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2015 No. 102813

IN THE COUNTY COURT FOR NORTHERN IRELAND
SITTING AT COLERAINE

BY THE COUNTY COURT JUDGE

BETWEEN:

WILLIAM KEITH STEELE

and

OLWEN MARGARET SMYTH

Plaintiffs

and

ROSS SEYMOUR SWEENEY

and

SEYMOUR SWEENEY

and

CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

Defendants

DEPUTY COUNTY COURT JUDGE DUNCAN

INTRODUCTION

[1] The plaintiffs, who are brother and sister, are the owners in fee simple of a dwelling house at 16 Seaport Avenue, Portballintrae, County Antrim. The property is a semi-detached house which faces the bay in Portballintrae. It is accessed to the rear from a public road. Until 2014 the front, eastern, boundary of the property was separated by a narrow strip of land from a hard- packed stone lane which runs north from Bayhead Road, a public road, to the vicinity of a quay. This stone lane is

known as Seaport Avenue ("the Avenue") and in these proceedings the plaintiffs seek a declaration that they have a right of way with or without vehicles over the Avenue, firstly, from the County Road to 16 Seaport Avenue, and secondly from 16 Seaport Avenue to the quay. The right of way asserted is claimed by prescription over the entirety of Seaport Avenue but in respect of part of the southern portion of Seaport Avenue, namely that running from the County Road to just past office buildings owned by members of the Sweeney family and being approximately 80 or 90 metres in length, the plaintiffs also claim that they have the benefit of an express grant of easement. This portion of the Avenue is best illustrated on an Ace map of the area exhibited to the affidavit of Mr AJ Reilly sworn on 16th June 2017 and found on page 627 of Book 2 of the trial bundles. On that map the relevant portion of the Avenue is, together with other lands not the subject of these proceedings, shown shaded brown and is currently owned by the first named defendant.

[2] The civil bill has been amended twice during the course of these proceedings but even in its latest format, submitted after the close of oral evidence, no reference is made in same to the assertion of the express rights which the plaintiffs submit emanate from the grant of easement. However, the issue was raised in the plaintiffs' initial skeleton argument, is addressed in the affidavit of Mr Reilly filed on behalf of the first and second defendants and was explored during the examination in chief and cross examination of Mr Reilly during the hearing of this action. Despite the civil bill being silent on this issue I do not consider that the defendants have been taken by surprise by the ventilation of this matter and in the spirit of the overriding objective I intend to examine the effect of the express grant in the course of this judgment.

[3] In addition to the declarations sought over the Avenue, the plaintiffs in the latest amendment to the civil bill have also sought a declaration that the plaintiffs have the following rights:

(a) a right to park at a particular location on the Avenue identified on the amended map attached to the civil bill;

(b) a right to launch boats, dinghies and to do other such recreational activities from the jetty (the quay referred to in paragraph 1 above and which for the sake of consistency in this judgment I will continue to refer to as "the quay");

(c) a right to launch boats, dinghies and to do other such recreational activities from or at the sandy beach lying to the south of the quay; and

(d) the right to use the quay and beach for all recreational activities.

[4] Being satisfied that the latest amendments are necessary to properly address issues raised during the course of the hearing and being further satisfied that the

defendants have not been prejudiced by these amendments I have permitted the civil bill to be so amended under Order 9 rule 1 of the County Court Rules.

[5] In these proceedings the plaintiffs have been represented by Mr Orr QC with Mr Sinton BL; the first and second defendants by Mr Shaw QC with Mr Dunlop BL; and the third defendant by Mr Beattie QC with Mr Girvan BL. I am very grateful to counsel for the written and oral submissions received. I have taken all of their submissions into account even if not expressly referred to in this judgment.

THE BACKGROUND

[6] The plaintiffs assert that from 1946 when their grandmother, Mary Steele, purchased 16 Seaport Avenue, they and their predecessors in title have used the Avenue to gain access to and egress from their property from the County Road. That access has been exercised as of right and until 1999 was never challenged or queried.

[7] In 1999 Coleraine Borough Council, the predecessor in title of the third defendant, wrote to the first plaintiff, (Dr Steele) stating that they, the Council, owned the roadway (the Avenue) in front of the plaintiffs' house, that they were not aware of the property enjoying any vehicular access along this roadway and requested that the plaintiffs cease using the roadway as a vehicular access to the property. The letter ended with an invitation to Dr Steele to advise the Council if, in fact, he did enjoy vehicular access over the roadway. Dr Steele did not respond to that letter and the Council took no further action at that time.

[8] On 23rd May 2001 solicitors acting on behalf of the Council wrote a letter addressed to "The Owner" of 16 Seaport Avenue expressing their client's concern about the increase in traffic using Seaport Avenue and the impact that this was having on the condition and stability of the Avenue. They intimated that the Council was considering erecting a gate with a padlock to prevent unauthorised vehicular use of the Avenue. Again this letter invited the plaintiffs to forward evidence that their title included vehicular access along the Avenue, pointing out that the road was vested by the Council in 1964 and that "any rights over the roadway were also vested at that time".

[9] That letter was replied to by David Smyth, the husband of the second plaintiff, by letter dated 1st June 2001, on behalf of the plaintiffs. He explained that their use of the Avenue was limited to a small number of car journeys per year whilst acknowledging that the volume of vehicular traffic that year (2001) had been exceptional as builders reroofing the property and the adjacent house at 14 Seaport Avenue had used the Avenue to bring in materials. He asserted that the plaintiffs had acquired "a right of way by virtue of undisputed usage during a period in excess of 30 years".

[10 Mr Smyth met with Mrs Alison Millar, solicitor for the Council, on 20th August 2001 and on 28th August 2001 wrote to Mrs Millar reasserting the views of the plaintiffs that they had acquired a right of way over the Avenue. He asked the Council to acknowledge that right. No evidence was adduced of any response to that letter by the Council nor indeed of any action by the Council in relation to this issue over the following decade.

[11] On 26th August 2011 the Council wrote to the "Occupier/Owner" of 16 Seaport Avenue advising that in order to protect the roadway from damage "whether from usage of the path by vehicle or by coastal erosion" the Council had decided to erect a vehicular barrier at the entrance to the Avenue with effect from 30th September 2011. Again, the letter invited the addressees to furnish the Council with evidence of any legal entitlement to vehicular usage of the Avenue.

[12] The plaintiffs replied to that letter via their solicitors, Messrs Diamond Heron, on 28th September 2011 asserting again that they enjoyed a right of way on foot and with vehicles over the Avenue to and from their property. Over the succeeding months the solicitors for the Council and the plaintiffs' solicitors continued to correspond regarding the documentation that the former considered sufficient to establish the plaintiffs' asserted vehicular right of way to the satisfaction of the Council. During the course of this correspondence a chain was erected across Seaport Avenue by the Council blocking vehicular traffic. This appears to have occurred towards the end of 2011 or early 2012. Ultimately, after the plaintiffs had submitted statutory declarations from Dr Steele and his father and a corroborating statutory declaration from an independent witness (Mrs Barbara Joy Cooke) on 31st July 2012, a key for the chain was furnished to the plaintiffs. The chain was replaced by a retractable bollard installed by the Council some time later in 2012 and a further key was furnished by the Council to the plaintiffs for this barrier. The bollard remains in place to this day.

[13] The plaintiffs also assert that they have both a pedestrian and a vehicular right of way from 16 Seaport Avenue along the Avenue to the quay. Until 2013 Dr Steele took his motor car from time to time to an area above the quay to transport his family to a small beach adjacent to and south of the quay. He also transported boats and his windsurfer to the same location by car. Until the Council erected the chain and then subsequently the bollard in 2011 or 2012 members of the public drove along the Avenue for similar recreational purposes.

[14] By deed of conveyance dated 1st February 2013 Coleraine Borough Council conveyed to the first defendant a plot of land at the northern end of Seaport Avenue. The land was adjacent to Seaport Lodge which was then in the ownership of the Sweeney family. The lands conveyed included the area where the plaintiffs would have parked when going to the beach just south of the quay, or when using the quay for boating or other recreational purposes. The conveyance reserved a pedestrian right of way for the Council and its successors, agents, licensees and invitees over a route to be designated by the first defendant to access adjoining lands of the Council.

[15] Shortly after the conveyance of the 1st February 2013 the lands acquired were fenced off by post and wire fences with strands of razor wire erected behind the fences. A corridor wide enough to provide pedestrian access from the northern end of the Avenue across the lands conveyed to the lands of the Council on the northern side of the headland was created between the fences. Access at one end of this corridor was controlled by the installation of a wooden stile. It is not disputed that this fencing was erected by or on behalf of the first defendant. The effect of the fencing was to obstruct access to the quay, the small beach to the south of the quay and the parking area at the end of the Avenue. At or about the same time a sign was erected on the fencing reading:

> "Private Property
>
> Access permitted on foot only to cross directly to opposite stile.
>
> No access to foreshore or quay."

[16] Perhaps not surprisingly, this action was not supported by all of the residents of Portballintrae. Newspaper articles recorded the opposition of some residents to being denied access to the quay and the beach and a publication, "Portballintrae Newsletter", in its autumn 2013 edition claimed that the public had acquired a prescriptive right of way to the beach. This publication seems to be an organ representing the views of an organisation known as the Portballintrae Residents' Association and the autumn 2013 edition reported that the Council had been asked for help in reaffirming this right of way. Ultimately however, after receiving representations from the residents group and after taking legal advice, the Council decided that it would not initiate measures to assert a right of way across the land in question, a stance the Council confirmed in a letter to the solicitors for the first and second defendants on 15th April 2014.

[17] These proceedings were instituted by a civil bill dated 30th October 2015 against, initially, the first and second defendants. The third defendant, Causeway Coast and Glens Borough Council, was added on the application of the plaintiffs, by order of this court on 7th November 2016. The third defendant is the successor in title of Coleraine Borough Council following the reorganisation of local government in Northern Ireland on 1st April 2015. In these proceedings the plaintiffs seek the declarations outlined above and the legal representatives of all parties to this action have been at pains to stress that what is sought is a declaration of a private right of way for the benefit of 16 Seaport Avenue alone.

THE DOMINANT TENEMENT

[18] The plaintiffs' root of title to 16 Seaport Avenue, the asserted dominant tenement, is a conveyance dated 9th April 1946 ("the 1946 Conveyance") by Robert

Platt to Mary Steele. The property was conveyed in fee simple. The dwelling house must at that time have already been erected as one of the parcels therein described was conveyed "together with the dwelling house and premises thereon".

[19] There were two parcels of land conveyed by the 1946 Conveyance. The larger parcel, on which the dwelling house was erected, is described as being bounded on the East by "land reserved for a Roadway". The second, smaller parcel is described as "All that portion of land to the east of the first described premises lying between the land reserved for a roadway and the sea". Both parcels of land are described "as more particularly delineated" on the map endorsed on the deed. The map shows both parcels edged red and separated by a strip of land that appears to be 80 feet in width. Within that strip is delineated a narrower passage which on the map is described as "30 FT ROADWAY RESERVED".

[20] In addition to the parcels of land conveyed by the deed the Purchaser was granted two rights of way in the following terms:

> "The general right of way (in common with others) for all purposes and at all times for the Purchaser, his heirs, executors, administrators and assigns over and along the said roadway and TOGETHER ALSO with a right of way (in common with others) on foot only at all times for the persons aforesaid over and along that portion of the Avenue leading to Seaport Lodge and lying between the County Road and the premises hereby conveyed".

[21] On 1st October 1964 all of the lands in the second parcel and a strip of land along the eastern boundary of the first parcel were with other lands vested in Antrim County Council under the provisions, inter alia, of the Development of Tourist Traffic Act (Northern Ireland) 1948. I shall revert to the extent and effect of this vesting order in more detail later.

[22] Following the death of Mrs Mary Steel in the mid-1960s, title to the property at 16 Seaport Avenue devolved to her three sons including the plaintiffs' father William Steele. It appears that William Steele acquired the interests of his brothers in 1984. On 11th May 1990 William Steele conveyed the property to the plaintiffs in fee simple. The deed purported to convey all of the premises comprised in the 1946 Conveyance but that was inaccurate since by that time a portion of the lands comprised in the 1946 Conveyance had, of course, been vested in Antrim County Council by the 1964 vesting order.

[23] What is now the asserted dominant tenement was completed by the conveyance to the plaintiffs on 9th December 2014 of a small strip of land adjacent to the eastern boundary of the plaintiffs' property and directly abutting the Avenue. This was a portion of the land which was vested by the 1964 vesting order but over which in the intervening years the plaintiffs had asserted ownership by way of

adverse title. Ultimately, the plaintiffs agreed to purchase this strip of land from Coleraine Borough Council (the successor in title to Antrim County Council) for the sum of three thousand pounds. The lands are now comprised in Folio AN 214206 Co. Antrim.

[24] It should be noted that the correspondence between the solicitors for the plaintiffs and the solicitors for Coleraine Borough Council relating to this transaction reveals an attempt by the former to persuade the latter to incorporate the grant of a formal right of way in favour of the plaintiffs over the Avenue from the County Road. This was resisted by the Council and eventually the plaintiffs accepted a conveyance of the lands without reference to, or the formal grant of, any right of way.

THE SERVIENT TENEMENT

[25] The lands over which the plaintiffs seek a declaration that they have a right of way are owned by several different parties:

(a) The southern section of the Avenue, referred to in paragraph 1 above, and coloured brown on the map at page 627 of the trial bundle, is currently owned by the first defendant having been conveyed by Elaine Hilary Thomas on 3rd May 2017. This section of Seaport Avenue runs from the County Road for a distance of approximately 80 to 90 metres in a northerly direction. This land was not vested in 1964, and following the conveyance to the first defendant is now comprised in Folio AN 231595 Co. Antrim.

(b) The middle section of the Avenue and forming by far the greater portion of the lands over which the plaintiffs' right of way is asserted is owned by the third defendant, the successor in turn of Antrim County Council and Coleraine Borough Council. This portion is shown coloured yellow on the map on page 627, and consists of land vested in the Administrative County of Antrim by the Ministry of Health and Local Government for Northern Ireland on 1st October 1964 in exercise of its powers under, inter alia, the Development of Tourist Traffic Act (Northern Ireland) 1948. The lands were therein described as vested in the Council "in fee simple discharged from all claims estates incumbrances and charges whatsoever in accordance with and subject to the provisions of the said Acts." The area shaded yellow on the map at page 627 includes all of the lands still vested in the third defendant at this location, but the plaintiffs' claim is now restricted to a lesser area illustrated by map B (dated 15th May 2018) attached to the plaintiffs' latest amended civil bill.

(c) The northern section of the Avenue is coloured green on the map on page 627. Mr Reilly, in his affidavit, and in his oral evidence to the

court, avers that the title to these lands is vested in the first defendant. Certainly most of the lands coloured green on that map were conveyed in fee simple to the first defendant by Coleraine Borough Council by deed of conveyance dated 1st February 2013. The title to the lands comprised in that conveyance is now registered in the Land Registry under Folio AN 199186 Co. Antrim. However, the area shaded green in the map on page 627 exceeds the parcel of land conveyed to the first defendant by that conveyance. The area shaded green incorporates the western landward part of the quay which was not included in the 2013 conveyance. This portion of the quay appears to have been part of the lands vested in 1964, and ostensibly therefore is in the ownership of the third defendant. The first defendant contends, however, that this projection of the quay was constructed on land which had many years before accreted to and thus formed part of, the lands conveyed to the first defendant by the 2013 conveyance. However, that is an issue, the court was informed, on which the third defendant wishes to reserve its position and is not an issue on which the court has been invited to make any determination in these proceedings.

(d) Lands coloured red on the map on page 627 comprise the eastern, seaward part of the quay and a portion of the foreshore and sea bed. These lands are now held by the first defendant under a lease dated 31st July 2017 and made between Her Majesty the Queen of the first part, The Crown Estate Commissioners of the second part and the first defendant of the third part for a term of 125 years from 1st May 2017. This lease replaced a lease dated 25th August 2011 for a term of 25 years, and made between the same parties with the addition of the second defendant as a tenant. The second defendant transferred his interest under the earlier lease to the first defendant by a Land Registry transfer dated 8th January 2013.

(e) The plaintiffs' map dated 15th May 2018 has shaded yellow two additional areas for which no title has been adduced during the course of these proceedings. The first is a small beach area lying immediately south of the quay and almost completely surrounded by the vested lands owned by the third defendant, the lands of the first defendant comprised in the 2013 conveyance and finally the foreshore leased to the first defendant by the leases of 25th August 2011 and 31st July 2017. The second area is a small beach lying immediately north of the quay and described by some of the witnesses as Shelly Beach. The title to neither area has been analysed in Mr Reilly's affidavit. Mr Shaw informed the court that this was because at the time Mr Reilly swore his affidavit on 16th June 2017 neither area had been identified by the plaintiffs on their maps as an area over which their prescriptive rights were being asserted. That is certainly correct in respect of the northern beach area which appears for the first time in the plaintiffs' amended

map (Map B) dated 15th May 2018. However, in respect of the small beach area immediately south of the quay that does not appear to be the case. This beach area appears to have been shaded blue in a map attached to the first amendment of the civil bill on 7th November 2016 and identified in paragraph 4 of the civil bill as belonging to the third defendant. Mr Shaw asserted nonetheless that the first and second defendants lay claim to this beach. Mr Hunter, the solicitor for the third defendant, informed the court that although the Council was reserving its position on this issue, just as it was with other title issues between the first and second defendants and the Council, it was prepared to accept whatever ruling the court made on the plaintiffs' claims over these lands including the beach area where the ownership may be in dispute.

THE EVIDENCE

[26] Much of the oral testimony of Dr Steele was unchallenged and not controversial. I summarise same below:

(a) Dr Steele is 64 years of age and his evidence regarding the use of the Avenue goes back to when he was approximately ten years old.

(b) His grandmother, Mary Steele, died in 1965 and after her death his family would have holidayed at 16 Seaport Avenue once a month during the summer practically every year. He recalled his father driving his car along the Avenue regularly during these periods to park at the front of the house.

(c) Dr Steele passed his driving test in 1970 and thereafter drove his own car to 16 Seaport Avenue using the Avenue intermittently but mainly using the rear entrance to the house.

(d) At all times 16 Seaport Avenue and the adjacent house, No.14, opened directly onto the Avenue making access by vehicles possible.

(e) In 1985 the family acquired a dog and to prevent it from running out onto the Avenue a fence was built which prevented vehicular access from the rear to the front of the house.

(f) When the family was entertaining visitors, family cars were regularly driven up the Avenue and parked at the front of the house to better accommodate visitors at the rear.

(g) Some visitors used the Avenue to visit the house as did occasional workmen and tradesmen delivering furniture. It was easier to manoeuvre larger items of furniture through the front door than through the rear of the house.

(h) From the age of ten years onwards he recalled walking up the northern part of the Avenue to go to the quay to fish with crab lines. Also from that time, he recalled his father, who enjoyed the sun, regularly walking up the Avenue to the little beach south of the quay to sit in the sun. The family regularly swam from the beach.

(i) In 1974 when he was 21 years old Dr Steele bought a small boat which he transported on the roof of his car along the Avenue to the beach. He parked in a small area just above the quay. He did this intermittently until 1980 when he got married.

(j) After his marriage he purchased in or about 1980 or 1981 a larger boat which he moored at the quay. Before doing so however he went to see Mr Hume Stewart-Moore, the then owner of Seaport Lodge, a large house at the northern end of the Avenue overlooking the quay. He knew Mr Stewart-Moore owned a large boat which was also moored at the quay and initially Dr Steele testified that he had gone to seek Mr Stewart-Moore's advice about mooring his new boat there. In cross examination however he agreed he had gone to ask Mr Stewart-Moore for permission to moor his boat at the quay. Mr Stewart-Moore gave him permission provided that he kept his boat out of the way of other boats which moored there.

(k) He agreed that as a boy he could remember Mr Stewart-Moore carrying out work to the quay, converting it from a stone built jetty to the concrete structure that exists today.

(l) He owned this boat until 1985 and frequently drove his car along the Avenue to the parking area above the quay during this period. He did so to transport lobster pots to the boat and also when his family went to the beach beside the quay to transport all the paraphernalia required by a young family. The parking area was large enough to accommodate four or five cars parked there.

(m) In the mid-1980s he acquired a wind surf board and frequently drove his car along the Avenue to the parking area to transport this board to the quay. The last occasion he did so was in 2011. Towards the end of August of that year having parked his car in the usual parking area above the quay he was approached by Mr Seymour Sweeney who said "It's alright, I see it is you Keith." Mr Sweeney went on to say that he was having trouble with people interfering with the ropes of the boats

moored at the quay. Dr Steele responded that he would take great offence if stopped from using the Avenue.

(n) Dr Steele believed that the area at the northern end of the Avenue was fenced off approximately six months later blocking access to the parking area, the beach and the quay.

(o) Dr Steele refuted the suggestion that his use of the Avenue, whether pedestrian or vehicular or his use of the beach beside the quay, was in any way permissive. He considered that he had the legal right to do so.

[27] Evidence corroborative of Dr Steele's testimony was given by a number of witnesses:

(a) Dr Allistair Taggart, aged 64, had been a regular visitor to Portballintrae since the mid-1980s. He had been a friend of Dr Steele since 1984 and stayed with the Steeles for a week in 1986, rented other accommodation for a week in Portballintrae in 1987 and 1988 and ultimately purchased a bungalow in the village in 1988. Dr Taggart described this property as his second home, not just a holiday home. During the period from 1986 until 2012 he visited the Steeles regularly, often accessing their home via the Avenue and frequently driving his car over the Avenue to visit them. He also drove his car along the Avenue to access the quay in order to windsurf or to use a small dinghy which he owned. He recalled the existence of a T-bar (a rusty pipe with a cross bar on it) which could be slotted into a pipe in the ground in the middle of the Avenue just below Seaport Lodge. It was never locked and could be lifted by hand and placed to one side. It was not regularly in place and he personally had never had to remove the barrier at any time when he brought his car down the Avenue to the parking area. He never regarded his use of the Avenue as permissive. He assumed that he had a right of way. He stopped driving down the Avenue in 2012 when the Council erected their post and chain barrier. It never occurred to him to apply to the Council for a key. By that stage he was getting too old for windsurfing.

(b) Mr David Hopley testified that he had been a friend of David Smyth, the husband of the second plaintiff, from childhood days. He first visited the Smyths at 16 Seaport Avenue in 1979. He, his wife and their children would have regularly visited the Smyths, staying at 16 Seaport Avenue up until 1999 or 2000. On occasions he would have used the Avenue to park his car at the front of the house. He himself did not take his car down to the quay but did recall Dr Steele bringing his car to the quay area on 3 or 4 occasions over this period. Mr Hopley when going with his family to the quay to fish for crabs, or very occasionally to the beach beside the quay, always walked.

(c) Mrs Barbara Cooke testified that she had lived on Seaport Avenue all her life and was now almost 69 years old. Originally she lived with her parents at 12 Seaport Avenue but for the last 30 years or so she had lived at 10 Seaport Avenue. She recalled Dr Steele using his car to access 16 Seaport Avenue on occasion but she had no clear recollection of him using a vehicle to drive to the quay. Neither of the houses she had lived in had vehicular access to the Avenue and she did not pay particular attention to the use of the quay or beach by the residents of 16 Seaport Avenue.

(d) Miss Gail Morrow testified that she had lived at 12 Seaport Avenue all her life (she was 65 years old). She is the sister of Mrs Cooke. She had a clear recollection of Dr Steele using his car to access 16 Seaport Avenue and indeed of his father also using the Avenue to bring contents to his house. She regularly saw Dr Steele, when he was in residence, driving up the Avenue with his boat and later his windsurfer to the grassy area above the quay. Her recollection of this activity covered the period from when Dr Steele was 18 years old until access to the quay was fenced off.

[28] The first witness called on behalf of the first and second defendants was Mr Alan Reilly. He is a retired solicitor who had specialised in commercial property law and had worked for the firm of Carson & McDowell from 1976 until his retirement in 2012. From 1991 he had supervised most of the conveyancing transactions undertaken by the second defendant and his companies. Since his retirement he has continued to work to support long standing clients who had become friends. The second defendant fell into this category. In this case he was working for DWF (Northern Ireland) LLP, the solicitors for the first and second defendants, providing such support within his area of expertise. As such Mr Reilly was not proffered by the first and second defendants as an independent expert witness but as a witness of fact with personal knowledge of various conveyancing transactions relevant to some of the issues in this case. Mr Orr requested the court to formally record his objection to the admissibility of Mr Reilly's evidence but was content that the court hear Mr Reilly's testimony subject to any submissions on same that Mr Orr might later make.

[29] Mr Reilly had sworn an affidavit on 16th June 2017 to which was exhibited a map of the lands affected by the issues in this case (referred to in paragraph 1 above and found at page 627 of the trial bundle). In his oral testimony he detailed the title to each portion of land illustrated on that map. I accept the accuracy of that map for the purpose of these proceedings subject to the following caveats:

(i) the plaintiffs reserved their position on the title to the portion of land coloured brown on the map, acquired by the first defendant by virtue

of deed of conveyance dated 3rd May 2017 (referred to in paragraph 25(a) above);

(ii) the area of land shaded green on the map is more extensive than the portion of land conveyed by Coleraine Borough Council to the first defendant by deed dated 1st February 2013. Reference is made to this issue in paragraph 25(c) above. As already observed, the third defendant reserved its position on any issue which may arise in the future between the defendants in relation to the title to the lands shaded green; and

(iii) in their written closing submissions, the first and second defendants challenge the accuracy of the plaintiffs' map A attached to their most recently amended civil bill. This map incorporates as part of the lands owned by the third defendant a small portion of land abutting Seaport Avenue which actually belongs to the owner of 14 Seaport Avenue (Joyce Rankin). No evidence of Mrs Rankin's title has been furnished to the court but if the first and second defendants are correct in this assertion then it is an error which has also been replicated in Mr Reilly's map.

[30] Mr Reilly took the court through the title to the various portions of land shown on his map. He also gave opinion evidence of his interpretation of firstly the effect of the 1964 vesting order and the distinction between the vesting regimes in England and Northern Ireland and secondly in cross examination by Mr Orr the effect of the right of way granted by the 1946 conveyance to Mary Steele. These were effectively legal submissions to which Mr Orr had at the outset of Mr Reilly's evidence objected and as such I do not consider same admissible. These have however been adopted by Mr Shaw in his written closing submissions and I will deal with them, in that context, below.

[31] The only other witness called by the first and second defendants was Mr Arthur McKinley. He is 76 years old and had lived in Portballintrae and Bushmills from 1973 until 1999 when he moved to Portstewart. From 1988 to 1999 he was the owner of Seaport Lodge. In the mid-1970s he bought a dinghy and sought permission from the then owner of Seaport Lodge, Hume Stewart-Moore, to moor his dinghy at the quay. It was well known that the quay was private and that the licence for the quay was held by Mr Stewart-Moore. He considered that it would be inconceivable that anyone would keep their boat at the quay without seeking the permission of Mr Stewart-Moore. Similarly, he regarded the small beach beside the quay as privately owned. The Stewart-Moores adopted a benevolent attitude to members of the public using the beach, an attitude that he also attempted to embrace when he purchased Seaport Lodge from the Stewart-Moores in 1988. He did not wish to take over responsibility for the quay when he purchased Seaport Lodge and so the licence was retained by Mr Stewart-Moore and Mr McKinley agreed to keep an eye on the quay for him. It was Mr McKinley who erected the T-bar barrier on

the Avenue just below Seaport Lodge. His object was to attempt to control the volume of traffic using that end of the Avenue and to keep the quay area more secure. The barrier was never locked, since he was not sure of the legality of doing so, and could be lifted out by hand. After the Avenue was vested by the Council it more or less became a public thoroughfare and cars frequently used it. The Council installed speed ramps on the Avenue to slow down the traffic. He confirmed that he would have seen Dr Steele using his car to bring his children to the beach, or to launch his windsurfer. He usually saw him and his family during the month of August each year. No one would ever have objected to Dr Steele using the quay or the beach to launch his windsurfer or his dinghy. That that would have been condoned.

[32] The third defendant chose to call no evidence. During the course of these proceedings however it had filed three affidavits:

(a) One sworn on 22nd December 2016 by Moira Quinn, Director of Performance of the third defendant in which she averred inter alia that the third defendant owned and controlled Seaport Avenue. She also averred that when keys to the barrier which the Council had erected were provided to residents of the Avenue in 2012, that was to permit them to access their properties only. She quoted from a letter dated 9th June 2016 sent to the plaintiffs' solicitors by the solicitors for the third defendant in relation to this issue:

> "This permission was granted without prejudice to, or acknowledgement of, any other potential rights, and to the exclusion of all others."

She further averred that in relation to the declaration sought by the plaintiffs in these proceedings in respect of access to their property from the County Road the third defendant regarded same as "unnecessary because the Council has never challenged that right."

(b) An affidavit by Niall McSorley, a digital services manager with the third defendant, also sworn on 22nd December 2016, averred to his preparation of maps and aerial photographs exhibited to the affidavit of Moira Quinn. Objection was taken by the first and second defendants to those maps and same were not, in fact, referred to during the course of the hearing.

(c) An affidavit by Andy Scott, a maintenance supervisor with the third defendant, sworn on 20th June 2017, averred to the maintenance of Seaport Avenue by the third defendant and its predecessor Coleraine Borough Council. He had carried out maintenance work to the Avenue from 1993 and during this time had seen local residents and

members of the public using the Avenue for tourism and recreational purposes.

THE PLAINTIFFS' CLAIM OF A RIGHT OF WAY TO THE QUAY

[33] In Finlay v Cullen [2014] NI Ch17, Deeny J (as he then was) summarised the way easements may be acquired by prescription as follows (paragraph 11):

> "An easement, including a right of way, not by deed, may be acquired by prescription in three ways: (i) by reference to The Prescription Act 1832; (ii) under the doctrine of lost grant; or (iii) at common law. The Prescription Act 1832, c.71, by S.9 expressly did not extend to Ireland. However, the Act was extended to Ireland by An Act for Shortening of Prescription in Certain Cases in Ireland 1858 c.42. The single clause extends the 1832 Act to Ireland. It remains part of the statute law of Northern Ireland without significant amendment to this day."

Since the plaintiffs claim that all three methods of prescription are applicable in this case it is necessary to examine each in turn.

Prescription at Common Law

[34] The courts are prepared to presume that a grant of easement had been made if user as of right can be shown from time immemorial. In fact the date fixed as the limit of legal memory was 1189 by the Statute of Westminster I, 1275 c.39. The plaintiffs cite Professor Wylie in support of the proposition that in practice the courts have been prepared to presume continuous use from 1189 on production of evidence showing 20 years continuous user or sometimes user since living memory [Wylie, Irish Land Law, 5th Ed. at 7.67]. However, Wylie [at 7.68] recognises that a claim at common law can be defeated by showing that at some date since 1189 there has been unity of possession. The first and second defendants submit, correctly in my judgment, that prior to 1945 the plaintiffs' lands and all the relevant lands now owned by the defendants were owned by the Leslie family. No dominant or servient tenement existed prior to that date and any claim to prescriptive rights under common law cannot in this case be sustained.

Lost Modern Grant

[35] "Under this doctrine the courts are prepared to indulge in an alleged fiction that the easement…..claimed was the subject of a grant executed since 1189 but before the action brought by the claimant, and that the deed of grant has been lost and so cannot be produced in evidence… [T]he presumption arose that user from living memory or a period of 20 years prior to the action established the existence of

a lost grant." [Wylie, Irish Land Law 5th Ed. at 7.69]. The fact that there existed unity of title subsequent to 1189 does not assist the first and second defendants under this doctrine. The doctrine was fully considered by the House of Lords in Dalton v Angus (1881) 6 App Cas 740 and a modern statement of the effect of that case was provided by Buckley LJ delivering the judgment of the Court of Appeal in England in Tehidy Minerals Limited v Norman [1971] 2 QB 528 at 552.

> "In our judgment Angus v Dalton decides that, where there has been upwards of twenty years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the twenty year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made."

The Prescription Act 1832

[36] Section 2 of the 1832 Act provides that:

> "No claim which may be lawfully made at common law, by custom, prescription, or grant to any way or other easement….when such way….shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way….was first enjoyed at any time prior to such period of twenty years…"

The 1832 Act thus provides that a plaintiff may establish an easement by showing a period of twenty years user "without interruption". Section 4 of the Act clarifies that the twenty year period:

> "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which said period may relate shall have been or shall be brought into question and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have written notice thereof, and of the person making or authorising the same to be made."

[37] Mr Shaw submits that no evidence was called by the plaintiffs to enable the court to find the existence of any prescriptive rights prior to the 1964 vesting order. Since the dominant tenement could not have existed prior to 9th April 1946, he submits, the plaintiffs cannot show more than twenty years user prior to the vesting order. On the evidence before the court I consider this submission well founded.

[38] Even if that is the case however, Mr Orr advances two submissions in relation to the effect of the vesting order:

(i) that the vesting order of 1964 did not completely extinguish any easement enjoyed by the plaintiffs' predecessors in title at the date of vesting; and

(ii) even if such easements were extinguished by the vesting order they could begin to accrue again by prescription thereafter.

The defendants do not demur, in principle, from the second submission and I accept the submission as an accurate statement of the law. The first submission however is not accepted by the first and second defendants and requires further analysis.

[39] Mr Orr cites Roots, Humphries, et al, The Law Compulsory Purchase, 2nd Ed. at A[657] in support of his submission:

> "Easements ….do not prevail against an acquiring authority where land compulsorily acquired is used for the statutory purposes of that authority. Unless specifically extinguished by the compulsory purchase, however, such interests may revive against a subsequent purchaser."

and at D[1605]:

> "Unless the authorising Act provides to the contrary, where an acquiring authority compulsorily acquires a servient tenement it remains subject to any existing easement or other right over it for the benefit of other land (ie. the dominant tenement). There is no requirement to serve any notice to treat on the owner of the dominant tenement, assuming the dominant tenement itself is not required. The owner of the dominant tenement will not, however, be able to enforce such easement or other right against an acquiring authority acting in pursuance of its statutory powers; his rights are instead converted into a claim for

> compensation…. Where the acquiring authority later disposes of its interests in the servient tenement to a third party, any such adverse easement or other right may become enforceable again by the dominant tenement against the new owner of the servient tenement, except where this is prevented by express statutory provision."

Finally, he cites Gale on Easements, 20th Ed. at 12-13

> "Where lands compulsorily taken under one of the numerous statutes giving compulsory powers are subject to an easement which is disturbed in exercise of statutory powers, the person entitled to the easement cannot in general bring an action for disturbance; nor is he entitled to be served with a notice to treat. However, the easement will not be completely extinguished and will bind the lands in the hands of persons other than the acquiring authority."

[40] This submission is relevant to the issues in this case since, as already described, the deed of 1946 to Mary Steele contained an express grant of a right of way along a roadway which, Mr Orr contends, extended from Seaport Lodge to the County Road. He submits that even if after the vesting order became effective that right of way could not be enforced against the acquiring authority it remained in abeyance and would revive against a subsequent purchaser, in this case the first defendant following his purchase of the parcel of land, including a portion of Seaport Avenue, from Coleraine Borough Council under the deed of conveyance dated 1st February 2013.

[41] I cannot accept this submission for a number of reasons:

(i) The process of vesting in Northern Ireland differs from that in England and Wales and I concur with the submissions of Mr Shaw in this regard. In Northern Ireland upon the vesting declaration all interests in the subject land are extinguished and transferred to the compensation fund. In my judgment it is irrelevant that the plaintiffs' father may or may not have chosen to encash any cheque issued to compensate him for the loss of his rights. By that stage the lands had already vested in the Council.

(ii) The wording of the 1964 vesting order in this case expressly states that the lands acquired compulsorily were vested in the Council:

> "…..in fee simple discharged from all claims estates incumbrances or charges whatsoever….".

(iii) Mr Orr concedes that there are no Irish authorities that support the proposition that following the vesting of land in the terms adopted in this case, a subsequent sale of all or part of the lands to a third party acts to revive the easements extinguished by the vesting order.

(iv) I accept as a fact the evidence of Mr Reilly that in Northern Ireland the medium of compulsory acquisition by vesting order is from time to time utilised to create a new statutory fee simple extinguishing all putative or express easements or other rights which might inhibit future or contemplated development of the lands in question. Mr Reilly gave the example of the Castlecourt development in Belfast, with which he was personally involved, where the lands were vested by the Department of the Environment for Northern Ireland under the Planning legislation at the request of the developer in order, inter alia, to clear the lands of all pre vesting easements, interests and claims. Such an exercise would in my judgment be rendered otiose if Mr Orr's contention that such rights could be resurrected again by the subsequent disposal of the vested lands to the developer or other third parties, was sustainable.

[42] I therefore find that irrespective of the interpretation of the wording of the express grant of easement contained in the 1946 conveyance to Mary Steele, the subsequent sale of part of Seaport Avenue to the first defendant by the Council in 2013 did not, and could not, have the effect of reviving the easement contended for by Mr Orr.

[43] The plaintiffs are therefore, in my judgment, restricted to claiming prescriptive rights over this northern portion of the Avenue, and are also restricted to the period subsequent to the coming into effect of the vesting order, in 1964.

[44] It is common case that there are four essential characteristics of an easement:

(i) a dominant and servient tenement. It is not disputed that this characteristic is satisfied in this case;

(ii) accommodation of the dominant tenement;

(iii) ownership or occupation by different persons. Again this is not an issue in this case; and

(iv) the right is capable of forming the subject matter of a grant.

[45] Similarly, it is not disputed that, in addition to proof of the user for the requisite period of time, it is necessary also in order to acquire prescriptive rights that the user must be:

(i) as of right i.e. "nec vi, nec clam, nec precario "; and

(ii) continuous.

Accommodation of the dominant tenement

[46] In his skeleton argument Mr Shaw submits that in order to establish a prescriptive right, the user must attach to the land. That is conceded by Mr Orr citing Lord Evershed MR in Re Ellenborough Park [1956] Ch 131. At page 170 Lord Evershed quoted with approval from Dr Cheshire's Modern Real Property 7th ed. at p457:

> "a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and it is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties."

Mr Orr contends that the right of way claimed to the quay clearly accommodates and benefits the dominant tenement, a seaside dwelling house, allowing the dominant tenement to enjoy common law and customary rights to the seashore. In response Mr Shaw submits that the plaintiffs' claim is based not on a customary right but on a prescriptive right connected to 16 Seaport Avenue. Whereas I accept that the court is not dealing with customary rights in this case I am also prepared to accept that the prescriptive private rights for which the plaintiffs contend are rights which are capable of attaching to the dominant tenement.

Subject Matter of a Grant

[47] Are the rights for which the plaintiffs contend capable of forming the subject matter of a grant? In the latest amendment to the civil bill the plaintiffs seek a declaration not only that they have a vehicular right of way along Seaport Avenue but also the right to park at a particular location and the right to indulge in the various recreational activities detailed in paragraph 3 above. In Regency Villas Title Limited v Diamond Resorts (Europe) Limited [2017]EWCA Civ 238 where there was an express grant of the right to use free of charge, inter alia, a golf course, squash courts, tennis courts, croquet lawn, putting green and Italianate gardens the Court of Appeal while finding that the declarations granted by the trial judge were too broad (he having included substantial extensions to recreational facilities on additional areas of land not existing at the time of the original grant) upheld the trial judge's

declaration in respect of the above recreational facilities. The court also recognised that it was possible to have a valid easement to use an outdoor swimming pool. In theory the easements sought by the plaintiffs are, in my judgment, equally capable of being the subject matter of a grant.

User "as of right"

[48] To successfully assert a prescriptive right of way the plaintiffs must establish that their user was "as of right". The phrase was explained by Lord Neuberger in R (Barkas) v North Yorkshire County Council [2015] AC 195 at paragraph [15]:

> "….the legal meaning of the expression 'as of right' is, somewhat counterintuitively, almost the converse of 'of right' or 'by right'. Thus, if a person uses privately owned land 'of right' or 'by right', the user will have been permitted by the landowner - hence the use is rightful. However, if the use of such land is 'as of right' it is without the permission of the landowner, and therefore is not 'of right' – hence 'as of right'. The significance of the little word 'as' is therefore crucial, and renders the expression 'as of right' effectively the antithesis of 'of right or 'by right'."

[49] In the present case the first and second defendants contend that the plaintiffs' use of the Avenue and the quay was not "as of right" but was with the permission of the landowner and as such their use lacked the essential character to create a prescriptive right.

[50] Mr Shaw relies on Barkas, the facts of which, he submits, are analogous to the present case. In Barkas the Supreme Court had to consider whether the use of the land in question was "as of right". This was in the context of a local council refusing to register land as a village green under section 15(2) of the Commons Act 2006. That subsection applied where a significant number of inhabitants of any locality "have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years." Lord Neuberger considered the question of use by members of the public of land held by a public authority for recreational purposes and stated at paragraph 21:

> "…. So long as land is held under a provision such as section 12(1) of the 1985 [Housing] Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."

And at paragraph 23:

> "When land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct. Of course, a local authority would be entitled to place conditions on such use – such as on the times of day the land could be accessed or used, the types of sports which can be played and when and where, and the terms on which children or dogs could come onto the land."

[51] Mr Orr submits that Barkas is of no assistance to the court in the instant case. He correctly points out that that case related to an application under the Commons Act 2006 to register a village green in England; that it did not concern an easement, let alone a prescriptive right of way. That distinction was recognised by Lord Neuberger in Barkas at paragraph 22 where he observed:

> "It is true that this case does not involve the grant of a right in private law, which is the normal issue where the question whether a use is precario arises…the right alleged by the council to be enjoyed by members of the public over the field is not precisely analogous to a public or private right of way."

Nonetheless in the same paragraph he goes on to state:

> "However, I do not see any reason in terms of legal principle or public policy why that should make a difference. The basic point is that members of the public are entitled to go onto and use the land provided they use it for the stipulated purpose….namely recreation…".

[52] The vesting order in this case was made for the purposes of the Development of Tourist Traffic Act (Northern Ireland) 1948 ("the 1948 Act"). The 1948 Act permitted a local authority to formulate a scheme for, inter alia, the development of tourist traffic and to compulsorily acquire land for those purposes. Antrim County Council formulated such a scheme ("the Scheme") on 24th February 1953. The Scheme was expressed to be for the purposes of "the preservation of existing amenities and beauties and the provision of additional tourist facilities within the areas delineated…." For those purposes the Council could inter alia:

(a) acquire 245 acres of land;

(b) develop and maintain the lands as open spaces, walks, shelters, parking spaces, provide recreational and sanitary facilities and, with the consent of the Minister of Health and Local Government, appropriate lands for such other purpose as it thought fit;

(c) generally undertake works or provide further facilities or improve any amenities or services calculated to promote the development of tourist traffic in the area; and

(d) make by-laws for inter alia regulating the use and management of any lands or buildings provided under the Scheme.

[53] Mr Shaw submits that all of the evidence of user called by the plaintiffs including the evidence of Dr Steele himself, was completely consistent with the Scheme and that therefore as far as the vested lands are concerned the plaintiffs use was permissive, not nec precario, and their claim to prescriptive rights must fail. In response Mr Orr asserts that the terms of the Scheme are not as broad as the first and second defendants contend, and in particular that the Scheme does not make reference to vehicular use of the lands. Mr Reilly in cross examination had conceded that although the Scheme made reference to the right to develop parking spaces he was not aware of any designated parking spaces having been developed.

[54] Lord Neuberger in Barkas found the argument successfully advanced in that case and now adopted by Mr Shaw in this action as compelling as it is simple. I respectfully agree. The recreational activity which Dr Steele travelled along the Avenue to indulge in fell wholly within the user contemplated by the Scheme and was entirely consistent with the use which the Council permitted the general public to make of the vested lands. Until the chain across the Avenue was installed in 2011 or 2012, I am satisfied that the permitted user included vehicular use of the Avenue to make recreational use of the Council's lands. In my judgment the Scheme's reference to the right to develop and maintain parking spaces clearly contemplated the use of vehicles to access the parking spaces. Although no formal parking spaces were marked out by the Council, the general public made use of the de facto parking area at the northern end of the Avenue. In addition Mr Arthur McKinley's unchallenged evidence was that the Council installed speed ramps on the Avenue to slow down vehicular traffic. It is clear from the correspondence addressed to the plaintiffs, as owners of 16 Seaport Avenue, by the Council in 2001 that the Council were well aware of the vehicular use of the Avenue by members of the public but until 2011 there is no evidence of any steps taken by the Council to prohibit vehicular traffic. Dr Steele's use of his car to transport his boat or windsurfer or indeed his family to the quay or the beach was, until then, in my judgment, wholly permitted recreational use. As such the plaintiffs' claim to a prescriptive right over this portion of the Avenue cannot be sustained.

[55] It is clear from the maps attached to the vesting order that the western portion of the quay i.e. that closest to the mainland, formed part of the lands vested by the Council in 1964. The eastern portion of the quay which it appears belonged to the Crown was not vested. The plaintiffs' claim to a right to launch boats and carry on other recreational activities from the quay must therefore be separately examined.

[56] Dr Steele's use of the quay falls into two types of activity. Firstly, as a boy and later in life with his own family, strolling along the quay and occasionally, as a boy, fishing for crabs, an activity that his children would also have indulged in in their younger years. Secondly, using the quay to moor the boat there from approximately 1980 until 1985. He does not appear to have used the quay to moor a smaller boat which he owned prior to his marriage in 1980. That boat was launched from the beach. Similarly his windsurfer appears to have been launched from the beaches on either side of the quay rather than the quay itself. Prior to mooring his larger boat at the quay he went to visit Mr Stewart-Moore whom he knew had something to do with the quay. I am satisfied from his evidence that he went to see Mr Stewart-Moore to seek permission to moor his boat at the quay, permission which was granted by Mr Stewart-Moore. I therefore accept Mr Shaw's submission that the use of the quay for that purpose was expressly permissive and no prescriptive right to such use can arise as a result.

[57] I am satisfied that Dr Steele did not at any time seek express permission to use the quay for strolling or fishing for crabs. Mr McKinley expressed incredulity that anyone would have sought to access the quay without the consent of the Stewart-Moores. However, he described them as benevolent landlords who would have permitted Dr Steele and his family to make that informal type of recreational use of the quay. During his time as owner of Seaport Lodge Mr McKinley adopted as far as possible the same generous attitude. When he purchased Seaport Lodge in 1988 he declined to undertake responsibility for the quay from the Stewart-Moores but agreed to monitor the use of the quay for them. From his evidence it would appear that he was conscientious in his performance of that role. He notified the police whenever he detected damage to the boats moored at the quay and it was he who installed the T-bar structure on the Avenue with a view to increasing the security of the harbour and the quay area. He confirmed that he would have seen Dr Steele and his family at the quay and using the small beach to the south of the quay and in common with the Stewart-Moores was happy to permit their enjoyment of the recreational use of these areas. I am satisfied therefore that the additional recreational uses that the plaintiffs made of the quay were with the tacit consent of the Stewart-Moores. In such circumstance the plaintiffs' claim to a prescriptive right in respect of these activities also cannot be sustained.

[58] I have referred in paragraph 25(e) to the issue of the title to the beach area immediately south of the quay. The declaration sought by the plaintiffs in respect of this area is the right to launch boats, dinghies and do other such recreational activities from or at this beach. If this beach belongs to the third defendant then for the reasons I have given in paragraph 54 the plaintiffs' claim fails. If it is owned by

the first (or indeed the second defendant) then for the reasons given in paragraph 57 the claim must also fail.

THE PLAINTIFFS' CLAIM TO A RIGHT OF WAY FROM THE COUNTY ROAD

[59] As analysed by Mr Reilly the plaintiffs' asserted right of way to 16 Seaport Avenue from the County Road involves two distinct parcels of land, the "yellow land" owned by the Council and the "brown land" owned by the first defendant.

[60] In relation to the yellow land the first and second defendants make the following submissions:

(a) The court must be satisfied that the nature and extent of the user by the occupiers of 16 Seaport Avenue is in fact sufficient to acquire any prescriptive right. Mr Shaw makes reference to the letter written by David Smyth to the Council on 1st June 2001 in which he accepted that the vehicular use of the Avenue was "limited to a small number of car journeys per year". This submission also applies to the brown lands.

(b) Any right of way enjoyed by the plaintiffs, whether express or otherwise, was extinguished by the vesting order in 1964. For the reasons given in paragraph 41 I accept that submission. I also however accept Mr Orr's submission that prescriptive rights can begin to be acquired afresh after the vesting order i.e. after 1964.

(c) Any user of the yellow lands by the plaintiffs to pass and repass was with the consent of the third defendant and their predecessor councils and since such use was permissive no prescriptive rights can be legitimately claimed.

(d) The user by the plaintiffs has not been established as being "nec clam".

[61] In relation to the brown land their submissions are as follows:

(a) The express vehicular right of way granted by the 1946 conveyance to Mary Steele was conditional upon the intended roadway to upgrade the Avenue being constructed. Since those works were never undertaken the vehicular right of way never came into existence. The only unconditional express right of way was pedestrian.

(b) Following the vesting of the yellow land in 1964 both the express, but conditional, vehicular right of way and the pedestrian right of way over the yellow land were extinguished. Since a right of way must exist to service the dominant tenement, and since the brown land, after the vesting of the yellow land in 1964, no longer served or provided

access to the dominant tenement, the express rights of way over the brown land terminated once the vesting order became operative.

(c) Even though the Council did not in fact own the brown land, access over that land was only undertaken with the permission of the Council. The plaintiffs' use of the brown land was therefore permissive. This is reflected by the terms on which the Council furnished keys to the plaintiffs to access their property in 2012 and confirmed by the presence of the signs erected by the Council. The latter, Mr Shaw submits, are sufficient to prevent prescriptive rights being established.

[62] I will deal first with the nature and extent of the user of this part of the Avenue. The unchallenged evidence of Dr Steele, corroborated to varying extents by the witnesses called on behalf of the plaintiffs, establish to my satisfaction both vehicular and pedestrian user of the Avenue to access 16 Seaport Avenue for more than the requisite period post 1964 to establish prescriptive rights. Dr Steele's evidence covers the period from 1964 to date and whereas this user may have been seasonal, often being restricted to one month each summer, I am satisfied that it was sufficiently continuous to bring its enjoyment to the attention of the person in possession of the servient tenement i.e. the Council. The user was exercised openly, accessing a dwelling house that opened directly unto the Avenue and no evidence has been called by the council, nor indeed by the first and second defendants, to challenge Dr Steeles's testimony regarding the open nature and regularity of this user. Indeed, the correspondence between the Council, its solicitors and the plaintiffs in 1999, 2001 and 2011 illustrates that the plaintiffs' vehicular user of the venue was clearly known to the Council. I am satisfied therefore that the plaintiffs have established sufficiently continuous user to be capable of giving rise to prescriptive rights.

[63] Before attempting to interpret the nature of the express grant of the general right of way in the 1946 Conveyance it is necessary to first examine the effect of the vesting order on the brown land. Taking the plaintiffs' case at its height, namely that the grant of the general right of way was not conditional on the intended roadway upgrading the Avenue being constructed but, rather, operated as an immediate grant of a vehicular right of way within the confines of the existing Avenue, what was the effect of the extinguishment of that express grant by the vesting order? Mr Orr submits that the express grant continues to subsist over the remaining (non-vested) land and relies on Todrick v Western National Omnibus Co [1934] Ch 561 and Pugh v Savage [1970]2 QB 373 as authorities for this. He cites the current (20th) edition of Gale on Easements at 1-31 as accurately summarising the legal position on this issue:

> "If land to which a right purports to be annexed is in fact accommodated by the use of the right, the right qualifies as an easement whether the dominant and servient

> tenements are contiguous or not. A right of way, not ending anywhere on the land to which it is annexed, will be a valid easement, if the owner of the land owns, or otherwise has the right to pass over, the intervening lands."

In the Todrick case the owner of the intervening lands was in fact the owner of the dominant tenement, but Romer L.J. (at page 580) considered that the law encompassed a more extensive application:

> "Supposing that that right to be a right to maintain some erection such as a sign upon a servient tenement, I see no reason why that should not be a good easement merely because to get to the servient tenement the owner of the dominant tenement has to go over land which does not belong to him, if and so long as he can get a right or permission to go to the servient tenement."

[64] Thus, Mr Orr argues that the fact that No.16 was no longer contiguous to the brown land did not render the express easement to which the brown land was subject ineffective. I am afraid I do not accept that submission. What distinguishes the present case from Todrick and from the exposition of the law in Gale, is the absence immediately after the vesting of the yellow land in 1964, of any right or permission which the plaintiffs' predecessor in title could have relied on to reach the servient tenement, the brown land, from their premises at No. 16. The vesting order had extinguished their rights over the yellow land and at that time no prescriptive rights had been acquired. Accordingly, the express grant of easements over the brown land no longer accommodated the dominant tenement and in my judgment those rights, however interpreted, terminated with the coming into effect of the vesting order in 1964.

[65] Mr Shaw submits that post 1964 the plaintiffs have failed to acquire prescriptive rights since their use of both the yellow and brown lands on the southern portion of the Avenue have been permissive. The argument he marshals in respect of the yellow land echo those he successfully employed in relation to the claim to the northern right of way. He submits that the plaintiffs' use of this portion of yellow land was pursuant to the discretion of the Council, not "as of right". He invoked the erection of signs by the Council in 2012 and the terms on which a key to the chain across the Avenue, and later to the retractable barrier, was furnished to the plaintiffs in 2012 as evidence that the plaintiffs' use was permissive. Finally, he submits that the nature of the plaintiffs' use must be reasonably apparent to an objective bystander. In this case this means that the plaintiffs must have exercised rights which are capable of being distinguished from the consensual rights afforded to the public generally.

[66] I am satisfied that after the vesting order was made in 1964 the Steele family carried on using Seaport Avenue as they had done before the vesting order. In relation to this portion of the Avenue that use was to enable the plaintiffs, their visitors, their workmen and occasional delivery men to access their dwelling house when that was more convenient than using the rear entrance to the property. That use had nothing to do with tourism nor any of the other stated purposes of the Scheme for which the Council had vested the land. The principles of Barkas are of no assistance to the first and second defendants in relation to this user. This user, accessing a dwelling house, in my judgment falls outside the ambit of the Scheme. It was not a use which was permitted under the Scheme. Instead the user was for the private purposes of the plaintiffs, being exercised by them as of right and not by virtue of any right afforded by the scope of the Scheme or the vesting order.

[67] Did the erection of the signs by the Council in 2012 or the provision of a key to the plaintiffs that same year prevent prescriptive rights from being established? Mr Shaw has referred the court to Winterburn v Bennett [2016] EWCA 482. That case concerned whether the appellants, the owners of a fish and chip shop, had acquired by prescription the right for themselves, their suppliers and their customers to park in a car park owned by the respondents, next door to the appellants' premises. The evidence was that up until 2007 a sign had been attached to the wall of a building on one side of the entrance to the car park. The sign read "Private Car Park. For the use of patrons only. By order of the Committee." Up until 2010 the building and car park had been owned by a Conservative Club. The issue for the Court of Appeal was whether the sign was sufficient to prevent the appellants from acquiring a right to park cars in the car park. The Court held that it was. Counsel for the appellants had suggested that the car park owner could have stopped the user by erecting a chain across the entrance, or objecting orally, or by writing letters of objection threatening legal proceedings. David Richards LJ delivering the judgment of the court stated, at paragraph 40:

> "In my judgment, there is no warrant in the authorities or in principle for an owner of land to take these steps in order to prevent the wrongdoer from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be 'as of right'."

[68] In my judgment Winterburn v Bennett does not assist the first and second defendants. I agree with Mr Orr's submission that for the principle in that case to have any validity in the present case the defendants would have to show that the signs were erected before the prescriptive rights accrued. It appears to be accepted that the signs in this case were erected in 2012 long after the period of in excess of twenty years user had been established by the plaintiffs.

[69] I also accept Mr Orr's submission that the provision of a key to the barrier in 2012 by the Council to the plaintiffs did not render the plaintiffs' use permissive. By that time, in my judgment, the plaintiffs had long since acquired a prescriptive right to use the Avenue. In the affidavit filed on behalf of the third defendant, their Director of Performance, Moira Quinn, avers that the plaintiffs were provided with a key for access purposes to their property. That key was only released after the plaintiffs had provided to the satisfaction of the Council and their solicitors statutory declarations vouching their acquisition of a prescriptive right of way for this purpose. Ms Quinn avers in her affidavit that the provision of the key and the permission granted to the plaintiffs to access their property was "without prejudice to, or acknowledgement of, any other potential rights". In my judgment those rights included any already accrued prescriptive rights.

[70] Mr Shaw submits, correctly, that the plaintiffs must establish that that user was "nec clam". He submits that as against the Council, the plaintiffs must have exercised rights which are capable of being distinguished from the consensual rights afforded to the public generally, and furthermore such rights must have been exercised in a sufficiently overt manner that they can be regarded as "nec clam" - without secrecy. He cites the test set out by Lindlay LJ in Hollins v Verney (1884) 13 QBD 304 at 315:

> "No actual user can be sufficient to satisfy the statute unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, that the fact that a continuous right to enjoyment is being asserted, and ought to be restricted if such right is not recognised and if resistance to it is intended."

It is explicit in my findings set out in paragraph 62 that the user exercised by the plaintiff was overt and by my findings in paragraph 66 that that use was in fact distinct from the consensual rights afforded by the Council to the general public under the scope of the Scheme. The additional issue raised by Mr Shaw here is whether that user was capable of being distinguished by the Council from the general public user to such an extent that it ought to have alerted the Council to the fact that prescriptive rights were in the course of being accrued and required action on its part if that user was not to crystallise into acquired prescriptive rights.

[71] In my judgment the plaintiffs' user passes the test in Hollins v Verney. The plaintiffs exercised their rights openly. Their property was one of only two private dwelling houses which for all the relevant period post-vesting opened directly onto the Avenue. In passing I acknowledge that a third dwelling, for a period, opened onto the Avenue but no longer has such access and no evidence was adduced to establish for how long that direct access was enjoyed. The affidavit of Andy Scott establishes that Council employees undertook regular maintenance works to the

Avenue from at least 1993. He avers that he had observed local residents using the Avenue for tourism and recreation over the years. However, in their letter of 7th September 1999 to Dr Steele the Council acknowledged that they had been advised that he was using the roadway in front of his house to access his property. I am satisfied that not only was the plaintiffs' user capable of being distinguished in the mind of the servient owner from the general public user but was in fact so distinguished by the Council. I consider that it is not without significance that this was not an issue raised in these proceedings by the third defendant.

[72] In relation to the brown land the defence mounted by the first and second defendants that the plaintiffs' user of this portion of the Avenue was in some way permissive cannot be sustained in the light of my findings in respect of the yellow land. Mr Shaw had submitted that irrespective of the ownership of the brown land it was the Council's permission which had rendered the user of this land not nec precario. I can discern no evidence to justify such a finding.

[73] I am satisfied therefore that the plaintiffs have established a prescriptive right of way from the County Road both with vehicles and on foot for the purpose of accessing and egressing 16 Seaport Avenue.

CONCLUSION

[74] For the reasons given, I:

(a) dismiss the plaintiffs' claim seeking the declaration and associated rights in paragraphs 10(1)(a) to (d) of the amended civil bill;

(b) grant the declaration sought by the plaintiffs in paragraph 10(2) of the amended civil bill against the first and third named defendants;

(c) decline to grant the injunction sought by the plaintiffs in paragraph 10(3) of the amended civil bill. No evidence has been adduced of any wrongful interference with or obstruction of the rights of the plaintiffs by any of the defendants in relation to that section of the Avenue in respect of which the declaration has been granted nor has any suggestion been made that those rights will be wrongly interfered with by the defendants in the future; and finally

(d) will hear counsel on the issue of costs.