

THE HIGH COURT

[Record No. 2009/5228 P.]

BETWEEN

INLAND FISHERIES IRELAND

PLAINTIFF

AND

PEADAR O'BAOILL, JOHN GERARD BOYLE AND JOHN BOYLE

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 12th day of December , 2019

1. Within the notice of motion, the plaintiff seeks an order, pursuant to the inherent jurisdiction of the court, giving directions as to the mode of trial of the within proceedings as follows:-
 - 1.(a) An order directing that the entitlement of the plaintiff to reliefs claimed at paras. 1, 3, 4 and 5 of the general endorsement of claim and that the costs of the proceedings can be heard on affidavit only;
 - (b) Insofar as paragraph 1 of the general endorsement of claim is concerned, an order that the map referred to therein be the map exhibited at "PMCM1" to the affidavit of Patrick McMullin, sworn on the 30th day of January, 2018 - insofar as this relief is sought there is agreement amongst the parties that this order can be made;
 - (c) An order directing the entitlement of the plaintiff to an order dismissing the defendant's counterclaim in limine be heard on affidavit only - insofar as this relief is sought there is also agreement amongst the parties that that order can be made;
 - (d) An order treating the hearing of this application as the trial of the within proceedings and in particular as to the trial of the proceedings for the purposes of determining the plaintiff's entitlements to the relief sought at para. 1 (a), 1 (b) and 1 (c).
 2. If necessary, an Order giving appropriate directions for an exchange of affidavits to facilitate the mode of trial and hearing sought by this Notice of Motion.
 3. Costs.
2. In such circumstances it is therefore necessary to set out the relevant reliefs sought in the plaintiff's general endorsement of claim which issued on 8th June, 2009. It is as follows:-
- "1. A declaration that the defendants together with all persons acting in concert with them do not have the right to fish the Gweebarra Salmon Fishery, County Donegal ("the fishery") in the waters coloured yellow on the map exhibited at "GMCC1" to the affidavit of Gerry McCafferty sworn on 8th June, 2009 without a permit issued by or with the authority of the plaintiff.
 2. [This relief is not sought within the notice of motion]

3. An injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the said order from entering upon and/or fishing the fishery without an individual permit issued by or with the authority of the plaintiff to such persons.
 4. An injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the said order from howsoever communicating to persons holding permits issued by or with the authority of the plaintiffs who are entering on/or fishing the fishery that they are not entitled to fish the fishery.
 5. An injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the said order from inciting persons wishing to fish the fishery to do so without a permit issued by and with the authority of the plaintiff and from representing to such persons that they would be entitled to do so by joining the Fintown or Rosses Anglers (Clubs)".
3. An interlocutory order was made by Charleton J. on 20th July, 2009 bearing the title of the plaintiff's predecessor (The Northern Regional Fisheries Board), the court noting that the plaintiff's undertaking to erect a notice in the relevant premises indicating the parts of the river not under the control and accessible without a fishing permit that within one week of this date:-

"IT IS ORDERED that the defendants together with all persons acting in concert with them and all persons having notice of the making in this order (i) be restrained pending the trial of the Action from howsoever communicating to persons holding permits issued by or with the authority of the Plaintiff who are entering on and/or fishing the fishery that they are not entitled to fish the fishery (ii) be restrained pending the trial of the Action from inciting persons wishing to fish the fishery to do so without a permit issued by or with the authority of the plaintiff and from representing to such persons that they would be entitled to do so by joining the Fintown or Rosses Anglers Clubs".

The costs of the motion and order were directed to be costs in the cause.

4. Thereafter a statement of claim was delivered on the 11th May, 2010 with the defence and counterclaim delivered on the 13th December, 2010.
5. Pursuant to a motion by the plaintiff for directions seeking a modular trial of the proceedings and directions as to the first issue to be tried. On 21st November, 2011 Murphy J. directed a modular trial and the first issue to be tried. The same order also amended the title of the proceedings to now read that the plaintiff sues in the name of "Inland Fisheries Ireland" (it had formally been Northern Regional Fisheries Board). The court directed that the first issue within the modular trial to be as follows:-

- (a) Does the plaintiff have the right to manage, control and regulate access to the lands within what the plaintiff refers to as the Gweebarra Fishery marked in yellow (IFI owned fishing) and green (Kevin McDonnell Fishing) on the map exhibited at "PMcM1" to the affidavit of Patrick McMullin sworn on the 13th day of September, 2011.
 - (b) Is the plaintiff entitled to the reliefs sought by it as against the defendants insofar as the lands at (a) above are concerned.
 - (c) Are the defendants entitled to the reliefs set out in their counterclaim insofar as the said lands at (a) above are concerned.
6. The reply and defence to counterclaim was delivered on 16th January, 2012.
 7. The judgment in respect of the first module was delivered by Laffoy J. on 10th December, 2012, with the order on foot of that judgment dated 7th February, 2013 - [2012] IEHC 550.
 8. The notice of appeal issued on the 14th day of March, 2013, a notice of motion seeking to adduce new evidence pursuant to RSC O. 58, r. 8. before the Supreme Court issued on the 8th October, 2014 and the order and judgment of the Supreme Court (Clarke J.) is dated 15th May, 2015 - [2015] IESC 45.
 9. The first and, as I understand it, only module which has been heard before the court to date, was that heard before Laffoy J. and it ran for six days.
 10. Following the decision of the Supreme Court to refuse the Defendants' application to admit new evidence, the defendants then withdrew their substantive appeal against the judgment of Laffoy J. Accordingly, the judgment of the Supreme Court relates solely to the issue or question of the admissibility of new evidence.
 11. The grounding affidavit to this motion makes it clear that there is now unanimity that the operative map in respect of this matter is that referred to as exhibit "PMcM1" referred to within this affidavit. That map is headed "Gweebarra Fishing Rights – Module Two" and shows a green coloured line comprising the McDonnell's section, a state-owned section coloured yellow described as module two and a red coloured section described as state-owned section – module two.
 12. It appears that whilst this plaintiff seeks directions regarding any future second module, in my view the motion in and of itself also seeks some form of final summary reliefs. As set out above, module one was clearly delineated by the questions of Murphy J. resulting in the judgment and order of Laffoy J.
 13. In its judgment, the Supreme Court (Clarke, MacMenamin and Charleton JJ.) in the judgment of the Court, Clarke J. described the proceedings generally as complex and the judgment of Laffoy J. as furnishing a detailed history of the proceedings to date. Both assertions are undoubtedly correct.

14. In considering the application to admit new evidence, the Supreme Court, Clarke J. essentially summarised the then present position of the proceedings and concluded as follows:-

- (a) That the chain of title to the fishery at the northern bank of the Gweebarra River (to which much of the new evidence was directed) is not relevant to the specific issues which Laffoy J. had to determine on the first module of the trial and is not, therefore, relevant to the issues which specifically arise on appeal.
- (b) In respect of the evidence (styled new evidence) sought to be admitted, the Supreme Court then held as follows:-

“To the extent that the relevant chain of title may be relevant to any subsequent module, it will be open to the trial judge hearing that module to consider, if thought appropriate, additional evidence which might suggest that the chain of title identified by Laffoy J., although sustainable on the evidence before her, is in fact incorrect. In those circumstances, the proper place in which to explore any issues concerning the chain of title concerned is in the context of any subsequent module during which that chain of title may transpire to be material to the result of the issues which the judge hearing that module has to determine. It would be inappropriate to expand this appeal to consider a question of the chain of title which could have no possible bearing on the result of module in respect of which this appeal has been brought, and which would require this Court either to embark on the entirely unsatisfactory task of considering, at first instance, the issues of title raised or, alternatively, would result in the matter being remitted back to the High Court. Should the latter course of action be adopted then there would, in practice, be no difference to what will happen anyway, and thus no prejudice to the fishermen”.

Clarke J. concluded:-

“I would, therefore, conclude that the question of the chain of title prior to the trial of the first module in the High Court is not an issue which can properly be raised on this appeal and it follows, therefore, that the evidence sought to be introduced cannot itself be relevant, for it only touches on that question. In those circumstances I would dismiss the application”.

15. It appears noteworthy that pursuant to the judgment of the Supreme Court regarding the admissibility of new evidence and the withdrawal of the substantive appeal by the defendants, those defendants have taken no steps thereafter to seek to adduce this evidence in the manner set out or potentially envisaged by the Supreme Court. They only now seek to do so by way of replying affidavit to the motion and grounding affidavit of the plaintiff within these proceedings. Equally the plaintiffs who seeks the reliefs appear to have taken no further steps until this application.

16. In addition, in the affidavit grounding this notice of motion, the plaintiffs make clear that it will not pursue any claim for damages against the defendants and moreover, the plaintiff is prepared to forego any costs of the interlocutory injunction (Charleton J.) notwithstanding that those costs were made costs in the cause. This in part is linked to certain comments of Clarke J. within his judgment which are recited below.
17. The Plaintiff contends (and the Supreme Court adverted to this point) that given that the claim for damages is not being pursued that this is now a prospective (as opposed to retrospective) action that it is now open for this plaintiff to seek its reliefs, particularly with regard to treating this application as a trial of the proceedings.
18. The replying affidavit to the present motion is sworn by Mr. Boner on the 20th day of April, 2018. Clarke J. in the Supreme Court has already made reference to Mr. Boner's assiduous researches.
19. Mr. Boner avers that there has been no prosecution of this action by the plaintiff because of further new historical evidence brought to the plaintiffs' attention in July, 2016. The nature of that evidence and any correspondence in that regard is simply not exhibited.
20. Mr. Boner avers thereafter:-

"Since the matter by Ms. Justice Laffoy, copies of the transcript of the evidence taken before a parliamentary committee of the British Parliament at public hearings in Glenties Courthouse in July of 1911 came to light. This evidence establishes that the fishing rights on all of the northern bank was purchased by the Congested Districts Board from General Tredennick in 2008 and then sold on to a collective of the former tenant purchasers of the John Irwin Estate under the management of the local curate, Father James Scanlan. The plaintiff has not indicated whether or not it accepts the truth of the evidence given on that transcript".

21. In respect of these averments, no documentation is exhibited and accordingly, the matters set out simply cannot be evaluated.
22. The documentation exhibited comprises:-
 - (a) A copy of the extracts from the record of the Parliamentary Committee of the Department of Agriculture and Technical Instruction printed in 1913 (the 1913 report). In particular, the evidence taken in Co. Donegal and, in particular, from John O'Conner who was a solicitor for the Congested Districts Board, whilst his evidence was not taken in Co. Donegal (as averred to by Mr. Boner), he avers that it is relevant to the issue of the collective.
 - (b) Minutes of the Congested Districts Board of 5th July, 1901.
23. The assiduous collection of this evidence by Mr. Boner is to be commended but very little new evidence is in fact exhibited. Mr. Boner sets out what must be his understanding of the position but, in my view, there is a difficulty for the court seeking to even evaluate it.

24. The decision of Laffoy J. shows that a significant volume of documentation was before her which she has comprehensively analysed. The same is not the position in respect of this application.
25. In respect of the first exhibit to Mr Boner's affidavit, which I have styled the 1913 report, it is, without any criticism of any parties, very difficult to read. It is headed "Department of Agriculture and Technical for Ireland, Departmental Committee on Irish Inland Fisheries, Minutes of Evidence, Appendices and Index, Presented to Both Houses of Parliament by Command of His Majesty".
26. It appears (and again, it is extraordinarily difficult to read and there is no transcript) that Mr. O'Conner as solicitor to the Congested Districts Board ("CDB") states that the river (which I suppose for the moment is the river, the subject matter of these proceedings) was purchased by the board for about £100 in respect of the fishery rights. Those rights appear to be rights appurtenant to the Tredennick Estate. In answer to a question posed within that inquiry at what appears to be number 196, Mr. O'Conner states:-

"The fishery rights were revered on the sale agreement (a reference to the estate being passed to the tenants it appears)".

The quote continues:-

"The object of the board was to have those rights vested in such a way that the profits should (cannot be read) for the benefit for the riparian proprietors not in proportion to the valuation of their holdings, nor to the extent of their holdings on the river, but equally amongst them all".

Mr. O'Connor appears to continue thereafter:-

"Father McFadden who is the parish priest, paid the Board for these fishery rights, and he is farming them out as best he can. I believe he raised the money by a loan. The idea is that he (cannot be read) of the profits of the fishery to pay first of all, the expenses, secondly, to repay the interest of the loan, thirdly, to repay the loan itself and afterwards to apply the proceeds for the benefit of the riparian owners".

Mr. O'Connor continues:-

"The object of the board... referenced to this fishery was this. They wish to vest the rights of the profit a prendre, I may call it, arising from the fishery, to make it an appurtenant inseparable from and belonging to each particular holding, so that a man could not sell and realise the fishery apart from the holding which he might be deposed to do and which he could do of course if it was a several fishery".

He continues:-

"The deeds have not been finally settled yet and in the meantime, Father McFadden is at liberty to use the name of the board in legally prosecuting trespassers and so".

27. In answer to a question concerning Gweebarra, he states as follows:-

"About the Gweebarra, I think there is more activity now in preserving the waters and less poaching on the waters than there was in the past... and the point of my remarks generally is that the transfer of the sporting rights and the fishing rights – or the sporting rights including the fishing rights – will greatly tend to improve the supply of birds and improve the conditions as to these matters and make these things more valuable in the future than they were in the past..."

28. The second exhibit refers to the minutes of proceedings before the CDB on the 5th July, 1901. Amongst such matters was a resolution passed by the Board in the following terms:-

"On estates, or portions of estates where the sporting rights are, or may be expected to become a source of profit, the policy of the Board shall be either (a) to reserve these rights to the Board for the benefit of the purchasers; or (b) to invite the purchasers to form a representative committee and to vest the sporting rights in the committee or in trustees nominated by the committee, for the benefit of the new peasant proprietors.

Where, in the opinion of the Board, other amenities can be advantageously transferred to such committee as seem fitted and willing to administer so important a trust, the Board will aim at transferring them from time to time and will cooperate with the committees in turning them to the best account".

29. The final exhibit appears to be a proposal set out in a letter or memorandum of 10th June, 1912 from the CDB to the Marquis Conyngham (as vendor) whereby they propose to purchase lands set out in a schedule (which is not appended). The document recites that the vendor, the Marquis Conyngham will sell and the Board will purchase lands as set out in a schedule 'discharged from all claims affecting the said lands and hereditaments whether in respect of superior or intervening interest or incumbrances or otherwise but subject to the interests of the tenants in occupation of the lands or any person having claim to those interests, to any easements, rights and appurtenances mentioned in s. 34 of the Land Law (Ireland) Act, 1896..."

30. Mr. Boner then avers that that he has seen the 1913 contract between the Conyngham estates and the Congested Districts Board in the Department of Agriculture in Cavan town but that the Land Branch were not prepared to make a copy available to him. Mr. Boner does not depose to when he discovered these matters (and of course his evidence of having cited documentation is not any proof of title).

31. I do not know if this is a similar reference to the documentation stated to be held within the same department and location in Cavan that formed part of the new evidence sought to be adduced before the Supreme Court. Within the notice of motion grounding that application, the appellants state:-

"The evidence constitutes newly uncovered title documents relating to the titles of the northern bank of the Gweebarra Fishery contained in a file entitled CDB 5852 Box 3119 held at the Legal Services Division Department of Agriculture, Food and the Marine at Cavan County Council".

I do not know if this is the same evidence referred to as held within the Land Branch in Cavan town as averred to by Mr. Boner in his latest affidavit. The application to adduce new evidence or rather the motion issued on foot of that is dated 8th October, 2014. Either it is the identical documentation referred to by Mr. Boner in his latest affidavit, or it is different documentation; in either case, appropriate steps should have been taken to ensure that all documentation is properly before the court. I cannot rely on averments as to the title.

32. Having said that I also appreciate that, as I understand it, the Defendants are at this stage within the proceedings seeking to merely advert to the available or potentially evidence available in support of their defence of these proceedings (and also to bolster their claim to having an entitlement to fish within the fishery without a licence as contended for by the plaintiff). However I cannot discern any positive averments as to their suggestions as to the contents that any second module might deal with.
33. Mr. Boner then avers to notes of a meeting of the Congested Districts Board on the 24th March, 1914 states, amongst other matters:-

"And that also the Fisheries Branch paid to the account of the General Tredennick Estate the amount refunded to Cannon McFadden for the purchase of the Owenea Fishery on that estate..."

Mr. Boner then asserts:-

"I do not have a copy of the said minute note but the above represents word for word what I copied from the document that is in the manuscript office of the National Library. A copy can be procured at a later date".

My comments above are equally applicable to this averment.

34. Mr. Boner in light of these matters appears to state the following:-
- (a) Since the judgment of Laffoy J., the evidence taken before a parliamentary committee in July of 1911 has come to light.
 - (b) that the evidence establishes that the fishing rights on all of the northern bank was purchased by the Congest Districts Board from General Tredennick in 1908 and then sold on to the collective of the former tenant purchasers of the John Irwin Estate under the management of the local curate, Father James Scanlan.
35. I have set out above what I consider to be the relevant entries from the parliamentary committee sittings in 1911. Whilst I have located a reference to Father McFadden and the

Tredennick Estate as set out in the quotations above, the reference to the John Irwin Estate alludes me. This evidence is then said to be analogous to other evidence as to the sale of the Irwin Estate and entries made in the rating records. None are exhibited.

36. It appears that this, together with the second exhibit referred to above, is the basis for the position maintained by the defendants, namely that it suggests that a serious issue remains to be tried which will establish that the plaintiff does not have the rights it alleges in respect of the northern bank.
37. As regards the southern bank, the defendant maintains that essentially the same policy was in being with the CDB acquiring rights from the Conyngham Estate on trust for the tenant purchasers and that on the dissolution of the CDB, no rights on the Gweebarra passed to the State.
38. The 1913 contract between the Conyngham Estate and the CDB in the Department of Agriculture in Cavan town is referenced. I have great difficulty in understanding how the defendants can contend that there are matters presented to this Court which would enable it to accept in the suggestion or comments of Clarke J. in the context of a modular trial, that if there were matters that were not known or presented before Laffoy J. that that might enable the matter to be reconsidered. I can see no matters on the basis of essentially a derivation by Mr. Boner, with limited documentation, of the history of riparian landowners on the Gweebarra. Mr. Boner's researches may be exemplary but there is very little by way of documentation by which I can make any assessment as to title. Averments by Mr. Boner will simply not suffice.
39. Mr. Boner then refers to para. 3331 of the 1913 report from which I have quoted extract above. Within that, he sets out that Cannon McFadden, as a member of the CDB, made the point that the Southern Gweebarra was trying to replicate the arrangements that had worked so successfully on the Irwin Estate on the opposite bank and stated as follows: -

"We are considering the whole question of the gaming and fishing rights on this river and on the whole estate, and we are trying to effect an arrangement by which the *status quo* will be the same as on the Irwin Estate where they have succeeded so well; and of course there is strong evidence in favour of the view that when the tenants acquire the sporting rights, those rights will be better watched than ever were before and with better results".
40. Arising from these matters Mr. Boner concludes as follows: -

"I believe that on a full legal analysis of all the available information, it will be held that the fishing rights on the relevant section of the northern bank was acquired by a community collective and was not purchased individually by each tenant purchaser. On the southern bank, the aspiration of the CDB was for collective ownership but when, as it appears, that did not come to pass. The title was held in trust for each individual tenant purchaser and also subject to the terms of s. 34 of the Land Law (Ireland) Act, 1896. Accordingly, the CDB never purported to transfer

the Gweebarra rights to any Department of State and the State since its foundation until 2007 never asserted any ownership rights at all”.

41. In the judgment of Laffoy J., in dealing with the lands on the southern bank of the Gweebarra River, she asserts that they were all part of those marked with Conyngham Estate which was acquired by the CDB in 1917 and vested in the tenant purchasers in the subsequent years. She thereafter considers a number of registered holdings. After Laffoy J. noted that she found it difficult to understand why the relevant original title documentation in relation to the acquisition from the Conyngham Estate and the Irwin Estate cannot be traced in the National Archives, the learned judge stated as follows:-

“To recapitulate, by virtue of the 1917 Conveyance, the Conyngham Estate rights of fishery in the townlands on the southern bank of the Gweebarra River were conveyed to the Board in fee simple. It would appear that such title as the Board thereby acquired devolved in accordance with the following primary and secondary legislation”.

The court continued:-

“It would appear that, from the coming into operation of the Ministers and Secretaries (Amendment) Act, 1928, such fishing rights as were conveyed to the Board by virtue of the 1917 Conveyance and reserved out of the vesting orders made in favour of the riparian tenant purchasers of holdings on the southern bank of the Gweebarra River were vested in the Minister for Lands and Fisheries and subsequently in his successors, but subsequent changes of ministerial ownership have not been outlined by either party. What is of significance is that it would appear that such rights were not vested in the Irish Land Commission and did not, by virtue of s. 5 of the Irish Land Commission (Dissolution) Act, 1992 become vested in the Central Fisheries Board. Accordingly, it would appear that such rights did not become vested in the plaintiff by virtue of s. 51 of the Act of 2010”.

42. In short, it appears that whilst the title can be derived, in respect of both the northern and southern banks, with some degree of certainty to the CDB, or in the alternative some form of community collective (in respect of the northern bank) thereafter there appears to be no documentation available. This lacunae was acknowledged before Laffoy J. and dealt with comprehensively in her judgment.
43. Within the first module of this matter which ran for six days, the position of two aspects of this matter were (those coloured yellow and green) comprising the southern area and those held within the McDonnell holding were both adjudicated by Laffoy J. That order stands.
44. As is referable to the map or plan referred to above and indeed the order of Murphy J., module one concerned the section on that map called “McDonnell’s Section and the yellow portion marked state-owned section – module one”.

45. In the Supreme Court judgment referred to above, Clarke J. makes it clear, in his adjudication upon the appellants' motion to adduce additional evidence, that a modular trial cannot be used to ensure that the same arguments are rehearsed ad infinitum but rather leaves open the possibility that if there is additional cogent evidence that it might, subject to the court, be dealt with in any subsequent module.
46. It is unclear precisely what the affidavit of Mr. Boner seeks to advance, it is very general in the manner in which various propositions are put. Also, Mr. Boner does not set out any timings as to when this information came to light. Certainly he avers that it was after the judgment of Laffoy J. but it is difficult to discern what evidence comprised within the application before the Supreme Court for the introduction of new evidence and what evidence appeared thereafter.
47. Whilst, in my view, the title to the entirety of the northern and southern fishery bank can with some degree of certainty be derived to the Congested Districts Board or some loosely defined community collective, I can see nothing, with the greatest of respect to Mr. Boner's assiduous researches, that satisfies me as to any derivation of title thereafter. What Mr. Boner suggests on the basis of his researches is ultimately supposition. In order to prove title, there must by definition be title documentation. In terms of the matters exhibited to Mr. Boner's affidavit, they would not, in my view, even constitute secondary evidence of title. Mr. Boner avers to other documentation held both in Carlow and within the National Archives but none of this is exhibited and I cannot accept Mr. Boner's explanation of documentation that is not exhibited.
48. Accordingly, in my view, there is nothing within Mr. Boner's averments that provide the introduction of cogent title evidence of the type he suggests to show that some form of corporate collective ultimately held title to the northern and any new evidence of the type envisaged by Clarke J. to the southern portions of the Gweebarra River, such that would in effect on a modular basis, provide new evidence in respect of the matter already comprehensively dealt with by Laffoy J. after a six day hearing.
49. It is suggested by the defendants that additional oral evidence will be required and one would have singular reservations in that regard given that this matter has already been the subject of a six-day hearing. The nature of the evidence has not been specified. The defendants' counterclaim has been withdrawn and in such circumstances, the oral evidence to be advanced is entirely unclear.
50. In short, I have seen no new documentary evidence that shows any entitlement of the defendants to the private law rights which they assert in the face of the State's argument of its entitlement to regularise and regulate the fishing rights along the Gweebarra River.
51. There is a suggestion that a letter written by a Government Official in 2012 now requires to be subject to a notice to cross-examine. The contents of that letter, as they are deposed to on affidavit (but not exhibited), in my view, do not assist either party in any evidential matter that is now required for the resolution of this matter.

52. It was emphasised within Mr. Boner's affidavit and also in the submissions by counsel for the defendant that the three named defendants are not sued in a representative capacity but as three named persons. It was clearly implied that if any orders were made against those three persons, that there would be others who would maintain the stance that they presently adopt. This was certainly an apprehension raised by counsel for the plaintiff and was not gainsaid in any submission by counsel for the defendant.
53. Whilst I appreciate the difficulty in locating evidence at this remove, nevertheless, the documentation submitted before this Court on behalf of the defendants was of a non-specific, generalised nature. From that, certain suppositions have been drawn as to the likely derivation of title to the Gweebarra River. At one point, it was suggested that by virtue of arrangements in respect of the Owenea Fishery that matters must have been attended to in the same fashion in respect of the entirety of the Gweebarra River.
54. A number of reliefs are sought pursuant to this notice of motion. It is not, as I construe it, a hearing of any further module of this matter. Rather, as has been set out by the plaintiff in their submissions, an attempt to bring this matter to its conclusion.
55. This was not a further hearing of a modular trial. Accordingly I have considered the matters advanced by the defendants at their height and on the assumption (possibly misplaced) that, as the defendants contend, they have evidence sufficient for a new module of the hearing of this matter, they would be in a position to verify all of this matters deposed to by Mr Boner.
56. Turning to the reliefs sought as recited above, with regard to "(b)" of the notice of motion and "(c)", as I understand it, there is an agreement that the map exhibited at 'PMcM1' of the affidavit of Patrick McMullin be the map to be referred to and that there be an order dismissing the defendants' counterclaim.
57. In terms of the reliefs sought within the notice of motion itself, the initial orders seek orders directing the entitlement of the plaintiff to paras. 1,3, 4 and 5 of the general endorsement of claim to the statement of claim.
58. Linked to this is the final relief for an order that the hearing of the application proceed on affidavit only (sought at "(a)" in the notice of motion) but also that an order treating the hearing of this application as the trial of the within proceedings and in particular as to the trial of the proceedings for the purposes of determining the plaintiff's entitlements to reliefs sought in the above entitled paragraphs. In that regard, reliance was placed by counsel for the plaintiff on the decision in *Abbey International Finance Limited v. Point Ireland Helicopters Limited & anor* [2012] IEHC 374. The issue in that case was whether the court was entitled to grant relief on a summary basis to the plaintiff where the defendant, in plenary proceedings, had no real or *bona fide* defence. Within his decision, Kelly J. initially cited the decision of Costello J. in *Barry v. Buckley* [1981] IR 306 who held that the court had an inherent jurisdiction to strike out or stay proceedings which are frivolous or vexatious or have no reasonable prospect of success. The court continued:-

"In this case, it is argued that a similar jurisdiction exists so that a plaintiff can obtain summary judgment without having to proceed to plenary hearing if a defendant does not have a statable defence. This proposition was alluded to by McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] IR 425. At p. 428 he referred to the decision of Costello J. in *Barry v. Buckley* and commented as follows:-

"In Barry v. Buckley Costello J. referred to the notes on that sub-section as set out in Wylie on the Judicature Acts. Since the matter has not been debated, I express no view upon the decision in Barry v. Buckley save to comment that applying the underlying logic, a defendant may be denied the right to defend an action in a plenary hearing if the facts are clear and it is shown that the defence is unsustainable..."

The judge continued:-

"That obiter statement of McCarthy J. accepts the logic and the justice in providing a mechanism for a plaintiff to obtain relief in all proceedings if the facts are clear and it can be demonstrated that there is no sustainable defence".

In dealing with the court's inherent jurisdiction, it concluded as follows:-

"If there is an inherent jurisdiction to strike out proceedings which have no reasonable prospect of success then, in the interests of justice, why should there not, in an appropriate case, be a jurisdiction to adjudicate summarily upon a purported defence? If the defence offered is alleged to be lacking any reasonable prospect of success, then the plaintiff should have the ability to seek to recover judgment regardless of the type of proceedings, I believe that there is no good reason why such an application cannot be brought and considered by the court".

59. As set out above, I do not consider that the plaintiff's motion before this Court is a step within the modular trial process but rather a step seeking to have the entirety of the modular trial process and these proceedings brought to a conclusion in their entirety within the terms of this notice of motion. The plaintiff contends that no other matters require adjudication or, to the extent that any matters are advanced, that they are either unmeritorious or do not in any way assist the court in the conclusions that have already been reached by Laffoy J. and thereafter the Supreme Court in its adjudication upon fishery rights in the Gweebarra River.
60. It is important to acknowledge that one of the principal reasons stated very clearly by Clarke J. in his refusal to admit new evidence was that the evidence sought to be adduced would not affect any of the findings of Laffoy J. in any realistic sense. He stated as follows:-

"In those circumstances, it seems to me that it would be open to a trial judge considering a further module of this case to revisit the question of the chain of title

to the northern bank of the fishery. Obviously, a trial judge might well only do that if satisfied that there were good grounds for believing that the findings of the trial judge on the first module were both inessential to the ultimate result of that module and based on incomplete evidence. However, both of those factors may be present in this case. For those reasons I am satisfied that, to the extent that it might be necessary in the context of any subsequent module to determine the chain of title to the relevant part of the fishery at some date prior to the time at which the first module was tried, it would be open to the fishermen to put forward evidence to suggest that the findings in that regard by Laffoy J., although entirely sustainable on the evidence which was before her, may be incorrect as a result of additional evidence which is now available. I should emphasise that a trial judge permitting that matter to be reopened should only do so if persuaded that the difference in the chain of title identified by Laffoy J. to that now proposed to be established would make a material difference to the issues which the trial judge had to determine in the context of that module.

On the other hand, to allow the issue of the chain of title to now be agitated before this Court would be wholly unsatisfactory for at least two reasons. First, it is clear that the new evidence could not affect the actual findings of the trial judge in respect of the issues which she was required to determine in the first module”.

61. As set out above, there is now no retrospective aspect to this claim. The entirety of it is prospective and, accordingly, that issue does not now arise.
62. This matter has been extraordinarily carefully examined and analysed by Laffoy J. The defendants’ replying affidavit to this motion does not suggest any additional module or its scope, and the nature of the extremely broad-based, non-specific and indeed non documented suppositions which Mr. Boner (whilst doubtless an assiduous and knowledgeable researcher in respect of the Gweebarra River on behalf of his clients) does not, in my view, provide any matters of title sufficient to or persuade me that there is any difference in the chain of title identified by Laffoy J. and, to the extent that the northern bank of the fishery is concerned, none that would suggest that it was held by the CDB and thereafter its derivation was also as identified by Laffoy J. within her judgement.
63. In my view, adopting the criteria of Clarke J. as to the matters that must be considered prior to any application to the trial judge, I can now consider the plaintiff’s application as a prospective one. In my view for the reasons set out above I cannot discern any new matters that raise sufficient queries or issues such as to direct a second /final modular hearing of this matter. I am also conscious of the time that has already been expended in this matter. My view on the documentation adduced mirrors that of Laffoy J. In short, the new evidence to be advanced by the defendants does not in my view progress matters.
64. Accordingly, I make the following orders in respect of the plaintiff’s notice of motion;

- (a) On consent orders in terms of paragraph 1 (b) of the Notice of Motion and dismissing the defendant's counterclaim as set out within paragraph 1(c) and pursuant to the Order of Laffoy J.
 - (b) In respect of 1(d) an Order in accordance with its terms, only in so far as paragraph 1 (a) is concerned, noting the matters set out at (a) above have already been dealt with and accordingly no further orders are required in respect of paragraphs 1(b) and (c).
 - (c) In respect of paragraph 1 (a) of the Notice of Motion an order in terms of that paragraph save in respect of the issue of costs.
65. I will hear the parties on any further or other orders required, including any orders as to costs.