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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF FERMANAGH AND TYRONE

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BETWEEN:

JOSEPH McNULTY

Plaintiff/Appellant;

-and-

DONOVAN ROSS

Defendant/Respondent.

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GILLEN LJ

Introduction

[1] This is an appeal from the decision of His Honour Judge Miller sitting in the County Court for the Division of Fermanagh and Tyrone when he dismissed the claim of the plaintiff and directed that the plaintiff be responsible for the defendant's costs on the claim.

[2] Mr McNamee appeared for the appellant (hereinafter called "the plaintiff") and Mr Sands on behalf of the respondent (hereinafter called "the defendant"). I am grateful to both counsel who have invested in this case exemplary thoroughness and skill in the preparation of their skeleton arguments and their conduct of this case. I also pay tribute to His Honour Judge Miller for a commendably focused and well researched judgment.

Background

[3] Most of the essential background facts as found by the trial judge are not in issue and accordingly I shall recite them as he did in the course of his very helpful judgment.

[4] Eskragh Lough is situated five miles from Dungannon and has been in the ownership of the defendant since 2001. The defendant over the past ten years has developed the lough for commercial purposes including trout fishing and water based sports activities. Importantly for the purposes of this case, he has also created a pathway system around at least a part of the lough for visitors to the area. He has also erected substantial and sturdy fencing between the lough shore and the neighbouring lands.

[5] The defendant and his wife acquired the lough in fee simple from CMI (1993) Limited for £100,000 on foot of a deed of conveyance dated 9 March 2001. This document traces a title back to a deed of conveyance dated 3 March 1954 by which a transfer was made from the Earl of Ranfurly to Stevenson and Son Limited in fee simple.

[6] The property conveyed is described as follows:

> "FIRST OF ALL THAT AND THOSE the bed and soil of the Lough commonly called or known as Eskragh Lough and all water rising in or flowing through under or over same situate in the townlands of Eskragh Glassmullagh and Glenadush in the barony of Middle Dungannon and County of Tyrone together also with all rights and privileges to which the present Earl is now entitled in respect of the waters of the said Lough accepting and reserving hereout the rights (if any) of the owners of the lands adjoining the said Lough and also the rights of all other persons as they at present exist in respect of the waters of the said Lough (and which is the water power of several mills on the former estate of the present Earl) and also in respect of the Mill Races or streams by which the waters of the said Lough are conveyed to the said Mills. …"

[7] All the land in the area of the lough including that now owned by the plaintiff had previously belonged to the Ranfurly estate. Following the passing into law of the Land Purchase Act 1903 the Ranfurly estate sold off most of the lands in the estate to the tenant farmers. Lough Eskragh in common with several other small lakes in the area was retained, however, as it provided the source of water for the Moygashel Mills, in which enterprise the Earl had a commercial interest. As the title deeds confirmed the lough remained separate from the ownership of the adjoining lands and the owner is vested with distinct property rights over it. The defendant as the present owner is also the owner of several parcels of land adjoining the lough including one folio that is adjacent to the plaintiff's lands. These lands were acquired by Mr Ross over the past 15 years or thereabouts.

[8] The plaintiff Mr Joseph McNulty has roots in the area of the lough going back several generations and several plots of land abutting the lough belonging to members of the McNulty family. Whilst it was a matter of some dispute during the case, it appears to be common case that the plaintiff did live away from the area between 1978 to 1983 although there was a suggestion by the defendant that he had been away between 1971 and 1978 which was disputed by the plaintiff. The plaintiff did not live on the adjoining lands and did not move to his present address until 2004 but the plaintiff asserted that he regularly visited the family lands during that period. 2004 was of course after the defendant had acquired ownership of the lough and installed the fencing surrounding the perimeter abutting the land purchased by the plaintiff and known as the "back field" (hereinafter called "BF"). Mr McNulty now lives at 104 Ballygawley Road, Eskragh which is located in Folio TY1214 County Tyrone. These lands are back from the lough but they adjoin fields in Folio TY76352 County Tyrone which do run down to the shores of the lough.

[9] There are two fields which are of relevance to this case. These were previously owned by a brother of the plaintiff, Mr Malachy McNulty who tragically died in a swimming accident in 2002. His widow sold off his property including these fields. The first, known as "BF", to the plaintiff, and the second adjoining it to the southeast referred to as "the lough field" (hereinafter called "LF") to another brother, Pat McNulty.

[10] The works carried out by Mr Ross referred to above were completed before the plaintiff and his brother Pat acquired ownership of BF and LF. It is clear however that since about 2004 the plaintiff and the defendant have been engaged in a dispute over aspects of those works and in particular the defendant's decision to fence off the lough from the fields and by so doing, as the plaintiff sees it, interfering with his rights of access to and use of Eskragh Lough.

[11] The plaintiff and his brother Pat had also been involved in a dispute about land which culminated in proceedings being issued and eventually settled in or about 2012. The fact remains that much of the evidence relied on by the plaintiff focused on access to the lough from the LF notwithstanding that no claim has been brought against the defendant by Pat McNulty.

[12] The plaintiff's claim remained as that summarised by the learned trial judge as follows:

(i) Trespass by the defendant on the plaintiff's lands at Folio TY76352 in an area shaded yellow and a map prepared by one of his experts Mr Kelly. This area was alleged to have been approximately 60 square metres.

(ii) A declaration that the plaintiff and owners and occupants for the time being of Folio TY76352 have a right of way on to Eskragh Lough for recreational, domestic and agricultural purposes.

(iii) A declaration that members of the public have a public right of way across Folio TY76352 for access for recreational purposes to Eskragh Lough.

(iv) An injunction prohibiting the defendant from preventing the plaintiff and/or members of the public and/or owners for the time being of Folio TY76352 from accessing Eskragh Lough from the folio.

[13] The plaintiff asserted that for generations members of his family had accessed the lough from the BF for purposes which included:

- To draw water for domestic use.
- For cattle to drink.
- For recreational pursuits including swimming, sunbathing and fishing. These pursuits were shared with members of the local community from as far away as Dungannon.
- Using a path which he claims existed around a part of the lough which could be accessed from BF and which was habitually used by his family and their invitees.

[14] The claim is based largely on alleged prescriptive rights, there being no express grant of a right over the lough to Mr McNulty. This aspect of the case must proceed under the Prescription Act 1832 whereby the plaintiff requires to show continuous user for at least a 20 years period "without force, without stealth and without permission" ("nac vi nec clam nec precario") prior to the issue of proceedings. A right established for a period of 40 years or more is deemed absolute and indefeasible. Any interruption in that use will break the continuity required by statute.

[15] It was common case that I should accept that the cause of action crystallised in 2004 when the plaintiff moved to his current address. The onus therefore is on the plaintiff to establish the terms of the Prescription acts up until that date and not the date of the original hearing or this appeal.

Relevant legal principles

[16] An easement is a right benefiting land. As such it closely resembles the Roman law concept of "servitude ". An easement is an incident to the land and not a personal right in the owner. Thus a grant of the sole and exclusive right of putting pleasure boats on a canal to a lessee of land on the canal's bank was held to confer a licence only in Hill v Tupper (1863) H& C121. Moreover in Ackroyd v Smith (1850)10 CB 164 it was held that a grant of a right of way "for all purposes " to the

tenant of an estate and his successors in title permitted the right to be used for all purposes not necessarily connected with that estate and so it failed to create an easement.

[17] There are four ways in which an easement can be acquired: by statute, express grant or reservation, implied grant or reservation and presumed grant (prescription).

[18] I share the view of the learned County Court judge that in this instance the case proceeded primarily on the basis of long user or the Prescription Act 1832. In my view Mr Sands correctly submits that a common law claim for prescriptive easement cannot apply here because the dominant and servient tenement were in common ownership until 1906. A claim under the doctrine of lost modern grant has been popular in the last 40 years as a way of getting around the problems caused by the Prescription Act following Thivy Minerals Limited v Norman (1971) 2 QB 528. Where there has been upwards of 20 years uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20 year period have made a grant, the experience of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made. The great advantage that the doctrine has over prescription under the Prescription Act 1832 is that the user does not have to continue up to the commencement of proceedings.

[19] The seminal case of Re Ellenborough Park [1956] Ch. 131 establishes four essential characteristics to an easement namely:

(i) There must be a dominant and a servient tenement.

(ii) An easement must accommodate the dominant tenement.

(iii) Dominant and servient owners must be different persons.

(iv) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

[20] The crucial characteristic in this case was the second, namely that the easement must accommodate the dominant tenement. At p. 170 Lord Evershed MR in Ellenborough said that what is required is that the right "accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties".

[21] In Ellenborough's case the use of a park which was the central component of the litigation, did accommodate and serve each of the houses with which it was granted in that the use of the park was an extension of the normal use of the house. The court recognised however that there may be some other rights granted with the house, which may fail to qualify as easements because they are not connected or are too remotely connected with the normal enjoyment of the house. The question whether or not a connection exists is a question of fact and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.

[22] Clos Farming Estates v Easton [2002] NSWCA 389 repays examination on this aspect of the law. The question in this case was whether a right to enter the servient land, to carry out viticulture work and to harvest the grapes and sell them was capable of existing as an easement. Rhetorically asking the question "what does accommodation mean in this context", Santow J said at [30]:

> "First, it requires there to be a natural connection between the dominant and servient tenements. The right must be reasonably necessary for the enjoyment of the dominant tenement and not merely confers advantage on the owner of that tenement as would a mere contractual right. …. (The trial judge) concluded that whether the right granted accommodated and served the dominant tenement depended on whether the right granted was connected with the normal enjoyment of the dominant tenement. This is a question of fact, dependent on the nature of the dominant tenement and the right granted. It was not enough that the land be a convenient incident to the right. Rather the nexus must exist in a real and intelligible sense."

[23] The Prescription Act 1832 requires that the easement "shall have been actually enjoyed by any person claiming the right thereto". The requirements for lost modern grant are essentially the same. From the statutory provisions seven elements can be distilled:

(a) Continuity.

(b) Openness.

(c) Absence of force.

(d) Enjoyment (by the person claiming right thereto).

(e) Actual or imputed knowledge of the servient owner.

(f) Absence of permission.

(g) Legality.

[24] Riparian rights became an issue in this case in the context of Lough Eskragh and the land of the plaintiff abutting that lake. The natural rights of a riparian owner, that is the owner of land intersected or bounded by a natural stream, may be shortly defined as threefold. First, he has a right of user. He can use the water for certain purposes connected with his riparian land. Secondly, he has the right of flow. He is entitled to have the water come to him and go from him without obstruction. Thirdly, he has a right of purity. He is entitled to have the water come to him unpolluted (see Gale of Easements 19th Edition at 6-01). Thus an owner of land abutting on water is entitled in the natural course of things to access and regress from that water where it is in contact with his frontage provided his land is in actual daily contact with the water either laterally or vertically.

[25] In the context of a landowner abutting a lake, two cases, both cited before me, are of significance namely Marshall v Ulleswater Steam Navigation Company (1871) LR 7 QB 166 and Earl of Iveagh v Martin [1960] 2 All ER 668 at 684-685.

[26] Marshall's case concerned persons living in the vicinity of Ulleswater Lake whose land abutted onto the edge of the lake. In that case Blackburn J based his judgment on the fact that the public had the right of highway over the lake and stated at paragraph [27] that it was well established law that where there is a public highway the owners of land adjoining thereto have a right to go on the highway from any spot on their land. Consequently every person in the vicinity of Ulleswater Lake whose land abutted on the edge of the lake had the right to come down to the brink of the water for the purpose of exercising the public right of navigation. I am satisfied that in the instant case, there was no such public right of way across the lake in a sense of it representing a public highway with the right to go on to that lake from any spot on the abutting landowner's land.

[27] Mr McNamee contended that a public right of way had been established along the bank of the lough. The law in the creation of highways is set out in Halsbury's Laws of England 4th Edition Volume 21 paragraph 62 as follows:

> "A road or other way becomes a highway by reason of the dedication of the right of passage to the public by the owner of the soil and of an acceptance that as user of the right by the public 'dedication' means that the owner of the soil has either said in so many words or so conducted himself as to lead the public to infer that he meant to say that he was willing that the public should have this right of passage."

Paragraph 63 asserts:

> "Dedication necessarily presupposes an intention to dedicate. The intention may be expressed in words or writing but is more often a matter of inference."

Paragraph 65 states:

> "An intention to dedicate land as a highway may only be inferred against a person who at the material time is in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple and sui juris."

[28] The issue in this case is whether the use of the alleged pathway by the public has been such that dedication should be implied. The matter was debated in Seaport Investments Limited, Seymore Henry Sweeney and Carol Sweeney v Andrew Cameron Mitchell Bailey, John Crooks and The Attorney General, an unreported judgment of McCollum LJ on 16 June 1999 McCE2727.

[29] In that case the Attorney General had been joined as a representative of the public interest. Neither the parties in this case submitted that was necessary particularly in light of correspondence before me from the local Council Mid-Ulster District Council of 17 April 2015 indicating that it held "no records that would confirm the evidence of a public right of way leading to Eskragh Lough and a sluice gate". As will appear later in this judgment I felt the argument for a public right of way was so devoid of substance that I considered it unnecessary to invoke the assistance of the Attorney General.

Expert evidence

[30] Over the course of the four day trial I heard a number of experts in this case. I shall deal with the salient issues in turn.

[31] First, on behalf of the plaintiff a soil expert Mr Wells from Ground Check Limited. This is a site investigation company which investigates geological conditions of sites. Mr Kelly has a Masters and BSc degree and is an expert in engineering geology. His opposite number was Mr Patterson of Stratex Site Investigation and Geotechnical Engineers. Although Mr Patterson did not have a degree, he is an extremely experienced geotechnical consultant over many years and I found no practical difference in the expertise between these two experts.

[32] The role of these two experts was to investigate the sub-soils to help determine the original location of the edge of the lough in recent times and thus to establish geologically where the boundary of McNulty's land was. Had the road put in place by Mr Ross been built on water or on land?

[33] These experts examined the ground conditions for the purpose of their site investigations, carrying out boreholes and trial pits. Both had examined county series and ordinance survey maps from 1904, 1906 and 1907 dating back from 1833 together with examination of head levels of the water level depicted in 1949 and 1984 etc.

[34] There was a complete conflict between their findings. Mr Patterson, having considered the boreholes made on Mr McNulty's side of the current boundary fence and also on the roadside of the current boundary fence came to the conclusion that the reed bed and sub-soils at and immediately below its lair constituted original recent deposits which had formed in, and due to the presence of, the lough. It was his estimation that the furthest extensive steady high water would have extended to somewhere between these two boreholes hence the formation of lacustrine deposits and the flourishing of wetland flora. He had dug a trial pit in the lake itself which uncovered sands and silts inter-bedded with layers of soft dark brown organic material similar to the material recovered within the boreholes immediately on the two sides of the new road. In particular it was his opinion that the presence of reeds/organisms i.e. decayed reeds covered with sediment would only be found under water. Whilst he could not say precisely where the shore line would have been in relation to where the high watermark of the lough was, nonetheless he concluded from these borehole/pit findings that the original boundary or edge of the lake extended on to Mr McNulty's side of the current boundary fence thus establishing that Mr Ross was correct in asserting that the road was built on the floor of the lake.

[35] Mr Wells on the other hand found that the shoreline of the lough was sandy consistent with dynamic erosion whereby sand and sediment had been moved and was of deep seated origin. He illustrated his point of view with photographs of wave action showing the shoreline attacked by waves leading to erosion. It was his opinion that the high watermark had been artificially controlled by a sluice gate since it was first shown on the ordinance survey map in 1833 and the water level was in fact a moveable feast by virtue of the sluice gate. It was his opinion that the road had obliterated any sign of the shoreline and that pre the construction of the road there was still a strip of land there of sandy material which had been eroded and affected by earthworks during the construction of the road.

[36] The experts differed over interpretations of the head level descriptions in various maps in 1949/1954 etc. They also differed as to whether or not the sluice gate had made any difference to the high watermark of the lough and as to whether or not the mill race coming out of the lough to Moygashel was an artificial channel dug by man or a natural drainage channel.

[37] I found both of these experts very compelling and the expert minute note of 29 November 2014 agreed by each of them probably records the reality of the matter when it states:

> "RW/RP concur that there is a degree of uncertainty in relation to the location of the shoreline and high water mark prior to construction to the access road which cannot be defined from the limited scope of the investigation."

[38] Insofar however as I did derive assistance from the conflicting evidence, I came rather more on the side of Mr Patterson's account. Whilst he was not definitely able to say where the shoreline was in relation to the high watermark, his evidence as to where it could not have been was somewhat marginally more impressive than that of Mr Wells. It did seem to me that the very impressive photographs that he produced of his borehole findings did illustrate the presence of dead organic reeds which are more likely to have been found under water thus indicating that the water did cover the land on the McNulty's side of the road rather than the contrary view put forward by Mr Wells.

[39] I also heard from Mr Clive Heatherington who had carried out a digital survey of the area having been requested to do so by Mr Aidan Kelly of J Aidan Kelly Limited (Architect) on behalf of the plaintiff and Mr Tommy O'Neill chartered surveyor of T J O'Neill on behalf of the defendant.

[40] Without burdening this judgment with a lengthy recital of everything these experts said, I concluded on a factual basis the following matters:

(i) The land registry map of Folio TY76352 included a small area of Eskragh Lough which was now terra firma on which a private road was constructed.

(ii) When the parent Folio 6183 was created, the calculation of the area excluded water as per the Schedule of Areas prepared by the Land Purchase Commission in 1907.

[41] They did have available to them a site survey supplied by architects McKeown and Shields which had been prepared by K Hagan in 2003. In January 2003 K Hagan had carried out a digital topographical survey in the locus of the disputed boundary prior to the design and construction of the private road. Some bewildering additions had been made to this. The unedited survey by Hagan did not show a broken green line but this had been added in by others. His survey showed a single yellow line but there was now a second yellow line added by others. The Hagan survey seemed to show one gap in McNulty's hedge whereas the hedge on his survey at the bottom of McNulty's field seemed to no longer exist.

[42] Of these witnesses in this aspect of the case, whilst all of them were acknowledged experts in their field and gave their evidence in thorough fashion, I found Mr O'Neill the most impressive of them. In particular I found the nine maps that he had prepared of great value. Two crucial points emerged. First, whilst two

of those maps, Nos. 6 and 7, were not accurate enough to determine the precise position of a boundary on the ground due to distortion and scale, they were acceptable to show the approximate location of a boundary and to identify the parcels of lands which comprised each folio adjacent to the lough. This does represent a record of what was registered in the Land Registry in 1907 and identifies the extent of the boundaries of the lough. Folio 6183, described by Mr O'Neill as the grandparent of Folio TY76532, does illustrate the water edge of the lough at that time. None of the lough appears to be part of Folio 6183.

[43] Map number 6 shows Folio 6183 as it was registered in 1907. Folio TY76352 is a sub-division of what was originally Folio 6183. When a 1:2500 negative of the digital tile to which is added a boundary of Folio TY76352 was overlaid on map number 7 (a scale enlargement of map number 6), the southern boundary of TY76352 extends beyond the corresponding boundary of Folio 6183 into Eskragh Lough. Also the private road constructed by Mr Ross is within the mapped Eskragh Lough boundary and not within Folio 6183.

[44] Secondly, in 1907, the Land Purchase Commission Schedule of Areas, the calculation of areas of land parcels sold to tenant farmers by Earl Ranfurly states that the water is excluded.

[45] Thirdly in January 2003 the Hagan survey carried out a digital topographical survey in the locus of the disputed boundary prior to the design and construction of the private road. The road appears to be constructed within the perimeter of Eskragh Lough as it was in January 2003. In short map number 9 by Mr O'Neill was his digital survey in 2014 superimposed in part on Mr Hagan's survey.

[46] As indicated above, there was much uncertainty about the various additions that had been added to the Hagan survey. However one matter did seem to me of signal importance. Mr Hagan was carrying out a survey with reference to hedges, fences etc. If there was a pathway of any significance, I failed to see why he would not have included that on the map.

[47 He was not concerned with McNulty lands but rather the Ross lands. He had used a theodolite with an infra red beam to survey all points and I have grave difficulty understanding why he would not have recorded the pathway as described if it existed.

[48] The references to "existing dilapidated ex-main path" is sufficiently ambiguous to prevent me deciding whether this was a reference to an existing path or if it was the path that had been cleared by Mr Ross with his excavator. If the path which had existed in the past was that now depicted as a double line on the map Mr O'Neill had measured this as between 10 feet wide – 23 feet wide. How could this possibly have been missed by Mr Hagan?

Other witnesses

[49] Over the course of the four day hearing the plaintiff called a number of witnesses who were non-experts. The defendant was the only non-expert witness on his own behalf. I do not intend to weary this judgment with a full recitation of what was said but some of the salient issues arising from their evidence was as follows:

The plaintiff

[50] The plaintiff stated in the course of his evidence that apart from a period between 1978 and 1983, he had maintained a presence on the McNulty lands at 104 Ballygawley Road. From 1983 his mother had lived there and in 1994 he had bought a house in Eglish but maintained his presence as main carer of his mother. Thereafter she assigned the house to him in 1988. His father died in 1973 leaving the complete McNulty farmlands to his brother Patrick who in turn sold it to his brother Malachy. His widow sold the BF to the plaintiff in 2005 and the LF to Patrick about the same time.

[51] The plaintiff's case was that throughout his time there he and his family have regularly gone down to the lough shore through a gap in the BF, along with other members of the public, for the purposes of fishing, swimming and walking along a path to the sluice gate approximately 400 yards up from the McNulty land. Cattle also regularly drank from the lough shore. He declared there were no fences there at all until 2004 when the defendant had erected a fence between these lands and the lough. He drew attention to the Hagan survey on behalf of the defendant which showed no fences along the McNulty land. He drew attention to stock fences which farmers had raised on the lough shore to prevent their cattle moving from one field to another.

[52] In cross-examination of him a number of assertions and points were made on behalf of the defendant by Mr Sands. These included the following:

- That there had been wooden posts with a couple of strands of barbwire along the lough shore on the edge of the McNulty land set up by owners previous to Mr Ross.

- That any person who walked towards the sluice gate was not asserting any right and there was no such path.

- Whilst Moygashel had been happy to allow people to swim in the water, this was with their permission.

- There was never any cattle feeding from the lough shore and despite the plethora of photographs in this case, there were no photographs of such cattle drinking water.

- In 1985 there was a document whereby Moygashel leased rights to the Dungannon Angling Club for fishing. This lease did not permit anyone else who was not a member of the Dungannon Angling Club to fish.

- The plaintiff's brother Pat had a fish and tackle shop in Pat's yard on the lough field where fishing permits were sold.

- There was a letter of 1946 to the Earl of Ranfurly from Moygashel illustrating evidence of fishing with the express permission of Moygashel.

- It was important for Moygashel as a trading company to keep the lough clear and sterile and therefore they would not have permitted cattle etc. to use it.

- There was a letter of 11 August 1970 from the Chief Engineer in Moygashel to the Administrative Department in Moygashel referring to the "lough boundary fence".

- Much of the time in this case was taken up with a dispute as to whether a 1983 photograph produced to me with a Mr McKernan in it was or was not a photograph of the McNulty land bordering on the lough which illustrated posts and wire fence and the absence of a path. Such was the dispute between the parties that I was not able to form a positive conclusion one way or another on this particular photograph.

- The Symington farmland had obtained a lease for abstraction of water in 1946. These were neighbours of McNultys.

Roisin Corrigan

[53] This witness was a sister of the plaintiff and, as in the case of all the other witnesses, had filed an affidavit in addition to giving evidence. The following points emerged from her evidence.

- She was born in 1959 and asserted that ever since she could remember there had been people swimming in the lough. It was difficult to access the lough from the LF and people came from the BF which had a big gap through which people could access the lough. There was no fence along the McNulty land until Mr Ross constructed one in 2006.

- She recalled a well-worn path from the McNulty land to the sluice gate of about 500/600 yards in length which she often walked with her

father. The path was narrow and required single file being muddy in the winter and dry in the summer.

- As the plaintiff had asserted, her brother Pat suffered from Alzheimer's Disease and accordingly was not giving evidence.

- It was her case that hundreds of people had gone swimming. Whilst a leisure centre had been built in the nearby town in 1972, people still continued to come here to swim. I had before me a number of photographs from the 1970s and 1980s showing young people in swimming suits at the lough shore.

- She dismissed the suggestion by Mr Sands that the 1996 aerial photograph of the ordnance survey map showed no such path. Similarly there were no aerial photographs or any other type of photograph showing the path.

Paddy Donnelly

[54] Mr Donnelly, 56 years of age, made the following points in the course of his evidence and on affidavit.

- Himself, his immediate family and wider family and friends over the decades had used the lough for the purpose of swimming, picnicking and fishing, accessing it through the laneway leading to McNulty's farm and their fields. The BF was the best access because there was no bank. On a good sunny Sunday there would be literally hundreds of people at the shorelines in these fields and in the evenings after school. They regarded the shoreline as their own "Bundoran".

- He recalled the pathway which went to the pump house and stopped dead there.

- He accepted that Moygashel had the right to stop people swimming and that Mrs McNulty could have refused to allow people to go through her property at the BF. The whole situation changed when Mr Ross erected the fence in 2004 and closed the gate from the lough field in 2005.

Kevin McGuckin

[55] Mr McGuckin made two affidavits and in addition gave evidence before me. He was born in 1959. The salient points of his evidence were as follows:

- He recalls the diving board from the mid-1970s in front of the McNulty land.

- He also recalled a "rough old path with weeds coming through" which had been there a long time from the BF past the pump house where it stopped in that reeds and marsh took over. It was about two feet wide and was just "well-trodden on". It was not surfaced or maintained.

- He accepted that although he had seen people swimming in the lake, Moygashel owned the lake and could stop them doing so. He also accepted that whilst he had come down to the path through the McNulty land, the McNultys could have stopped this happening.

Martin McNulty

[56] Mr McNulty gave evidence along with two affidavits. He was the youngest boy in the McNulty family of 12. In the course of his evidence he made the following points:

- He recalled walking down the BF and then on to the sluice through a path. The path was dry and comfortable to walk in the summertime and was 300/400 yards long. Sometimes you could walk in single file and other times not. People from the town used this.

- There was never any fencing along the McNulty land and no fencing had been erected by Moygashel. Cattle would go to the water and drink from the water opposite the BF.

- He recalled fly fishing over the lough.

- The pathway was accessed mainly from the BF. Boats were moored there namely that of his brother Joe and Malachy's boat.

- He did not agree that the only fishing was that done by the Dungannon Angling Club.

- He did not agree that access was through Drew Lane but asserted that all access was through the McNulty land. It was the country culture to allow people to go through the McNulty land.

- He did not agree that whilst people may have been swimming during the 1950s and 60s, once the leisure centre opened in 1972 in the nearby town swimming all but ceased in this area .

Maxwell Trimble

[57] Mr Trimble filed an affidavit and also gave evidence. He has a case for trespass against Mr Ross which was heard before the High Court some months ago

and the judgment is still outstanding. His lands are diagonally opposite to those of the plaintiff. He had farmed it since 1972 with his brother. He made the following points:

- He recalled looking across to see the McNulty lands and saw young people in the BF making their way down to the shore.
- He recalled seeing people walking along a path up to the sluice.
- He recalled also a few cattle coming down to the shore.
- He as a farmer lifted water out of the lough.
- There were fences perpendicular from the fields to stop cattle straying.
- His father had put a stock fence to keep the cattle out of the water. However they did not think that McNultys had a fence.

William Sloan

[58] Mr Sloan had made two affidavits and gave evidence before me. He and his family had farmed the land on the lough shore and had known the McNulty family for about 50 years. His land is opposite that of the McNulty farm. He made the following points in his evidence.

- He regularly had fished in the lough until Ross had bought it. He was then told he had no right to fish on it. His recollection was that this had been going on for many years. He did not believe that Moygashel had the right to stop people fishing or their cattle drinking water from the lough.
- He recalled an old pad a couple of feet wide between the field and the lough accessed from the BF.
- There was never a fence on his land between the land and the lough. For generations his cattle had drunk water out of the lough. He had used water from the lough for the house and for cattle. Moygashel never bothered with anyone about this.
- He recalls fences perpendicular to the lough to stop cattle straying into the next farm.
- He recalled a few hundred people on the lough shore on Sundays. There were two routes namely from the LF or the BF. The McNulty field was not fenced or wired as otherwise people could not have obtained access to the lough.

- There was a debate between him and Mr Sands as to whether or not some photographs of his land showed a post and wire fence as opposed to his argument that it was simply an electric wire to keep the cattle back put up by him after the case involving Mr Trimble and Mr Ross. I was unable to determine which argument was correct.

- He denied ever seeing a hedge or fence across the BF and the LF. He did not accept that Moygashel did not want cattle there rendering the lough less than sterile.

The defendant

[59] The defendant had made two affidavits and gave evidence before me. He had purchased the lough in 2000/2001. His background was that he was born approximately half a mile away and had spent most of his life as he described it "not too far from the lough". His aim had been to tidy up the lough and to open it up for fishing and outdoor pursuits. He has now operated it as a fishery and outdoor pursuits centre in which he allows fishing if health and safety standards are adhered to together with annual events such as a triathlon. He claims he no longer permits casual swimming because it could require a lifeguard and public liability insurance which at the moment only covers fishing related activities. He claimed he had travelled around mid-Ulster and looked at various reservoirs all of which strictly prohibited swimming because of the health and safety concerns.

[60] He said he had bought most of the McNulty land in or about 1998 and had built a house next to the lough field. He had observed fencing on the land and there is still remnants of the old fencing with posts and two strands of barbed wire separating it from the lough. He recalled an incident in 2002/2003 when he alleged Mr Sloan had loaded clay into the shore of the lough.

[61] He was never aware of any public right of way along the shore from the McNulty land to the sluice gate. He recalled that the area was full of brambles and hedgerows and was extremely muddy. The only people he saw walking along the area were fishermen who had accessed the area from Drew Lane.

[62] When challenged as to the presence of the phrase "existing dilapidated ex-maintenance path along shoreline" inserted on the McKeown and Shields map of June 2003 (architects and engineers retained by him), he explained this as the reference to a pathway that he had constructed while clearing the area along the shoreline by virtue of an excavator. An application for planning permission made on his behalf by McKeown and Shields of 4 March 2003 had recorded:

> "Description of proposal: proposed retention of paths, jettys, fishing stands and extended car park."

His explanation of this was that it was a loose use of phraseology by McKeown and Shields in the course of a general planning application.

[63] Mr Ross accounted for the reference on the Hagan map of 2003 referring to "old pathway" in his handwriting as a reference to the pathway along the LF (belonging to Pat McNulty) down to the shoreline.

[64] When challenged as to the absence of any mention of fencing along the McNulty land on the Hagan map, the defendant asserted that the sole purpose of the Hagan map was to draw the edge of the lough and the only issue was whether or not he was building on his own property. The references to fencing would therefore have been irrelevant.

[65] He had no recollection of any fences into the lough water to prevent cattle straying from one field to another.

[66] The defendant was aware that people did swim from time to time there although he said that from the advent of the leisure centre in Dungannon in 1972 this became very rare indeed.

[67] There was much cross-examination about the 1983 photograph but as I have already said, I have been unable to discern any positive conclusions from that photograph and accordingly I do not intend to deal further with it.

[68] His evidence was that he had built a new road around the lough into the water itself. He had stipulated to his architect that he wanted the road built where the water was on the basis that he owned the bed of the lough. He had lowered the water by the sluice in order to build this. There were a number of deep holes there which were filled in. He had been assigned in the relevant conveyance the bed and soil of the lough and the water that covered it. It was his view that the lough to its "high water line" had been sold to him. Whilst there was a reference in the Deed of Conveyance to Mr Ross to "excepting rights, if any, of owners of adjacent lands", he was unaware of any such rights.

[69] The defendant asserted that when he had bought the lough, there were brambles, bottles, plastic bags together with a smell from the dump in Mr Trimble's field over the lough.

[70] He now allowed the fishing club with 45 members to use it with his permission and tourists buy tickets to go fishing there. Open water fishing opened in May of the year he bought it. There was an argument as to whether or not the lake was in poor condition at the time it was bought – the defendant alleged that there was blue algae which meant that people would not be swimming in it. He asserted that he had cleaned up the algae by the use of barley straw which he deployed in bales weighed down every 200-300 yards and within a matter of weeks this had resolved the problem. Even now they still can have an algae bloom.

Conclusions

1. *Trespass*

[71] The learned County Court Judge correctly summarised this issue as follows:

> "The defendant has constructed a hard core based and tarmacadam surface path around the lough. This is divided from the neighbouring lands by fences erected by Mr Ross in or about 2003. The plaintiff argued that the portion of this path, which abutted the 'Back Field', trespassed on his land as did the fence. The defendant on the other hand claimed that the path was constructed on what was in essence reclaimed land, created when he opened the sluice gates at the end of the lough and thus reduced the water level from the high water mark, which was the original outer limit of his ownership."

[72] The Land Registry map as interpreted by Mr Kelly and Mr Heatherington on the part of the plaintiff would lead to a conclusion that there had been an area of encroachment of 146 square metres.

[73] I have come to the conclusion that the learned County Court Judge was correct in concluding that trespass had not been proven in this case. I am of this view for the following reasons.

[74] First, the authorities are replete with assertions that the description of any land in the Land Register shall not be conclusive as to the boundaries or extent of the land. See the Land Registration Act (Northern Ireland) 1970 Section 64(1) and "Land Registration Northern Ireland" by Arthur Moir at paragraph 6.9 where the author has stated:

[75]

> "The problem of inexact mapping was compounded when the Registry began to computerise its maps at the turn of the millennium, as it was quickly discovered that the transposition of boundaries from relatively inaccurate maps to much more accurate computerised maps caused a large number of boundaries to be distorted."

[76] The original Land Registry map dating from 1906 depicts the boundary line set back by 13 metres from the current Land Registry map according to the evidence of Mr O'Neill which I accept. As earlier indicated, I was impressed by Mr O'Neill's

evidence on this matter and I am satisfied that his interpretation of the 1906 original Land Registry map is more likely to be the correct one.

[77] Secondly, it is clear that the conveyance of the land to the defendant unequivocally states that the ownership of the bed and soil of the lough and the waters rising over it are within his ownership. I was unimpressed by the assertions by the plaintiff and his experts that the water level in the lough had somehow altered with the advent of a new sluice sometime in the 1950s. I could find no convincing evidence as to what the earlier heights had been and those heights that were put before me as recorded on OS maps represented heights at a particular moment and not an overall pattern. None of the documentation before me made any mention of the increase in overall levels of the lough and I felt Mr Sands made a valid point when he indicated that one would have expected farmers to have been aware that water levels had risen with consequent possible flooding to their fields.

[78] Thirdly, I was as impressed as the learned County Court Judge by the presence of the 2005 ordinance survey photograph on which had been superimposed the edge of the water from the 1988 ordinance survey map. As the judge pointed out, from this it is clear that the path is entirely on the defendant's side of the boundary.

[79] Fourthly, a survey was carried out by Mr Hagan in 2003. He had depicted a line recording the edge of the lough before the respondent had constructed the road that is now in dispute. Superimposing that line on a 2014 topographical survey again suggests that the respondent's road had been constructed on what was clearly the water of the lough.

[80] Finally, although probably of least importance, I was somewhat impressed by the evidence of Mr Patterson which illustrated the presence of water covering the land on the McNulty side of the road and therefore the proposition that Mr Ross had built on land which had been under the water.

[81] I therefore find that the plaintiff has not proved trespass in this instance.

2. Are there easements of a right to swim in the lough, a right to sunbathe on the lough shore, a right to fish in the lough, a right to access the lough to obtain water for domestic use and a right of access by cattle to the lough?

[82] I have come to the conclusion that the learned County Court Judge was correct to conclude that no such easements exist in the instant case. My reasons are as follows.

[83] First, whilst I have no doubt that swimming, and for that matter some aspects of sunbathing, did take place in the lough and the lough shore as evidenced by the photographs produced to me during the 1970s and 1980s by the plaintiff's family and indeed by members of the public, nonetheless I share the view of the learned

County Court Judge that such pursuits cannot be described as something reasonably necessary for the enjoyment of the dominant tenement provided by the servient tenement. None of these matters could ever reasonably be necessary for the enjoyment by the plaintiff of the BF. No claim is made by Pat McNulty as the owner of the lough field for such easements and therefore I am confined only to looking at these in the context of the back field.

[84] I am satisfied that these matters did not accommodate or benefit the dominant tenement. They are not necessary for the better enjoyment and are mere recreational activities. As Santow J said in Clos Farming Estates (see paragraph 22 of this judgment), it is not enough that these matters confer advantages on the owner of the tenement as would a mere contractual right. It is not enough that the land be a convenient incident to the right.

[85] In any event the swimming and sunbathing occasions were, I conclude, facilitated by the permission of the McNulty family to permit such people to go through their lands. This could have been stopped at any time by Pat McNulty or indeed the plaintiff or his predecessors.

[86] I consider that the swimming has largely disappeared now since the advent of the leisure centre in Dungannon and the passing of the 1980s.

[87] So far as the fishing is concerned, whilst again this has probably been carrying on for a long time, the preponderance of the evidence is to the effect that this was only with the permission of the Ranfurly estate and more particularly Moygashel with the use of permits and leases between Moygashel and Dungannon Angling Club from as far back as 1946. It is clear to me that the McNultys themselves fished with the permission of the Dungannon Angling Club.

[88] On the question of water for domestic use, very little evidence in recent years was presented before me on this aspect of the case. This is not surprising because it seems to me that whilst many years ago use may well have been made of the lough, with the advent of main supply waters, such use has been rendered unnecessary for many years now.

[89] Turning to the access of cattle to take water from the lough, I share entirely the views expressed by Robert Carswell, junior counsel in 1972 who stated, in the course of a characteristically well-researched and sage opinion, as follows:

> "The riparian owners who occupy lands abutting on the lough, do not, in my opinion have rights of drawing water from the lough. A riparian owner of a lake is entitled to access and egress to and from that water. …. This does not ... extend to the right to abstract water from the lake itself, the right of a riparian owner of land abutting onto a river. The

> situation is quite different with a river where is a flow passing the riparian owner's land which the riparian owner is entitled to use so long as he returns it undiminished. But there is no indication in any of the authorities that the right extends to a lake and in principle the right of abstraction of water on the part of a riparian owner should be limited to circumstances where a flow of natural water reaches him. Ownership of the bed and soil of the lough would therefore give the company the exclusive right to take water from the lough."

[90] That opinion went on of course to state the obvious matter that their title is expressly subject to the rights of other persons presently existing in respect of the water of the lough but I do not consider that any such rights were properly outlined in this case.

[91] While some cattle from time to time doubtless did take water from the lough, I have no doubt that this was sparingly tolerated. It stands to reason that Moygashel would have needed the water to be clear and sterile and it offends common sense to suggest that they had permitted such activity to carry on in any scale.

[91] In this context I again would find that it offends common sense if Moygashel had not caused to be in situ some boundary fencing however sparse to prevent cattle on a large scale getting into the water. Whilst there may well have been gaps over time e.g. in the LF or the BF this is probably a breakdown of the fencing rather than proof of the absence of such fencing in total. Whilst I had a plethora of various photographs and maps drawn to my attention, hard independent objective evidence of the presence or absence of fencing is not present in this case. However I note that it was drawn to my attention that in a letter of 1970 from the engineer of Moygashel in connection with a bungalow being built by the McNultys he refers clearly to "the farmland on this side extending right down to the lough boundary fence". I do not see why, at a time when it was not controversial, he would have referred to a boundary fence if there had been none. Mr Sands also correctly draws my attention to the fact that another farmer Mr Symington paid Moygashel for the right to pipe drinking water on a large scale from the lough for his dairy herd. This fits the pattern of Moygashel, from a common sense point of view, not wishing to have cattle take water from the lough on any kind of large scale. I have no doubt therefore Moygashel would never have permitted cattle to drink from the water unless on a very sparse, casual and intermittent basis. No such right to allow cattle to drink from the lough therefore exists.

3. Right of access to and egress from the lake – riparian rights

[92] The natural rights of an riparian owner, that is, the owner of land intersected or bounded by a natural stream, may be shortly defined as threefold. First, he has a

right of user. He can use the water for certain purposes connected with his riparian land. Secondly, he has the right of flow. He is entitled to have the water come to him and go from him without obstruction. Thirdly, he has a right of purity. He is entitled to have the water come to him unpolluted.

[93] The person who owns land bounding a natural water course has various riparian rights therefore regardless of whether he also owns the bed of the water course (see Lyon v Fishmonger's Co [1875-76] LR 1 App CAS 662). The rights were described by Lord Templeman in Tate & Lyle Industries v Greater London Counsel [1983] 2 AC 509 as follows:

> "As riparian owners Tate & Lyle are entitled to access to the water in contact with their frontage, and to have the water flow to them in its natural state in flow quality and quantity so that they may take water for ordinary purposes in connection with their riparian tenement including the use of water power."

[94] The right of a riparian owner to have entitlement to access to egress to all rivers can apply to Lakes. The leading authority is that outlined by me in paragraphs [25] and [26] of this judgment where I dealt with the cases of Marshall v Ullswater Steam Navigation Company and Earl of Iveagh v Martin. There is no public right of way across this lake in the sense of it representing a public highway with a right to go on it from any spot on the abutting land owner's land. This is a lake that was used by Moygashel for commercial purposes and they must have jealously retained the right to control that lake and prevent persons trespassing thereon to ensure that the water remained pure and suitable for their purposes.

[95] Consequently, I am satisfied that the learned County Court judge correctly concluded that this case fell outside the Marshall case principles and that there can be no right of access to the plaintiff through a claim of riparian ownership.

4. The right of way, private or public

[96] Despite the evidence of the various witnesses that they had walked from time to time along the shore by means of a path, I am not satisfied that any such path or right of way exists. I am of this view for the following reasons:

(i) I fear time and a natural inclination to frustrate the defendant's case may have, perhaps unwittingly in some instances, coloured the recollection of these witnesses. Surprisingly I did not see any hard evidence, despite all the aerial photographs/ordnance survey maps produced to me, of any path. Of course whilst normally a right of way will be over a defined path, this is not necessarily the case. An implied grant of a right of way has been found where there was a gate at either end of a garden with no obvious track between (Donnelly v Adams [1905] 1 IR 154). In Wimbledon and Putney

Commons Conservators v Dixon, a prescriptive claim succeeded even though a number of different tracks had been used. As long as the user is as of right and amounts to an exercise of a right of passage across the land, the absence of any precise path is not fatal. Those situations are factually distinguishable from the present. In the present case I found no evidence of any path whatsoever.

(ii) On the contrary, I found the evidence of the survey by Mr Hagan to be compelling. If there was a clearly delineated pathway 2/3 feet wide as related by these witnesses on behalf of the plaintiff , I cannot conceive of any reason why Mr Hagan would not have recorded this on his survey prior to the work being carried out. It is inconceivable that given the details that he has mounted on his map, he would not have recorded such a pathway.

[97] If the pathway was that depicted on the McKeown & Shields map described as "existing dilapidated ex-maintenance path", then, as Mr O'Neill measured, it would have been in places 10 feet wide and another 16-23 feet wide. It is inconceivable that Mr Hagan would have missed a path of this varying width. I am satisfied therefore that the explanation of that phrase is probably that given by Mr Ross, namely that it was the track that he had forged with the excavator.

[98] Finally, whilst I have no doubt that from time to time fishermen or members of the McNulty family may have walked along the shore area towards the sluice gate, I am satisfied that this did not represent anything other than an un-delineated muddy walk which did not have any precise destination in an overgrown reedy area. It clearly did not fall within the accommodation pre-requisite for the dominant tenement and is not reasonably necessary for the enjoyment of that land. I have no doubt that Moygashel tolerated this but were not granting any right of easement, nor was the walker or walkers asserting same. Mr Sands properly draws my attention to the fact that Moygashel Mills did grant "strolling rights" to the general public along lands adjacent to the nearby Black Lough but never granted any such rights in respect of Eskragh Lough.

[99] So far as a public right of way is concerned, I have already outlined the criteria for this in paragraph [27] of this judgment. I invited counsel to consider joining the Attorney General or any other public body as a representative of the public interest in this case but they each indicated that this was unnecessary. I consider that where a public right of way is being asserted, normally the Attorney General should be joined as a representative with a public interest. However in the present case I believe that the assertion of a public right of way is so unsustainable and the connection of the public with this area so exiguous, that there was no need to do this. I am satisfied that there is not a scintilla of evidence either that the public had established any right of passage by way of dedication of such a right to the public by the owner or that the defendant or any of his predecessors had conducted themselves as so as to lead the public to infer that it meant they were willing that the public should have this right of path for all the reasons I have

outlined above. In any event the public would have been unable to get access to this area without the permission of the McNultys either through the BF or LF. Accordingly it is inconceivable that the public could have had a right of way across this area in the circumstances.

[100] In any event, the evidence of the public using this matter in the last 20 years has been devoid of any real substance and there is an evidential lack of any basis for such an assertion. In short I consider there has neither been any express dedication of this way to the public nor has the use been such that dedication should be implied. I am satisfied that any reasonable member of the public would have recognised that not only the McNultys could have prevented their access to the shoreline, but that the owners of the lake had maintained the right to deny passage to anyone they chose. The tolerance of swimmers or fishermen from time to time strolling in this area did not in my view amount to such dedication. I find nothing in the evidence of those who used the area to suggest anything other than neighbourly permissive use or a failure to challenge on the basis that not every incursion had been noticed and the amount of incursion was so rare as to scarcely merit notice. Hence there has not at any time been a dedication to the public either expressly or by implication of any part of this shoreline.

Conclusion

[101] Accordingly, I have come to the conclusion that this appeal must fail and I affirm the decision of the learned County Court Judge.