Easter Term
[2016] UKSC 14
[2014] EWCA Civ 846

JUDGMENT

Lynn Shellfish Ltd and others (Appellants) *v* Loose and another (Respondents)

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

13 April 2016

Heard on 9 and 10 February 2016

Appellants

Guy Fetherstonhaugh QC
Charles Harpum
Philip Sissons
(Instructed by Andrew Jackson)

Respondent (John Henry Loose)
Michael Davey QC

(Instructed by Parkinson Wright LLP)

Respondent (Michael George le Strange Meakin)
Zia Bhaloo QC
Tim Calland
(Instructed by Charles Russell Speechlys)

Intervener (Crown Estate Commissioners)
Thomas Braithwaite
Zahler Bryan
(Instructed by Bond Dickinson LLP (Southampton))

LORD NEUBERGER AND LORD CARNWATH: (with whom Lord Clarke, Lord Sumption and Lord Hodge agree)

1. The issue raised by this appeal is the extent of an exclusive prescriptive right (ie an exclusive right obtained through a long period of use) to take cockles and mussels from a stretch of the foreshore on the east side of the Wash, on the west coast of Norfolk.

The factual and procedural background

An outline of the basic facts

2. The proprietor of the exclusive right in question is the second respondent, Mr Michael Le Strange Meakin, who is Lord of the Manors of Snettisham and Heacham ("the Manors") and the owner of a substantial amount of land adjoining the east side of the foreshore. The land, the right to fish and the Lordships have been in the ownership of the Le Strange family for many generations, and we shall refer to Mr Le Strange Meakin and his predecessors as "the Estate". In 1970, the Estate granted a lease of the exclusive right to the first respondent, Mr John Loose, who is still holding over under that lease.

3. The appellants are individuals and companies who operate fishing boats out of King's Lynn in Norfolk. During the summer of 2007, 13 of the appellants' boats fished for cockles in locations claimed by the respondents to be within the area of the exclusive fishery vested in the Estate. Some of the appellants' fishing activities took place at or near an area known as Stubborn Sand, and some at or near an area known as Ferrier Sand. Both Stubborn Sand and Ferrier Sand are now attached to the foreshore, but they had not been so attached in the past.

4. Although we were provided with a large number of detailed plans, the following summary of the position on the ground should suffice for present purposes.

5. The stretch of foreshore between Wolferton Creek to the south and Thornham Creek to the north ("the Foreshore") is irregular in shape, but it can be treated as going from north to south, with the Wash to the west, and land (owned by the Estate) to the east. There are a number of sandbanks which are separated from the Foreshore at low tide. The evidence establishes that some sandbanks which are currently

attached to the Foreshore at any rate at low tide had previously been separated from it.

6. The shifting nature of sandbanks is a feature of the shore on the eastern side of the Wash, and, at least in that part of the Wash with which this appeal is concerned, the trend over the past 400 years or more appears to have been for previously separated sandbanks to become joined to the Foreshore with the passage of time. Examples include Stubborn Sand, which is now attached to the Foreshore but which was separated from it until sometime in the 18th century; Ferrier Sand, which only became attached to the Foreshore around 50 years ago; and Blackguard Sand, which only became attached within the past 20 years or so. The attachment to the Foreshore of previously separated sandbanks appears to have occurred as a result of the gradual silting up of channels which had separated the sandbanks from the Foreshore.

7. It is also clear that the low water marks (ie the lines showing the edge of the sea at low water) of the Foreshore have moved significantly with the passage of time. At least in recent periods the low water marks have, in very general terms, moved further west - ie seaward, further away from the shore. We refer to low watermarks in the plural because, of course, the extent of low water varies from time to time. For present purposes, four different types of low water measurement should be mentioned. (i) Mean low tide, the average of neap and spring low waters, (ii) mean spring low tide, the average of spring low waters, (iii) mean neap low tide, the average of neap low waters, and (iv) the lowest astronomical tide, the most extreme neap low water, which occurs every 18.6 years. (Extreme low water was also referred to in oral argument, when it was said to be the same as lowest astronomical tide, but that was corrected subsequent to the hearing. However, it did not feature in argument as a separate relevant measurement, save by way of explanation of a line on a chart). There are, unsurprisingly, high water equivalents of these four low water measurements.

8. The breeding and other habits of cockles and mussels differ to some extent, but it is common ground that there is no need for present purposes to make any distinction between the two types of shellfish (and any reference to "shellfish" hereafter is to cockles and mussels). Shellfish are to be found on the foreshore, but they are also to be found in the shallow seas. At least in the past, shellfish were taken entirely from the foreshore at low tide by individuals coming by foot from the shore and gathering them by hand. In recent times, however, with the development of more sophisticated and aggressive fishing techniques, in particular suction dredging, shellfish are increasingly gathered from vessels at a time when the foreshore is not exposed by the tide - as was done recently by the appellants as referred to in para 3 above.

The issues between the parties

9. As mentioned above, it is accepted that the Estate is the owner by prescription of the exclusive right to take shellfish over part of the Foreshore ("the Right"), but what divides the parties is the extent of the area over which it can claim the Right ("the Area").

10. The southern and northern boundaries of the Area are not in dispute: they are Wolferton Creek and Thornham Creek respectively. The disputes involve (i) the location of the western, seaward, boundary and (ii) issues relating to former sandbanks near the eastern, landward, boundary.

11. The dispute over the western, seaward, boundary is whether the Estate's Right extends to mean low tide, mean low water spring tide, lowest astronomical tide, or some other mark. At first instance, Sir William Blackburne held that it was the mean spring low water, whereas the Court of Appeal concluded that it was the lowest astronomical tide mark. The appellants primarily contend that the western boundary should be that shown in the Lynn Deeps Fishery Order 1872 ("the 1872 Order"), or alternatively mean low water, whereas the respondents support the conclusion reached by the Court of Appeal.

12. As to the issue relating to sandbanks, the appellants contend that, unless the respondents can establish that the Estate's prescriptive Right extended to a sandbank before it became attached to the Foreshore, the Right cannot extend to such a sandbank simply because it becomes attached to the Foreshore. The respondents contend that the Right can and does so extend, and in that connection they rely on two arguments. The first is that the Right is a prescriptive right which applies to the Foreshore as it is constituted from time to time. The second argument is that, if this first argument is wrong, the respondents are entitled to invoke the doctrine of accretion, so that a sandbank becomes, as it were, added to the Area the subject of the Right by operation of law, when it becomes attached to the Foreshore. Sir William Blackburne and the Court of Appeal accepted both the respondents' arguments.

The factual evidence and previous litigation

13. The evidence included a number of charts and maps going back to 1588, which, as mentioned, clearly establish that (i) the location of the low and high water marks moved significantly over time, and (ii) various sandbanks, which were initially separated therefrom, became attached to the Foreshore as channels became silted up. The evidence also included a number of witness statements, which

concentrated on both relatively recent events and analyses of the effect of earlier proceedings or deductions made from historic documents, some private and some public.

14. The private documents include a number of leases of exclusive fishing rights granted by the Estate between 1857 and 1970. These leases describe the extent of the exclusive fishery in different terms. For instance, the 1857 lease referred to "the extreme low water mark of the sea", and the 1970 lease described the boundary as "so far as may be worked without boats … at extreme low water". A 1903 lease identified the seaward boundary as the ordinary low water mark. Other leases were less precise as to the boundary, some simply referring to "the foreshore" and another to "the foreshore and so much of the seabed that belongs to [the lessor]".

15. The 1857 lease was for a term of ten years, and, during its currency, a successful action for trespass at the Norfolk Summer Assize was brought, for some reason in the name of the Estate rather than the lessee, against a Mr Rowe who had taken mussels from the Foreshore between high and low water - *Le Strange v Rowe* (1866) 4 F & F 1048. In his direction to the jury in that case, Erle CJ said at p 1056 that "there is evidence of what to my mind was a very strong act of ownership in respect to the taking of mussels".

16. The 1872 Order was the first of a number of orders regulating fishing in the eastern side of the Wash. It applied for 60 years. The boundary of the exclusive fishery in the 1872 Order was described as "the line of ordinary low water mark, by the western side of the Stubborn Sand". The chart attached to the 1872 Order indicated that the seaward extent of the exclusive fishery vested in the Estate was "at least as far seaward as" mean spring low water (at least according to Bridge LJ in the judgment referred to in paras 22 and 23 below), and that that fishery included Stubborn Sand (which was by then joined to the Foreshore) but not Ferrier Sand (which was still separate from the Foreshore at that time). The Estate was involved in the drafting of the 1872 Order (including the attached chart), which also established the Lynn Fisheries Committee.

17. The 1872 Order was made under the Sea Fisheries Act 1868 (31 & 32 Vict C45), which was enacted following a national review of fisheries, and was intended to bring some clarity to the existence and extent of coastal private fishing rights. Section 48 of the 1868 Act specifically provided that that no order made under that Act "shall take away or abridge any Right of Several [ie exclusive] Fishery … enjoyed by any Person under … Prescription or Immemorial Usage, without the consent of such Person".

18. In 1885, proceedings were brought by the Estate against the local authority, Lynn Corporation, with a view to establishing the southern boundary of the fishery - *Le Strange v Lynn Corporation*. The decision of Lord Coleridge CJ, in favour of the Estate, was only reported in a local newspaper, but we were shown a fairly full note of the judgments of the Divisional Court, who refused Lynn Corporation's application for a new trial. The propositions which this case supports for the purpose of the instant proceedings are limited, but may be summarised as follows: (i) the Estate claimed its exclusive Right extended over Stubborn Sand but not over Ferrier Sand or other unconnected sandbanks, (ii) the decision effectively established the northern and southern boundaries of the Area the subject of the Right, and (iii) the proceedings illustrate how the Estate has taken steps to protect the Right over the Area.

19. The most recent lease was granted in 1970 for a term of three years to Mr Loose, who continues to hold over 45 years later. In 1971, a Mr Castleton took mussels from a location near Stubborn Sand, seaward of the mean low water mark, but landward of the mean low water springs mark. This led to proceedings against him by Mr Loose for declaratory, injunctive and financial relief. The proceedings were heard in the King's Lynn County Court by His Honour Judge Moylan, who, in a judgment given in January 1977, found for Mr Loose. He decided that the Estate, as the Lords of the Manors, had acquired the ownership of an exclusive fishery over the Foreshore by prescription, and that the western, seaward, boundary of the area concerned was "at least" as far from the shore as the mean spring low water mark (as Mr Loose claimed). Judge Moylan's decision was subsequently upheld by the Court of Appeal - see *Loose v Castleton* (1978) 41 P & CR 19.

20. Judge Moylan's judgment is only available in draft form, but it is clear and coherent, and shows that he had little hesitation in reaching his conclusion, saying that the "evidence builds up to a very strong case that for nearly the last four centuries … the Lords of the Manors … have acted as the owners and possessors of the soil of the Foreshore … and of a several fishery in the waters over that soil". Some of the documents of title relating to each of the Manors included specific references to fisheries - in the case of one of the Manors as long ago as the early 12th century and in the case of the other in the 16th century; and, while other documents of title did not specifically refer to fisheries, they included rights in general terms which could have extended to fisheries. Judge Moylan also referred to "acts of ownership, possession and user" supporting the existence of the Right, on the part of the Lords of the Manors going back to the early 17th century, including acts against third parties who were fishing on the Foreshore, leases granted of the fishing rights claimed, and records of expenditure on preserving those fishing rights.

21. Judge Moylan went on to accept that, as "the most successful mussel beds are found between mean low water and low water mean springs, … the seaward boundary of the fishery is and always has been at least as far out as the line of low

water mean springs wherever that may be from time to time", which is what the Estate had claimed.

22. The Court of Appeal upheld Judge Moylan's decision for reasons given by Bridge LJ, with whom Megaw and Ormrod LJJ (both of whom gave short judgments) agreed. The main issue on the appeal was whether the evidence of title relating to the two Manors was such as to undermine Judge Moylan's conclusion. In that connection, Bridge LJ said at p 30 that the evidence was sufficient to raise "the presumption of a lost grant dating from some period … before the end of the reign of Henry II". At p 32, Bridge LJ rejected the contention that there was a rule of law that the seaward boundary was limited to the mean low water mark. On the evidence, he agreed with Judge Moylan that the boundary was mean spring low water, but, as Judge Moylan made clear, Mr Loose's case was that it was "at least" mean spring low water.

23. In concluding where the seaward boundary of the Area lay, Bridge LJ's reasoning was controversial. Having given two reasons which were each based on evidence of fact which had not been referred to, let alone specifically accepted, by Judge Moylan, Bridge LJ said this at p 33:

> "perhaps most importantly of all, there was clear evidence … that the best mussel grounds … lay between the low water mark of ordinary tides and the low water mark of spring tides. In the light of that evidence, one is entitled to ask oneself the question: is it really to be supposed that, when the Crown was granting to favoured subjects a valuable right such as a several fishery relating to shellfish …, it was doing so by reference to an artificial line on a map - mean low water at ordinary tides - …, and doing so in order to deny to the favoured subjects the primary benefit that one would suppose was intended to be conferred on them, namely the benefit of exploiting the fishery where it could best be exploited? The answer to this question is, obviously: 'no …'."

24. Successive Fishery Orders were made after the 1872 Order expired. The most recent is the Wash Fishery Order 1992 (SI 1992/3038) ("the 1992 Order"), which was made pursuant to the Sea Fisheries (Shellfish) Act 1967. So far as the legal effect of the 1992 Order is concerned for present purposes, it included in article 16 a statement that "[n]othing in this Order shall affect prejudicially … any right … of [the Estate]" and it also stated that "nothing herein contained shall be deemed to be a consent to or be construed to recognise … the existence of any right, power or privilege of the [Estate]". However, during the currency of the negotiations leading up to the 1992 Order, and relying on *Loose v Castleton*, the Estate successfully

persuaded the relevant Fisheries Committee and the Crown Estate that certain sandbanks which were part of the foreshore but had previously been detached from it, including Ferrier Sand, should be excluded from their respective jurisdictions. This caused resentment among the fishing community in the location, and this then led to the testing of this outcome by the appellants fishing in the areas described in para 3 above, and this in turn resulted in the instant proceedings.

The proceedings below

25. At the hearing before Sir William Blackburne, the appellants (unsurprisingly) accepted Judge Moylan's finding that there was an exclusive, or several, fishery vested in the Estate, which had been let to Mr Loose. However, they concentrated on (i) an aspect which was not conclusively determined in *Loose v Castleton*, namely the seaward boundary, and (ii) another aspect which appears to have been barely touched on in *Loose v Castleton*, namely the sandbanks which had formerly been separated from the Foreshore, but which had become attached thereto.

26. In relation to the formerly detached sandbanks, there was no suggestion by the respondents that the Estate had exercised an exclusive right to take shellfish over any of the sandbanks which, at least on the evidence currently available, had previously been separated from the Foreshore, with the sole exception of Stubborn Sand. Thus, with the exception of Stubborn Sand, it was common ground that former sandbanks (such as Ferrier Sand and Blackguard Sand), so long as they were separated from the Foreshore, had not been treated as part of the exclusive fishery claimed by the respondents. It was also accepted that they had been available to members of the public for fishing as of right, and, at least in the case of some of those sandbanks, that members of the public had actually taken shellfish from them within living memory.

27. The appellants contended at trial (i) that the seaward boundary of the Area was the mean low water mark, and (ii) that none of the formerly separated sandbanks (including Stubborn Sand) was subject to the Right. In an instructive judgment, Sir William concluded that (i) mean spring low water marked the boundary of the Area, on "pragmatic grounds" but also following *Loose v Castleton*, and (ii) sandbanks, which were formally separated from the Foreshore, became part of the Area when they became joined to the Foreshore, on the alternative grounds that (a) the prescriptive right extended to the Foreshore as it was physically constituted from time to time, or (b) if the prescriptive right was limited to the foreshore in its original state, it nonetheless extended to previously separated sandbanks as they joined to the foreshore, pursuant to the doctrine of accretion - [2013] EWHC 901 (Ch).

28. On the appellants' appeal and the respondents' cross-appeal, the Court of Appeal held, for reasons given in a clear judgment by Moore-Bick LJ, that (i) allowing the cross-appeal, the seaward boundary of the Area was the lowest astronomical tide mark, and (ii) dismissing the appeal, Sir William was right about the former sandbanks being included in the Area for the reasons which he gave - [2015] Ch 547.

29. On this appeal, the respondents adhere to their position below and contend that the Court of Appeal was right on both aspects, essentially for the reasons given by Moore-Bick LJ. The appellants, on the other hand, have changed their position, albeit only slightly. As to the seaward boundary, the appellants contend that it should be as marked on the chart attached to the 1872 Order, or alternatively that it should be mean low water. So far as the formerly separated sandbanks are concerned, while the appellants' basic case remains as it was (namely that neither ground for accepting the respondents' case is sustainable), they now accept that Stubborn Sand is included in the Area the subject of the Estate's exclusive fishery, although they maintain their contention that Ferrier Sand, Blackguard Sand and any other sandbanks which have become joined to the foreshore within living memory, are not.

30. The Crown Estate Commissioners have since 1961 been responsible for managing the Crown Estate, and therefore have an obvious interest in the outcome of this case. They intervene in this appeal, and support the appellants' case on the issue of whether previously separated sandbanks, which have now attached to the foreshore, should be treated as subject to the Estate's right, contending that they should not be so treated.

Prescription: the applicable legal principles

The right to fish on the foreshore

31. Piscary is the legal name of a right to catch and take away fish, and it is an example of a right over land known as a profit à prendre (or, more simply, a profit), which is a right to go on to the land of another to remove items (eg gravel, timber, game). Profits, like easements (a different category of rights over land, which include rights of way, rights of light and rights of water), are recognised in common law and statute as legal rights known as incorporeal hereditaments. A right of piscary which does not limit the quantity of fish which can be taken to the requirements or benefit of neighbouring land, is in law known as a profit in gross, and, unlike a right of piscary which is so limited (or a right of way or a right to light), it is capable of surviving independently of any land owned by the grantee - see *Harris v Earl of Chesterfield* [1911] AC 623.

32. Historically, it has long been accepted that the Crown is prima facie the owner of the bed of the sea, and of the foreshore so far as the tide flows and reflows. "Prima facie" because there is nothing to prevent the Crown from alienating (ie transferring away its ownership of) any part of the foreshore or seabed, and it has done so in respect of much of the coast of England and Wales. However, as Sir Matthew Hale wrote in *De Jure Maris et brachiorum ejusdem* (1888 ed), p 11, "the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary". This is because, since time immemorial, the public has fished for fish and shellfish by right in those areas, but not in non-tidal waters.

33. Nonetheless, as Hale went on to explain, the Crown could, by its prerogative, exclude the public from exercising that right, and grant the right of fishery to an individual or individuals "exclusive of that common liberty". It has been said on a number of occasions that this prerogative power was irrevocably lost in 1215 following the sealing of Magna Carta - see per *Blackstone*, 2 Bl (Comm), p 59, and, more recently, per Willes J giving the unanimous advice of the judges in *Malcolmson v O'Dea* (1863) 10 HL Cas 593, 618, where he added that this did not affect rights "which were made … by Act of the Crown not later than the reign of Henry II", ie not later than 1189, when Richard I succeeded him.

34. This advice was held by Lord Blackburn in *Neill v Duke of Devonshire* (1882) 8 App Cas 135, 178 to "settle" the law, and it was described as "unquestioned law" by Viscount Haldane LC in *Attorney-General for the Province of British Columbia v Attorney-General for the Dominion of Canada* [1914] AC 153, 170. It should also be mentioned that, while it is accepted that the Crown cannot create an exclusive fishery, there is no reason why Parliament cannot do so or authorise the executive to do so, and, as Sir William Blackburne explained at [2013] EWHC 901 (Ch), paras 15-26, it has done so in relation to many areas round the United Kingdom, including the Wash.

35. The grant of an exclusive fishery (whose technical description is, as already explained, somewhat confusingly, a several fishery) over a tidal area is not really a grant of the right to take fish from that area, as the grantee would presumably have that right in his capacity as a member of the public. Rather, it is the grant of a right to exclude anyone else from fishing over that area. Classically, such a right would be granted by deed, but, as with many rights over property, it can be acquired by long use - ie by prescription.

Obtaining rights by prescription

36. As Lord Hoffmann said in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349, "[a]ny legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment". Given that a prescriptive right is based on long use, the nature and extent of a prescriptive right depends on the nature and extent of the long-established use. As Bovill CJ put it in *Williams v James* (1867) LR 2 CP 577, 580, "[i]n all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved".

37. The quality of the use required in order to establish a prescriptive right to a profit or an easement is embodied in the expressions, which have been held to be synonymous in their meaning and effect, namely "as of right" and *nec vi, nec clam, nec precario* (ie not secretly, not by force, and not with permission). As Lord Walker put it in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 30, persons claiming to have acquired a right by prescription "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him".

38. The period for which use must be enjoyed to establish a prescriptive right to a profit or an easement depends on the nature of the right claimed. The law in that connection is a mixture of inconsistent and archaic legal fictions, practical if sometimes haphazard judge-made rules, and (in the case of easements and some profits but not profits in gross) well-meaning but ineptly drafted statutory provisions.

39. The common law originally fixed the requisite prescription period as being from "time immemorial". In due course, this came to mean from before 1189, as discussed by Cockburn CJ in *Bryant v Foot* (1867) LR 2 QB 161, 179-182, and as explained by Lord Hoffmann in *Sunningwell* at pp 349-350. Because of the impracticality of requiring evidence of use going back to the end of the 12th century, the judges developed the rule that use which can be shown to have been enjoyed as of right for 20 years continuously or else since before the "time of living memory" (ie there is no living witness who can speak to a period when it was not enjoyed) would suffice to establish a prescriptive right - see eg *Aynsley v Glover* (1875) 10 Ch App 1023 and *RCP Holdings Ltd v Rogers* [1953] 1 All ER 1029. However, such a claim could be defeated where it could be proved that the origin of the enjoyment must have been more recent than 1189 - see *Bury v Pope* (1586) Cro Eliz 118 and *Bowring Services Ltd v Scottish Widows Fund and Life Assurance Society* [1995] 1 EGLR 158, 160.

40. Because even this somewhat more relaxed approach to common law prescription was regarded as imposing too rigid a test in some cases, the judges then developed the more flexible doctrine of lost modern grant, which can be relied on where there has been "upward of 20 years' uninterrupted enjoyment" even if there is "direct evidence that no such grant was in fact made" - per Buckley LJ in *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552. However, as he also explained, the doctrine cannot be relied on if "for some reason, such as incapacity on the part of [the putative grantor], the existence of the grant is impossible".

41. Meanwhile, after the judiciary had developed common law prescription and lost modern grant, the legislature intervened and enacted the notoriously poorly drafted Prescription Act 1832 (2 & 3 Will 4 c71). The 1832 Act has not replaced the common law, but has added a further basis for claiming a right by prescription.

42. The Right in this case is based on the uncontested fact that the Estate (and their lessees and agents) have excluded the public from at least part of the area over which they claim to have established a right back to a period before the time of living memory, and there is no evidence to suggest that the Right could not have been granted before 1215. No specific reliance has been placed by the respondents on the 1832 Act. This may be because it is assumed that the present case involves a profit in gross (as, by virtue of the words "the occupiers of the tenement in respect whereof the same is claimed" in section 5, it appears that that statute does not extend to a profit in gross). Or it may be because it is assumed that the 1832 Act does not take matters further than common law prescription, in the light of the effect of Magna Carta, as described in paras 33 and 34 above. Lost modern grant was not relied on, presumably for this latter reason. Accordingly, it is contended by the respondents (and not challenged by the appellants) that the Right is founded on common law prescription.

43. In the light of the arguments in this case, it is worth quoting another passage in the advice of Willes J in *Malcolmson.* At p 618, he said that once a prescriptive right is established "the result is, not that you say, this is a usurpation, for it is not traced back to the time of Henry II, but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory". In other words, because the several fishery is treated today as having been the subject of a valid grant at some point before living memory, the legal fiction that the right is treated as granted before 1189 should not be treated as more than a metaphor. As Lord Mansfield said in *Jones v Randall* (1774) Lofft 384, 385, "[t]he law would be a strange science … if … we must go to the time of Richard I … and see what is law".

The extent of a prescriptive right

44. When considering the arguments relating to both the seaward boundary and the formerly separated sandbanks, it is vital to bear in mind that the basis upon which the Estate claims to have obtained its right of exclusive fishing is by prescription. It is therefore appropriate to consider the precise nature of the inquiry involved in an exercise of establishing the nature and extent of a prescriptive right.

45. It is true that a prescriptive right can be said to be based on a notional grant, but that grant is not merely notional: it is fictional. The essential point is that such a right is based not on an imagined document, but on actual use "as of right", namely use which is such as to "bring home to the landowner that a right is being asserted against him", as Lord Walker said in the *Redcar and Cleveland Borough Council* case at para 30. In other words, in order to identify the nature and extent of the right obtained by prescription, one has to examine the actual use as of right upon which it is said to be based. The correct question is therefore not what the notional grant would have been likely to be, let alone what would have been the intention of the notional grantor; it is what is the extent of the user as of right for the requisite period. (In many cases, of course, these questions will produce the same answer).

46. Thus, as is reflected by what was said by Bovill CJ in *Williams v James*, the "general rule" is accurately set out in *Gale on Easements* (19th ed (2012), para 9-03, discussing rights of way, but it is applicable to any right), namely "where a right of way is acquired by user, the extent of the right must be measured by the extent of the user". Having said that, the extent of the right obtained by prescription has to be established bearing in mind practical reality. This is exemplified by the *unum quid* rule which was explained by Lord Blackburn (who said that it was "as much the law in a Scotch as in an English Court") in *Lord Advocate and the Trustees of the Clyde Navigation v Lord Blantyre* (1879) 4 App Cas 770, 791-792 in these terms:

> "[A]ll that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided that there is such common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what kind of possession was proved."

47. This was said in connection with possession and ownership of land, but it applies equally to rights over land. Thus, the rule was specifically applied to a prescriptive claim for a several fishery in *Neill v Duke of Devonshire*, where at p 151, Lord Selborne LC said that "[i]f the fishery of the whole river … was what has

sometimes been called a *unum quid*, there can be no doubt that evidence of acts of ownership and enjoyment in any part of it would be applicable to the whole". As Lord O'Hagan emphasised at p 165, reflecting what Lord Blackburn had said in *Blantyre*, whether evidence of long enjoyment of fishing over one part of a river will extend to another part, or to other parts, "must of course vary according to circumstances", and "[w]hat may demonstrate it, in one case, may be quite inadequate for that purpose, in another".

A shifting prescriptive right

48. Another issue which should be mentioned in relation to both the seaward boundary and the sandbanks in the present case is whether the property over which a prescriptive right is established can change. The concept of a conveyance of, or a grant of a right over, a shifting, or fluctuating, area of land is not offensive to any principle of property law, provided that the land in question can be ascertained at any time with reasonable precision.

49. As Sir Robert Megarry V-C pointed out in *Baxendale v Instow Parish Council* [1982] Ch 14, 22, the contention that there cannot be such a thing as a shifting freehold is undermined by what is stated in no less an authority than *Coke on Littleton* - see Co Litt 48b, p 494 - which plainly supports the argument that what was conveyed by a particular deed was the foreshore as it existed from time to time. As Sir Robert went on to hold, and as seems supported by at least the majority of the court in *Scratton v Brown* (1825) 4 B & C 485, when it comes to construing a conveyance of (or indeed a deed of grant over) the foreshore, it is a matter of interpretation whether what is conveyed (or granted) is the foreshore (or a right over the foreshore) at the time of the document or the foreshore as it exists from time to time.

50. If a right over land, the identity of which shifts, can be the subject of an express grant, then it appears to us to follow that, as has been assumed on all sides below, there is no reason why that should not apply equally to a right over land obtained by prescription.

Presumptions in the case of prescriptive rights against the Crown

51. It is well established that, unlike other instruments, grants by the Crown are not construed against the grantor (*contra proferentem*). Crown grants are "construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words" - per Lord Birkenhead LC in *Viscountess Rhondda's Claim* [1922] 2 AC 339, 353. The reason for this is that

"the prerogatives … of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives … are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away" - per Sir William Scott in *The Rebeckah* (1799) 1 Ch Rob 227, 230. This principle has been more recently recognised by Lewison J in *Crown Estate Comrs v Roberts* [2008] 2 P & CR 255, paras 78-80.

52. As the Court of Appeal rightly said, this rule has no part to play in a case such as this, where the right concerned was not granted by a document, but arises as a result of long use. However, in our view, the principle upon which the rule is based can, for what it is worth, properly be prayed in aid by the Crown in relation to a claim based on prescription, and therefore by the appellants in this case. It appears to us that that basic principle is that a court should not be too easily persuaded that the Crown has been deprived of a property or a right, given that the property or right is held for the public good. Therefore, in cases where it would otherwise be quite unclear whether a prescriptive right obtained against the Crown extended to certain property or certain rights, the principle may properly be invoked to justify the conclusion that it does not so extend. In the great majority of cases of prescription, as in most cases of express grant, this principle will take matters no further, as it is only where the extent of the right would otherwise be really unclear that the principle can come into play.

53. There is, we would add, some force in the point that this principle should be given particular weight in relation to a prescriptive several fishery, given the importance accorded to the public right to fish as long ago as 1215. As Lewison J said in *Roberts* at para 115, "[g]iven the importance of the fishing industry both in ancient times and also today several fisheries were not popular".

Conclusions on the issues in this appeal

Introductory

54. The appellants have been realistic in accepting that the Estate has a several fishery on the Foreshore, in the light of the findings and judgments in the earlier cases, as well as the leases and the oral evidence before Sir William Blackburne. Both parties have been realistic in accepting that the location of the seaward boundary of the Area subject to the fishery has not been determined in previous proceedings (in *Loose v Castleton*, Mr Loose contended that it was "at least as far out as the line of low water mean springs", which Judge Moylan accepted). Equally, they have been realistic in accepting that the issue whether the fishery extended to previously unattached sandbanks was not decided in previous proceedings.

55. So far as the two issues on this appeal, the seaward boundary and the previously unattached sandbanks, are concerned, most of the relevant evidence had already been agreed before, or found by, Judge Moylan in *Loose v Castleton*. However, there was further and more detailed evidence adduced before Sir William Blackburne, particularly relating to the location of the Estate's fishery at different times, fishing methods and tidal movements.

56. The leases granted between 1857 and 1970 obviously support the Estate's contention that it owned a several fishery, but, when it comes to identifying its eastern and western boundaries, they are imprecise and inconsistent. The Fishery Orders are expressly not intended to determine private rights. The maps and charts established facts described in paras 5 to 7 above, but are not of much further help. As to the more recent factual evidence, there were occasions when the appellants or other fishermen negotiated with representatives of the Estate or Mr Loose to take cockles from Ferrier Sand. However, the negotiations were quite insufficient in terms of frequency, period of time, and express terms to give rise to any arguable inference of a public acceptance of the existence of a several fishery over Ferrier Sand (and we doubt whether they could give rise to a several fishery in any event).

The seaward boundary: a fluctuating boundary?

57. As mentioned above, it is rightly common ground that the Estate has a prescriptive exclusive Right to take cockles and mussels within an Area of the foreshore between Wolferton Creek to the south and Thornham Creek to the north. It is clear that the seaward, western, extent of the boundary of that Area must be a low water mark. The first question is, logically, whether that boundary is a fixed boundary, or whether it is one which fluctuates with the relevant low mark. The second question is which of the various suggested low water marks is the appropriate boundary.

58. So far as the first question is concerned, we consider that the assumption which was made below was correct, and that the seaward boundary of the Area the subject of the exclusive Right to take shellfish fluctuates with the passage of time as the low water mark moves. The Estate has exercised a prescriptive exclusive Right to take shellfish from the foreshore for a substantial period, during which the low water mark fluctuated to a significant extent over time, in circumstances where the evidence clearly establishes that the only way in which the shellfish were gathered was by individuals walking from the land when the tide was out. It is in those circumstances inherently very likely, indeed inevitable in terms of practical reality, that the putative Right would have been exercised over an area which was defined, or limited, by a shifting low tide mark. Thus, based on the inherently probable nature and extent of the actual exercise of the putative Right to fish by or on behalf of the

Estate, we conclude that the boundary of the Area would have been low water as it was from time to time.

59. This is not an application of the *unum quid* rule, but it involves an approach roughly akin to it. The natural unit of property so far as the exercise of the Right is concerned is the stretch of foreshore between high water and low water, and, as the land comprised within that unit moves with the shifting tides, one would expect, at least in the absence of good reason to the contrary, the exercise of the putative right to move correspondingly. As Sir Robert Megarry put it in *Baxendale* at p 25, "one would expect sea-grounds, oyster-layings, shores and fisheries to follow the sea as it advances or retreats".

60. Further, and importantly, it is not as if the existence of such a fluctuating right would have detrimentally affected any other interests, and in particular any public interests, of any significant value. We accept that the public would have enjoyed the right to take shellfish seaward of a low water mark boundary, and that right would be lost as, and to the extent that, the boundary shifted seaward. However, such a right would have been of no value, as nobody could have got access to the shellfish below the low water mark on foot, and, as explained in para 8 above, access from the sea for that purpose is of comparatively recent origin.

61. In these circumstances, we cannot accept the appellants' primary contention that the boundary of the Area is the low tidemark shown on the chart attached to 1872 Order, as this would mean a fixed seaward boundary to the Area. In any event, as already mentioned, the 1872 Order was made under legislation which provided in terms that it was not intended to delimit the extent of private fisheries (even though it is fair to say that there is some evidence which could be said to suggest that the tidemark shown on the chart was understood by some people at the time to identify the boundary of the Right).

The seaward boundary: which low water mark?

62. As to the second issue, namely the identity of the low water boundary of the Area, it is well established that the landward limit of the foreshore is the mean high water mark. In *Attorney-General v Chambers* (1854) 4 De G M & G 206, 218, Lord Cranworth LC (who was assisted by Alderson B and Maule J) said that "Lord Hale gives as his reason for thinking that lands only covered by high spring tides do not belong to the Crown, that such lands are for the most part dry and maniorable". Lord Cranworth then said that "the reasonable conclusion is, that the Crown's right is limited to land which is for the most part not dry or maniorable". However, as is common ground between all parties to this appeal, there is no equivalent consensus as to where the seaward limit of the foreshore is located. Further, the reasoning of

Lord Cranworth in the passage just cited does not cast much, if any, light so far as the seaward limit of the foreshore is concerned.

63. Accordingly, the selection of the relevant low water mark which provides the boundary of the Area is a relatively open question.

64. Not without some hesitation, we have come to the conclusion that the most satisfactory low water mark to select as the appropriate seaward boundary of the Area the subject of the Right is the lowest astronomical tide. That conclusion appears to us to produce the least arbitrary result and to be consistent with the *unum quid* principle (discussed in paras 46 and 47 above). Selecting the most extreme low water mark means that all parts of the Foreshore which are at any time uncovered by the sea are included in the Area, whereas any other selection involves some of those parts being excluded from the Area. And, as we see it, the *unum quid* principle would at least tend to suggest that one should assume, at least in the absence of good reasons to the contrary, that the Right was being exercised in respect of the whole of the Foreshore, as it was from time to time uncovered by the sea.

65. Further, the alternative marks proposed (whether mean spring low water, as the Judge selected, or mean low water as the appellants suggested) are mean low water marks. As Moore-Bick LJ said, unlike lowest astronomical tide, which is an actual (if rare) tide mark, they would therefore involve taking an artificial mark, although it is fair to say that it could be seen from a chart. In addition, it seems to us that the lowest astronomical tide is consistent with the approach of Popham CJ in *Sir John Constable's Case* and *Sir Henry Constable's Case* as translated and discussed by Moore in *A History of the Foreshore and the Law Relating Thereto* (1888), pp 233-237. The passage in the judgment, quoted at pp 235-237, suggests that the correct mark is where "the sea does not ever ebb" or "the lowest ebb". The two cases were respectively concerned with the extent of a manor and the right to take a wreck, so we would accept that they are only of indirect assistance.

66. We were initially impressed with the appellants' point that lowest astronomical tide was an unattractive boundary to select, as it occurs only once in every 18.6 years, which significantly exceeds the average life of a cockle or mussel. At first sight, at any rate, that renders the lowest astronomical tide a rather unrealistic mark to take. However, it is important to bear in mind that, until recently, cockles and mussels could only be gathered from the shore when the tide was out, and could not be gathered from a ship. Accordingly, nobody would have been able to take the cockles and mussels which were just on the shore side of lowest astronomical tide, except once every 18.6 years. It is only with the advent of suction dredging and other similar techniques that anyone could gather such cockles and mussels.

67. We do not agree with the reasoning of Moore-Bick LJ (which was understandably based on the likely notional grant, following the wrong approach in *Loose v Castleton* at p 33, rather than the probable actual use), but we agree with his conclusion that the seaward boundary of the Area subject to the Right is the lowest astronomical tide mark from time to time.

The previously separated sandbanks: prescription

68. We turn to the respondents' contention that sandbanks, previously separated from the foreshore, and thus not forming part of the Area subject to the Right, nonetheless become part of the Area as a matter of prescription when they become attached to the foreshore. In this connection, the respondents' first argument is that, although the Estate did not gather cockles or mussels from sandbanks such as Ferrier Sand and Blackguard Sand, when they were separated from the Foreshore, the nature of the Estate's prescriptive right is such that it automatically extended to those sandbanks as soon as they became attached to the Foreshore around 50 and 20 years ago respectively.

69. Given that the Estate is claiming a prescriptive Right, this argument must be based on the proposition that, over a long period, sandbanks which have been close to, but detached from, the Foreshore have from time to time become joined to the Foreshore as channels have become silted up, and, as and when this happened, the Estate effectively extended the collecting of shellfish to that former sandbank. The Court of Appeal accepted this argument, on the basis of assessing the likely terms of the hypothetical grant which would have been made (applying Bridge LJ's faulty analysis in *Loose v Castleton* at p 33) - see para 26 of Moore-Bick LJ's judgment. However, as already explained the proper basis for establishing the nature or extent of a prescriptive right is not by assessing the likely terms of a fictional notional grant, but by assessing the extent of the actual use of the putative right established by the evidence.

70. The respondents maintain that the Court of Appeal's conclusion was nonetheless correct and, at any rate at first sight, they can derive substantial support for their argument from the reasoning in paras 58-60 above, which justifies the conclusion that the seaward boundary of the Area fluctuates. Although we acknowledge that that argument has some force in the present context, we have reached the conclusion that the evidence does not establish that the Estate's prescriptive exclusive Right extends to sandbanks which were not previously joined to the Foreshore, as and when they become so attached.

71. For present purposes, there are two distinctions of significance between the notion that the low tide mark boundary of the Foreshore fluctuates and the notion

that attaching sandbanks become part of the Foreshore. First, the low tide mark will, presumably, at least normally, shift relatively gradually, whereas, although the silting up of the channel concerned will be gradual, the attachment of the whole of a previously detached sandbank to the Foreshore will happen at one moment. It is true that a channel between a sandbank and the foreshore will silt up gradually, but the question whether a sandbank has become joined to the foreshore must surely be tested by reference to a particular point in time, and we would have thought that it would be when the tide has receded past the point where the sandbank has or could become joined to the foreshore - ie low tide. In that connection, it was implicitly accepted by the respondents that there would be a specific point at which a former sandbank would become joined to the foreshore: they did not suggest, for instance, that the prescriptive right would attach to a sandbank at low tide but not at high tide.

72. Secondly, and particularly importantly in this context, the public will have had the right to take fish (including shellfish) from such a sandbank, at least until the moment when it becomes attached to the Foreshore. In those circumstances, at least in the absence of any specific evidence that the Estate in fact took shellfish and excluded the public from doing so, as of right from sandbanks as they became attached to the Foreshore, we do not think that it would be right to assume that the Estate did in fact behave in this way.

73. Unlike the position in relation to the fluctuating low tide mark, it is by no means plain or obvious that, once a sandbank became attached to the Foreshore, the Estate would have exercised an exclusive Right to take shellfish from that former sandbank. After all, up to that moment, the public had had a right, and, at least in some cases, had exercised the right, to take shellfish from that sandbank. In the absence of any evidence that such a thing had ever happened, it appears to us wrong in principle to assume that what the Estate contends might have happened would have happened, let alone that it did happen. Indeed, given that, over at least the past 150 years or so, members of the public took shellfish from the Area which was subject to the Right (at least on the occasions giving rise to these and the earlier proceedings), it appears to us unlikely that local fishermen would have been prepared to accept the Estate maintaining (or, as they would have seen it, extending) its exclusive Right to fish over former sandbanks which were previously subject to a public right to fish just because they had become attached to the Foreshore. It is also relevant to mention that in his case in *Loose v Castleton* Mr Loose did not contend that Ferrier Sand was included within the Area.

74. The respondents argue that the fact that it is common ground that the Estate's several fishery extends to Stubborn Sand is inconsistent with this conclusion. We do not agree. For instance, it may be that, throughout the period during which the Estate has been taking shellfish from the Area, that activity extended to Stubborn Sand, even before it became attached to the Foreshore. Over and above this, if, as seems to have been the case, Stubborn Sand has been joined to the Foreshore since before

the time of living memory, it would, as we see it, appear to follow that the Estate would have acquired the right to take cockles and mussels from Stubborn Sand by prescription in any event.

75. Thus, in summary, we consider that the courts below were wrong on this point. We accept that there is force in the respondents' contention that, as a sandbank becomes attached to the Foreshore, it should be treated as part of the Area subject to the Right in accordance with the notion that the foreshore is a shifting piece of property - in effect a *unum quid*. However, it appears to us that the existence of a public right to fish over that sandbank, a highly relevant circumstance, serves to negative the respondents' contention, at least in the absence of further supportive evidence - and there is none.

The previously separated sandbanks: accretion

76. The alternative basis upon which the respondents rest their contention that previously unattached sandbanks become incorporated within the Area the subject of the Estate's prescriptive exclusive Right is through the process of accretion. Thus, given (as we have just indicated) that the nature of the prescriptive Right is not such as to extend automatically to those sandbanks, the argument is that they are, as a matter of law, nonetheless added to the Area as a result of the doctrine of accretion.

77. Whether one is concerned with the ownership of, or rights over, land, the principle that land can increase (or indeed decrease) as a result of accretion is well established. In the Privy Council, Lord Wilberforce described accretion in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, 716 as:

> "a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible (a phrase considered further below), the law considers the title to the land as applicable to the land as it may be so changed from time to time. This may be said to be based on grounds of convenience and fairness. Except in cases where a substantial and recognisable change in boundary has suddenly taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year. To do so is also fair. If part of an owner's land is taken from him by erosion, or diluvion (ie advance of the water) it would be most inconvenient to regard the boundary as extending into

> the water: the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it. The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long-term ownership of property inherently subject to gradual processes of change."

78. The respondents argue that accretion applies to the former sandbanks in this case, because the channels formerly separating those sandbanks from the Foreshore only gradually and imperceptibly became silted up, and it was as a result of such gradual silting up that they became attached to the Foreshore. Although that argument was accepted by Sir William Blackburne and the Court of Appeal, we consider that it is wrong. In a nutshell, the argument relies on the "gradual and imperceptible" process pursuant to which the boundary of the further land allegedly changes, whereas the doctrine of accretion only applies where the actual change to the boundary is "gradual and imperceptible". As explained in para 71 above, it seems to us clear that there is a specific moment in time when the whole of a sandbank becomes attached to the foreshore, and therefore the addition of the sandbank is not "gradual and imperceptible" as that expression was used by Lord Wilberforce. We believe that this follows from what he said in the passage quoted above, especially in his reference to "changes in the boundary" which are "gradual and imperceptible", and his specific exclusion of cases where "a substantial and recognisable change in boundary has suddenly taken place".

79. The issue was specifically addressed in the judgment of Griffith CJ in the High Court of Australia in a passage in his judgment in *Williams v Booth* (1910) 10 CLR 341, 350, with which we agree:

> "I do not think that any case of accretion is made out. The law as stated by *Blackstone* (2 Bl Com, p 262), is that 'if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*. ... But, if the alluvion or dereliction be sudden or considerable, in this case it belongs to the King; for, as the King is Lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.' The word 'imperceptible' refers to the slowness of the additions to the soil. Assuming, then, that a moment has arrived at which the mouth of the lagoon became permanently closed, the suggested accretion is not an addition of an imperceptible quantity of soil to the plaintiff's land, but of an area of many acres occurring at the moment of permanent closure, so that, according to the plaintiff's contention, on one

> day the land belonged to the King as Lord of the sea and on the next to the plaintiff. This is a sudden and considerable alluvion or dereliction, and does not operate to confer a title by accretion."

80. In other words, there is a difference in kind between the gradual extension of one recognised bank and the joining up of two formerly distinct banks. It is true that the two cases just referred to were concerned with ownership of land rather than prescriptive rights over land, but we can see no reason in principle or practice why the rules relating to accretion should not apply equally to rights over land as they do to ownership of land: one would expect them to march together. Such a view derives support from *Mercer v Denne* [1905] 2 Ch 538, especially per Sterling LJ at p 582.

81. We were pressed by the respondents with the argument that, if we held that accretion did not apply to Ferrier Sand and other formerly separated sandbanks, the corollary must be that land forming part of the original Foreshore which becomes detached as a separate sandbank would nonetheless remain part of the Area subject to the Estate's Right of several fishery. We accept that is indeed the corollary, but we see nothing surprising about it. As Ladd J pithily said in an Iowan case *Holman v Hodges* 84 NW (1901) 950, 952 (a decision cited with approval in the Iowan Supreme Court in *State v Sorensen* 436 NW 2d 358 (1989) and - albeit on a different point - by Brennan J in the US Supreme Court decision in *Nebraska v Iowa* 406 US 117 (1972)):

> "There is no more reason for saying the state loses title to an island when connected by accretions to the shore than to say title to an islet formed at one side of the thread in an unnavigable stream is lost when connected with another's land on the opposite side."

Conclusion

82. In these circumstances, we would dismiss the appellants' appeal in so far as it relates to the seaward, western, boundary of the Area, but we would allow their appeal in relation to previously detached sandbanks.

83. It would be helpful if we were able to define the precise extent of the Area over which the Estate's several fishery should be enjoyed. However, we suspect that that would only be possible if the parties were able to agree it following receipt of this judgment. In the absence of agreement, there may be issues such as the precise identification of the boundary between Stubborn Sand and Ferrier Sand.

Accordingly, if agreement cannot be reached, it appears to us, at least as at present advised, that we should remit the proceedings to Sir William Blackburne, or another judge of the Chancery Division, to enable the precise extent of the Area to be identified.