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Matthew Ryan, Esq,
Ryan Solicitors,
46 Harrington Street,
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6th June 2020

Re: Dublin Simon Community.

Dear Matthew,

I have advised previously that on the instructions received, there is no evidence of the existence of any rights in respect of the culvert, but there was a risk that at some time historically the mill premises enjoyed a right in respect of it. As the mill is no longer in existence, I am fully satisfied any right that formerly existed for the benefit of the mill has been released by abandonment.

I have been advised that further investigations have revealed that three potential storm water connections outside the boundary of the site that may have a parasitic connection to the culvert. As these were connected without the knowledge of the owner of the site, the use has been *clam*, and not as of right, so that no prescriptive rights could be acquired.

Even if there were prescriptive rights, those rights would be to discharge from the dominant tenement, and would not extend to a right to require the drainage conduit or conduits on the servient tenement to remain preserved in their original state. If there is a right to discharge into a conduit on my land, I may replace that conduit so long as I do so with a similar or improved structure so that there is no infringement of the right. The measure of the right is the history of the use, and has been identified by technical assessment.

As previously advised, Querist is entitled to improve the watercourse by changing it from a culvert to pipes of a similar capacity provided that doing so would not create any real and substantial interference with the exercise of such theoretical and unlikely third party rights by ensuring that there is no material change to the efficacy of the watercourse.

I have read and considered the IE Consulting assessment report, which outlines the assessment of the existing culvert and the design capacities required for a proposed replacement, the report of Rory O'Moore which identifies and explains the proposed design solution of three 900mm diameter concrete pipes and the map prepared by Hayes Higgins Partnership of the route of the proposed new system which tracks the route of the existing culvert.

I am satisfied from my understanding of this material that the proposed works will not infringe any third party rights that may possibly exist in the respect of the former culvert. The design capacity of the proposed

solution has been fully modelled to provide storm water drainage capacity for all potential flow rates based on the surrounding lands and the potential connections.

As such the proposed design solution should not create any real or substantial interference to the identified potential drainage connections.

Please do not hesitate to contact me if I can be of any further assistance.

Best wishes,

Yours sincerely,

Peter Bland SC

Enc.

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14th May 2019

Re: Dublin Simon Community.

Dear Matthew,

I am instructed that Querist acquired a site at Old Nangor road in Clondalkin in 2018. Planning permission has been granted for the development of a small block of apartments on the site. It was discovered that there is a reasonably large culvert running across the rear of the site. Although the deed map indicated pipe work traversing the site, a survey carried out prior to contract did not identify the culvert.

Querist has received engineering advice to replace the existing culvert structure with two modern pipes following the same course and of equal capacity. These pipes could be bridged over to secure the orderly and efficient development of the site.

The culvert is not in the charge of South Dublin County Council, and it should be confirmed also that Irish Water confirms that it is not vested in it under the Water Services Acts, 2007-2014. The belief is that the culvert originally served a mill that was located about 100 metres away from the site. The mill no longer exists, and it has been replaced by the Old Mill apartment complex.

Working on the premise that the culvert is an artificial watercourse that historically served a mill, it would follow that the mill owner is likely to have held an easement of conduit in respect of the culvert. This right probably came into existence either on the severance of the dominant and servient tenement as an implied right by way of grant or reservation, or it could have been asserted as a prescriptive right. In any event, the culvert inspection report of Owen Moran of the 3rd of January, 2019 records that it is understood that the culvert may have been blocked off during the building of the Old Mill apartment complex, but this cannot be confirmed. I cannot tell from the report whether it is believed that the former mill premises utilises the culvert for any purpose, such as surface water drainage. If it is the case that the conduit was blocked on the Old Mill apartment complex and it no longer serves that tenement by way of drainage or otherwise, then it can be argued that such right as may have existed for the benefit of the Old Mill premises over Querist's site has been extinguished by implied release under the doctrine of abandonment.

If A has a right of conduit over B's lands to serve a mill, and the mill is demolished with access to the culvert sealed, with such works having the character of permanence, then the non-user coupled with evidence of intention to permanently relinquish the right is sufficient to give rise to an inference of abandonment. The

principle of abandonment was described in *Gotobed v. Pridmore* (1970) 115 SJ 78 by Cumming Bruce LJ as follows:

“To establish abandonment of an easement the conduct of the dominant owner must, in our judgement, have been such as to make clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement abandonment is not, we think, to be lightly inferred. Owners of properties do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use of it.”

It is often repeated that mere non-use does not amount to abandonment. For example, in *Cullen v. Dublin Corporation*, Unreported, Supreme Court, 22nd of July, 1960, an easement of watercourse that was not utilised for 32 years, Kingsmill Moore J said that where the right is valuable the question arises as to why any owner would abandon it when it potentially enhances the value of his lands. Therefore, there must be non-user coupled with evidence of an intention to abandon, such as the blocking of a right of way with a wall followed by a long period of non-user.

In the case where a dye works had a right to build a stream but where the works had been demolished, the person who claimed to commence the pollution 25 years later under the same right was unsuccessful: *Crossley & Sons Ltd v. Lightowler* (1867) LR 3 Eq 279.

Review of the planning file leading to the Old Mill apartment complex might possibly reveal whether the culvert is being utilised for any means of drainage.

The demolition of the mill could also be fatal to an express grant or prescriptive acquisition of the right to a millrace for such right could no longer be exercised.

Section 39 of the Land and Conveyancing Law Reform Act, 2009 introduced a provision for the automatic statutory extinguishment of unregistered easements and profits acquired by prescription or implication on the expiration of a 12 year continuous period of non-user, provided that at least three years of the period of such non-user occurred after the commencement of the Act on the 1st of December, 2009. Statutory abandonment is easier to establish than common law abandonment since statutory abandonment only requires a “12-year period of non-user” and there is no further requirement to adduce evidence sufficient to raise the inference of an intention to abandon.

A further important distinction between statutory abandonment and common law abandonment is that common law abandonment can be relied upon to extinguish rights acquired by any means, but statutory abandonment under section 39 is only effective in respect of unregistered rights acquired by prescription or implied grant of reservation.

Such right as may be claimed in this case is not registered, but it could conceivably have been created by an express grant or reservation.

In so far as I can ascertain from the culvert inspection report, the culvert is not dry in that, for example, photograph 002/015 illustrates water coming from the breached culvert into a trial hole. The water may come from the former mill premises, or alternatively, it could come from an alternative location such as the community hall as contemplated by Mr Morgan in his note to photograph 002/009.

On the relatively limited information to hand, it does seem to be a viable proposition that such right as originally existed for the benefit of the mill premises has been abandoned when the mill was demolished. The concern is that there may be some other parasitic rights acquired by either the mill premises or other properties who could have joined connections to the culvert. If such connections took place secretly, or in circumstances

where the owner of Querist's premises could not reasonably become aware of the connection, then no rights could be acquired by prescription as subsequent user would not be as of right in that it would be, in the language of easements, *clam*.

The next question that arises is whether, working under the premise that there is a right of conduit held by some party in respect of the culvert, Querist as servient owner is entitled to remove the culvert and replace it with pipes to facilitate the development of its premises. Although there has been some debate on the issue, the better view is that a right to lay pipes or culverts in land and use them exclusively is an easement and no title to the land comprised in the conduit passes to the dominant owner. The servient owner accordingly owns the culvert, subject to the dominant owner's right to use it.

Prima facie the chattel is part of the land acquired by Querist. The dominant owner has implied rights to enter onto the servient land to repair the pipe, and can effectively be under a duty to do so if it leaks, since he has no right to create a nuisance by a leaking pipe. Where the servient owner uses the pipe, he is also entitled to repair it. Unless required by statute or contract, there is no obligation on the servient owner to repair a pipe.

There is no definitive authority on the question as to whether a servient owner can effect repairs to the certain matter of an easement without agreement with the dominant owner or against the dominant owner's wishes. I do not see any difficulty in principle with the servient owner doing so. By analogy, in the case of a right of way, the servient owner can do whatever he wants on his land so long as he does not interfere with the lawful use and enjoyment of the right of way, and it cannot reasonably be argued that the resurfacing, repair and improvement of the right of way amounts to a real and substantial interference with its exercise. Similarly, the replacement of an old culvert with new pipes cannot be said to interfere with the exercise of right of conduit if there is a preservation of the flow. If the culvert is leaking at any point, or it can be established that it is likely to leak, then the servient owner would be acting within his right in abating the nuisance or apprehended nuisance. Again, working by analogy, just because there is a right of way over my land does not mean that I have to suffer it descending into potholes just because the dominant owner does not exercise his ancillary right to carry out repairs.

The dominant owner could not replace the conduit with pipes as such would alter the character of the right and in theory at least increase the burden on the servient tenement. But, again, I see no difficulty in principle to the servient owner changing the character of the conduit, when there is no real or substantial interference with the exercise of the right (if any).

In summary, the following conclusions arise:

- (a) There is no evidence of the existence of any rights in respect of the culvert, but there is a risk that at some time historically the mill premises enjoyed a right in respect of it, and that other properties may drain into it.
- (b) It is safe to conclude that any right that formerly existed for the benefit of the mill has been released by abandonment.
- (c) It would be difficult for owners who connected into the culvert to assert prescriptive rights if the owner of Querist's premises could not have reasonably ascertained the fact of those connections.
- (d) Operating under the premise that there may be prescriptive rights to use the culvert as a drain from premises on its route, Querist is entitled to improve the watercourse by changing it from a culvert to pipes of a similar capacity provided that doing so would not create any real and substantial interference with the exercise of any such rights. Querist's right to do so would be strengthened if Querist's land drained into

the culvert at any point.

- (e) Whether or not Querist's lands are also served by the culvert, or whether the culvert is leaking at any point so as to justify abatement of that nuisance, I am satisfied to conclude that Querist will not be restrained from replacing the culvert with pipes of a similar capacity ensuring that there is no material change to the efficacy of the water course.

I enclose a note of suggested fees.

Please do not hesitate to contact me if I can be of any further assistance.

Best wishes,

Yours sincerely,

Peter Bland SC

Enc.