THE COURT OF APPEAL
CIVIL

APPROVED
Neutral Citation: [2022] IECA 266
Appeal Number: 2020/133

Murray J.
Whelan J.
Faherty J.

BETWEEN/

INLAND FISHERIES IRELAND

RESPONDENT

- AND –

PEADAR Ó BAOILL, JOHN GERARD BOYLE AND JOHN BOYLE

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 18th day of November 2022

Introduction

1. This is an appeal against a judgment delivered by Ms. Justice Pilkington in the High Court on the 12th December, 2019 together with consequential orders perfected on the 10th June, 2020 granting orders and reliefs sought by the respondent on foot of a motion seeking summary judgment which issued on 31st January, 2018. The proceedings were instituted in June 2009. They concern fishing rights on the Gweebarra River, a spate river which enters the sea in north Donegal near Doochary Bridge.

2. Certain interlocutory orders – to which I will shortly return - were made in 2009 by Charleton J., and thereafter on 21st November, 2011 Murphy J. made an order providing for

a modular trial of identified issues. That trial concluded after six days of hearing before the High Court and judgment was delivered by Ms. Justice Laffoy on the 19th December, 2012. The appellants appealed from aspects of that decision and the Supreme Court, in a judgment reported [2015] 4 I.R. 132, declined the appellants' application to admit new evidence, whereupon the appellants abandoned their appeal.

3. The area coloured yellow in the map annexed to this judgment represents the southern side of the fishery, the green portions represent what was styled the "McDonnell section" on the northern bank by Laffoy J. in her judgment, the balance of the fishery on the northern side is shown coloured orange on the said map. Before considering the judgment under appeal, it is necessary to review the anterior events and litigation events in some detail for context and to achieve an understanding of the state of the evidence that obtained when the motion for summary judgment came before Pilkington J. for hearing in 2019.

Background

4. As counsel for the appellants, Mr. Ó Dúlacháin SC, outlined to this court the issues, though net, derive from the contested history of the Plantation of Ulster in the reign of King James I, including the Commission of 1609 whereby the said plantation was inaugurated and executed for the purposes of giving effect to the redistribution of the escheated lands and forfeited territories of Ulster amongst the cohort of undertakers, servitors and others designated eligible and which is comprehensively analysed in various texts, including in an academic paper "The Commission of 1609: Legal Aspects" by F.W. Harris in *Studia Hibernica*, no. 20 (1980), pp. 31 – 55. The determination of the issues arising in this appeal are more narrowly focused in their ambit and ultimately, in large part, turn upon whether the respondent has an entitlement to insist that the appellants may only fish the Gweebarra on foot of a daily fishing permit to be granted by it and whether the respondent, which has since 15th June, 2012 demonstrated that it is in actual possession of the Gweebarra Fishery for the

purposes of management of the fishery pursuant to statute for the benefit of the relevant Minister and the State as owner and thereby has sufficient possession of same to ground a claim to perpetual orders restraining acts of trespass in circumstances where the appellants no longer claim any estate, right, title or interest whether public or private in nature to same.

5. The respondent in this appeal asserts that in light of the fact that the High Court judge, by consent of the parties, dismissed the appellants' counterclaim, it is no longer open to them to purport to set up a *jus tertii* asserting that third parties have a title greater than that of the respondent where they have themselves already abandoned all claims asserting title over the several fisheries in question. On this argument, the *jus tertii* objection raised by the respondent, if established, offers a complete answer to the appellants' current assertions as formulated in the appeal notice because trespass to land protects possession rather than title and it is immaterial and irrelevant that any third party, not being a party to the action, may have a better title than the respondent since the defence of *jus tertii* is not recognised in such circumstances.

6. Given the involved history between the parties and the changes and modifications that have evolved in the respective position of the parties over time from and after the institution of the within proceedings in 2009, it is necessary to review the history and background through the prism of the litigation and various court orders and judgments to date.

The Proceedings

7. Inland Fisheries Ireland, the respondent in these proceedings and the successor to the original plaintiff, the Northern Regional Fisheries Board, is a statutory agency charged with responsibility for the management of fisheries of freshwater and coastal fish up to 12 nautical miles off the shore. Under the terms of the Inland Fisheries Act, 2010 (the 2010 Act) the respondent (hereinafter IFI) was established in the context of the dissolution of the Central Fisheries Board and various regional fisheries boards, including the Northern Regional

Fisheries Board. Section 8 of the 2010 Act effected the transfer of all functions vested in, *inter alia*, any regional board to IFI. Thereafter by virtue of the Inland Fisheries Act (Establishment Day) Order 2010 (S.I. No. 262 of 2010), 1st July, 2010 was appointed the establishment day for the purposes of the Act.

8. The proceedings were instituted just over a year prior to the establishment day. Under the terms of the General Endorsement of Claim, various injunctions were sought, together with a declaration that the defendants (the appellants in these proceedings) *"together with all persons acting in concert with them do not have the right to fish the Gweebarra Salmon Rod fishery… in the waters shown coloured yellow on the map exhibited at "GMcC1 to the Affidavit of Gerry McCafferty sworn on 8 June, 2009 without a permit issued by or with the authority of the Plaintiff."* On the 20th July, 2009 Mr. Justice Charleton in the High Court granted interlocutory orders restraining the defendants together with all persons acting in concert with them and all persons having notice of the making of the order, pending the trial of the action, *inter alia,* from:

(1) 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) restraining them 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 will be entitled so to do by joining the Finntown or Rosses Anglers Clubs.

9. The plaintiff through counsel gave an undertaking to the court to erect a notice on the relevant premises indicating that the parts of the river which were not under the plaintiff's control and which were accessible without a fishing permit. The plaintiff's application was

grounded on the affidavits of Gerry McCafferty and Paul Gallagher and a notice of motion dated the 8th June, 2009.

10. The Statement of Claim was delivered on the 10th May, 2010. There, it was outlined that the plaintiff's responsibilities included the protection of fisheries in the region and the enforcement of relevant Fisheries Acts and the management, conservation, regulation and development of the inland fisheries resource. At para. 6 it is pleaded:-

> *"Within the area for which the Plaintiff has responsibility there is a salmon rod fishery on the fresh water portion of the Gweebarra River in the County of Donegal ('the Gweebarra Fishery'). The catchment encompasses the lands drained by the Gweebarra river and its tributaries. The Gweebarra Fishery includes the Mayo Pool and the confluence of the Cloghernagore River. These proceedings relate primarily to the parts of the said Fishery more particularly delineated on the map attached hereto titled 'Gweebarra Managed Fishery' ('the map') and thereon shown coloured yellow and blue unless indicated otherwise references hereinafter to 'the (Gweebarra) Fishery' shall be those parts of the Fishery.*
>
> *7. In early 2007 the Plaintiff decided on foot of its express statutory remit pursuant (inter alia) to section 11(1) and (2) of the Fisheries Act, 1980 as substituted by section 8 of the Fisheries (Amendment) Act, 1999 to enter into certain agreements in relation to the management, preservation and development of the Gweebarra Fishery. In pursuance of the said objective the Plaintiff entered into agreements with the Gweebarra Fishing Club ('the Club') and certain of the private riparian landowners of lands abutting the fishery. A large part of the balance of the fishery was in State ownership and is managed by the Plaintiff on behalf of the State."*

11. Details of the terms of the plaintiff's agreement with the club are set out and particularised and further the terms of the agreements between the plaintiff and riparian landowners are particularised. It is pleaded:-

> *"10. The Plaintiff has entered into agreements with landowners in the said terms in respect of the areas of the fishery marked in yellow on the map. Various state authorities have assigned the Plaintiff the right to manage fishing on the lands marked in blue on the map.*
>
> *11. Without prejudice to the generality of the foregoing, on 29th June 2008 the Plaintiff entered into a Management Agreement with Mr. Kevin McDonnell, the single riparian landowner of one side of the 'Mayo Pool' referred to in paragraph 6 above.*
>
> *12. On foot of the said agreements and assignments, the Plaintiff acquired the entitlement to manage, control and regulate and access the lands within the fishery. The Plaintiff decided to restrict access to fishing on the said lands to members of the Club and the holders of visitor permits in accordance with the terms of the agreement between the Plaintiff and the Club referred to ante.*
>
> *13. Wrongfully, the Defendants have 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, have engaged in conduct intended to intimidate other anglers and intended to dissuade them from joining the Club and purchase permits."*

These allegations are thereafter particularised in some detail. A declaration is sought that the defendants did not have the right to fish the Gweebarra Fishery without a permit issued by or with the authority of the plaintiff and various injunctions were sought, *inter alia,* restraining intimidation, watching, besetting and incitement. A claim for damages for

trespass was not however pursued and was subsequently expressly abandoned, as confirmed in the written submissions of the respondent (at para. 8.) filed in this appeal.

Defence and Counterclaim

12. On the 13th December, 2010 a defence and counterclaim was delivered on behalf of the defendants. It denies that the plaintiff was the competent fisheries authority for the Gweebarra river or that it had responsibility for the freshwater portion or catchment area of same. It is denied that the plaintiff had any power to enter into agreements pertaining to the management and preservation or development of the Gweebarra Fishery. State ownership of parts of the Fishery as pleaded are denied and the plaintiff is put on full proof of various agreements with third parties said to have conferred rights and entitlement on it to manage same:-

> *"14. It is denied that the Plaintiff had any power to enter into agreements with landowners in the said terms as alleged or at all without reference to the existence of a free fishery and the rights of the defendants and others prior to 2007."*
>
> *...*
>
> *"17. It is denied that any such powers were granted to the Plaintiff or could be granted to the Plaintiff without proper consideration of the rights of the defendants herein and others in relation to the several fishery on the Gweebarra River and the private fishery on the Gweebarra River."*

Para. 19 contended that the Gweebarra Fishery Club was operated by the plaintiff to:-

> *"...control access to the said river waters and to issue fishing permits which the plaintiff has no power to do and it is denied that they have any powers to do based on any agreements or assignments as alleged or at all."*

The defendants denied that the plaintiff had any power to or right to impose a rod management plan on the river as it intended to do. (para. 35)

13. The defendants' counterclaim was dismissed by Pilkington J. on consent on 13th March, 2020, however its terms and tenor are still of relevance. As of the hearing of the appeal before this court, the appellants did not claim to be successors in title to any original tenant purchaser/ riparian owner, nor did they assert any estate, right or interest in the fishery either on the basis of public law or private law rights. Their counterclaim had sought a declaration that they were entitled:-

> *"...by way of easement to fish, that the plaintiff's actions constitute an interference with the rights of the defendants ... in relation to the several fishery and to the fishing rights generally on the Gweebarra River."*
>
> *"B. A declaration that the defendants ... are entitled to take by way of profit à prendre from the said river in accordance with the seasons such fish as may be caught by the defendants, their servants and/or agents and that the plaintiff's actions constitute a substantial interference and/or trespass in relation to the said right and profit."*

It further counterclaimed for a declaration that:-

> *"part of the Gweebarra River from the bridge to the sea is a several fishery and as such the defendants, their servants and/or agents have a right to fish the said several fishery as it is a public right.*
>
> *E. A declaration that the balance of the fishery that the defendants, their servants and/or agents have a right by way of easement and profit à prendre have a right to enter onto the lands abutting the said river to fish and have done so since time immemorial and have a right to take fish from the said river by way of profit à prendre and have done so since time immemorial."*

These bold assertions were subsequently abandoned and the counterclaim was ultimately dismissed on consent, by Pilkington J. Laffoy J. in a judgment delivered in 2012 had rejected the claims in regard to the southern bank of the fishery.

This claim is confined to trespass *quare clausum fregit*

14. It is necessary to observe at the outset that since the appellants no longer claim any rights over the subject fishery, the issue of title so forcefully argued by the appellants is ultimately of very limited relevance in the within appeal, where the proceedings are confined to a claim for orders to restrain trespass *quare clausum fregit* (simple trespass) in the context of tort, rather than to the issue of title which would more likely sound in nuisance and slander of title and declaratory reliefs as to title which are not advanced by the respondent. In considering the myriad of issues raised in this appeal, sight must not be lost of the fact that to succeed in a claim for reliefs to restrain trespass *quare clausum fregit*, generally all a plaintiff must show is that it has possession or occupation of the property in question. There is a long line of authority including *Browne v Dawson* (1840) 12 Ad. & El. 624, *Wilkinson v Kirby* (1854) 16 C.B. 430 and, more recently, *Brake & Ors v. Cheddington Court Estate Ltd.* [2022] EWCA Civ. 1302, for the proposition that evidence of actual possession as owner, of the kind exercised by the Minister/State in the instant case and operated by the respondent on their behalf, is a sufficient basis to invoke remedies for the tort of trespass *quare clausum fregit* to vindicate the plaintiff's existing possession against a wrongdoer or trespasser who cannot show any better title or authority. Possession by a plaintiff is sufficient to invoke the equitable jurisdiction to seek remedies in support of a simple trespass action against a defendant who has not shown a greater title to the property. A defendant unable to show a better or greater right to possession of the property vested in themselves than the plaintiff has no answer in law to a claim, such as that of the respondent in this case, which sounds in simple trespass.

Modular trial

15. In 2011 a modular trial was ordered by Murphy J. The issues to be tried were:

(a) whether the plaintiff had the right to manage control and regulate access to the lands "Gweebarra Fishery" marked in yellow and green on the relevant map; and

(b) was the plaintiff entitled to the reliefs sought against the defendants in respect of the said lands; and

(c) were the defendants entitled to the reliefs set forth in their counterclaim in respect of the said lands.

To gain an understanding of the issues in this appeal is necessary to consider in depth the ensuing judgment of Laffoy J.

2012 Judgment of Laffoy J.

16. The trial of those issues was heard by Ms. Justice Laffoy in the High Court over six days and judgment was delivered on the 19th December, 2012. Laffoy J. heard extensive evidence with regard to the development and management of angling on the Gweebarra river and events leading to an agreement for the management of the Gweebarra Fishery concluded on the 9th March, 2007 between the Gweebarra Fishing Club of the one part and the plaintiff of the other. At para. 1 of her judgment Laffoy J. observed:

> *"... 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."* (para.1)

Having considered a substantial number of title documents and the evidence of witnesses tendered by the parties concerning the manner in which the said river had been fished prior to 2007 she emphasised:

"…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 Gweebara River under consideration, it is necessary to consider the pleadings in some detail."

17. Laffoy J. reviewed the pleadings and proceedings, including a procedural order made on the 21st November, 2011 whereby the title of the plaintiff was amended by the substitution of "Inland Fisheries Ireland" (IFI) for Northern Regional Fisheries Board (NRFB) in light of the coming into operation of the 2010 Act. The court noted that by Ministerial Definition No. D.140 dated 6th December, 1946, the boundary between the tidal and freshwater portions of the said river were defined 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.*" The judgment identifies the precipitating events that led to the institution of the proceedings, including that the first defendant had been the subject of a prosecution in late 2008 by the plaintiff alleging that he (and others) had entered upon the Fishery for the purpose of taking fish without permission of the several fishery owners contrary to s. 178 of the Fisheries (Consolidation) Act, 1959 as amended. The stance adopted by the first named defendant was that no permission or consent of any party was required to fish lawfully in the Gweebarra river. Whereas equity proceedings were instituted in the Circuit Court in June 2009 by the second named defendant asserting an entitlement to fish the river lawfully without permission or consent, same have never been progressed. The court noted that the plaintiff had pleaded a decision on foot of its express statutory remit to enter into certain agreements in relation to the fishery and 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."*

18. At para. 11 Laffoy J. observed:-

> "*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 continue to fish and to otherwise assert their 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.*" (para. 11)

19. Opening the case on behalf of the plaintiff in 2012, counsel had initially asserted a claim based on ownership, rather than actual possession, of the several fisheries in question. The claim now subsists based on the plaintiff's superior right to possession:-

> "*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.*"

As outlined hereafter, the plaintiff pursued the latter route with effect from the 12th June, 2012.

20. Laffoy J. made the following observation concerning the defendants' counterclaim at para. 16 of her judgment:-

"…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 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."

21. The court noted that whereas the counterclaim appeared to be setting up a private right to fish an entirely inconsistent position was adopted at the hearing claiming that a public right to fish was enjoyed by the defendants.

22. Laffoy J. was satisfied that the principles enunciated in *Gannon v Walsh* [1998] 3 I.R. 245 regarding the *locus standi* of a party in possession of a fishery to seek interlocutory relief to restrain trespass did apply and that a plaintiff was not required to prove ownership of the riverbed.

Laffoy J. and title to southern bank

23. Laffoy J. considered muniments of title advanced on behalf of the defendants, including a Memorial of an Indenture of Conveyance of the 6th March, 1917 finding that by virtue of same, proven by the secondary evidence, the southern bank of the Gweebarra river had been conveyed to the Congested Districts Board (the Board) in fee simple and subsequently vested in tenant purchasers but that sporting rights including any fishing rights had been reserved in favour of the Board. The title thereafter was found to have devolved in accordance with primary and secondary legislation. The court concluded that the fishing rights had vested in the Minister for Lands and Fisheries and his successors. Those findings were never appealed.

24. The appellants, having by 2019 abandoned claims that they enjoy either public or private rights to fish, contended before Pilkington J. and in this appeal that further new material uncovered *circa* 2016 is probative of a fresh proposition namely, that as of 1911

"negotiations for tenant purchase of the Conyngham Estate on the Southern Bank had proceeded to an agreement and that the fishing rights had been ceded to the tenants by the Marquis…" (appellants' submissions 14 December 2020, para. 26) and that same had vested in a tenants/local or community collective. It is necessary to consider whether such claims amount to a collateral attack on the unappealed determinations of Laffoy J. on ownership of the southern bank and separately, whether this new assertion, even if correct, could offer any defence to the claim in trespass.

Laffoy J. judgment and northern bank of the Gweebarra

25. The defendants also disputed the title to "McDonnell section" of the northern bank of the fishery. The court considered the evidence of title of the riparian owners on that section and observed: –

> "*… in accordance with well established legal principles [Mr. McDonnell]…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."*

Laffoy J. judgment – treatment of the counterclaim

26. The judge then proceeded to consider - and reject - the claim advanced on behalf of the defendants at para. 59, noting that counsel for the defendants had stated:-

> *"…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…"*

Laffoy J. concluded, citing the headnote of Longfield in *Murphy v Ryan* [1867] Ir. 2 Cl 143, that the claim was not maintainable in law and that on the balance of probability the Board acquired the several fishery from the Southern Bank to the centre of the river in 1917.

27. A further aspect which Laffoy J. had to consider was where the interest in the fishery acquired by the Board in 1917 may have ultimately come to vest . She noted *"... there is no evidence to suggest that they may not be vested in an emanation of the State*." (para.71) The court noted that it was on foot of its statutory remit that NRFB had, *inter alia*, required members of the public to have a permit to fish on the river which the defendants denied they were required to hold.

Letter of 12th June, 2012

28. The judgment of Laffoy J. noted that the powers and functions formerly vested in NRFB in relation to the river had vested in IFI by virtue of s. 7 of the 2010 Act. She also concluded, based on a letter dated 12th June, 2012 from the Inland Fisheries section of the Minister's department produced to the court, that IFI managed any fishing rights vested in the Minister or the State on their behalf.

Trespass – *locus standi*

29. Laffoy J. concluded on the evidence that the defendants did not have a right to fish on the southern bank equal or superior to the right of the successor in title of the Board. Citing authorities such as the decision of Laws J. in *Manchester Airport plc v Dutton* [2000] 1 QB 133, she observed: –

> "*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..."* (para. 78)

She concluded, as regards the southern side of the fishery, that the IFI "*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." (para. 80) This is a critical finding which clearly stands.

30. Laffoy J. determined that the plaintiff was entitled to the reliefs sought against the defendants in relation to the subject property and she was satisfied that the defendants had not established that they any fishing rights equal or superior to the rights of those who had put the plaintiff into possession of same.

Laffoy J. conclusions on counterclaim

31. The judge concluded, *inter alia*, at para. 88 –

> *"…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."*

She answered the questions raised in the modular trial order of the 21st November, 2011 as follows:

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

Answer – Yes.

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

Answer – Yes.

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

Answer – No

Following conclusion of the case, the appellants produced new evidence pertaining to the root of title to the McDonnell section (coloured green) on the northern bank of the fishery.

Appeal to Supreme Court from judgment of Laffoy J.

32. Subsequent to the delivery of the judgment by Laffoy J., the defendants, in the course of an appeal to the Supreme Court from parts of that judgment, sought to introduce this new evidence regarding the title to McDonnell's section of the northern bank. A succinct analysis of that application and the nature and practical import of the new evidence sought to be introduced was provided by Clarke J. (as he then was) in his judgment of 15th May, 2015, *Inland Fisheries Ireland v O'Baoill & Ors.* [2015] 4 I.R. 132 as follows:-

> *"11. In essence, it is suggested on behalf of the Fishermen that, as a result of extremely diligent searches carried out since the hearing in the High Court by their solicitor, Mr. Seán Boner, there may now be evidence which would establish that, rather than Mr. McDonnell having any title to the fisheries in question, those fisheries were now vested in the Minister for Communications, Energy and National Resources... It is suggested that the relevant interest in various fisheries in Donegal, including the Gweebarra Fishery, passed to the Congested District Board by a Deed of Conveyance dated 6th July, 1905. It is then said that the same interest…was transferred by statutory intervention from the Congested District Board to the Land Commission, and thereafter to the Minister of Lands and Fisheries, who is now succeeded by the Minister for Communications, Energy and Natural Resources."*

33. The Supreme Court dismissed the defendants' application to adduce new evidence purporting to support a different chain of title in respect of McDonnell's section. The view of the Supreme Court was that, as summarised in the head note, "*The new evidence, while affecting the findings of fact made in relation to the fishery's chain of title, would not affect the findings made in the module regarding the plaintiff's ultimate rights over the fishery*." The Supreme Court accepted the plaintiff's argument that because establishing a different chain of title to the fishery would not change the result of the first module, it could not therefore be relevant to the appeal. The plaintiff had argued that a failure to disturb that

aspect of the findings of Laffoy J. which could be shown to be wrong by the new evidence could have adverse effects on any future modules in the trial. Clarke J. observed:

> "*Thus, it is clear that the decision of the trial judge, on the specific issues which were before her in the first module, was entirely prospective. She held, as of the time of the trial, Inland Fisheries had established a sufficient interest to maintain the proceedings and the Fishermen had not established any entitlement to fish, whether as a matter of public or private right. It is as against those findings that this appeal lies*."

Significantly, Clarke J. noted at para. 12: –

> "*It was not, however, contested at the hearing of the application to admit new evidence that, if it were to transpire that the ownership of the fisheries which Laffoy J. held were vested in Mr. McDonnell were in fact to transpire to be as the Fishermen now assert, nonetheless Inland Fisheries would, as of today, and indeed as of the time of the trial of the first module in the High Court, have been entitled to manage those fisheries, although as a result of a different chain of title to the one identified by the trial judge*."

The court concluded, *inter alia,* that to the extent that the chain of title at the northern bank of the Gweebarra river may be relevant to any subsequent module, it would 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, was in fact incorrect.

Further new evidence post-2015

34. A feature of this litigation is that when an unfavourable determination is made regarding an aspect of title to the fishery, the appellants, through the industry of their instructing agent, identify new material which they contend casts doubt on an aspect of the

court's findings. This occurred initially during the course of the hearing before Laffoy J. in 2012, where title evidence from 1917 was produced - which the trial judge concluded established that the fishing rights on the southern side of the river had vested in the CDB thus supporting the respondent's position and undermining the appellants' own counterclaims as pleaded and otherwise asserted at the plenary hearing. Subsequent to the delivery of the Supreme Court judgment, in 2016 further material was produced by the appellants, which was unsuccessfully relied upon by the appellants before Pilkington J. to resist summary judgment based on the jurisprudence exemplified by the decision in *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] 2 I.R. 694 (*Abbey*). The trial judge's treatment of the said material and its relevance or otherwise are in issue in this appeal. The "new material" advanced before Pilkington J. included minutes of evidence taken by a Departmental Committee on Irish Inland Fisheries and published by HMSO in 1913.

35. I conclude for all the reasons set out below that the trial judge was correct in her treatment of same and that the said material taken at its height did not disclose any real or *bona fide* defence on the part of the appellants or any of them to the respondent's claim. Though the appellants assert that the material shows that title to the fishery came to vest in a tenant collective/community collective/local collective, I conclude that the "new material" does not provide any credible basis for this assertion. Further, in my view the issue of title (as distinct from possession) is not ultimately material to the resolution of the claim which is brought in trespass. Having reviewed the "new material" put before the High Court, I am satisfied that same does not offer evidence of title to the fisheries having vested in the third party "collectives" as alleged. I conclude the appellants' claim is comprehensively contradicted by the documentation of title previously produced and put before the courts in 2012 and 2015. I conclude that the appellants did not meet the relatively low threshold of

demonstrating a fair and reasonable probability of a defence to the claim and the trial judge's conclusions and orders were clearly warranted in light of the *Aer Rianta v Ryanair* jurisprudence.

2018 motion for summary judgment - the subject of this appeal

36. By Notice of Motion of the 31st January, 2018 the plaintiff, invoking the inherent jurisdiction of the High Court, sought orders:

(a) Directing that the entitlement of IFI to the reliefs claimed at paragraphs 1, 3, 4 & 5 of the General Indorsement of Claim and to the costs of the proceedings be heard on affidavit only.

(b) That the map exhibited at PMCM 1 to the affidavit of Patrick McMullin, Solicitor sworn on the 30th January, 2018 be the relevant map.

(c) Directing that the entitlement of the plaintiff to an order dismissing the defendants counter claim *in limine* be heard on affidavit only, and

(d) Treating the hearing of the application as the trial of the proceedings for the purpose of determining the plaintiff's entitlement to the reliefs sought.

In essence, IFI invoked the summary jurisdiction as adumbrated by Kelly J. in the High Court in *Abbey*, a jurisdiction exercised in the Commercial Court in the context of case management and characterised thus by *Delany & McGrath on Civil Procedure*, (4th ed., Round Hall, 2018) at para. 30-39 as follows:-

> *"In Abbey International Finance Limited v Point Ireland Helicopters Limited, Kelly J held that the High Court had an inherent jurisdiction to grant summary judgment in respect of an unliquidated claim where it was satisfied that the defendant had failed to identify an arguable defence and it was very clear that the defendant had no defence. Those proceedings had been brought in the Commercial List and he bolstered that conclusion by reference to Order 63A, rules 5 and 6(1). He considered*

that these rules conferred wide powers to make directions and orders as part of the case management of proceedings and that the ability to bring applications for summary judgment where a defendant was alleged to be unable to demonstrate a real or bona fide defence promoted the objects for which the Commercial List had been established."

IFI affidavit grounding application for summary judgment

37. The affidavit of Patrick McMullin, Solicitor on behalf of IFI, sworn on the 30th January, 2018 grounded the application. It deposes:-

"...The Plaintiff is of the view that there are no matters of substantial dispute between the parties such as to require a further trial of the balance of the issues in the proceedings. Accordingly, the Plaintiff seeks to have its entitlement to the balance of the reliefs sought, determined on affidavit. In order to avoid unnecessary controversy, I have been authorised by the Plaintiff to confirm that it will not be pursuing a claim for damages against the Defendants. I am also authorised to confirm that the Plaintiff is prepared to forego the costs of the interlocutory injunction notwithstanding that those costs were made costs in the cause and the Plaintiff has already established it is correct in relation to the fundamental issues in the proceedings." (para. 3)

At paragraph 5 he deposes, *inter alia,* in relation to the judgment of Laffoy J. of 19th December, 2012:-

"Laffoy J held that the defendants had not made out any case that they had acquired fishing rights in respect of the river. While that judgment only dealt with a specified portion of the river, I am advised that there is no basis upon which it could be contended by the defendants that they have a valid counterclaim in respect of any other part of the river."

38. Significantly, the affidavit engages with and addresses *"the import of the new evidence"* sought to be adduced by the defendants in 2015 before the Supreme Court:-

> *"The import of that evidence was that the Minister for Agriculture and Food was the owner of the fishing rights rather than the riparian land owners. While the Supreme Court refused to adduce that new evidence, the plaintiff subsequently took steps to investigate in detail the issues raised. Arising out of those investigations, the Plaintiff has formed the view that the Defendants are correct, i.e. that the Minister is the owner of the fishing rights."*

IFI placed reliance on the judgment of Laffoy J. coupled with the document dated the 15th June, 2012 signed by the Principal in the Inland Fisheries Division and referred to above, which had stated, *inter alia*, *"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."* The affidavit posited that IFI has a *"clear - and in light of the decision of Laffoy J. – indisputable right to manage all of the portions of the fishery marked on a map…*"

Affidavit opposing summary judgment

39. In a detailed affidavit sworn on the 20th April, 2018, Mr. Seán Boner, Solicitor on behalf of the appellants, deposed that there were *"significant disputes of fact and law in contention that required to be dealt with in the normal way by Plenary Hearing."* It was deposed at para. 3(iii) that *"... it has been conceded some years at the modular hearing by the Defendants that the counterclaim could not be proceeded with on the grounds that the Plaintiff was not the proper party to defend any such claim. Accordingly, the counterclaim can be treated as withdrawn."* This assertion appears to ignore the clear findings and order of Laffoy J. which rejected the appellants' counterclaim in relation to the part of the fishery the subject of the modular trial determined by her. It was deposed that the appellants had the

entitlement to cross-examination any deponents swearing affidavits on behalf of IFI. At para. 10 it is deposed that the families of two of the appellants held family holdings on tributaries of the Gweebarra river on the southern side. It was further deposed that the appellants had *"fished the river their entire lives."* The relevance of these bare assertions to identifying an arguable defence was not stated.

40. It goes without saying that the ownership of such holdings by ancestors or persons connected with the appellants or any of them could not confer any estate, entitlement or interest upon the appellants or any of them. More relevantly, it could not *per se* confer upon them a right to possession greater than that demonstrated by the respondent pursuant to the letter of 15th June, 2012.

The further new post-2015 evidence

41. At para. 17 of the affidavit Mr. Boner deposes:-

> *"A significant issue in the action is the nature and extent of any private rights enjoyed by the Board … Absent those rights the Plaintiff has no locus standi to bring this action at all."*

At para. 23 it is deposed that since the hearing before 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."*

It is asserted that:-

> *"This evidence establishes that the Fishing Rights on all of the Northern Bank was purchased by the Congested Districts Board from General Tredennick in 1908 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."*

It was further deposed:-

"The evidence is consistent with other evidence as to the sale of the Irwin Estate and entries made in the rating records. The conveyance from General Tredennick to the Congested District Board in 1909 (sic) was stamped at the trust rate of 10 shillings. This was consistent with the fishing rights being purchased for the collective." (para. 24)

42. It is contended that a booklet comprising extracts from the records of the Parliamentary Committee of the Department of Agriculture and Technical Instruction printed in the year 1913 is of relevance and extracts relating to part of the evidence taken, *inter alia,* in County Donegal are exhibited. It was contended that practices and policies of the Board recorded in Minutes of the 5th July, 1901 were material:-

"... the vesting of the fishing rights in a collective as per the evidence given in 1911 to the Parliamentary Committee was entirely in keeping with the policy of the CDB adopted in 1901. In the circumstances a serious issue remains to be tried which, if the Defendants (sic) evidence is accepted, will establish that the Plaintiff does not have the rights it alleges it has in respect of the Northern Bank." (para. 27)

It is further contended that:-

"... the evidence will disclose that the CDB had the same policy in mind when it acquired rights from the Conyngham Estate and that it acquired the fishing rights on trust for the tenant purchasers and that on the dissolution of the CDB no rights on the Gweebarra passed to the State."

43. A contention is advanced at para. 29 of the affidavit that:-

"...Despite the appearance that the CDB held the fishing on the Gweebarra to itself and subsequently transferred it to the State is (sic) rebutted by the fact that the Congested Districts Board transferred the rights in the Owenea to the fisheries

section of the Department of Agriculture and Technical Instruction for £1,466 the same price the entire rights were bought for from the Conyngham Estate."

At para. 30 of his affidavit Mr. Boner further deposes: *"Effectively this confirms that the tenants of the Conyngham (Glenties) Estate on the southern bank of the Gweebarra paid for the fishing rights with purchase of their land."* However, the treatment and historical devolution of title in respect of the fishing rights in the Owenea is not probative of any matter at issue in the within proceedings.

44. Reliance was placed on excerpts from the 1913 report including evidence of Canon McFadden, a member of the Board, and an assertion made to the said Board concerning the southern Gweebarra. The following is one excerpt relied upon:-

"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 would be the same as on the Irwin Estate where they have succeeded so well; and of course that 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."

45. The hypothesis being advanced on behalf of the appellants is articulated further at para. 34 of Mr Boner's said affidavit where it is deposed 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 CGB (sic) 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 Section 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."

Section 34 of Land Law (Ireland) Act, 1896

46. The said section provided:-

"(1) A holding vested in a purchaser by a vesting order under this Act shall continue to have appurtenant thereto and to be subject to, as the case may be, any previously existing easements, rights and appurtenances; and any privilege previously in fact enjoyed, whether by permission of the landlord or otherwise, in such manner and for such time that, if the holding had belonged to a different owner from the rest of the estate, it would have been an easement or right, shall be an easement or right within the meaning of this section, and shall be appurtenant to or exercisable over the holding, as the case may be.

(2) The vesting order may, if the Land Commission think fit, declare that the sale is made subject to or free from any particular easement, right or appurtenance, and such declaration shall have full effect."

Preliminary observations on the new material

47. Some engagement with the new material sought to be relied upon as giving rise to an arguable defence and a basis for opposing an order for summary judgment such as would warrant reversal the orders made by Pilkington J. is called for. The terms of reference of the Committee are noteworthy and are expressed as follows:-

"To enquire into the effect which changes in the ownership of land in Ireland under the Land Acts have had or may be expected to have on the Fisheries of the country, and in particular on the Salmon Fishing Industry, and to make recommendations as

to what steps, if any, it may be desirable in the circumstances for the State to adopt in the interests of Irish Fisheries."

The excerpt pertaining to Mr. O'Connor, Solicitor for the Board's evidence was exhibited. This included, *inter alia*:-

"The object of the board…referenced to this fishery was this. They wished to vest the rights of the profit á 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 disposed to do, and which he could do of course if it was a several fishery."

48. The appellants did not appeal against the finding of Laffoy J. in the 2012 judgment at para. 71, as regards the title to the fishery on the southern bank of the Gweebarra, that: "*…there is no evidence to suggest that they may not be vested in an emanation of the State.*"

<u>Judgment of Pilkington J. under appeal</u>

49. A key finding made in the High Court was that the appellants had not raised any new relevant matter in relation to the titles to either the northern or southern banks of the Gweebarra which warranted refusal of the respondent's application for summary judgment. Crucially, in the context of an action in trespass the trial judge held:-

"48. … 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.

…

50.… 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.

…

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 (sic) matters deposed to by Mr Boner.

…

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.

…

63. …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."

50. Thus, to my mind the critical determination reached by Pilkington J. was, in substance, that the appellants had not raised any relevant defence to the respondent's claim, based on

the summary judgment jurisprudence which required them to show, in the language of the Supreme Court (Murphy J.) in *First National Commercial Bank v Anglin* [1996] IESC 1 at p. 622: *"...a fair and reasonable probability of the defendants having a real or bona fide defence"* and followed in the *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 jurisprudence.

Orders appealed against

51. Pilkington J. having heard the motion and delivered judgment on the 12th December, 2019 made orders on consent concerning the map to be annexed to the general indorsement of claim and dismissing the defendants' counterclaim. She made the following further orders of relevance:-

> *"The plaintiff is entitled to 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 ("the Fishery") in the waters shown coloured red, green and yellow on the map…. Without a permit issued by or with the authority of the plaintiff.*
>
> *4. That the defendants and all persons acting in concert with them and all persons having notice of the making of this order are restrained by way of injunction 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.*
>
> *5. Restraining the aforementioned parties … by way of injunction 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.*
>
> *6. That the defendants …. Are restrained 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 the Fintown or Rosses Anglers (Clubs)."

Pilkington J. vacated a stay granted by Laffoy J. on the order for costs made on the 7th February, 2013 in respect of the first module hearing and further, an order was made that the plaintiff recover from the defendants the costs of the proceedings, including reserved costs on the costs of the motion, to exclude - on consent - the costs of the plaintiff's motion for interlocutory relief of the 8th June, 2009 and the orders made on the 20th June, 2009.

The appellants' notice of appeal

52. The appellants' notice of appeal is prolix and wide-ranging but essentially seeks to set aside the judgment and order of Pilkington J. and that the matter be remitted to the High Court or in the alternative, an order varying the orders made and:

(i) setting aside the injunctions granted and/or

(ii) setting aside the costs order made and/or

(iii) substituting an order for costs of the proceedings including the costs of the interlocutory injunction to the defendants and further seeking the costs of the within appeal.

Grounds of appeal

The appellants contend that the trial judge erred as follows:

(a) by determining the matter in a summary manner in light of the jurisprudence including *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] 2 I.R. 694.

(b) The substance of the decision is erroneous *"in so far as she determined that no issue had been raised in relation to title to the relevant sections of the Northern & Southern Banks of the Gweebarra."*

(a) By making the declaratory orders (recited above) – which the appellants seek to set aside.

(b) In granting injunctive relief *"in circumstances where no wrong doing of any kind has been established against the Defendants or any of them".*

(c) In making the order for costs *"…where it had been established that the Northern Regional Fisheries Board had no locus standi to bring the proceedings when initiated in 2009…"*

Appellants' arguments and submissions in support of the appeal

53. The submissions and arguments advanced within the notice of appeal itself, in the written submissions and in oral argument are broad-ranging and extensive. In substance, the appellants contend that the trial judge's determination that the matter proceed summarily based on the affidavits of the parties constitutes an error of law and that she did not have due regard to the plenary nature of the proceedings or that the module before Laffoy J. in 2012 had proceeded on a plenary basis. In written submissions before this court, the appellants argue (correctly, in my view) that the appropriate test to be applied by the court where summary judgment is sought is to be found in the judgment of the Supreme Court in *Aer Rianta Cpt v Ryanair*. It was contended that the court should assess "… *whether the matters set out in the Defendant's replying affidavit raises an issue for argument that is credible and has a fair or reasonable probability of constituting a real or bona fide defence and one that is not far fetched or self-contradictory…"* The dictum of Hardiman J. that summary jurisdiction ought to be used *"with great care*" was emphasised. It was argued in particular that the affidavit of Mr. Boner met the criteria of "*exceptional circumstances*" warranting the introduction of other additional evidence which had come to light since the disposal of the first module in the proceedings before the Supreme Court. It was very clear from the various submissions advanced at the hearing of this appeal that the appellants took

fundamental issue with the trial judge's analysis and treatment of the latter. Counsel on behalf of the appellants argued that his clients, by the mechanism of the newly discovered material, had established an arguable defence such that the matter ought not to have been disposed of summarily by the trial judge.

Arguments of appellants directed towards paragraphs 62 and 63 of the judgment.

54. The appellants take issue with the conclusions of the trial judge where, having analysed the evidence and the arguments and the decisions of Laffoy J. and of the Supreme Court. Pilkington J. expressed the following view: -

> *"62. …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 … 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 therefore its derivation was also as identified by Laffoy J. within her judgment."*

At para. 63 set out above, she had concluded, *inter alia*: –

> "*…I can now consider the plaintiff's application as a prospective one…In short, the new evidence to be advanced by the defendants does not in my view progress matters."*

55. The appellants contend that to succeed in this claim the respondent must prove title to the subject property. For reasons stated herein, I am satisfied that this is a fundamentally erroneous proposition in a suit brought to vindicate a right to possession of property against alleged trespass by a defendant. It was emphasised that the respondent had not disputed any of the averments made by Mr. Boner in his most recent affidavit and that the affidavit filed

by the respondent to ground the motion to have the matter disposed of on a summary basis had not engaged with the material exhibited to the Mr. Boner's affidavit sworn on the 20th April, 2018. It was contended that the affidavit evidence put by the respondent before the court had not engaged with the specific pieces of evidence uncovered by the appellants.

56. In the course of the appeal hearing, counsel on behalf of the appellants was also critical of the trial judge for failing to engage with the material exhibited to Mr. Boner's affidavit, including material pertaining to the Parliamentary Committee hearings which took place at Glenties Courthouse in County Donegal in 1911, minutes of evidence, appendices and index in respect of the Departmental Committee on Irish Inland Fisheries of 1913 which included, *inter alia*, minutes of the evidence on sundry dates in 1911 including, by way of example, testimony of the Very Reverend James Canon McFadden PP heard on Wednesday the 19th July, 1911 and Mr. Bernard Bonar heard on Thursday the 20th July, 1911 as well as minutes of evidence of Mr. John O'Connor from the 24th March, 1911, Mr. George Hewson from the 1st April, 1911, The Very Reverend James Canon McFadden PP from the 19th July, 2011, Mr. James McDwyer from the 19th July, 1911, Mr. John McDwyer from the 19th July, 1911, Mr. Hugh A. O'Donnell from the 19th July, 1911, Mr. John McNeilis from the 19th July, 1911, Mr. Charles Flattery from the 20th July, 1911 and Mr. Bernard Bonar from the 20th July, 1911 together with other witnesses including the recall of The Very Reverend Canon McFadden on the 20th July, 1911. The minutes of evidence were further exhibited of Mr. Hugh Law MP from Friday the 21st July, 1911 together with evidence of other witnesses. Further exhibits included the minutes of proceedings of the Board including from Friday 5th July, 1901 which encompassed a draft resolution approved at a meeting of the said Board on the 31st May, 1901 pertaining to the policy of the said Board as of the 31st May, 1901.

57. The material included a photocopy of an unsigned memorandum of the Marquis Conyngham which stated:-

1. *"The Congested Districts Board for Ireland proposed to purchase the estate, consisting of the lands mentioned in the schedule at foot, on the following terms1. The Vendor will sell and the Board will purchase in accordance with the provisions of the Land Purchase Acts, and the Congested Districts Boards Acts, the fee simple of inheritance in possession in all the lands and hereditaments particularly specified in the schedule at foot to be vested in the Board discharged from all claims affecting the said lands …"*

It is to be observed in passing that there is no schedule specified at the foot of the photocopy page hence it is impossible to know what property it pertained to and in particular, whether the lands the subject matter of the within proceedings are or are not encompassed within the ambit of same. In essence, the argument of counsel on behalf of the appellants was that the import of the evidence exhibited by Mr. Boner in his affidavit of the 20th April, 2018 established a defence which was arguable and such as would entitle the appellants to insist on a plenary hearing. I will return to an evaluation of the said evidence hereafter.

58. At paragraphs 3(a) to 3(bb) (both inclusive) of the Notice of Appeal, the appellants engage in a minute, detailed critique of the judgment. It suggested that the judgment was unfairly critical of Mr. Boner in a number of respects, *inter alia*, at paras. 19 and 30 of said judgment. It was again asserted that the burden of proving title resided with the respondent who had not contested the averments nor the import of the exhibits to Mr. Boner's affidavit. Infelicities in the judgment and various apparent errors are identified.

59. Another complaint is to be found at para. 3(j) where it is asserted:-

"*The Judgment failed to give proper or any weight to the recorded evidence of Mr O'Connor, Solicitor to the Congested District Board (cited in paragraph 26) that the fishing rights on the Northern Bank which had been acquired by the CDB from the*

Tredennick Estate had since then, through the good offices of the local parish priest Father McFadden, been purchased from the Congested Districts Board and the purchase price paid on behalf of a local collective..."

60. In the context of para. 32 of the judgment, the appellants reiterate the extent of their claim as it stood before the High Court :

"*The Defendants were not asserting a positive entitlement to fish, though the issue of rights on the Southern Bank could benefit of (sic) the 1st & 2nd Defendants whose family holdings bounded tributaries and lakes on the Gweebarra, rather is (sic) was contended that the Plaintiff did not have sufficient interest to insist that the defendants pay to the IFI, as agent for the parent Department, qua alleged private fishery owner, for daily fishing permits. The issue did not concern licences, as the Defendant (sic) were holders of the statutory salmon fishing licences*."

61. The appellants contest the findings and conclusion of the trial judge in her judgment, including *inter alia,* at para. 38 of their submissions, insofar as same suggests that: -

"*…no relevant documentation has been brought to the Court's attention that might enable the Laffoy J, judgment to be reconsidered, notwithstanding in paragraph 7 of Mr McMullin's grounding affidavit it is conceded that the finding of Ms. Justice Laffoy in respect of the Northern Bank was erroneous. In essence the issue was not the correctness of the Laffoy Judgment, but whether following the Defendants, through their own Solicitor, having discovered the Northern Bank Conveyance of 1909 (sic) to the CDB that a further transaction took place whereby the CDB transferred on the interest to a local collective, in respect of which cogent evidence was given*."

62. The appellants take issue with the observations of the trial judge at para. 45 of her judgment and emphasising that "… *the nature of a modular trial being such that issues still*

remain to be considered according to the rules applicable to a consideration at first instance." They dispute her assessment that the material exhibited by Mr. Boner "*would not even constitute secondary evidence of title."* (para. 47 of the judgment) It was contended that the trial judge was mistaken in her characterisation of the appellants' assertions as set forth at para. 50 of the judgment. The appellants assert (as Pilkington J. noted at paras. 49 and 51) an entitlement to:-

> *"cross-examine any witness on behalf of the Plaintiff or its parent Department as to their means of knowledge, documents within their power, possession and procurement, their assertions, if any, denying that the fishery vested in a community collective and as to the exercise by the State of any alleged fishery right between 1909 and 2009 and as to the records relating to what fisheries the CGB held and transferred in 1923*."

63. It is further argued that the High Court: "... *failed to have regard to the fact that were a finding that the fishery on the Northern Bank had been vested in a community collective in 1909 would result in a complete reversal of the earlier position, namely that the relevant Minister had no right to which the Plaintiff's alleged management right could be grafted*." (para. 3(z)). This line of argument is, as set out hereafter, grounded on a misunderstanding of the law and amounts to a repeated attempt by the appellants to advance a defence of *jus tertii* which is impermissible and offers no answer in law to a suit seeking protection from trespass for a respondent's right to possession of real property as considered hereafter.

64. The appellants at para. 3(aa) of their submission assert that the trial judge proceeded *"... on the false assumption that the findings made by Laffoy J were still valid, when this was not the case."* They assert that "…*primary issues of fact relating to the fishing rights on both the Northern and Southern Bank of the Gweebarra that remain to be determined*."

65. The appellants contend that before granting injunctive relief it was incumbent on the court to make *"...findings of wrong doing or anticipated wrong doing by the defendants."* It is alleged that neither of the judgments of Laffoy J. nor Pilkington J. "*involve any consideration of such actual or anticipatory wrongdoing by the Defendants*." It is asserted that the respondent has not *"established any right or entitlement existing in 2009, when the proceedings were commenced, whereby it could at all be alleged that the Defendants infringed any rights of the Plaintiff, then the Northern Regional Fishing Board."*

Appeal regarding Costs

66. Concerning the order for costs made by Pilkington J., it was contended that the court failed to have any adequate regard to the fact that the respondent had not at the commencement of the proceedings and at the time of the application for interlocutory relief *"...any right or title to bring the action against the Defendants."* This erroneously assumes that proof of title is a prerequisite in a trespass action. It was further asserted: -

> "*The court failed to have ... regard to the fact that the Plaintiff was standing over the order of costs made in its favour by Laffoy J despite acknowledging that in substantive part the findings were erroneous in fact*."

It was further contended that from 2012 the respondent had sought: –

> "…*without any formal amendment, to advance the action on the basis of establishing prospectively its rights, in such circumstances such costs should not have been visited at all on the Defendants as they do not arise from any act of trespass or wrong alleged against the Defendants and rights and entitlements relied upon arise post action*"

Some observations in respect of the appellants' stance

67. The appellants are greatly invested in the arguments they advance and the further material exhibited in opposition to summary judgment which, they assert, may somehow yet

show that some third party or collective may have a better right to possession of the fishery than the respondent. Were this a case where title to the subject fishery was in issue, such material might be relevant. It is not. The respondent's claim is confined to seeking remedies to protect its right to possession of the fishery prospectively only. That being so, it is of no assistance to the appellants that third parties may possibly have or have acquired a better right to possession of the subject fishery, or any part thereof, than the respondent. The appellants' counterclaims were dismissed on consent by Pilkington J., Laffoy J. having held in 2012 that they did not have an entitlement to the reliefs sought in their counterclaim insofar as the fisheries on the southern bank were concerned. As was observed by Littledale J. in *Harper v Charlesworth* (1825) 4 B & C 574 at 594:-

> *"Generally speaking, trespass may be maintained by a person in actual possession of land against a wrong doer even where that possession may be wrongful as against a third person… A party, therefore, may be in such a situation that he may be turned out himself by a person having a better title, but not by a stranger."*

68. The possession to be demonstrated by a plaintiff such as IFI in the context of an action in trespass is a question of fact rather than law. Such possession connotes effective, physical control or occupation, evidenced by outward conduct consonant with *de facto* possession and does not require proof of a legal title conferring a right to possession.

Southern bank

69. Notwithstanding the evidence that the respondent is in possession of the subject fishery and is charged prospectively with the management of same by the Minister/State in accordance with the evidence before Laffoy J. in June 2012 and that it had entered into agreements with riparian owners and was granting licences or permits to members of the public who wish to fish the subject fishery and prohibiting fishing same without the requisite permit, the appellants insist that the respondents are not entitled to the relief sought. They

admit that they do not pursue any claim either to a public right to fish the subject fishery and further are *"…not asserting a positive entitlement to fish"* (*per* para. 3.l of Notice of Appeal). The appellants themselves are clearly not in possession of the subject fishery, yet contend that the respondent is not entitled to require them to pay IFI for daily fishing permits.

70. In the course of their submissions, the appellants rehearse and seek to revisit the evidence and arguments advanced before Ms. Justice Laffoy and referenced in her judgment of the 19th December, 2012 which has been reviewed in detail above. To recap, it was concerned with two aspects, firstly the southern bank of the Gweebarra river which had formed part of the Conyngham Estate, shown as coloured yellow on the map annexed to this judgment and portions of the northern bank of the Gweebarra believed to have been in the beneficial ownership of one Kevin McDonnell, but subsequently and indisputably shown to have been the subject matter of a deed of conveyance dated the 6th July, 1908 and made between General Tredennick of the one part as vendor and the Board of the other part as purchaser. It is uncontested that the 1908 deed of conveyance remained unregistered. It appears that no Memorial of same was registered in the Registry of Deeds pursuant to the provisions of the Registration of Deeds (Ireland) Act, 1707 and no application was ever made to register the title pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891 in the Land Registry. But there is no dispute that the said deed exists and offers primary evidence that title to the subject fishery on the northern bank vested in the CDB in accordance with its terms on 6th July, 1908.

71. The findings of Laffoy J. in 2012 refute the appellants' arguments as regards the southern side of the river. It will be recalled that Laffoy J. in her judgment carried out a comprehensive evaluation of the evidence of title of the riparian owners on the southern bank of the Gweebarra river including, *inter alia*, at paragraphs 27 – 42 inclusive and in particular, at para. 35. She had before her, *inter alia*, a copy of a Memorial of an indenture of

conveyance of the 6th March, 1917. The said Memorial had been registered in the Registry of Deeds on the 3rd April, 1917. Laffoy J. considered that same was: –

> *"... 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."*

Having recited the parcels as specified in the said Memorial, Laffoy J. noted that within the first schedule the following rights were identified as being assured to the Board: -

> *"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."*

Laffoy J. concluded on the balance of probability that the CDB had acquired a several fishery from the southern bank to the centre of the Gweebarra river in 1917 which unappealed finding is binding on the appellants.

72. With regard to the devolution of the interest acquired by the Board in 1917, Laffoy J. had noted at para. 71that: -

> *"... 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."*

She observed:-

> "*… from the coming into operation of the Ministers and Secretaries (Amendment) Act 1928 such fishing rights as are 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."

73. The unappealed conclusions of Laffoy J. with regard to the title to the southern portion of the Gweebarra river *ad medium filum aquae* bind the appellants. Same cannot be the subject of any legitimate dispute in the context of these proceedings. I am satisfied that even were proof of title a requisite for a plaintiff who seeks a remedy, either legal or equitable, for trespass *quare clausum fregit*, through the mechanism of evidence adduced by the appellants themselves, the conclusive finding was that the fishery on the southern bank was vested in a state entity for whom the respondent prospectively managed same.

Northern Bank

74. As regards the subject fishery on the northern bank, at para. 19 of their written submissions in this court, the appellants state that the "…*Board acquired extensive fishing rights from General Tredennick including his moiety in the Gweebarra river, thus rebutting the presumption relied on by Ms Justice Laffoy*." The appellants in their submissions and arguments before this court appear to contend that the existence of the deed of the 6th July, 1908 undermines the respondent's title to the several fishery on the northern bank *ad medium filum aquae* of the Gweebarra river. However, that is plainly incorrect. Rather, as Clarke J. noted in the Supreme Court in 2015, it merely shows that the root of title or the mechanism whereby the sporting rights/fishing rights on the northern bank of the Gweebarra came to

vest in the CDB in 1908 was by the 1908 deed rather than *via* the presumptive route which constituted the best evidence put before the High Court in 2012 when the issue fell to be determined by Laffoy J. This greater clarity as to the true root of title to the subject fishery on the northern bank could be of relevance were a third party to come forward and assert title to the northern fishery as against the respondent. No such claim was before the High Court.

75. The appellants further contend that the new material is, in substance, probative of the existence of some agreement or instrument vesting the fishing rights in a collective of former tenant purchasers/riparian owners.

Appellants' further arguments concerning the 2016 tranche of new material

76. The material included minutes of evidence taken by the Departmental Committee. At para. 26 of their submissions the appellants contend that same: –

> "*...indicated that the Irwin Tenants on the Northern bank were [as of 1911] managing the fishery collectively under a committee and pooling the income for division equally among them."*

It was further asserted that this material:-

> *"indicated that the negotiations for tenant purchase of the Conyngham Estate on the Southern Bank had proceeded to an agreement and that the fishing rights had been ceded to the tenants by the Marquis and that pending completion of the sales that the Estate tenants were paying a sum equal to the interest on their agreed purchase price and not the sum reserved as rent*."

They further argued that: –

> *"The Minutes also recorded evidence taken at hearings in Dublin as to the policy of the Congested Districts Board in respect of the establishment of local committees and to vesting of such fishing rights in the committees for the benefit of the community*

as opposed to individual vesting of fragments of fishing rights with a string of riparian owners."

Respondent's submissions

77. The respondent points out that the new evidence sought to be adduced on behalf of the appellants before the Supreme Court was *"... that the State – not the riparian landowners – was the owner of the fishing rights on the northern bank."* It contends that the appellants had acknowledged during the course of the hearing before the Supreme Court that the import of the first tranche of new evidence was to the effect that *"the State owned the McDonnell lands and in effect the position improved the Plaintiff's position rather than undermined it."* In that regard, para. 12 of the judgment of Mr. Justice Clarke in the Supreme Court was relied upon.

78. The said submissions acknowledge (at para. 9) that *"[the] Congested Districts Board in or about 1905 acquired the fishing rights in part of the Northern Bank of the Gweebarra*." They emphasise that Clarke J. had determined that the appellants could rely on the "new evidence" but only for limited purposes and subject to conditions as to relevance. The respondent's submission continue:–

"*… in response to an application that relies upon their own arguments – arguments that are referred to in a Judgment of the Supreme Court – the Defendants have now executed a complete volte face and are now asserting that the fishing rights on the northern bank vest in a "collective" of riparian landowners. There is simply no evidence for this proposition and even if it was true none of the Defendants are riparian land owners."*

The respondent characterises the current assertions of the appellants as being no more than:-

"a variation on the claims made by the Defendants in their counterclaim, which were all dismissed by Laffoy J, i.e. that some sort of public right to fish has been created

in respect of the Gweebarra by reason of the fact that the fishery was not actively managed."

79. The respondent emphasises section 5 of the Land Law (Commission) Act, 1923 which provided that on the dissolution of the Board all its lands, tenements and hereditaments situated within the State became vested in the Irish Land Commission. It lays emphasis on para. 43 of the Laffoy judgment.

Counterclaim

80. Laffoy J., having analysed the counterclaim, concluding that it was "*wholly inconsistent with the case advanced*" at trial and had dismissed it in relation to the southern side of the fishery by order of 7th February, 2013. The order dismissing the entire counterclaim was made, on consent, on the 13th March, 2020 by Ms. Justice Pilkington.

Appellants' contentions in High Court with regard Costs

81. In post-judgment submissions filed before the High Court addressed primarily to the issue of costs, the appellants appeared to canvas a reopening of issues and arguments previously advanced. It was contended that the court should consider:-

"*… whether the discrete findings of fact set out in this judgment … and the earlier judgment of Ms. Justice Laffoy …, taken together constitute an outcome of the claim initiated against the Defendants on foot of the Plenary Summons of the 8 June 2009*."

82. Arguments were directed towards two factors, (a) that Laffoy J. had erroneously held on the available evidence before her that Mr. McDonnell was the owner of the fishing rights and entitled to confer management rights on the NRFB, the predecessor in title to the IFI, as he had purported to do by the Agreement dated the 29th June, 2008 in respect of riparian lands comprised in Folio 1308 and 1309 of the Register County Donegal and (b), in respect of the southern bank, Laffoy J. had accepted the arguments of the appellants that ownership had not passed as a matter of law to the Central Fisheries Board and that the respondent's

predecessor in title had not been entitled to rely upon a letter of authority from the Central Fisheries Board which had issued on the 29th August, 2008 prior to the institution of the proceedings. The High Court (Laffoy J.) had noted that the matter had been resolved and adequately addressed prospectively on foot of the letter of authority of 5th June, 2012 from the Department of Communications, Energy and Natural Resources and the correctness of that position was accepted by Pilkington J. for prospective purposes.

83. The appellants had appealed to the Supreme Court only that part of the Laffoy J. judgment as referred to the McDonnell section of the northern bank. The new evidence established that, the Board had purchased the fishing rights in July 1908 from the Tredennick Estate. The copy Deed had been discovered by the appellants.

84. The submissions acknowledge that on the 30th July, 2015 the appellants had withdrawn their entire appeal to the Supreme Court at a point when that Court refused to permit them to adduce additional evidence.

85. I am satisfied for the reasons outlined hereafter that as and from 12th June, 2012, IFI has been entitled to possession of and to manage the fishery on the northern bank of the Gweebarra, although as a result of a different chain of title to the one presumptively identified by Laffoy J. in 2012 when she considered the so called McDonnell section of the northern side of the fishery.

Appeal against Costs order made by Pilkington J.

86. On the issue of costs, it is contended that the order for costs was erroneous since the appellants or persons *"against whom no findings of tortious wrongdoing has been made."* It is acknowledged that the respondent has made clear that it was not *"pursuing the costs of the interlocutory injunction."* However, it was argued that the respondent had failed to offer to *"waive cost orders that had been obtained to date."* The appellants contended in

particular that *"there were bona fide issues as to the purpose, character and outcome of the acquisitions by the Congested District Board in 1908 and 1917"* (para. 34 of submissions).

Submission of Respondent in respect of High Court order for costs

87. The respondent's submissions emphasised the following factors:

(a) The appellants did not appeal the decision of Laffoy J. in relation to the State-owned fishing on the southern side of the river: "*The Defendants appealed the decision of Laffoy J in relation to the Kevin McDonnell fishing and in relation to that appeal sought to introduce new evidence*."

(b) Further, it was contended that the costs orders made by Laffoy J. were the subject of an appeal to the Supreme Court which was withdrawn in the face of a written judgment of the said court dismissing *"precisely the same arguments that the Defendants now seek to make."*

(c) The respondent emphasised that since the decision of Laffoy J. in 2012, it had been open to the appellants to have agreed that the respondent had the right to manage the fishery and that doing so would have brought the proceedings to a conclusion. They had refused to do so.

(d) The appellants' assertions and contentions had continued on the basis that they had some form of right to fish the river. They had sought to advance a further new basis for a proposition that they had a right to fish the river.

(e) It was emphasised that IFI *"... is not seeking the costs of the application for an interlocutory injunction. However, insofar as the balance of the costs of the proceedings are concerned, it is submitted that those costs together with the costs of the hearing of the motion dealt with ... [by Pilkington J.] ... should be awarded to the Plaintiff."*

(f) It was stated that *"[t]he Supreme Court has already determined ... that arguments about the position when the proceedings were initiated [in 2009] are irrelevant to the correctness or otherwise of judgments and Orders made in the proceedings that are prospective rather than retrospective in nature."*

The law

Jus tertii

88. The energy and industry of the appellants is directed towards demonstrating that the title to the sporting rights/fishing rights on the entire northern and southern sides of the Gweebarra river the subject of the proceedings is likely to have vested in some unidentified tenant/local/community collective/s. But had same been proven before the High Court – and I am satisfied that it was not - that is not an answer to this trespass suit where the appellants, having consented to their entire counterclaim being dismissed, assert no right vested in themselves conferring any entitlement to possession of any part of the subject fishery. The appellants, as with any defendants to a claim sounding in simple trespass to land, cannot set up a *jus tertii* contending that another has a better title to possession of the subject property than does the respondent, as *Harper v Charlesworth* (1825) 4 B & C 574 decided almost two centuries ago.

89. In advancing these arguments, they are seeking impermissibly to collaterally reopen the findings and conclusions of Laffoy J. in 2012 in respect of the title to the subject fishery on the southern bank of the Gweebarra river. This is a collateral attack on her determination which is *res judicata*. The sum total of the material presented by Mr. Boner in his affidavit as "new evidence" is demonstrably insufficient to displace the secondary evidence as to title to the southern side *ad medium filum aquae* and fishing rights therein as was determined by Laffoy J. and outlined above.

90. The statements, observations and testimony of the various witnesses at the 2011 Parliamentary Committee hearings are not evidence of a probative nature as to the disposition of the said fishing rights by the Marquis Conyngham or as to the acquisition by any third party including a supposed collective such as could cast doubt on the evidence as to title that was before Laffoy J. in 2012 - in relation to the Southern side - or Pilkington J. in relation to the northern side. Laffoy J. had correctly identified the copy conveyance of 1917 as "*satisfactory secondary evidence"* (para. 36) of title to the southern side, as outlined above. The July 1908 Instrument offered the best evidence of title to the northern side. By contrast, the records of testimony given by various witnesses and the minutes recording same are expressions of opinions, understandings, beliefs, hopes, expectations concerning the past and future actions of third parties including freeholders, owners of riparian rights and others. Such testimony may well have represented the expectations and understandings of one or more witness in 1911 as to how events might, could, should or ought to transpire. Insofar as there is any deviation between the said material and the Memorial of the indenture of conveyance of the 6th March, 1917 made between Marquis Conyngham of the first part, John Pomeroy of the second part and the Board of the third part, evidentially the Memorial must take precedence in relation to the Southern side.

91. With regard to the subject fishery on the northern bank, the position is similar. The title is derived from the Indenture between General Tredennick and the CDB of July 1908. Neither the reported policy of the CDB in 1901 nor the views of the witnesses who testified in 1911 amounts to "*sufficient evidence*" to displace its probative effect as a good root of title to the fishing rights on the northern bank *ad medium filum aquae,* including the so called McDonnell section of same, having vested in the CDB with its devolution, on the balance of probabilities having thereafter resulted in same vesting in some state entity in like manner as had occurred on the contiguous southern fishery.

Claim to restrain trespass by Plaintiff in possession

92. What is critical in the instant case is that the appellants do not themselves now assert any claim to any estate, right, title or interest in or over the fishery. Laffoy J. rejected their counterclaim so far as it related to the southern bank and the McDonnell section. The appellants did not appeal the judgment of Laffoy J. insofar as it pertained to the southern fishery bank. The appellants consented unconditionally to their counterclaim being dismissed and a consent order was made to that effect by Ms. Justice Pilkington on the 13th March, 2020. Sight must not be lost of those critical facts. Thus, they resiled from the extensive claims being advanced in the counterclaim delivered by them and relied on in their affidavits which had opposed the making of the interlocutory orders sought in 2009.

***Locus standi* of Plaintiff**

93. Prior to the commencement of the 2010 Act, the Central Fisheries Board had transferred to NRFB the care and management of Gweebarra Fishery with effect from midnight on the 29th August, 2008 as was held by Laffoy J. at para. 55. At para. 80, Laffoy J. noted: -

> *" 80. ... 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."*

The Supreme Court in its 2015 judgment at para. 5 observed of the decision of Laffoy J.: -

> *" the very point which the trial judge makes at para. 79 is that certain points made might have had an effect on the entitlement of the Inland Fisheries in 2009, but not as of the date of trial, and might, therefore, be relevant in other modules but were not relevant to the issue which required to be determined at (a)."*

The Supreme Court approved the finding of Laffoy J. that as of June 2009 the respondent did have, the right to manage, control and regulate the relevant part of the fishery.

(i) "New material" does not demonstrate that the CDB ever transferred relevant fishing rights to a local or community collective

94. Whilst the material exhibited to the affidavit of Mr. Boner alluded to an approach of the Board that in certain instances extended to the establishment of local committees and the vesting of fishing rights held by the Board in such committees for the benefit of the local community, the existence of that - or any - policy whether in 1901 or 1911 could not in and of itself be evidence that the Board ever vested the relevant fishing rights acquired by it on either the southern or the northern banks of the Gweebarra in any committee or to the use and benefit of any local community in the manner contended for. None of the appellants are riparian owners. Furthermore, it is noteworthy that notwithstanding the long period of time which elapsed from the institution of the proceedings in 2009 until the motion for summary judgment issued in 2018, no riparian owner along the entire relevant length of the river on its northern and southern banks has come forward to support the appellants' claim or to assert that they as riparian owners or in any other capacity are the beneficiaries of a trust, a "community collective" or a " local collective" as asserted. There is no evidence of any arrangement whereby the said fishery along the relevant length of the Gweebarra river was ever managed collectively for the use and benefit of "a collective" such as could demonstrate that such an hypothetical entity held some interest known to the law superior to and inconsistent with the rights to possession enjoyed by the respondent including in order to manage and operate the said fishery in accordance with the terms of the letter of the 15th June, 2012.

95. The appellants contend that the evidence they unveiled in 2016 indicated that the "Irwin tenants" on the northern bank of the river were by July 1911 *"managing the fishery collectively under a committee and pooling the income for division equally among them."*

(para. 26 of written submissions) With regard to the southern bank of the river, the appellants assert that the said evidence indicated that:

(i) negotiations for tenant purchase of the Conyngham Estate on the southern bank had proceeded to an agreement;

(ii) the fishing rights on the southern side had been ceded to the tenants by the Marquis of Conyngham, and

(iii) pending completion of the sales that the estate tenants were paying a sum equal to the interest on their agreed purchase price and not the sum reserved as rent. (para. 26)

These are all statements culled from a selective reading of excerpts from the said material. The material in its entirety does not establish any right to be vested in the appellants or any of them - or indeed anybody - such as would offer a good answer in law to the within trespass suit against them. Neither does it establish that fishing rights over the subject fishery were vested in any collective or community group as contended. At best the material is deployed to impermissibly set up by way of a defence a proposition that the fishing rights may possibly and hypothetically have vested in a tenant/local/community collective/s. This in substance amounts to the advancement of an impermissible *jus tertii* which is not a valid defence.

96. It will be recalled that in the course of her judgment, Laffoy J. considered the folios of a number of the riparian owners on the southern bank of the Gweebarra river. Her analysis is to be found at paragraphs 27 – 42 inclusive. At para. 30, the court noted that insofar as the riparian owners on the southern bank of the river was concerned *"[a]ll of the current registered owners are successors in title of tenant purchasers."* Laffoy J. concluded fishing rights had vested in the CDB.

97. The conveyancing transactions and assurances effected by the Conyngham Estate took place in 1917, six years after the 1911 hearings at Glenties Courthouse and elsewhere relied

upon. That issue is now *res judicata.* Demonstrably, insofar as the southern riparian owners along the length coloured yellow on the map is concerned the documentary title is inconsistent with the material being advanced as "new evidence" and the claims of the appellants in relation to the same. Further, it is noteworthy that the appellants did not pursue any appeal against Laffoy J.'s analysis of the evidence of title of the riparian owners on the southern bank in 2012 and is bound by that judgment. The muniments of title from 1917 are consistent with the folios considered by Laffoy J. and specifically since same were found by the said judge to have reserved in favour of the Board, the sporting rights *"if any"*, other than shooting rights which were vested in the tenant purchasers. The said folios are to be treated as "conclusive" as to title in that regard having regard to the relevant legislation including s.31(1) of the Registration of Title Act, 1964.

98. The sum total of the *"evidence"* advanced by the appellants is insufficient to dislodge the unappealed determinations of Laffoy J. in relation to the southern bank of the Gweebarra river. The approach of the appellants is a collateral attack on the judgment and findings of Laffoy J. in the 2012 judgment insofar as the fisheries on the southern bank of the Gweebarra river are concerned and as such is impermissible. It is not *" better evidence"* than what was before Laffoy J. in 2012.

99. Arguments concerning the asserted policy of the Board extrapolated from minutes of meetings *circa* 1901 created many years before the entering into and executing the deeds in question in 1908 and 1917 and executed on foot of the sale of the lands along the river to the riparian owners in circumstances where the purchasers were in each case tenant purchasers and the transactions were effected pursuant to the provisions of the Irish Land Act, 1903, as amended, cannot avail the appellants. The material does not offer evidence of a better title to any part of the subject fisheries on either the northern or southern banks than the deeds, instruments, memorials and muniments of 1908 and 1917. The "new material" does not offer

evidence of title to anything and more particularly does not constitute evidence of "good title" to any of the subject fisheries. Since the appellants now claim no title over the subject fisheries, the title to same is not relevant in the context of the respondent's trespass claim.

Good title

100. J.C.W. Wylie and Una Woods, *Irish Conveyancing Law*, (4th ed., Bloomsbury Professional, 2019) observe in relation to the question what amounts to good title to property;

> *"[6.10] The vital test is usually whether the vendor would succeed, in an application for specific performance, in securing a court order forcing the title he had deduced on the purchaser. If the answer to this question is in the affirmative, then, the title is 'good' or, as it is sometimes described, at least 'marketable.' On the other hand, if the court would not decree specific performance, the title must be either 'bad,' in the sense that there is a clear defect in title, or so 'doubtful' that the court is not prepared to force it on an unwilling purchaser, unless, perhaps, the contract has been fairly 'closed' and the purchaser has committed himself to accepting that title."*

One need only apply those principles to the material exhibited by Mr. Boner in his affidavit in its entirety to demonstrate the wholly untenable nature of the proposition being advanced in this appeal.

101. Whilst it was contended at para. 24 of the appellants' written submissions that Laffoy J. had *"acknowledged that a future module would have to consider how the lack of 'legal interest' at the time of the alleged tortious conduct would be addressed"*, the language of para. 79 of the Laffoy J. judgment is materially different and more contingent:

> "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 <u>may</u> have to be addressed in*

another module in these proceedings. Issue (a) before the Court concerns the current position." (emphasis added)

Since the appellants now claim no title over the fisheries, assertions that title to same or any part thereof may have vested in third parties is not a valid defence to a trespass claim.

(ii) Collateral attack on 2012 judgment

102. The appellants in their written submissions appear to now seek to reopen the determinations of Laffoy J., not alone with regard to the McDonnell section (coloured green) on the map annexed to this judgment, but with regard to the entirety of the southern bank. Nothing in the judgment of the Supreme Court entitles the appellants to purport now to reopen the determinations and conclusions of Laffoy J. with regard to the southern bank of the river. Issues concerning the southern riparian bank are *res judicata* and cannot be opened afresh. Speculation with regard to the policy of the CDB is *nihil ad rem*. Policy and its execution are two materially different matters. The stated policy of the Board, whether in 1901 or at any time thereafter or indeed prior thereto, cannot - either in and of itself or with the other material being advanced, including the expressions and statements of views, understandings and so forth of the witnesses that are exhibited to the affidavit of Mr. Boner - have the effect of usurping the evidence as to title, including evidence of the clear transactions entered into by CDB for the purposes of effecting the sale of the said estates and reservation of the fishing rights to the CDB itself.

(iii) Alleged absence of any finding of wrongdoing

103. This is a trespass suit and not an action in which the appellants assert any estate, right, title or interest in or over the fishery. Sight must not be lost of that fact. The Notice of Appeal itself implicitly acknowledges the dramatic change in stance adopted by the appellants over the lengthy duration of this litigation including:

(a) *"The issue of asserting a public right to fish having not been pursued since in the Supreme Court*."– This does not avail the appellants as it does not undermine the respondent's right to possession.

(b) The appellants do not now assert a positive private or public entitlement to fish. – This does not avail the appellants as it does not undermine the respondent's right to possession.

(c) The appellants put forward a specious argument that *"the issue of rights on the Southern Bank could benefit of (sic) the 1st & 2nd Defendants whose family holdings bounded tributaries and lakes on the Gweebarra."*

(d) That IFI did not have sufficient interest to insist that the appellants pay it, as agent of the Department *"qua alleged private fishery owner",* for daily fishing permits. – This assertion is based on a misunderstanding of the proofs required to establish trespass.

(e) The issue was not the correctness of the Laffoy judgment but whether following the appellants "*having discovered the Northern Bank Conveyance of 1909 (sic) to the CDB that a further transaction took place whereby the CDB transferred on the interest to a local collective, in respect of which cogent evidence was given*." – This amounts to a bare assertion unsupported by any cogent evidence.

(f) *"[T]he issues left to be canvassed, the vesting in community collectives, had not been previously considered by Laffoy J or the Supreme Court.*" – The title to same is now *res judicata.*

(g) The issue was *"whether or not the Plaintiff could establish an entitlement to exercise private control of certain banks of the river on the premise that*

title to the relevant fishing rights vested in the relevant Minister." - This is based on a misunderstanding of the proofs required to establish trespass.

104. The respondent's title to the fisheries is not relevant now where the appellants do not assert any more that they have title to or any interest in any part thereof. The basis for the appellants' contention that there is no finding of wrongdoing against them appears, in part, to stem from the respondent's asserted entitlement to manage the fishery being now based upon the letter of the 15th June, 2012 *"not on any entitlement that the Northern Regional Fisheries Board had in 2009."* It is contended in particular that: -

"The essence of any action is that a Defendant is compelled at the instance of a Plaintiff to meet an allegation of wrongdoing as at the time the writ is issued."

This is an unduly stilted argument and is plainly incorrect. In long-running litigation events may occur which warrant a variation of the claim. Such amendments may be effected by formal Order pursuant to O.28 Rules of the Superior Courts or otherwise at the discretion of the court. As the High Court in 2012 and again in 2019 (under appeal) held and the Supreme Court held in 2015, the relevant determinations in this case fall to be made on a prospective basis. The wrongdoing in question is the interference with the respondent's possession of the subject fishery. Possession of the fishery as established by IFI entitles the respondent to charge a licence fee or otherwise impose conditions to be complied with in return for permitting a party to fish thereon and to invoke a remedy in trespass for interference with such possession.

Summary disposition of the claim - *Abbey jurisprudence*

105. The appellants contend that the trial judge ought not to have disposed of the matter on a summary basis and in particular that the replying affidavit *"raises an issue for argument that is credible and has a fair or reasonable probability of constituting a real or bona fide*

defence and one that is not far fetched or self-contradictory." Reliance was placed on the *Aer Rianta v Ryanair* jurisprudence. On the issue of title, the appellants contend: -

> *"The Deeds of 1908 and 1917 speak of the position at a particular moment in time."* (para. 41)

They go on to contend: -

> *"In considering what was [the] quality and extent of the rights that passed and what happened subsequently and what the position was by 2009 a wide range of potential evidential sources are relevant and admissible."*

In the instant case the material sought laterally to be adduced was offered to cast doubt upon the "paper title" to the subject fishery which had earlier been introduced into the case by the appellants themselves in relation to the southern bank as "new evidence" in 2012 before Laffoy J. All of the recent "new material" predates the execution of the two instruments in 1917 and predates the registration of the tenant purchasers at least on the southern side pursuant to the Local Registration of Title Ireland Act, 1891 as owners having acquired their title pursuant to the tenant purchase schemes and under, *inter alia*, the 1903 Act.

Section 59 Land and Conveyancing Law Reform Act, 2009, as amended

106. The appellants contend that the new material it has put before the court is sufficient to displace the clear evidence that the Board acquired the fishing rights respectively in July 1908 in respect of the northern bank of the river and in 1917 in respect of the southern bank of the river. It is acknowledged at para. 44 of their submissions:-

> "*The title evidence shows that the Congested Districts Board acquired fishing rights on both banks of the Gweebarra as a consequence of acquiring parcels of fishing rights from the Tredennick Estate in 1908 and the Conyngham Estate in 1917*."

The appellants contend that the approach thereafter by the court should be "… *to ask ... what had the CDB in mind when these particular fishing rights [were] acquired by the Board in 1908 and 1917?"*

107. This is plainly incorrect. Part 9, Chapter 2 of the Land and Conveyancing Act, 2009 provides s.59 (1), which effectively and in large measure re-enacts s. 2 of the Vendor and Purchaser Act, 1874 and s.3 of the Conveyancing Act, 1881, provides:

> *"(1) Recitals, statements and descriptions of facts, matters and parties contained in instruments, statutory provisions or statutory declarations 15 years old at the date of the contract are, unless and except so far as they are proved to be inaccurate, sufficient evidence of the truth of such facts, matters and parties."*

The appellants seek to weave together the "new material" to buttress a proposition that the said fishing rights, reserved to the Board from the Tredennick and Conyngham estates in the course of the Board purchasing the said respective tenanted estates, *"were acquired in trust for a tenants collective."* This is a process of speculation and conjecture which is impermissible being wholly at variance with the probative title documents the appellants themselves adduced. Further, the "new material" does not show "good title" as contended for. It does not show any title to any part of the subject fishery. It does not in any way cast doubt upon the tenor of the documentary evidence from 1908 and 1917 in any material respect. Contrary to the appellants' arguments, the "new material" was not "*proved to be inaccurate.*" The documentary title is unimpeached and stands as "*sufficient evidence of the truth"* of its contents.

108. This is further supported by s. 13(1) of the Irish Land Act, 1903 at subsection 1:-

> *"Where, at the time of sale of any land to the Land Commission or to tenants or others, the vendor has, subject to the provisions of the Ground Game Act, 1880, sporting rights, exclusive of the tenant, those rights may by agreement between the*

> *vendor and the purchaser be either conveyed to the purchaser or be expressly reserved to the vendor, and in the absence of such agreement those rights shall be vested in the Land Commission, and the Land Commission may deal with the same, subject to regulations to be made by the Lord Lieutenant."*

The sum total of the documentary evidence put before the court by the appellants does not probatively support their contentions. It is clear from the findings of Laffoy J., who had before her both 1917 instruments and the respective folio titles of the riparian owners and having considered same, that the fishing rights did not vest in the riparian owners. They were reserved and vested in the Board. The "new evidence" dating from 1901, 1911 and 1913 in particular does not provide a single shred of probative evidence that would cast doubt on the respective findings of Laffoy and Pilkington JJ. or the contents of the 1917 and 1908 Deeds. The "new material" offered no admissible evidence that any fishing rights acquired by the Board over the subject fisheries in 1908 and 1917 (or at any time) vested in any community collectives on either side of the river.

109. Whilst the appellants contend that in the case of the Conyngham Estate, an agreement was in place for the sale of same from 1909, there was no evidence put before the court (Pilkington J.) on foot of which she could have been satisfied that even any stateable or *bona fide* defence known to the law could be advanced by the appellants to the trespass claim. The minutes and the statements of the various witnesses including the Very Reverend Canon McFadden are not probative of same. The contents of the 1908 and 1917 deeds in light of s.59(1) of the 2009 Act offers a complete answer to this line of argument which is untenable. Even if all their contentions were correct, they would merely amount to a *jus tertii* which is no defence to a claim to restrain trespass since the appellants claim no right to possession of the property vested in themselves.

Further observations on appellants' hypotheses

110. The appellants offer a series of theories, such as at para. 55 of submissions: -

> "…*The same policy was being pursued at the same time with the fishery rights on the Northern Bank of the Gweebarra with the Irwin Tenants, save that it appears that as no sum of value had been attributed to those fishing rights the tenants were not required to refund the CDB, the Board operating on a no loss/no gain model of resale*."

In substance, this is pure speculation. No probative evidence is advanced to demonstrate that this is so or that any conveyancing transaction took place to give effect to such a desire or wish on the part of the tenant purchasers. Contrary to the appellants' contention that *"[t]his evidence is confirmed by Mr Henry Doran, a permanent member of the CDB in evidence taken on 1 April 1911 in Dublin and borne out by local evidence then taken at the Courthouse in Glenties on the 19 & 20 July 1911*." it is not. Firstly, same is not *"evidence*" of a probative nature. The statements of Henry Doran do not "*confirm"* that the fishery rights on the northern bank of the Gweebarra came to vest in the Irwin tenants. Neither is such a hypothesis "*borne out*" or indeed supported by the "*local evidence*" adduced at Glenties Courthouse on the 19th or 20th July, 1911. The testimony of the various witnesses adduced at the hearings and exhibited are of great social interest. They offer a snapshot of the respective understandings of various witnesses as to how aspect of fishing rights/sporting rights might be addressed in the process of the enfranchisement of the tenant purchasers. The observations and statements of Mr. O'Connor were not binding upon the Board. At best, they demonstrated his understanding of the Board's intention. There can be no doubt that the sale of the lands on the Conyngham Estate on the southern side of the river was in contemplation at the time of the hearings. That fact is not evidence that the terms of sale had been agreed as of 1909. Furthermore, any contract would have merged in the Deed at the time of its execution in 1917 under the doctrine of merger. Canon McFadden advanced

no legal basis for his statement that the vendor of the Conyngham Estate *"…gave over and reserved to the tenants all the sporting rights (including the fishing rights) with the exception of that portion of the Ownea which lies below the mill bridge at Glenties and below the town bridge*". It may be that the entirety of that statement is directed to the Owenea river and has no bearing at all on the Gweebarra. The appellants further rely on the Canon's statement that the Marquis had *"... yielded up his title to any fishing rights on the south side of the Gweebarra."* The 1917 Deed disproves this statement and was executed by the Marquis/vendor 6 years after the hearings. The Marquis did "*yield up*" his title to the southern bank fisheries in 1917 but did so by vesting same in the Board. Excerpts from the agreement being relied upon, as the appellants themselves acknowledge in effect at para. 57 of their submissions, demonstrate that a fundamentally different approach transpired between the giving of the evidence in 1911 and the subsequent conveyances entered into and executed in 1917 in respect of the Conyngham Estate.

111. The appellants acknowledge that the Land Law (Commission) Act, 1923 had the effect that, by virtue of s. 7(1) *"…all lands, tenements and hereditaments … which were vested in or held in trust for the Congested Districts Board … [became] vested in the Irish Land Commission for all the estate and interest for which the same ….were respectively held by or for the Congested Districts Board."*

112. The statement of the appellants at para. 62 that *"[t]he evidence does not establish with absolute certainty what steps were taken by the CDB to formally vest either the Northern or Southern bank fisheries in a tenant's collective*" is wholly misleading. There is simply no probative evidence whatsoever that the CDB took any step to "*formally vest*" either fishery in any tenant's collective. That is the beginning and end of the matter.

113. The appellants concede that they do not have any beneficial interest in either fishery. Though allusion is made to the fact that relatives of two of the appellants were tenant

purchasers elsewhere, no evidence of same was adduced and even had it been adduced, such could not confer any beneficial interest on the appellants and more relevantly, could not give rise to any stateable defence to the claim brought in trespass.

Assessment

114. The ever-changing stance of the appellants in the course of the litigation is a matter of no little importance. As Laffoy J. clearly stated at para. 21 of her judgment: -

> *"... 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." (emphasis added)*

In the course of the hearing before the High Court in 2012, it was apparently conceded that the counterclaim could not be pursued in a manner as might adversely affect rights of riparian owners without the said owners being joined in the proceedings. Laffoy J. observed at para. 23 of her judgment: -

> *"...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."* (emphasis added)

115. There is force in the respondent's position that the effect of the new evidence sought to be adduced by the appellants was that the ultimate position in respect of the McDonnell section on the northern side of the river, was the same as that found by Laffoy J. namely *"that it was vested in the then Minister responsible for Fisheries as successor in title of the Board, albeit by a different title route."* (Para. 14 of respondent's submissions). The new evidence is referable to the industry and efforts expended on the part of the appellants' solicitor in particular. However, there is no gainsaying the fact that in as much as the 1917

instruments dealt with in the Laffoy J.'s judgment in 2012 clarified and established the Minister's title, likewise the ascertainment of the instrument of the 6th July, 1908 from General Tredennick demonstrates that in regard to the northern side, same had vested in the Board as predecessor in title to the Minister. Therefore, the appellants have not managed to dispute or contradict a central stance adopted by the respondent, namely that "*the new evidence would improve rather than undermine the Respondent's position in relation to the management of the fishery*."

Possession

116. The undisputed evidence before the High Court was sufficient to demonstrate that the respondent was in possession of the subject fisheries and did have, at the date of the hearing before Pilkington J. in the High Court and at the time of her judgment, the right to exercise, control, regulate and manage, including by the granting of fishing licences or permits, along the entirety of the fishery shown coloured on the map annexed to this judgment. The appellants have not demonstrated that they have any estate, right, title or interest in or over the property or the fishery either by operation of public law or private law rights and, indeed, abandoned those assertions. They cannot advance a valid defence to a claim of trespass based on the proposition that another or others hold a better title to the fisheries than the respondent.

117. In the interests of complete accuracy, I am satisfied that it is appropriate to determine that the portion coloured green and characterised as the "McDonnell section" on the northern side is a State-owned fishery and that the title derives from the Tredennick Estate and came to vest in the Board on 6th July, 1908.

118. The arguments advanced by senior counsel on behalf of the respondent made clear that they were proceeding in respect of prospective issues only.

Jus Tertii

119. It does not appear to be in contention that the Board acquired title to the fisheries on both sides of the river as are the subject matter of the within proceedings and shown on a map annexed, in 1908 and 1917 as outlined above. The legal consequence is that the appellants are not in a position to assert that they enjoy rights to fish which are positively stronger than the right of the Minister or some State entity thereto, or greater than the right of the respondent to possession of same to manage, operate and control the subject fishery.

120. Whilst substantial indulgence has been afforded to the appellants in regard to the "*new evidence*" and their arguments and contentions regarding same, including various hypotheses as to the devolution of the fishery rights on both the southern and northern sides of the river nevertheless, taking the material at its height, as a matter of law I am satisfied that once the appellants' counterclaim was dismissed, even had the appellants' hypothesis that title was vested in "community collectives" been established – such would not have availed the appellants or provided a defence to the claim in trespass.

121. The appellants are not successors in title to any riparian owner. The shape and tenor of their assertions are to be gleaned from the defence and counterclaim originally delivered. As they appear to concede at Ground 3(l) of their Notice of Appeal "*the issue of asserting a public right*" was not pursued since withdrawn in the Supreme Court:-

> "*The Defendants were not asserting a positive entitlement to fish… rather is (sic) was contended that the Plaintiff did not have sufficient interest to insist that the Defendants pay to the IFI, as agent of the parent Department, qua alleged private fishery owner, for daily fishing permits*."

***De facto* possession by respondent**

122. The respondent asserts that the appellants' claims amount merely to a plea of *jus tertii*. As *Clerk and Lindsell on Torts*, (23rd ed., Sweet & Maxwell, 2020) at para. 18 – 18 states: -

> "*A de facto possession gives a right to retain the possession and undisturbed enjoyment as against all wrongdoers. It is not, however, sufficient as against the lawful owner*."

The authors make clear further that such a party in possession:-

> "*… may sue in trespass anyone who disturbs his possession, and in such an action it is no answer for the defendant to show that the title and right in possession is in another person. Jus tertii is no defence to the action unless the defendant can show that the act complained of was done by the authority of the true owner. Nor does it matter how recently the possession was acquired*."

The *locus classicus* where the consequences of a defendant to setting up a *jus tertii* was considered in the context of a several fishery is *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch. 84. Farwell J. observed at p. 86: -

> "*It is well settled that in an action of trespass a defendant may not set up a jus tertii. He may set up a title in himself, or show that he acted on the authority of the real owner, but he cannot set up a mere jus tertii. That is well settled, and was not seriously disputed."*

123. In *An Blascaod Mór Teoranta & Ors v Commissioners of Public Works in Ireland & Ors* [1998] IEHC 38, Budd J. held, *inter alia*, that: -

> *"… the Courts will only listen to arguments based on the plaintiff's own personal situation and generally will not allow arguments based on a jus tertii (see Norris v Attorney General and Madigan v Attorney General)."*

This is further reiterated in *Halsbury's Laws of England: Volume 97A* (LexisNexis, 2021): -

> *"If the claimant has exclusive possession of the land affected by the interference he can sue on the strength of his possession, and need not prove his title. The defendant cannot therefore plead jus tertii (or the third party has a better claim to the property than the claimant)."*

The authority of *Hunter v Canary Wharf Limited* [1997] 2 All E.R. 426 is relied upon and in particular, the judgments of Lords Goff (p. 435) and Hoffmann.

124. In reviewing the authorities both in nuisance and in trespass and the judgment of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880 at 902 – 903, Lord Hoffmann observed at p. 426: -

> "*In speaking of 'possession or occupation' Lord Wright was in my view intending to refer both to a right to possession based upon (or derived through) title and to de facto occupation. In each case, the person in possession is entitled to sue in trespass and in nuisance."*

Lord Hoffmann further observed at pp. 448 – 449: –

> *"Thus even a possession which is wrongful against the true owner can found an action for trespass or nuisance against someone else: Asher v Whitlock (1865) L.R. 1 Q.B. 1. In each case, however, the plaintiff (or joint plaintiffs) must be enjoying or asserting exclusive possession of the land: see per Blackburn J. in Allan v The Oversees of Liverpool (1874) L.R. 9 Q.B. 180. Exclusive possession distinguishes an occupier who may in due course acquire title under the Limitation Act ... from a mere trespasser."*

125. The consequences of defendants asserting rights of *jus tertii* in the context of a dispute concerning a several fishery was the subject of a comprehensive judgment by Keane J. in *Gannon v Walsh.* In that case, the evidence was that the plaintiffs and their predecessors in title had been in possession of the rents and profits from the fishery for many years. Keane

J. followed the decision in *Nicholls v Ely Beet Sugar Factory* and concluded that it was not open to the defendants to put the plaintiffs' title in issue as in doing so they were merely setting up a *jus tertii*. At page 276, Keane J., having reviewed the authorities, including Wylie, *Irish Land Law* (2nd ed., Butterworths, 1996) observed: -

> *"If the plaintiffs in the present case are entitled to no more than a profit a 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. (See the decision of Costello J. in Tennent v. Clancy [1987] I.R. 15)."*

126. The appellants have abandoned their claim to private law or public law rights in respect of the fishery. They expressly state at para. 3(v) of the Notice of Appeal:-

> "…*The issue was whether or not the Plaintiff could establish an entitlement to exercise private control of certain banks of the river on the premise the title to the relevant fishing rights vested in the relevant Minister*."

The framing of the issue in such terms by the appellants is fundamentally misconceived since the mechanism whereby the appellants agitated the said issue was to put the respondent's title in issue and in doing so, they were merely setting up a *jus tertii* which is impermissible in law and cannot amount to a defence.

Secondary evidence

127. In *Irish Conveyancing Law* (*opus cit*.) at para. 6.52 the authors observe: -

> "*In respect of unregistered land, a form of secondary evidence of a lost deed commonly tendered in Ireland was the memorial registered in the Registry of Deeds. This has long been accepted as suitable secondary evidence. As is the general rule with respect to secondary evidence, the memorial could be used instead of the deed*

only if the latter was not found after a proper search, and, apparently, only if the possession of the land had since been in accordance with what the memorial would lead one to expect. At one time it was thought that the original memorial had to be produced, and not just a copy, but by statute an office copy could be received and taken as evidence of the contents of the memorial in any court proceedings, unless, on giving notice to the other party, the latter demanded by counternotice the production of the original. So far as matters stated in the memorial were concerned, it was prima facie evidence against the party who executed it, and anyone claiming through him, but not against a party who did not execute it."

The footnotes reference the Registry of Deeds (Ireland) Act, 1832, s.32 and *Reidy v Pierce* [1861] 11 ICLR 361 espec. at 368-369 (per Pigot CB).

128. The trial judge was entirely correct that it was incumbent on the appellants to introduce or adduce "*cogent title evidence*" to show that a collective ultimately acquired title to the fisheries on the northern banks on the northern side of the river. There is no escaping the fact that the appellants singularly failed in their endeavour to do so.

129. Secondary evidence can be introduced where an original deed is lost or destroyed. An example is the decision in *Savage v Nolan* [1978] I.L.R.M. 151. Given the analysis (reviewed in detail by Laffoy J. and outlined above) of the devolution of title regarding the southern side of the river which came to vest in the Board in 2017, the sum total of the evidence tendered by the appellants in respect of same could never amount to secondary evidence since it long predates the said assurance and is inconsistent therewith. There is simply no evidence that there were ever any title documents or that same were either lost or destroyed. The material offered does not constitute sufficient secondary evidence of the contents and execution of alleged missing deeds, the existence of which is not established. The same can

be said for the fishing rights on the northern side of the river. As is stated by Wylie & Woods, *Irish Conveyancing Law*, at para 6.51: -

> *"...the vendor cannot force the purchaser to accept secondary evidence, such as a completed copy or draft of the original deed, unless he can establish clearly that the original deed is destroyed or, after a proper search, is still lost."*

Opinions and views, irrespective of how strongly held or authoritatively articulated or conveyed (such as at the 1911 hearings), do not constitute secondary evidence *per se* of either the content or execution of missing deeds or instruments. The title to the fishing rights and sporting rights in respect of both sides of the river shown coloured on the map annexed in yellow, orange and green vested in the Board in 1908 and 1917. No conclusive finding on the issue of ownership is required as regards either bank of the fishery to dispose of this appeal because the appellants do not claim any title to same. I do not understand the appellants to dispute that save by their unproven contention that through the mechanism of a hypothetical intervening assurance same was vested by means of a trust or otherwise in a tenants' collective. The existence of any document consistent with such an assurance or disposition is not shown. Thus, it can neither be said that same were either lost or destroyed.

130. Furthermore, a consideration of the additional material, though not strictly necessary to dispose of this appeal, drives one to the conclusion that in its totality it does not establish that any third party has an estate, right, title or interest in or over the said fisheries inconsistent with the asserted entitlement of the respondent to manage, control and operate same on behalf of the Minister/State. In deference to the industry of the appellants and their solicitor, the material has been considered in detail but, as set out above, it does not constitute evidence that could lead one to conclude that the sporting rights in respect of any part of the northern side of the fisheries or the southern side of the Gweebarra river the subject matter of these proceedings came to vest whether by act of the Board or otherwise in any collective

as contended. Such assertions are inconsistent with the evidence as to title put before the court and I am satisfied the "new material" does not constitute secondary evidence from a conveyancing perspective tending to support such a proposition.

131. The statements, assertions and representations advanced and recorded in the minutes from 1911 are of great social, sociological and historic interest. They are of no value as secondary evidence of a reputed missing assurance. They could not constitute such secondary evidence as a matter of law.

Good root of title

132. The Land and Conveyancing Act, 2009 provides no definition as to what constitutes a good root of title. The definition of a good root of title is, conventionally, to be found in Williams and Lightwood, *A Treatise on the Law and Practice of Vendor and Purchaser of Real Estate and Chattels Real* (4th ed., Sweet & Maxwell, 1936), p. 124 where it states: -

> *"… An instrument of disposition dealing with or proving on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the properties sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title of the disposing parties."*

The bare assertions and statements, as emerge from the minutes of evidence taken by the Departmental Committee on Irish Inland Fisheries, do not constitute evidence of title. The terms of reference of the Committee were not directed towards an investigation of title or to establish with certitude in whom fishing rights and sporting rights were actually vested. The enquiry and the testimony of its witnesses reflect their respective understanding as to events but could never be characterised as evidence of title or as to the beneficial ownership of the sporting rights in question as of the time that evidence was being taken in 1911 and certainly not with regard to any future vestings that had not then taken place – such as along the entire length of the southern side of the river Gweebarra.

133. At best it might be said that a key witness, The Very Reverend James Canon McFadden, expressed his hopes and expectations, *inter alia*, where he stated in response to questioning from Mr. Gwynn: -

> "…*And you know that the Gweebarra is the boundary of two parishes, and that is always a difficulty, and it will never be properly arranged till somebody becomes the owner of the land on both sides. If the Congested Districts Board get hold of both sides they will be able to arrange the sporting rights and the fishing rights satisfactorily, as they did in the case of the Tredennick Estate*."

Such material provides no answer to a claim seeking to restrain trespass and interference with the respondent's established possession of the subject fishery.

134. There is nothing to be gained from going line by line thought the testimony and minutes of evidence adduced before the 1911 Parliamentary Committee. There are no circumstances and indeed, no authority was identified whereby same could cast doubt upon the 1908/1917 deeds and instruments, nothing produced by the appellants and sought to be relied upon in support of the contention that a tenants' collective is beneficially entitled to the sporting rights can displace the evidence that the appellants themselves put before Laffoy J. in 2012 and which is dealt with extensively in her judgment, particularly paragraphs 37, 38 *et sequitur*. Likewise, with regard to the northern side of the river, the evidence as to title, including the indenture of the 6th day of July, 1908 from the Tredennick Estate to the Board wholly undermines the proposition that the sporting rights had vested in a collective of any kind.

135. The respondent was in possession of the several fishery at the date the respective judgments of Laffoy J., the Supreme Court and Pilkington J. were delivered. That possession establishes a clear legal basis for a determination on the claim for a remedy against trespass *quare clausum fregit.* The basis of that possession was clarified by letter of the 5th June,

2012 insofar as it was in pursuance of the management, control and operation of the fishery for and on behalf of the Minister in whom it was likely that title to the several fishery had ultimately vested as ultimate successor to the Board though a process of devolution of title that was not formally proven before the High Court. Once the appellants' counterclaim was dismissed and after they abandoned their appeal to the Supreme Court in 2015, the appellants were never in a position to purport to establish either an equal or superior right to possession to that enjoyed and exercised by the respondent. The appellants are mistaken insofar as they contend that they have no obligation to do so to show a *bona fide* or stateable defence in order to have the within litigation remitted to plenary hearing to pursue same. The key (and unproven) hypothesis that the several fisheries vested in one or more tenant collectives, is nothing more and nothing less than a classic *jus tertii* which is impermissible and offers no basis for a plenary hearing.

Criticisms in respect of errors identified in the judgment

136. The appellants raise a variety of infelicities, apparent typographical errors and straightforward (apparent) mistakes in the judgment. In reality, there was never any impediment to the appellants going before the High Court and requesting such errors, elisions or infelicities to be adjusted, amended or corrected. The matter was before the trial judge on 13th March, 2020 on the issue of costs, yet the appellants chose to remain silent and not raise these matters which could have been engaged with by the trial judge and in large measure corrected. Overall, a somewhat captious approach is adopted, given the order by consent dismissing the counterclaim. Nothing complained of brings the appellants to a threshold which warrants the matter being remitted to a plenary hearing or identifies a basis for a stateable defence to the trespass claim. It necessarily follows that no valid issue was being raised such as could constitute or give rise to a defence to the respondent's claims.

“No wrongdoing established against the defendants”

137. The appellants assert that the injunctive orders ought not to have been made against them by the trial judge. This stance is not understood in circumstances where, firstly, a very extensive counterclaim was extant and had not been the subject of a specific notice of discontinuance and indeed, was only disposed of formally on the 13th March, 2020 where Pilkington J. made the order *“on consent that the defendant’s counterclaim be hereby dismissed.”* As outlined above, it will be recalled that by order of Laffoy J. on the 7th February, 2013 in response to the question *“are the defendants entitled to the reliefs set out in their counterclaim insofar as the said lands at (a) above are concerned?”*, the learned judge had answered “No”.

138. Secondly, a perusal of the defence delivered by the appellants on the 13th December, 2010 clearly sets out the stance being maintained by the appellants which does not appear to have been amended or varied thereafter, notwithstanding the determinations of Laffoy J. For instance, at para. 14 of the defence:-

> “*It is denied that the Plaintiff had any power to enter into agreements with landowners in the said terms as alleged or at all without reference to the existence of a free fishery and the rights of the defendants and others prior to 2007*.”

Paragraph 17: -

> “*It is denied that any such powers were granted to the Plaintiff or could be granted to the Plaintiff without proper consideration of the rights to the defendants herein and others in relation to the several fishery on the Gweebarra River and the private fishery on the Gweebarra River*.”
>
> *…*
>
> *“20. The Gweebarra Fishery Club as referred to in the Statement of Claim has no power to issue visitor permits, has no power to enter into an agreement with the*

Plaintiff in relation to same or in relation to who can use the river for the purposes of fishing as alleged or at all."

Paragraph 29: -

"*The defendants have placed signs on the banks of the river and are entitled to do so as are the landowners who own the lands are entitled to place signs on their lands in relation to the said river and it is denied that any such signs have been placed there wrongfully by the defendants, their servants and/or agents and/or landowners in relation to the said river."*

There is, for instance, a clear acknowledgment of the placement of the signs in question on the banks of the river by the respondent which constitutes a continuing act of trespass interfering with the respondent's possession. The defence in itself (wholly excluding the counterclaim) asserts the existence of a free fishery.

139. Quite apart from the aforementioned factors, the arguments advanced in the course of the appeal are first and foremost directed to putting the respondent's right to quiet possession in issue laterally by means of setting up a *jus tertii* which does not constitute a real or *bona fide* defence to the claim to restrain trespass by way interference with possession.

140. The appellants do not, apparently, contest that the respondent has the right to regulate, control and manage the said several fishery on behalf of the Minister and in accordance with the tenor of the letter of June 2012. However, the maintenance of the grounds of defence and the advancement of the *jus tertii* pleas, with the proposal that such propositions could be further tested in a further module, amounts in substance to a continuing interference with the beneficial occupation, possession and use of the several fishery by the respondent in accordance with its established prospective rights to possession, including rights to regulate, to control and to manage same and as such constitute wrongdoing which demonstrates a valid basis in law for the granting of the injunctive reliefs made by the trial judge.

The summary disposal of plenary proceedings

141. Attempts before this court to suggest that the root of title identified by Laffoy J. in respect of the Kevin McDonnell fishing now being demonstrated to be not as she understood but rather to have derived from the Tredennick conveyance of 1908 materially alters matters is fundamentally incorrect. It makes no material difference that the root of title derived from the Tredennick Estate rather than as was presumptively understood by Laffoy J. (that it had derived from an assurance to Mr. McKelvick in 1898). The net outcome is the same.

142. The interlocutory orders made at paras. 4, 5 and 6 on the curial part of the order of Pilkington J. were warranted and appropriate in light of the clear stance of the appellants before the High Court, in this court and asserted in their Notice of Appeal and submissions that in effect the respondent's right to possession of the several fisheries shown on the map did not entitle IFI to insist that the appellants pay for daily fishing permits. That stance interfered and continues to interfere with the respondent's right to possession which the appellants have not impeached. The appellants failed to establish that at any time they had or continue to have any legal basis for interfering with effective possession by the respondent, including in the management, control and operation of the subject fishery.

***Abbey* jurisprudence**

143. Since Kelly J. in *Abbey* held that the High Court enjoys inherent jurisdiction to grant summary judgment in respect of an unliquidated claim, provided it is satisfied that the defendants have failed to identify any arguable defence and where it is clear that the defendants have no such defence, that principle has not been doubted. The decision was made in the context of the Commercial List and in proceedings governed by O. 63A of the Rules of the Superior Courts. As *Delany & McGrath on Civil Procedure,* (4th ed., Round Hall, 2018) have observed at para. 30 – 39: -

> "*He considered that these rules conferred wide powers to make directions and orders as part of the case management of proceedings and that the ability to bring applications for summary judgment where a defendant was alleged to be unable to demonstrate a real or bone fide defence promoted the objectives for which the Commercial List had been established*."

In the course of his judgment in *Abbey*, Kelly J. made reference, in the context of the Commercial Court, to the deployment of the said rules: -

> "… *To grant directions and make orders which facilitate the expeditious and cost-effective management and disposition of commercial proceedings*."

I am satisfied that the decision in *Abbey* was properly invoked by the respondent and correctly applied by the trial judge. The applicable test for the grant of summary judgment under the *Abbey* jurisprudence is the same as that applied in summary summons proceedings *per* Kelly J. at para. 33.

Delany & McGrath comment at para. 16-31, that Kelly J. in *Abbey*:

> *"… said that the fact that the Rules of the Superior Courts do not expressly provide for an application of this kind is no bar to it being made successfully. He added that if the defence offered was alleged to lack any reasonable prospect of success, the plaintiff should have the ability to seek to recover judgment. Apart from this inherent jurisdiction, Kelly J. noted that the matter before him was in the Commercial List and that Order 63A, rule 5 gave the court a wide discretion to make directions as part of the case management of the proceedings."*

144. Kelly J. in *Abbey* did not identify any specific reason why the inherent jurisdiction identified and articulated by him would not also be available to a wider cohort of cases outside of the commercial list. In Kirwan, *Injunctions: Law and Practice* (3rd ed., Round Hall, 2020), the author observes at para. 7-43:

"The case of Shawl Property Investments Limited v A&B involved a more unusual point, namely a consideration of whether a defendant was entitled to insist that an application for permanent injunctions restraining trespass must be heard by way of oral evidence. The plaintiff in that case contended on the facts that it could proceed by way of an application for summary judgment, relying in that regard on the judgment of Kelly J. in Abbey… . On the facts of the case, Allen J. held that he could determine the plaintiff's claim by way of summary judgment and did so having regard to the well-established principles for the requisite threshold for summary judgments as set out in the Supreme Court in Aer Rianta Cpt v Ryanair Limited. As to the approach to be taken in relation to the facts before the court, he applied the approach of the Supreme Court in Irish Bank Resolution Corporation v McCaughey which, at the risk of oversimplification, requires credible facts to be put before the court. As to the appropriate approach where questions of law are involved, Allen J. adopted the approach of the Supreme Court in Danske Bank A.S. v Durkan New Homes, 2010 IESC 22. This requires the court to consider questions of law on a summary application only where the issues arising are relatively straightforward and there is no real risk of injustice in determining such issues. As such, the circumstances in which a permanent injunction may be considered by the mechanism of a summary judgment procedure are very rare."

The decision in *Shawl* was upheld in this court and reported at [2021] IECA 53 (Whelan J.).

145. The analysis of Mr. Justice Sanfey in his judgment in *McAteer & Ors. v Fried & Ors* [2021] IEHC 249 is persuasive, where at para. 83 he observes: -

"*It seems to me that such an inherent jurisdiction must exist for the reasons set out in the judgment in Abbey International Finance. There will be situations where it would be unjust to deny a plaintiff who has commenced his or her action by plenary*

summons a right to summary judgment, and subject them to the long delays to which plenary proceedings can be prone, rather than to grant judgment where it is clearly appropriate to do so. The facts in [Abbey International Finance] present a compelling example of such a situation."

Harrisrange

146. The approach of the Superior Courts makes clear that a conservative approach must be adopted to an application of the disposition of a plenary suit summarily. Of the key principles outlined by McKechnie J. in *Harrisrange Ltd v Duncan* [2003] 4 I.R. 1, at para. 9, I find the following factors to be of assistance:

(i) *The power to grant summary judgment should be exercised with discernible caution* – I adopt this approach.

(ii) *In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done* - The entirety of the relevant history of the litigation has been engaged with and considered.

(iii) *In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence* - The positions of both parties to this trespass suit are explored fully.

(iv) *Where truly, there are no issue or issues of simplicity only or issues easily determinable, then this procedure is suitable for use* – The

issues here are very simple where the appellants assert no claim to title of the property and no public or private rights over the fishery.

(v) *Where however, there are issues of fact which in themselves, are material to success or failure, then their resolution is unsuitable for this procedure* - No such valid issue ultimately exists in this case.

(vi) *Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues* - Title in the plaintiff is not required to sustain a claim for trespass to property. The only surviving points being pursued by the appellants was that the putative title of third parties/local collectives who were not parties to this action had title to the said fishery. This constituted a *jus tertii* which is not a defence to this action.

(vii) *The test to be applied, as now formulated, is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the Defendant says credible?' - which latter phrase I would take as having as against the former an equivalence of both meaning and result* - The appellants have not satisfied the High Court and did not satisfy this court that they had either "*a fair or reasonable probability of having a real or bona fide defence*" or any defence to the respondent's claim.

(iv) *This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an*

arguable defence - This did not arise in the instant case for the reasons stated above.

(v) *Leave to defend should be granted unless it is very clear that there is no defence* - Here it is very clear that there is no defence.

(vi) *Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action* - This did not arise.

(vii) *Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally*

(viii) *The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be* - The orders made by Pilkington J. achieved the correct and "just result".

147. In light of the fact that the appeal from the judgment of Laffoy J. and her orders was abandoned by the appellants in the Supreme Court in 2015, her orders substantially stand. The only modification is in respect of the said several fisheries along the portions coloured green on the map derive from a different muniment of title and root of title than was understood to be the case by Laffoy J. This fact does not enhance the position of the appellants in any material respect and does not undermine the position of the respondent in any material respect.

148. I am satisfied that there is no valid reason why the principle set forth in *Abbey* pertaining to the inherent jurisdiction of the court ought to be confined to commercial cases

alone. The courts have limited resources. The claims and assertions on behalf of the appellants have taken up substantial time and been the subject of a modular process.

149. The Supreme Court having rejected an application seeking to adduce new evidence, counsel on behalf of these appellants informed that court on or about the 30th July, 2015 that the entire appeal in respect of the judgment and orders of Laffoy J. was being withdrawn. However, at that stage the counterclaim was not abandoned and continued to be maintained by the appellants in respect of the northern title. That aspect was fully agitated before Pilkington J. on affidavit and extensive written submissions and oral arguments were advanced, leading to her judgment and the orders she made on the 13th March, 2020 which are the subject of this appeal.

150. In the instant case, all the hypotheses, theories, material, documentation and additional evidence sought to be relied upon by the appellants were put before the High Court and comprehensively stress-tested. They lacked any reasonable prospect of success. There was no valid defence articulated but rather a *jus tertii*.

151. Nothing in the extant defence as delivered and excluding the counterclaim thereto, coupled with the material exhibited to the affidavit of Mr. Boner sworn in the context of the motion, could be said to give rise to a *bona fide* defence either in law or on the merits to the respondent's claim in the context of the *Aer Rianta v. Ryanair* jurisprudence.

152. There can be no doubt that the appellants are convinced as to the rightness of their cause. That does not justify the further pursuance of this defence which is demonstrably doomed and is being exclusively pursued now on a basis that offends the *jus tertii* principle.

153. Whilst it is asserted that material and records from the Board were received in evidence by Keane J. in *Gannon v Walsh*, the facts were entirely distinguishable. The material in question came within an exception to the hearsay rule pertaining to declarations of a

deceased person who compiled a record in the due performance of a public duty. The exception has no relevance to the instant case.

154. It is true that great care must be taken by the court in bringing plenary proceedings to an end summarily, but the balance of justice requires that where a purported defence, including new evidence or material in its totality, discloses no reasonable answer to the plaintiff's claim, the court has an inherent jurisdiction to grant summary judgment where same is warranted, having duly considered all material facts for the appropriate management of litigation and of the courts. As Kelly J. observed at para. 24 of his judgment in *Abbey*: -

> *"... 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 in 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*."

155. In a case such as the present where there have been extensive proceedings, the pleadings have closed and over a decade has elapsed since the institution of the proceedings, such an approach in the context of the factual matrix obtaining was overwhelmingly warranted and represented the correct and balanced approach on the part of the trial judge where no stateable or *bona fide* defence was shown.

156. I am satisfied that there was ample evidence before the trial judge that entitled her to reach the conclusions that she did. Infelicities and some factual errors appearing in the judgment do not detract from the substantive conclusions. The orders including the interlocutory orders made by the trial judge were warranted in all the circumstances, in particular, having regard to the sustained position adopted by the appellants throughout

which ultimately in substance amounted to a *jus tertii* stance advanced without probative evidence and furthermore, irrespective of the latter fact, constituted no defence whatsoever to the respondent's action. No basis has been identified to warrant interfering with her judgment or conclusions or the orders she consequently made. This appeal falls to be dismissed on all grounds.

The Costs Order

157. The trial judge was entitled to make the orders she made in respect of costs. A number of concessions had been made in relation to costs. Complaints in regard to the respondent having failed to vary or concede the costs awarded by Laffoy J. are not validly advanced. Laffoy J. heard extensive evidence, including all of the appellants' and entertained their counterclaim in detail in regard to the fisheries on the southern side, together with those in respect of the McDonnell section coloured green on the northern side. It will be recalled that the counterclaim was fully pursued before Laffoy J., who clearly concluded that they were not entitled to any of the reliefs being sought in the counterclaim with regard to the fisheries the subject matter of the said proceedings. An Order for costs followed. An appeal on the issue of costs could have been pursued before the Supreme Court had the appellants considered that there was any deficiency or error on the part of the trial judge. They chose not to do so but rather withdrew their appeal in 2015. There is no valid basis identified for interfering with the order for costs made by Laffoy J. The trial judge correctly vacated the stay which had been granted by Laffoy J. on the 7th February, 2013 in respect of the costs of the first module.

158. The general principle that costs follow the event obtains. The provisions of O. 99 of the recast rules and sections 168 and 169 of the Legal Services Regulation Act, 2015 are applicable. The respondents were entirely successful in the proceedings and as such by virtue of s. 169(1) of the 2015 Act are entitled to an award of costs against the appellants

who were not successful in the said proceedings. The unsustainability of the *jus tertii* point was clearly raised by the respondent and ought to have been constructively engaged with by the appellants. No basis has been identified for interfering with a costs order made by the High Court.

Costs of this appeal

159. In all the circumstances my provisional view is that the respondent is entitled to the costs of this appeal having due regard to s.169 and Order 99 Recast. The respondent has been entirely successful in its opposition to the within appeal. If the appellants contend for a different order as to costs, a written submission can be furnished within 28 days from the date of delivery of this judgment no longer than 2,000 words with any replying submission thereafter within 28 days. If necessary thereafter, an oral hearing may be held to determine the issue.

160. Murray and Faherty JJ. have authorised that their agreement with the within judgment be hereby recorded.