 1750 and the ending of the direct alignment tradition of roadbuilding around 1760-1770. As the route does not conform to the standard required of the grand jury system which took over the road system in 1765 the construction date of the road would be narrowed to between 1750 and 1765. This conclusion was not challenged by the plaintiff.

[18] Mr Reilly said he could find no evidence of any use of the asserted route. He said its existence could be shown, and its chronology fairly well ascertained, but there was no evidence of actual use. Equally, there was no evidence of either privately or publicly funded maintenance of the route. There were no records from the County Grand Jury or Parish systems of either the building or maintenance of the route. Mr Reilly described the road as an unfortunately timed construction. He

thought it was most likely constructed in the first half of the 1760's which was very near the end of the tradition of direct line roads. It was at this time that wheeled transport carts started to become much more common. He said that the road was one which could have been regretted within a decade or so. It would certainly have become a problem as the following decade progressed and wheeled transport became very common. There was no evidence of who created, funded or built the road. There was nothing contained on local landlords' letters or records nor in the Tyrone County Grand Jury or any parish records. Mr Reilly was referred to a 1759 document called "Jeffery's new and accurate map of the kingdom of Ireland." This was referred to by another witness. Mr Reilly confirmed that the asserted route was not shown in that 1759 document and that this created a very tight range between 1759 and 1765 when it is extremely likely the road was built.

[19] Mr Reilly also referred to the settlement pattern. He said this was essentially all down in the valley below the asserted route and quite near to the Crockanboy Road, well below the asserted route. There was a pattern of cottages or houses running along that road but really nothing between that settlement area and the asserted route. Each farm normally had its house down at the Crockanboy Road. These farmhouses were near what was a much better road than the asserted route. Mr Reilly said farmers would move south to north along their narrow farms and would not walk along the asserted route. They would cross it width wise not lengthwise. He said the asserted route didn't really have a lot of function. The asserted route was part of a route between towns. Mr Reilly said the 1802 map, which did not show the Crockanboy Road, was not an accurate map of the time and had required updating.

[20] Mr Reilly said there was no evidence in the Victorian era of the asserted route being used either as a public right of way or being used by the public at all. He said the pattern of movement was along the Crockanboy Road. Mr Reilly said the route was like a fossil from the time it was built onwards.

[21] Mr Reilly confirmed that the Hamilton family were major landowners in this part of Co Tyrone. They were likely to have owned the land over which the asserted route was constructed. He said there was a significant gap in the records, including any maps at the time, and it was Mr Reilly's view that there are no records because they simply didn't exist in these townlands. Mr Reilly said that he imagined that the landlord would have had to be consulted about the construction of a road but that he didn't know what the status of the land was in the relevant period because there is an absence of records. Sometimes landlords created very long interest leases and took little active part in dealing with the land and it was possible that the Hamiltons passed the land onto somebody else and other lesser landlords were involved. Mr Reilly accepted this was speculation on his part. He did confirm that the 16,000 acres that the Hamilton family obtained by royal grant at the time of the plantation did not appear to include the area of the asserted route according to the maps of the plantation grants. But he could not be definitive because of the difficulties of lack of records.

[22] He confirmed his understanding of the grand jury system which had a discretion as to whether or not to maintain a road. There was no statutory obligation. Mr Reilly confirmed there was nothing in the Grand Jury records to show any indication of a closure of the road or any records indicating an intention to abandon the road. However, he said that records did exist in County Tyrone for the Grand Jury from 1799 onwards so it was strange that there was no interest in the upkeep or upgrading of the road or any interest at all in the road comprising the asserted route. There were no references to the asserted route at all.

[23] Professor Connolly is a retired Professor of Irish history at Queen's University Belfast. He has a particular interest in the social and economic history of Ireland in the late 18th and early 19th centuries, and the culture and social role of the Protestant middle and upper classes in the late 17th and 18th centuries.

[24] Professor Connolly confirmed there was no evidence of who had constructed the asserted route. Grand Jury records did not start until 1799 and nothing appeared in the state records. There was no evidence as to who had funded or paid for the work. Although the asserted route appeared in the Taylor and Skinner map of 1777 there were no records showing whether the route was maintained at any stage or showing the precise time of its construction.

[25] Professor Connolly was referred to a map of 1802 which did not show the Crockanboy Road. This led to the assumption that it could have been constructed later. Professor Connolly said that on the basis of his research the 1802 map was not to be relied on as there was evidence that the map was not an up-to-date map. Professor Connolly did, however, find presentments from the Grand Jury after 1799 which relate to the maintenance of the Crockanboy Road. A map of 1833 identified ruins along the Crockanboy Road and Professor Connolly was of the opinion that these represented buildings which were erected along the line of the Crockanboy Road long enough ago for them to have been abandoned and fallen into ruin by the time of the preparation of the 1833 map. There was no corresponding evidence of any development along the asserted route. Professor Connolly concluded that the asserted route was constructed at some point between 1759 and its identification on the Taylor and Skinner map of 1777.

[26] Professor Connolly was asked whether it was possible that tenant farmers could have financed or built the asserted route. Professor Connolly replied that it was impossible to tell whether there even were tenant farmers at that time. There were no estate records to confirm either way.

[27] Mr McVitty is a member of the Royal Institution of Chartered Surveyors. He prepared a report and provided oral evidence to the court. His focus was on determining the records that existed in relation to the asserted route and also to consider the assertion of the right of way. Much of his evidence concerned the status and condition of the asserted route over the last 100 years or so and then up to the

present day. He found no evidence from his research that showed how the asserted route was developed or any work carried out to it by way of maintenance, upkeep, and repair. The development pattern emerged along the Crockanboy Road, with an absence of any development along the asserted route.

[28] At the risk of oversimplifying his evidence on these matters, Mr McVitty had travelled the asserted route on two occasions and found it to be impassable even on foot at certain points and certainly impassable for any kind of vehicle, including a bicycle. There were deep gorges known locally as “spinks” created by water channels over the years, parts of the route have been overtaken by agricultural use, parts of the route had been fenced off and parts are simply unidentifiable. The deterioration of the route has been taking place for a very considerable time. There was evidence of much more recent works on the land including strimming and the construction of stiles.

[29] Mr McVitty identified a number of adopted public roads in the area. He referred to the Crockanboy Road. This appeared on the 1813 map but did not appear in the 1777 map of Taylor and Skinner. The Crockanboy Road was a contour road, unlike the asserted route. There was significant ribbon development along this road. Mr McVitty noted that in the 1833 survey there was land-use along the Crockanboy Road including reference to four ruins suggesting they had been there for perhaps a generation to allow the buildings to fall into ruin.

[30] Mr McVitty also referred to the road known in these proceedings as the 1854 New Road. It was also a contour road which at times crossed the asserted route.

[31] Mr McVitty was asked about the construction of a wind turbine along the asserted route. It was put to him that the turbine was not itself on the asserted route. Mr McVitty said that the application form for planning permission showed the proposed wind turbine on the asserted route and that there were other uses of the area including the placement of a storage compound.

[32] Mr McVitty also gave evidence that the portion of the asserted route, marked A to L on the map he had prepared, was a public road. It was recorded by DFI Roads as being a road that it was responsible for maintaining. Although it is classified as a public road, Mr McVitty said it was not used as a public road. This section started at Rousky and continued for just over 2 miles along the route. The asserted route in its entirety is 2.78 miles. Mr McVitty said the asserted route has not been a through route for at least 100 years mainly because it is impassable at points and the evidence that makes impassable has been in existence for over 100 years such as the sheer drop at one of the spinks.

[33] The plaintiff’s claim is based on Article 3 of the Access to the Countryside (Northern Ireland) Order 1983 which provides:

“3. – (1) A district Council shall assert, protect and keep open and free from obstruction or encroachment any public right of way; and for this purpose a district Council may institute proceedings in its own name.

(2) A district Council may, after consultation with the owner of the land concerned, maintain any public right of way; but this paragraph shall not relieve any person from any liability to maintain a public right of way.

(3) A district Council shall compile and preserve maps and other records of public rights of way in its district.”

[34] A number of authorities were opened to the court in relation to the assertion of such a public right of way. Much of the earlier case law, including the principles set out by the House of Lords in *Folkestone Corporation v Brockman* [1914] AC 338, were considered in the Supreme Court of the Republic of Ireland in *Walsh and Cassidy v Sligo County Council* [2013] IESC 48. A number of principles can be distilled from that judgment and some of those, relevant to these proceedings, are as follows:

- (1) A public right of way can arise in a number of ways. It can be shown to arise from use from time immemorial; be created by statute; or be established by proof of long user by the public as of right, leading to an express or implied dedication by the owner of the ground over which it passed and acceptance of such dedication by the public.
- (2) The court, depending on the duration, frequency and intensity of the user of the alleged right, may infer that the owner dedicated, and intended to dedicate, the way to the public and that the public accepted that dedication.
- (3) Whether there is dedication is a question of fact to be decided in the light of all the evidence. It is not necessary to point to an express active dedication. The process can be one of inference, drawn from the strength of the evidence of user, the fact that the user was as of right and whether the landowner took any steps to disabuse the public of their belief that they had the right to use the way.
- (4) Any inference of dedication of a public right of way must be found during the period of user. A court cannot infer dedication of a public right of way by an owner by reference to user they did not commence until many years later.
- (5) Evidence of long user does not compel a finding of dedication, nor does it create an irresistible inference of dedication. The presumption of dedication is a question of fact.

- (6) User alone does not create a public right of way. Depending on the circumstances user might provide compelling evidence of dedication to the public, or might more properly be ascribed to tolerance or liberality of the landowner.
- (7) Where the essence of the enquiry was whether there is sufficient evidence to infer that the landowner intended to dedicate a right of way to the public, it necessarily follows that evidence might be produced on the landowner's behalf tending to negative the existence of such an intention.
- (8) Part of the evidence of dedication, in combination with user, may be the fact that public money was spent, with the consent of the landowner, on the repair or maintenance of the road.

[35] The court said at para 59 of the judgment:

“Cases decided as far back as the early years of the 19th century, cited by the parties on the hearing of the appeal, lay down the essential requirements. The first step is proof of the use, as of right, by the public of the way over the owner's land. The second step is that, depending on the duration, frequency, or intensity, of that user, an inference may be drawn that the landowner has dedicated the way. Such an inference, sometimes called a presumption, can be drawn only after consideration of all the facts. The third step is that it may be concluded that the public has accepted the dedication.”

[36] It is clear from these authorities that the application of any presumption of dedication is a question of fact in each particular case. Where there is an absence of an express act of dedication the process is one of inference to be drawn from the available evidence. The court in Walsh said at para 78:

“Since the inquiry is into whether an intention to dedicate can be inferred, it follows therefore that the quality, duration, frequency, and intensity of the public user will be highly material. So also, will the degree of awareness of the landowner and his or her attitude; in short, all the surrounding circumstances.

Part of the evidence of dedication, in combination with user, maybe the fact that public money has been spent, with the consent of the landowner, on the repair or maintenance of the route.”

[37] The court's task therefore is to examine the evidence that has been advanced to consider whether the cumulative effect of that evidence is sufficient to allow the court to conclude, on the balance of probabilities, firstly that the landowner had an intention to dedicate a public right of way and did in fact dedicate such a right of way, and then secondly, that the public have accepted such a dedication.

[38] Having considered all of the evidence I am satisfied on the balance of probabilities of the following matters.

[39] The asserted route first appears as a route marked on Taylor and Skinner's 1777 road map of Ireland. Dr Hammond in his evidence said that there was no evidence of any sophisticated construction of the route. There was a rudimentary spread of stone gravel on the surface and drains along either side to prevent water logging. He concluded that such a finish would have been very vulnerable to weathering and would require constant maintenance. Dr Hammond could not identify who built the road or who financed it. He was unsure who the primary landowner might have been but commented that a road such as the asserted route would facilitate tenants and their access to fields and also enable them to travel to local market towns more easily. It would facilitate the opening up of the uplands for cultivation and pasturage.

[40] He acknowledged the existence of the new contoured road adjacent to the asserted route known as the Crockanboy Road. Dr Hammond noted that the Crockanboy Road did not appear on the 1802 map but did appear in the 1799 Grand Jury presentment books. I am satisfied from the evidence of Prof Connolly that the 1802 map is of limited assistance in this matter and I am further satisfied that the Crockanboy Road was in existence for some time before that date.

[41] I find Mr Reilly's evidence to be particularly helpful and persuasive. He set out in his evidence a history of the area. I am satisfied from his evidence that the asserted route was constructed within a very narrow timeframe. He initially placed the construction date between 1750 and 1765. He further refined that period by a document from 1759 which made no reference to this road. I am satisfied that the asserted route was constructed between 1759 and 1765.

[42] Mr Reilly also gave evidence of the settlement pattern in the area. Most of the settlement was further down the valley and close to the Crockanboy Road. That road is evidenced in the 1799 Grand Jury presentments. The maps available at that time also show development existing along the Crockanboy Road. These include the ruins of some properties which indicated that the road had been in existence for some time. Prof Connolly referred to those ruins as identified on the 1833 map.

[43] None of the experts were able to find any evidence of any use of the asserted route, or any public expenditure relating to the maintenance, upkeep, or repair of the route. Prof Connolly said it was impossible to tell whether there were even tenant farmers at the time of the construction of the route.

[44] There was however evidence of the maintenance and use of the Crockanboy Road and subsequently of the 1854 New Road.

[45] As is clear from the authorities the burden of proving the existence of a public right of way lies on the person making that claim. It is a fact-based exercise and where there is no express act of dedication the court is invited to infer that dedication from the evidence. In this case there is no evidence which supports an act of dedication for public use.

[46] It may be argued that the simple fact of the construction of the route as part of a longer route between Cookstown and Newtown Stewart evidences an intention to dedicate. That however is not sufficient. All of the factual matrix must be considered. To be able to infer an act of dedication some further evidence must be provided. Whilst the user of the route is not itself a presumption of dedication, it is an important factor. There is no evidence of user of this route as a public right of way up to and including the middle of the 19th century. There is no evidence of any public expenditure in relation to the upkeep, maintenance, or repair of the route. Mr McVitty's evidence is sufficient to satisfy me that the asserted route has not been passable with any ease for many decades. Parts of the route are completely impassable because of the deep gorges, or spinks, which have existed for some considerable time. Many parts of the route have been fenced off and on other sections new construction has been made. Parts of the asserted route are completely unidentifiable. I am satisfied that the more recent work on the lands, including strimming and the construction of styles, has been done in the context of the dispute which is now before the court.

[47] I am satisfied there is no evidence of acceptance or user by the public.

[48] The court heard some evidence from local landowners and residents. As is not untypical in cases of this nature that evidence is anecdotal and is quite contradictory. I have attached little weight to that evidence. Most of it contains assertions of unidentified individuals seen running along or walking parts of the asserted route. Some of the witnesses claimed such use was as frequent as weekly. Most of the local witnesses confirmed that they used the route to access lands or to further their farming activities.

[49] Other witnesses living side-by-side said that they had never seen anyone using the route. I have had the advantage of the evidence from those who have been on the route and also the evidence of Mr Hanna who is a specialist drone operator and who took detailed footage of the route which was shown in court. I am satisfied from that evidence that it is not possible to walk the route as has been described by some of the witnesses. At one end of the route, it has disappeared completely and Mr Hanna himself had great difficulty in trying to identify where the asserted route would have run. In other areas it is completely fenced off and finally there is a

substantial geographic impediment created by the gorges which have evolved over time.

[50] Some of the witnesses were also describing activity which they had seen on the part of the route which is in fact adopted by the public authorities. It became clear from Mr McVitty's evidence that a substantial portion of the asserted route, marked as points A to L on the map he referred to, is recorded as an adopted public road, even though it is not used by the authorities.

[51] It is accepted by the parties that this section of the asserted route cannot be the subject of a public right of way.

[52] I am satisfied that the asserted route is one which, as Mr Reilly said, was an unfortunately timed construction. It was a direct line Road constructed at the very end of that tradition and there is no evidence that any use was in fact made of it. The contour Road of Crockanboy was constructed very shortly after the asserted route. The asserted route was therefore a route which had practically no function. Mr Reilly described it as a fossil from the time it was built. That view is supported by the evidence. There is a complete absence of evidence of anyone using the road at or around the time of its construction or in the decades that followed. There is no evidence of any maintenance, repair or improvement. The road itself was a very basic construction and Dr Hammond said that given its exposed location it would have required constant maintenance. There is no evidence of such maintenance.

[53] I am therefore satisfied, on the balance of probabilities, that the plaintiff has failed to prove that there was either dedication of the asserted route, or any acceptance or user by the public.

[54] I dismiss the plaintiff's application.