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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2015 No. 80904

BETWEEN:

LEE BEVERLAND
AND
NAOMI LISTON

Plaintiffs;

-and-

DARRYL WILLIAMS AS PERSONAL REPRESENTATIVE OF JOHN HUGHES ("DECEASED")

Defendant.

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HORNER J

A. INTRODUCTION

[1] This case concerns the Otterburn Fish Farm ("Otterburn") situated on the banks of the River Maine. Otterburn is located off the Caddy Road near Randalstown. It is a glorious location close by to the Aghaboy Weir ("the Weir") as I witnessed on a site visit.

[2] Otterburn's history can be traced back to 1737 when paper was made in the mills, the rusty remains of which still exists on site. The mills were owned by Francis Joy, the grandfather of Henry Joy McCracken. It was on this site that the paper used to print the first newspaper in Belfast, the News Letter, was produced.

[3] In this case there are two central issues which require determination by the court. They are:

(i) Does the 1976 Grant of Easement permit the plaintiffs to replace a water pipe currently 1.8 metres in diameter with a rectangular pipe 2.2 metres by 5 metres in dimension?

(ii) Are the plaintiffs entitled to rely upon the equity doctrine of estoppel (promissory and/or proprietary estoppel) so as to preclude the defendant from refusing to allow them to replace a water pipe 1.8 metres in diameter with a rectangular pipe 2.2 x 5 metres dimension?

B. BACKGROUND INFORMATION

[4] The plaintiffs are the freehold owners of registered land comprised in Folio 31959 County Antrim ("the plaintiffs' lands"). The plaintiffs' lands comprise two sections. The first section is to the north and comprises a house and old mill buildings. The second section is to the south and it comprises a fish farm, which has been in use until quite recently, but is not presently in operation.

[5] The plaintiffs' lands are bordered to the north by Folio 16453 County Antrim which was owned and farmed by the deceased. Following his recent death the title is with his personal representative, the present defendant. The deceased died leaving four adult daughters who, I understand, all benefit from the estate.

[6] The plaintiffs' lands were acquired from the widow of William John Baird deceased ("WJB") on 10 May 2010. She had become the registered owner following WJB's death some six years before. WJB had become the registered owner of the plaintiffs' lands on or about 28 July 1976 when the deceased had transferred them by a deed dated 28 July 1976. This gave to WJB the right "to install and maintain a line of water pipes from adjoining lands comprised in the above-mentioned Folio between the points marked "H" and "G" on the Map attached hereto along the brown checked line thereon and enter upon the said lands for the purpose of maintaining, cleansing, repairing or renewing said pipeline".

[7] By a Deed of Indenture of the same date the deceased conveyed on to WJB:

> "All that Weir more particularly described on the Map attached hereto and thereon coloured purple being situate on the River Maine and being partly in the Townland of Aghaboy and partly in the Townland of Magheralave in the County Antrim together with a right to divert and take from said river at the point marked 'H' on the said map attached hereto such quantity of water as the Purchaser shall require for the purposes of the fish

> farm situate on the Lands coloured blue on the said Map and together also with the right to maintain and operate the said Weir for this purpose and together also with the right to enter upon the said Lands remaining in the ownership of the Vendor for the purposes of repairing or renewing the said Weir …"

[8] The undisputed evidence is that John Hughes Senior had acquired the lands and rights (of which the plaintiffs' lands formed a part), in 1935. There were two mills which harnessed the power of the River Maine flowing over the Weir. They comprised a scutch mill and a grinding mill and the water power was supplied by a head-race direct from the Weir. The use of the water power was exclusive to Mr Hughes Senior. I understand that he used any excess power to drive a dynamo to provide electricity for his farm as well as giving him additional sources of water for his agricultural requirements. This information was set out by him in a statutory declaration in December 1974.

[9] The easement described above allowed WJB to operate from the mid-1970s not only one of the earliest fish farms in Ireland, but one of the first fish farms in the British Isles. It would appear that the original production was of the order of some 125 tons per annum of trout. The court was told, without contradiction, that this is not economical in today's market. Mr Warrer-Hansen, an expert on aquaculture, provided a written report and gave oral testimony. He explained that such a scale was not viable today and that the plaintiff's proposal for the fish farm which anticipated a production of 239 tons of table sized trout and 233 tons of larger sized trout, making a total production of 472 tons per annum would be a viable commercial enterprise. In effect, the unchallenged evidence is that if the present pipe cannot be replaced by a larger pipe to carry additional water, then the fish farm will be unable to operate as a commercial concern in the future.

[10] However, production on such an intensive scale would only be possible with substantial capital investment. It would also require the assistance of hydro-electric power from the Weir because the more intensive processes would require additional power. These processes include:

(a) Oxygen generation.

(b) Oxygen injection.

(c) CO^2 de-gassing.

(d) Heat/cooling regulation of the hatchery.

(e) Water filtration.

(f) Pumping.

(g) Husbandry equipment.

(h) Lights.

The intensities will be four times higher than in the previous operation. The new intensive processes would be wholly dependent on intensified production methods which require additional electrical capacity. He thought that a power capacity of 200 KW would be required and that this could be provided if a suitable new pipe is installed. I have no doubt from listening to Mr Warrer-Hansen that a modern fish farm, able to operate and make a profit, could only do so if intensive methods are used and that would necessarily require a generous supply of cheap on-site electricity. I also accept that 143 KW would be required by the fish farm in periods of maximum feeding and that at other times the need might be even higher. Hydro-electric power generated from the Weir would provide the cheap power required and thus is a key to ensuring that a commercial fish farm is able to operate successfully on this site.

[11] As I have recorded I did visit the fish farm and Weir. The fish farm presently lies idle and looks somewhat forelorn. Mr Warrer-Hansen fairly summarised it as follows:

> "… the farm at present is in need of renovation to function even as a non-intensive farm. It is proposed to carry out the following works.
>
> - NH – New hatchery and starter feeding unit with heat/cooling.
>
> - Replacement of the six concrete round tanks with new fiberglass or concrete module tanks same number and size.
>
> - Renovation of the grow-out sets of raceways – same dimensions.
>
> - Six new round tanks in the area below the existing lay-out. These tanks can be used for the larger sized trout. The dimensions 12m diameter and water depth of 1.5m. Total volume of 1,070m^3.
>
> - The stock intensities will be intensive, from standard 15-20 kg/m^3 an old system to up to

> 50 and 80 kg/m^3 in the table trout part and the larger trout unit reflectively. This will entail oxygen injection systems in both production areas and CO^2 de-gassing by aeration in the larger sized trout section."

[12] The plaintiffs now seek to dig up the pipe which presently carries the water from the Weir under the field, which was owned by the deceased and has passed to the defendant, and replace the present circular pipe with a much larger rectangular one in order to secure an adequate flow of water to the proposed turbine, namely 12 cubic metres per second, and allow the production of hydro- electric power.

[13] The first plaintiff has been involved in fish farming since May 2002 when he commenced work for WJB at Otterburn. He progressed quickly and, although he had no formal qualifications, by August 2002 he was soon managing the Otterburn operation. When WJB died on 7 August 2004 his widow, Romayne Baird ("RB"), ran it with the first plaintiff's assistance until she placed it on the market in 2009. By this time the first plaintiff had been joined by the second plaintiff who had come over from Scotland where her family's background is one of involvement in the aquaculture sector. She has provided the first plaintiff with much support and assistance.

[14] The highest bid for Otterburn came from Damien O'Mullan. However, this bid came to nothing and the plaintiffs, who had made the next best offer, acquired Otterburn on 12 May 2010.

[15] There can be no doubt from the papers that the original intention of the plaintiffs was to install a turbine, divert water from the Weir and use the power of the water from the Weir to produce electricity that could then be sold to the grid. In 2009 a hydro-electric feasibility study was carried out by Mr McBurney of HydroNI. This concluded that:

(a) A hydro-electrical 200kw system was viable at this location.

(b) The project would be eligible for NIE grant funding up to a maximum of £20,000.

(c) It would generate sufficient electricity to make it viable.

I reject any suggestion that it was originally the plaintiffs' primary intention to operate the fish farm with the sale of excess electricity being merely incidental to such a scheme. The primary objective of this original hydro-electric scheme was "to produce electricity for sale to the grid".

[16] The first plaintiff claims that he met the deceased on a number of occasions. The deceased gave his evidence on commission shortly before he died. One of those meetings was on 4 June 2010 when there was a discussion about plans for, inter alia, the installation of larger pipes to be laid across the deceased's land. Apparently, the deceased was content for this to take place provided the land was reinstated immediately afterwards. The amended reply to the defendant's Notice of Particulars dated 18 October 2016 said the first plaintiff indicated that:

> "… he intended to put a hydro-electric turbine, to which the (defendant) agreed. The first-named plaintiff explained to (the deceased) that he would bring over his intended planning application drawings for discussion with the deceased."

In November 2010 the first plaintiff claimed that he then produced the drawings and the first plaintiff claims that the deceased gave his go ahead to work being carried out in accordance with the planning application, "as long as the pipe was covered up".

[17] I am not persuaded by the evidence that the deceased understood that the purpose of the installation of the larger pipe was to generate profits from the sale of electricity to the grid rather than for the furtherance of the fish farm. I have heard from his daughter, I have read his evidence in commission and I have seen statements from other witnesses which have been admitted in evidence. I have also carefully watched the first plaintiff give his sworn testimony. I have no doubt that the deceased was someone who was unlikely to give away something for nothing. I conclude that <u>at best</u> the deceased did not understand what was being asked of him in June 2010 because it was not clear to him at that time that this was primarily a scheme to allow the plaintiffs to make money from generating hydro-electric power which they would then sell on to the grid. Indeed, I am not persuaded by the totality of the evidence that any clear assurance was given to the first plaintiff about a new pipe at all. But, any assurance the deceased did give to the plaintiff was, taking the plaintiffs' evidence at its very height, in relation to the operation of a fish farm and not to any activities for the production and sale of hydro-electric power to the national grid, and the first plaintiff knew that.

[18] The second visit which was relied on was on 19 November 2010 which is not even referred to in the amended Statement of Claim. It appears for the first time in the amended replies dated September 2016, when it is alleged that the drawings for the planning application were made available to the deceased. It is claimed that the deceased agreed to the drawings. But the important question is to what did the deceased think he was agreeing to. When he gave his evidence on commission he did not deny the meetings. Certainly his offspring felt that the first plaintiff was hounding the deceased. The deceased claimed he had no recollection of what happened. I remain unpersuaded by the plaintiffs that after this November meeting

the deceased had any real understanding of what the plaintiffs proposed to carry out on their land, what the pipe feeding the turbine, whether covered or uncovered, was for, and most importantly, that this proposal was designed to generate power which the plaintiffs were then going to sell on to the national grid and had little, if anything to do with the fish farm. I have formed the view from hearing the first plaintiff give his evidence that he was rather less than candid about his plans, and that the deceased in all the circumstances could not have understood the precise nature of the plaintiffs' future intention at that time. The way in which the pleadings have evolved supports my finding.

[19] The first plaintiff should have ensured that the deceased knew exactly what was happening. This might have involved, if the deceased consented, the first plaintiff explaining his plans in detail to the deceased's daughter(s). Alternatively, the deceased could and should have been encouraged to seek legal advice or other independent advice before being asked to make any decision one way or the other in respect of the plans of the plaintiffs for a turbine which was going to be fed by a new pipe over the deceased's lands. I note that Mr McBurney in his report of 5 August 2010 to the first plaintiff said:

> "A significant element in the development of this project will be the need to obtain permission from the owner of the field to install this structure across his land. We would recommend that the terms of this agreement are discussed and agreed at the earliest possible stage of the project, preferably before preparation of planning proposals."

I am satisfied that this was not done. This was sound advice that the first plaintiff should have followed to the letter. The first plaintiff failed to do so at his peril. He should have explained in detail what he intended to do and his purpose. But as I have said I am unpersuaded after listening to the first plaintiff that any clear assurance was given to him upon which he or his co-plaintiff relied.

[20] Planning permission for the turbine was obtained on 28 June 2011. An NIE grid connection application was lodged in July 2011. An abstraction licence was obtained on 8 December 2011. An NIE grid connection was granted to the first plaintiff at the cost of £6,000 on 30 January 2012.

[21] On 4 May 2012 the first plaintiff wrote to the deceased as follows:

> "Further to our discussions regarding the construction of a pipeline in the form of a boxed culvert along the line of the existing pipeline, this letter is to give you formal notice of my intention to carry out the works on your lands in pursuance of the

> rights granted in the Transfer Deed dated 28 July 1976 from yourself to William John Baird from whom I acquired the benefit of those rights."

It is highly significant that this letter does not rely on any agreement, representation, assurance or promise given by the deceased to the first plaintiff in 2010 but instead relies entirely on the "rights granted in the Transfer Deed dated 28 July 1976", which related to the operation of a fish farm.

[22] As I have noted the original Statement of Claim which was served in 2015 also did not attempt to rely on any agreement, assurance, promise or representation made by the deceased. This claim for estoppel is also undermined by its late introduction. It is almost as if it was an afterthought. If the plaintiffs had generally relied on any assurance, representation or agreement of the deceased, I would have expected such a case to appear in the initial correspondence and in the original pleadings. Its omission in particular from both the letter of 4 May and from the original pleadings is highly significant.

[23] On 14 May 2012 Patrick Diamond and Co, solicitors, who were then acting for the deceased, replied:

> "The rights you refer to in the 1976 deed permit you to maintain the water pipe that was installed when the 1976 deed was signed. It does not permit the pipe to be enlarged or enhanced. Our client instructs that your plans disclose a considerably larger pipe being installed. This is not permitted without fresh consent from our client as this work is not permitted under the deed with which you hold land."

[24] If the deceased had given the assurance which the first plaintiff now contends for one would have expected an early rejoinder from the first plaintiff or his solicitors. In fact the next communication is 20 September 2012 which appears to be a draft from the first defendant to his solicitors. I am not clear whether this was sent. Again it does not suggest that the deceased was specifically informed that it was the plaintiffs' intention to use the larger water pipe to produce power which would be sold on to the national grid although it does refer to the deceased having agreed to the planning drawings before their submission. In any event there is a letter of 15 November 2012 from the deceased's solicitors stating that if the first plaintiff wanted to put a pipe of an increased diameter through the deceased's land it would cost him £12,000 per annum.

[25] The next communication which I have seen is an e-mail of 21 November 2013 to the deceased's solicitors which significantly says that the deceased had "no problem with the existing pipe being enlarged <u>for a Hydro Scheme</u> as long as it was

"covered up" (emphasis added). It is clear that this scheme was primarily concerned with selling hydro-electric power to the grid, and not with the fish farm for which the rights had been granted to the plaintiffs and their predecessors in title. It does refer belatedly to the deceased approving the plans of the planning application in November 2010 but this related to the hydro-electric scheme. The deceased's solicitors made it clear in the replying letter of 27 November 2013 that any rights they had did not extend to a "commercial hydro-scheme".

[26] On 28 February 2014 the plaintiffs' solicitors wrote to advise the deceased and his solicitors of their intention in relation to the installation of an underground water pipe and for the first time state:

> "This pipe will be used to convey a supply of water from the river to run a turbine or turbine's free electricity which would be used for the purposes of the fish farm."

The letter then goes on to state:

> "For your information, it is not intended that the electricity supply thereby created will be connected to the grid."

I understand that this is a mistake and it was meant to read that the electricity would not be supplied to the grid. In any event, this marks a major change in the plaintiffs' strategy. The deceased's solicitors wrote back on 6 March 2014 saying they had no objection to the installation of an underground water pipe but they insisted that it would be "the same size as the one that it replaced and will not be enhanced". On 3 July 2014 the plaintiffs' solicitors wrote to the deceased's solicitors making it clear that it was their intention to replace the current pipeline with a pipeline of an increased internal section measurement of 2.2 metres by 5 metres.

The defendant's solicitors refused to agree and replied on 22 July 2014 as follows:

> "It is obvious that your client is attempting to create a channel for the purpose of a Hydro Scheme by the **back-door** which is clearly something that goes far beyond the rights already granted in favour of your client."

[27] There were heads of terms drawn up some time in 2013 which provided for an agreement which was to run for some 20 years but final resolution was never achieved. There was also a suggestion of there being an open channel (which would be cheaper to construct) but this was never pursued to any resolution. Proceedings were issued on 16 August 2015 and the case made on behalf of the plaintiffs was

fairly and squarely that the hydro-electric power plant to be installed on the plaintiffs' land was for "purposes relating to the fish farm", although surplus power generated from time to time might be sold at the appropriate electricity generation tariff. As I have recorded, this was different from the original scheme which was concerned primarily with the production and sale of hydro-electric power to the grid. There have been a number of different iterations of the plaintiffs' case and, as I have recorded, the case of estoppel was one that was only made long after proceedings were initiated.

[28] Mr McBurney of HydroNI gave evidence. He said or confirmed that:

(i) HydroNI intended to put up the capital.

(ii) This was an excellent site for developing hydro-electric power.

(iii) The cost of making an open channel was much less than a closed pipe, although both were viable.

(iv) HydroNI built projects for clients and have done 37 sites to date.

(v) There was now no entitlement to Renewable Obligation Certificates ("ROCs").

(I should point out that these proceedings have concentrated exclusively on liability. Any potential claim for damages will therefore fall to be considered at a separate hearing following this judgment.)

[29] Mr Warrer-Hansen gave oral testimony. This supplemented his two reports given on 3 October 2016 and 14 September 2016. I found him to be an expert witness upon whom the court could place reliance.

I can summarise his evidence briefly as follows:

(a) Otterburn is a potentially profitable fish farm.

(b) However to make it profitable will require renovation, expansion and intensified production and improved husbandry.

(c) The net profit dependent as it is on the hydro-electric scheme to produce cheap power for the enterprise, provides a return which would be considered acceptable for a trout fish farm.

(d) The total investment return which is envisaged represents good value.

The above is necessarily a brief summary of the history which forms the background to this particular dispute.

C. DISCUSSION

Issue 1

[30] The central issue in this case is whether the grant of easement to the plaintiffs and their predecessors in title permits them to install a much larger pipe to provide power to the fish farm and allow the fish farm to operate on a more intensive basis and thus make it a commercially viable enterprise. I am satisfied on the evidence that without the benefit of the hydro-electric power the capital investment necessary to modernise the fish farm will not be available. Furthermore, without the hydro-electric power to intensify the processes, the fish farm will not be able to provide a commercial return on further essential investment. The consequence of this failure to modernise and farm the fish more intensively will be that Otterburn will cease to exist as a fish farm. Accordingly the replacement pipe bringing with it the benefits of cheaper power and more intensive farming methods is critical to the long term survival of Otterburn as a fish farm and its continuing operation as a viable enterprise.

The relevant legal principles

[31] Wylie's Irish Land Law (3rd Edition) at 6.058 comments on the construction of grants as follows:

> "The precise effect of a purported grant or reservation of easements or profits is, of course, to a large extent a matter of construction of the particular conveyance. In such questions of construction two principles are most relevant, namely that a grant is in general construed against the grantor and that a man may not derogate from his grant. The first principle means that, in the cases of doubt (e.g. over the exact scope of the easement or profit), a grant of an easement or profit would be construed against the grantor in favour of the grantee, …. The underlying philosophy is that the person who is in a position to dictate the terms of the transaction, by making the grant, cannot complain if a dispute subsequently occurs and he is not given the benefit of the doubt."

[32] Wylie goes on to say at 6.059:

> "As regards the rule that the man may not derogate from his grant, the philosophy here is that, when a

> man transfers his land to another person, knowing that it is going to be used for a particular purpose, he may not do anything which is going defeat that purpose and thereby frustrate the intention of both parties when the transfer is made."

[33] Wylie also states that when considering the effect of the wording of an express grant the provisions of Section 6 of the Conveyancing Act 1881 must be kept in mind. He says at 6.066 in respect of Section 6 as follows:

> "From the outset, however it must be emphasised that the section does so through giving an extended meaning to general words in an express grant."

[34] In Partridge and Others v Lawrence and Others [2003] EWCA Civ. 1121 Peter Gibson LJ said in respect of the construction of express grants at paragraph [28] as follows:

> "There is little or no dispute between the parties as to the approach to the construction of the 1995 deed as a contractual document. As Sir John Pennycuick, giving the judgment of himself, Russell and Orr LJJ in St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No.2) [1975] 1 WLR 772 said:
>
> > **'... one must construe the document according to the natural meaning of the words contained in the document as a whole, read in the light of surrounding circumstances.'**
>
> Those are the surrounding circumstances at the time the document was executed. Further, as Lord Hoffmann emphasised in ICS Ltd v West Bromwich Building Society [1998] 1 WLR 98:
>
> > **'(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'**

> Only if the court cannot ascertain the meaning does it have recourse to the presumption that the document is construed against the grantor."

[35] In ICS Ltd v West Bromwich Building Society Lord Hoffmann set out five principles for resolving issues of the interpretation of a written contract. One further principle was added in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 by the Supreme Court. In Al Sanea v Saad Investments Co Ltd [2012] EWCA Civ. 313 Gross LJ summarised the effect of both judgments as follows:

> "(i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
>
> (ii) The Court has to start somewhere and the starting point is the wording used by the parties in the contract.
>
> (iii) It is not for the Court to rewrite the parties' bargain. If the language is unambiguous, the Court must apply it.
>
> (iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with business common sense. A Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.
>
> (v) The contract is to be read as a whole and an 'iterative process' is called for:
>
> > **'….involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'."**

Finally, it is important to "elucidate the commercial purpose of the contract under consideration, and as between competing interpretations to select the meaning which best serves the commercial purpose of the contract as perceived by the court": see 2.07 of Lewison on the Interpretation of Contracts (6th Edition).

[36] I consider that it is important to read together both the grant of easement in respect of the right to install a line of water pipes with the indenture granting WJB the right to divert and take from the river such water as WJB shall require for the purposes of a fish farm. They are inextricably linked as the water diverted from the river can only be used for the purpose of a fish farm if it travels through the pipeline over the deceased's field.

[37] I consider that the following is relevant:

(i) There is no restriction in the amount of water which can be diverted save that it comprises such water as is (reasonably) required for the **purposes** of a fish farm.

(ii) There is no restriction placed on the dimension of the pipeline.

(iii) The pipeline must be of sufficient dimension to take the water diverted from the Weir.

(iv) The right is given to the deceased and his successors in title.

(v) The commercial purpose of the easement is to allow the grantee to run and operate a (viable) fish farm.

(vi) Without an increase in the water supply, which requires a consequent increase in the diameter of the water pipe, a fish farm cannot operate at this location.

It seems to me that a fair construction of the easement taking both documents together is that the plaintiffs are entitled to install a pipeline of sufficient diameter to take water diverted from the Weir provided that the water is reasonably required for the purposes of the fish farm. This will of course include providing power to drive the various processes of the farm. The commercial purpose of the easement (and the indenture) is to allow the operation of a fish farm at this location. The plaintiffs are not entitled to install a larger diameter pipe in order to produce hydro-electric power which they can then sell on to the national grid because that is not the purpose of the grant. I do consider that in the overall context "install" and "renew" must include the right to lay down a larger (or smaller) pipeline to cope with such water as is diverted from the Weir and which is required to service the (reasonable) purposes of the fish farm. The right to install and renew, must include the right to lay down a pipe of larger diameter, if otherwise a fish farm could no longer operate as a viable

enterprise. To refuse to allow a new, larger pipeline to be installed would defeat the very purpose of the easement, namely to permit a commercial fish farm to operate at this site. Further, I am satisfied that by refusing to allow the plaintiffs to install a larger diameter pipeline, the defendant is derogating from the grant in that he is preventing the operation of a fish farm at Otterburn, given that without the new pipe a fish farm could not operate at this location. In other words, the construction contended for by the defendant defeats the very purpose of the grant, namely the ability of the grantee to operate a fish farm. This cannot be a lawful interpretation of the easement (and the indenture). If the deed is ambiguous, and I do not believe in the overall context it is given its commercial purpose, then the ambiguity as to what install (or renew) means, must be construed against the deceased.

[38] The plaintiffs' counsel put it clearly when he said:

> "It is submitted the words themselves are clear and unambiguous and can be construed that there is no restriction on the amount of water other than the requirement that is used for the purposes of a fish farm. It is a wide construction and the dimension of the pipes must be sufficient to carry the water from the Weir to the fish farm. The dimension of the pipes is not fixed within the grant but rather is determined by the amount of water which is required for the purposes of the fish farm."

I agree.

[39] In the defendant's closing submissions reference was made to Martin v Chiles [2002] EWCA Civ. 283. However, the facts of that case are very different to the present ones. In that case the plaintiff wished to install a pipe of a larger diameter but wished to lay the new pipe over a different route to that of the original pipe. This would have an adverse effect upon the respondent's water supply:

> "The new pipe proposed by the appellants would improve their flow at the expense of that to the farm."

Pill LJ's conclusion that the word "install" was not designed to permit the appellants to install a completely new system was a correct finding on those facts. But such a conclusion was confined to another deed and circumstances were very different, including the fact that the only claim before the court at first instance (and the Court of Appeal) related to one of trespass.

[40] The defendant also alleges that by increasing the flow of water through the new pipe there will be excessive user. I do not agree that this is the position here because the water which can be extracted is necessarily limited by the requirement

that it is for the purposes of the fish farm. Although, if excess power is from time to time produced at certain periods this can be sold but only if it is incidental to the operation of the fish farm. If it is extracted for the purposes of the fish farm, the user cannot be excessive. If water is diverted for other purposes, then that would be in breach of the terms of the express grant. I was referred to McAdams Homes Limited v Robinson and Another [2004] EWCA Civ. 214. However, that case involved an implied grant not an express grant. There was "by implication, right in favour of the purchaser to discharge foul and service water from the bakery, through the drain under the site and under the cottage garden, into the pipe under cottage garden, and then through the pipe into the public sewer." Neuberger LJ said:

> "[50] The authorities discussed above appear to me to indicate that that issue should have been determined by answering two questions. Those questions are:
>
> (i) Whether the development of the dominant land, ie the site, represented a **radical change in the character** or a **change in the identity** of the site …
>
> (ii) Whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land, ie the cottage …
>
> [51] In my opinion, the effect of the authorities in relation to the present case is that it would only be if the redevelopment of the site represented a radical change in its character and it would lead to a substantial increase in the burden, that the dominant owner's right to enjoy the easement of passage of water through the Pipe would be suspended or lost.
>
> [52] In reaching this conclusion, I am relying principally on cases relating to rights of way. It appears to me that none of the decisions concerned with the passage of water are inconsistent with such reliance, and there are two such decisions. … The satisfaction of only one of the two requirements will not, at least on its own, be sufficient to deprive the dominant owner of the right to enjoy the easement, in light of the first and third principles which I have suggested can be extracted from the cases. However, where both requirements are satisfied, the dominant owner's right to enjoy the easement will be ended, or at least suspended so long as the radical change of

> character and substantial increase in burden are maintained."

[41] In this case it could not be argued that the proposed development of the dominant land constituted a radical change given that the water to be extracted and taken along the pipe is for the "purposes of the fish farm". So even if this was an implied grant, which it is not, what is proposed would not constitute excessive user. The answer, of course, would be very different if the extraction of water was primarily to generate electricity for onward sale to the national grid, rather than being incidental to the operation of a commercial fish farm.

[42] Accordingly, I conclude that the grant of easement does permit the installation of a larger diameter pipe over the defendant's field provided it is for the purposes of the fish farm, which is obviously a question of fact and degree. All parties need to appreciate that the diversion of water through the pipe whether, old or new, is only lawful insofar as it is for the primary purposes of a fish farm.

Issue 2

[43] I do not consider it necessary for me to consider in detail the taxonomy of estoppel and whether as Lord Scott said in Yeoman's Row Management Limited and Another v Cobbe [2008] UKHL 55 that proprietary estoppel is a sub-species of promissory estoppel. It is true in this case that we are dealing with an alleged representation made in respect of existing legal and beneficial rights. This is more the natural territory of promissory estoppel given Lord Walker's comments in Thorner v Major [2009] UKHL 18 at [5] where he said that promissory estoppel "must be based on an existing legal relationship (usually contract, but not necessarily a contract relating to land)."

[44] Promissory estoppel and proprietary estoppel have been the subject of detailed consideration by the House of Lords in Yeoman's Row Management Limited and Another v Cobbe [2008] UKHL 55 and in Thorner v Major [2009] UKHL 18.

[45] There are three requirements for a promissory estoppel to arise:

(a) A representation in the nature of a promise.

(b) A promise that the promisee understood was intended to effect relationship by the promisor and could be relied upon by the promise.

(c) An existing relationship: see *Snell's Equity (33rd Edition) at 12-24*.

[46] In a case of proprietary estoppel, there is no existing relationship and the court is encouraged to "look at matters in the round": see Gillet v Holt [2001] Ch 210 at 225. However, the three main elements of proprietary estoppel are:

(i) A representation or assurance made to the plaintiff.

(ii) Reliance on it by the plaintiff.

(iii) Detriment to the plaintiff as a result of his (reasonable) reliance: see Gillet v Holt [2001] Ch 210 at 225.

[47] It is therefore essential in both promissory and proprietary estoppel claims that there is firstly a representation and secondly a reliance upon that representation. The suggestion that there is no requirement in proprietary estoppel for a "clear and unequivocal" representation was rejected by the House of Lords in Thorner v Major: see paragraph [56].

[48] Lord Scott pointed out Yeoman's Row Management Limited at paragraph [28] that:

> "Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying or asserting, and clarity as to the interest in the property in question that that denial or assertion, would otherwise defeat."

[49] Finally, Oliver J in a comment approved by Lord Walker in Yeoman's Row said in Taylor's Fashions Limited v Liverpool Victoria Trustees Co Ltd [1979] [1982] QB 133 at 151-52:

> "Furthermore, the more recent cases indicate, in my judgment, that the application of the Ramsden v Dyson principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some pre-conceived formula serving as a universal yardstick for every form of unconscionable behaviour."

It is important to note that Lord Walker does say at paragraph [59]:

> "This passage certainly favours a broad or unified approach to equitable estoppel. But it is emphatically not a licence for abandoning careful analysis for unprincipled and subjective judicial opinion."

In this case there was no clarity, taking the plaintiffs' case at its very height, as to whether the consent was to a new and large pipe for the generation and sale of hydro-electric power for sale to the grid or for the generation of power for use in a more intensive fish farm or for a combination of both.

[50] I am unpersuaded by the evidence for the reasons which I have set out earlier in this judgment that estoppel, which was raised so late in these proceedings, offers any comfort to the plaintiffs. My reasons are as follows:

(a) I am unpersuaded by the testimony of the first plaintiff as to whether a clear assurance was given to him by the deceased at all in respect of the pipe.

(b) Certainly there was no clear and unequivocal representation by the deceased to the plaintiffs that they could put down a new larger pipe to produce hydro-electrical power for sale to the grid, which was the plaintiffs' original scheme. The plaintiffs' position changed much later apparently following legal advice. By then the deceased and his solicitors had made it clear that a larger pipe could not be installed as of right and would have to be paid for by the plaintiffs.

(c) If an assurance was given by the deceased, and I remain unpersuaded, the plaintiffs did not rely on this assurance at this time because they would have been aware that the defendant was not agreeing to them building a turbine to allow them to produce power for the onward sale to the grid.

(d) In those circumstances the deceased did not act unconscionably in refusing to allow the plaintiffs to relay a larger pipe for the turbine and it is unsurprising, apparently following legal advice, that the nature of the project has changed to one involving primarily the supply of hydro-electric power to use in the fish farm. Given that conclusion it is not necessary for me to comment about whether the plaintiffs, and in particular that the first plaintiff, behaved unconscionably by seeking to take an unfair advantage of the deceased, an elderly man.

Conclusion

[51] On Issue 1, I conclude that the plaintiffs are entitled under the grant of easement, read together with the indenture permitting extraction of water from the Weir, to replace the water pipe running from G and H with a larger diameter water pipe to power a turbine which will provide hydro-electric power to the fish farm and allow it to operate more intensively. This will permit it to function as a viable economic enterprise. Without the larger pipe, no commercial fish farm can operate on this site.

[52] On Issue 2, no estoppel arises which would bind or restrict the deceased's estate in respect of the substitution of a larger replacement pipe.

Further thoughts

[53] This was not an easy case. In those circumstances I did express some surprise during the trial that the plaintiffs had not relied upon the Property (Northern Ireland) Order 1978 and in particular Article 5 to ask the court to modify the grant of easement, the subject of these proceedings, in the event that the arguments they were making on the construction of the easement and on estoppel were rejected. The court (and the Lands Tribunal) has power under Article 5(5) to modify or extinguish impediments, which would include easements, in the circumstances set out at (a)-(h). For the record I must stress that the court has not had to consider whether it would exercise its power under Article 5 given its construction of the easement and it retains an open mind on this issue.