HIGH COURT

COMMERCIAL

[2023] IEHC 536

[Record No. 2022/2199P (2022/85COM)]

BETWEEN

PAMELIA SMYTH

PLAINTIFF

AND

LAURENCE FENELON AND LORRAINE THORNTON

DEFENDANTS

JUDGMENT of Mr. Justice Oisín Quinn delivered on the 29th day of September, 2023

Introduction

1. The issue in this case concerns the extent of a right of way over a laneway in Ballsbridge, Dublin. The right of way is the subject of an express grant contained in a Deed of 30 September 1955 made between, amongst others, the parties' predecessors in title.

The locus of the Right of Way

2. The laneway is approximately 14ft wide and runs behind five houses on the Merrion Road, being the even numbers from 116 to 124. These are substantial properties with reasonably long back gardens. The laneway is wide enough for vehicular access, but it would be difficult for two vehicles to pass each other and any normal size vehicle would not be able

to turn. At its north-western end, behind number 116 Merrion Road, the laneway by means of gates opens out on to a public roadway called Shrewsbury Park. This road in turn leads out on to the Merrion Road emerging between numbers 116 and 114 Merrion Road. The south-eastern end of the laneway at the rear of number 124 Merrion Road is a dead end. The laneway is effectively a *cul de sac*. As one enters the laneway through the gates at its junction with Shrewsbury Park there are walls running down each side and a wall at the end. On the left-hand side there is a garage entrance built into the wall to facilitate access to a garage that serves a house on Shrewsbury Park and a house in the Shrewsbury Park estate (a private gated residential development). On the right-hand side (from the perspective of someone standing at the Shrewsbury Park entrance) there are rear entrances in the wall into the Merrion Road houses. Accordingly, if one emerged through one of the rear entrances of the Merrion Road houses on to the laneway, one would essentially turn left to travel along the laneway and pass out through the gates leading out on to the Shrewsbury Park road and from there one could turn left and emerge out on to the Merrion Road, a significant public roadway heading northwards into the city and southwards towards Blackrock. In addition to the laneway, the Shrewsbury Park public road gives access to a number of houses on Shrewsbury Park itself and access to two private gated residential developments, called 'Shrewsbury' and 'Shrewsbury Park'. These developments were built on a large site that was originally contained in a 1945 Deed and which lies between the Merrion Road and the railway line running between Sydney Parade and Sandymount and accordingly the Shrewsbury Park public road remains effectively the only way 'out' to the wider public road network which is accessible once one emerges out onto Merrion Road.

The parties

3. The Plaintiff owns a house built in the back garden of number 118 Merion Road and she has a rear entrance out on to the laneway. The Plaintiff's property was built in the late 1990s

and is called Haylands and it is occupied by the Plaintiff's brother-in-law and his wife. The Plaintiff is a successor in title to one of the grantees of the right of way contained in the 1955 Deed. Haylands also encompasses land purchased from number 116 Merrion Road which facilitates a generous direct entrance out on to the Shrewsbury Park roadway. As a result, the owners of number 116, having sold a portion of their back garden many years ago, no longer have a boundary with the laneway or any entrance out on to the laneway itself. However, there is also a house built in their back garden which has direct access out on to Shrewsbury Park since the Shrewsbury Park public road passes between numbers 116 and 114 Merrion Road, and accordingly one entire side boundary of 116 Merrion Road abuts Shrewsbury Park. The Defendants own and live at number 120 Merrion Road and also own the laneway. Number 120 abuts on one side number 118 and Haylands, and on the other abuts Number 122 and together with number 124 each of these houses also has a rear entrance out on to the laneway.

Background to the proceedings

4. The Plaintiff claims that the right of way granted to her by virtue of the 1955 Deed extends over the entire length and width of the laneway running from Shrewsbury Park to the wall at end of the far boundary of number 124 Merrion Road. The Defendants on the other hand, while accepting that the 1955 Deed granted a right of way over the laneway to the Plaintiff's predecessor in title, say that the extent of the right of way is limited to a right of way between the Plaintiff's rear entrance onto to the laneway and Shrewsbury Park at the north-western end of the laneway and that there is no right to emerge on to the laneway and to turn right and travel to the south-eastern end of the laneway (which is behind number 124) and which is a dead end, even if the Plaintiff were doing so with the intent of doubling back on herself and re-passing her rear entrance with the ultimate purpose of emerging out on to Shrewsbury Park public road.

5. The context to the proceedings is that Defendants are proposing to sell the laneway and a portion of their back garden at number 120 to a developer who is in a position to acquire, or has also acquired, number 122 Merrion Road and a portion of the back garden of number 124 Merrion and has a planning permission from earlier in 2023 from An Bord Pleanala to build a development of eight townhouses in the back gardens of numbers 120, 122 and 124 Merrion Road and to demolish and build a new house at number 122 Merrion Road together with a new access road through the site of number 122 Merrion Road which will service the eight new townhouses and provide vehicular access between the townhouses and the Merrion Road. Accordingly, it is not envisaged that the townhouses will have vehicular access to and from Shrewsbury Park along the laneway, rather they will use the new roadway to be built on the site of 122 Merrion Road to get access out on to the Merrion Road. The laneway it seems would be used for more limited rear access to the new townhouses for bikes and refuse and garden waste removal and such like. Nonetheless, this proposed development will impact the laneway somewhat behind numbers 120, 122 and 124 Merrion Road. However, the Plaintiff and her residents of Haylands will still be able to emerge from their rear entrance on to the laneway, turn left and emerge out on to Shrewsbury Park. This is aside from the fact that Haylands, by virtue of the acquisition of a portion of the rear garden of number 116, has its own direct vehicular and pedestrian gates directly out on to Shrewsbury Park. Nonetheless, there is no case made by the Defendants that the right of way has been abandoned or extinguished. In addition, the developer was not a party to these proceedings and there was no case made as to whether the proposed development might amount to a substantial interference in the Plaintiff's right of way. The Plaintiff's brother-in-law was the principal witness called on behalf of the Plaintiff, who did not herself give evidence. He had objected unsuccessfully to the proposed development and in addition had, in the past, sought money from the Defendants' predecessors in title in return for co-operating with any proposed development in the back gardens of the

other Merrion Road houses which backed onto this laneway. At that stage it may have been envisaged that the laneway might have needed to be widened to provide comfortable vehicular access to any new houses to be built in the back gardens of 120, 122 and/or 124 Merrion Road. The owner of Haylands might have been required to convey some land or grant a right of way over her property in such a scenario. Accordingly, there is nothing necessarily inappropriate about such a stance being adopted and the Plaintiff's brother-in-law admitted he had sought money from the Defendants' predecessor in that regard. However the new development contains the proposal to build an access road to the new townhouses through number 122 Merrion Road. Accordingly, co-operation from the Plaintiff (or her brother-in-law) was not strictly required. There was disputed evidence as to whether the Plaintiff's brother-in-law had demanded money from the Defendants, from other neighbours and indeed from the developer (who claimed one of the new houses had been demanded) but ultimately it is not necessary to resolve those disputes to determine the issue in the case, namely the extent of the right of way, which in turn requires the interpretation of the 1955 Deed.

Law relating to the interpretation of an express grant of the Right of Way

6. It is well settled that the overarching principle to be applied in interpretating a legal contract such as one containing an express grant of a right of way is to seek to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract.

7. In addition to the foregoing general principle, the case law and leading texts (see *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274; *I.C.S. v West Bromwich B.S.* [1998] 1 WLR 896; *Gale on Easements* 21st Edition paras. 19.18 *et seq.*; *Bland on Easements*, 3rd Edition, paras. 10.04 *et seq.*; and *Law Society v MIBI* [2017] IESC 31) identify a number of

further interpretative guides and subsidiary principles, the most relevant of which are as follows:-

(i) the 'background knowledge', or as it is sometimes referred to, the 'matrix of fact', includes anything which would have affected the way in which the language would have been understood by a reasonable person;

(ii) evidence of previous negotiations and declarations of subjective intent are not admissible;

(iii) the meaning of words in the document is what the parties using the words against the relevant background would reasonably have understood those words to mean;

(iv) the words should be given a single meaning which is the meaning both parties are taken to have agreed upon and that meaning is to be determined from a consideration of the agreement as a whole;

(v) semantic and syntactical analysis of words should yield to common sense meanings if there is a conflict between the two.

8. In the context of a deed containing an express grant of a right of way it is clear that any other documents expressly referred to in the Deed are likely to be relevant (see *Gale*, para 9.24). It also emerges from the authorities that the 'background knowledge' can typically include information to be gleaned from any recitals in the deed (see *Law Society v MIBI*, O'Donnell J at para 8 and paras. 33-34). Finally, the physical circumstances on the ground are usually very relevant to understanding the right of way (see *Gale*, para 9.25 and *Bland*, para 10-08).

9. It is also necessary to take account of the nature of the agreement. An express grant of a right of way is a very particular type of contract. It is far more than simply a personal agreement. It is the grant of an interest over land (the servient tenement) which attaches to other land for the benefit of that other land (the dominant tenement). It is an easement and

accordingly comes with all the characteristics of an easement (see *Bland*, para 1-04 et seq.). If a deed purporting to create a right of way is successful in its task, as the 1955 Deed was, then the parties to the original contract will have created an easement, being both a burden and a benefit, that will run with both the grantor's and grantee's land and which will continue to bind their successors in title for potentially many decades and indeed centuries to come. It goes without saying that even without contemplating the application of the general principle of interpretation referred to above, it would be a general starting point to assume that the parties in those circumstances would expect that any court approaching the task of interpreting what they had agreed - potentially decades or even centuries, as some authorities show, later - would do so with a healthy dose of common sense and high regard for the practical realities on the ground. The decisions of Shanley J. in *Redfont Ltd v Custom House Dock Management Ltd.,* [1998] IEHC 206 and McMahon J in *White v Callan* [2006] 2 ILRM 92 are two examples of common sense and practical realities informing the court's interpretation of express grants of interests in land. Indeed, as McMahon J. stated in *White*:

> *"…it must be conceded that this right way is not static and must be reasonably allowed to respond and develop with social change. This means that a right of way, for example, granted at the beginning of the last century, which allowed passage by horse drawn carriages might now extend to cars and small motorised vehicles."*

10. The essential features of a right of way are therefore important to be borne in mind. It is well established that they are usefully summarised in *Re Ellenborough Park* [1956] Ch 131 (re-endorsed by the UK Supreme Court in *Regency Villas v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 and see *Bland*, para 1-04) and adopted in Ireland by Shanley J. in *Redfont* who stated as follows:-

> *"it was well established that an easement had four essential characteristics: firstly, there had to be a dominant and a servient tenement; secondly, the easement had to accommodate the dominant tenement; thirdly, the owners of the dominant and servient tenements had to be different persons, and, finally, that a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant."*

Accordingly, as described by *Gale* at para 9.26:

> *"... a question of construction [of an express grant of a right of way] is a question of law in respect of which no burden of proof lies on either side. In particular, in construing a grant the court will consider (1) the locus in quo over which the way is been granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used."*

A similar view was expressed in the 15th Edition of Gale at page 292 and that text was adopted and applied by Shanley J. in *Redfont*.

Application of the relevant legal principles to the express grant contained in the 1955 Deed

11. Considering the above in the context of the issue in this case, it is important to bear in mind that accordingly, as an easement, the purpose of the grant is not to personally benefit the Plaintiff (or her tenants/visitors) as the successor to the grantee, but to 'accommodate' her property (being the dominant tenement). Secondly, what was granted was a right of way over what is, and what was described as, a 14ft laneway running along behind the back of the grantee's and other neighbouring properties. It was not in the physical nature of a park area or a garden to be generally enjoyed in the nature of the grant in *Re Ellenborough Park.* The contention of the Plaintiff that the grant entitles her to travel to the end of the laneway and then return back along the laneway and re-pass her own rear entrance on the way out to the public

road known as Shrewsbury Park "even if she doubles back on herself in doing so" (as per the Plaintiff's written submissions at para. 12) is therefore instinctively not an attractive interpretation as it is not a sensible thing that anyone would do. Equally, it was accepted on behalf of the Plaintiff, that her brother-in-law's various examples of how he in practise said he actually used the full laneway (returning neighbours pets and rugby balls, taking the air during the pandemic, acting as an informal 'security officer' and so on) while neighbourly and relatively mundane were not actions in accordance with the grant to the Plaintiff.

12. Approaching the challenge of ascertaining the meaning of a document entered into almost 70 years ago by parties who are - not unusually perhaps in a right of way case - long gone, is not done in a vacuum therefore. However, it is not the function of the court to simply conjure up an interpretation that accords with common sense. The legal principles described above make it clear that the task is one of seeking to ascertain the meaning which the 1955 Deed would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time, that is 30 September 1955.

13. The specific starting point is therefore a detailed consideration of the 1955 Deed itself. This document is helpful in that it not untypically contains recitals that inform future readers of the context in which the agreement was entered. In addition, it also helpfully refers to preceding deeds that explain the property context in which this deed came to be executed.

The 'background knowledge' available to the parties to the 1955 Deed

14. Firstly, the 1955 Deed is made between William J. Kavanagh of Leixlip Castle who is described as the 'grantor' and then the various owners of the houses on Merrion Road from number 102 through to number 124, even numbers only, who are described as the grantees. These include the Plaintiff's predecessor in title who owned number 118 Merrion Road.

15. It will be observed that the grantees include, not just the five houses (even numbers 116 to 124) that back onto the laneway the subject of these proceedings, but also the owners of a further seven houses (even numbers 102 to 114) on Merrion Road. These further seven houses are on the same side of Merrion Road - being the right-hand side as one travels northwards towards the city - as the five that back on to the laneway. As will be recalled, the Shrewsbury Park public roadway emerges out on to the Merrion Road between numbers 114 and 116. This is of some significance as will be explained.

The 1945 Deed

16. Next, the 1955 Deed having identified the parties begins with a recital referring to the conveyance in 1945 (the '1945 Deed') by the Earl of Pembroke of a long lease (for a 150 years from 29 September, 1944) to the aforementioned Kavanagh of a substantial site of lands (the 'Kavanagh Lands') that are described and which encompasses the aforementioned Merrion Road houses. This site is a reasonably large area of lands lying between the Merrion Road on the west and what was then the Great Southern Railway line on the east. The Kavanagh Lands were bounded to the north by existing residential developments and to the south by an ESB sub-station and lands described in the 1945 Deed as 'Building Sites, Messrs Lynne & Co'. The 1945 Deed envisaged a phased residential development on the Kavanagh Lands including the construction of residential homes, roadways, footpaths and drains and sewers. At the time of the 1945 Deed the Kavanagh Lands were not developed. The 1945 Deed envisaged the constructions of residential properties ('dwelling homes') which were not to be used (without the consent of the Earl of Pembroke) for the purposes of any trade, manufacture or business save for the professions of a medical practitioner or 'surgical dentist'. There are no roadways shown as constructed or in existence leading into or within the Kavanagh Lands.

The 1948 Deed

17. The 1955 Deed then, in the next recital, refers to the various conveyances between 1947 and 1953 of the residential homes from Kavanagh to the owners of the Merrion Road houses from numbers 102 to 124. A sample of these Deeds from 1948 was introduced in evidence being the purchase of the Defendant's property in 1948 (the '1948 Deed'). In this Deed, Mr. Kavanagh is described as a builder. The map attached to the 1948 Deed shows the residential house at no. 120 Merrion Road and the neighbouring houses at 118 (the Plaintiff's predecessors in title's property) and number 122. Based on this Deed, these purchasers (the homeowners of 102 to 124) also covenanted to only use these properties as private dwellings and not to use them for any trade or business, save that of a doctor's or dentist's surgery without the consent of Kavanagh (who in turn would have needed the consent of the Earl of Pembroke). The map attached to the 1948 Deed is significant. It shows the houses with frontage onto the Merrion Road and then shows what is described as a "proposed new roadway" running along the rear of the houses where the laneway now is. It is known from what was built by 1955 that in addition to the construction of twelve residential homes along the Merrion Road, Kavanagh had built a roadway into the site from the Merrion Road between numbers 114 and 116. Certainly by 1955 this road was called Shrewsbury Park and was in public charge by that time. This roadway was hugely important as it was the only way into the rest of the site in circumstances where Kavanagh had built houses all along the rest of the Merrion Road boundary to the Kavanagh Lands. This much is clear from the map attached to the 1955 Deed.

18. From the foregoing the following can be gleaned as being part of the 'background knowledge' of the parties at the time of the 1955 Deed: Kavanagh, a builder, had purchased a substantial site from the Earl of Pembroke in 1945 between the Merrion Road and the Great Southern Railway line for the purposes of a residential development. He set to initially building a number of homes fronting on to the Merrion Road and these were sold pursuant to long leases beginning in 1947. He kept some space between numbers 114 and 116 and built a roadway into

the site from the Merrion Road between these houses. When the houses on the Merrion Road were sold (mostly in the late 1940s) it was indicated in the map attached to those deeds that a proposed new roadway would be built at the rear of those Merrion Road houses. Accordingly, the purchasers of the houses from 102 to 124 Merrion Road were expecting to have access to and from the rear of their properties by means of a new roadway to be built by Kavanagh and this roadway in turn would have linked into the Shrewsbury Park road which in turn linked back out on to the Merrion Road between numbers 114 and 116. From a practical point of view, this would mean for example that all manner of deliveries such as coal etc or removal of garden waste from the substantial gardens could be effected by means of accessing these properties from the rear.

The threatened proceedings in the 1950s

19. Having recited references to the 1945 and 1948 (and related) Deeds, the 1955 Deed then reveals a very interesting and important piece of the background. It recites as follows:-

> *"AND WHEREAS the Grantees have claimed to be entitled to a right of way across the Grantor's said premises from Shrewsbury Park to their respective rere entrances and have threatened to institute proceedings for the purpose of enforcing such alleged right of way".*

From this it can be understood that as of 1955 the Shrewsbury Park road had been built and was almost certainly in charge as a public road as there was no reference to the grantees claiming a right of way over Shrewsbury Park road itself. Secondly, it is known, based on the physical characteristics of the locus now, that the so called 'proposed new roadway' to run behind their houses indicated on the 1948 Deed had not been built. The owners of the Merrion Road houses clearly apprehended that Kavanagh was not going to build the 'proposed new roadway' and that they might be compromised in gaining access to the rear of their properties

so they threatened proceedings claiming a "right of way" across Kavanagh's land "from Shrewsbury Park to their respective rere entrances".

The grant of the right of way in 1955 was made to compromise the threatened proceedings

20. The 1955 Deed then explains by means of a further recital that the grantor has decided to compromise the aforementioned threatened proceedings by agreeing to grant the grantees *"an easement or right of way over portion of his said premises for the purpose and in the manner hereinafter expressed".*

Conclusions in relation to the "background knowledge" of the parties to the 1955 Deed

21. During the hearing, a document described as a "Pembroke Estate map" was referred to. It emerged from the Defendants' discovery and it was explained that their solicitor had it by virtue of also being solicitor to the Pembroke estate. There was no witness able to prove or say exactly what it was or who made it or even when it was made. It constituted some sketching or drawing of a potential road network in what was described as a 'cruciform' shape inside the Kavanagh Lands. The sketching had been drawn on top of a larger map of the Pembroke Estate. It may well have been an early sketch made by someone working for the Earl of Pembroke of a potential road layout within the Kavanagh Lands. It was not established if this document was known to or ever in the possession of Kavanagh, much less any of the grantees. A suggestion was made on behalf of the Plaintiff that part of this document indicated an intended "turning circle" at the end of the roadway that appeared to run behind where the Plaintiff's house now is. It is not possible to say if that is so. For the foregoing reasons I am not satisfied to include this document as part of the "background knowledge".

22. On the other hand, both the 1945 Deed and the 1948 Deed are referred to in the 1955 Deed and it is clear they form part of the 'background knowledge' of the parties for the purposes of interpretating the agreement. In any event the parties to the 1955 Deed would of necessity have been parties (or the successors in title to parties) to the 1948 Deed (and the related similar

conveyances) when they or their predecessors purchased their properties from Kavanagh. Equally the maps attached to those Deeds combined with the clear evidence describing the physical characteristics of the locus enable a clear picture to be made of the situation on the ground at the time of the 1955 Deed. The recitals in the 1955 Deed in relation to the threat of the proceedings to claim a right of way "from Shrewsbury Park to their respective rere entrances" and to the decision to compromise those proceedings by means of the grant of the right of way in the 1955 Deed mean those events are also clearly part of the "background knowledge" of the parties not just because they are referred to in the recitals but also because they evidence matters that both sides, namely Kavanagh and the grantees, clearly had at the forefront of their minds when entering into the 1955 Deed. A threat of legal proceedings conveys the reasonable impression that the grantees had taken a considered view as to the position they found themselves in when the 'proposed new roadway' intended to be built at the rear of their properties had not been built. That considered position is described as being an entitlement to a "right of way … from Shrewsbury Park to their respective rere entrances". Equally, that threat of proceedings was the context in which Kavanagh decided to make the express grant of the right of way thereby, by virtue of the essential characteristic of an easement, creating a burden over his lands as the servient tenement which would run with those lands binding his successors in title. The Defendants submitted accordingly and not unreasonably, that Kavanagh would be unlikely in those circumstances to grant the grantees more than they had sought in their threatened legal proceedings.

The wording of the express grant

23. Following those recitals, the 1955 Deed provides for the following grant from Kavanagh to the grantees:

> *"FULL AND FREE right and liberty for them and their tenants, visitors, servants and agents and licensees in common with all others having a like right at all times by day*

or night with or without horses cattle or other animals, carts, carriages or other vehicles of any description for all purposes connected with the use and enjoyment of the Grantees premises for whatever purpose the said right of way may from time to time be used by them and to pass and repass along the said right of way for the purpose of going from Shrewsbury Park to their respective rere entrances as more particularly delineated on the map attached hereto and thereon coloured yellow"

24. The parties agree that the grant contains a minor obvious error and should include the words 'to and' so that it should be read as meaning *" ... for the purpose of going <u>to and</u> from Shrewsbury Park ..."*. This follows as a matter of common sense and from the words that are used, in particular *".... to pass and repass..."*.

25. It is then necessary to examine the map attached to the 1955 Deed. It shows the Kavanagh Lands bounded by a solid line save for where Shrewsbury Park emerges out on to the Merrion Road between numbers 114 and 116. It shows the Shrewsbury Park road as extending into the centre of the Kavanagh Lands. A green line tracks the rere boundary of the houses already build by Kavanagh fronting onto the Merrion Road plus an additional area on either side of the Shrewsbury Park road where additional houses were already or to be built. There is then two areas 'coloured yellow'. Both are described as 14ft wide. The first runs behind the houses from numbers 102 to 114. This indicates essentially a 14ft laneway running behind these seven houses. This area starts at the rear of number 102 and then stops exactly at the junction with Shrewsbury Park behind number 114. The right of way along this area would allow each of the householders from 102 to 114 to have access to the rear of their properties from Shrewsbury Park. Next, there is a second area coloured yellow also 14ft wide which runs along the rear of the houses from 116 to 124 Merrion Road. This 14ft strip starts at the junction of the rear of number 116 and Shrewsbury Park and continues in a steady 14ft wide strip down to the far end of the rear of number 124. Equally this strip, or laneway as it was in reality,

allowed each of the owners of numbers 116 to 124 to have access from the rear of their properties out to Shrewsbury Park.

26. When the words of the grant state: "as more particularly delineated on the map attached hereto and thereon coloured yellow" the area coloured yellow is in fact these two laneways.

27. The meaning of much of what is contained in the grant is not in dispute. The categories of persons who can use the right of way and when and by what mode and for what purpose connected with the dominant tenement are all broad and clearly spelt out and no dispute arises thereon. The purpose is also clear – it is "*for the purpose of going [to and] from Shrewsbury Park to their respective rere entrances".* It is when it comes to the 'extent' of the right of way, and by that is meant the physical extent, that the dispute arises. Each side submits that the meaning of the grant in respect of the physical extent of the right of way is clear.

Submissions and Conclusions

28. The Plaintiff submits that the more general wording of the grant must yield to the specific identification of the physical extent of the right of way in the map attached to the Deed which is the area coloured yellow. By this argument it is contended that the map shows the entire laneway and therefore each grantee had a right of way over the entire laneway irrespective of where their house was in relation to Shrewsbury Park. It is said that it is wrong to conflate the 'purpose' of the right of way with the 'extent' of the right of way and there should be no wider reading of the words unless there is ambiguity, and it is said that there is no ambiguity as the area coloured yellow on the map is the entire laneway. The Plaintiff relies principally on the English Court of Appeal decision in *West v Sharp* (2000) 79 P & CR 327.

29. The Defendant submits that the wording in its context is clear. The Deed specifies that the right of way granted to each householder is between Shrewsbury Park and their "respective rere entrances", not to each other's rear entrances. Attention is drawn to what was claimed in the threatened proceedings and that it would not make sense for the grantor to grant more than

what was claimed. It is also contended that this is the only interpretation that makes sense as it would not make any sense for a householder on either side of Shrewsbury Park to emerge from their rear entrance and travel 'away' from Shrewsbury Park down a laneway only to have to turn back and re-pass their rear entrance to reach Shrewsbury Park.

30. Turning to the specific questions identified in *Gale* at para 9.26 cited above, the locus in quo is a relatively narrow 14ft laneway at the rear of several residential houses. The terminus a quo and the terminus *ad quem* are clear; every right of way must have these, see *Donnelly v Adams* [1905] IR 154. They are the public roadway described as Shrewsbury Park located as identified on the map and, in the case of each grantee, their respective rear entrances. The purpose is also clear, it is to go to and from Shrewsbury Park and their respective rear entrances.

31. The Plaintiff's reliance on *West v Sharp* is misplaced. In *West,* while the plaintiff succeeded in obtaining a declaration that the right of way extended over the entire width of the area, which in that case was marked brown on the map, the area did not extend from the public roadway up to *and beyond* the plaintiff's premises into a *cul de sac*. Secondly, in *West* the defendant was resisting an argument that the right of way extended over the entire *width* of the laneway as marked on the map. In this case on the other hand, the Defendants are perfectly willing to accept that the Plaintiff's right of way extends across the full width of the laneway. The issue here is whether it extends beyond the Plaintiff's rear entrance and down to the end of the laneway at the rear of 124 Merrion Road.

32. More fundamentally, the Plaintiff's submissions as to the particularity of the map trumping the wording of the grant runs into an insurmountable difficulty when one considers that the area coloured yellow on the map is in effect two laneways or one laneway in two parts – one part behind numbers 102 to 114 and the other behind 116 to 124. The Plaintiff's counsel reasonably accepted that a case could not be made that the 1955 Deed granted for example the owner of number 118 a right of way over that part of the area coloured yellow behind numbers

102 to 114. Indeed there could be no conceivable basis for claiming that the parties in 1955 would have agreed that to pass and repass between one's rear entrance and the public roadway identified as Shrewsbury Park could involve emerging from one's rear entrance passing along such portion of the laneway coloured yellow as would be required to reach Shrewsbury Park and then having reached Shrewsbury Park crossing over Shrewsbury Park and passing as of right up and down the laneway behind the other Merrion Road houses on the other side of the Shrewsbury Park junction. Plaintiff's counsel explained this concession on the basis that to do so one would reach, in the scenario described, the '*terminus ad quem'* the first time one reached Shrewsbury Park thus bringing the extent of the right of way to an end. It should be pointed out that at some point later, probably in the late 1980s or early 1990s, a private gated residential development called "Shrewsbury" was built in the area behind numbers 102 to 114. Access to that part of the area coloured yellow on the 1955 Deed map behind numbers 102 to 114 is now behind a private gate that leads to this development. It was not suggested that this took away any rights of the householders living in numbers 116 to 124.

33. Even by the logic of the Plaintiff's submissions on this point the contention about the map undermines the Plaintiff's case. Firstly, it amounts to a concession that the extent of the Plaintiff's right of way is in fact not the entire of the area coloured yellow on the map as the Plaintiff concedes that neither she nor her predecessors in title had any right of way over that part of the area coloured yellow on the map behind numbers 102 to 114. Therefore, even on the logic of the Plaintiff's own argument, the area coloured yellow 'as more particularly delineated on the map' attached to the Deed does not actually reflect the extent of any particular grantee's right of way. Next, if one applies the logic of the Plaintiff's reasoning above but this time to a householder travelling *from* Shrewsbury Park to their rear entrance then the same problem arises. In this instance a householder travelling from Shrewsbury Park who wants to travel to their rear entrance by travelling the entire length of the laneway behind their side of

the houses, say from numbers 116 to 124, reaches their '*terminus ad quem'* – in this scenario, their rear entrance – on their way to the far end of the laneway, thus bringing the extent of the right of way, on the Plaintiff's own logic, to an end. Accordingly, it is not possible to reasonably assert that the right of way granted extends to the entire of the area coloured yellow on the map. Such an interpretation would not be practical, rational or sensible when one considers it in the context of the Deed as a whole, the background context, and the locus in quo. The same applies to the idea that the words used should be interpreted as meaning that the right of way extends to the entire of the laneway behind houses 116 to 124.

34. Next, the Plaintiff submits that regard should be had to the covenants and in particular the covenant that provides that each grantee shall be jointly and severally liable to the grantor for any damage done to "the Grantor's premises the walls paths and said gates leading to Shrewsbury Park aforesaid". It is said that if any grantee could be liable for any damage caused along the entire area then the court should interpret the extent of the right of way as also extending to the entire area.

35. There are at least two problems with this argument. The first is that the Plaintiff accepts that the right of way granted to her predecessor does not extend to that portion of the Grantor's premises behind houses 102 to 114 which is nonetheless covered by the covenant referred to. Secondly, the Deed further provides that without prejudice to this joint and several liability, that "should damage as aforesaid be occasioned by any one or more of the Grantees such damage shall be made good at the expense of the Grantee or Grantees who shall have so occasioned the same". In other words it was agreed that a grantee could be liable - on the joint and several basis - for damage caused to a part of the laneway over which they had no right of way. More importantly though, the Deed in truth provides that it will be the person who causes the damage who will ultimately be responsible for the expense of making good the damage.

That provision undermines the argument that the broad liability to the grantor means the clear meaning of the grant should be departed from.

36. The Plaintiff made two further broad points. One was to suggest that in 1955 it may have been conceivable that a road called Shrewsbury Park might have extended around inside the Kavanagh Lands to bring it near the south-eastern end of the laneway. This argument echoed the earlier pleaded case of the Plaintiff that the south-eastern end of the laneway once had gates leading into the private residential development which happens to be called Shrewsbury Park and underpinned a plea initially made for an injunction to "unblock" these gates. That relief and the relevant paragraphs of the statement of claim at paragraphs 4 and 6 that underpinned it were abandoned following "further investigations" and consideration of the Defendants' witness statements; see Plaintiff solicitor's letter of 25 June 2023. The evidence of the Defendants' engineer and that of a former householder, a chartered architect, who lived at number 122 Merrion Road made it clear that the Plaintiff's assertion that there had been 'gates' in the south-eastern end of the laneway leading into the Shrewsbury Park private estate was mistaken. In addition, the evidence of the Defendants' mapping expert together with submissions made it clear that the Shrewsbury Park estate could just as easily have been called 'Shrewsbury Pines' or indeed any other name. This was not seriously disputed either. Overall, there was no evidence to underpin a contention that the 'background knowledge' of the parties in 1955 might have included the idea that the road marked Shrewsbury Park on the map to the 1955 Deed would have extended around to the far end of the laneway in either direction, i.e. around to the rear of either number 102 or 124. The cases relied upon by the Plaintiff in this regard were not in reality on point as they dealt with the concept of extinguishment. Both *Huckvale v Aegean Hotels Ltd.* (1989) 58 P & CR 163 and *Jones v Cleanthi* [2006] EWCA Civ 1712 deal with scenarios where for one reason or another at a particular moment in time a right of way essentially goes nowhere. Where there is a possibility in the future that it might then

the court will be reluctant to extinguish such a right. In this case, the right of way from the rear entrance of the Plaintiff's property still links directly to the Shrewsbury Park public roadway as provided for in the grant and as identified on the map.

37. A final argument advanced on behalf of the Plaintiff was that the broad range of purposes connected with the use of the dominant tenement might mean for example that the owner of one of the Merrion Road houses might turn it into an abattoir and that it could be very useful to deliver large numbers of cattle to this abattoir via its rear entrance and this could involve corralling the animals behind a gate all the way along the laneway while they were being ushered through the rear entrance. Despite the fact that the 1945 and 1948 Deeds technically allowed the Earl of Pembroke and Kavanagh to grant consent for trades or businesses to operate from these properties (other than Doctors or Dentists surgeries for which consent was not required), the imaginative example suggested is too far-fetched to safely inform an interpretation of the Deed, which must, after all, be interpreted bearing in mind the over-arching principle of what the document would mean to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract. Even then, aside from the 'corralling' element of the hypothetical example suggested, the meaning contended for by the Defendants would in any event allow a vehicle with cattle to have access from Shrewsbury Park to the rear entrance of the Plaintiff's property.

Summary of Conclusions

38. The Plaintiff's primary argument that the words of the Deed must yield to the more particular description contained in the map attached (i.e. that the right of way is "more particularly delineated on the map … coloured yellow") flounders when one sees that the area coloured yellow on the map includes an area that the Plaintiff accepts she has no right of way over.

39. It is necessary to take a straightforward common sense reading of the words of the grant and the map together in the context of the agreement as a whole and taking account of the "background knowledge" of the parties, as identified and described above, and also taking account of the known physical characteristics of the *locus in quo*. In addition, this approach involves seeking an interpretation that looks at the meaning of the grant in the context of these factors as a whole and not for example divorcing the interpretation of the extent of the right of way from the purpose or any other part of the Deed.

40. The 1955 Deed contains an express grant of a right of way which is to pass and repass between Shrewsbury Park (as shown on the map) and the respective rear entrances of each grantee. This does not amount to a grant to use the entire laneway on either side of the Shrewsbury Park junction or otherwise. Such an interpretation would be to go further than that expressly provided. Furthermore, it would amount to a grant of a right of way that would not accord with common sense in view of the physical characteristics of the locus. It would envisage pointless journeys from or on behalf of householders down dead ends or as the Plaintiff's submissions themselves put it "even if she doubles back on herself in doing so". The tentacles of common sense should reach all corners of the Deed. The Plaintiff's interpretation would amount to a grant of a right of way as part of a compromise of threatened proceedings by granting more than was being claimed in those threatened proceedings. It would involve ignoring, in their context, the words "their respective rere entrances".

41. The overarching interpretation must emerge from the words of the Deed as a whole but should also align with an outcome that is practical, rational and sensible to the owners of the land (the servient tenement) and the right of way (the dominant tenement). The 1955 Deed clearly identifies the starting and end points of the right of way. The purpose is expressly stated as "going [to and] from Shrewsbury Park and their respective rere entrances". That is the extent of the right of way granted. Accordingly, I am satisfied that the Plaintiff's claim to a Declaration

that her right of way extends over the entire length and width of the laneway must fail and accordingly I propose to make an Order dismissing the Plaintiff's claim. The matter will be listed for the purpose of hearing the parties in relation to costs.