

NWIFCA Quarterly Meeting

13th March 2015: 11.00 a.m.

AGENDA

ITEM NO.

7

CHIEF EXECUTIVE OFFICER REPORT

BOUGHTON ESTATE CLAIM OF FISHING RIGHTS IN MORECAMBE BAY

SUPPLEMENTARY REPORT

Purpose: To present legal advice on this claim

Recommendation: Further research is undertaken by Mr Scott and NWIFCA to develop further legal advice for TSB to review.

Introduction

1. This is an interim report to update members on a matter of priority.
2. Boughton Estate have from time to time for over 20 years advanced a claim of private fishery on their land in North Morecambe Bay. The implications of the claim are that the application of NWIFCA byelaws on Boughton Estate land is disputed.
3. This claim has not been accepted by NWIFCA or its predecessor Sea Fisheries Committee in the absence of conclusive evidence. The latest claim was made in 2013 in connection with the need to remove mussel seed from around the Oyster farm at Foulney. The NWIFCA continued to hold its previous position that Byelaws do apply on Boughton Estate land and will be enforced.

Legal advice

4. The Authority asked for legal advice on the matter although NWIFCA understand that it is for the Estate to prove its claim. The NWIFCA does not have to prove that public fisheries do not operate on Estate land.
5. In 1994, a study on ownership of the fisheries was commissioned by Boughton Estate and undertaken by Mr Alan Crosby. In 1996, the then NWNWSFC received legal advice from Mr Peter Scott that the Crosby study did not provide conclusive proof of a private fishery.
6. In 2014, Boughton Estate commissioned their own legal advice from Bond Dickinson which was received in February and shared with NWIFCA. In response, NWIFCA has asked Mr Scott for further advice on the report from Bond Dickinson. Mr Scott's interim advice was received on Monday in time to be shared at the NWIFCA meeting on 13th March.
7. The Crosby study (Annex A), the Bond Dickinson advice to Boughton Estate (Annex B) and the legal advice from Mr Scott to NWIFCA in 1996 (Annex C) and 2015 (Annex D) are attached.

Findings

8. In summary Mr Scott advises that the Crosby report and legal advice from Bond Dickinson does not provide conclusive evidence of private fishery on Boughton Estate. Further research could be undertaken to attempt to answer the question

Next Steps

9. Members have not had enough time to digest this new information in time for an informed discussion on 13th March. Officers suggest that this item should be discussed at the next TSB Sub-Committee when further research should have been completed and further advice may be available.

Chief Executive Officer
11th March 2015

THE OWNERSHIP OF THE FURNESS FISHERIESReport on the historical evidence

In this report the following abbreviations have been used to indicate the location of the original material consulted:

BHN = Boughton House, Northamptonshire
BRO = Barrow in Furness Record Office
LRO = Lancashire Record Office
NRO = Northamptonshire Record Office

1. Ownership of the fisheries before 1662

- 1.1 The surviving documentary evidence makes it clear that in the medieval period the outright ownership of the shore fisheries of Furness had been vested in the abbey of Furness. At the Dissolution these fisheries, together with all other property and assets of the abbey, passed to the Crown and remained in its ownership until after the Civil Wars and Commonwealth. In 1662 the estates, including the fisheries, were granted to the Duke of Albemarle by King Charles II.
- 1.2 Furness Abbey was founded following a grant of extensive lands by Stephen, Count of Boulogne and Mortain [later King Stephen of England], in 1127. The original charter whereby the grant was made does not specifically mention fisheries, and this pattern is followed by all successive confirmations and recitations of the grant down to the 16th century. The reason is not that the fisheries were excluded, but that it was not necessary to name them. The grant was of real estate and assets, and these were not individually specified unless there was a particular need to do so - the charter was instead concerned with generalities. This is invariably the case with monastic foundation charters of the 12th and 13th centuries, and in this example it most definitely does not imply the exclusion of fisheries.

- 1.3 The 1127 charter states that the new foundation was to receive:

'omne dominicum meum infra Furnes, cum hominibus et omnibus ei pert[inences] videlicet in bosco et in plano, in terra et in aquis...et piscar[i]um meam in Lancaster' [J.C. Atkinson, *The Coucher Book of Furness Abbey* vol.1 pt.1 (Chetham Society NS 9, 1886, p.123)].

- 1.4 This can be translated as 'all my possessions within Furness, with the men and appurtenances thereto belonging, that is to say in the woods and the open ground, on the land and in the waters...and my fishery in Lancaster'. In other words, everything in Furness which Stephen had hitherto owned and enjoyed was to be granted to the abbey, together with one specified asset at Lancaster - his fisheries in the Lune (i.e., that was the only Lancaster property granted and therefore it had to be specifically mentioned). There can be no doubt that all fisheries in Furness were by implication granted in 1127.
- 1.5 Subsequent kings confirmed the grant of these lands and assets - the abbey, like all religious houses, was careful to ensure that every new monarch solemnly reiterated the grants of his forebears, to ensure that there was no legal challenge to its ownership. As these reiterations were simply a matter of form, and as the original grant had made no individual mention of such matters as fisheries except in the case of those on the Lune, they too make no reference to them. They do specify certain legal privileges, such as the right to appoint a coroner within Furness, and the right of wreck, but these are referred to and specifically reiterated because they were a delegation of legal powers which were normally a royal prerogative. In technical terms those were constitutional matters, while the grant of the lands had simply been a property transaction on a grand scale.
- 1.6 There are no subsequent separate grants of fisheries recorded in the *Furness Abbey Coucher Book*. This volume, which is in effect the abbey's own record of the charters and deeds which it acquired property and privileges, is exceptionally complete, and it is inconceivable that if the fisheries had

been granted separately after 1127 there would have been no record of such a transaction. This means that the fisheries were undoubtedly granted *before* the two versions of the Magna Carta, in 1215 and 1216.

- 1.7 There are no known surviving medieval accounts or rentals from Furness Abbey, but a very valuable source comes from the very end of its life. In 1537, when the estates and properties were seized by the Crown at the Dissolution, a very comprehensive and detailed financial statement of the assets was prepared. It was produced immediately after seizure, but it was retrospective in that it listed rent and other income which had been received in the last year of the abbey's existence and before. It thus provides crucial evidence of the ownership of the fisheries and the money received from them during the lifetime of the abbey. All the income from the Dalton (manor of Low Furness) properties was received by William Sandes the younger, 'bailiff there', and it was he who produced the accounts:

[Dalton]

Farm of the Fishery And of 30s. of the farm of the fisheries of Ramsyde and Waynowe, with the rabbits in Waynowe, payable at Michaelmas only. And of 6s. 8d. of Peter Richardson for the rent of farm of another fishery there called the Oystergarth at the Hedde and Bekingill between Ramsyde and Southende, payable at Michaelmas
sum - 36s. 8d.

Fishery And of 10s. from John Lampley, Knight, for his rent or farm of a certain fishery there, called Doddyng Fysshynge, payable at the said terms
sum - 10s.

[Waynowe = Walney; J. Brownbill (ed), *Furness Abbey Coucher Book*, vol.II pt.III, Chetham Society NS 78, 1919, pp.594 and 603]

- 1.8 These references tell us that the abbey was receiving rent money in 1536 for the fisheries at Rampside, Walney and Duddon, and that it had leased them to other landowners and individuals on a fee farm basis [see below, paras. 1.9-10]. The sums which are quoted are of particular interest, as

they remained unchanged until the 1930s, four hundred years later, and provide a means of identifying the rents in question. Another point of interest is that the name 'Oyster-garth' clearly indicates that shell-fisheries were involved in these coastal fishings.

- 1.9 Fee farm rentals were an extremely common arrangement in medieval England and later. By this system an asset - usually not a piece of land or a building, but a potentially profit-making enterprise - was 'farmed out' by its owner, who in return for a fixed and guaranteed annual fee or rental handed over all responsibility for the running of the enterprise to another body or individual. The lessee received all profits above his fee farm payment, bore all losses, and undertook all investment and expenditure. The owner retained his original ownership and a limited financial interest, but in effect handed over the asset for practical purposes.
- 1.10 The system became less popular in the 17th century, and new fee farms were rare after 1700, because more sophisticated forms of leasing and renting were developed. However, there was no legal obstacle to their continuation, and in the case of the Furness fisheries the fee farm remained operative until the mid-1930s. Other Boughton Estate fee farm rentals were still being paid in the 1950s.
- 1.11 In 1540 a new survey of the properties of the former abbey was made for the Crown, which now owned and managed the estates. A copy of this survey survives among the Buccleuch papers at the Northamptonshire Record Office, and it has been amplified with early 18th century annotations about the then position as far as rentals were concerned:

A Rental in ye 32 Hen 8 of the Liberty or of the then late Monastery of Furness A.D.1540

*Freehold, the ffishery called Dodding ffishing then in the
Tenure of Sr John Lampley att ye Rent
This paid to his Grace by Sr Thos. Lowther*

0-10-0

*Freehold Estate then being the ffishery of Ramside & Wainow with
the Rabbits there Rent 1-10-0
& another Fishery then called the Oyster garth att Hedde &
Bekyngill between Ramside & South end 0-06-8
This paid to his Grace by Sr Thos Lowther in part he paying
only 0-16-8*

[NRO Montagu (Boughton) Box X7525 uncatalogued]

- 1.12 This document indicates that the same rentals were being paid in 1540, after the fisheries had passed into Crown ownership, as had been paid in 1536. In the apparent absence of pre-1537 rentals there is no way of knowing how old these sums and arrangements were, but the crucial point is that the abbey as owner had been receiving the rentals.
- 1.13 The annotations to the document also indicate that the fisheries had subsequently passed into the ownership of the Duke of Montagu ('his Grace') who received identical fee farm rental payments from his lessees. The only exception is that whereas originally the Walney rabbit warrens had been counted with the fisheries and paid a collective rent, they were by the end of the 17th century separately accounted: this is why Sir Thomas Lowther paid less rent than had been the case in 1540.
- 1.14 One of the documents produced in the case *Cavendish v. Buccleuch* (1902), a statement of the position regarding the Duke's claim to the fishing rights on the west shore of the Leven estuary, notes [BRO BD/HJ 181/1/16] that all the many rights granted to the Abbots of Furness (including appointment of sheriff and coroner, right to have a gaol, courts of all descriptions, return and execution of king's writ etc):

'placed the Abbot in the position of almost an absolute ruler within the bounds of the Lordship...These possessions remained in the Abbot's hands down to the dissolution of the Monastery and then by an Act of 31 Henry VIII they became vested in the Crown [they were in fact annexed to the Crown in right of the Duchy of Lancaster]. All the rights &c formerly vested in the Abbots were retained. During the period the Lordship remained vested in the Crown (1539 to 1662) Fee Farm and other Grants

and Leases of Portions of the property formerly belonging to the Abbots were made by Henry VIII and his successors but the Lordship itself with all its rights privileges and jurisdictions remained intact.

1.15 This statement emphasises that a) the abbot had absolute power in the Liberty of Furness b) the rights he exercised included rights of fisheries c) those rights, with others, remained intact and were not alienated during the period of Crown control (1539 to 1662).

1.16 In the 1630s the Crown made new leases of the fisheries on a fee farm basis. The original agreements for these have not been traced, but they are described in detail in other slightly later documents, and have been partially transcribed. These include the very clear statement written up in a volume at Boughton House [BNH, *Furneis Extracts - Alphabetical Index vol.1*] which states that the manorial rights of the liberty of Furness, which were held by the Dukes of Buccleuch but leased to Sir Thomas Preston of Holker, included:

The Oyster Fishings & Fishing at Ramside & Dudden & taking of Conies in Walney and Oldbarrow with all such other liberties & privileges as John Preston Grandfather to Sr Thos Preston did enjoy there

Granted to Wm Scriven by King Cha: the first A^o 9^o (1633) under the Rents of 1-8-8 vizt for Dudden 10^s For Ramside 16^s 3^d & for the Conies 2^d the 2 former of these Rents are now paid to the Manor of Furness, see the Survey (1696) but no mention of the 2^s in the said Survey so I doubt this Rent is lost

King Charles the 1st by letters Patent under the Great Seal dated the 16 May A^o 9^o (1633) Granted to Wm Scriven & others & their heirs and assigns for ever...all that the Fishery of Ramside & Waynow [sic] & another Fishery called the Oystergarth at the head of Beckinghill between Ramside & Southend of the yearly value of 16^s 8^d...all of which premises were parcel of the possessions of the late dissolved Monastery of Furness' [BHN op. cit., no.4]

1.17 It is apparent that these two sums, 16s 8d and 10s, and the fisheries involved - Rampside, Walney and Duddon - can thus be traced as *de facto* and *de iure* fee farms firstly to the

period before the grant of the estate by the Crown to Albermarle in 1662, secondly to the period before the grant of 1633, and thirdly to the period before the Crown seized possession in 1537. The precise legal reasons why, in the above-quoted document, the Duddon fishery was claimed not to be a fee farm but only treated as such elude me at present, and are referred to nowhere else.

- 1.18 As far as the pre-1662 evidence is concerned, therefore, it seems to me quite unquestionable that the abbots of Furness did own the fisheries, from the beginning of the abbey's existence in 1127, and that this was never challenged. The fisheries not managed as an integral part of the abbey's estates, but instead were let out on a fee farm basis to individuals, of whom Peter Richardson and Sir John Lampley, mentioned in the 1536 and 1540 rentals, were the last. When the fisheries passed into Crown ownership in 1537 the same fee farm arrangement was maintained, and the identical geographical descriptions and rent levels were used.

2. The ownership and leasing of the fisheries from 1662

- 2.1 The Furness estates, and therefore the fisheries, remained in Crown ownership until 1649, then passed to the Commonwealth government, and in 1660 were restored to the Crown. In 1662 King Charles II granted the entire Furness property to George Monk, Duke of Albemarle, in gratitude for the part which Monk had played in the King's restoration. Thereafter the properties descended to the Dukes of Montagu and their successors, the Dukes of Buccleuch.
- 2.2 The grant to the Duke of Albermarle specifically refers to fisheries. By Letters Patent dated 27 March 13 Charles II (1662) the King:

'granted to George Monk Duke of Albermarle in fee amongst other Estates of large extent the Lordship and Manor of Furness with its rights members and appurtenances in the County of Lancaster parcel of the possessions of the Duchy of Lancaster And all messuages mills farms lands tenements courts and profits and perquisites thereof vaccaries mines of

coal feedings pastures herbages fishings rents revenues and other hereditaments parcel of the Lordship or Manor of Furness...in as full and ample a manner as any Duke of Lancaster or any King or Queen of England or any other person at any time theretofore possessed and enjoyed Except Royal Mines of Gold and Silver and the Advowsons and rights of patronage'

- 2.3 This form of words, with its specific reference to the ownership of the fisheries, is repeated in numerous post-1662 marriage settlements, recitations of title and other manorial and property documents. For example, in an indenture of 17 June 54 Geo III (1814) [BHN vol.1 (Room 23)] the properties are listed as including 'Mines Feedings Pasture Herbage Piscaries Fishings'.
- 2.4 The Duke and his successors thus 'inherited' the rights which had been exercised by the abbots of Furness from the 12th century onwards, and those rights included fisheries rights. It is also quite clear, from a large body of post-1662 evidence, that throughout the two and a half centuries after 1662 the fisheries in the area of foreshore owned by the Dukes of Buccleuch and their predecessors, and in the last few years of that period by Boughton Estates Ltd., belonged to the Lord of the Manor of Low or Plain Furness, as parcel of his Liberty of Furness.
- 2.5 These fisheries, in the Duddon, Walney and Rampside areas, were always rented out on a fee farm basis to the Cavendish family of Holker and their predecessors including Sir Thomas Lowther, and it appears that at no time did the Buccleuch estate exercise any managerial or supervisory role over the fisheries. The fee farm for the Furness foreshore fisheries was fixed at 16s 8d *per annum* for the Rampside and Walney fisheries collectively, and 10s 0d *per annum* for the Duddon fisheries. These sums were identical to those rentals received in the 1530s, and to those charged by the Crown in the 1630s, and they remained unaltered almost until the Second World War.
- 2.6 The Cavendish of Holker accounts which have been searched in the Lancashire Record Office do not specify the individual

components of the rental moneys due to the Dukes of Buccleuch, but instead enter a single totalled sum, as below:

LRO DDcA 1/116 [Cavendish of Holker]

Furness estate accounts, 1845-1846

To the Duke of Buccleuch for the years customary rents for estates in Furness, due Martinmas 1845 £36-0-3

LRO DDcA 1/106 [Cavendish of Holker]

Rents due to the King and Duke of Albemarle att ye Excheqr. & Dutchy Aud[it] [1665]

ffor Sarby Dudden & Rampseyde

£009-00-02

[this is a collected rent for the Duddon and Rampside fisheries, and for other manorial rents paid on property at Sowerby, in Hawcoat: although the entry does not state to whom the money was due, it is quite clear that the recipient was the Duke of Albermarle - the predecessor of the Dukes of Buccleuch]

The same document, DDcA 1/106, also has an entry as follows (for the year 1665):

Wages and allowances:

To Thomas Bolton his for the Oyster skar

£003-00-00

- 2.7 In contrast to the generalised nature of these account entries, the Buccleuch accounts which survive for the same overall period do specify the individual sums involved. A sample of rentals and other accounts which were searched at the Barrow in Furness Record Office shows that the fee farm rentals were received from the Cavendish family and their predecessors on a regular basis during the 18th and 19th centuries. Rentals and accounts do not survive from the 17th century in comparable quantities, but such material as is extant confirms that the same pay-

ments were being made.

- 2.8 At Boughton House there is a volume which dates from the 1730s and describes in detail the fee farm rents 'that seem to be due but are not paid to His Grace' and the Fee Farm Rents 'payable at Lady Day and Michaelmas'. It includes the following statement:

Sir Thomas Lowther For the fishery of Rampside & Walnow with the
rabbits there and a fishery called the Oyster
Garth granted in fee farm by K Ch 1st in 1643
reserving 1-8-8 of which no more is paid than
16-8

The same For Dodding [Duddon] fishery in Angerton Moss
(which is called a fee farm rent but never was
granted as is supposed in fee farm so that the
fishery and not the rent properly belongs to His
Grace 10-0

- 2.9 In other words, the sums and the arrangement were the same as those which when this was a Crown manor in the period 1537-1662, and when the estate was the property of Furness abbey before 1537. Since the 1662 grant specifically included the grant of fisheries, and specifically stated that the rights to be enjoyed by Albermarle and his successors were those which had been enjoyed by the Kings and Queens of England and all other persons who had held the liberty and manor, we here have further evidence that fishery ownership was exercised by the Crown before 1662, and that it was granted with the estate and liberty in that year. That the combined sum of £1 6s 8d continued to be received as a fee farm rent by the Earl of Albermarle and his successors, including the Dukes of Buccleuch and Boughton Estates Ltd. is indicated by the following, among other instances:

BRO BD/BUC Box 22 Bundle 1 No 1 Rental and accounts 1850-1851

'John Cranke's account with his Grace the Duke of Buccleuch from Lady Day 1850 to Lady Day 1851'

Fee Farm Rents, Liberty of Furness

Earl of Burlington Rampside and Walney Fisheries 16s 8d

Earl of Burlington Duddon Fisheries 10s 0d

- 2.10 In 1738 a manuscript history of the Liberty and Manors of Furness was produced for the Duke of ~~Buccleuch~~^{MONTAGU}. Several copies of this survive, and it seems to have been written to provide a clear and thoroughly researched statement of the Duke's legal and other titles to the property and to the numerous liberties and privileges which went with it. This document states of the Liberty of Furness that it:

'is now held & enjoyed by his Grace the Duke of Montagu the present Lord of the said Liberty. From what has been said it is manifest that the present Lord of the Liberty may Exercise & enjoy all the Rights Liberties & Priviledges, which the Abbott of Furness as Lord thereof over Did or had a right to enjoy' [NRO The Liberty of Furness ms copy in Box X7525]

3. The ending of the fee farm arrangement

- 3.1 The ending of the fee farm rental arrangement between Boughton Estates Ltd. and the Cavendish estate is revealed in the Boughton (Furness) accounts for the 1930s. It may be postulated that the conversion to a limited company was followed by the gradual modernisation of the administrative and financial arrangements for the running of the estate, and therefore the medieval fisheries rental which had been inherited was quickly abolished. It is clear, too, that the Cavendish estate was no longer maintaining regular payments by this time. The specific entries are given below:

BRO BD/BUC/36/1 Rental account 1932-1934

Manorial Rents, Liberty of Furness (fee farms)

Fisheries

Rampside and Walney Lord R.F. Cavendish 2 yrs [rental term] 16s 8d
p.a. 5s 6d in arrears

Duddon Lord R.F. Cavendish 2 yrs [rental term] 10s 0d
p.a. 3s 4d in arrears

BRO BD/BUC/36/2 Rental account 1934-1935

Manorial Rents, Liberty of Furness (fee farms)

details identical to those in BD/BUC/36/1

BRO BD/BUC/36/3 Rental account 1935-1936

Manorial rents, Liberty of Furness (fee farms)

Fisheries

Rampside & Walney Lord R.F. Cavendish 1 year [rental term] 15s 9d
1 March 1936 Received 15s 9d [pencil annotation 'redeemed']

Duddon Lord R.F. Cavendish 1 year [rental term] 9s 4d
1 March 1936 Received 9s 4d [pencil annotation 'redeemed']

BRO BD/BUC/36/4 Rental account 1936-1937

Manorial rents, Liberty of Furness (fee farms)

No entry for fisheries (or for any subsequent rental year)

- 3.2 It was thus in the rental year 1935-1936 that the fee farm arrangement was ended. The arrears of rent from previous years, and one year rental for that year, totalled 15s 9d and 9s 4d. This sum was redeemed on 1 March 1936, at which date the agreement ended. At that point the fisheries reverted to the direct control of the Boughton Estate, and the

involvement of the Cavendish estate in their management was ended. That there does not appear to have been any active effort to manage the fisheries by Boughton Estates Ltd. after 1 March 1936 does not mean that there ownership was in any way in dispute - simply that the management of the company chose not to make any use of this asset.

- 3.3 In the adjacent Manor of Muchland the Crown did own the fisheries because Muchland had not formed parcel of the abbey estates in Furness. Here the Crown rented the fisheries out on a fee farm basis, also to the Cavendish estate at Holker. Thus the Cavendish estate exercised the management and regulation of the fisheries in the entire area from the Duddon through to Conishead, but in respect only of its two fee farm arrangements, with the Crown and with the Buccleuch estate.
- 3.4 The Dukes of Buccleuch and their predecessors and successors owned every other foreshore right, including right of wreck and all mineral rights, and it exceedingly unlikely that, as these were in their possession, at the same time the fishing rights would have been reserved to another party. In my experience the granting by the Crown of rights of wreck etc. to a manorial lord was invariably accompanied by the ownership of fishery rights over the same foreshore by that lord. In the case of Furness there is no question at all about the ownership by the Buccleuch estates of the rights of wreck and mineral rights.

4. Other evidence for ownership and management of the fisheries

- 4.1 The manor court books of the liberty of Furness do include some references to the regulation of fishing rights by the manor [that is, the Duke's manor] even though the fisheries were fee farmed by the Cavendish estate at Holker. This was the result of manorial jurisdiction. Although the Cavendish family had the fee farm of the fisheries, they were of course not the manorial lords for the manors in which the fisheries at Duddon, Rampside and Walney were situated.

Therefore the Buccleuch manors still had jurisdiction where making of court orders and regulations was concerned.

- 4.2 The following material was extracted from the court books in the early 1900s as part of the evidence in a dispute over the Leven fisheries, but it relates to the Barrow and Rampside area because the whole district came within the jurisdiction of the liberty of Furness [BRO BD/HJ Bundle 184/9 Duke of Buccleuch and Cavendish (case): Copy extracts from the Verdicts of the Chief Court of the Liberty of Furness [held at Dalton Castle]

24 Oct 1767 We order that after the 24th of March next no person setting nets upon the Sands within this Manor in order to take Flooks shall be allowed to set Nets less than four inches wide in the mesh in the penalty of one pound nineteen shillings for every offence

28 Oct 1768 We present Richard Simpson of Rosebeck for setting nets for flooks not four inches wide contrary to a former order in one pound nineteen shillings upon the oath of Capn Jno Berry

24 Oct 1792 We order that no person within this liberty after the first day of January next shall use any net for catching Flooks with the meshes less than three inches and a half from knot to knot or which hath a false or double bottom or shall put one net before another or shall take or expose to sale any Fish less than the following sizes from the eyes to the extent of the Tail, Sole, eight inches, Place or Dab, eight inches, and Flounder, seven inches, under the Penalty of Twenty shillings for every offence

- 4.3 Papers relating to the manor of Muchland and to the Cavendish estates do include some details indicating the procedures for management of the fisheries, and giving supporting evidence for the system of fee farm renting. These are paralleled by the issuing of orders for fishery regulation in the Buccleuch manorial courts.

LRO DDCa 23/1 [Cavendish of Holker]
Memoranda book of John Fletcher, 1725-1740: unpaginated volume

1730 Bass Pool & Rampside Fishery

Persons that Fished in Bass Pool wthout the Lycence of Sr Tho^s Lowther or his Farmers & refused to pay Tides for Fish in Rampside Fishery viz^t

Tho^s Postlethwait of Bigger

Chris: Postlethwait of Same

Ja^s Hunter of South end

Ja^s Richardson of same

Rich^d Richardson of same

James Towers of same

Those persons have since Submitted being first Sued in the Wapentake Court

LRO DDHj Muchland Manor Court Book 1740-1760

The following is typical of a standard entry found each year in the manor court book: the names, places and sums vary but the format remains the same:

15 October 1740

'the Assessors aforesaid Affeer the several Fishing Rents within the said Manor at the several sums hereinafter mentioned (that is to say) the fishermen of Bardsea Two Shillings John Fleming of Beckcliffe Rowland Barker of Aldingham and James Mount One Penny each The Fishermen of Rousbeck and Newbiggin Two Shillings and Six Pence Christopher Lowther William Sherwen William Webster and John Jackson of Leece One Penny each Thomas Simpson of Dendron One Penny Christopher Kendall Thomas Kendall James Kendall Thomas Fell and John Fell James Clayton Myles Cooper George Kendall Thomas Johnson and John Ashburner of Gleaston One Penny each and Thomas Walker of Scales One Penny'

Pencil note on document: 'Mr Walker says Crown have several rights of Fishery'

The 'observations' state that 'In 1888 Mr Vaughan Hawkins, in advising as to the fishing rents stated that the evidence pointed to the payments made having been in respect of the fixing of stakes & on the foreshore and that it did not seem to be established that there is any right of several fishery'. It is suggested that in future the nature of the payments [i.e. their legal basis] should be clearly indicated on the court rolls. 'In view of Councils opinion the rents should be described as foreshore rents and should only be charged against persons who actually interfere with the soil of the foreshore by fixing stakes &c for fishing or otherwise. The rents at present inserted on the Rental against persons who do not use the foreshore should be omitted from future Rentals'.

- 4.4 There is other evidence to indicate that the Dukes of Buccleuch owned the fishing rights in the area of the Liberty of Furness. In the legal proceedings, *Cavendish v. Buccleuch* (1902), which concerned fishing rights in the Leven estuary, evidence was given to clarify the position regarding the Duke's fishing rights in Furness generally. Edward Wadham, the agent, stated categorically as part of his evidence [copy of text, BRO BD/HJ 181/1/5] that:

'The Pier at Piel built on a freehold Island purchased from the Duke by the predecessors of the Furness Railway Co and a lease of oyster beds in Duddon opposite to Sandscale and the Sowerby Lodge estates were negotiated on the Duke's behalf by myself as Receiver...The Duke receives from Mr Victor Cavendish Fee Farm rents for a fishery at Rampside & Walney and also for a Fishery in Duddon'

This not only confirms the fee farm rental of the three fisheries, but also indicates that the Duke was the owner of the fisheries because it was on his behalf that the oyster beds in the Duddon off Sowerby were leased to an [unnamed]

individual. Had these been Crown fisheries the Duke would not have been in a position to make such an agreement.

- 4.5 In contrast to these various statements which clearly support the case, there is the counsel's opinion produced in October 1897 by R. Bertrand Jackson of Lincolns Inn, concerning the Duke's rights to foreshore. It was a potential case in this year, *Buccleuch v. Millom & Askam Iron Co.*, which finally established the Duke's full title to the foreshore and to right of wreck etc. In a document called *History of Furness with reference to the rights [of] the Duke of Buccleuch in that District to the Foreshore & Anchorage Dues* [BRO BD/HJ 183/3/2] Jackson stated that:

'There is a grant dated 11th Feby 1723 from Geo II to Thos Townley and John Plumber of the right to search for oysters "between the mouth of the river Ribble [and] the Peele of Fouldray within the County Palatine and the low water mark of the said coasts" but it appears questionable whether this grant only means a right to search below low water mark'

- 4.6 Clearly it would not be possible to search for oysters below low water, so the foreshore must have been intended in the grant, but it is very significant that the limit of the grant is the Peel of Fouldray. If this is taken to be an approximate location (just as the phrase 'the mouth of the river Ribble' is very vague) it seems likely that the Crown was not in a position to grant the oyster rights beyond the Peel - i.e. beyond the bounds of the manor of Muchland. This, although undoubtedly circumstantial evidence, reinforces the supposition that the extent from Muchland to the county and manorial boundary at the head of the Duddon estuary was not a Crown fishery.

- 4.7 In the same document Jackson says that there is also a problem insofar as the Duke does not appear to have received any rental from the fishermen regarding the right to take shellfish. He notes that in the manor of Aldingham the Crown does [1897] take small rentals for such a purpose but that:

'in the remaining part of the Liberty of Furness I cannot find any such payments are made or that the Lords title is recognised in any way by

the fishermen. I think the last is the only point that throws any real doubt on the Duke's title to the Foreshore...if the Millom & Askam Company concluded to fight this claim it appears to me that the only evidence of contrary user they could produce would be the continued exercise by fishermen of custom of taking shellfish &c. from the Sands without acknowledgment of the Lord's title'

- 4.8 Although at first reading it appears that Jackson was doubtful about the ownership of the fisheries, further investigation suggests that he has overlooked the fact that the Lord (the Duke of Buccleuch and his predecessors) would not, at any time in the period since at least 1662, have been in a position to receive money from the fishermen, since the fisheries were let out on a fee farm basis to the Holker estates (latterly the Cavendish family). Therefore any rentals charged on individual fishermen would have been payable to the Holker estate, not the Buccleuch estate. Whether such rentals were charged or not was therefore an irrelevance, and did not affect the Duke's ultimate title to the fisheries.
- 4.9 The document makes it plain that the title to the foreshore was, in Jackson's opinion, derived ultimately from Stephen's grant to the monks of Furness, and he emphasises that factors such as the right of wreck, anchorage and shipping dues and other foreshore rights which were exercised point very definitely to the overall ownership of the foreshore. As noted above, it seems to me impossible that these rights would not have included fishery rights.
- 4.10 Of particular importance is the statement that when Charles II granted the Liberty and estates of Furness to the Duke of Albermarle the only rights specifically excluded and reserved to the Crown were the mines royal of gold and silver, and the ecclesiastical rights of advowson and patronage. There is absolutely no reference to the reservation of any fisheries or fishing rights to the Crown or to the Duchy, and since we know that the Crown held these rights, and had apparently acquired them on the annexation of the monastic estate of Furness Abbey in 1539, it is quite clear that the fisheries in question were granted in 1662.

4.11 The 1853 deed of conveyance of Roa Island from John Abel Smith to the Furness Railway Co. [at Boughton House] specifically states that the conveyance included one hundred acres approximately of beach and shore which had been purchased by John Abel Smith from the Duke of Buccleuch and the Earl of Dalkeith, together with the right of fishery over that same shore which had been purchased from the Earl of Burlington [i.e. the Cavendish of Holker estate]. This might be construed as meaning that the Earl of Burlington was the outright owner of the fishery, but I wonder whether the real meaning is that John Abel Smith had in fact purchased the leased rights from the Earl of Burlington - in other words, that the ultimate owner of the fisheries remained the Duke of Buccleuch.

4.12 This area of fishing rights is that which is now owned by the Roa Island Boating Club. The land and foreshore which is now theirs was conveyed to them outright in the late 1950s, and the ownership of the fishing rights was transferred at the same time. No legal doubt was raised at that time, and it was assumed with every reason that the fishery was the property of Boughton Estates Ltd. and theirs to convey without hindrance.

5. Summary

5.1 The abbey of Furness was granted the fisheries in its original endowment, by the charter of Stephen, County of Boulogne and Mortain, in 1127, and retained the fishery rights until 1537 when the abbey was dissolved.

5.2 The fisheries then passed, with all the other properties of the former abbey, to the Crown. They were held by the Crown until 1662, with the exception of the brief period of direct government control in 1649-1660.

5.3 In 1662 they were granted outright, together with the rest of the Furness estate, to the Duke of Albemarle, and so passed by normal means of inheritance to the Dukes of Montague and ultimately to the Dukes of Buccleuch. In the early

1930s, on the formation of Boughton Estates Ltd., the fisheries passed to that company, and in its ownership they have remained.

- 5.4 The abbots of Furness, the Crown, and the Dukes of Albe-marle, Montague and Buccleuch, and Boughton Estates Ltd., all rented out the fisheries on a fee farm basis, at the rental of 16s 8d per annum for the combined Rampside and Walney fisheries, and 10s per annum for the Duddon fisheries. These arrangements were in operation before 1537 and continued to 1936. The rentals and the geographical areas and terminology remained unaltered throughout this period.
- 5.5 The fee farm arrangement made no difference of the ownership of the fishery, which was, throughout, vested in the manorial lords - the Dukes of Buccleuch and their predecessors. It thus passed to Boughton Estates Ltd. For most of the period from 1662 the lessees of the fishery were the Cavendish family of Holker. They managed the fishery but had no claim to ownership.
- 5.6 There is no evidence to suggest that the Cavendish/Holker estate had any involvement whatsoever in the Furness fisheries after 1 March 1936. The Crown and the Duchy of Lancaster both state that they have no claim to the fisheries. All the evidence therefore indicates that Boughton Estates Ltd. owned the fisheries after this time, just as their predecessors had done since the original grant of 1127.

Alan G. Crosby

9 January 1994

Material checked:

Barrow Record Office

BD/BUC Buccleuch estates (Furness)

Box 17/1	Correspondence re sale of Piel Island 1919-35
Box 17/48	Correspondence re sale of foreshore, Ramsden Dock, to Furness Railway Co., 1921-22
Box 18/85	Correspondence re effluent pipe at Walney Coastguard Station, 1924-25
Box 18/114	Correspondence re concrete causeway at Earnse Bay, Walney, 1928
Box 18/122	Correspondence re Barrow Corporation groynes, Walney, 1928-30
Box 19/137	Correspondence re Barrow Corporation plan to widen promenade at Walney, 1930
Box 19/188	Correspondence re application to work sand at Roosecote, 1937-39
Box 19/213	Correspondence re application to erect pier on the Duddon foreshore, 1940
Box 19/223	Correspondence re working of sand and gravel at Concle, Rampside, 1942
Box 22/8	Documents relating to the Barrow in Furness Corporation Bills of 1875 and 1881
Box 22/9/9	Material re sand extraction at Roose 1914-15
Box 22/9/10	(more of same)
Box 22/9/11	(more of same)
Box 36/1	Furness rental 1932-1934
36/2	Furness rental 1934-1935
36/3	Furness rental 1935-1936
36/4	Furness rental 1936-1937
36/7	Furness rental 1939-1940
36/13	Furness rental 1946-1947
Box 44/4	Fishery papers:
	7) Wright v Edmondson 1894 (evidence re byelaws)
	8) Wright v Edmondson 1894 (note re court proceedings)
	9) Wright v Edmondson 1894 (copy verdict)
	10) Wright v Edmondson 1894 (cuttings re

case from *Barrow News*)
11) Mussel tanks at Roa Island 1917 (draft of
licence)
12) (same) (correspondence)
15) Sketch chart (undated) showing Irish Sea
fisheries
16) Notes re fishing rights from court books
1742-1792
Box 44/8 Material re Piel Harbour pier

BD/HJ Hart Jackson of Ulverston (solicitors)

Liberty of Furness Court Baron Court Books
1. 1740-1758
2. 1758-1827

Liberty of Furness Court Leet Court Books
1-2. 1740-1763

Box 175/Bundle 2 Plain Furness rentals 1810-1852
Box 176 Liberty and Manor of Low Furness verdicts
1740-1864
Box 181/Bundle 1 Papers relating to the case Cavendish v.
Buccleuch 1902
183/Bundle 3 ditto
184/Bundle 13 ditto
194/5 Observations relating to Fishery Rents in
the Manor of Muchland (no date: c.1900)
237 [unlisted] papers relating to estates at
Walney Island
304 [unlisted] papers relating to the Kent and
Bela fisheries

Lancashire Record Office

DDCa Cavendish of Holker papers

1/1 Accounts including Furness rents 1663
1/2 ditto, 1669

- 1/3 ditto, 1670-71
[THESE ARE IN FACT ORDINARY RENTALS, not accounts]
- 1/106 Rents due to the Duke of Albemarle, 1665-66
- 1/116 Estate accounts, 1845-46
- 1/124 Estate accounts, 1859-61
- 16/98 Case and opinion re Muchland manor, 1705
- 17/214 Rental/memoranda re customary tenancies, Furness
manors, late 17th century
- 17/231 Recollections of estate stewards 20th century
[WITHDRAWN SO NOT SEARCHED]
- 21/13 Survey and valuation of the Furness estates, 1765
- 21/25 Survey and valuation of Low Furness estates, 1826
- 22/16 Collection of nineteenth century correspondence
including references to fisheries
- 23/1 Memoranda book of John Fletcher, steward to Sir
Thomas Lowther, re estates in Furness, 1728-1740

DDHj Hart Jackson of Ulverston, solicitors

(uncatalogued material)

Muchland Manor Court Book, 1740-1760

DDSa Sandys of Graythwaite: catalogue searched but no items of
apparently immediate relevance found

Northamptonshire Record Office

Montagu (Boughton) papers, uncatalogued but boxed and box-listed:

four boxes searches in conjunction with Ken Royston

[1338/3, V1713, X7524, X7525]

Printed sources:

including the *Victoria County History of Lancashire* vol.8
and the *Furness Abbey Coucher Book* (Chetham Society)

Dr Alan G Crosby MA

Curriculum vitae

Qualifications

- 1977 B.A. (Hons) (First Class) in Geography, St. Edmund Hall,
University of Oxford
- 1982 M.A. University of Oxford
- 1982 D.Phil in Geography, St. Edmund Hall, University of Oxford
- Housing policies and their influence upon the residential
development of selected urban areas*

Employment

- 1981-present Freelance genealogist and record agent (from 1984
a member of the Association of Genealogists and
Record Agents - AGRA)
- 1983-present Freelance local history consultant, researcher,
lecturer and writer
- Contract research for:
- Great Yarmouth Port and Haven Commissioners
Norfolk County Council
Sefton Borough Council
Lancashire County Council
Royal Commission for Historical Monuments in
England
Preston Borough Council
Ibstock Building Products Ltd.
British Coal
Bollihope Estates Ltd.
West Lancashire District Council
James Starkie & Sons Ltd, Preston
Melvyn Bragg
and numerous private individuals
- 1986-present Editorial consultant and freelance indexer for
Carnegie Publishing, Preston: from 1992 Managing
Editor
- 1983-1985 Part-time tutor in local history, University of
Cambridge Department of Extra-Mural Studies
- 1985-present Part-time tutor in local history, University of
Liverpool Department of Continuing Education
- 1991-present Part-time tutor in local history, Lancaster
University Department of Adult Continuing
Education
- 1993-present Honorary Research Fellow in Department of History,
University of Liverpool

Organisations

Friends of Lancashire Archives:

1986	Steering Committee member
1986-1987	Editor
1987-1989	Chairman
1989-1992	Editor

Lancashire Local History Federation:

1986-1988	Committee member
1988-1991	Editor
1988-1990	Assistant Secretary
1990-	Editor, <i>Lancashire Local Historian</i>
1991-	Chairman

Association of Local History Tutors:

1991-	Committee member
-------	------------------

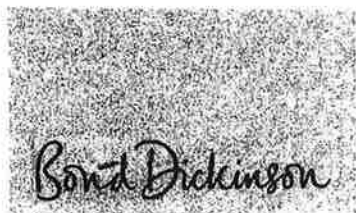
British Association for Local History:

1992-	General Editor
1993-	Council member
1993-	Chairman of Publications Committee

Publications:

- 1980 *The Experience of Gradual Renewal in the Jericho District of Oxford* (Oxford University School of Geography Research Paper No.25)
- 1982 *A History of Woking* Phillimore (Chichester)
- 1982 *Seeing Oxford* Oxford Books (Oxford): revised editions published 1986, 1988
- 1982 *Oxford and its Countryside* (joint author with DI Scargill) Oxford Books (Oxford)
- 1986 *A History of Thetford* Phillimore (Chichester)
- 1987 *Burscough: the story of an agricultural village* (editor: author E Rosbottom) Carnegie Press (Preston)
- 1988 *Penwortham in the Past* Carnegie Press (Preston)
- 1988 'Lancashire Probate Records', in *The Manchester Genealogist*, vol.24 no.1 (January 1988), pp.3-8
- 1989 'Changing the Face of Norfolk', in *Centenary: a hundred years of County Government in Norfolk* Norfolk County Council (Norwich)
- 1989 'Cartographic Reproduction', review in *The Local Historian*, vol.19 no.3 (August 1989), pp.130-132
- 1989 *The Oxford Guidebook* Oxford Books (Somerton)
- 1990 *A Landscape History Survey of the Ellerbeck West Proposed Opencast Coal Site* priv pub Lancashire County Council (Preston)
- 1990 'An historical account of the Cliftons of Lytham from the 12th to the 18th centuries', in J Kennedy, *The Clifton Chronicle* Carnegie Publishing (Preston)
- 1991 'East Anglian Urban Heritage', review in *The Local Historian*, vol.20 no.3 (August 1990), p.140
- 1991 *The History of Haslingden Grane: A valley, its landscape and its people* (editor, with J Hallam) Lancashire County Council (Preston)
- 1991 'Papers of a Norfolk Squire', review in *The Local Historian* vol.21 no.1, pp.33-34
- 1991 *The History of Preston Guild* Lancashire County Books (Preston)
- 1991 *Through Eight Preston Guilds: The Story of Starkies 1842-1992* James Starkie & Sons (Preston)
- 1991 'Poulton-le-Fylde in the 17th Century', in *Poulton-le-Fylde Historical Society 1981-1991* Poulton HS (Poulton)
- 1991 *The Family Records of Benjamin Shaw, Mechanic of Dent, Dolphinholme and Preston, 1772-1841* (editor) The Record Society of Lancashire and Cheshire, vol.130
- 1992 'Genesis of a County', review in *The Local Historian*, vol.22 no.1 (February 1992), p.48

- 1992 'Benjamin Shaw: growing up in Dentdale', in *The Sedbergh Historian*, vol.3 no.1 (Spring 1992), pp.31-34
- 1992 'Preston Guild', in *CNWRs Regional Bulletin* (Lancaster University), New Series No.6 (Summer 1992), pp.3-5
- 1992 *Garstang: A Town Trail* Lancashire County Books (Preston)
- 1992 'Lichfield kersey in the sixteenth century: some references in Manx correspondence', in *Transactions of the South Staffordshire Archaeological and Historical Society*, vol.xxxii (1990-91), 85-86
- 1993 'From soil to soul'; ' "When we build, let us think that we build for ever" ' and 'Nostalgia knows no bounds': articles in *Local History News* no.26 (February 1993), pp.1-2, 19-21
- 1993 'The Croxteth Hall Household Accounts, 1690-1693', in *CNWRs Regional Bulletin* (Lancaster University), New series No.7 (Summer 1993), pp.4-9.
- 1993 'How others see us' and '"Archives are for ever" - but where are yours?': articles in *Local History News* no.27 (May 1993), p.1, 14
- 1993 *Lancashire Local Studies: in honour of Diana Winterbotham* [editor] Carnegie Publishing with Lancashire Local History Federation (Preston), 154pp
- 1993 'Fowl Play? Keeping and stealing geese in Lancashire, 1550-1850', in *Lancashire Local Studies* (ed. Crosby), pp.43-62
- 1993 'John Makin, Salford baker and brewer, 1613', in *Salford Local History Society Newsletter*: part 1, 'A comfortable lifestyle' (vol.21 no.3, July 1993, pp.8-9); part 2, 'The tools of his trade' (vol.21 no.4, August 1993, pp.6-7)
- 1993 'The experience of history' and 'A new league of nations' - articles in *Local History News* no.28 (August 1993), p.1, 13-14
- 1993 'Listing new buildings' and 'Regional perspectives and local history' - articles in *Local History News* no.29 (November 1993), p.1, 13-14
- 1993 *Preston Guild 1992: The Official Record* Carnegie Publishing and Preston Borough Council (Preston) 248pp.

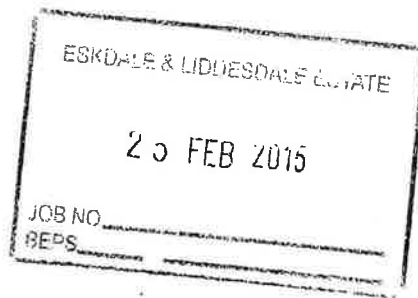


ANNEX B

www.bond dickinson.com

20 February 2015

M Oddy Esq
Buccleuch Group
Weatherhouse
Bowhill
Selkirk
TD7 5ES



Bond Dickinson LLP

One Trinity
Broad Chare
Newcastle upon Tyne
NE1 2HF
Tel: 0191 279 9000
Fax: 0191 230 8501
DX 727902 Newcastle upon Tyne 28

david.towns@bond dickinson.com
Direct: 0191 230 8350

Our Ref:
SRK/DJT/BOU/0019/00019
Your Ref:

Dear Mark

Boughton Estates Limited
Sea Fisheries and Foreshore - Manor of Plain Furness

As requested, I have reviewed the position as regards the Estate's ownership of foreshore and private sea fisheries around the Liberty and Manor of Plain Furness, and I can confirm as follows:-

Foreshore

The foreshore (being the land between the mean high and low water marks) adjoining the Liberty and Manor of Plain Furness was included in the Grant by Charles II to the Duke of Albemarle on 27 March 1662. This is evident because not only does Charles grant the Liberty and the Manor of Plain Furness, but also with them all appurtenant "waistes...and all other "rights, jurisdictions, franchises, liberties, commodities, customs, privileges, profits, advantages, emoluments and hereditaments whatsoever" as had been held by the King in his right of Crown and also in his right as Duke of Lancaster. As you are aware from our previous discussions, "waistes" was a word used to describe land including foreshore.

The Estate's foreshore at the Liberty and Manor of Plain Furness was formally registered in September 2013 with Absolute Title at Land Registry. The title numbers are:-

CU275059
CU275139
CU275140
CU275141
CU275142
CU276643
CU276644

Although the extent of the title is between the mean high and low water marks, the Estate's ownership actually extends to the point of the lowest astronomical tide. This is because the Duchy of Lancaster historically claims ownership to that point, and the Estate is of course a direct successor in title to the Duchy. However, Land Registry has no jurisdiction to register land beyond the mean low water mark, and so this additional strip is not capable of registration with them.

Sea Fisheries

The essential characteristic of a right of fishery is the entitlement to fish in one's own, or another person's water, which may exist either as an incident to the ownership of the soil which is covered by water, or independently of the ownership of that soil. Generally, the right of fishery constitutes a profit of the soil and the title to the fishery arises from the ownership of the soil. Where the soil and the right to fish are in the same ownership the fishery is referred to as a corporeal fishery; where the right of fishery is severed from the ownership of the soil, it is an incorporeal hereditament and the right is a *profit a prendre*.

Bond Dickinson LLP is a limited liability partnership registered in England and Wales under number OC317661. VAT registration number is GB123393627. Registered office: St Ann's Wharf, 112 Quayside, Newcastle upon Tyne, NE1 3DX, where a list of members' names is open to inspection. We use the term partner to refer to a member of the LLP, or an employee or consultant who is of equivalent standing. Bond Dickinson LLP is authorised and regulated by the Solicitors Regulation Authority.

A person who has the sole and exclusive right of fishing, either with or without ownership of the soil over which the right is exercised, is said to have an *exclusive*, *several* or *free* right of fishery: meaning that the owner has the right of fishing independently of all others and that no other person has a co-extensive right to the fishery. By contrast, the term *common fishery* indicates the right of the public to fish in tidal waters, and *common of fishery* refers to a right of one or more persons to fish in common with the owner of the fishery.

In sea and tidal waters a public right of fishery will exist unless the right of fishery has been appropriated through the creation of a private several fishery in these waters. The basis of the distinction between public and private fisheries lies in the original vesting of all tidal and non-tidal fisheries in the Crown as the ultimate owner of all land. Ownership of the right of fishery in tidal waters formerly enabled the Crown to grant private rights of several fishery to individuals as parcels of manors.

Although private rights of fishery so granted in tidal waters may remain in private ownership to this day, the right of the Crown to grant such rights was abolished by Magna Carta in 1225. As stated by Lord O'Hagan in *Neill v. Duke of Devonshire*:-

"...unless a several fishery in tidal waters was in being before Magna Charta, it cannot be created by subsequent grant."

If, however, such a fishery existed before Magna Carta, it was possible for the Crown to make a grant of the same thereafter, if in the meantime – as by forfeiture – the Crown had got it back. This position was stated by Lord Blackburn in *Neill v. Duke of Devonshire*, as follows:-

"[The Crown] can grant a several fishery [in tidal waters] since Magna Charta, if that fishery existed before Magna Charta. If a tidal river in which there was a prima facie right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Charta"; at p180.

The grant by the Crown of a right of several fishery in tidal waters was sufficient to exclude the public from those waters. Provided that right to make a private grant and to exclude the public was exercised by the Crown before Magna Carta, the private fishery concerned could then lawfully be made the subject of subsequent grants by the Crown to private persons, either together with or separately from the soil.

The ownership of the Furness fisheries has been researched in detail by Dr Alan Crosby. The historical starting point is the grant of lands made by Stephen, Count of Boulogne, to Furness Abbey in 1127; which grant included the fisheries in Furness. On the dissolution of the abbey in 1537, these fisheries, together with the other property and assets of the abbey, passed to the Crown. They remained in Crown ownership until 1649 and then passed to the Commonwealth government. In 1660 they were restored to the Crown.

As above, in 1662 Charles II granted the entire Furness property to the Duke of Albemarle. The grant to the Duke of Albemarle specifically refers to the "fisheries and fishings" as part of the Liberty and Manor of Plain Furness. From the Duke of Albemarle, the properties descended to the Dukes of Montagu and Buccleuch and their successors, and thence to the Estate.

It is therefore clear that the private fishery at Furness was first granted before the date of Magna Carta, and accordingly it is the case that the Crown was able and entitled to make the subsequent grant of this right to the Duke of Albemarle in 1662, from which grant the Estate's entitlement is derived.

In conclusion, not only does the Estate own the foreshore as registered to it at Land Registry (and beyond) but there is no public right of fishery over that land.

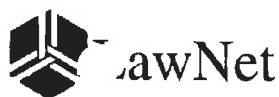
Kind regards,

Yours sincerely



David J Towns

for and on behalf of Bond Dickinson LLP



Quality in Law

Boughton Fcl. 2015

ANNEX C

TOLLER BEATTIE SOLICITORS

Church House Church Lane
Barnstaple Devon EX31 1DE

Tel: (01271) 75821

Fax: (01271) 74762

DX: 34954 Barnstaple

PGS/LJ/NO/472

P Dymond Esq
Clerk and Chief Fishery Officer
North Western and North Wales Sea Fisheries
Committee

Lancaster University
LANCASTER LA1 4YY.

Our ref:

PD/IVA/050

Your ref:

Date: 25 November 1996

Dear Peter

Morcambe Bay Private Fisheries Claim

Thank you for your letter of 21st November, with enclosures, which I have perused over the weekend. Further to your instructions, the advice I would give to the Sea Fisheries Committee falls into two main parts, first, the claim of Boughton Estates to a several fishery which includes the shellfish species sought to be the subject of the new order, and secondly, the implications for the proposed order of the existence or claimed existence of private several rights. The third part draws the first two issues together with recommendations as to future action.

A. THE BOUGHTON ESTATE CLAIM

1. I have examined the paper produced by Dr A G Crosby. Dr Crosby is a geographer, rather than a professional historian, and he does not appear to be legally qualified. His knowledge of shellfisheries may be limited - I have noted a reference on page 17 which argues that an oyster fishery cannot exist below low water mark. The document does not pretend to be an impartial examination of the evidence referred to, but a partisan representation of some, but not by any means all of the information available to the Boughton Estate. He refers on page 17 to a "potential case" in 1897 as establishing the Duke's "full title to foreshore". No reliance should in my view be placed upon any of the partial citations or pleading of the counsel's opinions or other statements given on behalf of the Duke which Crosby cites without all the documents being fully examined on behalf of the Sea Fisheries Committee. Ultimately, where a private fishery exists would have to be determined by a court of law, and I do not believe that the Sea Fisheries Committee should accept Mr Crosby's paper as prima facie evidence of the existence of a several fishery, or of a several fishery vested in the Boughton Estate.
2. The evidence produced by Dr Crosby may in many instances be consistent with the exercise of manorial authority by the lord of the manor or the exercise of rights of ownership or claimed ownership of soil. It must be remembered that many acts



A QUALITY SERVICE
Approved by the Legal Aid Board

Partners: Robert H. Beattie, Alan Gordon-Lee, Mervyn T. Fudge, Timothy S. H. Hook, Deborah Baker, Richard Congdon, Jayne A. Perring.

Associates: G. Alan Feinson, Peter G. Scott, Anne Taylor.

This firm is regulated by the Law Society in the conduct of investment business.

carried out by shellfishermen and other fishermen are acts which cannot be justified under a public right of fishery e.g. the installation of fixed nets, traps, pools for the storage and purification of shellfish. There is also the possibility of confusion with the position under Scottish law where mussel scalps and oyster beds belong to the owner of the soil. Even now under English law we hear of claims by owners of fundus that no cockle fishery can be pursued except by their consent, upon payment.

3. As to the existence or otherwise of a private fishery, documentary evidence can on occasions override years and decades of non-use or absence of claim. The fact is that once a right in property (and a right of several fishery is a right in property) has come into being no public right can co-exist with it. The abandonment of a private right and the creation of a new public right are difficult to establish once a valid grant pre-Magna Carta has been found to have been made.
4. However, Dr Crosby has in my view made a serious error in interpreting the papers to which he refers in so far as he relies on them to establish an entitlement to an alleged several fishery by the Boughton Estate. The crucial passage is on pages 12-13 of the report. Dr Crosby interprets the annotation "redeemed" to mean that the Cavendish estate surrendered the rights on which Dr Crosby relies to the Boughton Estate. In fact, the term redeemed, in relation to a rentcharge or fee farm rent, means that the person who pays the rent pays a capital sum to the person who receives it to extinguish his liability to pay rent in relation to the asset in question in the future. Following the redemption, whatever rights Cavendish estate had paid the rent on, were enjoyed by Cavendish estate without financial liability, and all rights in the matter of Boughton Estate were extinguished.
5. When Dr Crosby therefore says "That there does not appear to have been any active effort to manage the fisheries by Boughton Estates Limited after 1 March 1936 does not mean that the ownership was in any way in dispute" he is disregarding evidence that the Boughton Estate ceased to have any claim of rights, and pursuing a hypothesis which goes entirely against the evidence he adduces.
6. My provisional conclusion, therefore, is that if there is a claim to a several fishery in these waters, then it was vested in the Cavendish estate subject a rental in favour of the Duke of Buccleuch until 1936, and since 1936 vested in the Cavendish estate and/or their successors in title. The papers you have provided to me taken from the records of the Lancashire Sea Fisheries Committee refer to Mr Victor C D Cavendish as the lessor of fishery rights in Barrow Harbour in 1895.
7. I would advise that the Boughton Estate be asked to produce the documentation relating to the "redemption" of the fee farm rents in relation to the alleged fishery from 1936.



**QualitySolicitors
Parkinson Wright**

Our Ref: PGS/LCD/116980

Stephen Atkins Esq.
CEO
NWIFCA
1 Preston Street
Carnforth
Lancs
LA5 9BY

ANNEX D

4 Abbey Lane Court
Abbey Lane
Evesham
WR11 4BY

Tel. 01386 761176
Fax. 01386 765489
DX 700285 Evesham 2

evesham@parkinsonwright.co.uk
www.qualitysolicitors.com/parkinsonwright

9th March 2015

Dear Dr Atkins

The position of NWIFCA vis-à-vis claimed private fishery in Morecambe Bay

Thank you for your instructions on behalf of NWIFCA in relation to this issue. This initial advice takes into account the limited information so far supplied by Boughton Estate. Further, it is not clear whether Boughton Estate claims a several fishery for all species of fish or only some species.

I have advised that a search is conducted of the sea fishery committee minutes and other records, and of other public records, and evidence from other sources including personal statements of the enjoyment of fisheries for all species in the relevant area by parties without specific Boughton Estate licence i.e. apparently in the exercise of a right of public fishery.

The changes which have taken place since my previous advice

As you are aware I have previously seen the Crosby study and advised the former Sea Fisheries Committee on it almost 20 years ago. At that time the byelaw making powers of SFCs did not extend to private fisheries without the consent of their owners.

Since then the Waddenzee decision of the European Court of Justice has led to the universal acceptance of the proposition that fishing operations do constitute plans or projects for the purposes of Article 6(3) of the Habitats Directive, the obligation to review pre-directive consents has come into effect, the regulations implementing the directive have been amended and the powers of IFCA's to make byelaws without the consent of the owners of private fisheries have been introduced by the Marine and Coastal Access Act.

During that period I have been involved in two very substantial court proceedings involving similar claims to several fishery one of which on behalf of the claimant of several fishery and the other on behalf of the claimant of public fishery.



Our branches:	Worcester 01905 721600/726789	Droitwich 01905 775533	St Johns 01905 425167
----------------------	----------------------------------	---------------------------	--------------------------

A list of members of the LLP is available for inspection at each office.
Registered Number 00323172 Registered Office: Haswell House, 31 Nicholas Street, Worcester, WR1 1JL.
The firm is authorised and regulated by the Solicitors Regulation Authority. QualitySolicitors Parkinson Wright is the trading name of Parkinson Wright LLP.
Parkinson Wright LLP is a Limited Liability Partnership registered in England and Wales.

Direct lawyer contact | No hidden costs | Free first advice | Same-day response | Open on Saturdays

I have also since my previous instructions been engaged in extensive work and engagement with Natural England in connection with a recognized several fishery within a European site elsewhere, as well as having acted as the retained adviser to another sea fisheries committee with specific reference to the powers and obligations of SFCs under the Habitats Directive.

Consequently, I come to advise on this matter with the benefit of these experiences.

What is the relevance of a claim to several or private fishery

The IFCA has the statutory duty of regulating the exercise of fisheries throughout its district.

It also is obliged to exercise its powers with regard to the purposes of the Habitats Directive.

Fishery operations are operations which under the terms of Article 6(3) of the Habitats Directive as now understood following the Waddenzee decision and therefore require to be subject to a process under which their potential impacts are assessed in combination with other plans and projects. Therefore, if there is a several fishery within a European site all regulation within the site has to have regard to the implications of the exercise of the several fishery.

If it were successfully asserted that there was a several fishery over the whole of Boughton Estate foreshore then persons exercising that right would in my view technically need a consent from Natural England under the Wildlife & Countryside Act 1981 in order to pursue it. A situation where a private fishery was being pursued without a consent from a competent authority after an Article 6(3) process would be inconsistent with the regulatory framework required by the Habitats Directive. Alternatively, notwithstanding a claim of ownership, the estate could apply to DEFRA for a several order under section 1 of the Sea Fisheries (Shellfish) Act 1967. In either event the estate would need to provide a management plan and an environmental assessment of the impacts of the proposed fishing operation on the European site.

Implications of a private fishery

Byelaws made by the IFCA prima facie apply to the whole or the specified part of the district of the IFCA and apply to the taking of any fish within it. Within a private fishery for shellfish which complies with the statutory requirements, the taking of relevant species from the private fishery constitutes a breach of statutory duty i.e. a civil claim actionable by the owner of the fishery and also a criminal offence under section 7 of the 1967 Act which can be prosecuted by the owner or indeed any one, including a public authority such as the IFCA. For the purposes of such proceedings, of course, the existence of the private fishery has to be established beyond reasonable doubt, and not simply on the balance of probabilities.

The IFCA should be aware that in relation to a private fishery which is not created or reinforced with a several order the fish within it are not the property of the owner of the fishery but wild fish. Consequently when fished they become the property of the

fisherman even if the fisherman has no entitlement from the owner of the fishery to fish there. Legal proceedings if brought by the owner would normally be in trespass.

My conclusions on the Crosby paper and the difficulties of proof of a several or private fishery

My conclusion in 1996 was that I did not believe that the Sea Fisheries Committee should accept Mr Crosby's paper as prima facie evidence of the existence of a several fishery at all, or of a several fishery vested in the Boughton Estate.

These two issues can be separated into three:

- (1) Is there evidence which suggests that the Crown granted a several fishery right prior to Magna Carta? The Boughton Estate suggest that it is conclusively established that a several fishery was granted prior to Magna Carta. This is certainly not the case.
- (2) If so, is it a fishery for all species of fin and shellfish, or for specific species. For example, Dr Crosby (1.8) refers to an oyster garth appurtenant to Furness abbey, implying that there may be a several right for native oysters (incidentally as a garth is an enclosure, this reference appears equally capable of referring to an enclosure in which oysters are relaid. The references to Dodding fishing, Ramside & Wainow are of particular interest (1.11) in that they represent an agreement with Lowther about an area of interest adjacent to the Leven.
- (3) Whether the claimant has title to such a right. If the claimant has alienated such right as he has, then it is not possible for the IFCA to proceed on the hypothesis that the claimant has such a right until such time as the title is challenged by a third party. In particular there are concerns as to whether the transactions between Boughton and Cavendish vested such claims in Cavendish absolutely rather than subject to the fee farm rental: redemption normally carries such an implication: the statement at 3.2 that no active effort to manage the fisheries by Boughton Estate after 1936 is entirely consistent with the proposition that the Estate had parted with all interest to Cavendish.

At the present time my provisional view of the Boughton claim expressed to NWNWSFC in 1996 is unchanged.

Ideally a several fishery at common law in England is shown by a specific grant of a charter prior to Magna Carta to that effect, or a subsequent renewals referring very specifically to rights of fishery in tidal waters. It must be understood that even where the Crown has granted the foreshore and/or fundus to the lord of the manor, or even a right of wreck, there is no necessary inference that a right of several fishery has come with it, and if it is a grant post Magna Carta there is the presumption that it did not. Crosby speculates at 3.4 that it was unlikely that a right of wreck and mineral rights were granted but no several fishery, yet this is not an uncommon situation.

Bond Dickinson refer to the grant to the Abbey of Furness in 1127 by Stephen Count of Boulogne in 1127 as establishing the grant of several rights of fishery, presumably for all fish species. Assuming that Stephen was able to make a grant of several fishery

when he had not succeeded to the crown, precisely what those fisheries were is not clear. Many such grants of fishery were in respect of fishing weirs, and it was this aspect of several fisheries which is expressly prohibited by Magna Carta. A right in respect of fishing weirs implies the absence of a general several fishery.

Great stress has been placed by Boughton Estate on the registration of the estate's titles to foreshore in 2013. This is in fact entirely irrelevant to the issue of whether a several fishery exists as frequently the foreshore has been granted by the Crown with no several fishery attached to it. Similarly if there is a several fishery it will not necessarily be coextensive with the foreshore.

In the absence of a clear pre Magna Carta grant the law looks to whether it can be inferred from the conduct of the claimed owner of the fishery and fishermen within the fishery that the claimed owner has possessed the fishery and vindicated his ownership so that it can be inferred that the several fishery must have been granted by the Crown to the claimed owner prior to Magna Carta.

One would therefore look to cases in which the ownership of the fishery has been determined by the courts. In strict theory a judgment is only binding on the parties to the litigation, but an authoritative judgment of the Court of Appeal or even a judge at first instance should be given particular respect, and a well reasoned county court judgment may well suffice to form a provisional view.

At a lower level a successful prosecution by the claimed owner of the fishery against a fisherman is significant evidence.

It does not appear that at any time Boughton Estate has litigated its claim to a private fishery. Dr Crosby refers to a "potential" claim. Much of the text of Dr Crosby's report is suggestive of an assumption by authors of documents that there was a right of fishing and that some rents were being paid, but without any indication that any management of any fishery was taking place.

In the absence of judicial decisions then, one has to look at how fisheries in the relevant area have been exercised over the period since Magna Carta to the extent that there is evidence. If a landowner has consistently over a period prevented fishermen from taking fish from his foreshore or the tidal waters flowing over it unless they paid him for the privilege that would be evidence tending to support a presumption that the Crown had granted a several right. The inference could be that a several fishery of all species (including finfish) had been granted, or a fishery for shellfish, and one would look at the evidence of public fishery being exercised or prevented in either context. One must put aside evidence relating to royal fish, which are a different issue altogether.

What is most commonly found is some evidence of payments in relation to stationing of nets. This is at best ambiguous, because the public right of fishery may include a right to use a net but not a right to drive a post into the foreshore. Brief notes therefore that an individual has paid the lord to station a net is not usually sufficient to establish such a fishery. That the nets referred to by Crosby at 4.2 clearly relate to fixed nets in that there is a manorial prohibition on one party setting one net in front of another. The presentments at Muchland in relation to fishery rents at 4.3 are construed by the author

of the pencil note precisely as I have suggested i.e. that the legal basis of these rents was in relation to the use of the soil of the foreshore for fixed stakes.

What has to be weighed against evidence suggestive of a several fishery right is the practice of fishing in the fishery without the consent of the claimant. Evidence supportive of public fishery may be obtainable from living memory, and from documentary sources including the records of the former SFC. Similarly appropriate weight should be given to any legal proceedings which are inconsistent with the several fishery claim, including any enforcement by the SFC of byelaws within the area claimed to be several fishery.

It is admitted in Crosby's report that there is no evidence of active management by Boughton Estate or by the fee farm lessees of whatever fishery rights Boughton had, i.e. Cavendish. If this is the case and the public have exercised rights of fishery for fin fish and shellfish throughout the relevant waters without intervention by the claimed fishery owner it is difficult to infer from limited historical information that a several fishery for all fish species, or indeed of all shellfish species, has been granted.

Options for the NWIFCA and the Boughton Estate

- (1) It is suggested by Boughton Estate that the area of the estate is taken out of byelaw control. Given the statutory duties of the IFCA and the requirements of the Habitats Directive this does not appear to be a lawful option.
- (2) The IFCA seeks to encourage molluscan aquaculture within its area. It may therefore appropriate to exercise byelaw powers to address conflicts which arise as a result of the pursuit of the public fishery immediately adjacent to the fixed installations of the oyster farm, it may be considered desirable that there should be a limited exclusion zone around those installations. However it would not be a legitimate use of byelaw powers in this instance if it were to result, in effect, in the appropriation to Boughton of substantial wild mussel stocks in wider areas. I have to mention at this point that I do not agree with an opinion which has been expressed to the authority that it is possible for a several fishery to be effectively created through the use of byelaws without an order.
- (3) The pursuit of aquaculture and the most appropriate management of the shellfish beds within the area would most appropriately be regulated by Boughton Estate applying to DEFRA for a several order, supported by an environmental study and management plan which will be subject to screening and/or appropriate assessment under the Habitats Directive. Such an order would vest title to shellfish of the listed species in the grantees of the order, and would put that title beyond any doubt. Boughton's advisers should appreciate that proof of historic fisheries in civil courts is a matter of considerable difficulty, and even if the IFCA were able and willing to proceed on the hypothesis of Boughton Estate having particular several rights in relation to particular defined areas, it is open to any party to challenge that assertion at any time. It will in my opinion be open to Boughton Estate to argue in its application its alleged entitlements at common law and seek the several order to confirm them.

(4) In the interim, the IFCA Natural England and the local planning authorities are subject to a duty of co-operation to achieve the objectives required by the Habitats Directive, and in particular that all plans and projects are subject to Article 6(3) procedures. It is therefore open to the IFCA to make a byelaw to the effect that no one shall take fish within the European site except under the authority of a licence granted by the IFCA or a consent granted under the Wildlife & Countryside Act 1981. Such a byelaw will close a loophole which in my view exists in the transposition of the Habitats Directive in England in that article 6(3) requires pre-project approval, but the 1981 Act in itself only provides sanctions when it can be shown that a particular individual has caused particular damage. Boughton Estate can of course apply for such a consent to Natural England, with whom it has confirmed it is in consultation. The IFCA will of course provide its input to the consultation process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter G. Scott', written in a cursive style.

Peter G. Scott

Partner

Quality Solicitors Parkinson Wright

Direct dial: 01386 760676