LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF AN APPLICATION

R/90/2023

BETWEEN

GREYABBEY LIMITED – APPLICANT

AND

MR WILLIAM MONTGOMERY – 1ST RESPONDENT

THE NATIONAL TRUST FOR PLACES OF HISTORICAL INTEREST OR NATURAL BEAUTY – 2ND RESPONDENT

Re: Right of Way at 84 Newtownards Road, Greyabbey

Lands Tribunal for Northern Ireland – Henry Spence MRICS Dip.Rating IRRV (Hons)

Background

1. The subject reference concerns an application to extinguish a prescriptive right of way ("the existing right of way") which passes through land owned by Greyabbey Limited ("the applicant").

2. An alternative right of way ("the replacement right of way", as named by the applicant) which passes around the edge of what is now the garden of 84 Newtownards Road ("the reference dwelling") was constructed by the applicant during the summer of 2018.

3. The existing right of way provided Mr William Montgomery ("the 1st respondent") and the National Trust ("the 2nd respondent") with access to Mid Island and South Island in Strangford Lough. These are only accessible via Causeways when there is a low tide.

4. The existing right of way was blocked off by the applicant, and the replacement right of way was in use from in or around the summer and autumn of 2018. The 2nd respondent had agreed to an express right of way registered in its favour over the replacement right of way,

though it had not agreed to the extinguishment of the existing right of way. The applicant's position was that the 1st respondent had also agreed to the replacement right of way but this was disputed.

5. It is the applicant's case that the existing right of way unreasonably impedes its use and enjoyment of its land. The applicant has, therefore, requested the Lands Tribunal to extinguish the existing right of way and replace it with the replacement right of way. This is the issue to be decided by the Tribunal.

The Lands in Issue

6. The following lands are in issue:

   (i) Folio DN231213: This comprises a paddock/garden, an outbuilding and part of the reference dwelling's garden and is registered in the name of the applicant.

   (ii) Folio DN254059: This parcel of land was to have been transferred to the applicant at the same time as folio DN231213 but due to a conveyancing error it was not included in the conveyance. The lands were subsequently transferred to the applicant under this new folio number.

   (iii) Folio DN224731: This includes the reference dwelling and the remainder of the old farmyard. These lands are not owned by the applicant but are registered to Jan Hollinger and Simon Shaw.

Procedural Matters

7. The applicant was represented by Mr Alistair Fletcher BL instructed by King & Gowdy solicitors. Mr Keith Gibson BL represented the 1st respondent, instructed by Cleaver Fulton Rankin solicitors. The 2nd respondent did not take part in the proceedings.

8. The Tribunal is grateful to counsel for their helpful submissions.

9. The Tribunal also received submissions from, on behalf of the 1st respondent:

Ms Jan Hollinger - director of the applicant company

Mr Paul Taylor – consulting structural and civil engineer Taylor Boyd

Mr John Hutcheson – architect of Hutcheson Irvine LLP

Mr Simon Shaw – director of the applicant company

Mr Kevin McVitty - Blamphin & Associates Architects and Surveyors

Mr Paul Blamphin – Blamphin & Associates

10. On behalf of the respondent:

Mr William Montgomery – 1st respondent

Mrs Montgomery

Mr Ronan Sheehy – engineer Sheehy Consulting

Ms Jenifer Mawhinney – director of MBA Planning

Mr Gareth Grindle – Gareth Grindle Associates

11. The Tribunal is grateful to all of the participants for their helpful submissions.

The Statute

12. Article 5(1) of the Property (Northern Ireland) Order 1978 ("the Order") provides:

"Power of the Lands Tribunal to modify or extinguish impediments

5.-(1) The Lands Tribunal on the application of any person interested in land affected by an impediment, may make an order modifying, or wholly or partially extinguishing, the impediment on being satisfied that the impediment unreasonably impedes the enjoyment of the land or, if not modified or extinguished, would do so."

13. Article 3(3) of the Order defines the scope of "enjoyment":

> "3(3) In any provision of this Part - 'enjoyment' in relation to land includes its use and development."

Application of the Statute

14. In Andrews v Davis R/17/1993 the Tribunal stated at page 13:

> "… In the 1978 Order the only requirement is that an applicant must persuade the Tribunal that the restriction 'unreasonably impedes the enjoyment', taking into account seven specified matters together with any other material circumstances. These matters reflect to a large extent the substance of the grounds and other matters of the 1925 Act [England and Wales] but the Tribunal is given a discretion to determine the weight, if any, to be attached to each of these matters in any particular case. The Tribunal takes the view that whilst it must have regard to the matters set out in Article 5(5) it has, at the end of the day, an overall discretion, which is a wider discretion than that often referred to in the English authorities as the residual discretion …".

15. And in Danesfort v Morrow & Anr R/45/1999 (Part 2) the Tribunal stated the overall question to be decided:

> "… Does the restriction achieve some practical benefit of sufficient weight to justify the continuance of the restriction without modification."

16. Article 5(5) of the Order lists the matters which the Tribunal must take into account in deciding whether an impediment affecting any land ought to be modified or extinguished, but the Tribunal has an overall discretion. The Tribunal will consider these matters in detail.

17. If the Tribunal determines that an impediment should be modified or extinguished, it has additional powers under Article 5(6)(a) of the Order:

"(6) Where the Lands Tribunal makes an Order modifying or extinguishing an impediment, -

(a) the Tribunal may add or substitute such new impediment as appears to it to be reasonable in view of the modification or extinguishment of the existing impediment;"

Authorities

18. The Tribunal was referred to the following authorities:

- Tulk v Moxhay [1848] 41 ER 1143
- Parixax (SA) Pty Ltd [1956] 56 SR (NSW) 130
- Cowen v Secretary of State for the Environment, Transport and the Regions [1999] 3 PLR 108
- Shephard v Turner [2006] P&CR 28

19. And from this jurisdiction:

- Cunningham v Fegan R/22/2010
- Bradley v Dittmar R/4/2016
- Menary v Bolton & Ors R/21/2016
- McElwee v Fulton R/11/2022

20. In McElwee v Fulton the applicants were successful in obtaining the modification of an express grant of a right of way along a particular route so as to accommodate a large scale residential development. Mr Gibson BL submitted that the Tribunal considered the following to be important elements in allowing the modification:

(i) The purpose of the right of way was to secure access from the country road to Doctor Fulton's dwelling house.

(ii) The grant of the right of way did not give Doctor Fulton or his predecessors in title any control over the remainder of the servient tenement.

(iii) The right was to be enjoyed with others.

(iv) That the granting of planning permission for the houses constituted a public interest which was in favour of the applicants.

(v) That the major test was whether or not the right of way significantly impeded the applicants' use and enjoyment, which included development of the lands.

(vi) That a significant factor was whether the alternative right of way was viable and safe.

21. Based against that background Mr Gibson BL considered that the Tribunal had to determine whether or not the existing right of way impedes the applicants' use and enjoyment of its land and, if it does, whether or not the replacement which is to be provided is a viable or safe alternative. The Tribunal agrees and will now consider (i) the Article 5(5) issues in detail and (ii) the suitability and viability of the replacement right of way.

The Article 5(5) Issues

5(5)(a) The period at, the circumstances in, and the purposes for which the impediment was created or imposed

Mr Fletcher BL:

22. The expert surveyor for the 1st respondent, Mr Kevin McVitty, helpfully produced historical maps:

(i) The 1834 survey does not show the existing right of way.

(ii) The 1858 survey shows some sort of track along the gable of the reference dwelling which could well be the existing right of way.

(iii) The 1907 survey and the 1921 survey are more clear and the existing right of way is identified.

23. In evidence, the 1st respondent, who has an intimate knowledge of the history of the locality, stated that he believed that the existing right of way came into existence in 1906. The use of it at that time, according to the 1st respondent, was to access Mid Island and South Island for the purposes of:

    (i) The tenant farmers accessing their farmlands.

    (ii) The collection of seaweed to be used as fertiliser.

    (iii) Using the dwelling on Mid Island.

24. The 1st respondent accepted that the existing right of way would have been used by foot and horse and cart only in 1906. He was able to state that the tenant farmers (the McAvoys) first car dated from 1920 and tractors only came in to use from 1910.

25. From this the Tribunal can conclude that the existing right of way was formed at a time before motor vehicles, tractors and farm machinery would have been able to use it.

26. This is a far cry from the modern farm machinery that the 2nd respondent's tenant farmers take over to Mid Island and South Island now. As the applicant's expert surveyor, Mr Paul Blamphin noted, a 1970 Massey Ferguson tractor was only 2970 mm long and 1730 mm wide whereas modern machinery is significantly larger.

Mr Gibson BL:

27. It is obviously important to identify both (a) the impediment and (b) the land being referred to within the dispute.

28. The impediment is the existing right of way which goes over the paddock. The impediment is the easement and the land is all of that land contained in Folio DN 230213 – the paddock.

29. It does not appear to be in contention that the right of way was created to allow access to Mid Island. The use commencing sometime around 1834.

30. The important aspect to be drawn is that the use of the right of way has been maintained and has not changed since its creation. It was used for agricultural purposes and access to the dwelling house on Mid Island and that position has been maintained to date. The fact that agricultural vehicles have changed from horse and cart to a tractor and trailer is immaterial. It is acknowledged that, as per McElwee v Fulton, that the purpose of the right of way was to grant access to Mid Island. It is not suggested that at the time the existing right of way was created there were ancillary rights created.

The Tribunal:

31. It was agreed that at the time of creation of the existing right of way, it was to allow access to Mid and South Islands on foot and horse and cart only. That use has continued until the existing right of way was blocked off by the applicant. The Tribunal notes, however, the size of the modern farm machinery which now requires to use the existing right of way.

5(5)(b) Any change in the character of the land or neighbourhood

Mr Fletcher BL:

32. The historic maps show that there has been little change in the neighbourhood over the past 200 years or so in terms of development.

33. What is most significant is the character of the paddock itself. This was formerly agricultural land and a working farmyard. The land is now domestic and used for domestic purposes – the grass area is a garden and the farmyard a private yard that is not used for farming at all. The land has therefore moved from being used for agricultural purposes to purely domestic purposes.

34. The change in character was not disputed by the 1st respondent in evidence nor by Mr McVitty.

Mr Gibson BL:

35. What the Tribunal is concerned with in interpreting this provision of Article 5(5) is any change in the character of the land or neighbourhood which supports the modification or extinguishment of the impediment. Here, the best the applicant can do is point to the fact that the use of the paddock has changed from agricultural to leisure but that is not a change in the character of the land, rather it is an ephemeral change in the use of the land which could vary on the whim of any occupier at any particular time.

The Tribunal:

36. The Tribunal agrees with Mr Gibson BL, there is no change in the character of the land or neighbourhood which supports the modification or extinguishment of the existing right of way.

5(5)(c) Any public interest in the land …

37. Both parties were agreed that there was no public interest in the land.

5(5)(d) Any trend shown by planning permissions ….

38. This was acknowledged by both parties as not being relevant.

5(5)(e) Whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit

Mr Fletcher BL:

39. When the existing right of way was in use, both the 1st and 2nd respondents did have practical benefit from it. That is quite obviously the ability to access Mid Island and South Island but

that is the extent of it. As the existing right of way is a prescriptive right of way rather than something formalised in a deed of grant:

(i) There is no obligation on the applicant to maintain it to any particular condition.

(ii) There was no right for the 1st and 2nd respondents to insist upon a particular type of construction of the lane itself.

(iii) There was no right to use the land for any other purpose than as a right of way.

(iv) There was no right to prevent the applicant from using the land as it pleased so long as the existing right of way was still passable.

40. The use that the 1st respondent and his family made of the existing right of way was limited to vehicular access no more than 15 times a year.

41. It is important to note the extent of the 1st respondent interests in Mid Island and South Island, as the 2nd respondent benefits from a long lease which was entered into on 2nd November 1987 and which demised Mid Island and South Island to the 2nd respondent for a period of 999 years.

42. This lease reserves a limited right of access to Mid Island and South Island for the benefit of the 1st respondent but is limited to:

> "excepting and reserving thereout a right of access at all times for the Lessor on foot, on horse or by vehicle or boat to an over the lands and the right to moor three boats in the immediate vicinity of Mid Island and South Island and two boats in the bay opposite the Mill House providing that the exercise of such rights shall be for recreational purposes only (such purposes shall not include any shooting rights whatsoever) and does not conflict with the good management of the lands within the Lessees scheme for Strangford Lough (at present known as the Strangford Lough Wildlife Scheme) or any other scheme affecting the lands operated by the Lessee from time to time insofar as same relate to or affect the lands or any part thereof from time to time in particular but

without prejudice to the generality of the foregoing having regard to the ornithological importance of the lands."

43. The rights quoted above are not in respect of the existing right of way as they relate to the rights retained by the 1st respondent over the lands he leased to the 2nd respondent. These lands include the causeway to Mid and South Island. This highlights that the 1st respondent's interest in the existing right of way is limited to the use he is able to make of Mid Island. If he has a limited right to access Mid Island then correspondingly his interest in the existing right of way is, in practical terms, limited as well.

44. Most importantly, the reserved right of access for the 1st respondent is subject to his use of the lands not being in conflict with the good management of these lands. This means in theory that his rights could end if the 2nd respondent considers that, for example, Mid Island should be a bird sanctuary with no human presence. This means that it is possible in the future that his rights of the existing right of way will be of little utility if it transpires, he is unable to access Mid Island.

45. The 1st respondent benefits from a right of way over the 2nd respondent's lands that lie between the causeway to Mid Island and the existing right of way which was granted by a deed dated 6th October 1992. Clause B of that deed prevented commercial use of the right of way and Clause F prevented him from having more than five people on any one occasion use it. Again, the limitations on the 1st respondent's use of the lands located immediately after the existing right of way in practical terms limit the extent of his interest in the existing right of way as there is no point in using a laneway for accessing Mid Island any more extensively than what is permitted to be used on the other piece of land that is necessary to cross in order to get across to the causeway.

46. The nature of the practical benefit of the existing right of way is accordingly limited and certainly is no more advantageous than the replacement right of way. The 1st respondent in evidence accepted that the replacement right of way was adequate, but what he was

objecting to was the existing right of way being extinguished on a matter of principle. His position was a peculiar one as he had spoken to Mr Cafolla and indicated he was content to use the replacement right of way so long as the right over the existing right of way was maintained and he could use it once year. An objection based on principle should not carry any weight with the Tribunal.

47. The 1st respondent's approach has something of a feudal aim about it essentially saying that "I have an ancient right and cannot be expected to give it up". There is no practical benefit to the 1st respondent maintaining an historic right of way just for the sake of it, nor is there a practical benefit in not being seen to give up a right. The fundamental problem in this dispute is an intractable position adapted by the 1st respondent that is rooted in a sense of familial entitlement to the existing right of way.

Mr Gibson BL:

48. The impediment undoubtedly secures a practical benefit to the 1st respondent insofar as it permits access to Mid Island. In McElwee v Fulton this was given a narrow interpretation.

49. Article 5(5)(e) is, however, worded in a very general sense, prescribing, as it does, for the Tribunal to consider the nature and extent of the benefit. There is little difficulty in identifying the impediment, it is simply the existing right of way. The nature of the impediment is a burden on the applicant's title, but the term "nature" (and extent of the benefit) in context, includes, not only reference to the form the existing right of way takes as a conveyancing burden, but also the physical nature of the right of way, a proposition supported by the fact that the terminology contained in the statute is for the Tribunal to consider the nature and extent of the benefit.

50. If it was the case that consideration under this head was simply restricted to the fact that the easement exists as a burden on the title the words "nature and extent" would not be included. The provision would have been worded in a different way i.e. whether the impediment secures any benefit to any person and their title.

51. The emphasis is very much on the practical i.e. the day to day benefit which accrues to the person utilising the impediment, in its nature and extent.

52. That is quite obviously the 1st respondent and the benefits include (a) the fact that the existing right of way is shorter (b) it has a long history of reliable use without significant maintenance. In respect of the suitability of the replacement right of way it faces significant issues as detailed under Article 5(5)(h).

The Tribunal:

53. The Tribunal agrees with Mr Gibson BL, the 1st respondent derives a benefit from the existing right of way as it provides him with a reliable access to Mid Island and has done so for many years. The Tribunal also, however, notes the restrictions on the 1st respondent's use of the existing right of way, as submitted by Mr Fletcher BL.

5(5)(f) Where the impediment consists of an obligation to execute any works …

54. This is not relevant in the circumstances of the subject reference.

5(5)(g) Whether the person entitled to the benefit of the impediment has agreed, expressly or by implication, by his acts or omissions, to the impediment being modified or extinguished

Mr Fletcher BL:

55. The applicant's case is that Ms Hollinger met the 1st respondent and his wife on the evening of 9th July 2018 as they were passing through the reference dwelling's farmyard to watch filming on Mid Island. At that point the replacement right of way was not completed but its path was laid with rubble. This was done as the reference dwelling was being refurbished and scaffolding had to be erected at the gable end, on the existing right of way, hence an alternative route for vehicles was necessary. Ms Hollinger says that she explained that the plan was to move the existing right of way along the new route and that the 1st respondent was content with this and even suggested what sort of screening could be used.

56. The existing right of way was out of use from in or around late summer/early autumn 2018 until it was blocked off by the applicant in February 2019. During that period the replacement right of way was used without complaint. The issue that arose was when the existing right of way was blocked off in February 2019 and the 1st respondent objected. Ms Hollinger set out her position in an email to the 1st respondent dated 10th April 2019:

> "I also explained that we planned to re-route the access lane to the islands and I remember being asked if we were going to restrict your access. As this would never be our intention I said that we would not and that we were merely providing a new, wider access laneway for the existing relevant parties which would take any traffic away from our yard and gable wall. I remember pointing out the approximate route that the laneway would take along the boundary fence.
>
> Daphne (Mrs Montgomery) asked what plans we had for the paddock and I said that we were planning to turn it into a garden, perhaps a little orchard, and screen it from the existing building site using trees and hedging etc. Daphne kindly suggested some trees and plants that would be suitable for the area and commented that it would also help to screen the site from Mid Island cottage. I also mentioned that perhaps in the future we would get a couple of Alpacas to graze the paddock.
>
> The conversation came to a natural end without any comment about any of this being an issue, then we all proceeded to the island to watch the filming. As I understood from our discussions that day that neither you nor Daphne had any problems with our plans, we then worked over the following seven months to create the new laneway."

57. It is alleged that Ms Hollinger could not point to any written evidence of it being explained to the 1st respondent that the works at the reference dwelling were temporary in nature. That is incorrect as on Day 2 of the hearing Mr Gibson BL started his continuation of the cross-examination by apologising to Ms Hollinger as in fact overnight he had come across a letter from her solicitor to the 1st respondent stating that very point. Whilst it is correct that Ms Hollinger did not show the 1st respondent and his wife any plans or maps of the new route, her evidence was that she did not need to as she pointed out the new route on the ground as it was being constructed.

58. Ms Hollinger in evidence said that shortly after 9th July 2018 she instructed her solicitor, at that time, to write to the 1st respondent to formalise matters regarding the replacement right of way. Her email to him of 4th August 2018 shows that she understood there to have been an agreement:

> "I have spoken with Mr Robin McAvoy [the 2nd respondent's tenant farmer] and William and Daphne Montgomery about the re-routing of the access lane and they are all happy with the change."

59. Mr Shaw in evidence was aligned with Ms Hollinger's account. Mr Shaw was not cross-examined. The 1st respondent's position at hearing was that he was not there for the portion of the conversation concerning the replacement of the existing right of way, and Mrs Montgomery's evidence was that she did not understand the proposal to be that the existing right of way would cease to be used. Although the 1st respondent had Ms Hollinger's account in writing on 1st April 2019 he did not reject it in writing or offer an alternative narrative:

    (i) He emailed Ms Hollinger on 17th April 2019 but was silent on the agreement.

    (ii) He emailed Ms Hollinger's solicitor on 6th May 2019 but was silent on the agreement.

    (iii) He emailed Ms Hollinger on 22nd May 2019 but was silent on the agreement.

    (iv) It was only on 12th September 2019 that the 1st respondent's son stated that his mother did not understand that Ms Hollinger was proposing to replace the existing right of way.

60. It seems that the 1st respondent's position is that he had assumed that it was only the 2nd respondent who would lose the right to use the existing right of way. For him to think that makes no sense as there would be little point in constructing a new access if the existing right of way would be in full use by him. In any event, the applicant thought there was an agreement and in July and August 2018 it engaged the McAvoy family to construct a

permanent replacement right of way. They are the long standing tenants of Mid Island and it was thought that they would construct the track in a way that would meet their needs.

61. In evidence Ms Hollinger did not suggest that the 1st respondent and his wife were lying, nor did they suggest Ms Hollinger was lying. The 1st respondent expressly said that he thought Ms Hollinger had just misunderstood their position. Although the applicant's position remains that there was an agreement it may be that the Tribunal can only find that each side is honestly mistaken in what they considered, was or was not agreed. In any event, there is nothing to point to the applicant acting recklessly as it thought it was doing what was agreed when it built the replacement right of way, hence why Ms Hollinger informed the applicant's solicitor that an agreement has been reached.

62. As to the 2nd respondent, the McAvoys started using the replacement right of way from in or around the autumn of 2018 and have used it since then without complaint. On 21st October 2019 the 2nd respondent and the applicant entered into an indenture granting an express right of way over the replacement right of way which provides:

> "Full right and liberty for the Grantee, its duly authorised employees, tenants, visitors, members and its successors in title as owner and occupiers of for the time being of the Dominant Land and all persons authorised by it in common with the Grantor and all other persons having a like right, at all times to pass and repass to and from the Dominant Land or any part of it with or without vehicles over and along the laneway shown coloured in Blue on the Plan attached hereto and comprised in the Servient Land for all purposes in connection with estate management and agricultural purposes and access to the premises situated at Mid Island and for occasional scientific and ornithological purposes."

63. There was no express agreement to extinguish the existing right of way, but the practical reality is that the 2nd respondent has not made use of it since 2018 hence what it agreed to was at the very least a modification. It certainly would not have been seen as an expansion of its rights otherwise it would have continued to use the existing right of way alongside the replacement right of way. In contrast to the 1st respondent, the 2nd respondent has never

complained that the existing right of way has been blocked off nor has it commenced proceedings in the County Court to seek to re-open the existing right of way. This is unsurprising given that Rhona Irvine representing the 2nd respondent emailed Ms Hollinger on 9th April 2021 and stated that access to Mid Island had been problematic for many years.

64. Hence, although there has never been a formal agreement for the 2nd respondent to cease using the existing right of way this should be inferred from its actions in agreeing to the easement over the replacement right of way and having never attempted to use the existing right of way again.

Mr Gibson BL:

65. Whilst the applicant, in its original submissions, sought to make the point that there was an agreement between Jan Hollinger and Mr and Mrs Montgomery in or about 9th July 2018, the evidence-in-chief- and cross-examination of Jan Hollinger put this to the sword.

66. If, however, it is being maintained that there is some concluded agreement by Jan Hollinger on behalf of the applicant, then the 1st respondent points to the following:

(i) That initially, Jan Hollinger created the temporary right of way as a "temporary measure" (her evidence) but did not seek the permission of either the 1st or 2nd respondents.

(ii) That although Ms Hollinger was now describing the replacement right of way as temporary, there was no reference to temporary in any of the documentation and it was clear it was intended to be much more than temporary.

(iii) That the conversation that allegedly gave rise to the agreement happened, in Ms Hollinger's evidence, between Ms Hollinger and the 1st respondent and his wife. The 1st respondent's clear recollection in evidence was that he was not present when the discussion took place. The clear evidence of the Montgomerys is to be preferred on this occasion.

(iv) Ms Hollinger accepted that the extinguishment of the existing right of way would have to be subject to a formal agreement and it was common case no such agreement was ever executed.

67. Ultimately it is clear that Ms Hollinger knew that a written agreement would have to take place and that the discussions with the Montgomerys could and only ever be preliminary. It is clear that Ms Hollinger was trying to manipulate a concession which would never have been given had the Montgomerys been approached properly and, which on the evidence of the parties, they did not give in any event. The Tribunal should be extremely reluctant to make any finding of fact that there existed an express agreement to the impediment being modified or extinguished.

68. There is no case put forward as to an implied agreement to the impediment being modified and what is being alluded to here is some sort of estoppel i.e. if it had been the case that the Montgomerys had used the replacement right of way for 10, 20, 30, 40 or more years and used it without complaint, then it may well have been appropriate for the Tribunal to infer that there had been implied agreement to the modification. Quite obviously this is not the case.

The Tribunal:

69. Having considered the submissions in detail the Tribunal agrees with Mr Fletcher BL's suggestion that the Tribunal can only find that each side is honestly mistaken in what they considered was agreed or not agreed. The Tribunal, however, notes the agreement with the 2nd respondent to use the replacement right of way, albeit that the 2nd respondent never expressly agreed to the extinguishment of the existing right of way. In any case there was clearly no written agreement which would have been required.

5(5)(h) Any other material circumstances

Mr Fletcher BL:

70. The following material circumstances fall to be considered:

The Practical Benefit to the applicant if the existing right of way is extinguished

71. The existing right of way passes through the reference dwelling's farmyard and close to its living room window. It was clearly dangerous to permit heavy farming machinery to traverse the existing right of way, and the applicant would also say that even vehicular traffic from the 1st respondent could be dangerous. If young children are present in the garden and farmyard there would be obvious concerns for their safety. Mr Cafolla confirmed in evidence that children do attend the property, namely his nieces and nephews.

72. The applicant's expert architect, John Hutcheson, opined in his report:

> "The new access is better for the landowner for the following reasons:
>
> (i) It reduces the nuisance and disturbance of traffic close to the building.
>
> (ii) It removes the concern of potentially unknown strangers passing close to the dwelling and through its curtilage unannounced and at any time.
>
> (iii) It is safer not to have large vehicles passing close to their house and through an area used for the enjoyment of the dwelling.
>
> (iv) It removes any issues there may be if animals are moved on or off Mid Island through the domestic driveway.
>
> (v) It improves privacy of life around and within the dwelling."

73. In cross-examination no points were taken against Mr Hutcheson on these issues. Instead, the focus of the cross-examination was the allegation that it was improper to consider the impact on the reference dwelling lands when assessing the impact on the paddock. This was the argument that the paddock was separate to the dwelling. This does not have merit as the two parcels of land are interconnected. It also fails as Mr McVitty, the 1st respondent's expert surveyor, expressly referenced the dwelling when assessing the merits and demerits of the existing right of way and used it as a yardstick. In the joint expert minute he stated:

> "The alternative roadway would keep the curtilage of the residential roadway at 84 Newtownards Road free from agricultural machinery and livestock.

The alternative roadway would be clear of domestic family belongings such as children's bicycles, toys etc.

The alternative roadway affords better private amenity to the household at 84 Newtownards Road.

Aside from other not insignificant matters beyond the scope of this discussion point, there is not much to choose between the two options. That said, it is my opinion that the existing access way/right of way is the better of the two options for direct access to the islands and foreshore (>51% better).

The alternative roadway is the better of the two options for the occupiers of the residential property at 84 Newtownards Road."

74. Mr McVitty's approach acknowledges that the reference dwelling is relevant to the paddock. Had he thought it appropriate to look narrowly only at the paddock then he would have done so. It is not possible to look at the impact on the paddock without considering the reference dwelling given that the latter has a right of way over the yard located in the paddock and use is made of it for domestic purposes.

75. In evidence it was also indicated that there were blind spots along the existing right of way. Mr Cafolla, Ms Hollinger and Mr Shaw, Mr Taylor (the engineering expert), Mr Blamphin and Mr Hutcheson all referred to these. If coming from the north into the yard then one cannot see pedestrians to the left (who may be passing from the garden or garden room). If coming from the south side into the yard there is a blind spot to the left of the corner of the reference dwelling which is where the entrance is located and where pedestrians pass and repass. Mr McVitty did not deny that there were blind spots. Additionally there are no passing points along the existing right of way.

76. The question of safety is relevant to the paddock even if one ignores the interest of the reference dwelling. From the perspective of the owner of the paddock it is potentially dangerous to have a right of way be used for domestic purposes and also to facilitate vehicles and large farm machinery. It is of benefit to the paddock to have the safety issue removed

entirely. The 1st respondent in evidence did not deny that the replacement right of way was safer and it keeps all traffic away from areas where people would be, even if he thought the likelihood of an accident was low. The point is that the replacement right of way removes all safety concerns completely, and even if they are relatively low to begin with that is of benefit to the paddock. It is better to ensure that people (especially children who may not have the same sense of danger) are not exposed to unnecessary risk.

77. Privacy is an important factor, as the 1st respondent has already recognised. He accepted in evidence that the attendance of thirty people for recent filming at Mid Island was a large number. Were they to use the existing right of way then there would be a significant invasion of privacy. If all traffic passes along the replacement right of way then the occupants of the reference dwelling and the paddock (which is used for domestic purposes) will be afforded greater peace and quiet and not have to be concerned about people entering into what is a private space. The 1st respondent did accept this principle but seems to have thought it did not apply to his access to the existing right of way, as he thought privacy could be preserved if the 2nd respondent used the replacement right of way. Any use of the existing right of way necessarily intrudes on privacy, not just that by the 2nd respondent.

The Nature of the remainder of the access way to Mid Island

78. The existing right of way forms only one portion of the access way from the main country road to Mid Island. Along that road there are a number of difficult surfaces to traverse:

    (i) Parts of the lane have potholes.

    (ii) There are several 90 degree, or almost 90 degree bends.

    (iii) The portion that runs from the end of the existing right of way to the causeway to Mid Island has a significant dip that fills with water.

    (iv) Part of the lane is over grass.

    (v) The causeway to Mid Island is very rough and can be covered with seaweed and stones

79. The access for the 1st and 2nd respondents is far from pristine, which is an important factor.

The benefit of the replacement right of way

80. The replacement right of way is constructed of compacted stones and therefore has a better surface than most of the existing right of way. It passes far away from the reference dwelling and poses no safety or privacy issues. This should be of benefit to those using it as they do not need to worry about these matters or disturbing the occupants. The replacement right of way is safer, it does not have blind spots and benefits from a passing point. It avoids people completely.

81. Mr McVitty's opinion was that the existing right of way passed through the paddock in a logical way. However, as the route was probably in existence from the 19th century and no later than 1906 according to the 1st respondent, any logic that applied to creating the route is more than 100 years old and was before modernised vehicles were in use. It was put to Mr McVitty that if there was no access lane to Mid Island and anyone was asked to now design a route through the paddock to the 2nd respondent's land from scratch they would not decide to build the lane where the existing right of way is, for the reasons already identified. The replacement right of way is a much more sensible route for getting to Mid Island.

82. The applicant had no obligation to maintain the existing right of way. The replacement right of way does have to be maintained by the applicant thanks to the express obligation in the easement granted to the 2nd respondent. This provides that the applicant covenants:

> "(i) Not to do or permit anything to be done which will (or tend to) terminate obstruct diminish restrict interrupt interfere or in any way impede or prejudice the exercise of the rights."

83. There was a suggestion from Mr Gibson BL that this was not a covenant to repair. Mr Shaw and Mr Cafolla confirmed that they took it to be such a covenant. That must be right as a lack of maintenance that results in the replacement right of way was being interrupted or impeded

would be a breach of covenant. In any event, the applicant is content for the Tribunal to impose a repairing covenant in respect of the replacement right of way (subject to the ability to remove the embankment if that proves to be required in the future, for example, if compelled by the court to do so).

84. As already indicated, the 1st respondent in evidence accepted that even though the replacement right of way was slightly longer in distance it was an adequate route. He and his family and the 2nd respondent and its tenant farmers have been using the replacement right of way since 2018 and there has been no complaint that it does not meet the need to get access to Mid Island. It is perfectly adequate and is in fact superior to the existing right of way.

The 1st and 2nd respondents have made commercial use of the replacement right of way

85. Although neither the existing right of way, nor the express right of way that the 2nd respondent has over the replacement right of way, allow for commercial use, both respondents have earned money by having film crews visit Mid Island. This points to the practical utility of the replacement right of way and also shows that commercial benefit has been obtained. The applicant has not been content with commercial use of the replacement right of way when no such right has been provided for in the 2nd respondent's deed of easement and it would certainly not want to have commercial traffic on the existing right of way – indeed there is no suggestion from the 1st respondent that the existing right of way permits commercial use, and nor could there be given that this is a recent development. If the respondents wanted to continue using the replacement right of way for access for filming crews then they would need the express consent of the applicant on each occasion. The applicant could consider this on a case by case basis, whereas it would not countenance commercial use of the existing right of way were it not extinguished and the 1st respondent was able to use it.

The alleged issues with the replacement right of way

86. The 1st respondent has raised three issues with the quality of the replacement right of way (a) the ownership of the lands at the start of the replacement right of way, (b) its planning status,

including environmental issues, and (c) the engineering at the foreshore. The Tribunal does not have to decide who is right about these points given that the applicant is asking it to extinguish the existing right of way and substitute with the replacement right of way with a "backup" new right of way over the part of the existing right of way during such times as the replacement right of way becomes impassable such that its prevents Mid Island from being reached via the causeway. The applicant is confident that the objections from the 1st respondent are baseless and will not result in this backup right of way being required at all. In any event, the Tribunal should not place weight upon the objections.

Land Ownership

87. The essence of the complaint is that the land where the replacement right of way commences outside the gates to the reference dwelling are not fully owned by the applicant at two points. The portions in dispute were identified at the hearing.

88. As to the issue at the start of the replacement right of way there is a portion of land that in Land Registry is not within the applicant's folio for the paddock but is within folio DN254059 ("the Beltraine folio") which is owned by the successor to the vendor of the paddock, Beltraine Developments Limited. The shareholder and director of the company is Ms Hollinger's cousin, Stephen Hollinger. The applicant's position is threefold:

    (a) It actually owns the portion that is not within the paddock folio at Land Registry.

    (b) Even if that is wrong the 2nd respondent and therefore the 1st respondent benefits from a right of way over the Beltraine folio.

    (c) Regardless of (a) and (b), if the replacement right of way is confined to the lands within the Land Registry folio then there is adequate room for vehicular traffic.

(a) The folio boundary

89. Mr McVitty accepted in evidence the principle that a contract for the sale of land can be rectified if its map does not reflect what was actually agreed. If the agreement was rectified the Land Registry's folio maps could be rectified too. Ms Hollinger and Mr Shaw gave

evidence that the boundary was agreed per the map that Ms Hollinger's uncle, Will Hollinger, presented them with in or about January 2018. They also gave evidence that they walked the boundary with Ms Hollinger's uncle so that there was clarity, and the boundary at the dispute point was per the said map and followed a wire and post fence that was present. The map that was submitted to Land Registry was prepared by Will Hollinger's surveyors, Scadin, seemingly on the basis of an ordnance survey map that did not identify the wire and post fence. This discrepancy was not picked up by Mr Shaw or Ms Hollinger during the registration process.

90. Mr McVitty accepted that the boundary on the Hollinger map did not align with the folio at Land Registry and that if the former was the proper boundary then the encroachment was not an encroachment at all. He accepted that the wire and post fence might not be picked up from the ariel photography he had assembled and he had no direct evidence on the ground to say that there was no such wire and post fence. No evidence was called to contradict the evidence of Mr Shaw and Ms Hollinger on this point. Mr Blamphin was clear that if the folios were rectified to follow the boundary on the Hollinger map then there was no encroachment. It therefore follows that with no contrary evidence as to what was meant to be transferred to the applicant the conclusion must be that it is open to the applicant to seek rectification. There have been no threats of trespass proceedings by Beltraine nor has it prevented the disputed portion from being traversed since the route was constructed in summer 2018. Ms Hollinger indicated in evidence that she had been speaking with Stephen Hollinger to see if they could reach an agreement but nothing has been agreed at all. The eastern boundary of the paddock was previously agreed to be rectified with Stephen Hollinger following an error in the conveyance. Since then she was hopeful something could be sorted but if necessary they would have to go to court to resolve the issue.

(b) The right of way

91. Both respondents enjoy a right of way over the disputed portion if it is in fact owned by Beltraine. The latter's predecessor in title, Scrabo Contracting Limited, granted the 2nd respondent a right of way over the entirety of the laneway connecting the replacement right of way to the country road. The 2nd respondent as "Grantee" has "full right and liberty for the

Grantee, its employees, tenants, visitors, members and its successors in title as owner and occupier of for the time being of the Dominant Land and all persons authorised by it in common with the Grantor and all other persons having a like right, at all times to pass and repass to and from the Dominant Land or any part of it with or without vehicles over and along the laneway shown coloured blue on the plan attached hereto and comprised in the Servient Land for all purposes in connection with estate management and agricultural purposes and access to the premises situated at Mid Island and for occasional scientific and ornithological purposes".

92. The right of way from Scrabo means there is no issue with the disputed point. The 1st respondent is a tenant of the 2nd respondent, as he himself accepted in evidence, hence has a right to use the disputed area that Mr McVitty says is an issue. He is also a visitor of the 2nd respondent pursuant to his right to access Mid Island and South Island pursuant to the 1987 lease with the 2nd respondent. Accordingly, for both the respondents, the question as to whether the disputed point is owned by the applicant such at that it can grant a right of way over it is neither here nor there. If it is owned by the applicant then the replacement right of way covers the portion of land. If it is not the owner then Beltraine is bound by the above easement such that the respondents have a right to pass over the land anyway.

(c) Adequate in practice

93. Mr Blamphin notes that a road legal vehicle must be no wider than 2.5 m. Mr McVitty has measured the offending pinch point as 3.24 m at its narrowest. According to Mr Blamphin that is adequate space for the vehicular traffic that could legally use the replacement right of way and, in agreement with Mr Taylor, the applicant's engineering expert, the 90 degree turn is no worse than others in the lane coming from the country road. Mr McVitty suggested the other tight corners have more space but when questioned he accepted he had not taken any measurements or carried out calculations concerning these other corners nor had anyone to his knowledge carried out a test with any vehicles to see if they could not swing in. The 1st respondent accepted that he had not had any issues making the turn into the replacement right of way.

94. As to the other disputed point, the allegation is that the corner is being cut on the replacement right of way as it meets the 2nd respondent's lands at the foreshore. It is worth noting that the corner cutting can only have been done by the 1st respondent, and or guests and or the 2nd respondent and or the 2nd respondent's tenant farmers hence it is incorrect to blame the applicant for this, given it does not use the replacement right of way. The cutting of the corner has been done when it is not necessary at all. Submitted photographs show the lane as constructed and before grass grew up due to lack of use. There is plenty of space for a turn within the applicant's lands. The 1st respondent accepted as much.

95. Even if this was not correct there can be no trespass. The 2nd respondent owns the land where the corner has been cut hence neither it or the tenant farmers are trespassing. The 1st respondent on foot of the 1992 easement has a right to pass and repass this land so he can cut the corner with impurity.

Planning

96. The 1st respondent complained that the replacement right of way did not benefit from planning permission. This is a non-issue given that the Council had issued a Certificate of Lawful Use and Development ("CLUD") which means that no enforcement action can be taken for the development subject to it. The 1st respondent's planning expert, Mr Mawhinney, accepted this. The area on the foreshore where Mr Shaw had the builders install the kerbstones is not the subject of the CLUD but no enforcement action has been taken. None can be taken as more than five years have passed since the kerbs were installed no later than January 2020, which is a date accepted by Mr Mawhinney. Another CLUD could be applied for to formalise the position. Even if the kerbstones were subject to enforcement action and had to be removed this would not affect the replacement right of way as it is sufficiently wide to accommodate the loss of the kerbstones. Besides, the kerbstones are not meant to be driven over hence their loss does not affect the route vehicles take presently.

97. Although the 1st respondent threatened to judicially review the Council's decision to issue the CLUD, he never followed through on this, meaning that the Council's decision is unchallengeable.

98. On the environmental issue, the contention from the 1st respondent is that the portion of the replacement right of way that abuts the foreshore is built on lands within the Strangford Lough ASSI, meaning that the Northern Ireland Environment Agency ("NIEA") was required to provide consent. It did not and therefore it is claimed that the applicant has breached Article 32 of the Environment (Northern Ireland) Order 2002. This rests on the premise that the replacement right of way is within the ASSI. The 1st respondent's environmental expert, Mr Gareth Grindle, bases his analysis on a map available online at Spatial NI. This, however, is not reliable as is clear from Mr Blamphin's report. This shows that there are oddities in the Spatial NI map viewer of the ASSI, for instance at the pier at Old Court in Strangford. DAERA, which controls NIEA, has produced maps of the ASSI directly to the applicant's solicitors which do not match the map relied upon by Mr Grindle. They show the replacement right of way lying outside the ASSI, hence it is not clear where the boundary is. The difference in the maps has been explained by DAERA as being due to Post Positional improvement mapping. As Mr Grindle accepted in evidence, the only definitive map is the original paper showing the ASSI. This is at a scale of 1:10000 meaning that 0.55 mm on the map is 5 m on the ground. This is more than the width of the replacement right of way hence the margin of error is too great to allow anyone to speak with authority as to where the boundary is. The evidence of Ms Hollinger was that the replacement right of way sits within the historic boundary of the paddock, as evidenced by the line of a hedge at the bottom of the garden directly outside the cottage that aligned with a wire and post fence. The replacement right of way is within the line of the wire and post fence hence it is within the former agricultural land that was never a sale marsh. Although the 1st respondent's submissions refer to Mr McVitty's evidence on this point it does not include his prior comment which was "I accept that's Ms Hollinger's evidence but my evidence shows the embankment has gone a metre or more beyond (the wire and post fence)". In any event, even if Mr McVitty were correct, then there is no suggestion that NIEA will take any action to "reclaim" the excess 1 m. None of the complaints the 1st respondent has made to NIEA have raised this in issue. Were NIEA to bring enforcement action regarding an alleged trespass then the replacement right of way is still wide enough to accommodate traffic, hence this is a non-issue.

99. The NIEA is clearly aware of the allegation that the ASSI has been damaged:

(a) The 2nd respondent emailed Ms Hollinger in July 2018 regarding the applicant putting some gravel in the dip on the 2nd respondent's land. They were asked to remove this, which they did, but the 2nd respondent also noted that they would contact the NIEA about the replacement right of way. Assuming they did this, the NIEA took no issue.

(b) Hugo Montgomery complained to NIEA on 25th June 2022 and 6th December 2024.

(c) The 1st respondent provided the NIEA with Mr Grindle's report on 17th July 2023.

(d) The Council's planning report shows that the NIEA were consulted about the replacement right of way. The Council reported "The Council were aware that these works had taken place and had consulted with NIEA- ASSI compliance in relation to this matter and they have confirmed that they are minded to close this case and have limited concerns in relation to the works". This is independent evidence from a neutral body, the Council, following direct interaction with the NIEA.

100. The NIEA has take no action of enforcement nor has it contacted the applicant to indicate that enforcement action will be taken. It is highly unlikely it will do anything with the replacement right of way. Mr Grindle's report is directed solely at the question as to whether the replacement right of way would have been granted permission to be constructed had the NIEA been contacted beforehand. He accepted in evidence that the NIEA was looking at a different question, namely whether removal of the replacement right of way at the foreshore would cause more damage than leaving it in situ. That question, he accepted, was not straightforward. He could not give any plausible explanation as to why the NIEA had taken no enforcement action after all this time other than that it was a complicated case - this does not ring true given the length of time the NIEA have had to investigate since 2018. In any event, Mr Grindle's report should be given no weight as it does not address the question of what the NIEA may do in terms of enforcement.

101. Even if the NIEA did decide to take enforcement action and prosecute the applicant this does not mean the replacement right of way would cease to exist. If the NIEA successfully prosecuted the applicant, then the Court could order it to remove the gravel and kerbing at the foreshore. This would require restoration to its prior state, namely in grass. But in that state the replacement right of way could still be used and would be in no worse condition than the 2nd respondent's lands and the causeway that must be passed over to get to Mid Island. Mr Grindle accepted that there was no environmental issue with vehicles crossing over the causeway and the 2nd respondent's lands, and likewise there would be no issue with vehicles traversing the replacement right of way in grass given that historically tractors would have driven in the field when it was in agricultural use. He said that he would "welcome" the replacement right of way being returned to grass and vehicles passing over it instead of the gravel that was there now. As such, the worst than can happen from an environmental enforcement perspective is that the gravel road of the replacement right of way that abuts the foreshore will have to be removed, but this will not stop vehicles passing along the route to the 2nd respondent's lands. The environmental objection from the 1st respondent therefore does not have merit as it does not mean the route of the replacement right of way would be rendered legally impossible to pass.

Engineering

102. The engineering experts for the applicant, Mr Taylor and the 1st respondent, Mr Sheehy, have confirmed that the replacement right of way is fit for purpose in engineering terms save for the portion that runs along the foreshore. It is agreed that water movement is undercutting the embankment on which the track is constructed. Over time this could well cause the track to erode along the edge if left unmaintained. In their joint minute the engineering experts agreed that in terms of an engineering solution the replacement right of way could be moved further inland, or it could be maintained where it is but it would need to be "repaired/enhanced to provide a long term solution". What that solution is will need to be confirmed by a marine engineer.

103. There was, however, an acceptance by both experts in evidence that another engineering solution would be to remove the embankment along the foreshore altogether and simply

have this portion of the land at the original gravel level. They both agreed that this would mean there would be no erosion of the lane, and that it would be in no worse condition than the 2nd respondent's portion of the route to Mid Island. That Mr Sheehy accepted this was a significant admission and undermines the 1st respondent's objection entirely as the height of what he can now say is that the portion of the replacement right of way along the foreshore may one day need to be removed and left to be a gravel level lane, but what he cannot say is that the replacement right of way will be unusable as a result.

104. Although there are engineering issues with part of the replacement right of way it is important to stress the following which both experts agreed with:

(a) The embankment has shown signs of erosion but there has been no impact upon the surface of the laneway yet.

(b) If the embankment erodes such that it results in deformation in the lane itself then this will be a gradual process rather than a sudden collapse. Mr Sheehy confirmed that he had not determined that the laneway was unsafe and had not advised the 1st respondent not to use it.

(c) One way of repairing would be to patch up the embankment using the same method of construction as had been used to build the lane. This would be an ongoing process as erosion would continue to damage the repairs, but if repaired in this way, would maintain the laneway.

(d) It was not clear how long it would take until the surface of the laneway suffered deformations, but it was accepted that it had at least 5 years without any repairs having been affected.

105. The replacement right of way continues to be used without interruption and no issue has been reported in terms of the condition of its surface at any point save for one instance where Ms Hollinger's cousin Paul Hollinger dug up part of the laneway at the northern end to access a water pipe. This was repaired promptly. Other than this, the 1st respondent cannot point to any maintenance that has been required during the more than five years it has been in use, and no doubt he has been live to the issue in order to point out any flaws that he could

complain about. The replacement right of way is performing well albeit it will need the applicant and its successors to maintain the embankment or remove the embankment entirely. Both approaches are achievable and would still allow the 1st respondent to access Mid Island.

106. In terms of planning issues relating to the maintenance or improvement of the replacement right of way, the law is:

107. Article 3 of the Planning (General Permitted Development) Order (Northern Ireland) 2015 ("the 2015 Order") provides that planning permission is automatically granted for certain specified types of development. Paragraph 10 of the Schedule to the 2015 Order provides:

> "The carrying out on land within the boundaries of an unadopted street or private way of works required for the maintenance or improvement of the street or way."

108. The identical wording in the equivalent English provision was considered by the Court of Appeal in Cowen v The Secretary of State for the Environment, Transport and the Regions [1999] 3 PLR 108. The appellant was a farmer who had constructed a hard surface on what was formerly a rutted track but the planning inspector determined that "improvement" had to be read as covering superficial works only and that the surfacing works were not superficial. It was held that the inspector had misdirected himself and the appellant succeeded. Evans LJ explained that the provision meant:

> "I would agree, however, that the ordinary meaning of "improvements" is limited to changes that do not alter the basic character of the thing that is improved. But to apply this test, it is necessary to establish what the basic character was.
>
> The primary attribute of the rutted farm track for present purposes was its status as a private way, for vehicles as well as pedestrians. In this sense the hard surface was an improvement of the way, as the inspector found but it does not follow from this that its character was changed.

What has changed is the construction of the way. This was the 'marked change in character' to which the inspector referred. The issue as I see it is whether Par 9 is limited to improvements that do not alter the surface or method of construction of the way.

These are indications in Part 9 itself that the meaning is not so limited. 'Improvement' is permitted as well as 'maintenance' and the provision is clearly concerned with the surface of the way. The physical limitations imposed by 'within the boundaries of the street or way' means that the permitted works can only affect the surface and foundations of the way. They cannot widen it or alter its route. There is no indication that the surface or the construction of the existing way may not be changed. On the contrary, it may be improved as well as maintained.

If the relevant character of the way is its status as a vehicular way, then the criterion of a hard surface for the way is an improvement without altering its character. Similarity, a pedestrian right of way could be given an appropriate hard surface that was suitable for pedestrians but it could not be converted for use by vehicles."

109. The character of the replacement right of way is a vehicular and pedestrian right of way. That is not altered by improvement works. It is clear that its construction can be altered. If enforcement action is brought by NIEA and it is successful then the foreshore embankment can be returned to grass with no planning issues.

Contingent Right of Way

110. The applicant is confident that the replacement right of way is adequate and that it can be maintained or improved into the future. However, if the Tribunal has any concerns with extinguishing the existing right of way and imposing the replacement right of way then the applicant is content to have the Tribunal exercise its powers under Article 5(6) of the Order and create an express right of way along the route of the existing right of way to be used only during any period when the replacement right of way is impassable thereby rendering it impassable to cross to Mid Island. Such a "back-up" right addresses all concerns that can be raised by the 1st respondent. If he is unable to pass over the disputed point such that he

cannot pass down the replacement right of way, or for reasons of the embankment causing damage or if there is enforcement action by NIEA that requires works to remove the embankment, then he will still be able to access Mid Island during the period the replacement right of way is inoperable.

111. This is unobjectionable, and ironically, it goes some way to addressing the 1st respondent's objection on principle to losing the existing right of way as he would be granted an express right over the same route, albeit to be used in limited circumstances. In evidence Mr Shaw stated that the applicant would be able to have the contingent right of way ready in a few days. The fence at the bottom of the paddock would need to be altered to provide a gate, the kerb at the top of the paddock garden would need to be removed, and plastic matting would be laid over the grass along the route. None of this is difficult nor would it cause the 1st respondent any difficulties. Mr Cafolla confirmed that he would be content to do this when the paddock is owned by him too.

The Position of the 2nd Respondent

112. It is telling that the 2nd respondent took no part in the hearing and did not adduce any expert evidence. This indicates that in reality it has no issue with the relief sought by the applicant as otherwise it would have defended its interest in the existing right of way. It has used the replacement right of way without complaint and unlike the 1st respondent, has never commenced County Court proceedings to try to re-open the existing right of way. The Tribunal should therefore place no weight on his formal objection to the relief sought by the applicant.

Mr Gibson BL:

113. Under this heading it is submitted that the Tribunal can consider the sufficiency of the replacement right of way. This issue constituted the main focus of the parties. These can be distilled into the following headings:

(i) Overlap of the replacement right of way

114. Quite obviously, if the applicant cannot satisfy the 1st respondent of the legality of the replacement right of way, then it will be entirely improper for the Tribunal to force upon the 1st respondent the position whereby the value of their title was demeaned by a deficient alternative easement.

115. In this regard the Tribunal is referred to the second report of Mr McVitty and the Tribunal will note the encroachment area shaded on the submitted map. This area encroaches onto the lands in folio DN254059 County Down, belonging to Beltraine Developments Limited. As pointed out, the current construction of a fence by the applicant creates a bottleneck.

116. Mr McVitty's conclusive evidence was that the area shaded pink is without the applicant's boundary for operational use of the laneway and he submitted that if driving down the laneway you would be going over third party lands which is out of the applicant's control.

117. In connection with the embankment at the foreshore Mr McVitty gave detailed evidence which demonstrated that the replacement right of way constructed by the applicant at the embankment had gone a metre beyond the existing boundary.

118. It is the 1st respondent's submission, if a new modified easement was to be imposed upon the respondent, then there is a correspondingly high burden on the applicant to show that which will be provided is a route for which there is clear and obvious title. What should not be imposed upon the 1st respondent is a "headache in the future".

119. It would be an extremely odd exercise of the Tribunal's discretion if it were to impose upon the 1st respondent a right of way with identified title issues. It is clear from Ms Hollinger that there is still outstanding an issue with Beltraine Developments Limited regarding the positioning of the fences and fence line along the proposed replacement right of way. Indeed, Ms Hollinger confirmed under cross-examination that it was "vital" that the applicant had

ownership of this tranche of land to give effect to the replacement right of way. If the Tribunal were to accede to the applicant's current application, the net effect of the modification would be to transfer the dispute effectively from the applicant to the 1st respondent. That cannot be said to be a proper exercise of the Tribunal's discretion.

(ii) Planning

120. The applicant after the first two days of hearing in October 2024, realised that planning was an issue and after those first two days of hearing acted immediately to secure a CLUD.

121. Ultimately, however, whatever the decision of the Tribunal, this will be a significant factor in favour of costs being awarded against the applicant regardless of the outcome as the obtaining of a CLUD after proceedings had commenced is a clear and obvious admission that the application was not simply up to scratch. The planning issue was raised as an issue in all of the experts' reports and in the experts' meetings. As set out in the minutes of the experts' meeting, it was unclear why a CLUD had not been applied for but it has now been done.

122. However, in the respondent's respectful submission, it only provides an answer to part of the problem. Ms Jennifer Mawhinney, on behalf of the 1st respondent, gave evidence that the entirety of the laneway is not covered by the CLUD, which was granted on 20th December 2024.

123. The replacement right of way is, therefore, still possibly subject to enforcement and to possible reinstatement.

(iii) Engineering

124. In respect of this issue, the parties are in total agreement that the replacement right of way is, from an engineering perspective, not fit for purpose. The Tribunal is referred to the meeting of experts, Mr Paul Taylor on behalf of the applicant and Mr Ronan Sheehy on behalf of the respondent.

125. As per the minutes, the replacement right of way is elevated from the shoreline and utilises rubble and concrete in its construction, making it vulnerable to erosion from wave action, which has already occurred. Both experts agree that the replacement right of way as it faces the shore requires significant repair work and various engineering solutions are proposed. Without further maintenance, the laneway will deteriorate, leading to slippage into the foreshore and it is acknowledged by both experts as being not fit for purpose.

126. The solution proposed by the applicant in part is to suggest some sort of obligation on it and its successors in title regarding repair and maintenance, citing the right of way granted to the 2nd respondent. This contains no such obligation but, even if such an obligation were to be inferred, it does not provide the necessary comfort.

127. Unlike the current position whereby the existing right of way leads directly to the shoreline rather than abutting the shoreline for a portion, there is no obvious requirement for ongoing maintenance and repair. The 1st respondent's evidence was that the existing right of way, to his living memory, had existed without the need for any ongoing maintenance and repair. What is proposed by the applicant now, however, in the form of the replacement right is an entirely different proposition. The experts agree that the replacement right of way will require significant investment in respect of maintenance in order to prevent erosion and, once again, what is proposed to be transferred to the respondent is "another headache in the future".

128. The 1st respondent may well have, by virtue of some covenant in a replacement right of way, a right to enforce against the applicant and successors in title an obligation to repair but this will require the following:

    (a) The 1st respondent to monitor the surface of the replacement right of way.

    (b) Whenever he finds it to be deteriorating, he will have to make a complaint to the applicant or its successors in title.

    (c) The applicant will then have to assess that complaint, there being no facility as currently proposed for any independent assessment.

(d) It will then make a decision as to whether or not it regards the respondent's complaints as being justified or unjustified. If it regards them as unjustified, then the 1st respondent will have to consider issuing proceedings for enforcement, which leads to an obvious cost and expense.

(e) If the applicant or its successor in title consider the complaint is justified, then they may either (i) do nothing, which will require enforcement; (ii) carry out substantial works, which will require enforcement or (iii) complete the works.

129. It is the 1st respondent's submission, therefore, simply providing a covenant to maintain repair and inspect the replacement right of way cannot be said to be comparable. In McElwee v Fulton, one of the points which the Tribunal considered in favour of the applicant for justifying modification was the fact that the road would be adopted. If it were the case that the applicant here was offering the possibility of adoption of the replacement right of way and this would be a factor in their favour, they are not and it is not.

(iv) Environmental

130. At present, there sits an enforcement file with the NIEA. Whilst they have not taken any steps to date, there is no guarantee that they will not do so. In addition, as pointed out by Mr Grindle, the replacement right of way as it abuts the shoreline either infringes or is in very close proximity to a number of environmentally protected sites. If further work is required, as envisaged by both experts, it is almost inevitable that this will require, if done property and lawfully, some acquiescence from NIEA.

131. In the context of what has been done to date, there can be absolutely no guarantees that this will be granted and, once again, it cannot be a proper exercise of the Tribunal's discretion that the 1st respondent is left with "another headache".

The Tribunal

132. The Tribunal will deal with the issues raised under Article 5(5)(h) in its conclusions.

Conclusions

Mr Fletcher BL:

133. It is submitted that the Tribunal should exercise its discretion and extinguish the existing right of way and replace it with the replacement right of way and the contingent right of way as back-up:

(a) The existing right of way is an unreasonable impediment on the land as it disturbs privacy and raises safety issues.

(b) Its only purpose and practical benefit is to provide access to Mid Island. The replacement right of way fulfils the same purpose and gives the same practical benefit.

(c) The replacement right of way is a better route and has a better surface.

(d) All concerns (whatever their merits) with the replacement right of way are assuaged if the Tribunal creates an express right of way over the same route of the existing right of way, solely to be used for a period during which the replacement right of way is impassable (in law or physically) such that it prevents access to Mid Island over the causeway.

134. Mr Gibson BL:

As appears clear from the evidence of the 1st respondent and the applicant, the rationale behind the altering of the laneway was to secure a better amenity space for Ms Hollinger and Mr Shaw, not the applicant. The change and alteration in the route of the replacement right of way does nothing to secure practical benefit for the paddock i.e. the land owned by the applicant, a point acknowledged by Ms Hollinger in cross-examination.

135. Whatever the applicant might do or offer now is only temporary, for the intention of Ms Hollinger and Mr Shaw, together with the applicant is to sell up and transfer the reference lands to a third party, Mr Cafolla. He is not a party to these proceedings and nor can he be subject to any Order made by the Tribunal.

136. The new route which is proposed is entirely deficient from a legal, environmental and engineering standpoint and has issues with the proposed title and compliance with the environmental statutes, with it overall clearly not being fit for purpose. Unlike the case of McElwee v Fulton, where the alternative was replete with title and acknowledged as being entirely satisfactory from a physical and engineering perspective, this proposed modification is not.

137. It is the 1st respondent's submission, there is little, if anything, to recommend this application to the Tribunal.

The Tribunal

138. The existing right of way has been in existence and continually used for over 100 years. The long term viability of the replacement right of way as a suitable alternative to the existing right of way was the main focus of the hearing and is the overriding issue for the Tribunal. As submitted by Mr Gibson BL, the Tribunal should not exercise its discretion under Article (5) to extinguish the existing right of way without having an entirely suitable and viable alternative in place.

139. The applicant has four main concerns with the replacement right of way and these fall under the headings of:

(i) Ownership of the right of way

(ii) Planning

(iii) Engineering

(iv) Environment

(i) Ownership of the right of way

140. Mr Gibson BL referred to an area of land which has encroached onto the lands at folio DN254059 and which was in the ownership of Beltraine Developments Limited.

141. He also referred to Mr McVitty's expert evidence which concluded that the replacement right of way was not built in its entirety on lands owned by the applicant as the embankment had gone one metre beyond the existing boundary.

142. Mr Gibson BL submitted that if a new, modified easement was to be imposed upon the 1st respondent there is a high burden on the applicant to show that what will be provided is a route for which there is clear and obvious title.

143. He also referred to Ms Hollinger's evidence which made it clear there was still an outstanding issue with Beltraine Developments Limited regarding the positioning of the fence and fence line along the replacement right of way.

144. Ms Hollinger and Mr Shaw gave evidence that the Land Registry map did not reflect what had been agreed with Mr Will Hollinger. Mr Fletcher BL asked the Tribunal to note that Mr McVitty accepted in his evidence, the principle that a contract for the sale of land could be rectified if its map does not reflect what was actually agreed. He noted that it was open for the applicant to seek rectification.

145. Ms Hollinger gave evidence that she had been having discussions with Mr Stephen Hollinger to see if they could reach agreement but nothing had been agreed as yet. She was hopeful "something could be sorted out" but if necessary they would go to court to resolve the issue.

146. The Tribunal notes Ms Hollinger's submissions that the Lands Registry map did not reflect what was agreed between the parties to the transfer and also notes her efforts to rectify the issue.

147. As at the date of the hearing, however, nothing had been rectified and it was clear that part of the lands used for the replacement right of way were not in the ownership of the applicant.

148. The Tribunal agrees with Mr Gibson BL, the applicant should have clear and obvious title to the lands comprising the replacement right of way. There should be no areas of dispute.

(ii) Planning

149. Mr Gibson BL accepted that during the proceedings the applicant had successfully applied for a CLUD. He asked the Tribunal to note, however, that Ms Jennifer Mawhinney, on behalf of the of the 1st respondent gave evidence that the entirety of the laneway was not covered by the CLUD and as such, could still be possibly subject to enforcement and reinstatement action.

150. Mr Fletcher BL accepted that the area on the foreshore where, Mr Shaw had installed kerbstones, did not fall under the CLUD but noted no enforcement action had been taken. He submitted that none can be taken as more than five years have passed since the kerbs were installed. If necessary another CLUD could be applied for to formalise the position.

151. He also noted that even if the kerbstones were subject to enforcement action and had to be removed this would not affect the replacement right of way.

152. The Tribunal notes that if subject to enforcement action, the kerbstones could be removed, and this would have no impact on the replacement right of way. As at the date of hearing, however, the kerbstones were in situ, they were not covered by the CLUD and in theory could still be subject to enforcement action.

(iii) Engineering

153. Mr Gibson BL noted that both engineering experts, Mr Paul Taylor and Mr Ronan Sheehy, were in agreement that the replacement right of way, as it faces the shore requires significant repair works and without further maintenance will deteriorate leading to slippage into the foreshore.

154. He also noted that the solution proposed by the applicant was to impose some sort of obligation on it and its successors in title regarding repair and maintenance. He pointed out that the existing right of way leads directly to the shoreline rather than abutting it, as per the replacement, and as such there is no obvious requirement for ongoing repair and maintenance.

155. He submitted that the experts were agreed that the replacement right of way will require significant investment in respect of maintenance in order to prevent erosion.

156. Mr Fletcher BL submitted that the replacement right of way was fit for purpose in engineering terms apart from the portion that runs along the foreshore. He asked the Tribunal to note that the replacement right of way continues to be used without interruption and no issue had been reported in terms of condition.

157. He accepted, however, that it will require the applicant and its successors in title to maintain the embankment or remove the embankment entirely but both these approaches were achievable.

158. As at the date of the hearing, however, the embankment was in situ and the Tribunal notes that both engineering experts were agreed that without further maintenance the replacement right of way will deteriorate leading to slippage into the foreshore. There are no such problems with the existing right of way.

159. The Tribunal notes that there will be an obligation on the applicant and its successors in title to maintain the replacement right of way but Mr Gibson BL submits that this will require:

(i) The 1st respondent to monitor the surface of the right of way.

(ii) If it deteriorates he will have to make a complaint to the applicant.

(iii) The applicant will have to assess the complaint.

(iv) The applicant will make a decision as to whether the complaint is justified. If unjustified the 1st respondent will have to consider enforcement.

(v) If justified the applicant may (a) do nothing; (b) carry out substantial works or (c) complete the works.

160. The Tribunal agrees with Mr Gibson BL that potential repairing and maintenance issues could arise, and notes that there are no such issues with the existing right of way.

(iv) Environmental

161. Mr Gibson BL submitted that at present there sits an enforcement file with the NIEA and whilst they have not taken any steps to date, there is no guarantee that they will not do so in the future. In addition Mr Grindle had pointed out the replacement right of way, as it abuts the shoreline, infringes or is in close proximity to a number of environmentally protected sites.

162. Mr Fletcher BL submitted that were the NIEA to bring any enforcement action regarding an alleged trespass then the replacement right of way is still wide enough to accommodate traffic, hence this is a non-issue.

163. The Tribunal notes the position of both parties with regard to the environmental issues but this is a "grey" area and again there are no such issues with the existing right of way.

Contingency

164. Mr Fletcher BL had suggested a contingent right of way whereby the 1st respondent would be granted an express right of way over the existing right of way in limited circumstances. This would solely be used for any period the replacement right of way was impassable, in law or physically, such that it prevents access to Mid Island.

The Tribunal's Conclusions

165. If the existing right of way has to be re-opened every time there is an issue with legality, environment, planning, maintenance and repair regarding the replacement right of way then why should the Tribunal use its discretion under the Order to extinguish the existing right of way?

166. The subject reference is not on a par with McElwee v Fulton whereby the proposed replacement right was entirely viable and suitable.

167. There are open and outstanding issues with title, planning, environment, engineering, enforcement, maintenance and repair with regard to the replacement right of way.

168. In these circumstances the Tribunal declines to use its discretion under Article 5(1) of the Order to modify or extinguish the existing right of way.

16th July 2025

Henry Spence MRICS Dip.Rating IRRV (Hons)

LANDS TRIBUNAL FOR NORTHERN IRELAND