Don’t Let Items Slip Through The Net When Selling Land

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Last month, the Court of Appeal gave its awaited judgment on Borwick Development Solutions Ltd v Clear Water Fisheries Ltd [2020], a case heard by the High Court last year. The case is of interest as it is the first time that these two courts have considered the legal nature of wild fish and whether anyone can own them, but it is of wider importance as it highlights the need to expressly specify anything that should not transfer with property.

The facts of the case are as follows: an LPA receiver purchased commercial fishery land, which included nine manmade lakes and pools along with a number of solar panels. The lakes and pools were stocked with coarse fish, which were of substantial value. Following the sale of the land, the seller asserted that it was the owner of the fish and the solar panels. Neither were expressly dealt with in the contract for sale.

The High Court was asked to decide:

1. Whether or not the fish stocks passed to the buyer; and

2. Whether or not the solar panels passed to the buyer.

Land law states that fixtures (e.g. items fixed to land or a building so as to become a part of it) pass to a buyer on the sale of land. It was held, therefore, that the solar panels were fixtures and automatically passed to the buyer.

Owners, generally, have no absolute property in a living wild animal on their land. This is distinct from a domestic animal. However, it was held that ownership of the fish did not pass to the buyer but remained with the seller. The reasoning was that the seller had qualified property rights in the fish stocks; it had introduced and isolated them in a closed water system.

The two relevant qualified property rights were:

1. The right of a person who takes and keeps possession of a wild animal; and

2. The exclusive right of a freehold owner of land to hunt, take, keep and kill wild animals while they are on

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his land.

Crucially, the Court of Appeal held that the qualified property rights were lost when the property was sold. It did not matter whether the two qualified property rights mentioned above were right or not; when the property was sold, the owner lost possession of the fish and consequently any qualified property rights.

The Court of Appeal referred to a couple of earlier cases to justify its conclusion, one relating to bees in private hives and another in respect of homing pigeons.

It seems therefore that people can acquire certain property rights in wild animals, but these will be lost if an owner loses possession of them whether by a sale or the animals regaining their natural liberty, for example if the bees had escaped or the pigeons were no longer tamed.

There are a number of lessons to be learnt from this matter, in particular the need for parties to agree at an early stage what is included in a property sale, and what is not, and for that agreement to be properly documented.

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