

BETWEEN/

KERRY COUNTY COUNCIL

Plaintiff

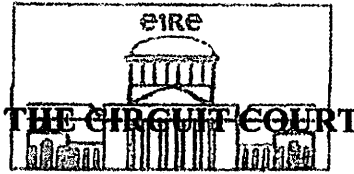
AND

SEAMAS O'SULLIVAN

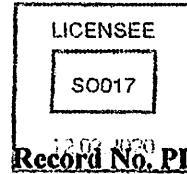
Defendant

AFFIDAVIT OF MIKE FLYNN

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SOUTH WESTERN CIRCUIT

COUNTY OF KERRY

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000, AS
AMENDED

BETWEEN/

KERRY COUNTY COUNCIL

Plaintiff

-and-

SEAMUS O'SULLIVAN

Defendant

AFFIDAVIT OF MICHAEL FLYNN

I, MICHAEL FLYNN, Consulting Engineer, of 4 Bindon Street, Ennis in the County of Clare, aged eighteen years and upwards MAKE OATH and say as follows:

1. I am a Consulting Engineer and a Director of Hassett Leyden & Associates, Consulting Engineers. I make this Affidavit on behalf of the Defendant and I do so from facts within my own knowledge, save where otherwise appears, and where so otherwise appears, I believe the same to be true and accurate in every respect.
2. I say that I was instructed by the Defendant herein to carry out an inspection of the fencing on his property in the context of the within proceedings, and to produce a report on relevant issues arising in respect thereof. I carried out my inspection on the 18th June 2019 and thereafter produced a report date the 29th August 2019. I beg to refer to a copy of my report and appended photographs, upon which marked with the letters and numbers "MF 01" I have endorsed my name prior to the swearing hereof.
3. I note that the Plaintiff herein seeks orders directing the Defendant to demolish and remove from his lands fencing which is shown in green at the points T and S, U to V, W to X and Y to Z on the map attached to the Notice of Motion herein (hereinafter referred to as the 'enforcement map'), on the grounds that same constitutes unauthorised development.
4. I say that from my examination of both the locus and the enforcement map, the fencing sections in question are as follows:
 - a. T is a small spur section of fence;
 - b. S is a small spur section of fence;

- c. U to V is circa 110 meters in length;
 - d. W to X is circa 230 meters in length;
 - e. Y to Z is approximately 250 meters in length.
5. My instructions from the Defendant are that the current fencing on his lands commenced in December 2006 and was completed by September 2008, almost ten years prior to the commencement of these proceedings. I am further instructed that repairs were carried out to certain localised sections of fencing in March and April 2014, following damage caused by Storm Darwin. I am also instructed that sections of the fencing in question and, in particular large sections between Y to Z, were not in fact damaged and, thus, not repaired following the said storm.
 6. During my inspection of the Defendant's property on the 18th June 2019 I took measurements and photographs of the locus of the fencing. The fencing was examined from the entrance to the lands to the north with the photographs appended to my report illustrating same. The entrance is located near point T, being the closest point as referred to on the enforcement map. Taking the first pole at the entrance gateway at point T, there are 26 timber poles of 6" diameter extending to point T. All poles are 6" in diameter and of a height of no more than 1.7m extended between the poles to a height of 1.9m. At pole 26, or point T, there is a slight spur to include 1 timber pole and 2 metal poles, with the metal poles concreted into the rock of the cliff edge.
 7. At pole 36, representing point S on the enforcement map, a spur is also provided protecting the edge of the cliff and the gorge in question, which includes 5 metal poles concreted into the stone surface. 6 wires are provided between the poles and their height does not exceed 1.7m. The fencing continues with 6" timber posts driven into the ground with 6 wires to pole 50, which corresponds with the end of a stone wall. The remaining poles to the 50th pole consist of timber poles with the exception of 1 steel pole, again at a height of no more than 1.7m with 6 wires.
 8. Pole 50 on the enforcement map represents point U, with pole 73 being point V. Point V to W i.e. between poles 73 and 84, consists of 6" timber poles with a plastic mesh provided, with point W continuing to point X around additional gorges with timber posts, again at a height of 1.7m with 6 wires. At point X the fence crosses over an existing stone wall and runs along the inside of the existing stone wall to a point which I assume to be point Y at pole 151. My assumption in this regard has been that there is no difference in the poles as examined or a specific pole or identifying mark to indicate point Y, and this has simply been taken as the last pole in the particular section of field. From point Y to point Z carried from pole 147 to pole 189 and, again, the poles consist of 6" timber posts with 6 wires. Some of the poles have been extended with metal hooks, however there is no distinction between the poles as examined.
 9. Having fully examined all the poles and wires etc., it is difficult to differentiate between any replaced or repaired sections of fencing. Whilst I appreciate that my inspection was only carried out in June 2019, it does appear to me that the poles were simply re-erected and provided with new wires where required, with the majority of repair works being localised in manner. This would accord with the instructions I have received from the Defendant.

10. The photographs appended to my report illustrate the condition of the fencing poles and their location. It should be noted from the photographs that the poles are along the edge of the grazing line and provide for stockproof fencing as there is a significant drop off in some locations, particularly along the cliff line to the north shore. This clearly would be an issue of serious safety concern to the Defendant, who is attempting to maintain and graze cattle within his lands. In this regard, I beg to refer specifically to photographs 18, 19, 20 and 21 which clearly show cattle grazing during the course of my inspection right up to the particular fence lines in question. The photographs in question clearly show the enormous danger to the Defendant's livestock which would exist if the perimeter of these fields was not properly fenced.
11. I am at a loss to understand why the specific sections of fencing in question have been identified in the enforcement map, as the fencing is generally consistent throughout the Defendant's lands, with timber post and wire and the occasional metal post provided, particularly around the cliff edge due to the rock beneath. Whilst there are areas of fencing where mesh has been provided between the poles, these areas of fencing have in fact been excluded from the enforcement map.
12. I note that the Plaintiff herein is relying on Affidavits sworn by three members of the public to ground the claim that sections of the fencing were repaired and/or replaced. However, having studied the Affidavits in question, it appears to me that same are unclear on the dates and specific locations of the repaired fencing, and little is provided by way of photographic evidence or measurements to support their claims.
13. I particularly note that in his Affidavit sworn on the 9th July 2018, Mr. Matthew Hopper claims that in February 2014 *"viewed from the elevated section of Tralee Golf Club it was possible to see the destruction of the fencing continued along the entire northern section of the Island to the Castle Strand."* He claims that *"from this location at Tralee Gold Club (he) was able to see the impact of the storm.....between points Z to Y, X to W and V to I"* on the enforcement map. However, I say and believe that the closest point on Tralee Golf Club to the north of Fenit Island would be a view of over half a kilometer, and I sincerely doubt that Mr. Hopper would have been able to see such alleged damage from such a distance. In this regard, I note that no photographic evidence has been adduced by him in support of this aspect of his claims.
14. I say and believe that the lines of fencing shown on the enforcement map are not strictly accurate. The point Y shown on the enforcement map was difficult to locate, as the fence between X and the presumed position of Y runs inside an existing stone wall. Furthermore, my instructions are that large sections of fencing were undamaged by the storm, including a 175m section along the section along the section Z to Y, and over 30m of fencing along section X to W. In those circumstances, it appears that significant sections of fencing at issue in these proceedings were never repaired since they were first erected. This, together with the fact that specific locations of repair cannot easily be identified, shows a clear lack of accuracy in the preparation of the enforcement map specifically, and the proceedings generally, by the Plaintiff herein. In this regard, it is also important to note that the decision of An Bord Pleanála does not state which specific sections of the fencing on Defendant's lands they have

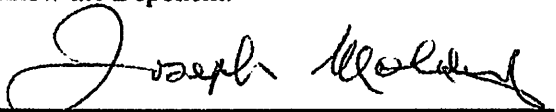
deemed to be unauthorized, and certainly does not identify the specific sections shown in the enforcement map.


15. In conclusion, I say and believe that, from my inspection of the Defendant's property, there is no clear distinction between those sections of fencing which have not been repaired and those that have. All the fencing consists of timber post and wire, with the exception of the locations where metal posts are required i.e. at the cliff edge. It is my professional view that all the fencing in question in these proceedings is simply general agricultural stock proof fencing which protects the Defendant's cattle from wandering or suffering injury. In this regard, I note that the An Bord Pleanala Inspector accepted that the fencing was consistent with what would normally be considered agricultural fencing. Furthermore, I say that an examination of the photographs appended to my report will show - quite clearly in my view - that the fencing does not detract from the overall views of the shoreline, is not obtrusive and is, in fact, quite difficult to see at a distance. Lastly, I would reiterate the point that the fencing in question is essential to the safety of the Defendant's livestock and, thus, to his farming enterprise.

16. In the circumstances, I pray this Honourable Court to refuse the relief sought in the Notice of Motion herein.



SWORN by the said **MICHAEL FLYNN** on
the 12 day of February 2020, at
Ennis in the County of Clare before me a
Commissioner for Oaths/Practising Solicitor and
I know the Deponent.



COMMISSIONER FOR OATHS/PRACTISING
SOLICITOR 

The Affidavit is filed by S.T. O'Sullivan & Co., Solicitors for the Defendant, of 6 Bindon Street, Ennis in the County of Clare, on this 12 day of February 2020.

THE CIRCUIT COURT

Record No. PL289/2018

SOUTH WESTERN CIRCUIT

COUNTY OF KERRY

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000, AS
AMENDED**

BETWEEN/

KERRY COUNTY COUNCIL

Plaintiff

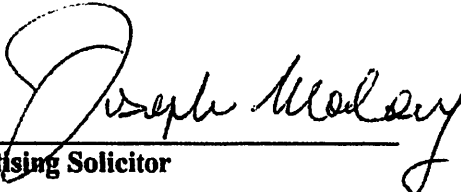
-and-

SEAMAS O'SULLIVAN

Defendants

"MF 01"


Michael Flynn


Practising Solicitor

HASSETT LEYDEN & ASSOCIATES

ARCHITECTS, CIVIL ENGINEERS & PROJECT MANAGERS

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encl Photographs

copy to

Mr. Shea O'Sullivan,
S. T. O'Sullivan & Co.,
Solicitors,
6 Bindon Street,
Ennis,
Co. Clare.

29th August 2019.

Re: Kerry County Council -v- Seamus O'Sullivan.
Record No. PL288/2018.

Dear Shea,

We thank you for yours of the 30th April 2019 in respect to the above mentioned matter.

We confirm that we have received the documentation as attached to your letter and further confirm on your clients' instruction we have attended their property located at Fenit Island, Co. Kerry on the 18th June 2019, to ascertain the condition of the fencing and the lands as owned by your goodself on Fenit Island.

We attach herewith 2 sets of photographs indicating the condition of the fencing as of our inspection of the 18th June 2019.

It is acknowledged by the writer that the duty of the expert is to assist the Court as to matters within my field of expertise and that this duty overrides any obligation to the party paying my fee in this regard.

1. Introduction

It is understood that this particular matter arises out of Enforcement Proceedings as issued by Kerry County Council on the 13th July 2018, where effectively the order dictates that by reference to the Enforcement map as attached to the Enforcement Proceedings dated June 2018 drawing HOP/018/013/ENF/LOC that the fencing presently situated upon these lands along the line shown in green between points T & S, U to V, W to X and Y to Z on said enforcement map comprises an unauthorised development.

Directors:
Michael Flynn,
B.A., B.A.I., C.ENG.,
M.TECH., M.I.B.C.I.,
M.I.E.I.

Maximilian Kraus
(German)
DIP. ARCH., M.B.I.A.I.

Consultant:
James Hassett,
B.E., C.ENG., M.I.C.E.,
M.I.STRUCT.E., M.I.E.I.

Member of:



Engineers Ireland
Association of Consulting
Forensic Engineers

The order further confirms that they are to cease forthwith and refrain from the erection, replacement, repair and/or renewal of fencing on said lands.

It is claimed in this regard that works have been carried out by the Defendants to these sections of fence lines which constituted a development. We wish to confirm our instruction in this regard to ascertain the condition of said fence line and to inspect same to which we understand the following:-

The lands are registered and owned by a Mr. Seamus O'Sullivan and refer to Folios KY17067 and KY17069 as lands held by Mr. O'Sullivan on the north side of Fenit Island.

The indicated sections of fences as described in the enforcement map equate to fence line UV circa 110m, fence line WX 230m and fence line YZ 250m. Fence sections T and S relate to small spur sections on the existing lands.

We understand that all fencing on the lands of Mr. O'Sullivan commenced and exist on commencement in December 2006, however was not completed until September 2008. It is therefore understood that the fencing in question commenced 11½ years prior to the commencement of these proceedings and was fully complete two months short of 10 years prior to the commencement of proceedings. Following certain damage which was caused to parts of the fencing in a severe storm, namely Storm Darwin in February 2014 repairs were carried out to localised sections of the fencing in March and April of 2014. It is understood that the particular repairs did not alter the structure, character or location of the fencing whatsoever and merely consisted of the reinstatement of certain poles which had been knocked down by the storm, reattaching wires and adding some replacement strands of wires in a small number of poles where necessary. Again, these works were carried out in a localised manner as would be expected in normal agricultural use.

We understand that Kerry County Council are relying on affidavits by Mr. William Parker, Mr. Matthew Hopper and Mr. Michael Corrigan. It is understood that the affidavits of these gentlemen claim to have knowledge of the dates of repair, however these affidavits were found to be generally unclear particularly in respect to the extent and the specifics of the repairs.

We further understand from the Defendants in this regard that sections of the fencing as indicated, particularly of large sections Z to Y were in fact undamaged and unrepaired following the particular storm.

2. Inspection

Our inspection took place on the 18th June 2019. We confirm measurements and photographs were taken of the locus of the fencing.

The fencing was examined from the entrance to the lands to the north with the attached photographs illustrating same. The entrance is located near point T being the closest point as referred to on the enforcement map and we note taking the first pole at the entrance gateway at point T, there are 26 no. timber poles of 150mm diameter extending to point T. All poles are 150mm in diameter and of a height of no more than 1.7m extended between the poles to a height of 1.9m.

At pole 26 or point T, there is a slight spur to include 1 no. timber pole and 2 metal poles with the metal poles concreted into the rock of the cliff edge.

At pole no. 36, it represents point S on the enforcement map and from this position a spur is also provided protecting the edge of the cliff and the gorge in question which includes 5 metal poles concreted into the stone surface. 6 no. wires are provided between the poles and again their height would not exceed 1.7m. The fencing continues with 6" or 150mm timber posts again driven into the ground with 6 no. wires to pole 50 which also corresponds to the end of a stonewall with the remaining poles to the 50th pole consisting also of timber poles with the exception of 1 no. steel pole again at a height of no more than 1.7m with 6 no. wires.

Pole 50 on the enforcement map would represent point U with pole 73 being point V. Point V to W i.e. between poles 73 and 84 consists of 150mm timber poles with a plastic mesh provided with point W continuing to point X around additional gorges with timber posts again at a height of 1.7m with 6 no. wires. At point X the fence crosses over an existing stone wall and runs along the inside of the existing stone wall to a point which we assume to be point Y at pole 151. The assumption in this regard is that there is no difference in the poles as examined or a specific pole or identifying mark to indicate point Y and this has simply been taken as the last pole in the particular section of field. From point Y to point Z carries from pole 147 to pole 189 and again the poles consist of 6" timber post poles with 6 no. wires. Some of the poles have been extended with metal hooks, however again there is no distinction between the poles as examined.

On full examination of all poles, wires etc whilst we note that our inspection took place in June 2019, it is difficult to differentiate between any replaced or repaired sections as claimed by the local authority in this regard and we would suspect in this regard as instructed by the Defendants that the poles were simply re-erected, provided with new wires where required with the majority of the repair works being localised in manner.

We further note that the Defendants have confirmed that large sections of the fencing particularly between sections Y to Z were in fact undamaged to which they will confirm and give evidence.

The attached photographs illustrate the condition of the poles and their location and we again note from the attached photographs that the poles are along the edge of the grazing line and provide for stockproof fencing as there is a significant drop off in some locations particularly along the cliff line to the north shore. This clearly would be an issue of serious concern to the landowners who are attempting to maintain livestock within the area. This is also evident in the photographs as there were cattle grazing during the course of our inspection right up to the particular fence lines in question.

It is unclear to the writer why the specific locations have been identified by Kerry County Council between the various sections as the fencing is generally consistent throughout with timber post and wire with the occasional metal post provided particularly around the cliff edge as timber posts could not be driven into the rock beneath same. Whilst mesh has been provided between a number of the poles, these areas have in fact been excluded from the local authority's enforcement maps and again it is unclear what evidence is being produced besides the affidavits and the claims made by the three gentlemen to detail the specific repairs and their specific location.

3. Section 5 and Kerry County Council/An Bord Pleanala

It is understood that Kerry County Council issued a Declaration under Section 5 of the Planning and Development Act 2000 on the 15th April, 2014 considering the works (fencing) at Fenit island as exempted development under the scope of exemptions provided under Class 4 of Part 3 of Schedule 2 of the Planning and Development Regulations 2001-2013. Of particular note in this regard we further understand that Kerry County Council would have been aware of certain repairs to the fences being carried out following Storm Darwin prior to the date of the declaration.

The Section 5 was appealed to An Bord Pleanala by Keep Ireland Open and of particular note in Mr Philip Davis, of An Bord Pleanala, Inspectors Report dated 28th May 2015 relating to the fencing including that on the lands in question was the following:

- a. That all the fencing was 2m in height or lower.
- b. There was a need to prevent stock accessing the shoreline.
- c. That the fencing, including the chain link and electric fence were consistent with what would normally be considered agricultural fencing.
- d. That the fence fell within Class 4 Part 3 of the Second Schedule of the Planning and Development Regulations and on that basis exempted development.

We further note that the Inspectors Report indicated that having read the planning file held in the offices of Kerry County Council the following:

- (i) All fences appeared to fall within Class 4 Part 3 Schedule 2 of the Regulations.
- (ii) The fences did not create a significant visual impact and did not impact on any archaeological monument.
- (iii) That the appropriate assessment screening was carried out and it was concluded that an Appropriate Assessment was not required.
- (iv) That the report of the Planning Authority indicated its view that the fences were agricultural in nature, were above the foreshore and were exempt under Class 4 Part 3 of Schedule 2 of the Regulations and that no subsection of Article 9 applied.

However, the Inspector considered that the development (fencing) was not exempt under Article 6 of the Planning and Development Regulations as he erroneously considered the enclosure of the lands by the fencing was in the 10 years prior to erection of the fences were used by the public habitually to gain access to the seashore.

We note however there is substantial evidence to the contrary to be provided by the Defendant and his witnesses in this regard.

The decision of the Bord therefore is not based on the state, structure or condition of the fencing, or for that matter the effect the fencing would have on the habitat but is based on the assumption that the lands to which the fencing encloses has been used habitually used by members of the public for access to the seashore.

We note that Kerry County Council's decision and particularly the affidavit as provided by Mr. Jim Fox relies completely on the affidavits given by the various gentlemen in this regard.

We note that the gentlemen within their affidavits are quite unclear on the dates and specific locations of the repair of the fence lines and also provide little in the way of photographic evidence or measurements to support their claims. We particularly note that one of the affidavits as provided by Mr. Matthew Hopper in which he claims that in February 2015 he witnessed the destruction of large sections of fencing and states that viewed from an elevated section of Tralee Golf Club, it was possible to see the destruction of fencing continuing along the entire north section of the Island to Castlestrand. He states that from this position in Tralee Golf Club, he was able to see the impact of the storm damage at points Z to Y, X to W and V to I. However it is considered to the closest point on Tralee Gold Club this would be a view of over half a kilometre with Mr. Hopper providing little in the way of photographic evidence to support such a claim.

We would further consider in relation to the lines as provided on the enforcement map that same would not be strictly accurate. We would note that the point Y as indicated on the enforcement map was difficult to locate as the fence line in fact between X and the presumed position of Y runs inside an existing stone wall. This together with the fact that large sections of fencing as confirmed by the Defendant were undamaged including 175m section along sections Z to Y were unaffected or undamaged by the storm and over 30m of fencing along sections X to W were also unaffected by the storm. Thus, significant sections of fencing at issue in these proceedings were in fact never repaired since they were first erected. This, based on our inspection particularly where specific locations and repairs could not be easily identified shows a lack of accuracy in the preparation of the maps and proceedings by Kerry County Council in this regard.

Similarly, An Bord Pleanála do not indicate in their decisions in writing or drawing what specific sections of fencing are deemed unauthorised and we would consider that both An Bord Pleanála and Kerry County Council would be unclear and inconsistent in respect to their various decisions and proceedings.

4. Conclusions

It is clear from our inspection of the entire boundaries particularly the sections as indicated in the enforcement notice that there is no clear distinction, albeit in 2019, of the repaired sections.

All fence lines are simply timber post and wire fencing with the exception of the locations which require to be metal post i.e. at the cliff edge which in our opinion and also of the opinion of An Bord Pleanála would be for general agricultural stock proof fencing to protect Mr. O'Sullivan's stock.

As one can note the fence line does not detract from the overall views of the shoreline and in fact is quite difficult to see at a distance.

We would therefore consider that the structural nature of the fencing would in our opinion provide for a stockproof fence and would not be visually intrusive in the area, and as of our inspection, does not show significant signs of replacement or repair over and above that as would be normal practice within an agricultural location.

We further consider that landowners and farmers would, as part of their typical duties and requirements on their lands, ensure that their lands are properly fenced and secure and that same would be maintained in a safe and secure manner to which the Defendants in this regard would be entitled to do, particularly following such a storm as Storm Darwin in 2014.

Yours sincerely,
HASSETT LEYDEN & ASSOCIATES


Michael Flynn.