

Resolving Rural Disputes: the murky waters of riparian rights



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The issue of riparian rights is a complex and, at times, confusing area of law that is becoming increasingly important for developers and land owners alike. It is also an area in which there is likely to be possible reform in the future. In this article Elaine Brailsford, a Partner in our rural disputes team, takes a dive into the murky legal waters of riparian rights.

What are riparian rights you may ask? Well they are very old rights, dating back to the law of ancient Rome, which still exist in our Scottish legal system. They are the rights held by owners of land over which a river flows.

Ancient though their origin may be, these rights are as relevant in modern Scotland today as they were in Roman times. With 85% of the UK's hydroelectric energy resource in Scotland and smaller hydro power schemes becoming more cost effective to run, riparian rights have become a renewed focus of attention for developers and landowners alike.

Who owns riparian rights?

Running water is ownerless just as is light and air. But the riparian owner is able to make use of the running water as it passes through the land in their ownership. Who owns the riparian rights depends on who owns the land over which the river runs. If the river runs solely through a person's land that person will own the rights. If the river then runs through another's land and on through yet another, each owner will have riparian rights in respect of their successive part of the river up to the boundary in their title. There is a legal presumption that where the boundary between two parcels of land is a river, the owner of each parcel will own the alveus (river bed) up to the mid-point of the river. This presumption is however rebuttable and it may well be that the legal title provides that the whole of the river bed is within the title.

In nature the course of the river may alter. The scouring effect of water might erode one side of a river bank and lead to deposits of silt on other parts of the river. Where a title is bound by a river this can lead to changes to the

boundary of the title. In turn, this may affect ownership of the riparian rights.

There can therefore be a variety of owners of riparian rights in one river and a variety of interests that may be affected by interference such as abstraction of water.

What are the basic riparian rights?

The primary concept is that a riparian owner has a right of common interest in the river. This means that the lower or downstream owner is entitled to receive the natural flow of the river. The case law talks about the riparian owner being entitled to the natural flow water "undiminished in quantity, unpolluted in quality, and unaffected in force and natural direction and current, except in so far as the primary uses of it may legitimately operate upon it within the lands of the upper heritor". Primary use has been held to be that generally used for a domestic purpose. Opposite proprietors have the right to oppose any use of the water other than for "domestic" use. There are competing cases on whether a riparian owner can remove water for secondary purposes like agriculture or industry. Some cases suggest a very extreme position that no consumption for secondary purposes is permitted at all while other cases suggest that a riparian owner can only object to water being used for secondary purposes if the use causes a material disturbance. It is considered that the requirement for a material disturbance reflects the current law in Scotland. What is material is always going to be a question of fact and degree depending on the volume of water in the river and how much water is being removed.



Hydro schemes and riparian rights

It is clear from the case law that at common law the abstraction of water on the scale required for a hydro scheme would likely breach the rights of downstream and opposite proprietors. The rights could also be breached if the flow of the stream or river was affected. The proprietor of a hydro scheme has a common interest obligation not to interfere with the natural flow of the river. It has been held that abstraction for use for power is permissible only if the water is returned to the stream prior to reaching the downstream proprietor.

The appropriate remedy for a breach of riparian rights will most likely be interdict. That may have serious consequences for the operator.

Not only will planning permission and licences from Scottish Environment Protection Agency (SEPA) be required for hydro schemes but consent of riparian owners may also be needed.

Possible reform

A number of jurisdictions, such as South Africa and Norway, have reformed their rules on private water rights over recent years. There have also been some significant court cases in Australia and the United States regarding private rights over water supply.

In Scotland in 2014, the Land Reform Review Group identified private water rights as an area which should be considered for possible legal reform.

Any process of reform in this area will require discussion with landowners and other stakeholders, but with the focus on a green recovery and the advent of not only small hydro schemes but “micro” and “pico” schemes this is very much a “watch this space” situation at present.

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