

An
Bord
Pleanála

Observation on a Planning Appeal: Form

Your details

1. Observer's details (person making the observation)

Your full details:

(a) Name

JAMES HICKEY

(b) Address

BALLYGRENANE, LISTOWEL, CO. KERRY

Agent's details

2. Agent's details (if applicable)

If an agent is acting for you, please **also** provide their details below. If you are not using an agent, please write "Not applicable" below.

(a) Agent's name

Not applicable

(b) Agent's address

AN BORD PLEANÁLA
LDG- 037635-21
ABP. _____
18 MAR 2021
Fee: € 50 Type: Mo
Time: AM By: Courier

Postal address for letters

3. During the appeal we will post information and items to you **or** to your agent. For this observation, who should we write to? (Please tick ☐ one box only.)

You (the observer) at the address in Part 1

☒

The agent at the address in Part 2

☐

Details about the proposed development

4. Please provide details about the application you wish to make an observation on. If you want, you can include a copy of the planning authority's decision as the appeal details.

(a) Planning authority

(for example: Ballytown City Council)

Kerry County Council

(b) Planning authority register reference number

(for example: 18/0123)

EX877

(c) Location of proposed development

(for example: 1 Main Street, Baile Fearainn, Co Ballytown)

Dromin Lower, Listowel, Co. Kerry

Observation details

5. Please describe the grounds of your observation (planning reasons and arguments). You can type or write them in the space below or you can attach them separately.

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1 Introduction

My main observation is that the palisade fence impedes my right-of-way to partake in fishing along the northern bank of the River Feale in Dromin Lower area.

Being a beneficial owner in Ballinruddery of land in the former Ballinruddery estate, confers upon me two *profit-a-prendre* rights:

1. The right to fish in all waters of the River Feale within the confines of the former estate.
2. A right of way across lands of the former estate to exercise my right to fish, as defined.

Let me explain how these rights exist for me and other landowners in a similar position.

2 Fishing rights in Ireland not held by Riparian Landowner: legal perspective

All inland fisheries are the object of private ownership. In cases where the Land commission acquired lands from former landlords special provisions exist regarding fishing rights and access thereto.

The Act of 1903 provides that where the land is sold to the Land Commission or the tenants, and the vendor (Landlord) held the fishing right exclusive of the tenants, these rights may by agreement between the Landlord and the tenant be either:

- Conveyed to the purchasing tenant (who is acquiring through the Land Commission).
- Or expressly reserved to the Vendor.
- In the case of no agreement the fishing rights went to the Land Commission.

The 1903 Act further provides that where any right is so reserved there is a right to enter upon the land to exercise that right and also to authorise any person to do so. Furthermore, any person authorised to enter the land for the purpose of exercising a right to fish (inter alia) shall have the same authority to prosecute for trespass in pursuit of fish as if he were the occupier of that land.

The High Court later held that where sporting/fishing rights are excepted and reserved under Vesting Orders of the Land Commission, the right of entry for the enjoyment of such rights is saved and reserved. The Judge stating, *"with regard to the right of entry, such a right is implied. I decide as a matter of law that under the Act (1903) and the Vesting Order, all rights of entry are saved and preserved by the Vesting Order"*.

2.1 Several Fishery and Profit-a-Prendre Rights

The right of a person to fish in a river or lake is a recognised right of property in our law. In the confusing terminology of the law, it is usually called a "several fishery", although it can be enjoyed by an individual as well as by a group of people.

A several fishery may be no more than a right vested in a person to kill and take away fish from a particular stretch of a river or lake. In such a case, it belongs to the category of legal right known as a *profit-a-prendre* i.e. the right to take away either part of another person's land, e.g. turbary, or animals on the land or in its waters, e.g. rights of shooting and fishing. As such, it belongs to the wider category of legal rights known as (in)corporeal hereditaments.

The *profit-a-prendre* rights relating to fisheries was under consideration in the Gannon v Walsh Case of 1998 in the High Court. Justice J Keane made the following judgement:

"If the Plaintiffs in the present case are entitled to no more than a profit a prendre, it remains the case that any wrongful interference by the Defendants with the exercise by them of that right would entitle them as a general rule to an injunction and/or damages. It is clear that it is

not necessary for them to establish that they are the owners of the soil of the river in order to obtain such relief" (Gannon v Walsh, 1998).

The profit-a-prendre rights "are entitled, both at common law and by virtue of S.13 of the Irish Land Act 1903, to a right of access to the bank of the river for the purpose of exercising these fishing rights" (Gannon v Walsh, 1998).

3 Ballinruddery estate: Right of access to fishing within the former estate

The Fitzgerald family sold the Ballinruddery Estate land to their then tenants on 10th October 1923, refer to **Figure 1**.

In the case of the fishing rights in the former Ballinruddery Estate – of which the land the palisade fence in question is located - was reserved by the Vendor, one Arthur Henry Brinsley Fitzgerald and the testator, Sir Maurice Fitzgerald, 20th Knight of Kerry, refer to **Figure 2**.

In addition, the then Knight also bestowed upon the purchasers (his former tenants) the right to fish the waters of River Feale within the former Ballinruddery Estate, refer to **Figure 7**.

This obviously necessitated the establishing of rights of way along the riverbank for the purchasers to exercise their right, refer to **Figure 7**.

Each deed to each parcel of land was subject to rights and easements e.g., the right to fish within the estate but the easement to allow others with the right to fish to pass over the land, refer to **Figure 7**.

The profit-a-prendre rights not only pertain to fishing rights (and right of way to exercise them) but also allow the removal of sand and gravel. The complex legal nature of the benefits contained in the 1923 conveyance was highlighted in a 2016 report of the Inland Fisheries Ireland (IFI) to Public Accounts Committee.

"This is the case of a fishery where the landlord, Sir Maurice Fitzgerald, divided the fishing rights of a 600 metre stretch of river amongst more than 30 tenants on the 10th of October 1923. At the time only a few tenants occupied land adjacent to the river bank. The only rationale to explain this division was that the landlord was making a provision for those tenants located some distance from the river, to allow them to catch salmon as a food source" (Inland Fisheries Ireland, 2016).

To reiterate, the *profit-a-prendre* rights to fish was not restricted to riparian parcels of land as attested to in the IFI report.

"The rights given to Patrick Dowling (1 and 1A) also included the right to take gravel and sand from the river and deposit it on the land of George Gleasure (Plot 13) (not more than 50 horse loads in any one year.). In addition it included: "A right of fishing and taking fish in and from that part of the river Feale comprised in the estate of Ballinruddery hereinbefore more particularly described and expressed to be conveyed together with a right of way for that purpose and such other ancillary rights as are necessary or convenient for the exercise of such rights of fishing."

It is important to note that these conditions are reflected in the conditions of many of the tenants even though the lands bequeathed to them do not all include land adjacent to the river in fact the majority do not have land adjacent to the river.

There are certain plots that do not have gravel abstraction rights specifically stated these are: 11, 17; 17A 24; 29; 30; 30A; 30B. There are fishing rights included in all properties except plots 29; 30, 30A and 30B.

It is clear therefore that the intention of dividing up the fishing rights to most of the tenants was to ensure that most of them had some reasonable opportunity to take salmon probably as a food subsistence issue" (Inland Fisheries Ireland, 2016).

Parcel 1 and 1A defines all the rights and easements and for subsequent plots they are referenced back to plots 1 and 1A e.g., "Similar rights to those set forth at Nos 1 and 1A", refer to **Figure 7**.

The main benefit relating to fishing in plots 1 and 1A is as follow:

"A right of fishing and taking fish in and from that part of the River Feale comprised in the estate of Ballinruddery hereinbefore more particularly described and expressed to be conveyed together with a right of way for that purpose and such other ancillary rights as are necessary or convenient for the exercise of such right of fishing", refer to Figure 7.

3.1 Location of the Palisade Fence within the former Ballinruddery Estate

The palisade fence in question is in the westernmost part of parcel 27 on the original map associated with the 1923 conveyance, refer to **Figure 8**.

Plot 27 is subject to the following easements:

*"Similar right of fishing and taking fish to that set forth at Nos. 2 and 2A, 3 and 3A in that part of the River Feale comprised in Plot No. 27 with similar right of way ancillary rights", refer to **Figure 9**.*

Plots 2, 2A, 3 and 3A are subject to the following easements:

*"A right of fishing and taking fish for all other Purchasers in that part of the River Feale comprised in Plot No 2A together with a right of way and such other ancillary rights as are necessary or convenient for the exercise of such right of fishing", refer to **Figure 10**.*

Therefore, right to fish and the right of way to access fishing in plot 27 is clearly defined in the original conveyance deed.

3.2 My Rights as per the 1923 Deed

My holding, plot 25A, refer to **Figure 3**, is located on the southern bank opposite to plot 27. My rights as defied by the 1923 deed are the right to fish and take fish and the right of way to exercise that purpose with the estate, refer to **Figure 12**.

Plot 25A has a number of beneficial owners; 79 owners signed the 1961 deed when the plot was purchased. Therefore, the profit-a-prendre rights associated and any wrongful interference in exercising those rights impacts numerous beneficial owners, not limited to plot 25A but to all lands associated with the estate.

In addition, my deed relating to the purchase of my land clearly shows the footpath along the riverbank going through plots 27 and 28 to exercise such rights, refer to **Figure 3**.

3.3 Legal Standing of Benefits Conferred by 1923 Deed

In addition to the IFI report confirming the fishing rights and rights of way to access fishing associated with the former estate, legal advice was obtained to confirm such rights in the past.

Firstly in 1961, legal advice was obtained from a barrister pertaining to the right to fish and access to fish within the former estate boundaries to the beneficial owner of 25A but also to subsequent heirs and assigns.

"I agree with the agent's view that each of the beneficial owners named in the Deed of the 10th October 1923, opposite to whose name in the Schedule a right of fishing is mentioned as being annexed to his parcel, may exercise that right over the entire stretch of the River Feale comprised in the Ballinruddery Estate conveyed by that deed. Such right is given to the beneficial owner his heirs and assigns." **Maurice Danaher 9th March 1961**

Secondly, confirmation was sought from a barrister to confirm the beneficial rights associated with plot 25A in 2019. The findings confirmed the rights outlined plus the benefits are conferred to the heirs of the beneficial owners.

4 My Observation in Detail

The palisade fence in Dromin Lower is a wrongful interference with those lawfully entitled to exercise several fishery profit-a-prendre rights emanating from the former Ballinruddery estate.

I have detailed the source of such rights, their legal basis, validity and my claim to them.

This fence obstructs my access to the Northern bank of the Feale to plot 27, 28, 29 and 30 from the west i.e. Listowel Town. My usual route prior to the development of the fence was along a historical riverbank walkway following the northern bank of the river Feale, as defined in the OSi 1937-1938 survey map, refer to **Figure 11**.

In addition to the rights to access the northern banks of the river Feale associated with my landholding and *profit-a-prendre* rights my use of the habitual walkway from the town of Listowel along the riverbank constitutes lawful use with reference to Article 9(1)(a)(x) of the Planning and Development Regulations.

I have been exercising these rights for the last 60 years without hindrance until the development of the palisade fence.

Furthermore, the palisade fence obstructs the legal right of way (and other benefits) of all current landowners with profit-a-prendre rights emanating from the former Ballinruddery estate lands and should therefore require full planning permission to allow us to exercise our legal right to lodge an objection.

5 Figures

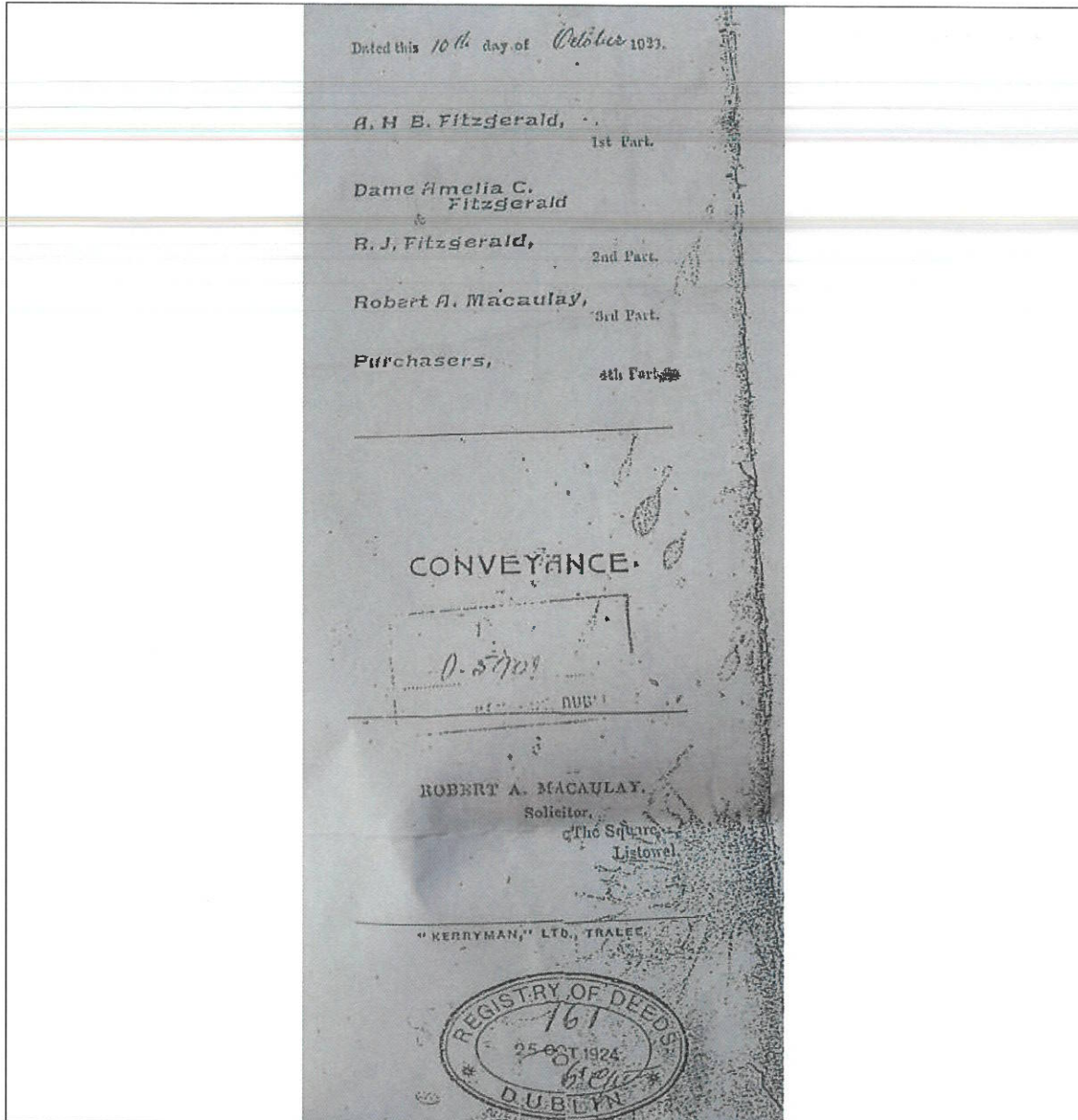


Figure 1 Conveyance document for sale of lands in Ballinruddery estate 10 October 1923

Part 3 - Burdens and Notices of Burdens	
No.	Particulars
1	The sporting rights within the meaning of the said Act, over the Property No. 1 to which the Vendor Sir Maurice Fitzgerald was entitled, exclusive of the tenant previously to the sale under the said Act, are reserved to the said Vendor his heirs and assigns.
2	A right of way over the Property No. 1 for Sir Maurice Fitzgerald his heirs and assigns and his and their tenants and licensees on foot and with or without horses, carts, and cattle over the lands above described along the passage lettered A.C.B. on the Registry Map.

Figure 2 Evidence of sporting* rights held by Vendor to former Ballinruddery Estate lands – Land Registry Folio no. 59023F

*Sporting rights includes any right of hunting, shooting, fishing & taking game or fish on any land

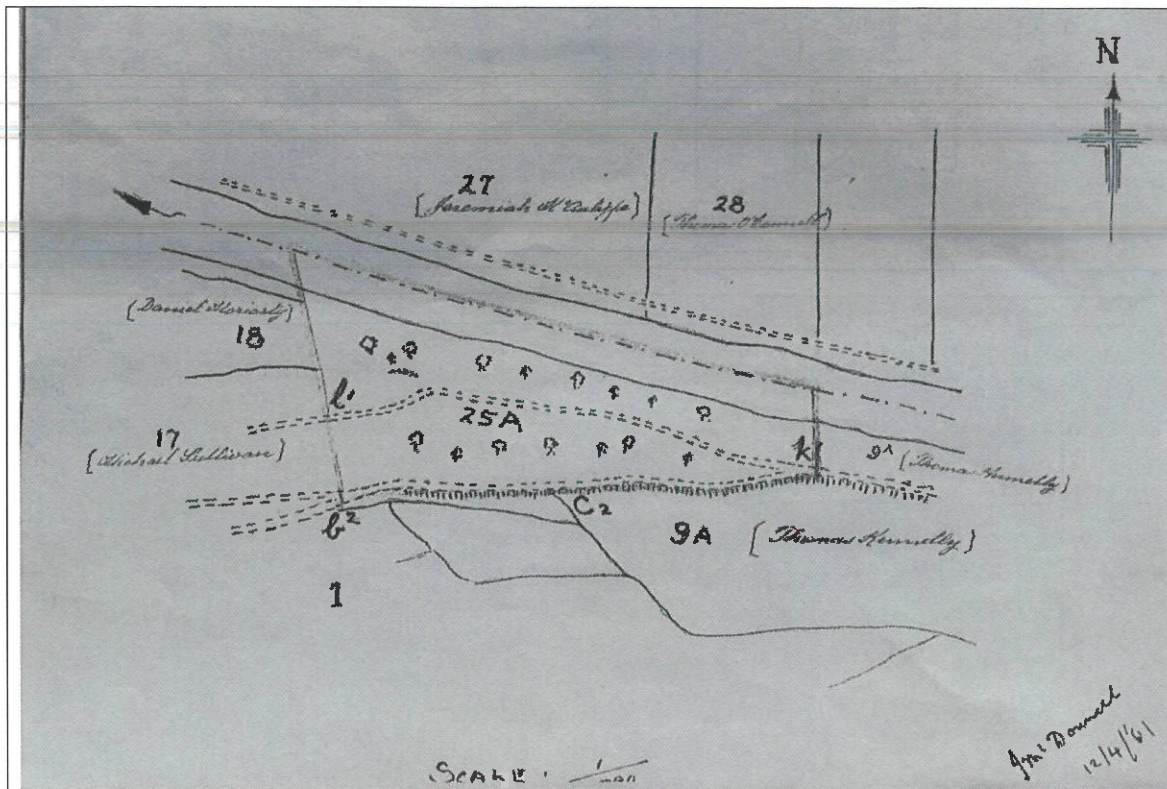


Figure 3 My deed map for my land (plot 25A) in Ballinruddery showing plot 27 with pathway along riverbank to exercise fishing rights

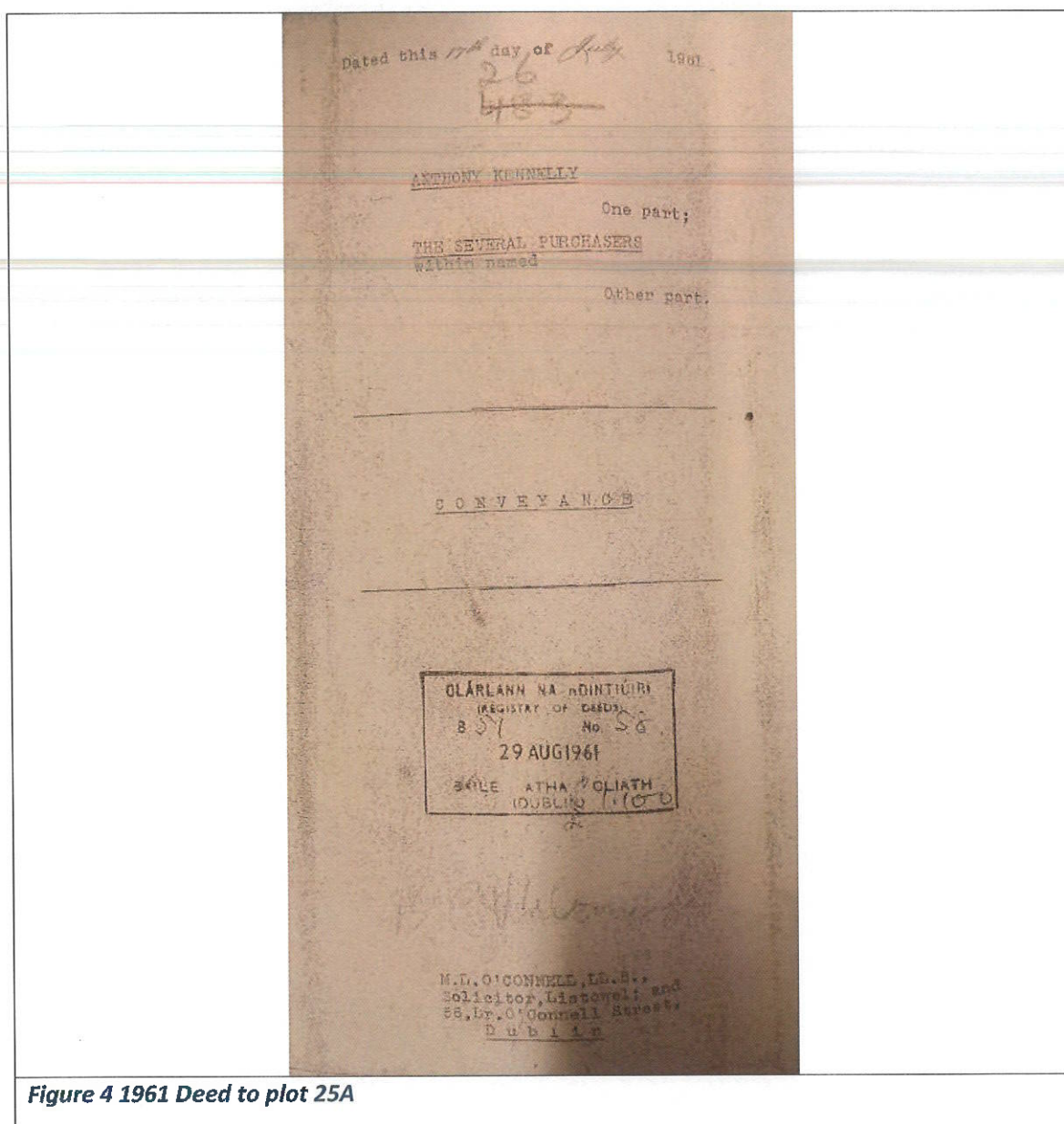


Figure 4 1961 Deed to plot 25A

SECOND SCHEDULE referred to

ALL THAT piece or plot of land part of the Townland of Ballinrudeery in the Barony of Glanmaurice and County of Kerry containing five acres and two perches or thereabouts statute measure being that portion of the hereditaments assured to the said James Kannelly by said Indenture of 10th October 1923 as aforesaid which is described in and Numbered 25A in the Schedule to said last mentioned Indenture and upon the map endorsed "Hereon Together" With the benefit of All and Singular the rights of fishing and taking fish from the river Feale, and such rights of way and of taking sand and gravel respectively specified in said last mentioned Indenture as are appurtenant or annexed to the said hereditaments numbered 25A in the Schedule thereto and on the map endorsed thereon.

Figure 5 1961 Deed for plot 25A detailing profit-a-prendre rights

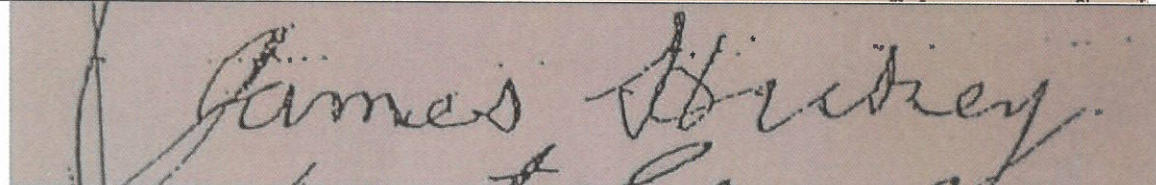
James Hickey	Colbert Street, Listowel
	

Figure 6 My name and signature on the 1961 Deed for plot 25A

Rights, Easements and Profits a Pie.
ndre to Which Land is Subject.

Figure 7 1923 Deed detailing Rights, Easements and profits to which the land is subject. Plots 1, 1A, 2, 2A, 3 and 3A



Figure 8 1923 Deed map showing plots of land within the Ballinruddery estate.

23 and 25A	James Kennelly	Hallinreddery	12 2 34	<p>Similar rights to those set forth at Nos 23 and 25A. Similar right to that set forth at Nos. 1 and 11 and 1A and in addition a similar right to that set forth at Nos. 1 and 11 along the line between the points V and 11 right of way for all purposes, over Plots (Plot No. 35) for the Purchaser of Plot No. 26 and a similar right along the double dotted line between the points 11 and 13 (Plot No. 23A and 24, along the line to closing No. 25A) for the Purchaser of Plots 17 and 18 hereinafter mentioned. Similar right of way and taking fish to that set forth at Nos. 2 and 2A, 3 and 2A in that part of the River Foyle comprised in Plot No. 25A with similar right of way and ancillary rights.</p>
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Figure 12 1923 Deed detailing Rights, Easements and profits to which the land is subject. Plots 25 and 25A

Supporting material

6. If you wish you can include supporting materials with your appeal.

Supporting materials include:

- photographs,
- plans,
- surveys,
- drawings,
- digital videos or DVDs,
- technical guidance, or
- other supporting materials.

Fee

8. You **must** make sure that the correct **fee** is included with your observation.

You can find out the correct fee to include in our [Fees and Charges Guide](#) on our website.

NALA has awarded this document its Plain English Mark Last
updated: April 2019.



