

THE HIGH COURT

1999/11606P

BETWEEN

IAN AGNEW AND GEORGINA AGNEW

PLAINTIFFS

AND

KAY BARRY PERSONAL REPRESENTATIVE OF THE ESTATE OF
JOHN BARRY, DECEASED

DEFENDANT

Judgment delivered by Macken, J. on 29th November, 2005

1. This is a claim by the Plaintiffs against the Defendant concerning fishing rights on part of the River Blackwater in County Waterford.

2. By its Plenary Summons the Plaintiffs seek a declaration that they are the owners of (a) the several fishery on a part of the River Blackwater running through several townlands in County Waterford together with the rights of fishing in and taking fish from that several fishery, and of (b) that part of the River Blackwater within the same stretch known as the "Bishop's Fishery". The precise description of the several fishery and the "Bishop's Fishery" as claimed, is set out in a Schedule to the Summons, and is made by reference to certain title documents, *inter alia*, a conveyance dated the 31st December 1955 to their predecessor in title. In short the several fishery extends from certain Lismore Castle lands in the East to the western boundary of Glencairn Abbey in the West. The Summons also seeks certain injunctive relief against the defendant, as well as damages for nuisance, conversion of the fish and trespass. The Defendant is the sister and personal representative of the estate of John Barry, deceased.

3. The Statement of Claim was delivered on the 14th March 2000 and pleaded, in essence, the following:

- That the Plaintiffs own and reside, *inter alia*, at Fort William Estate in County Waterford, and they and their predecessors are the owners in fee simple of the several fishery referred to above.
- That the (then) Defendant resided at Glencairn, Lismore Co Waterford.
- That in so far as that part of the several fishery called "the Bishop's fishery" abuts the Defendants' land, the Plaintiffs and their servants or agents and licensees, have a right of access along the river bank on that land for the purposes of exercising the full right of fishing and taking fish from the Bishop's fishery.
- That the Defendant has no right to fish or to permit others to fish the Bishop's fishery, or to impede the said right of access.
- That the defendant entered the said Bishop's fishery and fished in it and caught and removed the plaintiff's fish and converted them to their own use, and thereby trespassed on the plaintiffs' said fishery.
- That the defendant also trespassed thereon by carrying out extensive work on the riverbed, damaging, disturbing and potentially destroying the spawning habitat for salmon and by creating manmade steps leading to the river.
- The defendant had interfered with the right of access of the plaintiff to the Bishop's thereby trespassing on the said right which was in addition an actionable nuisance.
- The defendant had wrongly denied the plaintiff's exclusive ownership and title to the fishery and had wrongly licensed fishing rights to others.

4. Due to the death of Mr. Barry, a claim to slander of title included in the Statement of Claim did not survive, and the court is therefore not concerned with that claim.

5. Certain particulars were furnished, both in the Statement of Claim and also in reply to a request for particulars sent by the defendant. The Defence was then delivered, in the usual way, on the 20th April 2000. In the Defence, the Defendant denies:

- That the Plaintiffs own the several fishery;
- That the Indenture of conveyance of 31st December 1955 was effective to convey the said fishery to the plaintiffs' predecessors in title;
- That the plaintiffs' alleged fishery includes the Bishop's fishery;
- That the plaintiffs have ownership of the soil of the riverbed;
- That the plaintiffs have any rights of fishing or rights of access to the said riverbank abutting the defendant's lands.

6. The then Defendant further pleaded that, as the owner of the fee simple of the lands, he was entitled to preclude all persons, including the Plaintiffs, their servants or agents and licensees from entering upon the same without his consent. Further he pleaded that he was the owner of the said fishery to the extent of one half thereof.

7. The Plaintiff delivered a formal Reply to the Defence on the 11th September 2000. In essence, that Reply pleaded:

- That the Defendant was not, as alleged, the owner of the fishery in issue to the extent of one half, or at all.
- Further, the Defendant was estopped by his conduct, upon which the Plaintiffs had relied to their detriment, from asserting ownership of any part of the fishery.
- To the extent that the Defendant sought to claim ownership of any part of the said fishery, the Defendant was not entitled to do so by way of defence to the plaintiff's claim.

8. By an amended defence delivered on the 1st October 2004 the defendant repeated the defence previously delivered. Without prejudice to those defences, the defendant pleaded that even if the plaintiffs or their predecessors in title had been the owners of the several fishery, they had abandoned those rights through non-use over the last forty years. Likewise the Defendant claimed that if the plaintiffs or their predecessors had been the owners of the soil of the riverbed, they also abandoned the rights to the same, and any rights of fishing in waters abutting the defendant's lands, and any rights of access to the riverbank abutting the defendant's land, by non-use over the same period.

9. By way of counterclaim, the defendant pleaded she had acquired rights of fishing in relation to the waters abutting the defendant's lands by virtue of continued use of the several fishery.

10. In their Reply of the 7th December 2004 to the amended defence, the plaintiffs repeated their original Reply insofar as it was relevant, and further, as to the plea of estoppel, pleaded that the conduct of the late Mr. John Barry in taking the permission of the plaintiffs' predecessors in title to fish the Bishop's Fishery was inconsistent with any ownership claim by the defendant to it. They further denied the defendant's counterclaim to have acquired any rights of fishing in the fishery through any use.

Some outline facts

11. In the mid-90s a dispute developed between the plaintiffs' predecessors in title and the late Mr. John Barry over fishing in the relevant part of the River Blackwater. It is claimed by the plaintiffs that a verbal arrangement existed between the principal shareholder of Fortwilliam Estates Ltd., an American lady called Mrs. Mitchell, and the late Mr. Barry, to the effect that Mr. Barry, his immediate family and his brother David would be permitted, as a gesture of goodwill, to fish along the south bank of the river where the northern boundary of the defendant's lands abuts the river. Fort William Estates requested Mr. Barry to "acknowledge the company's sole and exclusive rights of fishing" on the same part of the river and not to permit others to fish there.

12. In 1995 Fort William Estates objected to Mr. Barry's name and telephone number appearing as the relevant contact number for "the Bishop's Fishery", in a 1995 edition of a magazine entitled the 'Coleraine Times' an angling guide. It also asked Mr. Barry not to cause obstruction or interference to anglers to whom Fortwilliam Estates had issued day-licences to fish.

13. When Fort William Estate, including its fishing rights, were put up for sale in 1996, Mr. Barry, through his then solicitors, sought assurances from the company's solicitors, that he would continue to enjoy fishing rights from his lands adjoining the river. In response, the company, through its solicitors, restated its ownership of the "sole and exclusive fishing" rights on that part of the river, and repeated that any permission Mr. Barry had to fish there would terminate when the property was sold, although they did indicate they would seek to see if the same arrangements could be reached with any purchaser. Both before the sale of the estate, solicitors acting for Mr. Barry and those acting for Fort William Estates, and after the sale, for Mr. and Mrs. Agnew, endeavoured to resolve the dispute regarding title to the several fishery.

14. In August 1998, the dispute escalated when it was alleged Mr. John Barry removed large quantities of gravel from the riverbed with a mechanical digger. Mr. Barry claimed that this action was necessary because the gravel accumulated in the river, and he claimed his predecessors had done likewise for 80 years, and denied in any event that the plaintiffs owned the riverbed. The plaintiffs sought a sum of £1,000 to refund the loss to it in respect of anglers who could not fish due to the disturbance arising from the removal of the gravel. The plaintiffs denied that Mr. Barry's removal of gravel was carried out with the consent of their predecessors in title. They also objected to anglers licensed by them being prevented from fishing on the river by Mr. David Barry, also deceased, Mr. John Barry's brother.

15. Other, related issues or disputes have arisen between the parties, all concerning fishing rights, including as to how many people had fished the river, either from Fort William Estate or with the consent or licence of Mr. Barry, as to how long any such fishing had gone on, as to access to the river bank on the Defendant's lands, as to disputes with fisherman permitted to fish or to be on the river bank by one or other of the parties, and, in respect of rates, what rates were paid, and by whom, and so forth.

16. From the pleadings, and against this background, and, it will be clear that before considering the allegations of trespass or other complaints made by the Plaintiff against the Defendant, and the reliefs sought, or the Defendant's response and the Defendant's own claims that the Plaintiffs abandoned their rights, or that prescriptive rights were acquired by the Defendant, there are in reality two essential matters at issue between the parties to be resolved, namely, (i) whether the Plaintiff is the owner of the several fishery including "the Bishop's fishery", and the extent of the rights attaching to such ownership, and (ii) whether the Defendant is the owner of the said Bishop's fishery, either exclusively, or together with the Plaintiff or is the owner of one half of the said fishery, as claimed

17. It will also be necessary to consider the Defendant's claim that the Plaintiffs abandoned such rights at it did have, and/or in the alternative, that the defendant acquired rights of fishing, by continuous use of the said fishery, or of the Bishop's fishery. The determination of some of these matters will depend also on the activities of the Plaintiff and the Defendant or of their respective predecessors in title, including those activities complained of or alleged in the pleadings of both parties.

18. The river Blackwater is a well known river partly in County Waterford, on which for many years there have been substantial fishing and/or fishing rights of one kind or another. The particular several fishery the subject of the dispute in these proceedings was owned previously by The Duchess of Westminster who purchased it in turn from a company established by the Duke of Devonshire, and is part of the river Blackwater adjoining the lands on which stand Lismore Castle to the East, the lands of Glencairn Abbey to the West, as well as the properties of both the Plaintiff and the Defendant which are in between the Castle and the Abbey. All of the lands, perhaps with others, apparently formed part of Lismore Estate at some time. As to the Plaintiffs, their lands include the house known as Fort William whose lands abut the river, and the Defendant's lands include the house known as Glencairn, which lands, on their northern boundary, also abut the southern bank of the river. They are also adjoining lands, at least where they abut the river. The several fishery extends beyond the lands of the defendant, to the West as far as the western boundary of the Abbey. Some or other of the fishing rights on the river were the subject of proceedings in the early part of the 20th century, in the House of Lords in England, and the judgment of that court was relied on by both parties in the course of legal argument before this court.

The Plaintiff's Title

19. The Plaintiffs rely on several documents as evidencing their title, and Mr. Brady S.C., for the Plaintiffs, argued that these title documents make it clear that the sole and exclusive rights to the several fishery vest in the Plaintiffs.

20. When this dispute first began around 1994, a company called Fort William Estates Limited owned the Fort William Estate, and subsequently sold it to Mr. and Mrs. Agnew, the plaintiffs, in 1996. Fortwilliam Estates Limited was formerly known as J.P. McCarthy & Co. (Brokers) Ltd. The plaintiffs claim their title to the several fishery has its origins in Lismore Estates, a company incorporated by the Duke of Devonshire who owned the several fishery in fee simple and whose title dates from the 17th century. That company, Lismore Estates, assumed by this court to have been an unlimited company, conveyed, *inter alia*, the several fishery to the Duchess

of Westminster on the 6th September 1955. The several fishery is described in that conveyance as "the several fishery in the River Blackwater in the townlands of Glencairn Fortwilliam Ballyvecane Lower Woodville and Glenmore." The several fishery is delineated in blue on a map annexed to that conveyance. The rights are described as including: "all rights of fishing in and of taking fish from the said Fishery and all rights appurtenant thereto." The several fishery extends along both the northern and southern banks of the river over quite an extensive stretch.

21. The secretary of Lismore Estates Mr. John E. D. Silcock, swore a declaration dated the 7th September 1955 in which he declared that the fishery had been at that time in the company's possession for over 20 years, and that the company currently had vacant possession of it. He also declared that the company had a good title to the fishery, that it was free from encumbrances, and that no person firm company or corporation had made any claim against or allegation or title, or any interest in it and there was no superior claim affecting it.

22. Subsequently, on the 31st December 1955, the Duchess of Westminster conveyed the same several fishery to J.P. McCarthy & Co. (Brokers) Ltd., and all the rights appurtenant thereto "unto and to the use of the Purchaser and its assigns in fee simple." In June 1956, J.P. McCarthy & Co. (Brokers) Ltd changed its name, by special resolution, to Fortwilliam Estates Ltd. That company conveyed, *inter alia*, Fort William Estate and the several fishery to the plaintiffs on the 30th August 1996. The several fishery is described in the Third Schedule to that conveyance as "all that the several fishery in the river Blackwater in the Townlands of Glencairn, Fort William, Ballyvecane Lower, Woodville and Glenmore in the Barony of Coshmore and Coshbride in the County of Waterford and more particularly delineated on the plan thereof annexed to an Indenture of Conveyance made the 31st of December 1995 between Her Grace Ann Winifred Duchess of Westminster of the first part and the Vendor under its then named of J.P. McCarthy & Co. (Brokers) Ltd of the other part and thereon coloured in blue and all the rights of fishing in and taking fish from the said Fishery and all rights appurtenant thereto."

23. As further evidence of their title to the several fishery, the plaintiffs submit copies of the demand for Fishery Rates in respect of a "Right of Rod", which they and their predecessors in title paid to the Southern Regional Fisheries Board as well as a copy of the contract for sale and the Requisitions on Title for the sale to them of the Fort William Estate and the several fishery by Fortwilliam Estates Limited, and point to their being no reference whatsoever made to the existence of any right in the late Mr. Barry to fish in the same. By contrast, the plaintiffs point to an entry under "Easements and Rights", where a right to water in favour of a Nicholas Connors is identified. Under "Fishing", a reference is made only to fishing licences which would expire at the end of the then fishing season.

24. Finally, the Plaintiffs rely on the decision of the House of Lords in the case of *Neill v Duke of Devonshire* (1882) 8 App Cas 135.

The Defendant's Title

25. The Defendant also relies on a series of documents as to its title, and I set out the basic deeds in question. They are:

- . Fee Farm Grant dated the 9th June 1739 of Ballygarran from The Earl of Cork and Burlington to Richard Gumbleton
- . [Copy Grant of Administration of the 12th January 1820 estate of Richard Edward Gumbleton, copy Letters of Administration dated 10th May 1831 in the estate of Henry Amyas Bushe, as well as a copy will dated 13th August 1908 of Frances M. Power].
- . Conveyance dated 4th June 1924 Major Ambrose Grattan Power to John Barry,
- . Copy Memorial of Conveyance dated 11th April 1927 Anne Mary Power and others to reverend R M Phelan and others, together with copy back sheet.
- . Copy Rates Demand Note – Bridget Barry (31st March 1965).

26. The defendant claims ownership in the several fishery by virtue of the above Fee Farm Lease of 9th June 1739. According to this lease, it is alleged on behalf of the defendant, Sir William Abdy and Jonathan Borward reserved the right to fish on the "lands at Ballygarren". For the purposes of this judgment, I assume this to be part of the defendant's lands on the river Blackwater.

27. John Barry, the defendant's father, purchased the lands which adjoin, on their northern boundary, the river, pursuant to the above conveyance of June 4th 1924 from Ambrose Grattan Power. This conveyance refers to the Vendor (Power) conveying the "lands of Glencairn known as the Barn Field and Long Field." "to Hold unto and to the use of the Purchaser in fee simple Subject to all incidents of Tenure rights of way water light drainage." The Schedule to the conveyance refers to the 1739 Fee Farm Lease and to the lands being held in administration following Richard Gumbleton's death in 1820.

28. As in the case of the plaintiffs, the defendant also submits a Copy Rates Demand Note, this time of the County Council of the County of Waterford, dated 31st March 1965 naming the townland as "Glencairn", the property being "stewards house and hereditaments + half river".

29. Before moving from the respective titles, it is important also to set out something about what are called the "Musgrave Leases" invoked by both parties, and which were considered in the decision of the House of Lords in *Neill v Duke of Devonshire, supra*. These are several leases granted by the Earl of Cork and Burlington (whose lands and title were apparently inherited by the Duke of Devonshire in 1735) to Christopher Musgrave.

30. In the first of these dated 11th September 1738, the Earl of Cork and Musgrave "doth demise set and to farm let and demise unto the said Christopher Musgrave his Executors and Administrators all that and those the Farm and Farm and Lands of Ballyeen as the same are now in his possession together with the Salmon Weyres and fishery in the River Blackwater and also the Mills of Ballyeen and the Ferry of Lismore . ." for a fixed term of 41 years.

31. A number of reservations are made to the grant. The lease states that there is "always reserved out of this present Lease unto the said Earl his heirs and assigns All woods underwoods Timber and Trees and all Mines Minerals Quarries Waifes Estrays Goods of Felons . . . and all other Royalties whatsoever happening or being in or upon the Demised premises with free liberty of Ingress Egress and egress at all times during this lease to cut dig and drive and carry away the same at his and their will and pleasure *and also the sole liberty of Hawking Hunting Fishing and Fowling* in upon and throughout the Demised premises at all times during this Lease . ." (emphasis added).

32. The next lease, dated the 20th September 1752 and also made between the Earl of Cork and Burlington and Christopher

Musgrave, is largely in similar terms to the first lease between the parties, with the same reservations in relation to the right of the lessor to fish, but with a different, longer, term. A note at the end of this lease records Christopher Musgrave's objection to the liberty of fishing reserved by the Earl "otherwise than by Angling which was the only reservation intended at the time of the first agreement [the first lease] the benefit of the Weyres and fishery on the River Blackwater being set to said Musgrave as by the within Lease and afterwards signed sealed and delivered by the said Christopher Musgrave in the presence of Will Connor."

33. There is a final, and third lease, in this series, this time dated the 31st March 1825 from the Duke of Devonshire to reverend P. S. Smyth. In this lease the lessor "doth demise grant set and to farm let unto the said Percy Scott Smyth all that and those a lot or piece of ground over which the sea ebbed and flowed in the River Blackwater on which the said Percy Scott Smyth hath lately erected a quay" "for a term of 21 years.

34. There is also a Deed of Surrender dated 5th April 1869. In this Deed Nelson Trafalgar Foley and Richard Cliffe surrender and yield up the 'several fishery and the right of fishing in the said River Blackwater' to the Duke of Devonshire.

35. Finally, there is a reference to a fishing licence dated 1874. In this licence the Duke of Devonshire grants Nelson T. Foley and his son Edmond, permission to fish in the 'several fishery on the River Blackwater as well in portions of said River Blackwater where the tide ebbs and flows as also in certain inland portions of the said River' in consideration for a rent of £710.10.9d for the fishing season of 1875.

36. I should mention here that four letters patent dating from several centuries ago have been admitted without formal proof, and their content will only be referred to in the event that it becomes absolutely necessary to do so.

37. Finally, before considering the evidence, it is appropriate to set out some of the exchange of correspondence which commenced in 1994 and terminated in 1998, and some at least of which was put to the various witnesses or otherwise relied upon in the course of the evidence. Of the letters exchanged between the parties or their predecessors and produced in court, the following were of particular relevance. They commence with a letter sent according to the evidence, shortly after a meeting between the late Mr. John Barry and Mrs. Mitchell of Fort William Estates Limited. This letter, dated the 26th July 1994, is from Messrs. McCann Fitzgerald, solicitors acting on behalf of Fort William Estates Limited, to the late Mr. John Barry, and reads:

'Dear Mr. Barry,

In the interest of preserving the good relationship which exists between Mrs. Mitchell of Fort William and you, Mrs. Mitchell has requested us to write to you in connection with the fishery rights on the River Blackwater between, on the North Bank, the Ballyvolane Sluice to the Glenmore Stream and, on the South Bank, from the Castle Grounds in the East to the western boundary of Glencairn Abbey. The sole and exclusive rights of fishing and taking fish from that part of the River Blackwater are owned by Fort William Estates Limited (the "Company"), it having purchase those rights on 31 December 1955.

We understand that, in the belief that you had a right to do so, you personally have fished part of the South Bank of the river extending from your boundary to the boundary belonging to Glencairn Abbey (and including those boundaries belonging to the Abbey) and have stated to a number of other individuals that they may also fish there. Our clients are quite prepared, as a gesture of goodwill and in furtherance of good relationships with you, to allow you and your immediate family and your brother to fish on that stretch of the river. Our client is also prepared to allow you to honour your commitments by permitting persons to whom you have made such commitment to fish for this season only on that part of the river on which your boundaries lie. In recognition of this concession, our client requests to you acknowledge the company's ownership of the exclusive right to fish and to take fish from the river between the points which I have mentioned in the first paragraph of this letter. I must also ask you to confirm that you will not purport to give any person, other than the members of your immediate family, any authority to fish on that stretch of the river at any future time.

Yours, etc."

38. The next letter was sent in 1995 (check) but is undated, and is written from Fortwilliam Estates Ltd. to the late Mr. John Barry directly.

"Dear John,

My attention has been drawn to an article in the edition of the Coleraine Times which was published on 4th January last. Under the heading "Times Angling Guide 1995" written by Peter Buckley, reference is made to some well known fisheries including "Bishop's Fishery, c/o John Barry, Glencairn, Lismore, Co. Waterford. Tel. 058 54139.

As you know, all fishing rights to the stretch of the Blackwater known as the Fishops Fishery, as well as the other sections of the river from the Glenmore Stream to the Lismore Castle grounds on the North bank, and from Glencairn Abbey West boundary to Lismore Castle bounds on the South bank, are owned exclusively by Fortwilliam Estates Ltd. It would be to our mutual embarrassment if readers of that paper or, indeed, any member of the public, were to make arrangements to fish the Bishops Fishery without having first received a licence from Fortwilliam. As we confirmed to you last year, you and your immediate family and your brother David are most welcome to fish the river, whilst giving due consideration to Anglers who have a booking to fish at that time. However, that concession is made exclusively to you and your immediate family and your brother.

We also intend to ensure that Mr. Peter Buckley is made of the inaccuracy in his article.

Yours, etc."

39. The next letter was written to Mr. David Barry, Mr. John Barry's brother of Mr. John Barry, by Messrs. McCann Fitzgerald, on the 21 June 1995, and reads as follows:

"Dear Mr. Barry,

As you know, our client, as a gesture of goodwill, has given you permission to fish the River Blackwater (here describing in the same way the boundaries already indicated in the earlier letter to Mr. John Barry). It is the practice of our client to issue a limited number of daily licences to persons who wish to fish on that stretch of the river. When such a licence is

issued, our client undertakes an obligation to ensure that the licensee will be entitled to fish on that stretch of the river free from any interruption or interference.

Recently, word has reached our client that on occasions, perhaps unknowingly, you have caused interference and annoyance to persons to whom a licence has been issued. We wish to impress on you that any action by you which might cause annoyance or constitute an interference with the right of a licensee to fish may have consequences for our clients which you might not foresee.

We write to assure you that our client wishes to continue to offer to you the facility of fishing on this stretch of the Blackwater. We also request you to refrain from causing any obstruction or interference to any person who are also fishing there at the invitation of our client and on foot of a licence issued to them. Your co-operation would be much appreciated.

Yours, etc."

40. No letters appear to have been sent or received in response to any of the foregoing. The next letter in the sequence is one to Messrs. McCann Fitzgerald, dated 18th April 1996, written by Mr. John Barry's then solicitors, Anthony Carroll & Co., in the following terms:

"Dear Sir,

We have been consulted by Mr. John Barry of Glencairn who is a riparian landowner adjoining the Fortwilliam Estate which has recently been offered for sale.

Over many years Mr. Barry and his father before him have enjoyed uninterrupted fishing from their lands in the river Blackwater but he now understands that this fishing is being offered for sale. Mr. Barry does not want any difficulty with the new owner and does not wish to affect the sale of the property since he enjoyed a good relationship with the late Mrs. Mitchell and her managers over the years. His concern however (sic) to protect his own position and has asked us to write to your firm pointing this out.

Can you please therefore confirm that Mr. Barry's fishing is not in any way affected.

Yours etc. "

41. This letter was immediately responded to by letter of the 22 April from Messrs. McCann Fitzgerald, in the following terms:

"Dear Sirs,

We have received your letter dated 18th April 1996.

In order to preserve good relationships between your client and the late Mrs. Mitchell, permission has been granted by our client to Mr. Barry and his immediate family and to his brother to fish that part of the river Blackwater (describing the same boundaries as in previous letters). We have previously written to your client in that regard and refer specifically to our letter to him dated 26 July 1994.

Fortwilliam Estates Limited owns the sole and exclusive fishing on that stretch of the river, as is evident from the title deeds which we hold. That fact has never been the subject of disagreement between our respective clients.

We are not clear what is meant by the expression that your client's concern is "to protect his own position". The availability of that part of the river to Mr. Barry for fishing is based on the permission which has been granted to him by our client. That permission will, necessarily, terminate when the property is sold.

We are quite prepared to use our best endeavours to assist your client in making an arrangement with the new owner to replicate the current arrangement. However, it will be a matter for your client to agree with the new owner the nature and extent of the access, if any, to be granted to your client to the river.

Yours, etc."

42. This letter was responded to by letter from Mr. Barry's said solicitor dated the 15th May 1996, as follows:

"Dear Sir,

We refer to our recent letter and subsequent phone conversation after which we understood your firm would be writing to us.

Mr. Barry has been touch again regarding the fishing and he indicated that a number of fishermen have been traversing his property apparently on the understanding that they have a right of way to the riverbank. This is not at all satisfactory and perhaps some arrangement could be worked out if your client were to contact John Barry directly at (number). Mr. Barry understands that your client resides in the U.S. and he would be prepared to travel in order to resolve the issue.

As previously indicated Mr. Barry understood that the relevant section of fishing was his property given that both he and his father before him exclusively fished the area. You appear to indicate that your clients had a documentary title to the fishery and perhaps you would now forward a copy of the same so that we can clarify the position for Mr. Barry once and for all.

Mr. John Barry was well known to the late Mrs. Mitchell having leased her farm for a good number of years. He does not wish to create difficulties for her estate and family but he would like to have this matter resolved before the property is sold.

We look forward to hearing from you.

Yours, etc.”

43. The relevant part of the letter in reply dated the 21 May 1966 states as follows:

“Dear Sirs,

...

Having received your letter, we consulted the manager of our client’s estate at Fort William. We are informed that, if any fishermen have been traversing your client’s property for the purpose of gaining access to the river bank, they have done so without our client’s knowledge and without any advice or instructions from our client that they were entitled to do so. Our clients are aware that their several fishery entitles persons who are authorized by them to fish on the stretch of the river have a right to walk along the bank on each side of that part of the river over which their several fishery extends.

I enclose a copy of the Deed of Conveyance of the several fishery right in question to our client and which will confirm our client’s ownership of the several fishery.

Yours, etc.”

44. The property was thereafter sold to Mr. and Mrs. Agnew in August 1996, and the next correspondence to Mr. John Barry is written on behalf of the plaintiffs by Messrs. McCann Fitzgerald on the 27 June 1997, as follows:

“Dear Mr. Barry,

We have written to your previously on behalf of Mr. and Mrs. Agnew’s predecessors in title in connection with the fishing rights on the river Blackwater. When Mr. and Mrs. Agnew purchased the property, they acquired the exclusive rights to fish the river between (setting out the previously indicated boundaries of the fishery). We have also provided your solicitors with incontrovertible evidence of the title to those fishing rights.

You are aware that it is a practice of the owner of Fort William to issue a limited number of daily licences to persons who wish to fish on that stretch of the river. That practice has been continued by our clients. ...

We understand that you intend to invite or have invited some individuals to fish on that part of the river which is described above. So that there is no misunderstanding on your part, we repeat our previous statement to you that our client has the sole and exclusive right to fish that part of the river. Any person who may attempt to fish this part of the river without our clients’ consent will be requested to discontinue immediately. Should further action become necessary to prevent infringement of our clients’ fishing rights, they are prepared to take such lawful action which may be necessary to protect those rights. It is not our clients’ wish that any acrimony should arise in connection with their fishing rights and the permission which has been given to you and to your immediate family to fish is evidence of our clients’ goodwill. It is our clients’ wish that you will continue to respect our clients’ ownership of the exclusive fishing rights on this stretch of the river and that the present amicable arrangement with you can continue.

Yours, etc.”

45. There were further exchanges between successor solicitors to the late Mr. John Barry, and solicitors acting on behalf of the plaintiffs, concerning the extent of the title to the fishery, and then a letter from the latter solicitors to Messrs. Arthur Cox, on behalf of the defendant, dated the 1st September, 1998 containing a complaint concerning the digging of a trench and the removal of gravel from a section of the riverbed with a mechanical digger. This was responded to by solicitors for the defendant, stating that Mr. Barry and his predecessors had been removing gravel from the river for 80 years, that the same was essential, and that the plaintiffs did not own the river bed, as claimed.

46. Finally, in their letter of 23rd November 1998, to the plaintiffs’ solicitors, the defendant’s solicitors query whether the Duke of Devonshire ever owned any land in the vicinity of the river, given that the 1739 Fee Farm Lease suggests that the Earl of Cork owned such lands. However, the plaintiffs’ contention that the Earl of Cork later became known as the Duke of Devonshire appears to be a correct contention. The title documents make it clear that the Duke of Devonshire succeeded to the estates of the Earl of Cork by marriage, in 1753. Further correspondence ensued in the same light, including clarification or an acknowledgement by the solicitors for the defendant that the Earl of Burlington subsequently became, or became known as, the Duke of Devonshire.

The Evidence of the Parties

47. Mr Ian Agnew gave evidence on behalf of himself and his wife, the second plaintiff. He had purchased by way of conveyance on the 30th August 1996 the lands fishery and fishing rights in question and proved the conveyance in court, although the defendants had agreed to admit the same. He subsequently in December 1999 acquired his wife’s interests in the lands. There were two beats on that stretch of the river comprising the several fishery, and he had a third by arrangement with the owners of Lismore Castle. He had intended that the beats would be developed, because there was very enjoyable fishing in the area and it was important that the fishery fulfil its part in the management of the estate, so that if the farm lost money and the fishery gained, then one would help defray the cost of the other. Each beat was anticipated to secure approximately Euro 20,000 per year and the intention was to improve the pools in the Bishop’s fishery, as they had done in other areas of the river where there had been no problem, providing for fly fishing from the banks. The works had cost in the region of €100,000.

48. Mr Agnew had visited the lands before buying them, had walked the lands and had secured information in relation to the fishing rights. He agreed he had been informed, probably by Anthony Cross the Estate manager, that Mr Barry fished on the river, but there was no dispute as to this. He understood the basis upon which Mr Barry was fishing was that he and his immediate family had had the permission of Fort William Estates to do so as a neighbourly agreement. Having been told that Mr Barry was claiming to fish as of right he did not believe he had any right. Had he known, he would not have been buying the lands or the Estate at all, or he would not have paid as much for the estate.

49. Mr Agnew said it had not been possible to develop the beats as planned because of the difficulties encountered with the Barrys. For example, his fisherman had found others fishing on the same banks of the river, the fisherman licensed by Fort William had been abused and were forced to leave the banks, and he did not feel that it was possible to send fisherman up to the area any longer. He accepted that Mr John Barry did not acknowledge that the exclusive fishing rights vested in the Fort William Estate. The above correspondence was put to him, in particular the above letter of the 26th July 1994. He accepted that he had not been told in writing

that Mr Barry acknowledged the existence of exclusive fishing rights. As to the discussions which had occurred between them, Mr. Barry had visited him originally on what he took to be a visit to a new neighbour. There were only two subsequent meetings, one concerning gravel and fishing issues, and another concerning a contretemps which they had but which did not concern the fishing rights. On the occasions when they met, Mr Barry did not acknowledge that he was fishing with the permission of Fort William Estates and on the contrary claimed that he had a right to fish. As to the removal of gravel, Mr. Agnew said that the amounts of gravel removed were substantial and had disturbed the river beds which are special beds for salmon spawning and because of this it became difficult to fish.

50. In cross examination, Mr Agnew accepted that Mr Barry did not say he was fishing with consent, and always, at least from the time in 1998 when the present dispute escalated, maintained he had a right to fish. He said that he first heard of this claim in about 1998 when the plaintiffs discovered that Mr Barry was letting fishing to outsiders, which had continued between 1998 and the date of the hearing. When it was put to Mr Agnew that this occurred only on three occasions he disagreed, saying he had actually challenged Mr Barry on three separate occasions but that Mr Barry was letting fishing rights, not only at his own lands but also beyond them, at the lands adjoining the river at the Abbey. These were being offered at €25 per rod per day. The average charge for fishing from Fort William Estates is €75 per rod per day. Concerning the undated letter in 1994, Mr Agnew was asked whether or not Mr Barry still had permission to fish, and he said that he knew nothing about the existence of the letter prior to the time when the dispute arose, but that it would be neighbourly to allow Mr Barry and his immediate family to fish, this being contingent only on Mr. Barry acknowledging that the right to fish vested in Fort William Estate.

51. In response to counsel contending that Mr Barry owned one half of the river bed, Mr Agnew said that in fact Mr Barry had made a claim to be the owner of the entire of the river. He agreed he did not himself see Mr Barry eject any one from the river but had heard this from the gillies. As to access to the river bank, which was also in dispute between the parties, Mr Agnew denied that he ever made any claim concerning ten feet of ground on either side of the river.

52. Mr Anthony Cross then gave evidence. He was the Fort William estate manager, as was his father previously. He actually took over in 1990, but had known the lands since his father became the farm manager of the Estate in 1979. There were records of fishing permits in existence, to his knowledge, at Fort William Estate dated from at least 1967 to 1979 and thereafter. He took over 400 acres of lands, and the management of the fishery. The farm was not paying its way and his brief was to bring the fishing up to a better standard. There was very good fishing on the river and the intention was to keep the pools for salmon. He did some considerable work with boulders and protecting the banks of the river which flows in a west easterly direction, and had constructed relief channels in the river. When there is flooding, livestock are removed from the area and the river flows on and off again, but if the banks are eroded the farmers may remove a small amount of gravel. As to the several fishery itself, the depths are quite important particularly for spawning. There is very coarse gravel, two inches to one foot in depth. If however the gravel is disturbed this creates silt which kills the salmon eggs, and if the gravel is removed fishermen can also step into a hole which is not otherwise visible and which can cause problems. There is very careful handling of croy, which offer cover to salmon for spawning, on the river. The fishery, according to Mr Cross, is a rod fishery only. There is no cot fishing except in the area below Cappoquin which does not concern the plaintiffs' stretch of river.

53. When he arrived to become the farm manager in 1990 the people who were fishing were his own father, David Barry and two others. It was not being run commercially but there was a small loose syndicate of fishermen. He had advised all the people involved what his brief was and the importance of bringing up the standard of fishing on the river, and in particular he advised Mr Barry, Mr Connors, David Barry and the two others. He met no resistance whatsoever. As far as he was concerned he had no reason to believe that Mr Barry had misunderstood the position in any way. There were four rods on each beat. The intention was to increase revenues without increasing any numbers. The only concern expressed was that the banks themselves might become crowded and it was important for him to show that this would not be so.

54. Between 1990 and 1994 in the event of any incidents, Mr Barry visited Mrs Mitchell. Mrs Mitchell was an American lady who had a substantial interest in Fort William Estates. Mr Barry would contact Mrs Mitchell and make an appointment. He would then call to the farm and arrangements would be made about crop rotation and where on the map he could not go. This was generally written and was a generally accepted practice. Fishermen from the Estate would be informed not to encroach on neighbours lands and to remain strictly on the bank. At that stage there were no difficulties whatsoever with Mr John Barry.

55. He recalled a particular meeting with Mrs Mitchell in July 1994 which he attended in part. He was there because Mrs Mitchell met every year with the neighbours. There was a discussion about fishing. Mr Barry had brought a letter with him which Mrs Mitchell read but he did not. He agreed Mrs Mitchell had had correspondence with her then solicitors subsequent to the meeting with Mr Barry in 1994. As far as he was concerned Mrs Mitchell would like that Mr Barry and immediate members of Mr Barry's family would not be excluded from fishing on the river.

56. He recalled an incident on the river involving three Frenchmen who were fishing without a licence. He had met them and apologising to them indicated that they were not entitled to fish on that part of the river. He was told by the Frenchmen that Mr Barry had given them a licence to fish. The location where they were fishing was two to three hundred yards upstream of Mr Barry's own lands. As to the advertisement in the Coleraine Times, he himself discovered this when a client phoned and asked if "they had sold the fisheries". He then wrote (an undated letter) to Mr Barry but he got no answer to that letter. He believed it was the first time that a warning had to be given to Mr Barry in respect of other anglers seeking bookings on the river.

57. There had also been incidents in relation to tourists fishing on the river from the north bank. Mr John Barry was not given to outbursts, but his brother, Mr David Barry had been very vociferous in relation to such tourists fishing from the north bank. As a result of this he said he discontinued allowing anglers to fish there. There had been another incident involving a Mr Lund and a Mr Davis, and a Mr. Weill. These were three separate fishing parties who had arguments with Mr David Barry. They had been disturbed in their fishing due to works being carried out by a licensee of the late Mr. John Barry.

58. He continued as Estate manager until 2002. He recalled seeing the removal of gravel in August of 1998. He himself had got no warning about this work being planned. The amount of gravel removed was substantial and had an effect on the salmon beds. Gravel was extremely important for the spawning habitat. It was expressly prohibited by the State Fisheries authorities to remove such gravel as these areas were used by spawning fish as a spawning bed. He had gone to the fisheries officer himself to check the position, and had kept the Fisheries Board advised because of his concerns about the matter. Duchas are the group controlling the river bank, and the officials from Duchas had problems with croy. As to the losses arising from the gravel disturbance, the value of the lost fishing permits which would have accrued to the Estate was £1000.00, and they repaid, in fact, £250.00.

59. He also gave evidence about having charge of paying the rates. The rates were in respect of a Right of Rod, and he produced several sample rate records or documents showing the same. As to the stiles, he himself had constructed the stiles on the banks, and

thereafter the head gillie looked after them. They were on the boundary of the property as between the Agnew property and the Barry property, and as the convention is to get as near the river as possible from the river bank, this means that they are about two feet to six feet apart. No complaint was ever made to him of any damage to stiles or to other lands. From his recollection, Mr Barry had, before 1996, carried out no works on the river bank. In the period between 1996 and December 1999 however, two trees had fallen in and Mr Barry had filled up the holes made with stones. Between 2000 and 2001 Mr Barry had dug two pits, one with permission, and one without.

60. In cross-examination Mr Cross said he knew all of the neighbours since 1979, and Mrs Mitchell became his employer in 1990. She spent a considerable amount of time on the estate, about six months fulltime for tax reasons, and three to four months on a part-time basis and at that time she was in her 80s or so, and had died in 1994. There was a good relationship existing between Mrs Mitchell and Mr Barry and Mr Barry had taken lettings on the Fort William lands in the 1980s. There was a system of licences and records maintained in respect of fishing on the river, and he was the person, after his father, who had organised giving out the licences. Mr David Barry Senior was a good and clean fisherman, although he accepted that he had not asked him for permission to fish. So far as he knew, Mr Barry had a loose arrangement with Mrs Mitchell in relation to fishing, as part of the Barry family.

61. As to the meeting in 1994, he said Mrs Mitchell was very concerned when Mr John Barry had claimed he had fishing rights, because, so far as he understood and also so far as he understood Mrs Mitchell's own understanding, Fort William Estate was the sole owner of the fishing rights. He had heard Mrs Mitchell give Mr John Barry and Mr David Barry permission to fish. She had said she was happy for them to fish so long as they accepted the fishing rights vested in Fort William but he could not recall the exact words she used. In answer to the question whether Mr Barry or his brother had ever asked him for permission to fish he said it was not his job to give such permission, but he accepted that neither ever did so. He agreed he had discussed the content of the letter of the 26th July 1994 from Messes McCann Fitzgerald to Mr John Barry, with the solicitor, that the information came from him and from Mrs Mitchell. He accepted Mr David Barry had been fishing since his (Mr Cross's) father's time, although he said from his point of view the implication always was that the fishing rights belonged to Fort William Estates. He had suggested to Mrs Mitchell and to Mr Sheedy that some order was needed in relation to the matter. Mrs. Mitchell had asked Mr John Barry to produce some evidence that he owned any fishing rights whatsoever, because she was quite clear she owned all the fishing rights on the river. It was suggested to Mr Cross that the purpose of the letter was to create a situation in anticipation of a sale. Mr Cross said it certainly was not, that Mrs Mitchell was very much alive at the time and there was no way she was going to sell.

62. While he accepted that the removal of gravel is good husbandry of the river, he said that this must be done in small amounts at most once a year. In the present case what had happened was that the salmon redds were destroyed because a huge hole had been made by the removal of such an amount of gravel. As to the stile, he had constructed this before 1996, there was at that time an intact post and wire fence, but he did not know whether there had been a stile prior to that again. It was put to him that this was Mr Barry's fence but Mr Cross said no, that in fact there were two fences one belonging to each party.

63. Concerning the numbers of people licensed by Fort William Estates to fish from the Barry lands, he said about 6 to 8 people fished either on a two weekly or four weekly basis, between June and September. It was put to him that evidence would be adduced that no one from Fort William had fished on those lands, but he denied this was so, up until the escalation of the dispute in 1998. The nature of fishing meant that the fishermen will move, and could be one hour in one place and one hour in another place. He agreed some of the fly fishing is done in the river, and that it is not necessary to go on the bank, but he said it is not possible to cross the river at the Barry's land. As to rates, he confirmed that he paid the rates for the Right of Rod, and when it was put to him that Mr Barry paid rates for half the river bed, he said that Fort William paid rates for the entire of the river, and that as to agricultural rates, in his time there were no such rates.

64. In response to the plaintiff's counsel in reply, he clarified that spawning time on the river is November to January including Christmas. When salmon lay eggs they go down stream immediately. If the gravel is disturbed in the bed the salmon cannot, on returning to the river, smell the waters in which they were spawned. In August 1998 the place where the gravel was removed was a salmon spawning bed, even though there was no spawning at that particular time, but the salmon had spawned in December 1997.

65. Evidence was also given for the plaintiff by Patrick Devaney, fisheries manager of Fort William Estates since 1996, who had taken about 11 photographs, which he proved. He said they were taken were taken in August 1998. Photograph No. 10 was taken looking down stream at the area called the strand, where he had seen digging. Photograph No. 11 was taken up stream, photograph No. 4 being on the same bank. Photograph No. 2 was a photograph showing the same hole, all the photographs having been dated the 30th August 1998.

66. In his experience, gravel was normally removed at the Barry lands only at the bend in the river. This was done by JCB, but once an excavator was used. Originally, this was not done on a regular basis but subsequently it was. Asked whether there was any objection to it, he said at first only a small amount of gravel was taken but in about the second or third year after the plaintiffs purchased, the digging got extensively worse. He said that the effect on spawning of the works which he saw being carried out was substantial.

67. In cross-examination Mr Devaney said that he was engaged in fishing and shooting. He had been a gillie on the river in 1996. When it was put to him that the area from which the gravel was taken was not a spawning bed, he accepted that the fish would be spawning in November. He also agreed that in other areas of the river gravel had been removed, but said this was only a certain amount. Originally he said, Mr John Barry fished very rarely, but as the situation between the parties developed, he saw the Barrys fishing on a more regular basis.

68. There were, in fact, two fences at the boundary and no stream between these two fences, which were about four to six feet apart. As to when the stile was put in he said the two fences join about twenty feet from the river as a single fence and the stile was there since before he came to Fort William and had never been removed, and so far as he was aware it had been put in by Anthony Cross.

69. For the Defence, Mr Patrick Barry, a brother of the late John Barry, who was born in 1928 at Glencairn, gave evidence of growing up on the farm and of his father not fishing. He himself, however, had enjoyed fishing for about sixty years from the early 1940s. He said his brother John had also fished, mainly trout and later some salmon. He moved away from Glencairn in 1971 and rarely fished after that. He saw David and John continue to fish. His recollection was that when he was a child, a Mr Dunne occupied Fort William Estate. He never saw anyone from Fort William Estate fishing, which occurred in the spring and summer but he recalled neighbours including Thomas Flynn fishing. He said he never thought about ownership of the river or the river bed, had never asked for permission to fish, and was never told to move by anybody. Gravel would be taken from "the strand" in the summer and each winter it would fill up again and nobody objected to the taking of this gravel.

70. William Feeney gave evidence of living nearby in Coleshil. He had worked since 1967 as a farm labourer - thirty five years for John Barry - and then two years for Mr Kevin Barry. He had seen people fish on the river, including David Barry, John Barry, Patrick Barry and their children and Mr O'Hara, the postman, as well as a man called Jimmy Daly, and in the case of John Barry or David Barry, they often fished every day. So far as he could recall, no one ever objected and no one ever asked them to leave. As to anyone fishing from For William Estate he said very seldom. He saw, over two or three years only one person fishing, and over four or five years an odd person every two or three weeks, but before 1996 did not recall seeing any people. He said that there was no stile until 1996 when Mr Cross constructed it but before that there was post and wire fence constructed by George Cross. From 1973, the year after he got married, he used to take gravel from the river with a JCB which had been bought in that year. He did so about every three or four years but not on a yearly basis, perhaps even every six years.

71. In cross-examination he confirmed he was born in 1951 and had been in the area from 1967. Mr John Barry fished only off his own lands and not the whole river, but Mr David Barry fished up at the other side of the river. As for Mr John Barry it was a hobby, but it did not add any benefit to the land.

72. Mrs Barry, widow of the late John Barry, then gave evidence, of Mr. Barry dying in December 2002, at 62. They had married in 1971 and she said that John Barry, David Barry and David Barry Junior, fished. The boundaries had been pointed out to them: the length of the bank was less than half a mile. She said she did not see any one else fishing on the river. Mr Barry was involved in farm organisation and fished as a hobby. This would depend on the amount of time pressure, but usually he would fish in the evening or at weekends to relax. Mr David Barry, his brother, was a very keen fisherman and depending on the weather would fish regularly, and continued fishing after 1971 when he moved one and a half miles away until he died in 2002, shortly after Mr John Barry's own death.

73. She knew that Fort William Estates was owned by Mr and Mrs Mitchell and that Mrs Mitchell usually came in the spring, she was reasonably old. She had met her just once. The farm at Fort William was looked after by a farm manager. When she arrived at Glencairn it was Pat Dudley, who knew Mr Barry, and who would visit the yard regularly. Mr Dudley was a keen fisherman but she did not know whether he fished from Mr Barry's land. She recalled the post and barbed wire fencing which had been arranged between Anthony Cross and John Barry and in respect of which they shared the cost, by agreement. The stile was established during Anthony Cross's time when Mrs Mitchell was in residence

74. Her understanding of the ownership of the riverbed was by reference to a map which had been opened in Court. This was a map, apparently not attached to the 1924 conveyance but allegedly shown to Mr. John Barry senior prior to the sale to him of the lands. Mrs. Barry said her understanding was that this showed that what had been purchased in 1924, was the house plus the lands plus half the river, and she always understood that her husband owned half way out the river. According to her, the Barrys never sought permission from Mrs Mitchell to fish on the river, and no farm manager said that they needed permission until Mr Anthony Cross did. He told Mr and Mrs Barry that they had Mrs Mitchell's permission. She knew nothing about the meeting between her husband and Mrs Mitchell in 1994. The main meetings held with Mrs Mitchell were when Mr Barry was leasing farm land from the Fort William Estate. He had stopped leasing that land around 1990 or perhaps even 1989.

75. Asked if she recalled getting any letters, she did recall one concerning three French fishermen. She owned self-catering cottages on the main road, one of which was booked by French people. They asked about fishing and Mr Barry said they had land and they took them to fish. They did not charge them although people usually paid something nominal £20/£30 a day. They sent a deposit for rent and fished but Anthony Cross challenged them. They then said they had then arranged fishing at Fort William. She thought Fort William had decided to develop the fishery commercially, which they had not previously done. She and her husband were worried about outsiders and the laws on liability of persons walking across land or concerns about cattle roaming from one farm to another.

76. Concerning the advertisement in the Angling Guide, she also recalled this. Her husband had been involved in a farming organisation, and was also member of the board of the Leader partnerships or their predecessors. This involved developing the agri-tourist industry for West Waterford. He had apparently met someone and fishing/tourism came up, including fishing at the Bishop's fishery but that this was purely a discussion, and nothing happened.

77. The only people who fished off the Barry lands with the permission of the Barrys were neighbours, and a man who came from Clonmel who they permitted to fish on the river for a minimal charge of £20 a day or who came with a bottle of whiskey at Christmas. The Barry home at Glencairn is the old steward's house with the surrounding land She had seen a few people fishing on the Barry land from the Fort William Estate including a lady with a dog which was running around the field and her husband had later told Mr Cross not to permit any dogs or any trespassing.

78. She understood that the statements about the exclusive fishery rights in the letters of 27th June 1997 were that Fort William Estates had certain types of fishing rights on some part of the river, but that the Barrys also had rights. Her husband had gone to Carrolls solicitors in 1996 by himself, so she did not know what had occurred. Her understanding of the rights the Barry family to fish was that there was a right to take fish from the river from their own land, for herself and her children and David's children or a neighbour or a friend.

79. Mrs Barry confirmed that she and her husband had visited Mr and Mrs Agnew when they arrived, as a neighbourly gesture, and also that there had been a meeting unrelated to fishing matters and another meeting in August, 2001 when she said Mr Agnew arrived in agitated manner and spoke very rudely.

80. She confirmed, in cross examination she is not the Executor of the estate of her husband, that she has another income from teaching and that the Executors are David Barry and Kathleen Barry and that Miss Barry, the sister of her late husband, took out the Grant of Probate. She also confirmed that the fences were now electrified and accepted that this had to do with tuberculosis. The electric fences divide the lands into certain grazing sizes in accordance with departmental regulations.

81. Although she married in 1971 she knew her husband since about 1968. She had been at Glencairn several times between 1968 and 1971, but had never walked the lands, or been to the river during that time. She accepted she knew nothing about the fishing on the river before 1971 except what she might have been told. Nobody told her about the existence of any fishing permits, and she knew nothing about fishing on the Fort William Estate lands. She accepted she did not know whether there was any activity up to the time when Anthony Cross took over in 1990, on either side of her husband's lands. The various permits from Fort William Estate dating from August, 1971 and one hundred receipts covering a period back to 1965 were put to Mrs Barry but she considered that this was simply a list of names. As to whether she had seen any fishing from Ellis stream to Glenmore, she said she never looked either up river or down river but saw very little fishing from the banks adjoining her lands. She accepted that her husband was not a member of any syndicate but she said this was because her husband was fishing on his river, and the members of the syndicate were David Barry, a Mr Trigg and a Mr George Ross. She knew nothing about the syndicate, or about rod fishing or about poaching on the river.

82. She said there is a commercial quarry on the lands. A man had leased the quarry and extracted stone from the quarry on a lease for a period of about six months and sold it, but it was a different type of stone than that found at the river. Concerning the gravel, she said that this was usually taken from the area at the side of the river called the strand to cover the farm roadways, but she knew nothing about the gravel taken in 1998, or where it went. She accepted she knew nothing of the implications of removing gravel from the river.
83. Mrs. Barry agreed that she would have read the letters received from the solicitors for Fort William Estates but did not recall whether she discussed them with her husband. The correspondence had to do mainly with the French fisherman, although she said she did not really remember. She did not recall either whether any reply had been made to the letter but said Mr Barry would normally reply. Her husband was chairman of Waterford Co-Op, a very big organisation, and Carroll & Company were the family solicitors. She had no discussions with them, not even in relation to the undated letter from Mr Cross concerning the entry in the Coleraine Times. She acknowledged she would have seen the letter dated the 21st June, 1995 but again did not believe she had any discussion with her husband about it. She also recalled seeing the letter of the 18th April 1996. Again she did not recall having any discussion about it, but said that her husband was worried that the Fort William Estate was being offered for sale.
84. She believed it was possible she saw the letter of the 22nd April, 1996 if Messrs Carroll & Company had sent a copy or if her husband was aware that Fort William Estates had claimed a fishing right from his lands. She did not recall seeing the letter of the 15th May, 1996 and did not know whether any deed was ever given by Mr Carroll in response to that letter, and she did not recall either any discussion in relation to the letter of the 21st May, 1996. She said that her husband was bothered about all this but that even so, there was no discussion between them on it.
85. The letter to her husband of the 27th June, 1997 did generate some discussion but she could not recall what it was, save that her husband was anxious that if Fort William Estates had a right to fish it would be necessary to check the title. As to the letter of the 23rd November, 1998 from Arthur Cox to McCann Fitzgerald the only discussion which they had concerned the fact that since he had always fished from the land and owned the bed of the river, there was no difficulty.
86. She accepted that consent to fish was given by Mrs Mitchell but did not accept that any acknowledgement of that was given. She did not know whether any fishing rights were included in the Inland Revenue affidavit as her sister-in-law had dealt with this as Executor and it was done in the presence of a solicitor. In response to the defendant's counsel she said that the only gravel taken from the river was from the strand area, but she acknowledged that the quarry is part of the river although a different part of the river.
87. The defendant's next witness was a Mr Joseph Flynn who was 75 at the time of the hearing, having been born at Fort William. He left Fort William in 1948 after which the Duke of Westminster lived there and the Barry lands were occupied by a Mr Screen. He said that as a child he knew the river very well from when his own father fished, when he was himself about ten or eleven in 1940 or 1941. They would fish every chance they got on Saturday and Sunday on Peter Screen's lands as far as Glencairn Abbey. They did so with the consent of John Barry and apart from him Mr Larry O'Hara had fished, and a Mr Mick Hickey. He had not seen people from Fort William Estates fishing, but in Mr Dunne's time he had. He accepted that if the Duke of Westminster had been fishing it might be unknown to him. He said he himself fished since 1950, having moved to South Tipperary in 1948, but returning in the summer for two weeks or sometimes at weekends. He emigrated in 1955 or 1956 to London for six months and then to the United States where he lived for 35 years. However, he returned most years for five or six weeks, and fished on the river. While he was fishing on the river during these visits he did not see anyone fishing from Fort William Estates. He finally returned in 1992 from when he has fished for trout, as he himself was not geared for salmon fishing. He would usually fish most evenings at what is called the island and at Lismore Castle. He said he had not seen anyone fishing on the Barry lands who he knew to be authorised, but he accepted he would not know whether they were or not.
88. Mr David Barry, nephew of John Barry then gave evidence. He lived near Glencairn and moved out of his father David's home about ten years prior to the hearing. As a child his own father was a very keen fisherman and they would fish as early as 7.00 am in the morning, from John Barry's land at Glencairn, usually on a boat fishing the Ellis stream and Glenbarn. He got his first rod himself at six years old, in about 1975, he had four brothers and two sisters and all of them got rods and fished from a very young age. He had a very good knowledge of the layout of the river from the time he was six or seven years till he was thirty years old. As to who else fished on the river, they rarely met anyone else fishing except for his uncle Johnny. He could only recall meeting one person apart from George Cross, David Connors, about twenty years ago. Mr Cross fished at Glencairn but on the other side of the river, and he also recalled Mr. Dudley fishing. He never saw a non-Barry family member fishing. But he said that you would see other people from Fort William Estates, or from Cork, but could not say if the latter were poachers, although there was a problem with poaching. He never saw anyone fishing at Fort William Estate itself, but he said he never fished there himself and that up until recently he had seen only a few people. If his father or John Barry found a stranger he would challenge them because of the problem with poaching.
89. He had no knowledge of any permits, or of ever having to show any permit. He would fish from the bank and by wading into the river depending on how the river was running. There were very few places where you could actually walk over the river only three or four even at low water, and the river could run from nothing to approximately twenty feet. He does not fish as often as he used to, perhaps twenty five or thirty times a year. His brother Peter also fishes as part of a group called Lismore Salmon Anglers of which his father was a founding member in 1978/1979 in the area around Lismore Castle where there is a good fishing syndicate.
90. Mr Barry said that fish spawn in shallow water where there is high oxygen. His father had been very involved in conservation on the river and he himself would not consider the gravel area in question as a spawning area, because spawning is found usually in those upper reaches of the tributaries, where there are vast spawning beds.
91. As to the removal of gravel, his view was that it was done rarely and only where the gravel accumulates in the river. If it was taken he assumed it would be taken to cover the farm lanes. The river frontage itself is about four hundred yards and the river is about four hundred yards from the house (Glencairn). He himself had never seen a stile on the lands but he was familiar with fencing between the lands. His understanding of the fishing rights was that they could fish on John Barry's lands. But he also fished from Glencairn to the Ellis stream and this was accepted without any objection. The ownership of the riverbed had not concerned him at all until about two days prior to his giving evidence.
92. In cross-examination he said he got married approximately ten years ago, and since bought a farm together with the house. He lives in Middleton and fishes exclusively at weekends. He accepted that he had not been working on the river for a period of at least twenty years. When asked whether he had got consent from Mrs Mitchell to fish he said he did not recall this. His understanding of the letter of the 21st June 1997 was the family had fished quite a bit at Glencairn and on the northern bank with Mr Connors, and that this was by arrangement with his father, David. He recalled George Cross and the fact that Mr Cross had formed a syndicate, his father had been brought into it, although nothing ever came of this. He accepted that the object of the syndicate was to manage

fishing on the river and he said that two water keepers had been found to help manage poachers on the river. He did not know whether Mr Connors had been a member of the syndicate, nor that the syndicate had lasted from 1980 to 1990 saying that if that had been so at the time he would have known all about it. As far as he was aware the discussions with George Cross concerning the river was with the Blackwater Fisheries group, of which he was a member. That group however fished at Lismore.

93. If he saw people netting the river he would certainly stop and ask them about it. They would be asked what right they had to be on the river fishing. This would apply on John Barry's land only but on other parts of the river, it was not the case. His understanding was that he had a right to fish on John Barry's land, but only on John Barry's land. Asked whether his right to fish on John Barry's land was because Mr Barry owned (to) the middle of the river he said that he did not know anything about ownership of the riverbed but relied on what he understood were the fishing rights. If those rights were not owned by Mr. John Barry, then because he himself had been fishing for as long as he had, he would have rights to fish on the river

94. Ms Ann Barry, a daughter of Mr John Barry gave evidence. She is the second eldest of his children and at the time of the hearing was aged 28. Her evidence was that she fished every summer: she herself, her uncles and her cousins. From about ten or eleven onwards they would fish with a rod with her father in a boat up and down the river, on fine days or at weekends. She used to draw and sketch and considered herself lucky to have the advantage of the river. Asked whether she remembered anyone fishing from Fort William Estates on the Barry land, she could not recall whether there were. As to the stile, she said there was a barbed wire fence with a small stretch and a tree and then another fence, but she did not remember a stile, only that there was a gate on the Glencairn side.

95. As to taking gravel from the river, she said this was taken from "the strand", almost every year, there was a digger at the house with a trailer and it would be used to gravel the passageways on the lands, or to fill holes. The gravel came from the centre of the river at the strand area, but on the bed of the river. In cross-examination she identified in a series of photos what is called the strand, showing a passageway where she said there can be severe flooding, leading down to a level space at the river.

The Submissions of the Parties

96. According to Mr. Brady, S.C., for the Plaintiffs, in his opening, they purchased the several fishery (and the lands at Fort William) without being aware of any claim by Mr. Barry. No such indication appeared in any of the requisitions on title, and indeed according to the declaration of Mr. Silcock, secretary of the company Lismore Estates, made in July 1955, no claim to the several fishery or to any right of fishing had been made by any person in the period of twenty years prior to the time of sale of the fishery to the Duchess of Westminster. The Plaintiffs became aware of the Barry problem only in 1997, during the incident concerning the three French fishermen fishing on the banks of the river, with a licence from Mr. Barry. The first claim to ownership of any rights to fishing came in a letter from the solicitors to the late Mr. John Barry in the month of September 1998, arising from concerns expressed by the plaintiffs about the removal of gravel, although Mr. Brady draws the court's attention to the fact that in the counterclaim delivered with the amended defence very late in the day in October 2004, there is no mention of such a right.

97. Mr. Brady submitted that the plaintiffs own the several fishery, as well as the soil of the river bed. The defendant has, on the contrary, no legal right to fish, and the plaintiffs' title is clear and they have a right of access to the fishery, even over the defendant's lands. As to the conveyance of the 6th September 1955 from Lismore Estates to the Duchess of Westminster, this is, according to the plaintiffs, clear on its face. It refers to the vendor as being seized in possession of fishing rights, in fee simple as beneficial owner, this being ALL THAT the fishery (as described) and all rights to fish in and all rights in and of taking fish from the river and all rights appurtenant thereof, and assigned these unto the use of the purchaser in fee simple. Although the statutory declaration of Mr. Silcock does not bind the late Mr. John Barry or his estate, it does help the plaintiff's title, and it is clear from this that for a period of at least twenty years counting back from 1955, no claim had been made by any person.

98. On the other hand, according to Mr. Brady, as to the Fee Farm Grant of 1739 upon which the defendant seeks to rely, this contains no fishing rights in favour of the grantee, and did not reserve any such rights in his favour. As to the conveyance of 1924 of certain lands to the late Mr. Barry's father, that too contains no conveyance or grant of any fishing rights, but rather conveys land, and that only by reference to a series of fields. The Plaintiffs have a good marketable title under an open contract and the conveyance to the Plaintiffs had been admitted by the defendant. In these circumstances, the title was prima facie a good title, and according to law, it is then for the other party contesting this to prove otherwise. In that regard Mr. Brady relied on the decision of Costello, J. in *Tenant and Another v Clancy* (1987) I.R.15.

99. The Plaintiffs also invoke the decision of O'Hanlon, J. in *Carroll v Sheridan* [1984] I.L.R.M. 451, in support of the contention that the rights of fishing cannot be abandoned by mere non user of the right, and in any event the plaintiffs and the predecessors had not abandoned their rights, and there had been no such non user..

100. Mr. Dwyer S.C. on behalf of the defendants said that, on his case, there were just two issues, namely:

- (i) ownership of the river bed with the land;
- (ii) the existence and ownership of the several fisheries.

101. As to the first of these, namely, ownership of the river bed with the land, the basis of title to the Barry land was the Fee Farm Grant of 1739. He submitted that this deed is clearly a conveyance of the land and the waters and it would therefore give one half of the river bed to Mr Dumbleton, accepting however, that it would not convey any several fishery or the right to fish which in that lease was reserved to Abdy and Burward. The 1924 conveyance of the Glencairn lands to the father of Mr John Barry included a conveyance of the river bed pursuant to section 6 of the 1881 Conveyancing Act 1881, and the reference in that conveyance to the various field names which about the river is significant. If Mr Power, the persons conveying the lands held the lands abutting or adjoining the river, then the river bed ownership went with them, unless expressly indicated to the contrary, relying on the case of *Neill v The Duke of Devonshire*, *supra*. In that case however there had been no proof that the bed was disposed of by the Duke of Devonshire, the 1739 Deed was not before the court, and the court did not consider if it had been disposed of. Therefore the 1739 Fee Farm Grant disposing of one half of the riverbed was not inconsistent in any way with that House of Lords decision. He argued that while the plaintiff had shown a good marketable title to a several fishery, and had purchased in reliance on a conveyance of 1955, there had been no several fishery up until that time.

102. The evidence of the Barrys and their witnesses was that no one from Fort William Estate fished from the Barry lands, in exercise of a several fishery right. In any event, he argued the mere existence of a several fishery does not mean that a right to fish by prescription cannot be acquired, citing in support of the same the case of *Little v Wingfield* [1858] 81 C.L.R. 279. In order to have acquired a right by prescription, this must have been acquired openly, without the consent of the owner of the right, for a specific period of time, thirty years or sixty years, in accordance with the Prescription Act 1832, and the defendant complied with all these

requirements. Mr Dwyer submitted there was evidence of fishing for a period thirty years by the defendants, it was continuous, and was a reasonable exercise of that right without the consent of the owner. It was not a question of considering whether the fishing was fishing as a hobby or incidental to ownership of lands abutting the river such as might be enjoyed by riparian owners, as appeared to be contended for on behalf of the by plaintiffs during the evidence. Mr. Dwyer contended that the evidence of Mr Flynn was that he had fished, on the consent of Mr Barry, from as early as November 1939. The defendant did not actually have to rely on sixty years use, because there was no evidence to challenge the use over a thirty year period.

103. Whether the fishing was done under a misapprehension as to the rights existing or not, did not preclude the prescriptive rights arising. In that regard Mr. Dwyer cited the case of *Earl de la Warr v Myles* [1881] 17 Ch. D. 535, and in particular the following extract from the headnote:

"In order to establish a right under the Prescription Act, it is only necessary to show that the benefit claimed has been actually enjoyed by the claimant for the requisite period as of right and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rested his alleged right to enjoy it."

104. Provided therefore that no permission had been granted, the fact that the defendant or others fishing with the consent of the defendant had misunderstood the legal right vesting in the defendant was not a relevant factor.

105. As to the correspondence which took place in 1994 and subsequently, the question arose as to whether one can give a consent or permission which was, in his submissions, both unrequired and uninvited. The correspondence according to Mr Dwyer on behalf of the defendant was an attempt to alter an existing status quo. Up until then they had fished not at all by consent, and it was only after that that an allegation was made that the fishing was with consent. This arose apparently on the basis that Mr Barry had had a meeting with Mrs Mitchell of Fort William Estates, but the basis was not important because Mr Barry needed no right to fish from his own lands. What had occurred could not constitute a consent, and such a requirement was never accepted. Moreover it was a conditional consent and that condition was never met. The letter of the 18th April 1996 was very clear in that Mr Barry was a riparian owner and had fished as of right and the letter from Anthony Carroll, solicitor of the 15th May 1996 left no doubt about Mr Barry's position. On this aspect of his argument, Mr Dwyer invoked the extract from an article by Professor Herbert Wallace in the Conveyancer under the title "Limitation Prescription and Unsolicited Permission" in addition of that publication of 1994. Anticipating that the plaintiffs would argue that the continued fishing on the several fishery was only with permission, Mr Dwyer referred the decision in the case of *B.P. Properties v Buckler* [1985] 55 P. and C.R. 337, and also made reference to *Rafique v Trustees of Walton Estate* [1992] 65 P.M.C.R. 356, saying each of these could be distinguished on the particular facts. Apart from these two cases, there was no authority for such a principle, and if applied, would constitute a major reversal of the Prescription Act and therefore should not be adopted as good law. Although the owner of a several fishery could legally stop an adjoining land owner from fishing, nevertheless since the defendant in the present case had fished for several years, he had acquired rights by prescription and therefore did not need the consent of the owner of the several fishery now to do so. He had a right to fish as the owner of the land, incidental to and appurtenant to ownership of that land and did not need consent to that either.

106. As to the issue of gravel, this was in reality the plaintiffs seeking an injunction against the defendant from interfering with his own river bank, to which he is entitled to have full access, as is clear from the case of *Gannon v Walsh* [1998] 3 I.R. 245 and the judgment of Keane J. in that case. There was Mr. Dwyer submitted, no access, up to the time Mr Agnew took over, to the Barry lands from Fort William Estates. The gravel had been removed over a long period. There was now a planned intensification of fishing. Since what was being sought was injunctive relief, all of these factors must be taken into account. The only entitlement of a several fishery owner insofar as the river bank is concerned is to have access to it in order to fish on the river. There was no evidence in the case that any work would interfere with fishing by the mere standing on the river bank, and the rights of a several fishery are subordinate to the rights of Mr Barry to remove gravel. Nor was there any evidence, he said, that gravel had been removed from the river. There was no danger anyone would fall into the hole in what was called the strand area, and the gravel having been removed over a continuous period of time the plaintiffs were not entitled to any injunction.

107. The plaintiffs had moreover, argued Mr. Dwyer, abandoned any rights which they had. The case of *Neill v Duke of Devonshire* [1882] 8 Appeal Cases 135, put forward by the plaintiffs, could not be taken as support for the principle that a several fishery right cannot be abandoned, and he invoked *Corr v Bradshaw*, unrep'd., The Supreme Court, 1967 as authority to the contrary. On the evidence from the memory of Patrick Barry or Mr Flynn or others, there had never been anyone seen fishing from the Fort William Estates, and this can be clearly considered to be abandonment of the right to do so, he said, invoking the decision in *Snell and Prideaux Limited v Dutton Mirrors Limited* [1995] E.G.L.R. 259. Further, in the case of *Neill*, *supra* the Duke of Devonshire had not claimed an entitlement to the river bed in all of the river but only in part of the river. He did not allege he owned the entire of the riverbed, so a right to the riverbed stemming from the Fee Farm Lease of 1739 is not inconsistent with the decision of the House of Lords in *Neill*.

108. In reply, Mr Foley, S.C., on behalf of the plaintiffs relied at the outset on the decision of the House of Lords in *Neill v The Duke of Devonshire*, *supra*, and this jurisprudence on *Gannon v Walsh* (1998) 3 I.R., 245. So far as the Fee Farm Grant is concerned, the defendant argued that the 1924 conveyance is all square with it. However, according to Mr Foley, this was not so, as the Fee Farm Grant has an exception and reservation in it. The court was therefore being asked to view the Fee Farm Grant as granting a right out to the centre of the river bed, eventually in favour of the defendant. Such a contention fails also to take into account the importance of the Musgrave leases and of the Deed of Surrender granted to N.T. Foley. The leases between the Earl of Cork and Burlington and Christopher Musgrave in 1738 and later are in respect of a substantial parts of land, and contain reservations and exceptions as to fishing, whereas the conveyance of 1924 is in respect of one of the fields in question. The *Neill* decision is very clear in that it dealt with these very leases and with the question of abandonment, and the effect of the judgment is to support the contention that the single fishery was not to pass by the Fee Farm Grant of 1739.

109. On the other hand the actual abandonment claimed by the defendant is abandonment by alleged non-user, according to the amended defence. Although the defence had relied on page 170 of *Neill v Duke of Devonshire* it was important to note the entire of the passage which read:

"An interruption may have been permitted through the absence of the proprietor; or through his ignorance, partial or complete, of the acts relied on; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position; or as requiring from him, for the purpose of resistance, effort or expense unjustified by the necessity of the case; or as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate. The Master of the Rolls has said, in his judgment of the Court of Appeal 'If anything is clear, in my opinion it is that the Duke and his ancestors never abandoned their claim to the several fishery'."

That claim was repeatedly urged, as we learn from the old documents, by the patentee of 1613. It was solemnly put forward in the necessary proceedings. It was made in the leases, the reservations and the covenants to which I have adverted; and it was asserted, continuously and consistently, whenever the occasion for making it arose, down to the time of the respondent and the successful institution of suits by which in particular instances he encountered interference with it, and until drift net fishing, practised by many great nets stretched across the river and barring the ascent of salmon, was substituted for the fishery by cots, which had been comparatively innocuous."

110. It was not submitted by the defendant, Mr. Foley said, that there was any abandonment until the period from 1955 to 1996. The declaration from Mr Silcock was to the effect that for a period of twenty years prior to the time when he swore the declaration in 1955, there had been no claim by any person to any rights in respect of the several fishery.

111. What had to be considered were the exclusive rights to fish and the riparian owner's rights. In that regard Mr Foley invoked Halsbury, at paragraphs 6.25 and 6.28 and the judgment of Keane J. in *Gannon v Walsh*, supra. in particular concerning the features of the legal presumption which must be considered. In the first place it is a presumption only and may be displaced by evidence to the contrary. And in the second place as regards the bed of the river, the presumption of ownership in the plaintiffs' predecessors as owners of the several fishery displaces the presumption that would otherwise arise in favour of the riparian proprietor being the owner of the bed of the river *usque ad medium filum*. The very definition of a several fishery as granting or evidencing the sole and exclusive right to fish, and the case law on the same, made it clear that it is for the riparian owner to establish or to rebut the presumption in the present case, and that had not been done.

112. Dealing with the correspondence both prior to and after the sale to Mr Agnew, Mr Foley pointed out that Mr Barry could no longer be in court obviously to give evidence, and from the evidence it was quite clear that his wife Mrs Barry could not help either. There were in fact no answers to the questions raised in correspondence. The letters were he said of critical importance because the defendant could of course have called Mr Carroll to give evidence but had not done so. Although Mr Dwyer had characterized the correspondence as being some type of ready-up, a reference that in some way it was an attempt to create a situation which was not entirely honest, it was perfectly obvious from the correspondence of the respective solicitors, and in particular the letter of the 18th April 1996, as to the true position, and the court was entitled to draw the conclusion that if in fact Mr Barry really believed he had some right to the lands in question, he did not furnish any evidence of the same when invited, and no proceedings were issued by the defendant in that regard. Not only that but the position was not even addressed by Mr Barry even though he was put on very full notice of the plaintiffs' predecessor's position. In that regard Mr. Foley relied on paragraph 3 of the letter of 22nd April 1996 as being very telling in that there were two solicitors involved who knew full well the importance of the respective claimed rights. In the absence of any evidence, those letters would permit very obvious conclusions to be drawn. It is clear from the letter of the 15th May 1996, according to the plaintiffs, that at this stage Mr Barry is clearly in discussion with his solicitor, there is a contemplated sale and a live claim and an indication of the clients understanding that he was entitled to exclusive fishing rights. But neither of the two men who could have shed light on the position arising from a legal point of view at that time had been asked by the defendants to come and give evidence. Even on the letter of 21st May 1996, the day before the sale of the property by Fort William Estates, the content of the correspondence of that date made clear the plaintiffs' position, the plaintiff's conveyance was sent to the defendant's solicitor, and yet nothing was done by Mr. Barry in relation to these matters. Mr Dwyer had sought to rely on "evidence" of the meeting between Mrs Mitchell and Mr John Barry. Mr Cross was quite clear in relation to that, he being an employee of Fort William Estates. In fact we don't know what transpired at that meeting and it is idle speculation, not evidence, to consider what might have happened at that meeting in the absence of Mr Cross being able to assist. There was, therefore, no substance whatsoever in the suggestion that there was any attempt to alter an alleged existing status quo.

113. As to the claimed acquisition of rights by prescription pursuant to the provisions of the Prescription Act 1832, and the issue of thirty years as against sixty years, section 4 of the Act makes it clear that the respective prescription period shall be the period of sixty years. The evidence in question was at best that of Mr Patrick Barry and of Mr Flynn. The proceedings started in November 1999. Mr Barry Senior secured the property, that is to say the father of Mr John Barry, in 1924. There was no evidence that Mr Barry Senior had fished on the river at all. The evidence began with the children in 1940s and insofar as they were concerned, there was no evidence of fishing for a period of sixty years. So far as Mr Patrick Barry or Mr Flynn is concerned, there was also no evidence of fishing for a full period of sixty years, on a continuous basis.

114. As to the issue of unilateral consent, Mr Foley rejected the adoption of any suggestion of Professor Wallace, not because he was not a professional person, but because of the danger of adopting principles emanating from articles in Law Journals, where the law may be quite different and may be subject to change, or to comment. On the contrary, he invoked an Australian decision on unsolicited permission as being good law on the matter.

115. Concerning the removal of gravel, there was in fact no claim to the gravel. The claim was in relation to the interference with the spawning beds, as a result of the removal of the gravel. The reason for the re-examination concerning the return of the salmon was that that was the time when the problem arose. The evidence of Mr Cross was that such disruption in the river caused by the removal of substantial amounts of gravel in the river and on the strand area in 1998 was such as to interfere with the spawning beds. Mr Keaveney also gave evidence of this as being an interference with the fishery *per se*. It is not the exercise of the moving gravel because of the weather, it is rather that especially in 1988 there was substantial potential damage to spawning.

Conclusions

116. The right of a person to fish in a river or a lake is a recognised right of property in our law. This is usually called a "several fishery", although it can be enjoyed by an individual as well as by a group of people. Rights of the type claimed by each party in these proceedings have been the subject of much and lengthy case law in this jurisdiction. This case concerns, it would appear, only those rights relating to a several fishery in non-tidal waters. At the very least there has been little said to the court on the possibility that it might cover tidal water, and therefore the distinction to be drawn between one type and another is not considered in this judgment.

117. As has been explained in the cases, on many occasions, a several fishery may be no more than a right vested in a person to kill and take away fish from a particular stretch of a river. In such a case it belongs to what is called a *profit à prendre*, and as such falls into the wider category of legal rights known as incorporeal hereditaments. Such incorporeal hereditaments may be exercised by a person by virtue of his right to the ownership of land in which case they are normally described as being *appurtenant* to that land, usually described as the dominant tenement, but they can also exist independently of ownership of any land in which case they are said to exist *in gross*.

118. The very many cases in which fishing rights have been considered do not all have to be referred to. It is sufficient to rely on recent and well known cases in which the court can find appropriate principles to be applied to the facts at issue here. According to the decision of Keane J. in *Gannon v Walsh*, supra., there is weighty authority for the proposition that a person entitled to a several

fishery in non-tidal waters, as here, is presumed to be the owner of the bed of the river over which the right is exercised. In that case Keane J. traced the history of the presumption, through a series of cases in the United Kingdom Court of Appeal and the House of Lords, over a period of years, and found that insofar as the legal presumption is concerned in the first place it is a presumption only and therefore may be displaced by evidence to the contrary, and in the second place, citing Lindley L.J. in *Hindson v Ashby* [1896] 2 Ch. 1,:

"As regards the bed of the river, the presumption of ownership in the defendants' predecessors as owners of the several fishery displaces the presumption that would otherwise arise in favour of the riparian proprietors being the owners of the bed of the river usque ad medium filum".

119. Even if the plaintiffs are entitled to no more than a profit à prendre, it remains the case that any wrongful interference by the defendant with the exercise by the plaintiff of that right would entitle them as a general rule to an injunction and/or damages. It is not necessary, following the decision of Costello J. in *Tennant v Clancy* [1987] I.R. 15, for the plaintiffs to establish that they are the owners of the soil of the riverbed in order to obtain such relief. As was also stated in *Gannon v. Walsh*, supra, it is also clear that such an action, although in form an action for nuisance, is more akin to an action for trespass.

120. In the present case it is, of course, true that the defendants claim not only that there is a weakness in the plaintiffs' title, but that they themselves have a title to the riverbed or to at least part of it.

121. As to the Plaintiff's argument concerning the title to the several fishery, I find as follows. The Plaintiffs acquired a good title to the several fishery, and the conveyances in question had been admitted by the defendant. The presumption as to ownership of the river bed therefore applies, in accordance with the case law. This of course can be rebutted by the Defendant, inter alia, as they suggest, on the basis that they acquired the river bed ownership, or part of the river bed by their own title to the lands in question.

122. In that regard, the so called "Musgrave" leases, mentioned above, are relevant. In their salient parts, although the fishery forms part of the lease, it is clear that the Earl of Cork and Burlington had reserved the right to fish in the River Blackwater for himself and his heirs. This view is also borne out by the fact that as well as rent, Christopher Musgrave was obliged under the lease to pay to the Earl and his heirs and assigns the "sum of £12.10.0 for every Ton of Salmon which shall be taken in said Fishery and sold salted and half the price which the fresh Salmon shall be sold for . . ."

123. As to the second lease, made in 1852, this lease is largely in similar terms to the first lease between the same parties. The same reservations in relation to the right of the Earl to fish are included in this lease. The note at the end of this lease records Christopher Musgrave's objection to the liberty of fishing reserved by the Earl "otherwise than by Angling which was the only reservation intended at the time of the first agreement [the first lease] the benefit of the Weyres and fishery on the River Blackwater being set to said Musgrave as by the within Lease and afterwards signed sealed and delivered by the said Christopher Musgrave in the presence of Will Connor".

124. As to the third lease made in 1825 between the Duke of Devonshire (as he was then known) and Rev. P S Smyth, the reservation in this lease is not so clear. The lessor is clearly reserving the "mines minerals and Royalties" but it is uncertain whether the next part of the lease gives PS Smyth any rights to the fishery.

125. The leases, or at the very least the first two, would appear to support the plaintiffs' contention as to the rights existing pursuant to them. The Deed of Surrender dated 5th April 1869 would also appear to support the plaintiffs' contention that the Fee Farm Lease of 1739 did not in fact convey the fishery to the defendant's predecessor in title. Finally, by a fishing licence dated 1874, the Duke of Devonshire grants Nelson T. Foley and his son Edmond permission to fish in the 'several fishery on the River Blackwater as well in portions of said River Blackwater where the tide ebbs and flows as also in certain inland portions of the said River' in consideration for a rent of £710.10.9d for the fishing season of 1875.

126. The defendant claims ownership in the several fishery by virtue of the Fee Farm Lease of 9th June 1739 mentioned earlier. In this lease, the Sir William Abdy and Jonathan Borward reserve the right to fish on the "lands at Ballygarren" which presumably are part of the defendant's lands on the Blackwater. There would also appear, however, to be a significant gap in the defendant's chain of title. From the Schedule to the 1924 conveyance to the defendant's father John Barry, it would seem that the land fell in to administration from 1820 until 1922 when it was disentailed. It is also significant that in the conveyance between Ambrose Grattan Power and John Barry of 1924 there is no reference whatsoever to the several fishery or even fishing rights in the River Blackwater in general. The lands are described as grasslands, woods, farmyard, dwelling house and 'out offices'. Included in the lands are "all incidents of tenure rights of way water light drainage and other easements (if any) . . . party walls . . . fences arches archways cellars or any other matters and to such further rights (if any) of adjoining tenants and occupiers." If there were to be rights to the several fishery, or any grant of fishing rights, this would have to have been mentioned in this conveyance.

127. In the foregoing circumstances, I am satisfied therefore that the defendant is not and was not at any time the owner, by virtue of the Fee Farm Lease of 1837 or by the Conveyance of 1924, of any fishing rights on the river Blackwater, either the fishery in question, or against the plaintiff, of the river bed. Although there appears to be some gap also in the Plaintiffs' title, between the deed of surrender in 1984 and the 20 year period stretching back from 1955 when Mr. Silcock made his declaration, I am nevertheless satisfied that the plaintiffs have established that they have a good title to the several fishery, in the sense required, namely would be accepted on a Vendor and Purchaser summons, in accordance with the decision of Costello, J. in *Tennant v Clancy*, supra.. I am also satisfied that the Defendant has not discharged the onus of proof which is on her to displace the presumption that the river bed belongs to the plaintiffs, as owners of the several fishery, and not to the defendant as a riparian owner, the defendant relying in that regard, in submission, on the rights flowing from the Fee Farm Lease of 1739..

128. Since I am satisfied that the Plaintiff has presented a good title to the several fishery, I must now consider the question of the exercise of access rights to that fishery. It is a well established principle of law that a grant of fishing necessarily implies a right of access to the banks of the river, save in those cases of which this is not one, where the full beneficial use of the fishing can be enjoyed by the person entitled to it by the use of boat. No suggestion has been made in this case that the entire of the several fishery can be properly or adequately fished by way of boats or indeed in any other way than by the use of a rod and line from the bank or by wading into the river, although in some cases it has been fished by boat in part.

129. The right of access to the bank must be exercised, as is also long established in law, in a manner which is as least detrimental to the riparian owner as is consistent with the exercise of the full beneficial use of the right of fishing. However the defendant has not contended, with the exception of a complaint about the existence of a stile, that the access to the banks of the river along the boundary stretch in question has in fact been unduly interfered with or indeed would be unduly interfered with in the event of more intensive fishing by the plaintiffs, and therefore the question of the manner in which this right is being exercised does not really arise

for consideration in the present case. Mr. Dwyer submitted that there was no access from the plaintiffs' lands to the Barry lands until after 1996 when the plaintiffs purchase Fort William Estate. This is not correct. Although there was a dispute about a fence, and a stile, and some of the witnesses whom the court would have expected to have known about the stile, given their claimed knowledge of the river or of the Glencairn holding did not know of it, Mrs. Barry gave evidence of the stile being installed by Mr. Anthony Cross, by agreement with her late husband, who had made a contribution to the cost involved, and that this had been done during Mrs. Mitchell's time, that is to say prior to 1996 when the plaintiffs purchased Fort William Estate and the several fishery. Since she is the person residing at Glencairn since 1971 and her evidence on this tallies with that of Mr. Cross, I am satisfied this is the true access position.

130. As to the removal of gravel, I am also satisfied that the evidence was contradictory on the part of the defendants. Some witnesses said it only occurred rarely, even every three or four, or perhaps every six years, and some witnesses indicating it took place every year, but only in small amounts. The position on the evidence, and I conclude as a fact, was that some small amounts of gravel, of which there is no complaint by the plaintiff, were removed almost annually. However, on a less frequent basis, including in 1998, much greater quantities of gravel were removed from the river bed, by digger or excavator, and that this had the effect complained of, namely, a substantial interference with the spawning bed or potential beds of salmon. I am satisfied that the plaintiffs established the same, as well as the actual and potential damage ensuing.

131. I am also satisfied on the evidence that there has been occasions, although not very many occasions prior to the institution of these proceedings when the late Mr John and his brother Mr. David Barry did interfere with the plaintiffs or their licensees right to enjoy access to the river bank, and the evidence is clear that anglers using the river bank were approached on occasion in a manner which made it impossible or very difficult for them to enjoy a peaceful day's fishing. I am also satisfied on the evidence that Mrs Barry, the wife of the late Mr Barry, together with Mr Barry entered into arrangements permitting, without the consent of the plaintiffs, tourists or anglers to fish on the rivers by licence and by advertising the availability of such licences in circumstances where they were not entitled to do so, and for these reasons trespassed on the plaintiffs' rights to the fishery and to the right of access thereof.

132. The Defendant's claim that the Plaintiff, if they had any rights, had abandoned them, or in the alternative, the Defendant had acquired rights to the fishery and/or the river bed by prescription Although a very considerable number of witnesses gave evidence in this case the essential issues which remain to be resolved are few. It is perfectly clear that for a very long period of time certainly stretching back to the last century and even to the 19th century this stretch of the River Blackwater and perhaps others have always been fished either in some stretches of the river by the use of nets or cots or by rod and line or indeed by both. It may be that other parts of the river carry better fishing, but in this particular stretch of river which concerns the several fishery there were in fact two beats with the possibility (not seriously contested) of the existence of a third licensed beat and the distinct possibility (again not seriously contested) that all three beats could be developed so as to provide better fishing.

133. As to what is meant by abandonment, this has been relied on by the defendant as being proven by alleged non use over a period of 40 years, according to the pleadings, or 30 or even 60 years according to the submissions. The evidence is presented and argued in the same way both as to abandonment and as to the acquisition of rights to the fishery by prescription.

134. In the circumstances, it is essential to consider the evidence in that regard. There is first the evidence of Mr. Flynn and of Mr. Patrick Barry. Mr. Barry is the brother of the late John Barry, and was born in 1928. He said his own father did not fish, but he and John and their other brother David all fished. He said he had fished from the "early 1940"s. He moved from Glencairn in 1971 and rarely fished afterwards. He had not seen anyone fishing from Fort William Estate. Mr. Feeney lived nearby, and had worked since 1967 for the late Mr. John Barry. He had seen David, John and Patrick Barry fish, as well as their children, a Mr. O'Hara and a Mr. Daly. He had very seldom seen anyone fishing from Fort William Estate, perhaps one person over two or three years, and over four or five years an odd person every two or three weeks, but before 1996 he had not seen such people.

135. Mr. Joseph Flynn, who would have been 75 on his next birthday after the hearing had been born at Fort William, which he left in 1948 after which he said the Duke of Westminster lived there. He said he knew the river as a child from when his own father fished, and he was about ten or eleven, in 1940 or 1941. He himself however said he fished only from the 1950s when he returned from Tipperary for holidays or at weekends. He was unable to say if the Duke of Westminster had fished from Fort William.

136. Mrs. Barry who had been living at Glencairn since 1971 and knew the house (although not the river) since 1968, said she had never looked up or down the river, and was unable to say if there was fishing by people from Fort William. She said she saw very little fishing from the banks adjoining Glencairn. Although fishing permits were adduced in court from Fort William, she rejected these as simply being a list of names. Mr. David Barry, a son of David Barry senior, was born in 1969 and had a rod from about 1975 when he was six years and had a significant interest in fishing. He had fished with his father over many years, on the river, and only left the area about 10 years previously, on marriage. He had continued to fish afterwards, but exclusively at weekends. At one stage he said he had never seen a non-Barry family member fishing, although he also said that Mr. George Cross also fished a lot. And he also said that he had seen fishermen from Fort William, from Cork, fishing on the river.

137. There was certainly evidence before the Court, that fishing permits were issued by Fort William Estates. For the Plaintiffs, Mr. Anthony Cross said he was the person who gave out those permits, as had his father before him. While he did not take over as estate manager until 1990, he gave evidence of knowing the lands and the river well since 1979 when his father took over. Neither the existence of nor the issuing of such permits was actually challenged on behalf of the Defendant. Nor was his knowledge of the river, nor his evidence that people fished on the river, with the permission of Fort William Estate, 6 or 8 of them, during the spring and summer, on a two weekly and four weekly basis. The evidence of both Mr. Agnew and of Mr. Cross was that the possibility of sending fishermen to the Glencairn area was only interrupted when incidents occurred, of the type described in evidence, and which were the subject of written protest. There is also the evidence of some at least of the defendant's own witnesses that Mr. George Cross, the Estate Manager of Fort William, Mr. Keaveney, current fisheries manager at Fort William and Mr. Dudley, former estate manager at Fort William, all fished the river over a period of time, as well as Mr. Flynn's own father, when he resided at Fort William.

138. Having regard to all the evidence adduced, I am not satisfied that the Defendant has established, as a matter of fact, that the several fishery or that part of it called the Bishop's fishery, was ever abandoned by the plaintiffs or their predecessors in title by non use. Moreover, the Plaintiffs argue that at law it is not possible to abandon such right to such a several fishery, relying on the decision of the House of Lords in *Neill v Devonshire*, *supra.*, in which it was held that the Duke of Devonshire had not, at the time of that judgment, abandoned, in any legal sense, the several fishery, possibly – without having to decide the issue definitively – the very several fishery in question here. That decision held that an interruption in use through the absence of the proprietor, or by the use through ignorance, of the acts relied on, or even through neglect or indifference, did not vitally affect interest or position or the owner. And, the House of Lords held, "...it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate."

139. While I do not consider this extract and this case to constitute a principle that there can never be abandonment by non use, it is clear that such abandonment must consist of something more than is contended for by the defendant, as the defendant rests her case on alleged non use, but no more. There is implicit in that judgment a finding that for the purposes of abandoning a several fishery, the owner of the same must do something more positive than mere non use, even if established, to prove abandonment. In the present case, I am not satisfied that the defendant has established that the plaintiffs or their predecessors in title abandoned their claim to the several fishery. Nor am I satisfied that the case of *Corr v Bradshaw*, invoked by the defendant is really authority in support of its case, that a several fishery, as here, is abandoned by non use.

140. There remains, however, the question of the defendant's claim to prescriptive ownership of the fishery through use. This is allied with the factual matters underlying the claim that the plaintiffs or their predecessors had abandoned the fishery. On the question of use by the defendant or her predecessors in title, the evidence can be divided into separate parts. First there is evidence of fishing on the river from the Barry lands themselves. This was given in evidence by Mr. Flynn, Mr. Patrick Barry and Mr. Feeney, as well as by Mr. David Barry and by Ms. Ann Barry. The evidence of Mr. David Barry and of Ms. Ann Barry as to their fishing relates to a period subsequent to 1975 or later, within a period of 30 years from the commencement of these proceedings. Mr. Patrick Barry and Mr. Flynn both gave evidence of fishing from the 1940s in the one case and from the 1950s in the other. Mr. Dwyer suggested it was 1939, but I think this was because of the suggestion by one or other witness that he was ten or eleven at the time he started fishing on the river. However, the earliest actual dates suggested were 1940 or 1941 or "in the 40s", when Mr. Flynn went with his father who was fishing, but he himself fished from "1950". In such circumstances the 60 year prescription period provided for in the Prescription Act 1982 was not met. It is true Mr. Dwyer argued that the defendant's claim to thirty year continuous use was not challenged. But Mr. Foley for the Plaintiff argued that the requirement is for continuous 60 year use on a correct interpretation of the said Act. I agree, and in the circumstances I do not find that the defendant has established, as she must do, that there has been use by the defendant, without the consent of the plaintiffs or their predecessors in title, for the requisite period, on a continuous basis, such as to be able to rely on the principle of prescription.

141. Although I do not think the issue essential to the resolution of the dispute between the parties in this case, having regard to the evidence and the submissions, I should say something about the question of the consent of Mrs. Mitchell to the Barry family to fish on the river. I am satisfied that this was a proper consent or permission, notified to Mr. John Barry, and also to Mrs. Barry, and to Mr. Barry's brother, David. It is not possible to come to a concluded view on the exchange of correspondence, but it is possible to say, without that, that had Mr. John Barry, or his solicitors, been of the view that he had a legal right to fish, pursuant to his title documents, or even pursuant to a legal right acquired by prescription, it would have been perfectly natural for him to have taken steps to have protected any of those rights by appropriate means, and he did not do so. The suggestion that he was friendly with Mrs. Mitchell and therefore did not wish to cause any difficulties represents a proper respect towards a woman who had been a neighbour for many years. Nevertheless, Mrs. Mitchell had died, and in fact it was the company which was selling the lands, and it seems extraordinary that there should have been any hesitation, if it were genuinely the case that Mr John Barry had such legal rights. It is also surprising that Mrs. Barry, who could remember many small details, could remember nothing about any discussions concerning this matter, or any real detail from the correspondence, or assist the court in any other way. I am satisfied that it is unlikely that one could conclude from the correspondence on behalf of Mr. John Barry that he did indeed have, or consider he had a good legal title to the river bed, or any part of it, or to fishing rights. But of course I do not have to decide this. In view of my findings on other issues, however, I do not consider it useful to reach any more conclusive view on the status of such a consent.

142. In the foregoing circumstances, I find that the plaintiffs are entitled to the reliefs sought.