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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18/10/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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IN THE MATTER OF ESTATE OF HARRY MURPHY DECEASED

BETWEEN:

HENRY JAMES McLAUGHLIN and JANE ANN McLAUGHLIN

Plaintiffs;

and

GLADYS MURPHY and DONAL MURPHY AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HARRY MURPHY DECEASED

Defendants.

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DEENY J

[1] The plaintiffs are the son-in-law and daughter of Harry Murphy deceased and of Gladys Murphy the first defendant. The second defendant is Ann McLaughlin's younger brother. The defendants are the executors of the estate of the deceased. He died on 7 December 1998 and probate was granted on 24 March 1999. Mr Mark Orr QC appeared with Mr Michael Humphreys for the plaintiffs. Mr Craig Dunford appeared for the first defendant. He conveyed to the court at the appropriate time that his client was greatly affected by the fracture in her family. As executor she was content to abide by the decision of the court on the evidence. She did not wish to call any evidence although Mr Dunford made a short and helpful submission on the law at the conclusion of the case. Mr John Thompson QC appeared with Mr Martin McDonnell for the second defendant.

[2] The plaintiffs seek a declaration that they are the full and beneficial owners of a property situate and known as 11 Carnanbane Road, Dungiven, County Londonderry, outlined in red on a map annexed to their writ of summons. It consists of a dwelling house, garage and some sheds with an area of 0.75 acres, approximately, bordering the Owenrigh River, about 3 miles from Dungiven. The plaintiffs also seek an order requiring the defendants to execute a transfer to the plaintiffs of the legal title of the said property.

[3] The case arises in this way. The property in dispute often referred to simply as Ann's house or the house in the course of the evidence was part of Craig's farm. The late Henry Murphy was registered as owner of that property on 2 December 1964. At some stage thereafter for a period of time a family called O'Reilly lived in the dwelling house. I find on the evidence that the house was in poor condition and I accept that the O'Reillys had it declared unfit for human habitation and thereby obtained public housing in or about 1970. The house was then completely uninhabited and nearly derelict, with the exception of the roof, for several years.

[4] The second plaintiff, known as Ann, is the second child and eldest daughter of the deceased. She is 54 years old and a nurse by profession. She met her husband, the first plaintiff, in or about 1969. They were engaged in the autumn of 1972. The issue arose as to where they would live. She thought the house at 11 Carnanbane could make a nice place to live in. It is interesting to note what happened next. She did not approach her father directly but asked a neighbour and his close friend James Stephenson to approach her father. I heard six of the seven children of the deceased who gave evidence and it was clear that he was held in a degree of awe by them. He was not a man to whom you put impertinent or even pertinent questions.

[5] In the event Mr Stephenson reported that her father said that she could have the house. She then spoke to her father saying she believed Jimmy had spoken to him. The deceased said "That would be great. I am delighted you want to live there." This was in front of her brother Patrick and her sister Dolores and her mother. On a subsequent occasion, after other conversations, her father handed to her and her fiancé Seamus the large old door key, which Seamus produced in evidence. At that time he said words to the effect of:

> "There is the key to the house. Good luck. Make that your home."

[6] Her sister Dolores, who is a health centre practice manager, and has no axe to grind in this matter, corroborated that account. Her brother Patrick Joseph Murphy who has no direct interest in the matter although he is owed a site by his brother Donal, was present when Mr Stephenson told Ann that her

father had agreed to give her the house. The first plaintiff gave similar evidence.

[7] On foot of this the plaintiffs engaged, with the encouragement they would say of her father, an architectural technician, Donald Forrest who prepared plans for the renovation of the property. It is to be noted that the plans were then used for a grant application to the Housing Executive, which was in the name of Henry Murphy and not of either of the plaintiffs. The plaintiffs were married in June 1974 and for the first two years lived with the deceased and the first defendant at their property at 74 Magheramore Road on the other side of the farm. During that time Mr McLaughlin said in evidence, and I so find, that he did work on the house which would not interfere with the Housing Executive application for a grant. By June 1976 a bedroom, living room, kitchen and bathroom were habitable and the McLaughlins moved in, which they were keen to do as she was then expecting their first child. The plaintiffs have set out in detail in their replies and in their evidence the work they did. Mr McLaughlin thought he had done about £4,500 worth of work which accorded with the Housing Executive calculation. I find, having heard all the evidence, that he principally did this work himself. He paid for some assistance from specialist sub contractors such as electricians and plumbers. He was a bricklayer to trade himself, several of his brothers worked in the building industry and they helped him.

[8] The deceased gave some assistance with regard to a door and skirting and the erection of a flat pack kitchen for his daughter in the new house. It may be that Donal Murphy also gave some assistance as he claimed but it must be borne in mind that he is now only 46 years old having been born on 22 June 1961. He was therefore a boy of only 14 or 15 at this time and presumably his involvement was limited. This expenditure by Mr McLaughlin included, on his evidence, the purchase of the materials for the building works with the exception possibly of a trailer or two of materials provided by his father-in-law. Having heard all the evidence I accept that that was the case. The first significance of that is, therefore, that there was considerable expenditure here by the McLaughlins on this house.

[9] However there is another important aspect to the evidence. The Housing Executive paid a grant of £1,600 to Mr Murphy. This was a not inconsiderable sum of money at the time. The building of a bungalow was said in evidence to have cost about £4,500 at that time or perhaps £5,000 to buy a new house, as Mr Thompson said at one point. It is clear on the evidence that Mr Murphy kept that grant. He did not give it to his son in law, as he ought to have done, to assist in the building of the house. Furthermore I am satisfied that while he did some work and perhaps furnished something in the way of materials that it fell far short of the £1,600 which was more than a third of the total cost of the works at that time.

[10] The McLaughlins remained in the house and still live in it. They have brought up five children in it and indeed three of those children and a granddaughter still live with them there. On all the evidence they have made a good house of it with concrete yard and handsome lawn and double garage. They remained on good terms with Ann's parents and indeed she, as the nearest daughter it would seem, was attentive to her father and drove him about in his later days.

[11] As stated above Harry Murphy died on 7 December 1998. A few days later the eldest son Martin, who lives in New Jersey, USA, but who comes home every year to see his relatives, went to see the family solicitor, on a Saturday and obtained the Will from him. He then took it with him and read it to his brothers and sisters, in the absence of all their spouses, at the home place. At the conclusion of this reading, he declared the Will to be "disgraceful". He was indignant on behalf of his mother and sisters. His mother had been devoted in that capacity and as wife, and who had worked on the farm all her days, had been left nothing but a right of residence in her own home for her life and a payment of £1,000 within 2 years without interest. (I note that the earlier Wills had provided a right to be maintained therein in the manner to which she is accustomed but this was not found in the last Will dated 20 July 1989). Furthermore there was a marked contrast between the treatment of the sons and daughters. While the second defendant Donal Murphy was left all four farms, and his brother Brendan the home place after his mother's death and the other brothers between £4,000-£8,000 each and plots of land on which to build a dwelling, his daughters Marion and Dolores were left only £500, each, payable within 2 years, without interest. The second plaintiff Ann McLaughlin was dealt with as follows:

> "That the bequest to Donal of the four farms, including Craig's farm, was subject to and charged with the following . . .
>
> "(h) The right of my daughter Ann McLaughlin to have the exclusive use of the dwelling house on Craig's farm aforesaid during the term of her natural life."")

[12] Martin said in evidence that having expressed his opinion about the Will he then turned to his brother Donal and said: "What are you going to do about this house of Ann's?". Donal was "very relieved" to have received the land and he said:

> "I am going to sign this house over to Ann first thing on Monday morning. Dolores, you can come with me as a witness."

[13] All about him wished him well. He would take care of it. The first plaintiff described what he said as:

> "He agreed he would go in on Monday and sort it out and asked Dolores to come with him and be a witness."

[14] Her sister Dolores said that Donal was in agreement with what Martin said and that he would go on Monday to sign over the house to Ann and take me as a witness as I was living at home at the time. Their brother Patrick said that Martin spoke to Donal about sorting out the house for Ann meaning getting it signed over. As he was leaving he shook hands with Donal, later and said:

> "Make sure you sort out that house for Ann."

[15] He said he would do it at the beginning of the week. He had agreed with Martin that he would do it and take Dolores with him. He couldn't believe it had not already been done. Mr Thompson cross examined on the basis that by sorting it out Mr Donal Murphy had intended that he would go and speak to the solicitor about it but had not committed himself to signing it over. In evidence Donal Murphy said that the four siblings were all definitely wrong. He did not say he would sign it over but he would sort it out meaning that he would get legal advice. He himself did not know what the Will meant.

[16] In cross examination Mr Orr put to him that leaving aside his own client Ann, the three other siblings Martin, Patrick and Dolores had all heard him say that he would take Dolores with him as a witness but he said they were all wrong. I reject his evidence in this regard. I am satisfied that he did say that i.e. that he would take Dolores with him as a witness. That clearly points to the correctness of the recollection of those witnesses who said he would sign over the house because he might well need a witness for that but he would not need a witness to go and take legal advice. More generally, the evidence of the second Defendant was marked by evasiveness and by a series of assertions which had never been put to the Plaintiffs or their witnesses. No explanation was advanced for this. The legal significance of what he said I will leave until later.

[17] In the event Mr Donal Murphy did not take any steps to sign the matter over. I think I can deal with aspects of the matter after the Will fairly briefly. Mr Thompson wanted to know why the McLaughlins didn't take action earlier. Mr McLaughlin said that he hoped and thought that Donal would come round. He went to speak to him some time after the death of Harry Murphy but Donal said because of words that had passed between their respective wives he was not minded to sign over the property. There was a further debate relating to something to be done in the yard at Craig's farm. According to Donal, and this

was not disputed, Seamus McLaughlin junior, the son of the plaintiffs, said to Donal's wife and son –

> "We don't need to listen to you b*****ds down here – this is our property".

[18] He said something similar that evening when Seamus McLaughlin came with his son to Donal's house to talk about the sheds. I am inclined to accept Donal's evidence that this contributed to him relying on the wording of the Will and refusing to sign over the property to his sister. It is interesting for another reason i.e. showing that the plaintiffs' son had been brought up with the belief that they did own the house outright and were not beholden to his uncle Donal. It is a straw in the wind.

The law

[19] Counsel for the second defendant relied on the following passage from Halsbury's Laws of England, volume 16(2) at paragraph 1089 as a general statement of the law.

> "This fivefold test has, however, now largely been abandoned in favour of a threefold enquiry based not on B's mistake but on an agreement between A and B or in A's encouragement of B's expectation. The court will enquire:
>
> (a) whether an equity in favour of B arises out of the conduct in relationship for the parties;
>
> (b) what is the extent of equity, if one is established; and
>
> (c) what is the relief appropriate to satisfy the equity?
>
> The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of proprietary estoppel; in the end the court must look at the matter in the round. Whether the principle is called proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is said to be really immaterial. Unlike other kinds of estoppel, proprietary estoppel may be a cause of action but only where it involves the promise of an interest in land."

[20] Mr Orr cited the section of Snell's Equity, 31st Edition, 10-15 following, including the well know dictum of Oliver J in Taylor Fashions Limited v. Liverpool Victoria Trustee Company Limited [1982] QB 133N which inspires Halsbury's modern statement to a significant degree i.e. -

> "If A, under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation."

[21] It is obvious that dictum applies to the estate of B as much as to B himself. It is also clear in the modern authorities that the relief granted by the court must be proportionate to the detriment suffered. It is accepted that the representation is not confined to existing facts but extends to future conduct. See Lowry v Reid 1927 N.I. 142, C.A.

[22] One of Mr Thompson's principal submissions was that whatever was said by Mr Harry Murphy did not constitute a representation which was "clear and unequivocal" and therefore could not create a proprietary estoppel. He relied on that as a requirement because the phrase is found in the judgment of Ralph Gibson LJ in J T Development Limited v Quinn [1991] 2 EGLR 257 at 261 M. I note however that Glidewell LJ did not agree with Gibson LJ on the issue of proprietary estoppel. Therefore it fell to Lord Donaldson of Lymnington MR to side, in a short judgment, with Ralph Gibson LJ "although not without hesitation". I note however that he did not repeat the words used by Ralph Gibson LJ. He preferred the more general statement of Lord Denning MR in Panchaud Freres Sa v Etablissements General Grain Co [1970] 1 Lloyd's report 53 at page 57:

> "It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has to be taken to be settled or correct."

[23] I accept Mr Orr's submission that not all representations in the decided cases have been found to be clear and unequivocal e.g. Jennings v. Rice [2002] EWCA Civ 159. Furthermore it cannot be doubted that in some incidences there is both a representation and encouragement or even silence. See e.g. Steed v. Walker [1740] Barn Ch 220.

[24] It does seem to me right that I have to ask what expectation had been created by the words, acts and silence of the deceased Harry Murphy towards

his daughter and son-in-law. Was it an expectation that they would own the house outright, and if so when or was it merely an expectation that she would have the use of it for her natural life, as he provided in his Will? I also accept the submission of Mr Thompson that even if I found that the expectation created was one of outright ownership, sooner or later, I would have to find that the conduct of the deceased was unconscionable in failing to confer that outright ownership, or, I might add, in failing to inform his daughter as to what he was going to do.

[25] In the alternative one could approach it in terms of the dictum of Oliver J cited above. There is no doubt that the deceased created and encouraged an expectation in the minds of his daughter and son-in-law. The real issue is what the "certain interest in land" was that they were entitled to expect from his representations, of one kind or another. Again in the alternative if one takes the plaintiffs' citation of Halsbury's Laws there is no doubt that an equity has been created in favour of the plaintiffs. The real issue is what is the extent of that equity in duration and in physical terms.

Applying the law

[26] In argument Mr Thompson laid considerable stress on the insurance position. I find as a fact that he had established that it was the deceased who insured this house up until about the time of his death. Mr McLaughlin was unable to prove that he had insured it himself until 1997 although he believed he had done so at an earlier stage. Along side that Mr Thompson pointed out that the two earlier Wills of the deceased in 1980 and 1985 also left to his daughter Ann the house at Craig's farm only during the term of her natural life. I therefore conclude that the deceased believed, certainly in the 1980s, that he had retained the ownership of the house and that it was for him to dispose of. That does not, of course, end the matter. Taken with his earlier representations and encouragement, which I find he provided, two explanations are possible. Firstly he may have believed that when he handed over the key to the McLaughlins and invited them to make their home there he was only doing so for his daughter's life. Secondly, he may well have intended, as I find they did believe, that he was committing himself to giving the house to them but that he changed his mind at some later date. In the light of Mrs McLaughlin's own evidence and the other evidence her expectation was, I find, that she would be left the house and its immediate environs outright in his Will. That expectation, which is not in itself enough to give any right in law, is consistent with all the evidence, including her husband's evidence that he suggested to her on several occasions that she should raise the matter with her father. As the authorities set out in Snell 10.17 show, the fact that the representation was that she will obtain a benefit in the property or that she and Seamus will obtain such a benefit is not a bar to proprietary estoppel in the modern law. I must therefore consider whether the deceased was in good conscience at liberty to leave to Ann and to Ann only a life interest only in the

property or whether it was unconscionable for him not to have left her an outright interest in the light of any detriment, in particular, that she or her husband would suffer. As a matter of fact the deceased never did tell Ann what he was doing and so I do not have to consider what the legal effect of him having done so belatedly in the 1980s or even the 1990s would have been. That fact is, however, relevant in another way.

[27] In support of his submissions in this area Mr Thompson laid considerable stress on the answer of various witnesses when he put it to them that the deceased was a man of integrity. They concurred in that description. However I have to say that one would expect little else from children when such a question was put to them about their deceased father. The court clearly has a duty to form its own mind as to his conduct in this regard.

[28] I have reviewed and taken into consideration the helpful submissions of counsel in closing the action. I will not set them out seriatim. I have mentioned some of Mr Thompson's significant points above and I will mention several more now. He asserted that Donal had paid insurance on the house also but I accept Mr Orr's submission that that has not been proved to the satisfaction of the court. Furthermore the sums paid by the deceased were modest but in any event only go to show that he considered that he was still the owner of the property. That does not bar the equity. Similarly Mr Thompson's point that he organised a 500 metre long concrete laneway to the house in 1982 does not prevent the equity arising. This was grant-aided 100% by the Department of Agriculture. His own son was actually the sub contractor although Donal said that he and his father helped also. It is part of the second defendant's case that this lane gave access to the two larger sheds, one a former flax mill apparently, to which Donal Murphy still lays claim. I will bear that in mind.

[29] Mr Thompson laid stress on the failure of the McLaughlins to tackle Harry Murphy in his own lifetime about the title to the land. As I said above she was content to wait for the Will. Mr Thompson says that is inconsistent with the expectation. While in theory if Ann had asked there were three possible outcomes i.e. he would have said yes you are getting it outright or no you are only getting it for your natural life or thirdly he would have declined to answer, on all the evidence about the deceased it is clear that the third would have been the answer. It might have had the additional and secondary effect of altering his view of Ann to her loss but on the probabilities I am satisfied that her failure to expressly ask was not inconsistent with her expectation.

[30] One then looks to the other side of the equation. It seems to me that there are a considerable number of factors here supporting the plaintiffs' case that the deceased created and encouraged an expectation that the plaintiffs would become (or had become) the outright owners of the house at Craig's

farm and that it would be unconscionable for the estate of the deceased to resile from that expectation which had been created.

[31] Firstly, there is the giving of the key to the McLaughlins with the invitation to them to make it their home. I agree that home may be used by tenants on occasions but the language more readily lends itself to an outright gift than to the gift only for the natural life of one of the donees. There are no words of qualification then or later. Furthermore, Mr Stephenson, according not only to the plaintiff but one of her siblings, said that her father had agreed "to give the house" to Ann and Seamus. As this is double hearsay I would only give modest weight to that item but it does support the plaintiffs' case.

[32] Secondly, I am satisfied that the reconstruction of this house from something close to a derelict condition to a comfortable and agreeable residence was almost entirely due to expenditure by the plaintiffs or work and labour by Seamus McLaughlin, while acknowledging that no doubt there was some help from other members of the family. This expenditure was known and obvious to the deceased who was in and out of the house as father, grandfather, neighbour and the farmer of adjoining fields.

[33] Thirdly, I accept the evidence of the plaintiffs that there was continuing expenditure by them as set out in the pleadings over a long period of time to improve the house and environs. I find it quite unconscionable for the deceased never to have said to his daughter that before she or her husband were spending all this money they should bear in mind that she was only to have the house for her day and Seamus was to have no interest at all.

[34] Fourthly, the deceased was inevitably aware of his daughter having five children, in succession, beginning in 1976 when they moved into the house. It would have been plainly obvious to him that they would want to pass the property on to one or other of their children in due course, as he himself was doing with his property. I find that the existence of the children, the grandchildren of the deceased, reinforces the fact of the equitable expectation being one of outright ownership ultimately rather than mere life tenancy.

[35] Fifthly, I find that the deceased kept all or virtually all of the government grant of £1,600 for his own use and did not spend it on the house. That is a step that any court must deprecate. The grant was paid for the purpose of improving the house and it was quite wrong of the deceased to keep it. The modest amount of work he did would be no more than a father skilful with his hands would have done for a daughter in those circumstances. Likewise any contribution from her brothers. It seems clear that if some materials were delivered they were modest in extent. It is a significant factor in rendering his conduct unconscionable.

[36] In the course of his evidence the second defendant was taken to a bundle of invoices which had been referred to in their list of documents but not previously furnished to the plaintiffs' solicitors. The reason for not furnishing them is I think apparent from the documents i.e. they were not in truth relevant. While they are considerable in volume they are all entirely consistent with work that the plaintiff did on his own house from time to time or on his farm buildings. I do see Ann McLaughlin's signature on one docket of 1979 for wallpaper. Whether her father paid her for that or whether she paid for it for her own house is not clear but the total amount in the invoice is £5.79. It is a useful reminder that £1,600 was a substantial sum of money in the 1970s. It is particularly striking, that, as the second defendant acknowledged, there are no invoices for the period 1974 to 1976 when the McLaughlins were married and working on the house prior to moving in.

[37] Sixthly, the detriment to the McLaughlins in this case is not confined to the expenditure on a house which they have for her or their lifetimes. It might be said that a lifetime living rent free might compensate them for the sums involved although they would dispute this. When this was put to Mrs McLaughlin she said that if they had known this was the case they could have and would have bought a house in Dungiven where houses were being built in the 1970s. When Mr Thompson put to them that that might have cost £5,000 or more, which may or may not be correct, Mrs McLaughlin said she believed they could have borrowed that. Given that she was a qualified nurse and her husband was regularly employed in the building trade and later a foreman, I find that they would have been in a position to obtain a sufficient mortgage for a house in the Dungiven area in the 1970s if they had known that Mr Murphy was not going to honour his apparent promise to them to give them the house.

[38] When Seamus McLaughlin was asked about this his evidence was even stronger. He said that he could have built at his home place. His mother died some years ago and the house was lying empty, only a few miles from Craig's farm. Furthermore he had actually bought a site for £250 near his own home place but after the late Mr Murphy gave them the house he gave that site to his brother. It is unarguable therefore that he has suffered a real detriment here if the court were to confine his equity to what Mr Donal Murphy is offering. If he had been told in a frank and honest fashion that the gift was a qualified one only for his lifetime or that of his wife he, I find, would have put his labours and his hard earned money into building or rebuilding a house on his own land which he would then have owned.

[39] A further and seventh factor is that the Will makes no provision for Seamus McLaughlin. It is true that Donal Murphy said in evidence, and I accept his sincerity in this regard, that "he would not put Seamus out". But that does not really deal with the issue of whether his late father's conduct was unconscionable. As Mr Dunford pointed out whatever about the position of Ann the deceased had made no provision for Seamus. He had ignored the fact

that Ann might predecease Seamus. He also ignored the possibility that their marriage might not continue. At least one of their siblings is in that position, as I heard in evidence. If they had separated Seamus would have been left with absolutely nothing, presuming that his wife would have remained in the house with the children. I think this is a further factor in support of the plaintiffs' case.

[40] Finally there is the evidence of the reading of the Will. Apart from one sibling who was not in the room at the time and one other who did not give evidence all five of the others, I find, were of the opinion that leaving the house to Ann only for her natural life was completely unfair and, to use Martin's word, a disgraceful state of affairs. Those most qualified to judge felt it was unconscionable, without using that word. I find that Donal Murphy agreed with them and was one of those five at that time hence his promise to take Dolores with him on Monday to witness the signing over of the property to Ann. In the circumstances I do not have to decide whether that independently causes an estoppel on his part as it may have deterred her from bringing provisions under the Inheritance (Family Provisions) Order 1979. I say this because taking all these factors into account I am of the opinion that the plaintiffs have an outright equity in the house at Craig's farm. I shall make an order directing the executors to execute a transfer in their favour of the title to the property.

[41] Having determined the extent of the equity in terms of duration I have to determine the extent of the equity in spatial terms. The plaintiffs had exhibited a map with a red line as their proposed boundary. At the invitation of the court Mr Thompson signed a black and white copy of the map on which marked in yellow was the defendant's contention as the extent of the equity. The markings on that map on further examination are a little obscure with regard to a double garage. I will hear from counsel further in that regard. The significant differences between the two maps are as follows. Firstly, the second defendant seeks to retain and exclude from the equity the two larger sheds already mentioned in this judgment, one of which he believes to have been a flax mill. I accept his evidence and that of his brother that their father did indeed store potatoes there while he was still an active farmer and machinery of one kind or another thereafter. It was also used as a winter cattle shed before the construction of another shed nearer the home place. It seems to me that Mr McLaughlin, quite honestly, could not and did not assert any significant use of those sheds. I find therefore that the deceased did not create a binding expectation that the McLaughlin's had acquired or would acquire ownership of those sheds and that therefore Mr Thompson's map is justified in excluding them from the equity. His yellow line then turns across the concrete lane somewhat earlier than the plaintiffs' map. In the circumstances I think that is justified. The third difference is that he runs his yellow line along the ranch fence. I was not aware of any evidence to make that fine distinction i.e. as opposed to the plaintiffs' contention that their title should run to the middle

of the little river which marches with the site at that point. I therefore find for the plaintiffs' red line so far as the river side of the boundary goes. When I have heard counsel on the subject of the small area around the double garage I will invite a fresh map to be prepared to be initialled by the court.

[42] The final issue, which I raised myself with counsel, was whether the McLaughlins' title was subject to a right of way across the yard to get to the bow field, as Mr Thompson called it, south of the house in question and bordered by the Owenrigh River. There was contradictory evidence as to the extent of that use and as to whether there was an access there before Mr McLaughlin improved the property. There was also a dispute as to the usability of a cart track in a nearby field to access the bow field. It seems to me that even if it is not usable by tractors and machinery at the moment a modest expenditure would allow it to become usable. This is particularly in the context that the second defendant is now carrying out active sand and gravel works on the very field where the lane begins. Furthermore he has other fields which adjoin the bow field. It is not a island. It cannot be in the public interest to leave a situation where potential disturbances might arise from the use by the second defendant of his sister's yard to drive machinery through, even a few days a year which is all the defendant asserted. I do not think that is in the interests of either party. I find that there is no right of way through the farm. Even if there was some user of the farmyard, as I accept there was, by the deceased, it did not amount to the establishment of a right of way. It would not be equitable to award one now. I confirm, what I think is not in dispute, that the plaintiffs do have a right of way for all purposes including vehicles along the concrete lane to the public road.