THE HIGH COURT

[2023] IEHC 417

[Record No. 2021/3588P]

BETWEEN

DROMADA WINDFARM (ROI) LIMITED

PLAINTIFF

AND

DENIS CREMINS

DEFENDANT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 14th day of July 2023.

Introduction

1. This case concerns an issue in relation to high voltage cables servicing the plaintiff's windfarm which have been laid in the grass verge alongside a public road which abuts the defendant's land. The plaintiff now accepts that the cables are in fact laid on ground which is the property of the defendant. Put at its simplest, the main issue this Court has to decide is whether orders should be made preventing the defendant from interfering with the cables, and allowing them to remain in situ – in which case the plaintiff accepts that the defendant would be entitled to monetary compensation for what is in effect a trespass on his land – or whether the court should order the plaintiff to remove the cables, which the plaintiff submits would result in it incurring a wholly disproportionate loss in circumstances where it alleges that the

cables do not interfere with the defendant's present use of the land in any material way.

2. The cables were laid in or about 2009. The question of trespass by the plaintiff on the defendant's land was first raised by solicitors acting on the defendant's behalf in November 2016. The trespass was denied by the plaintiff, and this led to proceedings entitled "The High Court, Record No. 2017/8323P, between Denis Cremins plaintiff and Dromada Windfarm (ROI) Limited defendant" ('**the 2017 proceedings**') being issued by the defendant. These proceedings were not progressed by the defendant. However, the defendant from June 2019 onwards mounted what could justly be described as a campaign of correspondence, mainly with the plaintiff's parent company, in which he threatened to remove the cables himself, repeatedly pointing out to the plaintiff that if injuries or fatalities occurred as a result, such occurrences would be the responsibility of the plaintiff or its parent.

3. Prolonged correspondence and meetings between representatives of the plaintiff and the defendant did not resolve the matter, and ultimately the present proceedings were issued on 5 May 2021. There was an immediate application for an interim injunction, the court (Allen J) granting an order which effectively restrained the defendant from interacting with the cables. An interlocutory order in the same terms was made on 18 May 2021 by Allen J with the acquiescence of the defendant, who represented himself in court.

4. Mr Cremins delivered a document that he drafted himself on 31 August 2021 by way of response to the plaintiff's statement of claim. It is effectively a defence and counterclaim, in which he seeks orders for the removal of the cables and damage for "interference with my land". The court must now decide what is to be done with the

cables, and what consequences must flow from them either remaining where they are, or being removed.

5. Fortunately, there was no material dispute between the parties as to the facts of the matter, although it will be necessary to set them out in some detail, so that the exercise of the court's discretion can be seen in context. Likewise, the parties are generally agreed as to the legal principles which govern the dispute. There is however major divergence between the parties as to the inferences to be drawn from the facts, and as to the appropriate course of action the court should take.

Background

6. The plaintiff is a company incorporated in the State, and is part of the SSE group of companies. The plaintiff is one hundred percent owned by SSE Renewables Wind Farms (Ireland) Limited which is one hundred percent owned by SSE Renewables Holdings Limited. That company is in turn a subsidiary of SSE plc. The court was told in evidence that SSE entities operate 26 windfarms in Ireland.

7. The defendant is a farmer and, together with his wife Sheila Cremins, is the registered owner of lands comprised in folio 3305F County Limerick ('**the lands**'). The defendant acquired the lands in or around 2006.

8. The plaintiff is the operator of Dromada Windfarm ('**the windfarm**'), which comprises of 19 turbines and ancillary developments located at lands at Clash South, Athea, County Limerick. Planning permission was obtained for the windfarm in 2004, but on the basis that twenty-three wind turbines would be erected, along with the substation, including a control building, the construction and upgrading of site entrances, site tracks and associated works. Permission was subject to 17 conditions.

9. When planning permission was obtained, it was on the basis that three of the 23 permitted turbines would be constructed on lands now owned by the defendant and

the defendant's wife, pursuant to a lease arrangement. In that regard, the plaintiff's predecessor in title had entered into an option agreement ('**the option agreement**') with the previous owners of the lands for the construction of part of the windfarm on their lands, and those lands were included in the planning application on that basis.

10. The defendant acquired the lands in folio 3305F subject to the option agreement for the construction of the turbines and in knowledge of that agreement. When purchasing the lands, the defendant entered into an agreement to be bound by the terms and conditions of the option agreement.

11. It was contended by the plaintiff, and in fact confirmed by the defendant in his evidence before the court, that he has significant experience of dealing with windfarm developments and entering into commercial arrangements regarding the use of lands for windfarm turbines. The defendant has been involved in litigation with another windfarm operator, apparently in relation to the proper construction of an option agreement relating to other lands owned by him. This case was heard in this Court and on appeal in the Court of Appeal. While it appears that Mr Cremins was unsuccessful in those outings, he acknowledged in cross-examination during the hearing that he told Mr Ciaran Maguire, a representative of the plaintiff who spent some time in negotiation with Mr Cremins, that he had obtained compensation of €4m from one windfarm and €6m from another windfarm.

12. The Athea holding of the defendant consists of approximately 150 acres, 50 of which are afforested and the remaining 100 of which have no particular use or function at the moment. It is some significance to note that Mr Cremins resides at some distance from the Athea holdings in Knocknagoshel, Co. Kerry.

13. The option agreement expired in or around May 2007, but negotiations continued between the plaintiff and the defendant with a view to putting a new lease

option in place. However, no agreement was reached, and the windfarm was constructed without the intended three turbines on the defendant's lands being constructed before planning permission expired.

The laying of cables

14. The windfarm has been operational since February 2010 and supplies electricity to the national grid pursuant to contractual arrangements which exist between the plaintiff and EirGrid. This is done *via* 110 KV high voltage cables which connect the windfarm to the national grid.

15. Mr Ciaran Maguire is onshore wind operations manager of SSE Renewables. Mr Maguire swore the grounding affidavit on behalf of the plaintiff for the interim and interlocutory injunction applications, and gave evidence on behalf of the plaintiff before this Court. Mr Maguire indicated in evidence that he has overall responsibility for the 26 windfarms in Ireland owned by SSE entities. In his evidence to the court, Mr Maguire referred to maps and photographs of the area in question. His evidence was that cables connecting nine of the windfarm's turbines to the national grid pass along a section of the public road. He stated that approximately 3km of cable was laid adjacent to the public road, and that 250m of this distance was at or outside Mr Cremins' lands [Transcript, Day 2 pp 12-13].

16. The road is a small rural road with a grass verge on either side. The photographs show that Mr Cremins' land is fenced off with wire and fence posts. From this "fence" the grass verge extends to the edge of the road, and the evidence of Mr Maguire was that the cable was laid between the "fence" and the edge of the road. One might have thought that the "fence" erected on Mr Cremins' lands marked the boundary of those lands, and that therefore cable laid in the grass verge between the fence and the roadway would not have impinged upon those lands. However, as we

shall see, the plaintiff now accepts that the cables are in fact laid in ground which belongs to Mr Cremins. The evidence of Mr Maguire is that the plaintiff had originally intended running the cables through the defendant's lands, but when the defendant refused to agree commercial terms to allow the three turbines to be built on his lands, the plaintiff took the decision to lay the cables in the grass verge alongside the public road.

17. By letter of 9 February 2009, Limerick County Council wrote to Roadbridge Limited, a contractor which had applied for a road opening licence to facilitate the installation of the cables, indicating that the Council had no objection providing there was compliance with an attached list of conditions. The application form indicates the exact location of the proposed opening as "CoolEast/Clash South, Dromada, Athea, County Limerick", and suggests that the length over which the cables were to be installed was in excess of 3,000m, with 2,630m of cabling to be installed in a "grass verge". The average depth of the pipe was expressed to be 1.5m.

18. Mr Maguire stated that the thinking in relation to running the cable alongside a road was that a road was an "ideal avenue to run a cable along…the road was an artery through the countryside where…a cable could be laid properly and without problem". [Transcript, Day 2, p.15, lines 16-23]. He stated that SSE believed that it was entitled to do this at the time. SSE's position as regards planning permission is set out at para. 22 of the statement of claim, which is as follows:

> "22. When the cables were laid in 2009, it was the plaintiff's understanding that planning permission was not required for the laying of electricity cables and that same were exempted development, having regard to class 26 of the First Schedule, Second Part of the Planning and Development Regulations 2001 (as amended). The general understanding in that regard changed

following the decision of the High Court in *O'Grianna v An Bord Pleanála* and in subsequent court decisions, culminating in a decision of *Daly v Kilronan Windfarm Limited*. However, from a planning perspective, the development would have been immune from attack under s.160 of the Planning and Development Act 2000 (as amended) when the Defendant's proceedings issued in 2017, and certainly, by the time the Defendant's letter dated 13 June 2019 was sent".

19. Mr Maguire stated in his evidence to the court that his concern was "to provide sites where people can go to work safely and come home from work to their family safely…". He was unequivocal in his evidence that the cables on the defendant's lands were safe:

> "…[F]irst of all, they are designed safely. Second of all, we maintain them, like we look after them. We carry out maintenance, we carry out surveys, you know, we have a schedule of maintenance to ensure that the balance of plant network, which includes the cable, is being looked after correctly and it will operate as required. And specifically in the case of the cables and the condition they were in, the cables were buried…they were covered". [Day 2, p.17, lines 20-29].

The 2017 proceedings

20. By a letter of 24 November 2016, Messrs O'Connell & Clarke, the firm of solicitors on record for the defendant in the present proceedings, wrote to the plaintiff raising various points in relation to the development of the windfarm. In particular, the letter stated that "our client has carried out searches and has been unable to identify any grant of planning permission in respect of the grid connection works. Accordingly the grid connection and internal [cabling] works are unauthorised

development as these works do not benefit from the exempted development provisions…". Significantly, the letter went on to state that "…we are instructed that the [cabling] works trespass on our client's lands. Our client has not provided any consent to the laying of cables on or over his lands and he has instructed us to request that same are removed forthwith…". The letter pointed out that "T14 and T23 are in immediate proximity to our client's boundary and are interfering with our client's ability to use and development [sic] his own lands".

21. A substantive response was sent by an in-house lawyer for SSE on 1 February 2017 by email. In particular, the email stated that "…my client has confirmed that there are no cables for Dromada Windfarm located on your client's land and there is no trespass on your client's land…". In response to a reply from O'Connell & Clarke, by email of 16 February 2017, the same author stated "…regarding the alleged trespass, we are satisfied from our inspections that there is no such trespass…".

22. A plenary summons on behalf of Mr Cremins against Dromada Windfarm (ROI) Limited issued on 18 September 2017. The general endorsement of claim, which was signed by counsel, sought:

> "1. A declaration that the plaintiff owns land comprising of folio LK3305F at Dromada, County Limerick and that the defendant has no estate or interests in the said lands and, in particular, has no entitlement to lay pipes, cables or conduits in the lands comprising the said folios.
>
> 3. [sic] An order, restraining the defendant its servants or agents from the laying of underground cables/ducting/or other equipment on the plaintiff's lands at Dromada, County Limerick without his consent or otherwise;
>
> 4. Damages for nuisance and trespass…".

23. An appearance was entered on 20 September 2017 by solicitors representing Dromada Windfarm (ROI) Limited. However, it is accepted by the defendant herein that he did not advance these proceedings, and no statement of claim was ever served.

Correspondence from June 2019 to date

24. Mr Cremins appears to have written the following letter on 13 June 2019:

> "To whom it may concern, I, Denis Joseph Cremins, am giving SSE Airtricity Dromada Windfarm until 15 July 2019 to remove the cable that is buried on my lands. Folio no: LK3305F. If the cable is not removed by this date I will have it removed myself. Should any injuries or fatalities occur to either me or my workers as a result of your failure to remove the cable, that you installed by trespassing on my land, you will be held responsible. I will be forwarding a copy of this warning letter to my family and solicitor, should I have to remove the cable myself. You, Airtricity, buried the cable on my lands without planning permission. I am again warning you, Airtricity Dromada Windfarm, should any loss of life occur after 15-07-2019 as a result of your failure to remove the cables my family and solicitor will be able to hold you responsible as you have been put on notice by this official warning letter. I can guarantee the cable, which is buried on my lands, will be removed regardless.
>
> Yours faithfully,
>
> Signed.
>
> Denis Cremins".

25. A further letter from Mr Cremins suggests that this letter was "posted to Airtricity on 13 June 2019", and to "Mr Philips-Davies CEO of SSE (the parent company for Airtricity)" by the said letter of 4 July 2019.

26. A letter was written on behalf of SSE to Mr Cremins on 8 July 2019. The letter stated as follows:

> "Dear Mr Cremins,
>
> We refer to the above matter and to your letter of 13th June 2019 in which you state that you intend to remove the underground electrical cable which you state is buried on your lands. The health, safety and welfare of staff and the general public is of paramount importance to SSE. The cable you refer to is a live cable and contact with this cable may cause electrocution and result in fatal injuries. Please find attached a copy of the Code of Practice for Avoiding Danger from Underground Services. This code of practice is a result of a joint initiative between the Health and Safety Authority, the Construction Industry Federation, Irish Congress of Trade Unions, key utilities companies/service providers and local authorities that are involved in the provision and maintenance of vital underground services.
>
> SSE takes any claim or intention to interfere with electrical plant and equipment extremely seriously. We urge you not to take any such action given the extreme danger involved in interfering with live underground cables. In addition to risking your own life and the lives of contractors with any such interference you would also be endangering the safety of members of the public and of SSE staff. In this regard please note that SSE has notified the Gardaí of the contents of your letter.
>
> SSE has investigated the claim in your letter that the cable which you refer to is buried on your lands and is satisfied that the cable is not located on your lands but located under the public road. We further note that you have, through your solicitors O'Connell Clarke, issued High Court proceedings against SSE

under record 2017/8323P in respect of this cable and any issues or concerns which you may have in respect of the location of the cable should be raised in the context of those proceedings. In this respect we have copied both your solicitor and the solicitors acting for SSE in these proceedings."

27. Over the course of the next two years, the parties exchanged correspondence in relation to the removal of the cables. The plaintiff's position was that any issues would be determined in the course of the 2017 proceedings, and emphasised the risk inherent in any attempt to remove the cables by Mr Cremins. Mr Cremins however continued to intimate his intention to remove the cables himself, and continually raised the prospect of injury or loss of life occurring as a result. By way of example, in his letter to Mr Alistair Philips-Davies, CEO of SSE, of 23 October 2019 Mr Cremins indicated that, if the cables were "not removed by 10 November 2019 then I will remove them after this date and SSE Dromada Windfarm and the Health and Safety Authority will be held responsible should any danger or even death happen to me as a result of your failure to act. I would rather take that chance than have somebody like SSE trespass on my title without my consent. So please have the cable removed by the above date otherwise any fatality will be in the hands of SSE and the Health and Safety Authority. You have been warned."

28. It then transpired that, in December 2020, the defendant exposed some of the plaintiff's cable ducting on the grass verge of the public road, having used a digger to access the area from his lands. When it learnt of this event, the plaintiff sent operatives out to the road to cover the exposed section of cable ducting with stone chippings and to put up additional marker posts to warn road users of potential danger. By letter of 16 December 2020, SSE wrote to Mr Cremins indicating that, "interfering with live cables…is extremely dangerous and could cause serious injury

to you or any person undertaking such works…", and stated that "…[i]t is imperative that you cease any such works immediately for your own safety and the safety of others. In the event that you cause any further interference with the cable we will be left with no option but to proceed to make an application to the High Court for an injunction to prevent you from interfering with these cables. We urge you to bring this matter to the immediate attention of your solicitors".

29. Mr Maguire then organised a meeting with Mr Cremins on the site on 7 January 2021. By a letter of 22 January 2021, Mr Maguire wrote to Mr Cremins setting out the plaintiff's position, which in essence was that any issues Mr Cremins had with the cable should have been raised in the 2017 proceedings. The response to this was a further letter from Mr Cremins of 1 February 2021 to senior officials of SSE giving until 14 February 2021 to either remove the cables or switch off the power to them, failing which Mr Cremins would be "left with no alternative but to undertake these works myself. SSE Airtricity will be held responsible for any and all injuries, up to and including death, that might ensue as a result of your failure to remove or cut the power to this cable…".

30. Mr Maguire met Mr Cremins on site on a number of occasions in February and March 2021 with a view to attempting to resolve the differences between the parties. However, there were further intimations in April 2021 by Mr Cremins and a firm of solicitors acting on his behalf that he would remove the cable himself if certain requirements of his were not met. By a letter of 19 April 2021, a firm of solicitors – not O'Connell & Clarke – wrote to "SSE Airtricity" enclosing a copy of an engineer's report by Ms Nora Curtin indicating the cables were laid on Mr Cremins' lands. This met with a robust response from the plaintiff's solicitors of 20 April 2021. The letter stated, inter alia, that …[i]n respect of the cables which you

state have been built on your client's lands, these cables were in fact laid in the verge of the public road, some 12 years ago…". The letter did not however go so far as to deny that trespass had taken place, and made "an offer suggesting mediation to your client in respect of all claims arising out of the [2017 proceedings] …".

31. Ultimately, a meeting with the defendant took place at Barack Obama Plaza carpark – due to pandemic restrictions – on 29 April 2021, attended by Mr Maguire and another representative of SSE. The statement of claim in the present proceedings records that:

> "Safety markings to identify the location of the cables, which the Plaintiff's workmen had put over the cables after the defendant attempted to interfere with the cables in December 2020 had been removed. The Defendant confirmed that he had removed the safety markings the previous week. The Defendant demanded that (i) the Plaintiff either remove the cables from the lands, (ii) pay him compensation of €4.5m to leave the cables where they were or (iii) go through a fresh planning process to move the cables to the other side of the road but to de-energise the cables during the currency of that process". [Paragraph 35].

32. It appears that the plaintiff's counterproposals were unacceptable to Mr Cremins, who sent further emails to senior executives of SSE plc confirming his intention to remove the cables himself.

The present proceedings

33. It was in these circumstances that the plaintiff issued the plenary summons in the present proceedings on 5 May 2021. Mr Maguire swore a grounding affidavit, and an application for an interim injunction was made to Allen J who made the following order:

> "IT IS ORDERED that the Defendant his servants or agents or any persons aiding abetting or acting in concert with him and any person having notice of the making of the Order be restrained until after 18th day of May 2021 or until further order in the meantime from interfering with and/or digging up and/or accessing in any way (whether with machinery or otherwise) the Plaintiff's electrical plant and equipment including high voltage cables which are connected to the Dromada Windfarm which were laid in the verge of the public road abutting the Defendant's lands at Keale Athea County Limerick in or around 2009".

34. The hearing of the interlocutory application took place on 18 May 2021. Due to the Covid-19 Pandemic, the plaintiff's lawyers attended remotely, but Mr Cremins, who was not represented by lawyers, attended in person. It appears from the order of the court of that date that Mr Cremins did not object to the continuance of the order made on an interim basis against him.

35. Mr Cremins continued to assert that the cables were laid on his property, and to this end swore an affidavit on 14 May 2021 attaching a report by an engineer, Nora Curtin, of 19 April 2021, in which Ms Curtin asserted that "the grid cable is laid within the folio lands of Denis Cremins LK3305F".

36. Mr Maguire swore two affidavits in the matter on behalf of the plaintiff. The first affidavit of 4 May 2021 sets out the background to the matter in detail much as I have set it out above, emphasising the necessity to prevent unauthorised interference with potentially lethal cables, while maintaining that any issues in relation to location of the cables could be dealt with in the 2017 proceedings. It is notable that neither of Mr Maguire's affidavits asserts unequivocally that the cables are not situated on Mr Cremins' land, although there is a passing reference at the start of para. 41 of Mr

Maguire's grounding affidavit to the grass verge being "outside the defendant's lands". At para. 48 of that affidavit, he avers as follows:

> "I say that the balance of convenience clearly favours the granting of an interlocutory injunction. *If the Defendant is correct in asserting that he is suffering a trespass by reason of the installation of the cables some 12 years ago, any wrong which he has suffered is capable of being compensated in monetary terms for the reasons already outlined.* Having regard to the terms of the Defendant's correspondence dated 24 February 2021, which I set out above, it is clear that the Defendant's real motivation is to obtain monetary compensation from the Plaintiff. There are legal proceedings in being in which those issues may be determined. However, if the Defendant interferes with the cables and suffers injury or even death, the consequences to the Defendant will be irreparable". [Emphasis added].

37. Mr Maguire swore a second affidavit on 17 May 2021, the day before the hearing of the interlocutory injunction. At para. 24 of that affidavit, he avers as follows:

> "...The Plaintiff is of the view that even if the Defendant is correct in establishing that he owns the lands on which the cables are laid and that he did not give permission for their installation, his remedy is limited to damages for reasons including the length of time the cables are in situ, the failure of the Defendant to raise any complaint about the cables for eight years after their installation, the fact that the cables are laid on the public road and that any trespass that the defendant might establish is technical in nature and the fact that the Plaintiff's prejudice in having to remove the cables is significantly

greater than any prejudice to the Defendant if the cables remain where they are".

38. This theme is continued in the statement of claim which was delivered on 9 August 2021. The plaintiff alleges at para. 44 that the defendant is estopped by a number of matters from seeking the removal of the cables, and the succeeding paragraph is as follows: -

"45. In any event, if the Defendant has suffered an alleged trespass as a result of the cables being laid in the grass verge outside the lands, same is capable of being compensated in monetary terms".

39. Mr Cremins delivered what is in effect a defence and counterclaim on 31 August 2021 at a time when he did not have legal representation. In the reliefs he claims, he seeks "damages for interference with my land" at para. 6. In its reply and defence to counterclaim, the plaintiff responds to this claim as follows:

"8. With regard to the reliefs sought at para. 6, the Plaintiff's position is (as pleaded in the statement of claim) that if this Honourable Court determines that the Plaintiff's cables are laid under the Defendant's lands, albeit that such lands form part of the public road, and this Honourable Court determines that the Defendant should be compensated in that regard, this Honourable Court should assess the compensation to which the Defendant is entitled on the basis that the cables are to remain in situ".

The legality of the laying of cables

40. The hearing of the matter took three days. During a lengthy opening in which the background to the matter was set out at length, the question of the ownership of the land adjacent to Mr Cremins' fenced-off land along which the cables had been laid was addressed. The plaintiff's counsel, Rossa Fanning SC, in addressing the reliefs

sought by the plaintiff, referred to the third paragraph of the reliefs in the statement of claim, which is as follows: -

> "3. A declaration that if the defendant is entitled to any relief as a result of the plaintiff's electrical plant and equipment, including high voltage cables connected to the windfarm, being laid in the verge of the public road abutting the lands at Keale, Athea, County Limerick in or around 2009, same is limited to damages in the High Court proceedings which he has commenced, by reason of his delay in seeking any equitable relief and, if appropriate, measuring such damages (if any) to which the defendant may be entitled in that regard".

41. Mr Fanning commented on this relief in his opening to the court as follows:

> "And that's a central issue, Judge, now, that the court will have to take a view on. That to the extent that we have trespassed, and there is no longer any contest in truth that we have as a result of our reading of Ms Justice Baker's judgment in Daly v Kilronan, which is referred to in my submissions and in the book of authorities, we accept there is a technical trespass here." [day 1, p99, lines 18-25]

42. Counsel for the defendant, Oisin Collins SC, immediately interjected to complain that the defendant had come to court to "defend his ownership of the lands and to establish a trespass". Counsel submitted that the proceedings were based on an entitlement to lay the cables in the grass verge; if counsel for the plaintiff was "…now conceding [that the plaintiff] has no entitlement to be there, it is difficult to see what future his case has at all" [day 1, p.99, line 26 to p.100, line 16].

43. In answer to a direct question from the court, counsel for the plaintiff confirmed that the plaintiff had resiled from the position that it had expressed in

correspondence. Counsel accepted that the laying of the cables on Mr Cremins' land was a "technical trespass", but one that "doesn't actually prejudice Mr Cremins in any respect…[Mr Cremins] can't, as a matter of law…dig [the roadway] up himself…it is a criminal offence to dig up a public road, other than with a licence, which we did have in 2009 when we did these works, but which Mr Cremins has never had…[the plaintiff's] objective in these proceedings…consistent with the reliefs I have sought, is to ensure that Mr Cremins cannot interfere with my cable and to obtain a court order to that effect" [day 1, p.132, lines 17 to p.134, line 25].

44. The legal principles in relation to ownership of the public road are set out at some length in the written submissions of the plaintiff, which were delivered on the first day of the hearing, *i.e.,* not in advance of the trial. The plaintiff notes, *inter alia*, a number of cases establishing the principle that the owner of land beside a public road or river "owns the soil to the middle part of the road or river unless the soil has been acquired by the local authority…" [Kenny J in *Holland v Dublin County Council* [1979] 113 ILTR 1 at 2: see para. 44 of written submissions]. The plaintiff now accepts that the application of this principle confirms that Mr Cremins "owns the soil to the middle part of the road", and that accordingly in the present case, the grass verge between the fence posts and the middle of the road is part of Mr Cremins' lands.

45. The plaintiff's submissions also note that s.13(10) of the Roads Act 1993 provides, *inter alia*, that a person who damages or excavates a public road "without lawful authority or the consent of a road authority…shall be guilty of an offence". The submissions note the requirement, pursuant to s.254 of the Planning and Development Act 2000 for a licence granted by a planning authority for the placement of a "cable, wire or pipeline…under, over or along a public road…"; it is contended however that

the plaintiff is a "statutory undertaker" as defined in s.2 of the Planning and Development Act 2000, to which s.254 does not apply.

46. The plaintiff however suggested that a significant change in the legal position had occurred with the delivery of the judgment of Baker J in *Daly v Kilronan Wind Farm Limited* [2017] IEHC 308. As the plaintiff put it at para. 49 of the written submissions:

> "49. The judgment of Baker J in *Daly v Kilronan Wind Farm Limited*, [2017] IEHC 308, clarified that a road opening licence does not confer a right or interest in the soil, as the purpose of the licence is to provide consent for an action which would otherwise be an offence under the Roads Act 1993. In that case, which involved an application under s.160 of the PDA, Baker J held that even though it formed part of the public road, the grass verge was *prima facie* the property of the applicant and no consent to enter had been given. Thus, *prima facie*, there was a trespass, and the road opening licence did not of itself amount to authorisation or permission to enter upon private land. In the event, Baker J proposed making a limited order prohibiting the continuation of the laying of cables, but she made no order that the works already completed be removed or that the land be restored."

47. Having quoted excerpts from the judgment, the plaintiff went on to state as follows:

> "51. Until this judgment, it had not generally been understood that the road opening licence, coupled with the fact that the laying of cables was exempted development, was not all that was required. Indeed, it might be suggested that the defendant himself laboured under this mistake, given that the judgment of Baker J was delivered on 11 May 2017 and the defendant's 2017 proceedings

> subsequently issued on 19 September 2017, when the cables had by that point already [been] in place for eight years. The applicant in Daly and the Defendant were both represented by O'Connell & Clarke Solicitors. It may be that the Defendant had the good fortune to be advised by solicitors who became alive to the point at some stage in 2016, as it was in their letter of 24 November 2016 that they first made the complaint of trespass on behalf of the Defendant."

48. The plaintiff then went on in the written submissions to contend that s.48 of the Electricity Regulation Act 1999 "would have provided a mechanism whereby the plaintiff would have been able to lay the cable without the defendant's consent". Under that section, "[t]he power to lay electric lines…, may, with the consent of the Commission [for the Regulation of Utilities], also be exercised by the holder of an authorisation" within the meaning of the section. The plaintiff contended that it was the holder of such an authorisation in respect of a generating station connected with the windfarm. The plaintiff also submitted that it might have been possible to apply to the Commission for the Regulation of Utilities for an order providing for the compulsory acquisition of the land.

49. Mr Fanning accepted that "the issue fundamentally really is whether the remedy for Mr Cremins ought to sound in damages or whether it ought to sound in removal of the cable" [day 1, p.146, lines 6 to 8]. It was suggested that this issue should be determined first, with the question of compensation of the defendant by the plaintiff – if it were decided that the cables should stay in the ground – to be the subject of a further module. Counsel also said that the plaintiff would in that event agree to an arbitral process to decide the issue of compensation.

50. Mr Collins accepted that the first issue to be resolved was whether the cables should remain in the ground, submitting that they "should be removed forthwith". He made sustained complaint about the way in which the plaintiff had approached the proceedings, stating that it was "absolutely clear that the plaintiff has approached this on the basis that the cable is not in fact on my lands" [day 1, p.151, lines 3 to 5]. Counsel also submitted that "the interlocutory injunction that was obtained in this case was obtained on the basis that this cable was laid outside my client's lands", pointing to para. 41 of Mr Maguire's grounding affidavit, which commences with the averment "…the cables located in the grass verge *outside the defendant's lands* serve nine of the turbines in the windfarm…" [emphasis added]. Mr Collins accepted that "some level of modularisation" was required "…because the [plaintiff's] case has changed so fundamentally from the case that was brought, that it needs now to be reconstituted and brought properly…" [day 1, p.155, lines 7 to 14].

51. In addressing the way in which the plaintiff had approached the present proceedings in general and the injunctive applications in particular, Mr Fanning stated that the plaintiff wasn't "overly keen to acknowledge a trespass…we were perhaps a little bit coy in the way we were putting it". He submitted however that the way the case was being presented at hearing could not be seen as constituting "a significant change of position", pointing out that s.48 of the grounding affidavit referred to the possibility that the defendant "is correct in asserting that he is suffering a trespass by reason of the installation of the cables…", in which case "…any wrong he has suffered is capable of being compensated in monetary terms for the reasons already outlined".

52. Counsel also points to letters written by the plaintiff's solicitors to Mr Cremins suggesting arbitration in relation to compensating him. In its letter of 12 May 2021, in

between the grant of the interim injunction and the hearing of the interlocutory application, Messrs Mason Hayes & Curran on behalf of the plaintiff stated as follows:

> "However, given the long history of the matter and the numerous failed negotiations between the parties, we are of the view that the best way to proceed would be to appoint an independent arbitrator to determine the issue of compensation on the basis that the electrical cables remain where they are. The arbitrator's decision on compensation would be a legally binding decision on both parties. The advantages of arbitration is [sic] that it would be conducted in private and it is capable of facilitating a speedy decision making process in order to bring this matter to a close. As a gesture of good faith, our client has offered to reimburse reasonable legal fees incurred by you during the course of the arbitration process, to ensure that you would have adequate legal advice and that you are fairly represented".

53. This offer was repeated by the plaintiff's solicitors in letters of 18 May 2021 – the date of the grant of the interlocutory injunction – 28 May 2021 and 16 September 2021. The letters do not concede that there had been a trespass; counsel submits however that it is clear that the plaintiff's approach was to accept that Mr Cremins was entitled to compensation as the price of the cables being left in the ground, the position that it ultimately adopted at the hearing.

Mr Maguire's evidence

54. Mr Maguire gave evidence in relation to the matter generally and in particular in relation to a series of meetings he had with Mr Cremins in early 2021, after Mr Cremins had excavated the grass verge in December 2020, thereby removing the markers and exposing the cable. At that time, it appears that Mr Cremins was still

hopeful that the three turbines which were originally to be built on his land could still be erected. At a meeting on 25 March 2021, Mr Maguire confirmed to Mr Cremins that this could not be done. Mr Maguire stated that Mr Cremins told him that, in that case, the plaintiff had two choices: "You compensate me or you take the cable out of the ground". The quantum of the compensation was then discussed, with Mr Cremins estimating damages in the region of €7m, and explaining the basis for the calculation [see day 2, pp. 39 to 41].

55. The negotiations were conducted without rancour or the aggressive tone adopted by Mr Cremins in his correspondence. In fact, Mr Cremins went out of his way in his evidence to compliment Mr Maguire on his approach to the negotiations. However, they did not bear fruit, and the plaintiff ultimately applied for injunctive relief in May 2021 as we have seen.

56. On cross-examination, Mr Maguire accepted that "it was only…during the creation of the affidavit that technically [sic] trespass was discussed …up to that point, I didn't know whether it was a trespass or not a trespass. I knew there was greyness now because of the case in 2017, but my understanding of what trespass was or wasn't in this case, I didn't know" [day 2, p.122, lines 3 to 9]. However, Mr Maguire subsequently acknowledges that "…[o]n advice, it was decided that this is a technical trespass and it needs to go into the affidavit" [day 2, p.122, lines 15 to 19].

57. Mr Maguire stated that he had informed Mr Cremins at their third meeting in March 2021 that the cable could be removed, but that this would involve obtaining planning permission, an environmental impact study would probably have to be commissioned, and that legal advice in relation to the entire operation would have to be procured. He states that Mr Cremins' reaction was to say "…and I'll object, I'll object…" [day 2, p.138, line 25 to p.139, line 3]. Mr Maguire stated that removal of

the cable would "disrupt the operation of the windfarm", and referred to figures relating to the disruption set out at para. 41 of his grounding affidavit. He also referred to the possible "knock-on" effect of other landowners insisting on removal of the cable from their lands, not only in the 3km along which this particular cable was laid, but potentially in respect of cables laid along the roadside in every windfarm operated by the plaintiff.

Mr Cremins' evidence

58. Mr Cremins gave evidence in relation to his involvement with Mr Maguire ("a lovely person to deal with") and to his correspondence in which he constantly sought an acknowledgement that trespass had taken place. He stated that the first time that this was acknowledged to him was on the first day of the hearing. He referred in detail to an email he sent to Mason Hayes & Curran on 6 May 2021 – the day after the grant of the interim injunction – which summarised Mr Cremins' position at the time. As it is of some significance, and essentially represents Mr Cremins' current position, I will quote it in full:

> "1. I want SSE Airtricity to admit the grid cable under dispute, part of the Dromada Wind farm at Keale, Co. Limerick, is in Denis Cremins' land. Mason Hayes & Curran Solicitors who represent Dromada Windfarm have already, inadvertently, admitted this by putting the subject of their correspondence to me as 'lands at LK3305F at Keale, Athea, County Limerick. This land folio title is under my name, Denis Cremins.
>
> 2. I want SSE Airtricity to confirm that they will immediately seal off the grid cable situated on my land, with my permission of course, either with high security fencing or by having a security firm engaged on the site so that no one gets injured or killed. As you can see from my engineer's report yesterday

(5/5/21) which I have already emailed to you, she says this is an extremely dangerous site as a result of the live cables.

3. I would like you to confirm that you will immediately apply for planning for these grid cables on my land. However, should Dromada Windfarm fail to receive such a planning within twelve months (up until the end of April 2022) I want you to promise that you will remove the cables from land folio LK3305F.

If your answer is yes to the above three questions then we will secure the site immediately, you will apply for planning and subsequently remove the grid cable if the planning has not been granted on or before the 30th April 2022.

Provided that we are in agreement with all the above then:

1. I, Denis Cremins, will give permission for Dromada Windfarm to enter my land, folio no.: LK3305F to erect security fencing. A copy of the indemnity insurance will be required before entering.

2. I give my word that I will not object to any planning application for the grid cable that is on my land to any relevant authority, including but not limited to Limerick County Council and An Bord Pleanála.

3. I also give my word that I will not interfere with the grid cables located on my land (folio no.: LK3305F) and I will make this clear to the court as well.

As my engineer reported on 5 May 2021, this is an extremely dangerous site and it needs the full cooperation of both myself, Denis Cremins [sic] and SSE Airtricity to make it safe as soon as possible. Therefore, to protect the lives of people who may be coming on to the site now, partly as a result of the publicity this injunction has caused, please try to have the answers to the above three questions answered by the end of today, the 6th of May 2021. This

is not a time for playing games because I am getting extremely worried that someone might get killed as a result of this unauthorised grid cable. Again, I beg of you, Dromada Wind Farm Ltd to switch off the power, immediately, while we await a satisfactory outcome to the worrying ordeal that you have brought upon me.

Regards"

[Emphasis in original]

59. On cross-examination, it was put to Mr Cremins that the existence of the cable had no impact whatsoever on how he chose to use his lands between 2009, when they were laid, and 2016, when Mr Cremins discovered their existence. Mr Cremins stated that, had he known in 2009 that the cables were there, "…we'd have been probably in the courts in 2009 in relation to this" [day 3, p.54, lines 1 to 6]. He accepted that complaints he had made to Limerick County Council in 2012 in relation to the planning situation were for the purpose of bringing the plaintiff back to the negotiation table. He also agreed that "section 160 proceedings" had never been brought by him in relation to any perceived breach of planning laws, nor had the Council ever commenced any such action against the plaintiff.

60. Mr Cremins was asked about the 2017 proceedings. He accepted that the reliefs included a claim for damages, that the plenary summons did not seek an order that the cables be removed, and that the proceedings have not been progressed in any way. He accepted that he "took [matters] into his own hands" by writing letters rather than getting on with the 2017 litigation. However, he did not agree that his threats to dig up the cable were "unnecessary and inappropriate, or intended to escalate matters to put pressure on the plaintiff…" [day 3, p.83, lines 3 to 23]. He accepted that he was

trying to get the plaintiff's attention in the correspondence ("of course I wanted attention").

61. Towards the end of the cross-examination of Mr Cremins, counsel specifically asked Mr Cremins whether his "repeated threats to personally dig up the cable were 'unnecessary and unsafe and inappropriate'". Mr Cremins said "…they were unsafe but they weren't unnecessary because I was left with no other option to bring you to the table…" [day 3, p.109, lines 1 to 13].

Evidence of Nora Curtin

62. Ms Nora Curtin gave evidence on behalf of Mr Cremins. She stated that she was a civil engineer in Newmarket, County Cork, and had been in private practice for "about eighteen years". Ms Curtin averred that she had a "planning business" which she had operated for eighteen years, submitting planning applications on behalf of individuals to planning authorities.

63. She averred to having attended the property in October 2016 and to having seen the cable. She stated that Mr Cremins wanted her to confirm that the cable was within his folio. Her evidence was that she had ordered Land Registry maps and satisfied herself that these maps gave ownership to Mr Cremins "to the centre of the public road". It is notable that the first allegation of trespass on the part of the plaintiff came in a letter from O'Connell & Clarke Solicitors of the following month on behalf of Mr Cremins.

64. Ms Curtin was again instructed in 2021, at which point she caused a satellite survey to be carried out. In a report of 19 April 2021 which was exhibited to Mr Cremins' affidavit in opposition to the interlocutory injunction application, she expressed herself as "extremely taken aback when [Mr Cremins] informed me he had exposed the electric cable and that SSE Airtricity had come back to his property and

unloaded stone on top of the recently exposed high voltage cable without his consent".

65. In truth, Ms Curtin's evidence was adduced primarily for the purpose of establishing that the cables were laid within Mr Cremins' lands, a matter which had been conceded by counsel for the plaintiff in his opening of the case. Her report is quite cursory, and it does not seem to me that it is of much assistance to the court in relation to the issue of whether or not the cables should be removed.

Legal principles

66. The facts give rise to an important and interesting issue: where a party has tortiously interfered with the land of another, is it ever appropriate to grant the tortfeasor injunctive relief to preserve the effect of the tort, and if so, in what circumstances?

67. In *Patterson v Murphy* [1978] ILRM 85, the plaintiffs, who were musicians, instituted proceedings for damages and an injunction arising from the operation of a nearby quarry. Having heard the evidence, Costello J (as he then was) found that the plaintiffs had established acts of nuisance to a serious degree arising from the emanation of noise and dust from the quarry and from the emanation of noise and dust from a laneway along which lorries travelled to and from the quarry. The plaintiffs "were, in effect, driven out of their home"…and "were not displaying any exaggerated degree of sensitivity in acting as they did" [p. 95].

68. The defendants contended that, even if the plaintiffs' rights had been infringed, the court had a discretion to award damages in lieu of an injunction, and should do so in that case. Costello J accepted that the court had a discretion whether or not to grant relief by way of injunction, but stated that there were "well established principles" in this regard, which he summarised as follows:

"1. When an infringement of the plaintiffs' right and a threatened further infringement to a material extent has been established the plaintiff is *prima facie* entitled to an injunction. There may be circumstances however, depriving the plaintiff of this prima facie right but generally speaking the plaintiff will only be deprived of an injunction in very exceptional circumstances.

2. If the injury to the plaintiff's rights is small, and is one capable of being estimated in money, and is one which can be adequately compensated by a small money payment, and if the case is one in which it would be oppressive to the defendant to grant an injunction, then these are circumstances in which damages in lieu of an injunction may be granted.

3. The conduct of the plaintiff may be such as to disentitle him to an injunction. The conduct of the defendant may be such as to disentitle him from seeking the substitution of damages for an injunction.

4. The mere fact that a wrong-doer is able and willing to pay for the injury he has inflicted is not a ground for substituting damages. (See: *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287; and Kerr on Injunctions 6th Edition pp. 656, 657)."

69. In *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287, to which Costello J made reference, an electric lighting company erected powerful engines and other works on land near a house which was subject to a lease. Due to excavations for the foundations of the engines, and to vibration and noise emanating from them, structural injury was caused to the house, and annoyance and discomfort to the lessee, who brought an action against the company for an injunction and damages. The trial judge accepted that there was a continuing nuisance as regards the

lessee, and structural injury to the house, but he held that the lessee – and the reversioners, who also sued – were entitled to damages but not an injunction.

70. The plaintiffs appealed, and the Court of Appeal held that the refusal of the injunction by the trial judge was unwarranted, and that the appeal must be allowed. In his judgment Lindley LJ referred at p.315 to Lord Cairns' Act (21 & 22 Vict C27) – an Act of 1858 which conferred on the Court of Chancery in Ireland the jurisdiction to award damages in lieu of specific performance: in this regard see the dicta of Laffoy J. in *McGrath v. Stewart* [2016] 2 IR 704, para. 31 – s.2 of which "conferred upon the Court of Chancery jurisdiction which it had not before to award damages in lieu of an injunction". In relation to the exercise of the jurisdiction, Lindley LJ commented as follows (at pp.315-316):

> "The jurisdiction to give damages instead of an injunction is in words given in all cases…there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed…[w]ithout denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable

nuisances, such jurisdiction ought not to be exercised in such cases accept under very exceptional circumstances…".

71. In his judgment, AL Smith LJ commented at p.321 of the judgment that "…there is no suggestion of any conduct on the Plaintiff's part depriving him of his prima facie right to an injunction". He went on to state as follows (at p.322):

> "Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.
>
> In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section.
>
> In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.
>
> In my opinion, it may be stated as a good working rule that –
>
> (1) if the injury to the plaintiff's legal rights is small,

(2) and is one capable of being estimated in money,

(3) and is one which can be adequately compensated by a small money payment,

(4) and the case is one in which it would be oppressive to the defendant to grant an injunction:

then damages in substitution for an injunction may be given…

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication…".

72. Reference was also made to *Shelfer* in the judgment of Feeney J in *McKeever v Hay & Ors.* [2008] IEHC 145. In that case, pipes had been laid across the verge of a public road off the main Carrickart to Downings road in County Donegal which cut across the plaintiff's lands. The purpose of the pipes was to provide a water supply to houses on Island Roy, a small island off the coast of County Donegal. The plaintiff was an owner of one of the folios in "The Commonage", the name under which the land along which the pipes were laid was locally known, and she issued proceedings seeking an injunction and damages in respect of what she alleged was a trespass upon her lands without her consent.

73. At p.15 of the judgment, Feeney J commented that "…the plaintiff…created a situation where the group [of which the defendants were representatives] was able to proceed on a misapprehension that all consents could be obtained. The facts of this case do not demonstrate a wanton interference with the plaintiff's rights nor were the

group's actions oppressive or vindictive. They carried out the works at a time when they truly had a belief that the plaintiff would ultimately consent".

74. However, it was clear that the placing of the waterpipes resulted in a continuing trespass, notwithstanding that the pipes were laid on behalf of Donegal County Council. The Council had instituted compulsory purchase procedures that would result in the land where the pipes were situated being acquired compulsorily. Accordingly, Feeney J awarded damages for €7,500 for trespass up to the date of compulsory acquisition. Feeney J stated at p.31 that the court

> "…is satisfied that no injunction should be granted until the final completion of the compulsory purchase process and then only if that process does not result in final orders. That process has the capacity to ensure that legal permission and authorities in place for such pipes to remain and that appropriate and proper compensation has been identified and paid. This Court is satisfied that the implementation of any injunction must be postponed to allow and permit that process proceed to completion…if the compulsory purchase order process does not result in the way-leaves being obtained then a period of time would still be required to ensure that the residents of the Island Roy could arrange alternative water supply. This Court must recognise that to grant an injunction which would come into effect without providing adequate time to provide alternative water supplies would be oppressive".

75. In his judgment, Feeney J cited the principles set out by Costello J in *Patterson* set out at para. 68 above, and confirmed that, notwithstanding that *Patterson* was a nuisance case, those principles were "also relevant for the purpose of this case". The court confirmed that "…the starting point for consideration by this Court is that the plaintiff is *prima facie* entitled to an injunction. In such

circumstances the plaintiff will only be deprived of her entitlement to such injunction if very exceptional circumstances are identified. This is particularly so where the infringement is in the form of trespass rather than nuisance". [p. 25].

76. In addressing the principle enunciated by Costello J that if the injury to the plaintiff's rights is small and is capable of being estimated in money and can be adequately compensated by a small payment, Feeney J – significantly in the context of the present case – stated as follows: -

> "…However, the mere fact that damage is small is not of itself decisive. If a court comes to the conclusion that the plaintiff's property will remain substantially as useful to the plaintiff as before the act complained of, and does not take the property away from him and the injury can be compensated by money, then an injunction need not necessarily be granted. The court may still grant an injunction if the facts are such as to indicate that the court should exercise its discretion to do so…" [pp. 26-27].

77. Feeney J indicated his intention to follow "the well-established principles" identified by Costello J in *Patterson v Murphy* and reiterated by Millett LJ in *Jaggard v Sawyer & Anor* [1995] 1 WLR 269:

> "When the plaintiff claims an injunction and the defendant asks the court to award damages instead, the proper approach for the court to adopt cannot be in doubt. Clearly the plaintiff must first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement by the defendant, but also by overcoming all equitable defences such as laches, acquiescence or estoppel. If he succeeds in doing this, he is prima facie entitled to an injunction. The court may nevertheless in its discretion withhold injunctive relief and award damages instead" [p.287].

78. There is no significant disagreement between the plaintiff and the defendant in the present case that the principles set out above govern their dispute, although they differ as to the application of those principles. There is therefore a roadmap for this Court as to the factors to be considered as to what should be done with the cables. However, the plaintiff draws attention to the following dicta of Millett LJ in *Jaggard v Sawyer*:

> "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently…" [p. 288]

Analysis

79. In the plaintiff's statement of claim, the plaintiff claims declaratory relief that the defendant be prevented from interfering with or damaging the plaintiff's plant and equipment (reliefs 1 and 2), and reliefs 4 to 6 seek injunctive relief in this regard. The third paragraph of the reliefs is as set out at para. 40 above, *i.e.,* a declaration that, if the defendant is entitled to relief in relation to the cables, that the relief be limited to damages.

80. The defendant drafted his own defence which, as I have previously commented, is effectively a defence and counterclaim. While expressed as "declarations", the first three reliefs clearly seek injunctive relief directed at the removal of the cables from the defendant's land:

"1. A declaration that the plaintiff removes the 20000 KV live cable within my land in folio No.: LK3305F immediately as these live 20000 KV cables were laid on my land without my knowledge or permission.

2. A declaration that the plaintiff will reinstate my land to its original habitat.

3. A declaration that the plaintiff will reapply for planning for the Drommada windfarm [sic] as a number of the turbines built are as a result of having an option over my lands at the time when planning was granted in 2003. These turbines are now only 60 metres from my boundary. This would not have been possible without my land being a part of the original planning permission. These turbines are causing massive noise and shadow flicker as a result of being so close to my property."

81. The plaintiff has now accepted that the cables are laid in the plaintiff's land, and that it has committed what it calls a "technical trespass". Applying the principles approved by Costello J in *Patterson*, the defendant is therefore *prima facie* entitled to the injunction he seeks. It falls to this Court however to determine whether there are circumstances which should cause this Court to exercise its discretion to refuse the defendant an injunction. As the third principle set out by Costello J makes clear, the conduct of both parties must be examined in the exercise of the court's discretion.

The Conduct of the Parties

82. The defendant appears only to have become aware of the existence of the cables in 2016, some seven years after they had been installed. He instructed solicitors who, from their first letter of 24 November 2016, clearly intimated that the cabling works constituted trespass. When the trespass was repeatedly denied by the defendant, the defendant issued proceedings in September 2017: see paras. 20 to 23 above. If those proceedings had been prosecuted by the defendant, the issues in the present

proceedings might well have been resolved, whether by agreement or order of the court, by this stage.

83. However, for whatever reason, having issued the 2017 proceedings, the defendant made no attempt to progress them, and there does not appear to have been any significant contact between the parties until June 2019, when Mr Cremins wrote the letter of 13 June 2019, the text of which is at para. 24 above. This was followed by repeated emails to the plaintiff and to officials of its ultimate parent company in which the defendant repeatedly threatened to remove the cables, and stated that the plaintiff or its affiliates would be responsible for any injuries or fatalities that would occur.

84. What might have seemed an idle threat on the part of the defendant took on a different aspect when, in December 2020, the defendant excavated the verge using a digger and exposed some of the plaintiff's cable, so that the plaintiff had to send out operatives to cover up the cable with stone chippings and erect additional marker posts. This led to a number of meetings between representatives of the plaintiff and Mr Cremins until Mr Cremins renewed his threats to remove the cables, which in turn lead to the plaintiff's application for injunctive relief.

85. At the point of issue of the proceedings in 2017, Mr Cremins' conduct had been appropriate and even commendable. He correctly asserted that the plaintiff was trespassing on his land; when this was denied by the defendant, he issued proceedings, although it is notable that the 2017 proceedings did not seek the removal by the plaintiff of the cables. However, instead of progressing these proceedings, he embarked, from June 2019 onwards, on a campaign of emails which did him no credit. His evidence in court was that he wanted to get the plaintiff's attention; it is very clear that what he was trying to do was to avoid the legal process altogether, and

to force the defendant to negotiate with him on his terms. He did so by means of threats to remove the cables in the knowledge that such a manoeuvre was extremely dangerous, and would be seen as such by the plaintiff; that he acknowledged in his emails the possibility of injury or fatality arising, yet repeatedly asserted his intention to go ahead with the removal, shows his intention to intimidate and coerce the plaintiff into negotiation. The threats became all the more serious when he exposed the cables in December 2020.

86. This course of action ultimately forced the plaintiff into seeking the injunctive relief it was granted by Allen J. As counsel for the plaintiff pointed out, the plaintiff is not a "natural" plaintiff in the current circumstances, having committed trespass; the 2017 proceedings more accurately reflect the respective positions of the parties. However, it is difficult to criticise the decision of the plaintiff to seek injunctive relief, given the actions of the defendant.

87. Although the defendant did not seek removal of the cables by the plaintiff in the 2017 proceedings, seeking "damages for nuisance and trespass" instead, he now seeks an order in this regard by way of counterclaim. Whether the defendant actually wants the cables removed, and perhaps re-routed in another direction, must be open to doubt. The defendant has consistently attempted to agree monetary compensation with the plaintiff, and his contention is that compensation would amount to a substantial seven-figure sum. It is difficult to avoid the conclusion that money is what the defendant wants, particularly given the complete lack of evidence that the installation of the cables has impeded his use or inhibited his enjoyment of the lands in any way. An order that the plaintiff remove the cables – a situation which would cause serious problems for the plaintiff – would improve his bargaining power considerably.

88. However, as Costello J pointed out in *Patterson*, the conduct of both parties must be taken into account. There are reprehensible aspects to the conduct of the plaintiff also. It is not known whether the plaintiff sought legal advice on receipt of the correspondence, from November 2016 onwards, from O'Connell & Clarke, a well-known firm of solicitors specialising in environmental matters, intimating that Mr Cremins owned the land in which the cables were laid. One would have thought that the receipt of the 2017 proceedings at least would have caused it to do so. Likewise, one assumes that the legal position would have been reviewed on the receipt of a barrage of emails from Mr Cremins from mid-2019 onwards, asserting that the plaintiff had trespassed on his lands. In particular, the receipt of Ms Curtin's report by a solicitor's letter of 19 April 2021, to which I have referred at para. 30 above, must have caused the plaintiff to review its position, if it had not done so already.

89. By the time the plaintiff initiated the present proceedings, it is in my view clear that the plaintiff was aware that the cables constituted a trespass on Mr Cremins' lands. Mr Maguire all but acknowledged this in his oral evidence: see para. 56 above. While his affidavit did not explicitly address the question of ownership, the averment at para. 41 of the grounding affidavit of Mr Maguire, to which I have referred above, suggested that Mr Cremins did not own the grass verge. It set out all the steps taken by the plaintiff to prepare for the installation, and gave a clear impression that all appropriate steps had been taken by the plaintiff. The farthest the affidavit went as regards acknowledging a possible right on the part of Mr Cremins was in para. 48 of Mr Maguire's first affidavit, and para. 24 of his second affidavit: see paras. 36 and 37 above.

90. Counsel for the plaintiff conceded that the approach of the plaintiff in relation to the question of ownership was "coy" and "jesuitical"; counsel attributed this attitude to the fact that "Mr Cremins is the sort of litigant, unfortunately…if you give him an inch he tends to take a mile…" [day 1, p.159, lines 14 to 17]. In fairness to the plaintiff, the correspondence in which Mr Cremins vigorously asserted that a trespass had occurred was exhibited to Mr Maguire's first affidavit, and the court was therefore apprised by the plaintiff of Mr Cremins' position that a trespass had taken place. While it was perhaps understandable for tactical reasons to wish not to make concessions to Mr Cremins until it was absolutely necessary to do so, this led to an approach in the affidavits grounding the injunction which, it must be said, did not "front up" about the position regarding ownership, was less than frank, and skirted the boundary of misleading the court. Indeed, it seems extraordinary that the first occasion on which the plaintiff conceded that it had trespassed on Mr Cremins' lands was the first day of the hearing before this Court.

Are the plaintiff's proceedings still viable?

91. As the open concession that trespass had in fact occurred was made by the plaintiff for the first time at the hearing, counsel for the defendant submitted vehemently that the plaintiff's proceedings, which he contended were based on the plaintiff's entitlement to lay the cables in the grass verge, could not now be maintained and would have to be "reconstituted and brought properly": see para. 50 above.

92. The first two reliefs sought in the plaintiff's plenary summons and statement of claim are for declaratory reliefs in relation to the issue of whether or not the defendant should be prevented from interfering with or damaging the cables. The third relief, set out at para. 40 above, sought a declaration that any claim the plaintiff might

have be limited to damages. The fourth, fifth and sixth reliefs sought specific injunctive orders restraining interference with the cables or the windfarm generally.

93. Paragraphs 7 and 8 of the statement of claim – corresponding to para. 8 and 9 of the plenary summons, which has no para. 7 – contain the substantive causes of action on which the plaintiff relies, and are as follows:

> "7. Damages for interference or threatened interference with the plaintiff's property, and with the plaintiff's economic interests.
>
> 8. Damages for nuisance".

94. The plaintiff submits that, even if the cables constitute a trespass on the defendant's land, the defendant is not entitled to interfere with the cables and, in the words of the plaintiff, has "no entitlement to avail of self-help remedies" [written submissions para. 59]. The plaintiff relies in this regard on the decisions of the Court of Appeal of England and Wales in *Arthur v Anker* [1997] QB 564 and *Vine v Waltham Forest LBC* [2000] 1 WLR 2383, both of which concerned clamping of motor vehicles which were trespassing on private lands. In the latter case, the Court of Appeal found that the act of clamping a car, in circumstances where there was no statutory basis for doing so and where it could not be shown that the owner of the car had consented to or willingly assumed the risk of being clamped, was a tortious act of trespass to the car owner's property, notwithstanding the original trespass by the car owner.

95. The plaintiff in the present case maintains that it had operated on a mistaken basis, in laying the cables in the grass verge, that it was not infringing on the defendant's lands, and that in those circumstances, the interference by the defendant with the cables in December 2020 and his campaign of threats to interfere with the

cables unless the plaintiff negotiated with him constituted an actionable interference with the plaintiff's economic interests.

96. It seems to me that, even if the defendant had not threatened to remove the cables or interfered with them in December 2020, but had sought an order in his own proceedings that the plaintiff remove the cables, it would have been open to the court, while acknowledging the defendant's *prima facie* right to an injunction to restrain trespass, to refuse the injunction and confine the plaintiff to a claim in damages. It would seem to follow therefore that the defendant did not have the right to take matters into his own hands and threaten and indeed partially implement a course of action which could have had dangerous and life-threatening consequences, even leaving aside the economic damage to the plaintiff that removal of the cables would inflict.

97. I accept that there will of course be occasions on which a landowner who is the victim of a trespass or nuisance may take reasonable steps to abate or reduce the effect of any such actions with a view to asserting his rights and minimising his loss, or making his land safe. In the present case, there is no evidence whatsoever of any actual loss suffered by the defendant. Between 2009 and 2016, he was unaware of the existence of the cables, which did not interfere in any way with his use or enjoyment of the land. Even when he did discover their existence, and after raising the issue of trespass and finding it denied by the plaintiff, he issued the 2017 proceedings, and did not seek an order of removal of the cables, but sought damages instead. It is clear to me that his interference with the cables and threats to remove them were for the purpose of – as he characterised it himself – getting the attention of the plaintiff so that a settlement could be negotiated by a non-legal route.

98. In the circumstances, it seems to me that, even though a trespass by the plaintiff has occurred, the plaintiff has a stateable cause of action against the defendant which is capable of grounding an application for a permanent injunction. As counsel for the plaintiff has commented – see para. 43 above – the plaintiff's objective is to ensure that Mr Cremins cannot interfere with the plaintiff's cable and to obtain a court order to that effect. I do not accept that the plaintiff's acceptance that a trespass has occurred is fatal to its proceedings, although the circumstances in which this concession was made are a matter which have a bearing on the exercise of the court's discretion. Of course, it must be reiterated that Mr Cremins, as the "trespassee", has a *prima facie* right to restrain the trespass and seek the removal of the cables.

Exercise of the court's discretion

99. Both parties accept that the pressing issue that must be decided is whether or not, as the plaintiff urges, the cables be left where they are, or whether, as the defendant contends, the plaintiff be ordered to remove them. In the former case, the plaintiff accepts that it must compensate the defendant, and envisages quantifying the compensation in a further module in these proceedings, or by mediation or arbitration. However, the plaintiff essentially asks the court to permit the continuance of its trespass.

100. The fourth of the principles set out by Costello J in *Patterson* emphasises the unwillingness of the courts to countenance a wrongdoing simply because the wrongdoer is in a position to pay damages in compensation. As the High Court stated in *Allied Irish Banks plc v Diamond* [2012] 3 IR 549, the courts have always sought to guard property rights, particularly in the context of interlocutory injunctions. Clarke J (as he then was) vividly set out the rationale for this principle:

> "Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value". [P. 590].

101. In my view, the circumstances of the present case are quite distinct from the sort of situation envisaged by Clarke J in this passage. I do not think the actions of the plaintiff in laying the cables in land owned by the plaintiff could be characterised as wilful or reckless. The plaintiff attempted to negotiate a situation where three turbines and the cables could be placed on the defendant's lands. This negotiation proved unsuccessful. Mr Maguire set out the plaintiff's reasons for laying the cables along the roadside, and to steps taken to ensure that this was done in accordance with what the plaintiff considered to be appropriate measures, e.g. obtaining the consent of the road authority pursuant to s.13(10) of the Roads Act 1993. Mr Maguire testified as to the genuine belief of the plaintiff that it had adopted the proper procedures to progress the development. I have no reason to doubt his evidence in this regard, nor is there any basis in evidence to suspect that the plaintiff laid the cables where it did in an opportunistic fashion, knowing that it was committing a trespass in doing so. In the

words of Feeney J in *McKeever v. Hay* "there was no wanton interference with the [defendant's] rights".

102. The defendant complained of the trespass for the first time in 2016, some seven years after the cables had been installed. On receiving an unsatisfactory response from the plaintiff, he initiated the 2017 proceedings, but did not, as part of the reliefs set out in the summons, seek an order directing the plaintiff to remove the cables. These proceedings were not advanced in any way, and the defendant did not seek an order in this regard until service on 31 August 2021 of what is effectively his defence and counterclaim.

103. The plaintiff contends that this inaction on the part of the defendant constitutes laches, which should result in a refusal of the claim by him for an order that the cables be removed. Whether or not that is the case, I am of the view that the failure to prosecute the 2017 proceedings and the campaign waged by the defendant from June 2019 onwards make it clear that the intention of the defendant was to force the plaintiff to the negotiating table so that a monetary settlement could be concluded. I do not accept that the defendant had genuine concerns about safety issues relating to the location of the cables, which had been undisturbed and, it appears, unnoticed between 2009 and 2016.

104. It also seems to me to be the case that the only issues in relation to safety arose because of the threats by the defendant and his action in exposing the cables in December 2020. The unopposed evidence of Mr Maguire suggests that the cables pose no threat as regards safety if left underground. The trespass undoubtedly constituted an interference with Mr Cremins' rights; however, there was no evidence of any practical consequences for the use or enjoyment by him of land which was either afforested or unused.

105. As against that, there is reason to be sharply critical of the manner in which the plaintiff conducted itself in its dealings with Mr Cremins. It incorrectly asserted, in the initial correspondence of Mr Cremins, that there was no trespass. This evolved into a more equivocal stance, culminating in an application for injunctive relief in which the plaintiff never clarified its position as to whether or not it had committed a trespass. If Mr Cremins had forced the issue and contested the interlocutory injunction, rather than acquiescing in it, the plaintiff would have had to acknowledge the trespass openly, and the court might well have had hard things to say about the manner in which the plaintiff approached the application.

106. There have been aspects of the behaviour of both parties which have been unattractive, to say the least. While I deprecate the manner in which the plaintiff approached the issue of trespass in the injunction application, I do consider that Mr Cremins' behaviour in threatening to interfere with the cables required action, and to that extent I accept that the plaintiff's application was justified. The issue now is as to whether the order made on an interlocutory basis should be continued.

107. As regards the second of the principles set out by Costello J in *Patterson* – see para. 68 above – the injury to Mr Cremins' rights could be said to be small, in the sense that there has been little or no interference with his use or enjoyment of the lands. As against that, there has been a significant trespass on his land, with the laying of high voltage cables across it. This Court has no evidence to assist it as to whether a "small money payment" would adequately compensate Mr Cremins; he is vehemently of the view that he is entitled to substantial compensation.

108. The court must also consider whether it would be oppressive to the plaintiff to order that the cables be removed. The evidence before the court of Mr Maguire in this regard is set out at para. 57 above; that the cable could indeed be removed, but that

this would involve obtaining planning permission, an environmental impact survey, and legal advice, with very substantial costs accruing daily. The Order would likely render the plaintiff in breach of its contractual obligations to EirGrid.

109. There is no indication before the court of how long all of this would take. However, it is clear that removal of the cable would cause enormous disruption to the operation of the windfarm while a route around the 250m of Mr Cremins' property was found, in addition to the significant financial losses. Also, the "elephant in the room" – to use that hackneyed phrase – is the possibility of other landowners along the 3km route also insisting on removal of the cables from their respective portions of the grass verge in the hope of exerting pressure on the plaintiff with a view to negotiating substantial compensation, and also the calamitous possibility of similar orders being sought and made in each situation in which a windfarm – whether owned by the plaintiff or not – has laid a cable along a public road.

Conclusions

110. As the case law makes clear, each case must be decided on its own facts. The conduct of neither party in the present case has been beyond reproach. It seems to me however that the appropriate and just result is that no order should be made directing the plaintiff to remove the cables, but that appropriate orders should be made with a view to establishing the compensation to be paid to the defendant by the plaintiff for its admitted trespass.

111. I am particularly influenced in this conclusion by four overarching factors:

(i) it does not appear to me that the plaintiff was aware that it was trespassing on the defendant's land when it laid the cables in 2009;

(ii) the defendant has not been able to point to any particular interference with his use or enjoyment of the lands;

(iii) the motivation of the defendant has always been to extract maximum compensation from the plaintiff, rather than any serious concern over safety;

(iv) there would be profoundly disproportionate consequences for the plaintiff if the removal of the cables were ordered.

112. The defendant is the victim of trespass, and deserves to be compensated. This Court expresses no view as to whether that compensation should be large or small. However, both parties agree that, in the event that the court does not order removal of the cables, a mechanism or further module must be put in place to assess compensation. It also seems to me that any such module would have to address the issue of the terms upon which the cables would remain on Mr Cremins' land, and the respective rights and obligations of the plaintiff as the owner of the cables, and the defendant as the owner of the land in which they are laid.

113. I will therefore allow the parties a period of 10 days from the date of delivery of this judgment to give them an opportunity to make written submissions of not more than 2000 words in relation to the orders to be made, in particular addressing:

(a) the issue of whether the interlocutory order, which remains in place for the moment, should be made permanent;

(b) the issue of whether an order should or can be made granting access to the plaintiff to the cables for the purpose of matters such as repair or maintenance, and if so, on what terms;

(c) the arrangements for a further module in relation to compensation, or

(d) agreed directions as to mediation or arbitration; and

(e) the costs of the proceedings.

114. The parties must observe the word limit set out above; longer submissions will not be accepted, nor will any attempt to reargue any of the issues addressed above. I

reserve the right to convene a hearing in relation to the orders to be made if I deem it necessary, but my intention is that any such hearing would take place before the end of this term.