

## THE HIGH COURT

[2009 No. 5228 P]

BETWEEN

INLAND FISHERIES IRELAND

PLAINTIFF

AND

PEADAR O'BAOILL, JOHN GERARD BOYLE AND JOHN BOYLE

DEFENDANTS

**Judgment of Ms. Justice Laffoy delivered on 19th day of December, 2012.****Introduction**

1. In the six days during which these proceedings were at hearing, the Court heard evidence in relation to the steps taken in the previous decade by the Northern Regional Fisheries Board (NRFB) in relation to the development and management of angling in County Donegal and, in particular, on the Gweebarra River, commencing with the publication in 2002 of *Outline Proposal for the Development and Management of Angling in Donegal – Consultation Document*, known locally as “the Blue Book”, and following through the consultation process in the locality, culminating in an agreement for the management of the Gweebarra Fishery made on 9th March, 2007 between the Gweebarra Fishing Club of the one part and of NRFB of the other part (the 2007 Agreement). The Court also heard evidence of alleged tortious acts by the defendants against NRFB in its development and management of fishing in the Gweebarra River. However, what the Court is concerned with in this module of the proceedings, as will be explained later, is to determine issues in relation to ownership of and title to fishing rights in a small segment of the freshwater portion of the Gweebarra River. That has involved the Court in considering a large number of title documents and the evidence of the witnesses for the plaintiff and also the evidence of the defendants and their witnesses as to the manner in which the Gweebarra River was fished prior to 2007. The focus of this judgment is on the title documents and on that evidence. However, as, from the outset, it was nigh impossible to discern the nature of the right to fish which the defendants were contending they enjoy in relation to the segment of the Gweebarra River under consideration, it is necessary to consider the pleadings in some detail.

**The proceedings**

2. When these proceedings were initiated by plenary summons which issued on 8th June, 2009, the plaintiff was NRFB. By order of the Court (Murphy J.) made on 21st November, 2011 the title was amended by the substitution of the current plaintiff for NRFB. This amendment was necessitated by the provisions of the Inland Fisheries Act 2010 (the Act of 2010), which established Inland Fisheries Ireland (s. 6) and transferred the statutory functions of the Central Fisheries Board and the NRFB to it (s. 8).

3. The plaintiff sought the following reliefs in the plenary summons:

- (a) a declaration that the defendants together with all persons acting in concert with them do not have the right to fish “the Gweebarra Salmon Rod fishery County Donegal” (hereafter and hereafter referred to as “the Fishery”) in the waters shown coloured yellow on a map, which was identified, without a permit issued by or with the authority of the plaintiff;
- (b) an injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the order from howsoever intimidating or watching or besetting persons holding permits issued by or with the authority of the plaintiff who are entering upon and/or fishing the Fishery;
- (c) an injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the order from entering upon and/or fishing the Fishery without an individual permit issued by or with the authority of the plaintiff to any such persons;
- (d) an injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the order 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; and
- (e) an injunction restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the order 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.

**Interlocutory application**

4. Contemporaneously with the plenary summons, the plaintiff issued a notice of motion seeking interlocutory injunctive relief in terms similar to the permanent injunctive relief sought in the plenary summons. The motion was grounded, *inter alia*, on an affidavit of Gerry McCafferty sworn on 8th June, 2009. The map referred to in the endorsement of claim on the plenary summons was exhibited in Mr. McCafferty’s affidavit. In exhibiting the map, it was made clear by the deponent that the proceedings related to the Fishery “in the fresh water portion of the Gweebarra river system”, which was shown coloured yellow on the map. The catchment area drained by the Gweebarra River, including its tributaries, was shown coloured pink on the map. In identifying the boundary between the tidal and fresh water portions of the Gweebarra River, the plaintiff relied on the definition in Ministerial Definition No. D.140 dated 6th December, 1946, which defined it as a “straight line drawn across the said river . . . at right angles to its course 70 yards downstream of the bridge known as Doochary Bridge in the townlands of Coolboy and Derrynacarrow”. While that definition, when considered in the context of the other descriptions of townlands through which the River Gweebarra and its tributaries pass, inevitably evokes Brian Friel’s “Translations”, one of the few areas on which there is not dissent between the parties in this case is where the location of the

line between tidal and non-tidal waters is. The area shown coloured yellow on the map includes the freshwater portion of the river extending to Lough Barra, which is also shown coloured yellow on the map, and a portion of the river above Lough Barra. It also depicts a tributary, which I assume is the Clohernagore River. At the confluence of the Clohernagore River and the Gweebarra River there is a pool known as the "Mayo Pool". While, as will appear later, the Court is only concerned at this juncture with part of the area coloured yellow on that map, the portion in question does include the Mayo Pool.

5. The plaintiff's entitlement to interlocutory injunctive relief was vigorously contested by the defendants. By order of the Court (Charleton J.) made on 20th July, 2009, limited relief was granted to the plaintiff. On the basis of an undertaking given to the Court that the plaintiff would erect a notice in premises, which I understand to mean the designated Angling Office, indicating the parts of the river not under its control and, accordingly, accessible without a fishing permit, within one week, it was ordered that the defendants together with all persons acting in concert with them and all persons having notice of the making of the order –

(1) 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; and

(2) 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 so to do by joining Fintown or Rosses Anglers Clubs.

It was ordered that the costs of the motion be costs in the cause.

#### **Plaintiff's claim as pleaded in the statement of claim**

6. Before outlining the basis of the plaintiff's claim as set out in its statement of claim, it is convenient to record that in late 2008 NRFB initiated prosecutions against various individuals, including the first defendant, alleging that they had entered upon the Fishery for the purpose of taking fish without the permission of the several fishery owners contrary to s. 178 of the Fisheries (Consolidation) Act, 1959, as amended. Without going into the basis on which they supported their contention, which I consider is not necessary, it was the contention of the persons charged that they did not require permission or consent of anyone to fish lawfully in the Gweebarra River. The proceedings in the District Court were adjourned to allow the persons charged to bring proceedings either in the Circuit Court or the High Court to establish the rights upon which they were relying. Eventually an Equity Civil Bill was issued in the Circuit Court, Northern Circuit, County of Donegal (Record No. E569/2009) by Francis Houston and six other individuals, including the second named defendant (named as John Boyle), against NRFB. The Equity Civil Bill was issued on 8th June, 2009, that is to say, the date on which the plenary summons in these proceedings was issued. Neither the District Court prosecutions nor the Circuit Court proceedings have advanced since these proceedings were initiated.

7. In the statement of claim, which was delivered on 11th May, 2010, the plaintiff, NRFB, was described as a statutory body established under the Fisheries Act 1980 (the Act of 1980) and as the competent fisheries authority for inland fisheries and sea angling in the area of Donegal with which this case is concerned.

8. The plaintiff identified the Gweebarra Fishery by reference to a map annexed to the statement of claim entitled "Gweebarra Managed Fishery". This map differed from the map referred to in the plenary summons in that it distinguished between the southern bank and the northern bank of the river. Along one stretch of the northern bank, it was not claimed that there was a managed Fishery. In any event, it was pleaded that in early 2007 the plaintiff had decided on foot of its express statutory remit pursuant, *inter alia*, to s. 11(1) and (2) of the Act of 1980, as substituted by s. 8 of the Fisheries (Amendment) Act, 1999, to enter into certain agreements in relation to the management, preservation and development of the Fishery and, in pursuance of that objective, had entered into the 2007 Agreement with Gweebarra Fishing Club and agreements with certain private riparian land owners of lands abutting the Fishery. It was asserted that a large part of the balance of the Fishery was "in State ownership" and was managed by the plaintiff on behalf of the State.

9. The terms of the 2007 Agreement with the Gweebarra Fishing Club were then pleaded. In brief, fishing was to be conducted in a sustainable manner under an agreed rod management plan. The Fishery was to be divided up into beats or sections and the rod management plan involved a limited number of anglers being accommodated on each beat at any one time. The anglers included the members of the Gweebarra Fishing Club who paid an annual permit fee to the plaintiff and visitors who paid a daily fee. As regards membership of Gweebarra Fishing Club, in addition to existing members at the date of the agreement, membership could be granted to all applicants of good character residing within the catchment and to riparian landowners who had entered into agreements with the plaintiff. There was also provision for admission of associate members.

10. The terms of the agreements between the plaintiff and the riparian landowners were also pleaded. As the focus of this module of the proceedings is on a management agreement entered into with Mr. Kevin McDonnell (Mr. McDonnell), the single riparian landowner of one side of the Mayo Pool, the terms of the agreement with him will be outlined later. For present purposes it is sufficient to record that it was pleaded that the terms of the agreement between the plaintiff and the riparian landowners were as follows: the plaintiff would have sole and exclusive right and responsibility to manage, control, use and regulate the Fishery, including any possible private interest the landowner had therein; the plaintiff could restrict entitlement to fish in accordance with the management plan and could issue fishing permits accordingly on such terms and conditions, including payment of a fee, as it thought appropriate; the entitlement to fish was to include the right of access to and along the banks of the river; and the plaintiff could exercise its management and other functions either directly or through another organisation or person including Gweebarra Fishing Club.

11. The nub of the plaintiff's case is that on the basis of –

- (a) its statutory functions, and
- (b) the 2007 Agreement with Gweebarra Fishing Club, and
- (c) the agreements with the riparian owners, and
- (d) the fact that other parts of the Fishery were in State ownership,

it (including its predecessor, NRFB) was entitled, as it did, to restrict access to fishing to members of the Gweebarra Fishing Club and the holders of visitors permits. The wrong alleged against the defendants is that they continued to fish and to otherwise assert the right to fish the Fishery, with intent to disrupt and frustrate the plaintiff's management of the Fishery, and that they engaged in conduct intended to intimidate other anglers and intended to dissuade them from joining Gweebarra Fishing Club and purchasing

permits. It is alleged that the defendants' conduct, in acting contrary to the plaintiff's agreements and arrangements for the Fishery, by pursuing a campaign of opposition to it, has resulted in loss, damage, inconvenience and expense being caused to the plaintiff, the landowners and stakeholders in the Fishery and to tourism in the area.

12. The reliefs sought in the prayer in the statement of claim correspond to the reliefs sought on the endorsement of claim in the plenary summons, save that there is, in addition, a claim for damages for trespass.

13. The claim for damages for trespass points to the real legal basis of the plaintiff's claim against the defendants. It was made clear by counsel for the plaintiff in opening the case that the core of the complaint against the defendants is that the defendants were trespassing on property rights (i.e. fishing rights) of which the plaintiff was and is the owner or over which the plaintiff had and has control on foot of an agreement with the owners of such rights. Therefore, in order to succeed, it is incumbent on the plaintiff to prove its title to the fishing rights alleged to have been interfered with and trespassed on by the defendants, or, alternatively, that it has a contractual relationship conferring authority on it to regulate and control such rights with the owners thereof.

#### **The defence and counterclaim and the plaintiff's response thereto**

14. The defendants delivered a defence and counterclaim on 13th December, 2010. In the defence they traversed various matters pleaded by the plaintiff and all allegations of wrongdoing pleaded against them. They put the plaintiff on full proof of its agreements with the riparian owners and of the State ownership and of its assignment by the State owners to manage the fishing.

15. The specific pleas in the defence which go to the core of the aspect of the defendants' response to the plaintiff's claim which challenges the right of the plaintiff to bring these proceedings against them are as follows:

- (a) a denial that the plaintiff had either express statutory power or implied statutory power or any power whatsoever to enter into the agreements in relation to the management and preservation of the Fishery;
- (b) a denial that the plaintiff had any power to enter into agreements with landowners in the terms alleged or at all without reference to the "existence of a free fishery" and the rights of the defendants and others prior to 2007;
- (c) a denial that any powers which were granted to the plaintiff under the agreements pleaded could be granted "without proper consideration of the rights of the defendants . . . and others in relation to the several fishery . . . and the private fishery" on the Gweebarra River;
- (d) a denial that all of the riparian owners along the Gweebarra River agreed to allow the plaintiff to manage the Fishery;
- (e) a denial that the plaintiff has any right to restrict access to fishing the Fishery;
- (f) a denial that the arrangements between the Gweebarra Fishing Club and the plaintiff could bind the defendants and others; and
- (g) a denial that the plaintiff had any power or right to impose a rod management plan on the river, or any power to impose a limited number of anglers per beat, or to divide the river per beat.

In general, the foregoing pleas are not inconsistent with the case advanced on behalf of the defendants at the hearing. However, some of the submissions made on behalf of the defendants verged on public law challenges to the actions of the plaintiff. I think it is important to emphasise that the plaintiff's claim is a private law claim against the defendants seeking, *inter alia*, equitable remedies.

16. Turning to the counterclaim, what is pleaded is wholly inconsistent with the case advanced on behalf of the defendants at the hearing. Apart from that, it is addressed to both the non-tidal and the tidal portions of the Fishery. The plaintiff's claim does not relate to the tidal portion. Moreover, the Court's function at this juncture concerns only part of the non-tidal portion of the river. Accordingly, I propose to address only what is pleaded in the counterclaim in relation to the non-tidal portion of the river.

17. In the counterclaim the defendants appear to be setting up private property rights, in that they have pleaded:

- (a) that they have fished and are entitled to fish the non-tidal area, most particularly the Befflaght stretch, and have done so for more than fifty years;
- (b) that they have fished the non-tidal area and have fished the Fishery, which is a several fishery (without identifying the owner of the several fishery) without the permission, authority or consent of the plaintiff, its servants or agents, which in any event, it was asserted, is not required, and as a result they have "acquired an easement to fish the said river in its non-tidal portions and have acquired a profit à prendre in relation to the taking of fish" from the river;
- (c) further, the defendants have obtained "a right to take profits from the said water both by dint of the user of the said river and in accordance with the rights of the proprietors of the land on either side of the river and with the consent of the proprietors of the land on either side of the river who are possessed of the bed and soil of the said river and the said easement and profit à prendre is recognised by the owners of the lands appurtenant to the said river on either side of the river and by owners of the lands abutting and adjoining the said river for its entire length"; and
- (d) the "easement to fish" and "the profit à prendre that now exists either particularly and/or in gross" is being interfered with and trespassed on by the plaintiff.

I surmise that the word "particularly" at (d) above was intended to be "appurtenant to". Only paragraph (a) and the first part of paragraph (b) of the foregoing are consistent with the case advanced on behalf of the defendants at the hearing.

18. Further, the inclination towards the assertion of private property rights continues later in the counterclaim, where the defendants have pleaded that the profit à prendre exists for their benefit in gross or "appurtenant to the said water and river". Further, they have pleaded that an easement exists on the basis of long user, and/or by the doctrine of prescription, and/or the doctrine of the lost modern grant, or by specific grant. They have also pleaded that the profit à prendre that "exists as a result thereof on foot of the said easement" exists notwithstanding the provisions of the Land and Conveyancing Law Reform Act 2009, as the proceedings were issued before the commencement of that Act. Later, in a paragraph which I find to be totally incomprehensible, they have pleaded that "the river adjacent to the townlands on each side of the Gweebarra River is not a private fishery yet the defendants do not claim that a public right exists". It has been expressly reiterated that each of the defendants and other persons not named in the

proceedings have established "private rights by way of easement and profit à prendre" to fish the Gweebarra River and to take fish from it. All of the foregoing is wholly inconsistent with the case made on behalf of the defendants at the hearing.

19. However, the position of the defendants, as pleaded later, is that prior to 2007 the Fishery "was a free fishery" and that prior to 2007 neither the plaintiff nor any of the riparian owners took any steps to limit access to the Fishery by the public and that had been the situation since time immemorial.

20. The reliefs sought by the defendants in the counterclaim are declaratory and injunctive reliefs. As regards the declarations sought, they include a declaration that the defendants "are entitled by way of easement to fish", are entitled "to take by way of profit à prendre from the said river in accordance with the season such fish as may be caught" by them, and that, as regards the non-tidal portion, they have "a right by way of easement and profit à prendre . . . to enter onto the lands abutting the said river to fish . . . and have a right to take fish from the said river by way of profit à prendre and have done so since time immemorial".

21. I have quoted extensively from the counterclaim for the purpose of illustrating that the predominant thrust of the defendants' counterclaim against the plaintiff, as pleaded, is that the defendants have established private right to fish the Gweebarra River, not a public right, which, as I have stated, is wholly inconsistent with the position adopted by the defendants at the hearing.

22. The plaintiff's reply and defence to counterclaim was delivered on 16th January, 2012. The reply contained the usual joinder of issue. As regards the defence to the counterclaim, all of the assertions made by the defendants as to the existence of rights on their part in the river were denied.

23. My understanding of the position adopted by counsel for the defendants on their behalf at the hearing, which was clarified when he was pressed on the issue, is that it was accepted that, without joining riparian owners, such as Mr. McDonnell, whose title to the portion of the Fishery in issue in this module will be considered in detail later, as defendants to the counterclaim, the counterclaim could not be pursued so as to affect their rights. However, counsel for the defendants submitted that the existence of a public right of fishing could be advanced as a defence to the plaintiff's claim and that, in any event, the plaintiff had to prove that it had sufficient interest to maintain these proceedings. Insofar as the defendants have contended for the existence of a public right of fishing in the non-tidal part of the Gweebarra River, it has to be observed that the Attorney General was not put on notice of that claim or of these proceedings.

#### **Modular trial**

24. It was the plaintiff who sought a modular trial of the proceedings, no doubt for tactical reasons, because it is clear that the plaintiff has not been able to procure the agreement of at least one private riparian owner to its plan for the development and management of the Gweebarra River. By the order of the Court (Murphy J.) made on 21st November, 2011 it was ordered that there be a modular trial of the proceedings and that the first issues to be tried are 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 referred to?

(b) Is the plaintiff entitled to the reliefs sought as against the defendants insofar as the said lands at (a) above are concerned?

(c) Are the defendants entitled to the reliefs set out in the counterclaim insofar as the said lands at (a) above are concerned?

It is to be noted that issue (b) addresses the entitlement of the plaintiff for relief against the defendants only and not the world at large.

25. I propose first considering the title to the so-called "IFI owned fishing", and then the title to the "Kevin McDonnell fishing", which the plaintiff has put before the Court, and the issues raised on behalf of the defendants in relation to such titles. The case made by the plaintiff is that the "IFI owned fishing" is on the southern bank of the Gweebarra River, whereas the "Kevin McDonnell fishing" is on the northern bank of the Gweebarra River.

26. It is important to emphasise that counsel for the plaintiff relied on a principle of law stated by Keane J., as he then was, in *Gannon v. Walsh* [1998] 3 I.R.245. The principle is expressed as follows (at p. 276):

"If the plaintiffs in the present case are entitled to no more than a profit à prendre, it remains the case that any wrongful interference by the defendants with the exercise by them of that right would entitle them as a general rule to an injunction and/or damages. It is clear that it is not necessary for them to establish that they are the owners of the soil of the river in order to obtain such relief. . . .

It is also clear that such an action, although in form an action for nuisance, is akin to an action for trespass and that, accordingly, at least where the plaintiff is in possession of the several fishery, it is not open to the defendants to put their title in issue, if by so doing they are only setting up a *jus tertii*."

Later, having considered the plaintiffs' title and concluded that the title was fully and effectively vested in the plaintiffs, Keane J. stated (at p. 282):

"Moreover, I have already held that the plaintiffs and their predecessors in title have been in possession of the rents and profits of the fishery for many years. Accordingly, even if any of the alleged defects in the plaintiffs' title had been substantiated, the defendants, in the light of the legal principles to which I have already referred, would not be entitled to assert the right of a *jus tertii*."

While I am satisfied that that principle does apply in this case, nonetheless, I propose considering all of the issues raised by the defendants in relation to the title of the plaintiff or other State entities and the title of Mr. McDonnell to fishing rights in the part of the Gweebarra River the subject of this module.

#### **Evidence of title of riparian owners on southern bank**

27. All of the lands on the southern bank of the Gweebarra River which is the subject of this module of the proceedings was part of the estate of Marquis Conyngham, which was acquired by the Congested Districts Board (the Board) in 1917 and vested in the tenant

purchasers in the following years. The lands in question, which were registered in the Land Registry subsequent to such vesting, are situate in four townlands: Meenachullion, Cloghernagore, Adderwall and Coolvoy. I have considered all of the title documents put before the Court by the plaintiff and I propose to summarise the content of those documents below.

28. All of the agreements for sale between the Board and the tenant purchasers were in the same form. To illustrate how sporting rights were dealt with, I will address the furthest upstream holding, which is now registered on Folio 13457 of the Register of Freeholders County Donegal. The agreement in relation to those lands was dated 1st November, 1918 and was made between the Board, as vendor, of the one part and the then occupying tenant of the holding, Peter O'Donnell, as purchaser, of the other part. It was agreed that the holding would be vested in Peter O'Donnell in fee simple subject as was thereafter mentioned and as provided by the Irish Land Acts 1903 and 1909. Clause 7 dealt with sporting rights and provided as follows:

"The Sporting rights within the meaning of the Irish Land Act, 1903, if any save the Shooting Rights to which the Vendor is entitled over and upon the said holding exclusive of the Tenant shall be: -

Reserved to the Vendor, and the Shooting Rights shall be Vested in the Tenant."

The words underlined were handwritten amendments. Clause 10 provided as follows:

"Nothing in this Agreement shall prejudice or affect any Sporting Rights, Mineral Rights, or Water Rights which are not now in the possession of the Vendor . . . and the holding shall be vested in the Tenant without prejudice to any such right."

29. The holding was subsequently vested in Peter O'Donnell and registered in the Land Registry on Folio 13457. The manner in which the sporting rights are dealt with on that folio is that they are registered as a burden on Part 3 as follows:

"The sporting rights within the meaning of the Irish Land Act, 1903, save the shooting rights to which the [Marquis] Conyngham was entitled exclusive of the tenant previously to the sale under the said Act."

The relevant dealing noted on the folio, L.R. 182/22829, was the agreement of 1st November, 1918.

30. With the exception of three folios, the current registered owners of the riparian holdings on the southern bank are private individuals who have no connection with the State. The three exceptions are:

(a) folio 13456, on which the registered owner is the Minister for the Environment, Heritage and Local Government, who became registered as full owner on 17th June, 2009, the folio being subject to a burden similar to the burden registered on Folio 13457;

(b) folio 26982F, on which the registered owner is the Minister for Arts, Culture and the Gaeltacht, who was registered as full owner on 4th June, 1997, the folio being subject to a burden in the terms set out at para. 31 below; and

(c) folio 20444F, the registered owner being the Minister for Arts, Culture and the Gaeltacht, who was registered as full owner on 4th June, 1997, the folio being subject to a burden in the terms set out in para. 31 below.

All of the current registered owners are successors in title of tenant purchasers.

31. Although all of the agreements between the Board and the tenant purchasers were in the same form, the manner in which the reservation of the sporting rights was dealt with on the relevant folio did not invariably follow the wording used on Folio 13457. The variations included the following:

"The property is subject to the fishing rights and fisheries (if any) reserved to the Land Commission by its Order."

The foregoing is the form of burden registered on Folio 26982F. It would appear that that variation resulted from a vesting order made by the Land Commission, which was published in Iris Oifigiúil on 2nd March, 1984, which involved an exchange, which I surmise was, in effect, the partition of commonage.

32. In the case of some folios, for example, Folio 16685, the reservation of the sporting rights appears as a note after the description of the property the subject of the folio. In the case of Folio 16685 the reservation was in the following terms:

"NOTE. The sporting rights within the meaning of the Irish Land Act 1903 (save the shooting rights) to which the Land Commission was entitled are reserved over the lands."

33. In the case of Folio 13684, the following appears as a burden on Part 3:

"The property is subject to the sporting rights within the meaning of the Irish Land Act, 1903 granted by indenture dated 2nd October, 1924 reserved by Fiat of the Land Commission."

The dealing reference (L.R. 416/22829) refers to the agreement between the Board and the occupying tenant.

34. There are two folios on which there is no reference to sporting or fishing rights. One is Folio 13689. The other is Folio 71413F, part of the land now registered on that folio having been transferred from Folio 13689. The lands now registered on Folio 13689 correspond with the lands the subject of an agreement dated 1st November, 1918 made between the Board of the one part and John Doherty, the tenant purchaser, of the other part, Clauses 7 and 10 of that agreement being in the same terms as the corresponding clauses quoted at para. 28 above. No explanation has been given as to, and I do not understand why, the reservation of sporting rights in that agreement is not reflected on Folio 13689 or Folio 71413F, although it is reasonable to assume that there is probably a rational explanation for it.

35. What the title put before the Court by the plaintiff in relation to the southern bank of the Gweebarra River stretching from the north-eastern extremity of the lands registered on Folio 13457, which is some distance below Lake Barra, to Doochary Bridge discloses is that all of the riparian holdings were vested by the Board in tenant purchasers pursuant to the Irish Land Act 1903, but there was reserved in favour of the Board the sporting rights "if any", other than shooting rights, which were vested in the tenant purchasers. Assuming that the Board had title to fishing rights and did effectively reserve those rights, it is necessary to explore the devolution of

title to those rights down to the present day and to identify in what person or body they are now vested. However, before considering that issue, it is convenient to address what implications, if any, certain documents put in evidence by counsel for the defendants, as a result of research carried out rather late in the day, have. The general thrust of the defendants' reliance on these documents was that they contended that they illustrate that it is doubtful whether any fishing rights were vested in the Conyngham Estate in 1917 and, if there were, it was contended that there was no satisfactory evidence of devolution of title from the Board after 1917.

36. The most important of the documents is a copy, certified by the Property Registration Authority under s. 22 of the Registration of Deeds and Title Act 2006 (the Act of 2006), of a Memorial of the Indenture of Conveyance dated 6th March, 1917 made between The Most Honourable Victor George Henry Francis Marquis Conyngham of the first part, John Pomeroy of the second part and the Board of the third part (the 1917 Conveyance), which was registered in the Registry of Deeds on 3rd April, 1917. That document, in my view, is satisfactory secondary evidence of the content and effect of the 1917 Conveyance, although, having produced it, counsel for the defendants seemed to resile from the position that it could be regarded as secondary evidence, suggesting that the title of the Board could not be established without production of the original of the 1917 Conveyance or evidence that it had been lost or destroyed. The memorial discloses that in the 1917 Conveyance Marquis Conyngham, as vendor, conveyed to the Board the properties described as:

"**All** the several and exclusive fisheries and rights of fishing for all kinds of fish of and in the fresh and tidal waters of the Onea and Lochries rivers . . . and in the River and Estuary of Bury Barragh otherwise Guibarra . . . and all Manorial and other rights claims dues tolls and other issues and profits and all rights of fishing and taking salmon and other fish now belonging to the said Vendor in said rivers and in all of the rivers of the Vendor within the Manor of Magheramore and in the Bays creeks and estuaries thereof and in the lakes loughs pools and waters of the said Vendor situate in the Barony of Boylagh and Banagh and County of Donegal and of and in all rivers flowing through or bounding any of the lands specified in the first part of the first schedule thereto and hereto and of and in all lakes loughs pools and waters in upon or adjoining any of the lands so specified together with the bed and soil of the fresh water portions of the said respective rivers and of the said lakes loughs pools and waters And all Weirs in all of any said rivers and waters and together with rights of way to the said Board and their licensees and assigns to from and along the banks of the said respective rivers and waters and to from and along the shores of the said lakes loughs pools and waters for the purposes of exercising the fishing rights aforesaid . . ."

The first part of the first schedule listed various townlands. It commenced with the "Glenties Section". At the end of that section there were a number of townlands mentioned, which are relevant to the issues in this module, for example:

- (a) "Adderwal otherwise Adderwell";
- (b) "Goolvoy otherwise Coolvoy";
- (c) "Clogheragore otherwise Cloughemagore"; and
- (d) "Meenachullion otherwise Meenacallien".

There followed the "Downstrand Section", which also listed various townlands in the Barony of Boylagh and County of Donegal. This part of the first schedule itemised the following rights at the end thereof:

"Exclusive sporting rights on the lands including the several fishery rights in the Estuaries of the Owenea River and the Gweebarra River and in the waters fronting the Downstrand Section of this Estate."

37. What has been represented by counsel for the defendants as a copy of the 1917 Conveyance, which was found among the Conyngham Estate papers in the National Library, in my view, probably is a copy of a draft of the proposed conveyance on which the date 6th March, 1917 was subsequently inserted. While not of any real probative value, that document is useful in putting the 1917 Conveyance into context. It contained the following recitals:

- (a) that the Vendor (Marquis Conyngham) was seised of the lands and hereditaments specified in the first schedule for an estate in fee simple of possession free from encumbrances save and except the charges and encumbrances set out in the second schedule thereto;
- (b) that the Vendor had entered into a contract with the Board to sell the said lands and hereditaments specified in the [first] part of the first schedule under the provisions of the Land Purchase Acts and the Congested Districts Board Acts for the sum of £62,496, of which £62,200 was agreed should be guaranteed stock and £2,296 cash to be paid by the Board to the Irish Land Commission;
- (c) the fee simple and inheritance in the said lands with the appurtenances would be vested in the Board by order of the Irish Land Commission pursuant to the said Acts;
- (d) for the purpose of assuring to the Board the several fisheries in the Owenea and Gweebarra Rivers and the estuaries thereof and in Loughrossmore and Gweebarra Bays and all other the fishing and fishing rights thereby assured the Board had required the Vendor to execute the conveyance thereafter contained.

In the operative part of the copy draft conveyance, it was expressed to be made "in consideration of the sum of £1,476 portion of the said sum of £2,296 paid by the Board into the Irish Land Commission to the credit of the Estate of the said Vendor. . .". The premises were expressed to be conveyed to the Board in fee simple free from encumbrances and charges "save those specified in the first part of the second schedule hereto and indemnified therefrom in the manner hereinafter appearing". John A. Pomeroy was joined in the deed for the purpose of giving such indemnity. The second part of the first schedule contained details of various properties of the Conyngham Estate, both in England and in Ireland, which were demised to John A. Pomeroy for one thousand years upon trust with the purpose of indemnifying the Board against the charges and encumbrances to which the lands conveyed were subject. It would appear from a copy of a draft Release, which I understand is also in the National Library archive of the Conyngham estate papers, that in 1921 the charges and incumbrances to which the 1917 Conveyance had been subject were released and the term of years which was created in favour of John A. Pomeroy by way of indemnity was released.

38. The defendants also produced a copy, which is also among the Conyngham Estate papers in the National Library, of a statutory declaration made on 13th February, 1917 by William Henry Saltwell, the Conyngham Estate's former solicitor, who averred as follows:

". . . I am also able to state that from the year 1870 to the date of the judgment of the Court of Appeal in the Action of 'Marquis Conyngham v. O'Donnell and Others' the said Marquis, or his predecessors in title, was in receipts (sic) of the rents and profits (or bore the losses, as the case might be) of one undivided moiety of the Gweebarra fishery (other part of the said Glenties Estate) and made lettings thereof from time to time for his own benefit. After the judgment of the Court of Appeal above mentioned, the Marquis ceased to exercise his rights as absolute owner of the said moiety because owing to the river being a small one and the Marquis owner of only one side of the river, it became impossible for him to preserve his rights against poachers, and General Tredennick, who owned the other moiety of the river, was unable to establish his title to same by reason of his not being able to produce the Grant under which he claimed to hold."

39. An extract from the rateable valuation records held by the Commissioners of Valuation put before the Court by the defendants in relation to the Townland of Coolvoy indicates that the rateable properties in that townland originally included a "Salmon Fishery" held in fee, the rated occupier being originally named as Marquis Conyngham. The rateable valuation was £5. The name Marquis Conyngham was crossed out at some stage and "Tenants of Townland" inserted in its place. That may have occurred in 1912. However subsequently, the entry was deleted in its entirety, perhaps in 1913, and a note was inserted, which was subsequently struck out "per Commrs file". The year 1913 appeared at the commencement of the note, which was in the following terms:

"This fishery is in the possession of the tenants but they have no netting or fishing rights".

While the provenance of the extract is clear and reliable, the meaning of its content is not. In my view, no probative weight can be attached to its content.

40. The reference in the statutory declaration of Mr. Saltwell to the judgment of the Court of Appeal was to a judgment in an action between Marquis Conyngham and the Earl of Mayo, as plaintiffs, and William O'Donnell, as defendant, in which judgment was given in the Court of Appeal on 29th June, 1906. The Court has been furnished with copies of judgments delivered by Walker L.C., Fitzgibbon L.J., and Holmes L.J., the latter two having, apparently, been certified by the "Court Reporter". The Court has also been furnished with a copy of a draft order, but it is not clear whether an order in the terms of the draft was made. In any event, what is clear from the documentation is that the defendant, Mr. O'Donnell, was a member of the public whom the plaintiffs were seeking to restrain from entering upon the tidal waters of the Gweebarra River and from shooting or drawing any net or using any other means or device for taking salmon or other fish from the tidal waters, and from hindering or obstructing by nets or other means the free passage of salmon and other fish through the tidal waters to the upper waters of the Gweebarra River. In other words, the proceedings were not concerned with the non-tidal waters of the Gweebarra River, which are the subject of this module.

41. The effect of the decision of the Court of Appeal was to reverse the decision at first instance granting an injunction to the plaintiffs and to dismiss the proceedings, but without prejudice to any other proceeding in which a claim to a several fishery in the whole of the tidal waters could be heard or determined. The reason for that rider was that it had been alleged in the statement of claim that a General Tredennick was entitled to "a free fishery in the tidal waters" in issue and that Marquis Conyngham was only entitled to the other portion of the said Fishery. No evidence had been given of any title in General Tredennick in the tidal waters which would warrant the exclusion of members of the public from such portions, or of the nature or extent of such title. Walker L.C. recorded that there was no allegation of any title in General Tredennick "as derived from the Conyngham family". In a nutshell, the evidential lacuna which resulted in the rider to the dismissal of the proceedings was that there was no evidence of the title to the Tredennick interest in the Fishery in the tidal waters, so that the possibility that such interest could be put in defence before *Magna Carta* could not be ruled out.

42. It is interesting to note, although of absolutely no relevance to the issues now before the Court, that an earlier decision of the Court of Appeal in *Marquis Conyngham v. O'Donnell* (C.A. 9 May 1906, unreported), which obviously related to security for costs, was distinguished in *Hennessy & Co. v. Keating* 41 ILTR 203. What is of relevance and worth noting is that I find it difficult to understand why the relevant original title documentation in relation to the acquisitions from the Conyngham Estate and the Irwin Estate cannot be traced in the National Archive, unless it was destroyed in the Public Record Office fire in 1922, which I surmise is unlikely.

#### **Devolution of title to reserved fishing rights on the southern bank of the Gweebarra River**

43. 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:

(a) By virtue of the Land Law (Commission) Act 1923 the Board was dissolved (s. 5). Its jurisdiction, powers and duties were transferred to and vested in the Irish Land Commission (s. 6) and all lands, tenements and hereditaments situate in Saorstát Éireann which were vested in or held in trust by the Board became vested in the Irish Land Commission (s. 7).

(b) Under the Ministers and Secretaries Act 1924, the Irish Land Commission (including "the late Congested District Board for Ireland") came under the aegis of the Department of Lands and Agriculture (s. 1(vi)).

(c) By virtue of the Irish Land Commission (Redistribution of Public Services) Order 1927 (S.I. 55/1927), the Irish Land Commission, came under the aegis of the Minister for Fisheries.

(d) By virtue of the Ministers and Secretaries (Amendment) Act 1928 the Department of Lands and Fisheries was established (s. 3). While that Act was enacted on 28th June, 2008, I assume that it did not come into operation until after the Statutory Instrument next mentioned.

(e) By virtue of the Irish Land Commission (Fisheries and Rural Industries) Transfer of Functions Order 1928 (S.I. No. 60/1928), which was dated 31st August, 1928, all the lands, hereditaments, tenements and premises situate in Saorstát Éireann and all other property and assets which at the date of the order were vested, by whatever means, in the Irish Land Commission were vested in the Minister for Fisheries (Article 6).

44. 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.

### **Evidence of title of riparian owners on the northern bank**

45. The only part of the northern bank of the Gweebarra River included in this module is located in the Townland of Befflaght and is comprised in two folios, Folio 1308 and Folio 1309 of the Register of Freeholders County Donegal. These lands were part of the Irwin Estate. The process of sale under Land Purchase Acts was the same in relation to each folio. I will describe the documentation available by reference to Folio 1308.

46. The earliest document is an agreement dated 28th July, 1899 made between John Arthur Irwin, as vendor, of the one part, and Patrick McKelvey, the tenant purchaser, of the other part, for the sale of the holding, which was to be carried out by means of a vesting order. The agreement was lodged with the Irish Land Commission. The vesting order was made by the Irish Land Commission on 15th December, 1900 and it related to, *inter alia*, the holding of Patrick McKelvey. The holdings the subject of the vesting order were vested in the tenant purchasers in fee simple subject to payment of the land purchase annuities. No sporting or other rights were reserved. Folio 1308 was opened on 21st February, 1901 and Patrick McKelvey was registered as the owner in fee simple subject to equities. The current registered owner on Folio 1308 is Kevin McDonnell who was registered as full owner with absolute title on 24th February, 1992.

47. Mr. McDonnell also became registered as full owner with absolute title of the lands registered on Folio 1309 on 24th February, 1992.

48. Counsel for the defendants has sought to cast doubt over Mr. McDonnell's title on a number of bases. First, he has done so by calling up the ghost of General Tredennick from the judgments of the Court of Appeal in the 1906 proceedings and the statutory declaration of Mr. Saltwell referred to earlier. I consider that it must be presumed that the title to the Irwin Estate lands and fishing rights was properly investigated in 1899 and 1900 before the vesting order was made in favour of Mr. McKelvey.

49. Secondly, there has been put before the Court by the defendants a copy, certified by the Property Registration Authority under s. 22 of the Act of 2006, of the memorial of a Landed Estates Court Conveyance dated 2nd July, 1868 made by William Cary Dobbs, one of the Judges of the Landed Estates Court Ireland, in favour of Edward Irwin, which was a conveyance in fee simple of a large area of County Donegal, including the Townland of Befflaght, containing almost 15,000 acres. Counsel for the defendants has drawn attention to the fact that, as regards the Townland of Befflaght, the conveyance was expressed to be subject, *inter alia*, to –

“ . . . the rights if any exist of all parties in respect of the Gweebarrow and Owenwee Rivers running through and forming the southern western and north-eastern boundaries of this Townland . . . and also to the rights of all parties if any such exist in respect of the Gweebarra and Owenwee Rivers forming the southern and south-eastern and north-western boundaries of this Townland . . . ”.

Counsel for the defendants also pointed to the fact that the conveyance was also subject to the tenancies mentioned in the schedule thereto, some of which were in the townland of Befflaght and, in particular, drew attention to one item in the schedule, namely, the tenancy of “Doocarry House”, the tenant being named as “Honble. Valentine Lawless” and the nature of the tenancy being described as follows:

“This tenant has a promise of a lease for the same term as that for which he holds the fishery of the Gweebarra River, from the Marquis of Conyngham, viz., for three lives or thirty one years and the purchaser will be bound to give a lease at the tenant's request and expense on these terms.

On a plain reading that passage referred to a promise to lease Doocarry House. However, the point made by counsel for the defendants was that it indicated that there was a lease of the Fishery on the northern bank of the Gweebarra River in 1868. In my view, the only reasonable inference to be drawn is that, even if in 1868 a lease affected the lands and fishing rights vested in Mr. McKelvey, and there is absolutely no evidence that it did, by 1900, when the vesting order was made, the lease clearly did not affect those lands and fishing rights.

50. On the evidence afforded by the Land Commission and the Land Registry documents, Mr. McDonnell, as the current owner of the lands registered on Folios 1308 and 1309, which are not subject to any reservation of fishing rights, in accordance with well established legal principles is presumed to be the owner of the soil of the Gweebarra River *ad medium filum aquae* and, as such, has a *prima facie* right of fishing over that soil. A point which was emphasised from the outset of the hearing by counsel for the plaintiff was that the rights asserted by the defendants, which are the subject of their counterclaim, if established, would adversely affect the interest of Mr. McDonnell. As the defendants have not joined Mr. McDonnell as a defendant to their counterclaim, counsel for the defendants acknowledged that Mr. McDonnell could not be bound by any finding of the Court adverse to him. In my view, the counterclaim cannot be pursued in this module as against Mr. McDonnell's property.

### **The plaintiff's agreement with Mr. McDonnell**

51. The agreement on which the plaintiff relies is the second agreement entered into with Mr. McDonnell. It was dated 29th June, 2008, and was expressed to be made between Mr. McDonnell of the one part and NRFB of the other part (the 2008 Agreement). The object of the NRFB was recited as follows:

“The Board wants to protect, improve, develop and then maintain the Fishery as a unit including those remaining sections thereof (outside State ownership) in which there may be private interests subsisting therein and to secure this objective, the Board is seeking to reach agreement with [Mr. McDonnell] (and all other similar Landowners in respect of any individual fishing rights they may be entitled to) in the terms hereinafter appearing.”

52. The 2008 Agreement sets out the entitlement of NRFB in relation to the entire Fishery, including the tidal or estuary fishery, and the non-tidal portion of the Gweebarra River, Lough Barra, and part of the river above Lough Barra. Specifically, the agreement provides, *inter alia*, that the plaintiff –

(a) shall have the sole and exclusive right and responsibility to manage, control, use and regulate the Fishery, including any possible private interest of Mr. McDonnell in the area identified by reference to the map annexed thereto,

(b) may restrict the entitlements to fish on the Fishery in accordance with the rod management plan and may issue fishing permits accordingly on such terms and conditions including payment of a fee as it think appropriate, entitlement to fish being expressed to include the right of access to and along the banks of the Fishery, and

(c) may exercise its management and other functions either directly or through another person or organisation including Gweebarra Fishing Club.



53. The 2008 Agreement was open-ended in duration. Certain obligations and duties were assumed by the plaintiff under the agreement, for example:

- (i) to provide and maintain stiles and facilities to allow access to the Fishery;
- (ii) to take out public liability insurance cover for a sum not less than €12,700,000 and to ensure that Mr. McDonnell is indemnified under any policy against all public liability claims;
- (iii) to erect signage limiting liability under the Occupiers Liability Act 1995 to duty owed to recreational users; and
- (iv) to bear the costs of development and maintenance of the Fishery.

There is implicit in the foregoing obligations that the plaintiff has a role and a physical presence on the ground, so to speak, in relation to the Fishery and, in particular, in relation to Mr. McDonnell's riparian segment. There are also provisions designed to ensure continuity, notwithstanding a change in riparian ownership, in that Mr. McDonnell has agreed that, in the event of a sale by him of part or the entire of the riparian section of his land, he would make the sale subject to and conditional upon the purchaser entering into a similar agreement with NRFB. It was expressly provided that the agreement should be deemed to have come into force on 28th June, 2008 and that it will continue in operation until terminated by one month's notice in writing given by one party to the other. The submission of counsel for the plaintiff that the 2008 Agreement amounts to an exclusive licence to the plaintiff to exercise such rights in relation to Mr. McDonnell's portion of the Fishery as could be exercised by Mr. McDonnell, in my view, is correct.

#### **Authority of the plaintiff to act on behalf of State entities**

54. After the hearing had commenced, the Department of Communications, Energy and Natural Resources issued a document dated 15th June, 2012, which was signed by the Principal in the Inland Fisheries Division, and which was addressed "To Whom it Concerns" and referred to these proceedings. It stated:

"Pursuant to s. 7(1) of the Inland Fisheries Act 2010, the principal function of Inland Fisheries Ireland is the protection, management and conservation of the inland fisheries resource. Section 3(6)(a) of the 2010 Act provides, *inter alia*, that IFI shall perform the functions conferred on it by the Act within and having regard to all waters within the State comprising of a fishery district.

Insofar as there are fishing rights that are vested in the Minister, I confirm that as an operational matter IFI manages those rights on behalf of the Minister and the State.

This confirmation is without prejudice to any other issues that may arise in the proceedings."

55. Prior to the commencement of the 2010 Act, by letter dated 29th August, 2008, the Central Fisheries Board had transferred to NRFB the care and management of "Gweebarra Fishery, Co. Donegal" with effect from midnight on that day.

#### **The defendants' evidence of their right to fish in the Gweebarra River**

56. No documentary evidence of the defendants' title to fish in the Gweebarra River was put before the Court and clearly none exists. However, each of the defendants testified that prior to 2007 he had freely fished in the river. I am satisfied from the evidence of each of the defendants, and also from the evidence of Charles Kennedy, that throughout the 1970s, the 1980s, the 1990s and the early part of this century until the management plan was implemented by NRFB in 2008 and the dispute which has given rise to these proceedings arose, the defendants and Mr. Kennedy and other local people and visitors from outside the area fished the Gweebarra River, including the Mayo pool, from both sides of the river without seeking the permission of, and without any objection from, anybody whether riparian owner or a person claiming otherwise to have fishing rights in the river. There was no suggestion in the evidence that the fishing by the public was other than recreational.

57. In fact, neither the plaintiff nor its predecessor, NRFB, has disputed that locals and visitors alike freely fished in the Gweebarra River prior to 2007. In the affidavit of Mr. McCafferty grounding the application for an interlocutory injunction there was exhibited an extract from a book entitled "*The Rivers of Ireland*". While the author was not named and the date of publication was not given, the book was clearly published after 1990. The excerpt quoted included the following sentence:

"Being a free fishery, information is sparse on the rod fishery but the banks are sufficiently trodden to suggest that it is heavily fished for spring salmon, grilse and sea trout."

The first witness called on behalf of the plaintiff, Dr. Milton Mathews, who is currently the Director of the plaintiff in the North Western River District Basin explained what a "free fishery" in the Gweebarra River is understood to be. His evidence was that it was regarded by local communities as a free fishery, in other words, aside from the licence fee, no payment had to be made by a person to fish there.

58. The dispute between the parties is whether the admitted free fishing by locals and by visitors from outside the locality of the Gweebarra River for a long number of years has given the defendants a right or entitlement to continue to fish in the Gweebarra River prospectively without interference from the plaintiff and without having to obtain a permit from, or otherwise be authorised by, the plaintiff. At this stage, it is necessary to consider the case made on behalf of the defendants as to the existence of such right at the hearing.

#### **The right claimed by the defendants at the hearing**

59. At the hearing, when pressed, counsel for the defendants stated that the defendants' case is "very simple"; what they are claiming is a right that has been exercised by members of the public, that is to say, a public right of fishing in the Gweebarra River, which was predominantly exercised by persons from the locality but not exclusively. It was suggested that it had been exercised for at least ninety years, which I understand to mean from prior to 1917, when the Board took the conveyance from Marquis Conyngham and Mr. Saltwell's statutory declaration referred to "poachers" fishing the river, to 2007, when the 2007 Agreement was entered into.

60. To support his contention that free fishing by the public over a long period, say, ninety years, could give rise to a public right which could not be interfered with at this remove by the plaintiff, counsel for the defendants referred the Court to the oldest text which he could find, Longfield on *The Fishery Laws of Ireland*, which was published in Dublin in 1863. The passage he relied on is to be found at page 210. Having referred to the then recent decision of the Court of Common Pleas in Ireland (*Bloomfield v. Johnson*) and to the finding of the Court that "the public common law right of fishing in navigable waters only existed where the tide ebbs and flows", the author went on to say:

"The case, however, is not yet concluded, and many points remain over for future discussion and litigation. There may, however, exist a public right of fishing in an inland water where the tide does not ebb and flow; and such is assumed to be the law in the Fisheries Acts; and in fact it is exercised as such in parts of the River Suir. The public, however, cannot except in such a royal river, claim the right of fishing. It exists in the owners of the adjoining lands."

61. The issue as to whether in Irish law a public right of fishing in an inland water where the tide does not ebb and flow could exist was determined a short time after the publication of Longfield in *Murphy v. Ryan* (1868) I.R. 2 C.L. 143. The headnote in the report of that case states:

"The public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow."

The word 'navigable', used in a legal sense, as applied to a river in which the soil *prima facie* belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows."

There is a very helpful overview of fishing rights, including rights of the public, in Bland on *Easements* (2nd Ed.) at para. 9.02 et seq., which explains the rationale underlying the right of the public, at common law, to fish in the sea and in tidal waters, but not in non-tidal waters.

62. Counsel for the defendants also submitted that the Court should follow the approach adopted in the dissenting speeches in the House of Lords in *Harris v. Chesterfield (Earl)* [1911] 1 AC 623 and submitted that this Court is not bound by the majority decision, referring the Court to the commentary on the status of pre-1922 judgments in *J. M. Kelly: The Irish Constitution* (4th Ed.) at para. 8.2.106 et seq. and the authorities referred to therein. Given the emphasis placed by counsel for the defendants on the House of Lords authority, I propose considering it in some detail.

63. The dispute between Lord Chesterfield and Mr. Harris commenced in 1906. The Chancery Division of the High Court (Neville J.) in *Chesterfield (Lord) v. Harris* [1908] 1 Ch. 203 found that a claim by prescription for the freeholders of a manor to a free fishery or common of fishery in a river within the limits of the manor is a right in the nature of a profit à prendre, and is legally capable of proof. Lord Chesterfield appealed to the Court of Appeal, which unanimously reversed the decision at first instance (*Chesterfield (Lord) v. Harris* [1908] 2 Ch. 397). Mr. Harris then appealed to the House of Lords. The split in the House of Lords was four to three. Earl Loreburn L.C., with whom Lord Ashbourne and Lord Shaw of Dunfermline agreed, dissented.

64. The factual basis of the appeal to the House of Lords is pithily summarised in the headnote of the report as follows:

"Freeholders in parishes adjoining the River Wye had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right and without interruption, not merely for sport or pleasure, but commercially, in order to sell the fish and make a living by it. Riparian owners [Lord Chesterfield and Mrs. Foster] claiming to be owners of the bed of the river brought an action of trespass against the freeholders for fishing."

The majority in the House of Lords held that a legal origin for the right claimed by the freeholders could not be presumed, and that the action lay at the suit of the riparian proprietors. The dissenters took the converse view.

65. The basis of the majority decision is set out as follows in the headnote:

"A prescription in a que estate for a profit à prendre in *alieno solo* without stint and for commercial purposes is unknown to the law."

As to the import of that, it is convenient to quote the following passage from the judgment of Buckley L.J. in the Court of Appeal (at p. 421) because it explains it clearly:

"At this point I emphasize again that the defendants make no claim in gross. It may well be that there can exist in law a right in gross to enter and take without limitation – without stint – the profits or proceeds of another's land commercially for the purposes of sale. But prescription in a que estate, being a prescriptive right in respect of particular land to a profit à prendre in *alieno solo*, is, I think, necessarily measured by the size or nature or wants of the estate in respect of which the prescription is made. Thus if it be for common of pasture it must be for cattle levant and couchant; that is to say, it must be limited by the number of cattle capable of being supported during the winter upon the estate in respect of which the prescription is made."

Buckley L.J. rejected an argument that a "common of piscary" stood in a different position to other rights of common, for example, the right to pasture which is referred to in the above quotation, the right to turbary and suchlike. He reiterated later in his judgment that a person who claims by prescription "must prescribe within a measure limited by the estate in respect of which he prescribes".

66. The Lord Chancellor in his speech in the House of Lords made it clear that he did not find it necessary to address whether, *inter alia*, an appurtenant right of fishery could be for more than was needed for consumption on the land, or whether it could be without stint. The point from which the Lord Chancellor started was an earlier decision of the House of Lords in *Goodman v. Saltash Corporation* (1882) 7 App. Cas. 633, a case which illustrated that when long and continuous enjoyment is established, a lawful origin will be presumed if it is reasonably possible. In determining whether the presumption should be made in the case before him, the Lord Chancellor said (at p. 629):

"To begin with, it is common ground that at one time this hundred, or manor, was *terra regis*, and most probable that the manor, or hundred, included all the stretch which is now in question. We know that in quite early times the King alienated the riparian land; whether with or without the bed of the river *usque ad medium filum* is left in doubt by the terms of such of his grants as are extant and have been produced. We know that his grantees, in fact, suffered (and I cannot suppose this was out of mere good nature for so many hundred years) a continuous fishing by the freeholders under claim of right. A legitimate inference is that before he granted the land he had previously granted his right of fishery. Nor is it strange if he did so. At the time of Domesday Book this was border land contiguous to Wales, a country still the scene of fighting, or in which the King was obliged to have fighting men ready for action, and among them the men of Irchenfield, whose privilege it was to form the vanguard in attack and the rearguard in retreat, as Domesday informs us. It would be natural enough that he should give them a right of fishery, and that they should repay him by a promise of service. . . . All this is far beyond human ken; but that in some way the King made a grant of this fishery seems a very natural supposition, and it is our duty, as I understand the law, to presume it was granted lawfully if it could be granted at all."

The alternative is that the freeholders have been poachers for all these centuries. That would be the most violent presumption I ever heard of."

67. Lord Ashbourne took a similar approach and concluded as follows (at p. 634):

"I have come to the conclusion that it is reasonably possible and probable that the right claimed had a legal origin. The King may have made a grant to freeholders of the area of fishing in gross, and this may have made them a corporation; or the King may have made a grant to an existing corporation upon trust for the freeholders."

68. Similarly, having stated that it was impossible to peruse the titles and records which extended over many centuries and to entertain doubt of the enjoyment in fact of salmon fishing in the River Wye by the freeholders in the five riparian parishes within the limits mentioned, Lord Shaw stated (at p. 640):

"I think, accordingly, that this is pre-eminently a case for the application of the principles of the case of *Goodman v. Saltash Corporation*. I do not see my way to hold that the right thus asserted and enjoyed for centuries must now be declared to be void and of no effect because it is inconsistent with legal concepts. It appears to me, on the contrary, that the rights of fishing as asserted and enjoyed by these freeholders may, on the principles of *Goodman's Case*, with perfect propriety be presumed to have had a legal origin."

69. I consider that it is not necessary to consider whether it would be appropriate for this Court to apply the dissenting decisions in *Harris v. Chesterfield (Earl)* to the facts of this case because, for the reasons I will outline later, in my view, the dissenting decisions could have no application to the facts of this case so as to give rise to the recognition of a public right of fishing in the freshwater part of the Gweebarra River.

#### **Conclusion on issue (a) in relation to IFI owned fishing**

70. What the evidence of the title of the riparian owners of the southern bank outlined earlier discloses is that the holdings in question were acquired by the Board from Marquis Conyngham and vested in tenant purchasers. On the sales to the tenant purchasers the fishing rights were reserved to the Board. The defendants sought to cast doubt on the title of the Board, on the basis that it was questionable whether Marquis Conyngham had title to the fishing rights. I am satisfied that the Board took an express conveyance on the fishing rights from Marquis Conyngham by virtue of the 1917 conveyance. The doubt which arose from the judgments of the Court of Appeal in the 1906 proceedings between Marquis Conyngham and William O'Donnell, on the basis of the evidence before the Court, related to the tidal portion of the Gweebarra Estuary and River. Irrespective of whether the view of the Court of Appeal might be questioned today on the basis that parts of Donegal were never conquered by the Normans and were outside the common law before the application of Magna Carta (*cf.* Keane J. in *Gannon v. Walsh* at p. 272; and Bland *op. cit.* at para. 9 – 12), in my view, the defendants have not been successful in their attempt to cast doubt on whether fishing rights were acquired by the Board on the acquisition of the estate of Marquis Conyngham. The probability is that the Board did acquire a several fishery from the southern bank to the centre of the Gweebarra River from Marquis Conyngham in 1917 in the non-tidal portion of the Gweebarra River to which this module of the proceedings relates, and I so find.

71. The next question which falls for consideration is where the interest which the Board acquired from Marquis Conyngham is vested now? I have traced the devolution of title, as best I can, on the basis of the submissions made by the parties, from the Board and I have been unable to conclude that the rights granted to the Board by Marquis Conyngham in 1917 and reserved out of the vesting orders made in favour of the tenant purchasers have devolved to the plaintiff. Indeed, in the closing submissions, counsel for the plaintiff acknowledged that it is extremely unclear where the rights which were vested in the Board are now vested, that is to say, whether they are vested in the relevant Minister or whether they are vested in the plaintiff. However, there is no evidence to suggest that they may not be vested in an emanation of the State.

72. As I have said at the outset, when these proceedings were initiated the plaintiff was NRFB. Its functions were regulated by s. 11 of the Act of 1980, as amended. As pleaded in the statement of claim, it was on foot of its statutory remit that NRFB entered into certain agreements in relation to the management, preservation and development of the Fishery, including the 2007 Agreement with Gweebarra Fishing Club and the various agreements with private riparian owners, such as Mr. McDonnell. It is on foot of those agreements that NRFB laid down that a person is only entitled to fish in the managed part of the Gweebarra River if he holds a permit, either a member's permit derived from membership of Gweebarra Fishing Club or a visitor's permit, and further that such person is limited to fishing in the manner prescribed by the rod management plan put in place by the plaintiff.

73. The powers and functions which were formerly vested in NRFB in relation to County Donegal are now vested in the plaintiff by virtue of s. 7 of the Act of 2010. The principal function of the plaintiff as set out in subs. (1) of s. 7 is the protection, management and conservation of the inland fisheries resource. Subsection (2) then sets out the general functions of the plaintiff, the first of which is to promote, support, facilitate and advise the Minister for Communications, Energy and Natural Resources (the Minister) on the conservation, protection, management, marketing, development and improvement of inland fisheries. Assuming, as I do, that the continuation by the plaintiff of the policy of the NRFB in relation to the Fishery on the Gweebarra River is in fulfilment of that general function, given that, during the hearing of the action, the Minister's Department furnished the letter dated 15th June, 2012 quoted in full earlier, the question which arises is whether the plaintiff now has sufficient interest in the Fishery on the southern bank to prevent the defendants from fishing from the southern bank without a permit issued by the plaintiff and in accordance with the rod management plan.

74. In other words, the questions which have to be addressed by the Court are whether –

(a) when these proceedings were instituted, was the NRFB entitled to maintain an action in trespass against the defendants and,

(b) in the circumstances prevailing now, is the plaintiff entitled to maintain the action in trespass against the defendants.

Both questions must be addressed on the assumption (which will be explored later) that the defendants do not have a right to fish on the southern bank equal or superior to the right of the successor in title of the Board.

75. With a view to establishing that the NRFB had sufficient interest to institute these proceedings in relation to Mr. McDonnell's fishing rights on the northern bank of the Gweebarra River, and that the plaintiff has sufficient interest to continue the proceedings, counsel for the plaintiff cited the decision of the Court of Appeal in England and Wales in *Manchester Airport Plc v. Dutton* [2000] 1QB 133. The facts in that case were that the plaintiff was granted a licence by the landowner, which was the National Trust, to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. The works involved felling and

lopping of certain trees, so as to reduce the height of obstacles in the flight path. Three days before the grant of the licence, the defendants, who were opposed to the works, entered the wood without permission with the intention of making it difficult or impossible for the works to be carried out. At first instance the plaintiff was granted an order for possession of the wood. The defendants appealed to the Court of Appeal on the ground that the plaintiff did not have sufficient interest in the wood to seek an order for possession, since the licence granted did not give it exclusive possession of the land. The appeal was dismissed, Chadwick L.J. dissenting.

76. Having stated that, elementarily the licensee cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own but, obviously, that would not avail a bare trespasser, Laws J. continued (at p. 150):

"In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable."

77. At the core of the dissenting judgment of Chadwick L.J. was the nature of the remedy that the plaintiff was seeking, namely, an order for possession, which was an order in rem, enforceable by a writ of possession addressed to the sheriff. He observed (at p. 140):

"It is relevant, also, to have in mind that it has not been contended by the defendants that, in appropriate circumstances, the airport company might not be entitled to a personal remedy against one or more of them; for example, a remedy by way of injunction to restrain them, individually, from interfering with the carrying out of the . . . works under the terms of the licence. There have been no claims for injunctions in the present proceedings - for reasons which are understandable in the circumstances - and the availability or otherwise of remedies *in personam* is not in issue on this appeal."

In this module, the issues which the Court has to determine are designed to lead the way to determination as to whether the plaintiff is entitled to remedies *in personam*, primarily equitable remedies, against the defendants.

78. If the fishing rights on the southern bank acquired by the Board in 1917 and reserved out of the vesting orders made in favour of the tenant purchasers are now vested in the Minister, rather than in the plaintiff, and the plaintiff has not refuted that possibility, it is the Minister who can allow or not allow third parties to fish that portion of the Fishery and, if he allows it, to impose terms, such as, the requirement of having a permit issued by the plaintiff and abiding by the rod management plan. That proposition is, of course, based on the underlying assumption that the defendants do not have an equal or superior right to fish to the right of the Minister. Given the nexus between the statutory functions of the plaintiff and the Minister and the statutory relationship between the plaintiff and the Minister in the exercise of those functions, it is difficult to see why the plaintiff should not be entitled to seek equitable relief to restrain the defendants interfering with the exercise by it of its statutory functions, merely because the title to the fishery is vested in the Minister. It would have been preferable if NRFB, before it instituted these proceedings, had ascertained conclusively in whom the title to the Fishery on the southern bank was vested, and, if it was not vested in the Central Fisheries Board, that it had obtained express authority from the State entity in whom it was vested to bring the proceedings against the defendants. However, to the extent that the fishing rights have been and are vested in the Minister, in my view, the situation has been rectified by the letter of 15th June, 2012 from the Minister's Department.

79. Counsel for the defendants made the point that the letter of 15th June, 2012 did not supply the lack of "legal interest" in NRFB to manage, control and regulate access to the Fishery in 2009 when the tortious conduct was alleged against the defendants and these proceedings were initiated. That point may have to be addressed in another module of these proceedings. Issue (a) before the Court concerns the current position.

80. Therefore, as regards issue (a), insofar as it relates to what is, possibly incorrectly, described as IFI owned fishing, I consider that the plaintiff does have the right to manage, control and regulate that part of the Fishery and the access to it, provided that the defendants have not established that they have an equal or superior right.

#### **Issue (a) in relation to "Kevin McDonnell fishing"**

81. As I have found, having outlined Mr. McDonnell's title, as a riparian owner abutting a non-tidal river, there is a presumption that he is the owner of the soil *ad medium filum aquae*, and, as such, has a *prima facie* right of fishing over that soil. There is no evidence before the Court that would rebut that presumption.

82. By virtue of the 2008 Agreement with Mr. McDonnell, the plaintiff's predecessor, NRFB, became contractually entitled to manage, control, use and regulate the Fishery, including the interest of Mr. McDonnell therein. I am satisfied that the contractual rights of NRFB under the 2008 Agreement are now vested in the plaintiff by virtue of s. 52 of the Act of 2010 and enforceable by the plaintiff. Accordingly, the plaintiff is entitled to seek equitable relief to restrain interference with Mr. McDonnell's interest in the Fishery, on the basis of the reasoning of Laws L.J. in the Court of Appeal in *Manchester Airport Plc v. Dutton*. Accordingly, I find that the plaintiff has the right to restrain the defendants from fishing Mr. McDonnell's interest in the Fishery and having access to it, provided the defendants have not established any equal or superior right to that of Mr. McDonnell.

83. For completeness, I should refer to the fact that counsel for the defendants raised as an issue that the 2008 Agreement and, presumably, the other agreements with the other riparian landowners, presupposed that the plaintiff and its predecessor were entitled to impose the management plan on the entire Fishery, including the tidal portion of it. Dr. Milton Mathews, in his evidence, made it clear that, although around 2007 the NRFB understood that there was a several fishery in the Gweebarra Estuary, it has since accepted that that is not the case and has never enforced a restriction on fishing on the estuary. In my view, the fact that the 2008 Agreement envisages NRFB managing the Fishery, including the tidal portions of it, does not in any way vitiate the authority given by Mr. McDonnell to NRFB and now vested in the plaintiff as successor of NRFB.

#### **Issue (b)**

84. In my view, the plaintiff is entitled to the reliefs it has sought against the defendants insofar as the lands referred to in issue (a) are concerned, because I am satisfied that the defendants have not established that they have any fishing right equal or superior to the rights of either -

(i) whomever is entitled to the fishing rights which devolved from the Board, whether it is the Minister or the plaintiff, or

some other State entity, as regards the southern bank of the Gweebarra River, or

(ii) Mr. McDonnell, as regards the northern bank thereof.

As a matter of law, members of the public, whether from the locality or otherwise, have no right to fish in the non-tidal portions of the Gweebarra River, notwithstanding that for thirty or forty years and, indeed, probably for in excess of ninety years prior to 2007, the Fishery was unregulated and members of the public fished there freely. The type of public right, based on long user, which was asserted on behalf of the defendants is not recognised at common law.

85. The reliance by counsel for the defendants on the dissenting speeches in *Harris v. Chesterfield (Lord)* was wholly misconceived. It was not a public right which the dissenting Law Lords considered should be recognised by the courts, but rather a private right appurtenant to a particular holding, which, on the basis of long user, it should be presumed was expressly granted to the predecessors of the landowners in question prior to the commencement of the centuries of the long user in question. What this Court is being asked to do, in effect, is to recognise the existence of a public right by analogy to the private right which the dissenting Law Lords were prepared to presume was granted by the King to the freeholders in the parishes adjoining the River Wye. The Court cannot do that.

86. In this case, even assuming that members of the public in the locality have continuously fished the non-tidal portions of the Gweebarra River in issue in this module freely and continuously, say, between 1917 and 2007, and I have no difficulty in finding that such was the case, when one considers the evidence as to the title transactions in 1900 and 1917 in relation to the riparian properties on both sides of the river, there is no basis for legitimately inferring that the public had previously been granted a public right of fishery in the fresh water part of the Gweebarra River, as the Lord Chancellor was prepared to do in relation to the fishery on the Wye. Further, it is impossible to presume that subsequently the Board, which acquired the Conyngham estate interest in the Fishery, or the tenant purchasers, such as Mr. McDonnell's predecessor, Mr. McKelvey, who acquired the Irwin estate interest in the riparian lands via the Irish Land Commission, intended by their subsequent inaction that members of the public would acquire a public right protected by law to fish in the stretch of the Gweebarra River running along their respective properties.

87. Finally, I reiterate that the only claim made on behalf of the defendants at the hearing was that they have a public right of fishing in the fresh water part of the Gweebarra River. No claim was made to private right in the form of an easement or a profit à prendre and there was no evidence to support the existence of any such right.

#### **Issue (c)**

88. While I have already expressed the view that the defendants could not pursue their counterclaim in this module against Mr. McDonnell's property because he is not a defendant to the counterclaim, in the light of the conclusions I have reached on issue (a) and issue (b) that is entirely academic. The reality is that the defendants have not established any right, public or otherwise, to fish in the freshwater part of the Gweebarra River, including the part thereof the subject of this module.

#### **Summary of findings**

89. The answers to the questions raised in the order of 21st November, 2011 are as follows:

(a) Does the plaintiff have the right to manage, control and regulate access to the lands marked in yellow and green on the relevant map? Yes.

(b) Is the plaintiff entitled to the reliefs sought against the defendants insofar as the lands at (a) above are concerned? Yes.

(c) Are the defendants entitled to the reliefs set out in the counterclaim insofar as the lands at (a) above are concerned? No.

#### **Consequences of findings on the issues**

90. The findings on issue (a) and issue (b) merely allow for the regulation by the plaintiff of a small portion only of the Fishery on the Gweebarra River, although they do cover what the author of "Rivers of Ireland" referred to as the "famous Mayo Pool". The reality is that the findings do not provide a solution to the dispute between the plaintiff and the defendants or ensure that the plaintiff will be able to implement its management plan over the whole of the freshwater element of the Gweebarra catchment. At the end of the third day of the hearing, in response to a question by the Court, counsel for the defendants stated that the major subject of dispute between the parties had been "the classification of what is local, who is local". It was the plaintiff, of course, which brought the defendants to the High Court to resolve a local issue, although counsel for the plaintiff professed its reluctance to do so. To avoid further expense, I would urge the parties to endeavour to resolve the remainder of the dispute by agreement locally. The Fishery on the Gweebarra River is a precious resource, which requires to be protected for this and future generations.