A

Supreme Court

Matthew and others *v* Sedman and others

[2021] UKSC 19

2021 Jan 19; May 21

B

Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Burrows, Lord Stephens JJSC

Limitation of action — Time, computation of — Midnight deadline — Claim against trustees for failure to make claim under court-sanctioned scheme of arrangement by midnight deadline — Whether day following midnight deadline counting towards limitation period — Whether claim time-barred

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The claimants brought a claim in negligence and breach of trust against the defendant trustees on the ground that they had failed to make a claim on behalf of the trust under a court-sanctioned scheme of arrangement by the scheme deadline of midnight on 2 June 2011. The defendants applied for summary judgment, contending that, having been issued on Monday, 5 June 2017, the claim had been brought outside the six-year limitation periods prescribed by sections 2 and 21(3) of the Limitation Act 1980[1]. The claimants contended that the cause of action was to be treated as having accrued during part of 3 June 2011, which day was therefore not to be counted for limitation purposes, with the consequence that the claim had been brought in time, having been issued on the first working day after the expiration of the limitation period on Saturday, 3 June 2017. The judge entered summary judgment for the defendants, holding that the cause of action had accrued at the first moment of 3 June 2011 but that that day would nevertheless be counted for limitation purposes. The Court of Appeal dismissed the claimants' appeal, holding that the claimants' cause of action had accrued at the very end of 2 June 2011 so that 3 June 2011 fell to be included in the limitation period.

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On the claimants' further appeal—

Held, dismissing the appeal, that the general rule which directed that the day of accrual of a cause of action should be excluded from the reckoning of a limitation period was that the law rejected a fraction of a day; that the justification for that rule was that it would prevent part of a day being counted as a whole day for the purposes of calculating a limitation period, which would have prejudiced claimants and interfered with the time periods stipulated by the Limitation Act 1980; that, however, the justification relating to fractions of a day did not apply in a midnight deadline case, because the day which commenced immediately after the accrual of the cause of action was a complete undivided day, whether the cause of action was held to have accured at the very end of one day or the very start of the next; that, further, there was no longstanding authority which excluded a complete undivided day from counting towards the calculation of a limitation period and to do so in a midnight deadline case would unduly distort the limitation period laid down by Parliament and prejudice defendants by lengthening the statutory limitation period by a complete day; that it followed that midnight deadline cases constituted an exception to the general rule, with the consequence that the whole day which followed a midnight deadline was not to be excluded from the calculation of a limitation period; that, in the present case, 3 June 2011 should be included in the computation of the limitation period since it was a whole day; and that, accordingly, the claim against the defendants was out of time (post, paras 47–50).

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Mercer v Ogilvy (1796) 3 Pat App 434, HL(Sc), *Lester v Garland* (1808) 15 Ves 248, *Radcliffe v Bartholomew* [1892] 1 QB 161, DC, *Goldsmiths' Co v West Metropolitan Railway Co* [1904] 1 KB 1, CA, *Stewart v Chapman* [1951] 2 KB 792, DC,

[1] Limitation Act 1980, ss 2, 21(3): see post, para 14.

Marren v Dawson Bentley & Co Ltd [1961] 2 QB 135 and *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, CA considered.

Gelmini v Moriggia [1913] 2 KB 549 explained.

Decision of the Court of Appeal [2019] EWCA Civ 475; [2020] Ch 85; [2019] 3 WLR 417 affirmed on different grounds.

The following cases are referred to in the judgment of Lord Stephens JSC:

Dodds v Walker [1981] 1 WLR 1027; [1981] 2 All ER 609, HL(E)
Gelmini v Moriggia [1913] 2 KB 549
Goldsmiths' Co v West Metropolitan Railway Co [1904] 1 KB 1, CA
Lester v Garland (1808) 15 Ves 248
Marren v Dawson Bentley & Co Ltd [1961] 2 QB 135; [1961] 2 WLR 679; [1961] 2 All ER 270
Mercer v Ogilvy (1796) 3 Pat App 434, HL(Sc)
Pritam Kaur v S Russell & Sons Ltd [1973] QB 336; [1973] 2 WLR 147; [1973] 1 All ER 617, CA
Pugh v Duke of Leeds (1777) 2 Cowp 714
Radcliffe v Bartholomew [1892] 1 QB 161, DC
Stewart v Chapman [1951] 2 KB 792; [1951] 2 All ER 613, DC
Young v Higgon (1840) 6 M & W 49

The following additional cases were cited in argument:

Abbey National Building Society v Cann [1991] 1 AC 56; [1990] 2 WLR 832; [1990] 1 All ER 1085, HL(E)
English v Cliff [1914] 2 Ch 376
Segal v Young [2001] NSWCA 141

APPEAL from the Court of Appeal

By a claim form dated 5 June 2017 the claimants, Peter Matthew, Scott Nixon, Diana Rose Cook, Sally Ann Evelyn Selby, Colin Richard Henry Cartledge and Philip Cartledge, brought claims in negligence against the defendant trustees, Barrie Sedman, Thomas William Hallam and Peter James Roberts, arising from the defendants' failure to make a claim on behalf of the trusts of the late Evelyn Hammond ("the trust") under a court-sanctioned scheme of arrangement in relation to which the trust was a shareholder and scheme creditor, by the scheme deadline of midnight on 2 June 2011. The defendants applied for summary judgment on the basis that the six-year limitation period prescribed by the Limitation Act 1980 had expired on 2 June 2017 so that the claims were time-barred. By a judgment dated 27 November 2017 Judge Hodge QC sitting as a judge of the Chancery Division entered summary judgment for the defendants, holding that the claim was time-barred [2017] EWHC 3527 (Ch).

By an appellant's notice dated 8 January 2018 and with the permission of the Court of Appeal (Lewison LJ) dated 30 April 2018 the claimants appealed on the ground, inter alia, that the judge had erred in determining that the claims were time-barred. By a judgment dated 20 March 2019 the Court of Appeal (Underhill and Irwin LJJ) dismissed the claimants' appeal [2019] EWCA Civ 475; [2020] Ch 85.

With permission granted by the Supreme Court (Baroness Hale of Richmond PSC, Lady Black and Lord Briggs JJSC) on 17 December 2019 the claimants appealed. The issue on the appeal was whether Friday, 3 June 2011 should have been included or excluded for the purposes of the

A limitation period in deciding whether the claim against the defendants was time-barred.

The facts are stated in the judgment of Lord Stephens JSC, post, paras 4–13.

Jeremy Cousins QC and *Christopher McNall* (instructed by *Steele & Son with Bagot Heyes, Clitheroe*) for the claimants.

B The correct identification of the date of accrual of the cause of action in the present case, whether in tort, contract or breach of trust, is indispensable in order to establish the date of expiration of the relevant limitation period under the Limitation Act 1980. From the common ground that dictates that no cause of action could have accrued on or before Thursday, 2 June 2011, it must follow that any relevant cause of action can only have accrued on or

C after Friday, 3 June 2011.

In the present case both members of the Court of Appeal accepted that it was a "long-established rule" that, for limitation purposes, the date of accrual of a cause of action should be ignored in the reckoning of time, but that there was a distinct category of "midnight deadline" cases identified by Channell J in *Gelmini v Moriggia* [1913] 2 KB 549, 552–553, which justified the non-application of that rule.

D The rule can be traced back to landmark cases such as *Mercer v Ogilvy* (1796) 3 Pat App 434, *Lester v Garland* (1808) 15 Ves 248, *Goldsmiths' Co v West Metropolitan Railway Co* [1904] 1 KB 1, *Stewart v Chapman* [1951] 2 KB 792 and *Radcliffe v Bartholomew* [1892] 1 QB 161.

Gelmini v Moriggia was wrongly decided. Channell J's judgment, which was not reserved, was made without his having been referred to *Radcliffe v Bartholomew* and cannot be reconciled with other decisions before or since.

E It was expressly disapproved in *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336.

The provisions of sections 2, 5 and 21(3) of the 1980 Act focus on three key words: "from", "date" and "accrued".

It is necessary to identify the "date" upon which the cause of action (or

F right of action) accrued. There was never a moment in time which was neither 2 June 2011 or 3 June 2011 since the law does not recognise a concept of a separate point in time between two days: *Dodds v Walker* [1981] 1 WLR 1027. On the expiry of the last moment of 2 June 2011 it was already 3 June 2011 when the loss was sustained. Therefore 3 June 2011 was the relevant date on which the cause of action or right of action accrued.

Once the date was correctly identified as 3 June, the claimants had six

G years "from" that date to bring an action in accordance with the provisions of the Act.

The 1980 Act focuses on the day on which the cause or right of action "accrued" and not on the time of day.

Since the defendants could validly have given notice at any time during the entirety of 2 June 2011, at no point during that day could the claimants' cause of action be said to have accrued. It inevitably follows that the cause

H of action must have accrued at the very beginning of 3 June 2011. By not attributing accrual to the day after the relevant midnight, which logically is the only day to which it could belong, accrual would by default effectively be attributed to the day before midnight, which logically is not a day to which it could belong.

There is no moment at which the passage of time stops. Any moment must belong to one day or another. At the very last second of 2 June 2011 the defendants could still have given notice under the scheme of arrangement. Therefore, even during the very last second of 2 June, the claimants could not have been and were not entitled to issue any claim in relation to the failure to give such notice. With the very first second of 3 June 2011 the situation was reversed. Accordingly, the day on which the cause of action accrued was 3 June. The first moment of entitlement to bring the claim arose on 3 June. Neither the law nor common sense admits of any other conclusion

There is no justification for departing from the clear and long-established rule as to excluding the day of accrual from the reckoning of time. That is consistent with authority at the highest level and also with the wording of the 1980 Act. The decision in *Gelmini v Moriggia* [1913] 2 KB 549 should be overruled and the claim should be held to have been issued in time.

Clare Dixon QC and *Nicholas Broomfield* (instructed by *Mills & Reeve LLP*) for the defendants.

On the pleadings, this case is concerned with a breach of trust or negligence by the omission to submit a claim form on or before 2 June 2011. Pursuant to section 2 of the Limitation Act 1980, the limitation period for the negligence claim is "six years from the date on which the cause of action accrued". Section 21(3) of the Act, which applies to the claim for breach of trust, is worded identically save that the words "cause of action" are replaced with the words "right of action". The claimants' cause of action for breach of trust accrued as soon as the breach of trust had been committed. The claimants' cause of action in negligence accrued as soon as they first suffered actionable damage. In both instances the claimants' cause of action accrued as a result of an omission and the effluxion of time, not as a consequence of a positive act. It accrued because something was not done by the end of a specified period and not because of a positive act at an identifiable moment on a particular day.

Therefore the claimants' cause of action, whether in negligence or for breach of trust, arose upon the expiry of the last moment at which a claim under the scheme of arrangement could have been made, namely the last moment of 2 June 2011. At precisely that moment the claimants lost both their right to pursue a claim under the scheme and simultaneously acquired a claim against the defendants. That is the moment which is of central relevance in this case and there is no difficulty in identifying that moment.

The claimants' right of action accrued at the expiry of the last moment of 2 June 2011. Irrespective of whether that moment is ascribed to 2 June 2011 or 3 June 2011, it is consistent with established principles and right that, in such circumstances, 3 June should be included for the purposes of calculating the limitation period. There is no moment in time between those two days, nor is there a moment in time shared by those two days. There is a single moment. One can either look back and call it the end of 2 June 2011 or look forward and call it the beginning of 3 June 2011.

[Reference was made to *English v Cliff* [1914] 2 Ch 376, *Abbey National Building Society v Cann* [1991] 1 AC 56 and *Dodds v Walker* [1981] 1 WLR 1027.]

Gelmini v Moriggia [1913] 2 KB, a "midnight deadline" case, was correctly decided on its own facts by Channell J. It did not depart from a

A widely recognised and universally adopted general rule because there was no such rule. Rather, it represented a permissible and principled determination on the facts before the judge. Neither the cases decided following *Gelmini v Moriggia*, nor the legislation passed since it was decided, sought to depart from the principles laid down in it.

[Reference was made to *Marren v Dawson Bentley & Co Ltd* [1961 2 QB 135 and *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336.]

B The distinction between "midnight deadline" cases on the one hand and cases in which a cause of action accrues part way through the day on the other was well established by the time that the legislature came to draft the 1980 Act. If *Gelmini v Moriggi* was considered heretical, or if Parliament had intended to provide for or maintain a general rule for computing time in all cases, it could have provided for such a rule either when drafting the 1980 C Act or subsequently. Therefore, it can be inferred that Parliament actively chose not to legislate and to leave the matter to the courts.

Cousins QC in reply.

Where limitation statutes are ambiguous they must be construed in favour of a plaintiff: *Segal v Young* [2001] NSWCA 141.

Dixon QC

D *Segal v Young* [2001] NSWCA 141 is distinguishable from the present case.

The court took time for consideration.

21 May 2021. **LORD STEPHENS JSC** (with whom **LORD HODGE DPSC, LADY ARDEN, LORD SALES** and **LORD BURROWS JJSC** E agreed) handed down the following judgment.

Introduction

1 This appeal relates to the calculation of the limitation period in respect of causes of action which accrued at, or on the expiry of, the midnight hour at the end of Thursday 2 June 2011. The respondents F contend that part of the proceedings brought against them by the appellants, and which is the subject of this appeal, and which I shall refer to as the "Welcome Claim", had been issued outside the limitation period of six years contained in sections 2, 5 and 21(3) of the Limitation Act 1980. The respondents sought, and Judge Hodge QC ("the judge"), sitting as a judge of the High Court, granted, summary judgment in relation to that part of the proceedings [2017] EWHC 3527 (Ch). The Court of Appeal (Underhill and G Irwin LJJ) dismissed the appellants' appeal [2020] Ch 85 and subsequently refused the appellants' application for permission to appeal to the Supreme Court. On 17 December 2019, a panel of the Supreme Court (Baroness Hale of Richmond PSC, Lady Black and Lord Briggs JJSC) granted permission to appeal.

2 The issue before this court is whether Friday 3 June 2011, the day H which commences at or immediately after the midnight hour, counts towards the calculation of the six-year limitation period.

3 The proceedings were commenced by a claim form issued on Monday 5 June 2017. If Friday 3 June 2011 is included for the purposes of calculating the limitation period, then as the High Court and the Court of Appeal held, the period expired six years later at the end of Friday 2 June

2017 so that the Welcome Claim is statute-barred. If that day is excluded, then the limitation period expired six years later at the end of Saturday 3 June 2017. Since the necessary act on the part of the appellants was the issue of the claim form in the legal action, something which can only be done when the court office is open, and the office is shut at the weekend, then it is common ground, following *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, that the final day for issue would be Monday 5 June 2017. That was the date of the issue of proceedings. Hence, on this basis the commencement of the action would be within the limitation period of six years and not statute-barred.

Factual background

4 The first and second appellants are the current trustees of a trust established under the 1948 will of Mrs Evelyn Hammond, who died in 1952 ("the Trust"). They replaced the respondents, who were the trustees until their retirement on 1 August 2014. Each of the respondents was a professional trustee, being employees or partners of the accountancy firm Forrester Boyd, Chartered Accountants.

5 Pursuant to the terms of the Trust: (a) the income is payable to the third appellant during her lifetime; and (b) upon the third appellant's death the Trust assets will be distributed to the fourth, fifth and sixth appellants.

6 The Trust had a shareholding in Cattles plc ("Cattles"), which was listed on the London Stock Exchange. In 1994 Cattles acquired Welcome Financial Services Ltd ("Welcome"). By April 2004 the Trust owned 161,900 ordinary shares in Cattles.

7 In 2007 Cattles published an annual report. Information in that report was then included in a rights issue prospectus which was released to potential investors in April 2008. The Financial Services Authority subsequently found that the information contained in the annual report and prospectus had been misleading.

8 In April 2009 trading in Cattles' shares was suspended and in December 2010, Welcome and Cattles each commenced proceedings for court-sanctioned schemes of arrangement ("the Welcome Scheme" and "the Cattles Scheme" respectively).

9 On 28 February 2011 the court made orders approving the Welcome Scheme and the Cattles Scheme. The terms of each scheme included provision for claims to be submitted by shareholders. As a consequence of the misleading information in the annual report and prospectus, the Trust had a claim in both the Cattles Scheme and the Welcome Scheme.

10 The respondents made a claim in the Cattles Scheme, but the appellants allege that the respondents were in breach of trust and negligent in failing to properly formulate and evidence that claim. I will refer to that part of the proceedings as "the Cattles Claim". The respondents accept that the Cattles Claim was commenced within the limitation period, and so it is not the subject of this appeal.

11 The Welcome Scheme rules provided by clause 3.6 that "in order to be entitled to any Scheme Payment, Scheme Creditors must, on or prior to the Bar Date, submit a Claim Form". It is common ground that the Bar Date was Thursday 2 June 2011. Accordingly, a valid claim in the Welcome Scheme could have been made up to midnight (at the end of the day) on Thursday 2 June 2011.

A **12** The respondents did not make a claim in the Welcome Scheme on or before Thursday 2 June 2011. This failure has led to that part of these proceedings which relates to the Welcome Scheme and which I have been referring to, and will continue to refer to, as "the Welcome Claim". The Welcome Claim is couched in the tort of negligence and breach of trust, though on behalf of the appellants it was submitted that it was also couched in breach of contract.

B **13** These proceedings were commenced by a claim form issued on Monday 5 June 2017 in which the appellants sought damages and/or equitable compensation and other remedies and relief in relation to both the Welcome Claim and the Cattles Claim. In response to the proceedings, on 4 July 2017 the respondents:

(a) Issued an application for strike out/summary judgment in relation to
C the Welcome Claim ("the application") on the basis that it had been issued out of time and was consequently statute-barred pursuant to sections 2 and/or 5 and/or 21(3) of the Limitation Act 1980, it had no real prospect of succeeding, and there was no other reason why the Welcome Claim should proceed to trial; and

(b) Filed and served a defence that: (i) did not plead to the Welcome Claim, except to admit its existence; and (ii) set out a substantive defence to
D the Cattles Claim; which the respondents accept was brought in time.

As I have indicated, the judge granted the application and the Court of Appeal dismissed the appeal.

The limitation periods

14 The relevant limitation periods are set out in materially identical
E terms in the Limitation Act 1980 for each of the causes of action in these proceedings. Section 2 provides a time limit for actions founded on tort: "An action founded on tort shall not be brought *after the expiration of six years from the date on which the cause of action accrued*." Section 5 makes provision for a time limit for actions founded on simple contract: "An action founded on simple contract shall not be brought *after the expiration of six years from the date on which the cause of action accrued*." Finally,
F section 21 makes provision for a time limit for actions in respect of trust property. It is common ground that the relevant time limit is contained in subsection (3) which, in so far as material, provides that "an action by a beneficiary . . . in respect of any breach of trust . . . shall not be brought *after the expiration of six years from the date on which the right of action accrued*" (emphasis added to each).

G *The judgments of the High Court and the Court of Appeal*

(a) The High Court judgment

15 In an ex tempore judgment handed down on 27 November 2017 the judge granted the application. He proceeded on the basis, at para 28, "that, if the cause of action arose during the course of a day, you exclude that day
H for the purpose of calculation for Limitation Act purposes". He explained the reason for this as being that "If you do not exclude [that] day, then the claimant would not have a full six year period within which to bring his cause of action". He held, at para 28, that this reason did not apply whenever the cause of action accrues at the very first moment of a day because "if the cause of action accrues at the very first moment of that day,

then [the appellants do] have the full six years". He added at para 31 that "At any moment during that day the [appellants] can bring a claim; and to exclude that day from the calculation for Limitation Act purposes would have the effect of giving [them] an extra day over and above the statutory limitation period for bringing the claim". Relying on *Gelmini v Moriggia* [1913] 2 KB 549 he held, at para 31, that "where it is absolutely clear that the cause of action arises at the very beginning of a particular day, that day should not be excluded from the calculation for Limitation Act purposes".

16 The judge concluded, at para 26, that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011, that this day was to be included for the purposes of calculating the limitation period so that the last day for issuing the claim form was Friday 2 June 2017 (para 31), and on this basis the Welcome Claim, which was issued on Monday 5 June 2017, was out of time. The respondents were therefore entitled to summary judgment on their Limitation Act defence.

17 The judge gave the appellants permission to appeal on the issue of "whether the date when the cause of action accrued in the Welcome Claim (being 3 June 2011) is or is not included in the calculation of when the limitation period expired".

(b) The judgments in the Court of Appeal

18 The Court of Appeal handed down reserved judgments on 20 March 2019 dismissing the appeal. The lead judgment was delivered by Irwin LJ and Underhill LJ delivered a concurring judgment. The Court of Appeal accepted, as was common ground, that in cases where the cause of action accrues part-way through a day, that day is to be ignored in the reckoning of time for limitation purposes: see para 17 Irwin LJ and para 38 Underhill LJ. However, Irwin LJ differed from the judge's conclusion that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Irwin LJ, relying on *Dodds v Walker* [1981] 1 WLR 1027, held at para 16 that "in the case of a 'midnight' deadline, it is wrong to attribute the accrual of an action . . . to the day after the relevant midnight, and the analysis must proceed from there". He added at para 32 that "the [midnight] deadline provides a categorical indication that the action accrued by that point in time, *rather than accruing on the day following midnight*" (emphasis added). In this way in a midnight deadline case Irwin LJ did not attribute the cause of action to 3 June 2011. Underhill LJ also differed from the judge's finding that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Underhill LJ held, at para 38, that "the cause of action arises at, not after, midnight". Both members of the Court of Appeal held that there was a discrete category of cases which could be termed "midnight deadline" cases, which were distinct from cases in which the cause of action accrues part-way through a day. That distinction justified including 3 June 2011, being the day after midnight, in the calculation of time.

Whether 3 June 2011 should have been included or excluded for the purposes of calculating the limitation period

(a) The appellants' submissions

19 The appellants submit that the cause of action accrued on 3 June 2011 and that long-standing authority establishes a rule which directs that

A the day of accrual of the cause of action should be excluded from the reckoning of time in all cases ("the rule"). It was submitted that the rule could be discerned from landmark cases such as *Mercer v Ogilvy* (1796) 3 Pat App 434, *Lester v Garland* (1808) 15 Ves 248, *Goldsmiths' Co v West Metropolitan Railway Co* [1904] 1 KB 1 and *Stewart v Chapman* [1951] 2 KB 792. Based on this rule, it was also submitted that *Gelmini v Moriggia* was wrongly decided being, it was said, inconsistent with *Radcliffe v* B *Bartholomew* [1892] 1 QB 161, and having been expressly disapproved in *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336.

20 The appellants also relied on the wording of sections 2, 5 and 21(3) of the Limitation Act 1980, and specifically on the following part of sections 2 and 5: "after the expiration of six years from the date on which the C cause of action accrued"; and the equivalent part of section 21(3), which is identical save that "right of action" is substituted for "cause of action". Three key propositions were advanced, which were said to be derived from the use of the words "from" "date" and "accrued" in those sections.

21 The first key proposition related to the word "date", it being said that it was necessary to identify the date upon which the cause of action or right of action accrued. In that respect Mr Cousins QC, on behalf of the D appellants submitted that there was never a moment in time that was neither 2 June 2011 nor 3 June 2011. Relying on *Dodds v Walker* [1981] 1 WLR 1027, he submitted that the law did not recognise the metaphysical concept of a separate point in time between two days. He stated that it was only after midnight at the end of 2 June 2011 that the cause of action accrued, so that the relevant date was 3 June 2011, not some metaphysical point in time E between those dates. He also submitted that the suggestion made on behalf of the respondents that the expiry of 2 June 2011 and the loss suffered by the appellants happened simultaneously could not be correct, as the two events were incapable of mutual co-existence. Rather, these events were sequential, so that upon the expiry of the last moment of 2 June it was already the 3 June 2011, when the loss was sustained, and so, it was submitted, the relevant date which should be identified was 3 June 2011.

F **22** The second key proposition related to the word "from". The appellants submitted that once the date of the accrual of the cause of action was correctly identified as 3 June 2011 the appellants in accordance with sections 2, 5 and 21(3) of the Limitation Act 1980, had six years "from" that date to bring an action. On the basis of long-standing authority, it was submitted that "from" signifies a period subsequent to the date of the event G itself, so that the date of the event is to be excluded from the reckoning of time.

23 The third key proposition related to the word "accrued". The appellant submitted that the statutory language focuses not on the time of day at which accrual occurs but rather on the day upon which it occurs, and that day is an indivisible unit of time which is to be excluded from the reckoning of time. Furthermore, if the date is to be excluded in some cases, then it must be excluded in all cases as, it was submitted, it serves no purpose H to have a different result in different cases.

(b) The respondents' submissions

24 The respondents' submissions approached the question on the basis that the Welcome Claim was based on negligence by omission (namely the

omission to submit a claim form in the Welcome scheme on or prior to 2 June 2011). On this basis it was contended that two things happened at precisely the same moment. First, the time for submitting the claim in the Welcome scheme elapsed, and second, the cause of action arose. These, it was said, were not consecutive events but rather were inextricably linked, so that they occurred simultaneously at the last moment of 2 June 2011. It was also said to be strictly unnecessary to determine whether that moment is "properly ascribed to 2 June 2011 or the very first moment of 3 June 2011", as one can "either look back and call it the end of 2 June 2011 or look forward and call it the beginning of 3 June 2011". In either event, there was no fraction of a day, and the appellants had the entirety of 3 June 2011 in which proceedings could have been commenced so that whether the cause of action arose at the end of the 2 June 2011 or the very start of 3 June 2011, the outcome should be the same.

(c) The case law on which the appellants rely

25 The appellants primarily relied on four authorities to establish what they submitted was a long-standing rule that the day of accrual of the cause of action should be excluded from the reckoning of time. However, on analysis none of those cases considered the position in relation to midnight deadlines.

26 The first is the decision of the House of Lords in *Mercer v Ogilvy* (1796) 3 Pat App 434. On its facts this case involved a fraction of a day. On 22 February 1791 at 8.00 p m Robert Mercer, executed a deed of entail of his lands of Lethindy, in favour of Katherine Mercer his niece, and various substitutes. He died between 10.00 and 11.00 p m on the 22 April 1791. Sir John Ogilvy brought an action against Miss Mercer and the other substitutes to set aside the entail, on the basis that Mr Mercer had not survived its execution for the 60 days required by a statute of 1696 for regulating deeds executed on deathbeds. The question arose as to whether the day of death was to be included or excluded from the calculation of 60 days. The decision of the House of Lords in relation to the computation of time was stated by Lord Thurlow as follows (p 442):

> "The terminus a quo mentioned in the act, is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *60 days after* is descriptive of another and *subsequent* period, which begins when the first period is completed. The day of making the deed must therefore be excluded, so the maker only lived 59 days of the period required. Had he seen the morning of the 60th, or subsequent day, it would have been sufficient; the rule of law above mentioned, (dies inceptus pro completo habetur,) then applying and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed."

I consider that, as Lord Thurlow stated, "the date or day of the deed . . . is indivisible" so that if there is a fraction of a day then that day is to be excluded. However, *Mercer v Ogilvy* did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

27 The second is *Lester v Garland* (1808) 15 Ves 248. This case concerned the calculation of time in relation to a condition in a will which

had to be fulfilled within six calendar months after the testator's death. The question was whether the six months were to be calculated inclusive or exclusive of the day of the testator's death. The Master of the Rolls, Sir William Grant, concluded that the day of the testator's death should be excluded from the period of six months, so that the condition was fulfilled in time. In his judgment he stated that "It is not necessary to lay down any general rule upon this subject". However, he went on to state that (p 257):

> "upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects *fractions of a day* more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referrible to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed." (Emphasis added.)

I make two observations. First, despite the Master of the Rolls disavowing any general rule, subsequent authorities have consistently adopted the principle of rejecting fractions of a day. Second, the factual situation in that case involved a fraction of a day. The Master of the Rolls did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

28 The third is *Goldsmiths' Co v West Metropolitan Railway Co* [1904] 1 KB 1. The issue was whether, as required by the terms of a statute passed on 9 August 1899, a notice to treat for compulsory purchase given on 9 August 1902 was given within three years from the date on which the Act was passed. That in turn depended on whether the day of the passing of the Act was to be excluded in the computation of the three years. The Court of Appeal held that the day of passing should be excluded, and that the notice was therefore valid. Collins MR stated (p 5):

> "It appears to me that no distinction can be drawn between the day determined by the passing of the Act, and any other day from which time might be reckoned. If this view is correct, then the day from which the period is to run must be excluded in computing the three years."

Mathew LJ in a concurring judgment referred to *Lester v Garland* and later authority. He stated (p 5): "The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded." Here again, however, it appears from the report of submissions of counsel that the facts of *Goldsmiths' Co* involved a fraction of a day, because Royal Assent was given part-way through the day of passing of the Act. Mulligan KC is reported, at p 4, as submitting that "If in this case one day were substituted for three years the effect of the argument for the plaintiffs would be, not to give a day, *but only to give the portion of it between the time when the Royal assent was given and midnight*" (emphasis added). In any event, the Court of Appeal did not consider the position that arises in a midnight deadline case. I note, for completeness, that section 4 of the Interpretation Act 1978 now makes provision as to the time at which an Act comes into force by providing that:

> "An Act or provision of an Act comes into force— (a) where provision is made for it to come into force on a particular day, at the beginning of

that day; (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent." A

29 The fourth is *Stewart v Chapman* [1951] 2 KB 792 which again on its facts involved a fraction of a day. The question in that case was whether a notice of intended prosecution had been served in time under section 21 of the Road Traffic Act 1930 (20 & 21 Geo 5, c 43). That section provided that:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating . . . to careless driving he shall not be convicted unless . . . (b) *within 14 days of the commission of the offence* a summons for the offence was served on him; or (c) *within the said 14 days* a notice of the intended prosecution . . . was served on or sent by registered post to him . . ." (emphasis added). B

Lord Goddard CJ delivering the judgment of the Divisional Court, with which Ormerod J agreed, held that it was not enough to post the letter within the 14 days, but rather that it must be posted within such time that in the ordinary course of post it would reach the person to whom it is addressed within the 14 days. The alleged offence was committed at 7.15 a m on 11 January 1951. The prosecutor did not send the notice of intended prosecution by registered post until 1 p m on January 24, and it was not delivered to the defendant until January 25 at about 8.00 a m. The outcome of the issue as to whether the notice of intended prosecution had been served in time depended on whether the date of commission of the offence was to be excluded from the calculation of the period of 14 days. The Divisional Court held that in calculating the 14 days the date of the commission of the offence was to be excluded. Lord Goddard CJ stated at pp 798–799: C D E

"[The earlier] cases were all considered by the Court of Appeal in *Goldsmiths' Co v West Metropolitan Railway Co* in 1903; and it was in that case that the Master of the Rolls . . . held that it was now well established that, whatever the expression used, the day of the doing of the act was to be excluded. Mathew LJ, put it very succinctly and shortly in his judgment; he said: 'The true principle that governs this case is that indicated in the report of *Lester v Garland*, where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke B in *Russell v Ledsam* (1847) 14 M & W 574, and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.' F G

"That case, which is binding on this court, seems to me entirely to apply to the words of this section. This letter was received on the morning of January 25. It follows, in my opinion, that the notice was served in time, and accordingly this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case." H

Stewart v Chapman did not consider the position that arises if the day of the commission of the offence was undivided. Furthermore, it did not consider

A the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

30 I consider that none of the cases relied on by the appellants establishes a general rule applicable to a midnight deadline case. The only midnight deadline case is *Gelmini v Moriggia*, which the appellants submit was wrongly decided.

B

(d) Gelmini v Moriggia

31 The case of *Gelmini v Moriggia* [1913] 2 KB 549 concerned an action upon a promissory note. The time for payment of the promissory note expired at midnight on 22 September 1906 and the writ in the action against the makers was issued on 23 September 1912. Section 3 of the Limitation Act 1623 (21 Jac 1, c 16) provided that: "All actions . . . shall be commenced and C sued within the time and limitation hereafter expressed, and not after (that is to say) . . . within six years next after the cause of such actions or suit." Channell J held that the cause of action was complete at the commencement of 23 September 1906. On that basis the question whether the action was commenced in time depended on whether the six-year period was inclusive or exclusive of 23 September 1906. Channell J was referred to authorities D including *Lester v Garland* and *Goldsmiths' Co v West Metropolitan Railway Co*, but not to *Radcliffe v Bartholomew*, in support of the proposition that 23 September 1906 ought to be excluded. Channell J held that that day must be included in calculating the six years within which the action could be brought, so that the six years expired on 22 September 1912, which meant that the writ was issued too late. Channell J's reasoning was expressed in the following terms in the King's Bench report (pp 552–553):

E

> "An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because *the cause of* F *action is complete at the commencement of that day.* If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are 'within six years next after the cause of such action or suit.' Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action G arises, and *on that day an action can be brought, and that day is the first of all the days in the six years.* Therefore, assuming that the day upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is H the previous day which is excluded, i e, the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it. Therefore, so far as the cause of action arises on the promissory note, the writ was issued too late." (Emphasis added.)

32 In this passage Channell J addressed the question as to the date upon which the cause of action accrued, though there is a degree of confusion in relation to that issue. Channell J stated that "until the expiration of that day an action cannot be brought because until then there is no complete cause of action". That could be interpreted as a finding by him that there was a complete cause of action *on the expiration of the day* rather than there being a complete cause of action on the next day. However, he goes on to state: "The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day." That is a finding that the cause of action accrued at the commencement of the next day, rather than on the expiration of the previous day. He also stated: "Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises." Again, that is a finding that the cause of action accrued on the next day. However, he went on to hold that "It is the previous day which is excluded, i e, the day at the expiration of which the cause of action becomes complete" which could again be interpreted as a finding by him that there was a complete cause of action on the expiration of the previous day. The reports in (1913) 109 LT 77 and (1913) 29 TLR 486 do not resolve this confusion. However, regardless as to whether the cause of action accrued at the very end of 22 September 1906 or at the very start of 23 September 1906 the essential point being made by Channell J is that the action could have been brought throughout 23 September 1906. In practical terms there was no fraction of a day on the facts in *Gelmini*.

33 Another aspect of the decision in *Gelmini* which is unclear is as to whether Channell J was determining that the decision in that case was an exception to the general rule applicable in midnight deadline cases, or whether the decision could be seen as endorsing a wholesale departure from the general rule in all cases. In his ex tempore judgment Channell J did not expressly state that this was a midnight deadline case not involving any fraction of a day, and therefore an exception to the general rule. I nonetheless consider that a fair reading is that he was defining an exception to the general rule. However, in considering any subsequent judicial expressions of disapproval of *Gelmini*, one should bear in mind that such expressions of disapproval could have assumed that Channell J was incorrectly departing from the general rule.

(e) Was Gelmini inconsistent with earlier authority or subsequently disapproved?

34 The appellants submit that *Gelmini* was inconsistent with *Radcliffe v Bartholomew*, expressly disapproved in *Marren v Dawson Bentley & Co Ltd* and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd*.

35 The decision of the Divisional Court in *Radcliffe v Bartholomew* [1892] 1 QB 161 concerned the question as to whether a criminal complaint under the Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict c 92) had been made within one calendar month after the cause of complaint had arisen. That question in turn depended on whether the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made. Wills J, giving the judgment of the court with which Lawrance J agreed, held that the day was to be excluded so that the complaint was therefore made in time, and the

justices had jurisdiction to hear the case. In arriving at that conclusion Wills J (p 163) referred to the remarks at the end of the judgment of Parke B in *Young v Higgon* (1840) 6 M & W 49, as follows: "Apply the criterion which has been before suggested—reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted." Wills J then considered that those remarks were entirely applicable to the decision in *Radcliffe v Bartholomew* stating that "The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity".

36 I do not consider that the decision in *Gelmini* is inconsistent with *Radcliffe*, as the decision in *Radcliffe* did not involve a midnight deadline. Furthermore, if one applied the criterion of reducing the time limit to one day in the present case then there would still be a complete day in which to commence an action. Indeed, if one excluded the day after midnight from the calculation of a one-day time limit then there would be two complete days in which to commence an action. On that basis the decision in *Gelmini* is consistent with the criteria suggested in *Radcliffe*.

37 *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 concerned an industrial accident in which the plaintiff sustained personal injuries. The accident occurred at 1.30 p m on 8 November 1954. On 8 November 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the negligence of his employers, the defendants. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on 8 November 1954, and that the proceedings had not been commenced within the three-year limitation period contained in section 2(1) of the Limitation Act 1939 (2 & 3 Geo 6, c 21). Havers J was referred to a number of authorities including *Gelmini* but he did not approach that case as being an exception to the general rule applicable in midnight deadline cases. This meant that Havers J did not consider distinguishing *Gelmini* from the facts before him where there was a fraction of a day, the accident having occurred at 1.30p m. Rather, Havers J considered that the approach in *Gelmini* was in conflict with *Radcliffe*. He considered that he was bound by the decision in *Radcliffe*, but even if he were not bound by it, then he preferred the decision in *Radcliffe* and the reasons on which it was based to that in *Gelmini*. He accordingly declined to follow *Gelmini*. However, as I have indicated, I consider that the principle in *Gelmini* is an exception to the general rule applicable in midnight deadline cases. In this way the decision in *Marren* is consistent with *Gelmini*, which ought to have been distinguished.

38 *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336 concerned a plaintiff who was the widow and administratrix of a foundry worker who had been killed at work on 5 September 1967. The writ was issued against her late husband's employers, claiming damages for negligence and breach of statutory duty. The defendants claimed that the cause of action did not accrue within three years before the commencement of the action so that it was statute-barred by virtue of section 2(1) of the Limitation Act 1939. Whether the action had been commenced within the limitation period depended on whether the day of the accident was included or excluded in the computation of time. Lord Denning MR succinctly stated at p 348E:

> "The first thing to notice is that, in computing the three years, you do not count the first day, 5 September 1967, on which the accident

occurred. It was so held by Havers J in *Marren v Dawson Bentley & Co Ltd* . . . The defendants here, by their cross-notice, challenged that decision: but I think it was plainly right."

Karminski LJ agreed with Lord Denning MR. Megarry J addressed the issue more fully at p 350F–H not only by reference to *Marren* but also by reference to the statutory wording. He stated:

"At one time there was some argument on whether or not the period was to be reckoned by excluding the date on which the accident occurred, but in the end the point was not pressed. The decision of Havers J in *Marren v Dawson Bentley & Co Ltd* . . . based on section 2(1) of the Limitation Act 1939, was that the day of the accident was to be excluded in the computation of the time; and in the present case the judge applied that decision. The language of section 2(1) with the phrase 'after the expiration of three years from the date,' plainly supports that view. If the wording of the Fatal Accidents Acts, with the phrase 'within three years after the death,' is less apt, it would nevertheless be regrettable to introduce any fine distinctions, especially as the period of three years was inserted into each statute by the same Act, that of 1954. I would therefore agree with the judge in excluding the day of the accident from the computation under both heads."

On behalf of the appellants, it is submitted that the express approval of *Marren* by the members of the Court of Appeal implicitly carried with it the disapproval of *Gelmini*. I do not agree. Rather, the court in *Pritam* based their decision on *Marren* which was a case involving a fraction of a day. There was no analysis in *Pritam* or indeed in *Marren* of whether the day of accrual of the cause of action would be included in the computation of time when that day was a complete undivided day as it was in *Gelmini*.

39 I consider that the decision in *Gelmini*, when viewed as an exception to the general rule, is consistent with *Radcliffe*, ought to have been distinguished in *Marren* and was not disapproved in *Pritam*.

(f) Megarry J's reasoning in Pritam

40 In *Pritam* Megarry J also based his reasoning on the statutory wording which included the word "from". However, the question as to whether the word "from" is inclusive or exclusive was considered by Lord Mansfield in *Pugh v Duke of Leeds* (1777) 2 Cowp 714, 725. Lord Mansfield having reviewed the authorities concluded "that 'from' may in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive". I consider that it would be inappropriate to decide the present case purely on a textual analysis of the meaning of the word "from".

(g) McGee on Limitation Periods

41 In addition to *Gelmini*, the respondents relied on *McGee on Limitation Periods*, 8th ed (2018), paras 2.005–2.007 where the editors wrote:

"2.005 The general rule in calculating the expiry of a limitation period is usually expressed as being that parts of a day are ignored. This formulation is ambiguous, and needs to be clarified by example. In *Gelmini v Moriggia* the defendant had given a promissory note. The time

for payment of this expired on 22 September 1906. The claimant's writ on the note was issued on 23 September 1912. Channell J held that the cause of action was complete at the beginning of 23 September 1906, since that was the earliest moment at which proceedings could have been commenced, notwithstanding that the court office obviously would not have been open at midnight. Consequently the six-year limitation period expired at the end of 22 September 1912, and the writ issued on the following day was out of time. This is the simplest possible example, since the cause of action was held to accrue at the very beginning of a day. . .

"2.006 . . . Perhaps the most satisfactory of the authorities on this point is *Marren v Dawson Bentley & Co*. The claimant was injured in an accident at 13.30 on 8 November 1954, and the writ was issued on 8 November 1957. The question was whether time had expired at the end of 7 November 1957, and Havers J held that it had not. The day on which the cause of action accrues is to be disregarded in calculating the running of time. It therefore followed that time began to run at the first moment of 9 November 1954 and expired at the end of 8 November 1957. Havers J expressly declined to follow *Gelmini v Moriggia*, but it is not clear whether his decision is inconsistent with that in *Gelmini*. The latter case deals with one very specific situation, namely where the cause of action must accrue on the stroke of midnight. It is arguable that here there is no question of disregarding any part of a day; the cause of action was in existence throughout 23 September 1906. Consequently, it may be argued that on those very special facts the decision is still good law.

"2.007 The alternative is to say that time did not begin to run until the start of 24 September, which seems a very odd conclusion, given that the time for payment expired at the end of 22 September. It is submitted that the cases are reconcilable and that both are correct on this point. The rule is that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period. Strictly speaking this will normally lead to the extension of the limitation period by a few hours but it could equally be argued that the contrary rule would lead to the shortening of that period."

(h) The extent of the Limitation Act 1980 and a comparison with the legislative provisions in Scotland and Northern Ireland

42 The Limitation Act 1980 has no provision addressing the issue we have to decide in this case. Section 41(4) of the Limitation Act 1980 provides, subject to one limited exception in relation to Northern Ireland, that "this Act does not extend to Scotland or to Northern Ireland". There are separate legislative provisions in relation to limitation in both Scotland and in Northern Ireland.

43 In Scotland section 14(1)(c) of the Prescription and Limitation (Scotland) Act 1973 provides that "if the commencement of the prescriptive period would, apart from this paragraph, fall at a time in any day other than the beginning of the day, the period shall be deemed to have commenced at the beginning of the next following day". The respondents submit that section 14(1)(c) applies the approach in *Gelmini* of including the day after midnight in the computation of time.

44 In Northern Ireland article 2(1) of the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (NI 11)) provides that the computation of time is governed by the Interpretation Act (Northern Ireland) 1954. Section 39(2) of that Act provides that: "Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period." Therefore, the respondents submit that the Northern Ireland legislation expressly excludes the day on which the cause of action accrues. However, that raises the question as to the day upon which the cause of action accrues in a midnight deadline case. For instance, does it accrue at, not after, midnight?

45 I mention these different legislative provisions in Scotland and Northern Ireland solely for the purpose of explaining that specific statutory provisions apply in those jurisdictions to the situation which arises in this case, and that this judgment addresses the issue identified in para 2 above in relation to the law in England and Wales only.

(i) Conclusion

46 It is not surprising that there are conflicting views as to the date upon which the cause of action accrues in a midnight deadline case. There were potentially differing answers to that question in *Gelmini* [1913] 2 KB 549 (see para 32 above). In this case the issue was decided in different terms both at first instance (see para 16 above) and in the Court of Appeal (see para 18 above). For my own part I would prefer the approach of Underhill LJ that "the cause of action arises at, not after, midnight". However, it is not necessary to endorse any of the competing answers to that issue and I do not do so, because, as in *Gelmini*, whether the cause of action accrued at the expiry of 2 June 2011 or at the very start of 3 June 2011 there is no significant difference, in that 3 June 2011 was for practical purposes a complete undivided day.

47 I consider that the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in this case it was, in my opinion correctly, submitted that in a midnight deadline case even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day. I consider that it would impermissibly transcend practical reality if the stroke of midnight or some infinitesimal division of a second after midnight, led to the conclusion that the concept of an undivided day was no longer appropriate. In that sense this would not only be impermissible metaphysics but also, in this context, such a minimum period of time does not cross the threshold as capable of being recognised by the law. Whether the issue is framed in terms of metaphysics, which the common law eschews, or of the principle that the law does not concern itself with trifling matters, the conclusion is the same: realistically, there is no fraction of a day. That being so, the justification in relation to fractions of a day does not apply in a midnight deadline case. During oral submissions Mr Cousins QC, in answer to an enquiry from Lady Arden JSC seeking to identify the rational justification for excluding a whole indivisible day from the calculation of the

reckoning of time, sought to do so based on continuing the application of the rule, as he submitted it had been understood since the 18th century, so that in relation to something as important as limitation there should be continuity of interpretation. I reject the premise to that submission. As I have indicated there is no long-standing authority which excluded a whole indivisible day. Furthermore, I consider that the premise is undermined by the decision of Channell J in *Gelmini*. So, I reject this argument as a sufficient justification for excluding a whole day from the reckoning of time in a midnight deadline case. Rather, I prefer to consider the impact of holding that a full undivided day in a midnight deadline case is to be excluded from the reckoning of time. If that day were excluded from the computation of time then the limitation period would be six years and one complete day. I consider that would unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.

48 I also consider that the impact of excluding 3 June 2011 can be seen by applying the criteria suggested in *Radcliffe* [1892] 1 QB 161 of imagining a limitation period of one day. If in this case 3 June 2011 were excluded from the computation and if the limitation period were a single day, then the impact would be to allow two complete days within which to commence an action (see para 36 above).

49 I consider that *Gelmini* is an exception to the general rule so that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period for the purposes of the provisions of the Limitation Act with which this appeal is concerned. 3 June 2011 was a whole day so that it should be included in the computation of the limitation period.

Disposal of the appeal

50 I would dismiss the appeal.

Appeal dismissed.

SHIRANIKHA HERBERT, Barrister

Neutral Citation Number: [2020] EWCA Civ 104

Case No: A3/2019/0485

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (CHANCERY DIVISION)
Mann J
[2019] EWHC 246 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ROSE DBE

- -

Between :

Giles FEARN (1) **Gerald KRAFTMAN (2)** **Ian MCFADYEN (3)** **Helen MCFADYEN (4)** **Lindsay URQUHART (5)**	**Appellants/ Claimants**
- and -	
THE BOARD OF TRUSTEES OF THE TATE GALLERY	**Respondent/ Defendant**

- -
- -

Tom Weekes QC and **Richard Moules** (instructed by **Forsters LLP**) for the **Appellants**
Guy Fetherstonhaugh QC, **Elizabeth Fitzgerald** and **Aileen McColgan** (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing dates : 21 & 22 January 2020

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lady Justice Rose DBE:

1. This is an appeal from the order of Mann J dated 12 February 2019 dismissing the claim of the appellants for an injunction requiring the Board of Trustees of the Tate Gallery ("the Tate") to prevent members of the public, or any other licensees, from observing the claimants' flats from certain parts of the viewing gallery at the Tate Modern ("the viewing gallery"), which is on the top floor of an extension to the Tate Modern.

2. The case, and this appeal, raise important issues about the application of the common law cause of action for private nuisance to overlooking from one property to another and the consequent invasion of privacy of those occupying the overlooked property.

The factual background

3. The Judge described the factual background over many paragraphs. The following is a very brief summary, sufficient to understand the context of this appeal. Reference should be made to the Judge's judgment for a full account of the design, planning and construction history of the flats and the viewing gallery. It can be found at [2019] EWHC 246 (Ch), [2019] Ch. 369.

4. The claimants are the long leasehold owners of four flats in a striking modern development designed by Richard Rogers and Partners (subsequently, Rogers Stirk Harbour + Partners), comprising four blocks of flats known as Neo Bankside, on the south bank of the River Thames. The design, planning process and construction of the development took place between 2006 and September 2012. The claimants' flats are in Block C of Neo Bankside, and they are directly opposite a new extension of the Tate Modern called the Blavatnik Building. The Blavatnik Building includes the viewing gallery, which runs around all four sides of the top floor, Level 10, and allows visitors to the Tate Modern to enjoy a 360-degree panoramic view of central London.

5. The flats which are the subject of the claim are 1301, 1801, 1901, and 2101. The first two digits indicate the floor on which the flat is situated. The floor plans of each flat in Block C vary but each flat involved in this action comprises two parts: a general living space, and a triangular end piece known as a "winter garden". The winter gardens have floor-to-ceiling single-glazed windows, which are separated from the flat by double-glazed glass doors. They have the same heated flooring as the rest of the accommodation but are separated from the rest of the accommodation by a lip and the double-glazed doors. Although the winter gardens were initially conceived by the developers as a type of indoor balcony, in the case of all the claimants' flats the winter garden has become part of the general living accommodation. The other sides of the flats which enclose the living space of the accommodation, including the kitchen, dining, and sitting areas, are made up of floor-to-ceiling clear glass panels but equipped with wooden fascias which prevent a whole view of the interior of the dining and sitting areas.

6. Adjacent to Neo Bankside is the Tate Modern (which, as well as the defendants, we shall call "the Tate"). The Tate is free and open to the public. Between 2006 and 2016 the Tate designed, obtained planning permission for and built an extension known as the Blavatnik Building. One of the features of the Blavatnik Building is the viewing

gallery. The viewing gallery provides a striking view of London to the north, west, and east, with a less interesting view to the south. The viewing gallery has been open to the public since the Blavatnik Building was completed in 2016. The viewing gallery attracts hundreds of thousands of people a year (with one estimate at 500,000 – 600,000), with a maximum of 300 visitors at one time. Visitors spend 15 minutes on average in the viewing gallery. Originally, the viewing gallery was open when the museum was open: 10am – 6pm Sunday to Thursday and 10am to 10pm on Friday and Saturday. On 26 April 2018 the opening hours for the viewing gallery changed. It is now closed to public access at 5.30pm on Sunday to Thursday, and on Friday and Saturday the south and west sides are closed from 7pm and the north and east sides are closed from 10pm. There is a monthly event called Tate Lates, which currently takes place on the last Friday of each month, and for which the viewing gallery, other than the south side, remains open until 10pm. The viewing gallery also hosts financially lucrative commercial and internal events for the Tate. In its first 17 months 52 external events were hosted there.

7. The winter gardens of Block C are roughly parallel to the Blavatnik Building. The distance between the viewing gallery and the 18th floor flat in Block C is just over 34m. Absent a barrier, visitors to the viewing gallery can see straight into the living accommodation of the claimants' flats. The most extensive view is of the interior of flats 1801 and 1901, with less for flat 2101, and less again for flat 1301. The flats have been fitted with solar blinds which, when kept down, obscure the view of the interior of the flat from the outside during the day. In the evening, however, when the lights are on, shadows of occupants may be visible to onlookers. The solar blinds also obscure the views of the outside and deprive the occupants of their use of the windows on one side of their flat.

8. Visitors in the viewing gallery frequently look into the claimants' flats and take photographs, and less frequently view the claimants and their flats with binoculars. Photographs of the flats are posted on social media by visitors. On the platform Instagram there were 124 posts in the period between June 2016 and April 2018. It has been estimated that those posts reached an audience of 38,600. The Tate took two steps to attempt to address the problem: it posted a notice on the southern gallery asking visitors to respect the privacy of the Tate's neighbours and it instructed security guards to stop photography.

9. The designs for the Blavatnik Building always included a viewing gallery in some form; although its precise extent varied through successive iterations of the design. There is no planning document which indicates that overlooking by the viewing gallery in the direction of Block C was considered by the local planning authority at any stage. It is not likely that the planning authority considered the extent of overlooking. Further, while the Neo Bankside developer was aware of the plans for a viewing gallery, they did not foresee the level of intrusion which resulted.

The proceedings

10. The claim form in these proceedings was issued on 22 February 2017 claiming, as we have said, an injunction requiring the Tate to prevent members of the public or any other licensees from observing the claimants' flats from the part of the viewing gallery shown cross-hatched on the plan attached to the particulars of claim. By time of the trial the cross-hatching had been amended to cover the whole of the southern

walkway, fronting directly on the flats, and also the southern half of the western walkway. The particulars of claim alleged that the use of that part of the viewing gallery unreasonably interfered with the claimants' enjoyment of their flats so as to be a nuisance. The particulars of claim also alleged that the use of that part of the viewing gallery infringed the claimants' exercise of their rights, conferred by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), to respect for their private and family lives and their homes, and that therefore the Tate, as a public authority, was in breach of section 6 of the Human Rights Act 1998 ("the HRA 1998").

11. In its defence the Tate denied that its use of the viewing gallery unreasonably interfered with the claimants' ordinary enjoyment of their flats. It denied that the viewing gallery diminished the utility of the claimants' land or caused injury to their land. The Tate denied that it was a public authority for the purposes of the HRA 1998, and, insofar as it was a hybrid public authority for the purposes of that Act, the Tate alleged that its use of the relevant part of the viewing gallery was a private act. The Tate denied that it was in breach of section 6 of the HRA 1998. It denied that the claimants were victims of a breach of Article 8 of the Convention. It denied that its use of the relevant part of the viewing gallery interfered with the claimants' right to respect for their private and family lives and their homes. It alleged that, if there was any interference with such rights, such interference was justified under Article 8.2. The Tate alleged that it had taken all reasonable steps to ensure that its visitors did not cause any disturbance to its neighbours, including the claimants. The Tate denied that the claimants' legal rights had in any way been interfered with or breached by it, and that in the circumstances the claimants were entitled to the injunction sought or to any relief.

The trial

12. The trial of the action took place before Mann J over five days in November 2018. There was considerable oral and documentary evidence. The oral evidence included that of the claimants and their planning expert, and that of six witnesses for the Tate. They were its director since 2016, its head of audience experience, its head of business, corporate membership and events, its head of regeneration and community partnerships, an architect employed by the firm which designed the Blavatnik Building and an expert on planning and associated matters.

13. The Judge undertook a site visit.

The judgment

14. The Judge handed down an impressive, comprehensive and detailed judgment on 12 February 2019, in which he dismissed the claim. The judgment runs to 233 paragraphs and 68 pages.

15. The following is a very brief summary of its critical reasoning, which inevitably does not do adequate justice to the conscientiousness of the Judge in this difficult case.

16. The Judge summarised his conclusion on the facts on the level of intrusion as follows:

> "88. Gathering my findings above into one place, I find:

> (a) A very significant number of visitors display an interest in the interiors of the flats which is more than a fleeting or passing interest. That is displayed either by a degree of peering or study, with or without photography, and very occasionally with binoculars.
>
> (b) Occupants of the flats would be aware of their exposure to that degree of intrusion.
>
> (c) The intrusion is a material intrusion into the privacy of the living accommodation, using the word "privacy" in its everyday meaning and not pre-judging any legal privacy questions that arise.
>
> (d) The intrusion is greater, and of a different order, from what would be the case if the flats were overlooked by windows, either residential or commercial. Windows in residential or commercial premises obviously afford a view (as do the windows lower down in the Blavatnik Building) but the normal use of those windows would not give rise to the same level of study of, or interest in, the interiors of the flats. Unlike a viewing gallery, their primary (or sole) purpose is not to view.
>
> (e) What I have said above applies to the upper three flats in this case. It applies to a much lesser extent to flat 1301, because that is rather lower down the building and the views into the living accommodation are significantly less, and to that extent the gallery is significantly less oppressive in relation to that flat."

17. On the direct claim in privacy under section 6 of the HRA 1998 and Article 8 of the Convention, the Judge concluded (at [124]) that the Tate does not have, or in this case was not exercising, functions of a public nature within the HRA 1998. Accordingly, the direct privacy claim failed, and the Judge said that he did not have to consider how Article 8 would have operated had the Tate been a public authority.

18. Turning to the nuisance claim, the Judge said that, if there was a nuisance, it would have to be the kind of nuisance caused by interference with a neighbour's quiet enjoyment of their land, and the first issue was whether that type of nuisance is capable of including invasion of privacy.

19. Having reviewed the arguments of counsel for both sides, and the various cases on which they relied, the Judge said (at [169]) that, had it been necessary to do so, he would have been minded to conclude that the tort of nuisance, absent statute, would probably have been capable, as a matter of principle, of protecting privacy rights, at least in a domestic home. He considered (at [170]) that, if there were any doubt about that, then that doubt had been removed by the HRA 1998 and Article 8 of the Convention; and (at [174]) that, if it did not do so before the HRA 1998, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case.

20. In considering whether there is an actionable nuisance in the present case, he said (at [186] and [188]) that the planning permission for the Blavatnik Building provides little or no assistance as the level of consideration given to the overlooking, if there was any at all, was not apparent from the evidence placed before him; and the planning permission did not really address the viewing gallery, as opposed to the building as a whole, and so it was not possible to draw any conclusions from it as to the views of the planning authority on the relative importance of the viewing gallery to the area.

21. The Judge observed (at [190]) that the locality is a part of urban South London used for a mixture of residential, cultural, tourist and commercial purposes but the significant factor was that it is an inner city urban environment, with a significant amount of tourist activity. He said that an occupier in that environment can expect rather less privacy than perhaps a rural occupier might, and that anyone who lives in an inner city can expect to live quite cheek by jowl with neighbours.

22. The Judge said (at [196]) that there was nothing unreasonable about the use of the Tate's land per se, in its context. He took into account (at [198]) the restrictions imposed by the Tate on the use of the viewing gallery both in respect of times for viewing and the other steps mentioned above.

23. So far as concerns the claimants' flats, he said (at [200]-[204]) that, while at one level the claimants were using their properties in accordance with the characteristics of the neighbourhood as they were used as dwellings, the complete glass walls of the living accommodation meant that the developers, in building the flats, and the claimants as successors in title who chose to buy the flats, had created or submitted themselves to a sensitivity to privacy which was greater than would have been the case of a less glassed design.

24. The Judge said (at [204]) that there was a parallel with nuisance cases in which the claim had failed because the claimant's user which had been adversely affected by the claimant's activity was a particularly sensitive one and that an ordinary use would not have been adversely affected.

25. The Judge also considered (at [209]-[210]) that, by incorporating the winter gardens into the living accommodation, the owners and occupiers of the flats had created their own additional sensitivity to the inward gaze. He concluded (at [211]) that the claimants were, therefore, occupying a particularly sensitive property which they were operating in a way which had increased the sensitivity.

26. The Judge then said that there were remedial steps that the claimants could reasonably be expected to have taken on the basis of the "give and take" expected of owners in this context. He mentioned (at [214]) the following: (1) lowering the solar blinds; (2) installing privacy film; (3) installing net curtains; (4) putting some medium or taller plants in the winter gardens, although the Judge accepted that, as a matter of screening, medium height plants would not be hugely effective. The Judge said (at [215]) that, looking at the overall balance which had to be achieved, the availability and reasonableness of such measures was another reason why he considered there to be no nuisance in the present case.

The appeal

27. The claimants were given permission to appeal on only one of their grounds of appeal. That ground is sub-divided into four paragraphs. They can be summarised as being that the Judge wrongly: (1) disregarded interference with the claimants' use of their flats due to their large windows because he wrongly made the counterfactual assumption that the flats were situated in an imaginary building with significant vertical and perhaps horizontal breaks which interrupted the inward view from the viewing balcony; (2) failed to have regard to the use of the viewing gallery to photograph and film individuals in the claimants' flats, with the photos and videos sometimes being posted on social media, contrary to the rights conferred Article 8; (3) failed to hold that the installation in the flats of privacy film and net curtains would be problematic preventive measures as such installation would be in breach of the leases of the flats; and (4) held that, for the purposes of the claimants' claim under the HRA 1998 s.6, the Tate is a "hybrid" authority.

28. The claimants did not proceed with that last criticism on the hearing of the appeal.

29. In preparing for the hearing of the appeal we were concerned that there was no respondent's notice raising the issues of whether, contrary to the view of the Judge (1) there is no cause of action in private nuisance for overlooking, which, as a matter of policy, should be addressed by planning law and practice or some other common law or statutory regime, and (2) it was not right, if necessary, to extend the cause of action for private nuisance to overlooking in view of Article 8. At our request, the parties provided us with written submissions on those additional matters and counsel addressed them in the course of the oral hearing. At the end of the hearing, we gave permission for the Tate to file a respondent's notice formally raising them.

Discussion

A. Is there a cause of action in private nuisance for overlooking?

Relevant general principles of private nuisance

30. The principles of the cause of action for private nuisance were recently summarised by the Court of Appeal in *Williams v Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514, [2019] QB 601, at [40]-[45]. What was said there may be broken down into the following headline points.

31. First, a private nuisance is a violation of real property rights. It has been described as a property tort. It involves either an interference with the legal rights of an owner or a

person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: *Hunter v Canary Wharf Ltd [1997] AC 655* 687G–688E (Lord Goff citing FH Newark, "The Boundaries of Nuisance" 65 LQR 480), 696B (Lord Lloyd), 706B and 707C (Lord Hoffmann) and 723D–E (Lord Hope).

32. Second, although private nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights. In *Hunter*'s case, at p 695C, Lord Lloyd said that nuisances are of three kinds:

> "(1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."

33. The difficulty, however, with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law.

34. Third, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance must be treated with considerable caution. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In the case of nuisance through interference with the amenity of land, physical damage is not necessary to complete the cause of action. To paraphrase Lord Lloyd's observations in *Hunter*, at 696C, in relation to his third category, loss of amenity, such as results from noise, smoke, smell or dust or other emanations, may not cause any diminution in the market value of the land, such as may directly follow from, and reflect, loss caused by tangible physical damage to the land, but damages may nevertheless be awarded for loss of the land's intangible amenity value.

35. Fourth, nuisance may be caused by inaction or omission as well as by some positive activity.

36. Fifth, the broad unifying principle in this area of the law is reasonableness between neighbours.

37. Overlooking from one property into another, if it is actionable at all as a private nuisance, would fall within Lord Lloyd's third category in *Hunter*. It is necessary, therefore, to consider in the present appeal certain aspects of that category in more detail than in *Williams*.

38. The first is what is often said to be the unifying principle of reasonableness between neighbours. Whether or not there has been a private nuisance does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances. The requirements of the common law as to what a claimant must prove in order to establish the cause of action for private nuisance, and as to what will constitute a good defence, themselves

represent in the round the law's assessment of what is and is not unreasonable conduct sufficient to give rise to a legal remedy.

39. We consider below the authorities discussing what the claimant must prove when the allegation is that the defendant has materially interfered with the amenity of the claimant's land. If material interference is established, the question of whether the defendant can defeat the claim by showing that the use of their land is a reasonable use was answered by *Bamford v Turnley* (1862) 3 B&S 66. In that case the plaintiff alleged that the defendant was liable for nuisance for burning bricks in kilns on the defendant's land which resulted in a bad smell affecting the comfortable and healthy occupation of the plaintiff's land. The jury found for the defendant. What was at issue on appeal in the Exchequer Chamber was whether the Chief Justice had misdirected the jury when he told them that they were to find for the defendant if they were of the opinion that the spot where the bricks were burned was a proper and convenient spot and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. It was held on appeal that there had been a misdirection. In an influential judgment, which has been cited, approved and applied many times, including at the highest level (see, for example, *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 2 AC 264 at 299, *Southwark London Borough Council v Tanner* [2001] 1 AC 1 at 15-16, 20) Bramwell B said (at p.83):

> "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle … would not comprehend the present [case], where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner - not unnatural or unusual, but not the common and ordinary use of land. … The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

40. It will be noted that there are two ingredients for such a defence for causing a nuisance to a neighbour: (1) the act must be "necessary" for the common and ordinary use and occupation of the land, and (2) it must be "conveniently" done. "Necessity" here plainly does not mean that the land would be incapable of occupation without the act being done at all. Its meaning is coloured by association with "the common and ordinary use and occupation of land and houses". "Conveniently" means that the act must be done in a way that is reasonable, having regard to the neighbour's interests. By way of illustration of both points, in *Southwark* (at p.16) Lord Hoffmann, commenting on Bramwell B's comments quoted above, said that it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises.

41. In *Southwark* (at p.20) Lord Millett (with whom three other members of the appellate committee expressly agreed) said that the law of nuisance seeks to protect the competing interests of adjoining owners so far as it can by employing the control mechanism described by Lord Goff in *Cambridge Water (*at p.299) as "the principle of reasonable user – the principle of give and take", and that it is not enough for a landowner to act reasonably in his own interest: he must also be considerate of the interest of his neighbour. Lord Millett said that "[t]he governing principle is good

neighbourliness, and this involves reciprocity". He went on to explain, however, that the law gives effect to those broad concepts by the principle stated by Bramwell B in the passage in *Bamford* quoted above. It is that principle, he said, "which limits the liability of a landowner who causes a sensible interference with his neighbour's enjoyment of their property". Lord Millett extrapolated (at p.21) the following from Bramwell B's statement:

> "[Bramwell B's] conclusion was that two conditions must be satisfied: the acts complained of must (i) "be necessary for the common and ordinary use and occupation of land and houses" and (ii) must be "conveniently done", that is to say done with proper consideration for the interests of neighbouring occupiers. Where these two conditions are satisfied, no action will lie for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance."

42. In *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2013] QB 455, the Court of Appeal reversed the decision of the trial judge that the defendant was not liable in private nuisance for odours caused by the tipping of waste. The essential reasoning of the trial judge was that the claim failed because defendant's use of its land was reasonable, as the use was in accordance with planning permission and the waste management permit granted by the Environment Agency and was without negligence, and some level of odour was inherent in the permitted activity. The Court of Appeal held that the approach of the judge involved errors of law, and so the case had to be remitted to be tried on the correct principles.

43. Carnwath LJ, with whom the other two members of the court agreed, rejected the judge's approach (described at [45]) that, as the "controlling principle" of the modern law of nuisance is that of "reasonable user", then if the user is reasonable, the claim must fail absent proof of negligence. Carnwath LJ said (at [46]) that "reasonable user" "is at most a way of describing old principles, not an excuse for re-inventing them". Having reviewed various references to reasonable user, reasonableness and "give and take" in *Cambridge Water*, *Bamford*, *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 and *Southwark LBC*, Carnwath LJ said as follows:

> "71. None of this history would matter if "reasonable user" in the present case was being used as no more than a shorthand for the traditional common law tests, as I understand it to have been used by Lord Goff [in *Cambridge Water*]. However, it is apparent that the judge, following Biffa's submissions, saw this concept as an important part of the argument for taking account of the statutory scheme and the permit, to which I will come in the next section.
>
> 72. In my view, these complications are unsupported by authority, and misconceived. "Reasonable user" should be judged by the well settled tests. …"

44. We turn to two other matters relevant to the loss of amenity category of private nuisance, which did not arise in *Williams* and so were not necessary to highlight there, but which are relevant to the present case.

45. As the cause of action for private nuisance is a property right, a claim can only be made by someone who has a right to the land affected or who is in exclusive possession of it. A licensee on the land, such as children or guests, has no right to sue: *Hunter*. As Lord Hoffmann said in that case (at pp.702H, 706B-C and 707C):

> "Nuisance is a tort against land, including interests in land such as easements and profits. A plaintiff must therefore have an interest in the land affected by the nuisance. … In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation. …Once it is understood that nuisances "productive of sensible personal discomfort" (*St. Helen's Smelting Co. v. Tipping, 11 H.L.Cas. 642*, 650) do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable."

46. The next point is that, in the case of the loss of amenity category of private nuisance, there must have been a material interference with the amenity value of the affected land, looked at objectively, having regard to the locality, and without regard to undue sensitivities or insensitivity on the part of the claimant. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822, Lord Neuberger said (at [4]):

> "In *Sturges v Bridgman* (1879) 11 Ch D 852 , 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out."

47. Lord Neuberger quoted (at [64]) the following passage from the speech of Lord Westbury in *St Helen's Smelting (*at p.650):

> "anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he

> should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop."

48. In *Barr* (at [72]) and in *Lawrence* (at [179]) Lord Carnwath quoted with approval the following passage from *Weir, An Introduction to Tort Law,* 2nd ed (2006) p. 160:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with."

49. Lord Neuberger in *Lawrence* (at [5]) said, with reference to that passage in Lord Carnwath's judgment, that he agreed that reasonableness in this context is to be assessed objectively.

Overlooking and the cause of action for private nuisance at common law

50. The Judge concluded (at [169]) that, had it been necessary to do so, he would have been minded to conclude that the tort of nuisance, absent statute, "would probably have been capable, as a matter of principle, of protecting privacy rights, at least in a domestic home".

51. He reached that conclusion on the basis of the following reasoning. Firstly, having surveyed the many cases cited by each side on the point (at [133]-[163]), he said (at [164]) that none of the cases go so far as to say that nuisance can never protect privacy, the one exception probably being the decision of the majority in the Australian case *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. He said that he found the dissents in that case "somewhat compelling", and, furthermore, on the other side of the fence was another Australian case, *Raciti v Hughes* (1995) 7 BPR 14837, which presupposed that an action in nuisance is capable of being deployed to protect privacy. Secondly, he rejected (at [167]) a submission on behalf of the Tate that it was only in exceptional circumstances that loss of amenity resulting from something other than an emanation (such as noise, smell or smoke) could be upheld in nuisance. Thirdly, he said (at [168]) that, if the sight of something on the defendant's land can give rise to a nuisance claim, as in *Thompson-Schwab v Cotaki* [1956] 1 WLR 335 (in which an interlocutory injunction was granted restraining the defendants from using premises for the purpose of prostitution), then it should be noted that part of the privacy claim could be founded on the fact that the claimants find it oppressive to see the watchers watch them. Further, fourthly, if it were necessary to find an emanation, the Judge said (at [168]) that he would have been prepared to find that the gaze of a watcher from the viewing gallery is analogous

to an emanation for these purposes. Fifthly, he considered (at [169]) that Mr Fetherstonhaugh's acceptance that deliberate overlooking, if accompanied by malice, could give rise to a nuisance:

> "gives the game away at the level of principle. It implicitly accepts that, given the right circumstances, a deliberate act of overlooking could amount to an actionable nuisance"."

52. We respectfully do not agree with the conclusion or reasoning of the Judge on this issue for the following reasons.

53. Firstly, despite the hundreds of years in which there has been a remedy for causing nuisance to an adjoining owner's land and the prevalence of overlooking in all cities and towns, there has been no reported case in this country in which a claimant has been successful in a nuisance claim for overlooking by a neighbour. There have, however, been cases in which judges have decided and expressed the view that no such cause of action exists.

54. *Chandler v Thompson* (1911) 3 Camp. 80 was a case concerning obstruction of a right of light. Le Blanc J is reported to have observed (at p.82):

> "that although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained; and when he was in the Common Pleas he had heard it laid down by Lord C. J. Eyre that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window."

55. In *Turner v Spooner* (1861) 30 LJ Ch 801 the plaintiff was the owner of a property with "ancient lights", that is to say a property which had the benefit of an easement of light. The plaintiff's property adjoined the defendants' property. The plaintiff replaced the frames of the ancient lights, which had, in part, been painted white and, in part, been fitted with small leaden lattices, with plate glass, which allowed much more light and air. The defendants objected and began to erect a wooden framework in the yard that abutted both properties within a few inches of the plaintiff's ancient lights. The plaintiff brought proceedings for an injunction for, among other things, removal of the wooden framework. The defendants contended that the increase in the amount of light was a new easement, and the defendants were entitled to reduce the light to its original amount. They also argued that there was interference with the privacy of the defendants, for which the court would grant relief. Kindersley V-C refused to grant an injunction. He held, on the first argument, that a mere increase in light through the same aperture did not give rise to a new easement. On the privacy argument, he said the following (at p.803):

> "With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this Court nor a Court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering, perhaps with his comfort. "

56. The Judge said (at [159]) that the decision should not be taken further than as applying to acts such as opening windows which happen to overlook, and does not assist in the present problem "which relates to a structure whose whole purpose is to overlook by providing a view to those who visit for that purpose". We do not agree. While there is certainly a substantial difference of degree between the overlooking in *Turner* and the overlooking from the Tate's viewing gallery, the issue of principle as to whether or not an invasion of privacy by overlooking is actionable as a private nuisance is the same. We consider that *Turner* is authority that it is not.

57. In *Tapling v Jones* (1865) 20 CBNS 166, a decision of the House of Lords, the issue was whether the defendant was entitled to build next to the plaintiff's wall, in which there were ancient lights and new windows, in a way which blocked the light to all of those windows, there being no way in which the defendant could obstruct the new windows without at the same time obstructing the ancient lights. The House of Lords, upholding the decision of the lower courts, held that the plaintiff was entitled to damages for interference with his ancient lights. The speeches in the House of Lords considered generally the law relating to the opening of windows overlooking another property. They made clear that there was no cause of action for overlooking, however many new windows there might be, and that the only remedy of the adjoining owner was (in the case of windows which were not ancient windows) to build upon the adjoining land itself so as to obstruct the light to and the views from the new windows.

58. Lord Westbury LC said (at p. 178) that it might be useful to point out "some expressions which are found in the decided cases, and which may seem to have a tendency to mislead". Having addressed, in that context, the phrase "right to obstruct", he addressed the issue of overlooking and privacy, as follows:

> "Again, there is another form of words which is often found in the cases on this subject, viz. the phrase "invasion of privacy by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory."

59. Lord Carnworth said the following (at pp.185-186) on the same point:

> "Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within 20 years after the opening of the window, obstruct the light which would otherwise reach them. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest; and if by so doing he obstructs the access of light to the new

> windows, he is doing that which affords no ground of complaint."

60. Lord Chelmsford said (at pp.191):

> "It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right;" because the owner of a house has a right at all times (apart, of course. from any agreement to the contrary) to open as many windows in his own house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves everyone to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows."

61. The Judge again distinguished those statements (at [161]) on the ground that they "do not necessarily deal with the case of a structure whose whole purpose is overlooking". We do not agree. While those statements were not, strictly, part of the *ratio,* or necessary reasoning of the decision, they are clear statements of the highest authority that the construction or alteration of premises so as to provide the means to overlook neighbouring land, whether or not such overlooking would result in a significant diminution of privacy and be the cause of justified annoyance to the neighbouring owner, is not actionable as a nuisance.

62. Before the Judge Mr Fetherstonhaugh placed weight on the decision of Parker J in *Browne v Flower* [1911] 1 Ch 219. In that case the plaintiffs, who were tenants of a ground floor flat in a building in respect of which Mrs Flower, as second mortgagee by subdemise, was entitled to the rents and profits, claimed an order for the removal of a staircase erected, with Mrs Flower's consent, on her adjoining land. The staircase was erected by another defendant, Mrs Lightbody, who was the tenant of another flat comprising rooms on the ground, first and second floors of the building, and who wished to subdivide her flat into two smaller flats and to provide a means of access to one of those smaller flats on the first floor. A person accessing the staircase would have a direct view into the plaintiffs' bedroom. The plaintiffs relied on the terms of covenants in Mrs Lightbody's lease not to do anything in her flat causing a nuisance to neighbouring premises; upon the principle of non-derogation from grant, that is to say that no one can be allowed to derogate from his or her own grant; and upon a breach of the covenant for quiet enjoyment in the plaintiff's lease.

63. Parker J dismissed the claim on the grounds that (1) so far as concerns the claim that Mrs Lightbody was in breach of her lease, she had not done anything on the premises demised to her: what was done was on adjoining land belonging to the lessor; (2) so far as concerns non-derogation from grant, the existence of the staircase did not render the plaintiff's premises unfit or materially less fit to be used for the purposes of a residential flat; and (3) the suggestion of a breach of the covenant for quiet enjoyment had not really been pressed, and in any event required some physical interference with the enjoyment of the demised premises and did not extend to a mere interference with the comfort of persons using the demised premises by the creation

of a personal annoyance. As the Judge observed, that last finding was disapproved, at least in the context of noise, by Lord Hoffmann in *Southwark LBC (*at p.11A-C).

64. In the course of his judgment, Parker J made some observations about privacy, including (at p.225) that the law does not recognise any easement of prospect or privacy, and (at p.227), in relation to non-derogation from grant, the following:

> "A landowner may sell a piece of land for the purpose of building a house which when built may derive a great part of its value from advantages of prospect or privacy. It would, I think, be impossible to hold that because of this the vendor was precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, and to a great extent interfere with the comfortable enjoyment and diminish the value of the property sold by him. … It is only the comfort of the persons so using the rooms [viz. those overlooked by the staircase] that is interfered with by what has been done. Either they have less privacy, or if they secure their privacy by curtains they have less light. Much as I sympathise with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation."

65. The Judge did not think that *Browne* was of much assistance on the general question of principle which we are currently addressing. We agree. The reasoning of Parker J is closely related to the particular facts of that case and the particular causes of action alleged, none of which were for private nuisance.

66. As mentioned above, the Judge acknowledged that *Victoria Park Racing*, a decision of the High Court of Australia, is authority for the proposition overlooking is not an actionable nuisance. In that case the defendant Mr Taylor, who was the owner of property neighbouring a racecourse owned by the plaintiff, gave permission to another defendant, the Commonwealth Broadcasting Corporation, to erect an observation platform from which an employee of the company gave a running commentary on the races, which was simultaneously broadcast by the company. The plaintiff claimed that the broadcasting had caused large numbers of people, who would otherwise have attended the race meetings, not to do so but instead to listen to the broadcasts, as a result of which the plaintiff had suffered loss and damage. He sought injunctions against the defendants on the ground of, among other things, common law nuisance. The majority (Latham CJ, Dixon J and McTiernan J) held that the decision of the Supreme Court of New South Wales dismissing the claim should be affirmed. A narrow reading of the judgments of the majority is that the defendants had not interfered with the use and enjoyment of the plaintiff's land, but rather the effect of their actions was to make the business carried on by the plaintiff less profitable. In the course of their judgments, however, the majority considered and rejected the proposition that overlooking was an actionable private nuisance.

67. Latham CJ said (at p.494):

> "Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people. At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, &c., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects."

68. Dixon J said (at p. 507):

> "It is the obtaining a view of the premises which is the foundation of the allegation. But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained. Not only is it lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroyed the previously existing under natural conditions."

69. The Judge said (at [158]) that *Victoria Park Racing* "does not deal with the arguably different situation of looking into someone's home", and that it was not clear to him that the result would have been the same if what was being overlooked was the interior of someone's house. He also said (at [169]) that (the case not being binding on him) "[b]eing free to do so, I would prefer the reasoning of the minority in *Victoria Park Racing*". We consider, however, that the passages in *Victoria Park Racing* which we have quoted above are consistent with the views expressed by judges in this jurisdiction.

70. On this issue of actionability the Judge referred (in [134]-[147]) to a number of cases and some academic commentary relied upon by Mr Weekes, namely *Semayne's Case* (1604) 5 Co Rep 91a, *Morris v Beardmore* [1981] AC 446, *Brooker v Police* [2007] 3 NZLR, the judgments of the dissenting judges in *Victoria Park Racing*, the judgment of Callinan J in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 28 CLR 199, *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, the Australian case of *Raciti*, an observation of Lord Millett at page 23 of *Southwark*, commentary in Clerk & Lindsell on Torts 21st ed (2014) and an article on "Privacy" by Winfield (1931) 47 LQR 23.

71. The Judge analysed each of them. He did not consider that any of cases was clear, let alone binding, authority that overlooking from the Tate viewing gallery is capable in principle of giving rise to a cause of action in nuisance. That was true even of *Raciti*, which, as we have said above, the Judge mentioned (in [164]) as supporting the existence of cause of action in nuisance to protect privacy. That was a decision of Young J in the Equity Division of the Supreme Court of the New South Wales on an application for an interlocutory injunction. In that case the defendants installed on their property floodlights and camera surveillance equipment positioned so as to illuminate the plaintiff's adjoining backyard and record on videotape what occurred in the backyard. The floodlight system appeared to be activated by a sensor which switched on the floodlights with movement or noise in the backyard.

72. Young J granted the injunction both on account of the lights and the surveillance equipment. As regards the surveillance equipment, he said that, on the evidence, there was a deliberate attempt to snoop on the privacy of a neighbour and to record that private activity on video tape. Importantly, for present purposes, he said that the surveillance and accompanying recording "gets sufficiently close to watching and besetting". "Watching and besetting", that is to say watching or besetting a person's house with a view to compelling them to do or not to do what is lawful for them not to do or to do, without lawful authority or reasonable justification, has been held actionable as a common law nuisance: *J Lyons & Sons v Wilkins* [1895] 1 Ch 255. Whether pure watching and besetting, without more, is capable of amounting to a common law nuisance is debatable: *Hubbard v Pitt* [1976] Q.B. 142, 175-177 (per Lord Denning MR, referring to *Ward Lock and Co Ltd v The Operative Printers' Assistants' Society* (1906) 22 TLR 327). In any event, "watching or spying on a person" is now an offence and civilly actionable under the Protection from Harassment Act 1997 ss..2A and 3. It is quite different from just overlooking and what takes place on the Tate's viewing gallery. Moreover, as the Judge noted in the present case (at [146]), Young J in *Raciti* regarded the application for the interlocutory injunction before him as "virtually the hearing of a demurrer" and so it was only necessary for the plaintiff to establish that there was an arguable cause of action.

73. The Judge concluded his survey and analysis of the cases relied upon by the claimants on the issue of actionability as follows (at [148]):

> "Thus far on the authorities … Mr Weekes has not much to go on in trying to establish that the tort of nuisance is capable of covering the acts of which he complains. However, he seeks to bridge the gap by relying on the Human Rights Act 1998, and in particular Article 8. … He submits that when one balances

> all the factors which have to be balanced in a nuisance and privacy claim, there has been an actionable nuisance in this case."

74. We, therefore, conclude that the overwhelming weight of judicial authority, particularly in this jurisdiction, is that mere overlooking is not capable of giving rise to a cause of action in private nuisance. There is certainly no decided case to the contrary.

75. Secondly, in our judgment that is not surprising for historical and legal reasons. As can be seen from the cases we have mentioned, such as *Chandler*, *Turner* and *Tapling*, consideration in the case law of the existence of a cause of action in nuisance for invasion of privacy and overlooking has often been in the context of disputes over obstruction of windows. The absence at common law of a right to light, short of an easement after 20 years' use which satisfies the relevant conditions, and of general air flow and prospect, are mirrored by the absence of a right to prevent looking into a residence. The reason for the former (no general right to light, air flow and prospect) has been judicially explained as being that such a right would constrain building in towns and cities.

76. In *Attorney-General v. Doughty*, (1752) 2 Ves.Sen. 453, at 453-454, Lord Hardwicke LC said:

> "I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town …"

77. In *Dalton v. Angus* [1881] 6 App.Cas 740 at 824, Lord Blackburn agreed with that reason and said:

> "I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement."

78. As Lord Lloyd observed in *Hunter* (at p.600F) this was, therefore, purely a matter of policy. It is logical that the same policy consideration underlies both the absence of any successful claim for overlooking, despite the very long history of a cause of action for nuisance, as well as the clear statements in *Chandler* and *Tapling* and the actual decision in *Turner* negating any such claim. Familiar images of cheek-by-jowl buildings in cities such as London in the medieval and early modern period show that overlooking was commonplace and indeed inevitable when the great cities were being constructed.

79. Thirdly, as *Hunter* shows, even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be. In that case the House of Lords confirmed the decision of the lower courts that the claimants had no claim in nuisance against the defendants who had constructed a very tall and large building which allegedly interfered with the reception of television broadcasts in the plaintiffs' homes. There was no cause of action because of the general principle that at common law anyone may build whatever they like upon their land. Lord Lloyd described (at p.699D) such a situation as "*damnum absque injuria*": a loss which the house-owner has undoubtedly suffered but which gives rise to no infringement of their legal rights.

80. Fourthly, in deciding whether, as a matter of policy, to hold that the cause of action for private nuisance is in principle capable of extending to overlooking, it is necessary to bear in mind the following three matters, all of which militate against any such extension.

81. Unlike such annoyances as noise, dirt, fumes, noxious smells and vibrations emanating from neighbouring land, it would be difficult, in the case of overlooking, to apply the objective test in nuisance for determining whether there has been a material interference with the amenity value of the affected land. While the viewing of the claimants' land by thousands of people from the Tate's viewing gallery may be thought to be a clear case of nuisance at one end of the spectrum, overlooking on a much smaller scale may be just as objectively annoying to owners and occupiers of overlooked properties. The construction of a balcony overlooking a neighbour's garden which results in a complete or substantial lack of privacy for all or part of the garden, with particular significance in the summer months, and which may even diminish the marketability or value of the overlooked property, would appear to satisfy the objective test. There would also be a question whether, in such a case, it makes any difference if there was more than one balcony or more than one family using the balcony or balconies. It is difficult to envisage any clear legal guidance as to where the line would be drawn between what is legal and what is not, depending on the number of people and frequency of overlooking. It is well known that overlooking is frequently a ground of objection to planning applications: any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected.

82. Further, when deciding whether to develop the common law by recognising that the cause of action for nuisance extends to overlooking, it is relevant to take into account other ways for protecting the owners of land from overlooking, including in particular planning laws and control. Lord Hoffmann said in *Hunter* (at p.710E), in which the appellate committee was asked to develop the common law by creating a new right of action against an owner who erects a building upon his land, it was relevant to take into account the existence of other methods by which the interests of the locality could be protected. He said the following on that topic (at p.710B/.C):

> " …we must consider whether modern conditions require these well established principles [of common law nuisance as to the right of landowners to build as they please] to be modified. The common law freedom of an owner to build upon his land has been drastically curtailed by the Town and Country Planning Act 1947 and its successors. It is now in normal cases

> necessary to obtain planning permission. The power of the planning authority to grant or refuse permission, subject to such conditions as it thinks fit, provides a mechanism for control of the unrestricted right to build which can be used for the protection of people living in the vicinity of a development. In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, is a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build.

83. Those comments are equally applicable in a case like the present one where there are complex issues about reconciling the different interests – public and private – in a unique part of London, with unique attractions, which draw millions of visitors every year. It is well established that planning permission is not a defence to an action for nuisance: see, for example, *Lawrence*. That, however, is a different issue to the question whether, as a matter of policy, planning laws and regulations would be a better medium for controlling inappropriate overlooking than the uncertainty and lack of sophistication of an extension of the common law cause of action for nuisance.

84. Finally, it may be said that what is really the issue in cases of overlooking in general, and the present case in particular, is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property. There are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection (Data Protection Act 2018), harassment and stalking (Protection Harassment Act 1997). This is an area in which the legislature has intervened and is better suited than the courts to weigh up competing interests: cf. *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, esp. at [33], in which the House of Lords held that there is no common law tort of invasion of privacy and that it is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

85. For all those reasons, we consider that it would be preferable to leave it to Parliament to formulate any further laws that are perceived to be necessary to deal with overlooking rather than to extend the law of private nuisance.

The significance of Article 8

86. As stated above, the Judge said (at [170]) that, if there were any doubt that the tort of nuisance is capable, as a matter of principle, of protecting privacy rights, at least in a domestic home, that doubt has been removed by Article 8. Having referred to *McKennitt v Ash* [2008] QB 73, he said (at [171]) that external prying into a home would contravene the privacy protected by Article 8, even without photography. He also said (at [174]) that, if it did not do so before the HRA1998, since that Act the law of nuisance ought to be, and is, capable of protecting privacy rights from overlooking in an appropriate case. He described this (in [177] as "developing the common law under the direction of statute".

87. We consider that there are a number of errors of principle in the way the Judge approached the issue of the relevance of Article 8.

88. In principle, the analysis should have been to ask whether, if the tort of nuisance does not otherwise extend at common law to overlooking: (1) there was nevertheless an infringement of Article 8; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of HRA 1998 s.6 on the part of the courts as a public authority.

89. The Judge, however, never made a finding of an infringement of Article 8 because, in effect, he found that in all the circumstances the claimants did not have a reasonable expectation of privacy in the absence of the protective measures which he considered they ought reasonably to have taken.

90. In any event, in determining whether or not Article 8 is engaged, it would be necessary to bear in mind that there has never been a Strasbourg case in which it has been held that mere overlooking by a neighbour or a neighbour's invitees is a breach of Article 8. The "mirror principle" articulated by Lord Bingham in *R(Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 (that our courts should keep pace with, but not go beyond, Strasbourg), as clarified by Lord Brown in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 A.C. 72, dictates caution about any conclusion as to the engagement of Article 8, let alone its infringement, in the case of mere overlooking.

91. Moreover, overlaying the common law tort of private nuisance with Article 8 would significantly distort the tort in some important respects. In the first place, as we have stated above, and all the authorities emphasise, the tort is a property tort and so mere licensees have no cause of action. Article 8 is not limited in that way and so will in principle confer a right on anyone who has a reasonable expectation of privacy: *Re JR38* [2016] AC 1131; *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [50], [82], [89]. As Lord Lloyd said in *Hunter* (at p.698B/C), to allow the wife or daughter of those who suffered from harassment on the telephone, whether at home or elsewhere, a remedy in private nuisance:

> "would not just be to get rid of an unnecessary technicality. It would be to change the whole basis of the cause of action."

92. Secondly, in assessing whether a person has a reasonable expectation of privacy for the purposes of Article 8, the court will take into account all the circumstances, including matters which are irrelevant to the cause of action for nuisance. For example, the particular sensitivity or insensitivity of the claimant to an invasion of privacy may be highly relevant for the purposes of Article 8, such as if the invasion of privacy is against a child as in *S v Sweden* [2013] ECHR 1128, 5786/08, but irrelevant in applying the objective approach to reasonable user in the tort of nuisance, as in *Robinson v Kilvert* (1889) 41 Ch D 88 (no nuisance for activity damaging a sensitive commercial process).

93. Thirdly, in determining whether or not there has been an infringement of Article 8, it is necessary for the court to consider justification under Article 8(2). That would give rise to a number of difficulties in the context of the tort of nuisance. In the context of the Convention, there can be a contest between the Article 8 rights of one party and

other Convention rights of the other party, such as freedom of expression under Article 10 and the peaceful enjoyment of possessions under Article 1 of the First Protocol, which involves a balancing exercise by the court. Such considerations have no place in the tort of nuisance.

94. Fourthly, even in a case where there has been an infringement of Article 8, Member States have a wide margin of appreciation as to the remedy both as regards respect for private life and respect for the home: *Von Hannover v Germany* [2004] Application no. 59320/00), [2004] EMLR 379 para. 104; *Powell and Rayner v United Kingdom* [1990] Application no. 9310/81, [1990] 12 EHRR 355, para 44; and cf. *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45, [40]-[41]. As mentioned earlier, common law principles of confidentiality and misuse of private information, and statutory intervention, such as the Protection from Harassment Act 1997, the Data Protection Act 2018 and planning law and regulations, suggest that, if there is a legal lacuna as to remedy, that is best left to the legislature rather than to the courts fashion to fashion.

95. In all those circumstances, we see no sound reason to extend the common law tort of private nuisance to overlooking in light of Article 8.

B. <u>If the tort of nuisance applies, without an overlay of Article 8, was the Judge correct to dismiss the claim?</u>

96. In view of our decision that overlooking does not fall within the scope of common law nuisance this appeal must be dismissed.

97. In any event, however, we consider that the Judge made two material errors in applying the principles of common law nuisance to the facts of the present case. We shall comment on those briefly.

98. Firstly, the Judge said (at [205]) that the developers in building the flats, and the claimants as a successors in title who chose to buy the flats, had "created or submitted themselves to a sensitivity to privacy which is greater than would the case of a less glassed design"; and that "[i]t would be wrong to allow this self-induced incentive to gaze, and to infringe privacy, and self-induced exposure to the outside world, to create a liability nuisance". It was in that connection that he considered (at [201]-[202]) the counter-factual of a building with significant vertical and perhaps horizontal breaks to interrupt the inward view. He drew an analogy (at [204]-[205] and [211]) with nuisance cases which have established that doing something is not a nuisance if it adversely affects a particularly sensitive process or trade in an adjoining property but would not have affected any ordinary process or trade: see, for example, *Robinson v Kilvert*.

99. In the present case we are not concerned with any undue sensitivity of the claimants as individuals or what is being carried on in the flats which would fall foul of the objective reasonable user test for nuisance. In the context of the tort of nuisance, what is in issue is the impact of the viewing gallery on the amenity value of flats themselves. There being no finding by the Judge that the viewing gallery is "necessary" for the common and ordinary use and occupation of the Tate within Bramwell B's statement in *Bamford* quoted above, once it is established that the use of the viewing balcony has caused material damage to the amenity value of the

claimants' flats and that the use of the flats is ordinary and reasonable, having regard to the locality, there would be a liability in nuisance if (contrary to our decision) the cause of action extended to overlooking. There would be no question in those circumstances of any particular sensitivity of the flats, nor of any need on the part of the claimants to take what the Judge described (in [214]) as "remedial steps": *Miller v Jackson* [1977] 1 QB 966 (a claim for nuisance from cricket balls from the neighbouring cricket ground damaging the plaintiffs' house held not defeated by the plaintiffs' refusal of the defendants' offers to provide protective measures).

100. Secondly, and connected to the Judge's approach to the issues of sensitivity and protective measures, the Judge conducted an overall assessment of the reasonableness of the claimants, on the one hand, and the Tate, on the other hand, in the light of all the circumstances. He said (at [180]), for example:

> "The question is whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land, bearing in mind the nature of that use, the locality in which it takes place, and bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale."

101. In relation to the protective measures which the Judge considered it would be reasonable for the claimants to take, he said as follows (at [215]):

> "The victim of excessive dust would not be expected to put up additional sealing of doors and windows; the victim of excessive noise would not be expected to buy earplugs. However, privacy is a bit different. Susceptibilities and tastes differ, and in recognition of the fact that privacy might sometimes require to be enhanced it has become acceptable to expect those wishing to enhance it to protect their own interests. I refer, for example, to net curtains. In the present case, if the occupiers find matters too intrusive they can take at least one of the measures referred to above. It will, of course, detract from their living conditions, but not to an unacceptable degree. Looking at the overall balance which has to be achieved, the availability and reasonableness of such measures is another reason why I consider there to be no nuisance in this case."

102. There was no suggestion in the present case that the claimants have been and are using their flats otherwise than in a perfectly normal fashion as homes. We consider that the Judge's balancing exercise, assessing what would be reasonable as between the claimants and the Tate, including protective measures which it would be open to the claimants to take to reduce the intrusion of privacy into their homes from the viewing gallery, is, for the reasons we have given above, contrary to the general principles of private nuisance.

Conclusion

103. For all the reasons above, we affirm the decision of the Judge, but for different reasons from those he gave, and we dismiss this appeal.

Orme v Lyon – Doctrine of Lost Modern Grant

13 March, 2013

by: Nitej Davda

This case does not establish any new legal principles. However, it highlights some important issues for landowners to be aware of with regard to rights of way.

The Ormes were appealing a decision made by the Adjudicator to the Land Registry that the Lyon's property had the benefit of a vehicular right of way along a track passing through the Orme's land, based on the doctrine of lost modern grant.

The doctrine of lost modern grant is a well established legal principle and essentially states that an easement will be presumed from long

What constitutes 'continuity of use' is a matter of fact in each case and in this case it was held that the Lyon's use was continuous enough to establish a right of way even though they only used the track on odd occasions for the later part of the 20 year period and they only used the track when their main route out of their property was blocked. There was no requirement that the Lyons must be using the track every week or month and their sporadic use of the track did not prevent a right of way being acquired.

Furthermore, in this case the adjudicator and the judge agreed that the physical attributes of the track were a factor that could be taken into account as further evidence that the Ormes would have known that the Lyons were using the track as of right. The court noted the fact that the track was 'open at both ends..the width of typical country lanes…bordered on both sides by hedges and it has and had as the aerial photographs show wheel tracks or ruts along its length'.

This case also confirmed the court's reluctance to overturn decisions of Adjudicators to the Land Registry, the judge in this case stating 'I recognise not only the Adjudicator's expertise..but also that his decision is rooted in fact and that he was better placed than I am to assess factual questions. He saw the witnesses. He visited the site.'

Consequently, landowners should keep a close eye on their land for signs of any unauthorised use by others, be wary of anyone crossing their land and think twice before incurring the costs of appealing a decision of the Adjudicator to the Land Registry.

Reviewed in 2015

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Singapore Court of Appeal Takes Lead in Departing from Dalton v Angus

Elizabeth Wong takes a brief look at Singapore's Court of Appeal's decision in Xpress Print Pte Ltd v Monocraft Pte Ltd & Anor [2000] 3 SLR 545, and its departure from the principle established by the House of Lords in Dalton v Angus [1881] 6 App Cas 740.

The principles of land law are among the oldest and most settled. However, the rationale behind some of these principles is difficult to comprehend and are consequently subject to criticism. Be that as it may, unless such a principle is departed from by way of statutory enactment or case law development, it remains part of the applicable law.

A classic example is found in the decision of the House of Lords in the case of Dalton v Angus [1881] 6 App Cas 740. In this instance, the Court of Appeal of Singapore has made headway in developing the law, and in the process of doing so, has attracted positive commentary from a leading and well-respected text on property law.

The Dalton v Angus Principle

The case of Dalton v Angus has entrenched the principle in England, as well as other common law jurisdictions (including Australia, Canada and New Zealand), that although a landowner has a right to support for his land, this natural right of support extended only to the land in its natural state. Any right of support for buildings and other constructions on the land had to be acquired, if at all, by easement. In that case, however, the House of Lords held that easement rights in respect of buildings could be acquired by prescription if there was a period of 20 years' uninterrupted enjoyment. On this basis, the court decided that the plaintiffs had acquired an easement of support for their building by virtue of their 27 years of uninterrupted enjoyment.

The court's judgment was based on the distinction between 'natural' rights which the adjoining landowner enjoyed in respect of the land and easement rights which he did not enjoy automatically but could acquire in respect of the building on his adjoining land. This distinction is borne out in the following passage from Lord Selbourne's judgment (at pages 791-792):

> In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the status quo of the land is maintained; and therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the status quo of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself …
>
> [T]he doctrine laid down must, in my opinion, be understood of land without reference to buildings. Support to that which is artificially imposed upon land cannot exist ex jure naturae because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it.

The principle in *Dalton v Angus* was affirmed by the Court of Appeal of the Straits Settlement in the case of *Lee Quee Siew v Lim Hock Siew* [1896] SSLR 80.

Through the years, the case of *Dalton v Angus* has become well-known for the proposition that 'a landowner may excavate his land with reckless abandon prior to the acquisition of a prescriptive easement' (per Yong Pung How CJ in X*press Print Pte Ltd v Monocraft Pte Ltd & Anor* [2000] 3 SLR 545 at 22). Understandably, the principle adopted in Dalton v Angus has been criticised in subsequent judgments, particularly in the light of construction and development in modern day urbanisation.

Decision in Xpress Print v Monocrafts

The decision of the Singapore Court of Appeal in *Xpress Print Pte Ltd v Monocrafts Pte Ltd & Anor* [2000] 3 SLR 545 represents a landmark shift from the principle in Dalton v Angus. The court held that the right of support enjoyed by a neighbouring landowner extended beyond the land in its natural state to the buildings erected thereon.

The facts of the case are briefly as follows.

The appellant and the first respondent were neighbouring landowners. As a result of excavation work done by the first respondent on his land for the purposes of construction, the building on the appellant's land, which had been built in 1996, suffered massive damage. The appellant sued for, inter alia, wrongful interference of support, which was dismissed by the trial judge on the basis of *Dalton v Angus*. The appellants, represented by K Shanmugam SC, Edwin Tong and Prakash Pillai, argued, inter alia, that the principle in Dalton v Angus, established over a 100 years ago and relied on by the trial judge, was inappropriate in the context of urban and heavily built-up Singapore, and should be departed from.

The Court of Appeal had no doubt that the principle in *Dalton v Angus* had to be rejected. This is made clear in the following passage (at paragraph 37):

> [W]e are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it.

In arriving at this conclusion, the court was of the view that the right of support must have its roots in 'the principles of reciprocity and mutual respect for each other's property' (paragraph 47). In this regard, the court held as follows (paragraphs 48 and 50):

> We believe that the true legal justification for the right of support is the legal principle encapsulated in the Latin maxim sic utere tuo ut alienum non loedas, which translates in English to: use your own property in such a manner as not to injure that of another. The importance of that principle is compounded in Singapore in view of our land use pattern, whereby all land available for commercial, industrial or residential purposes is used to a high intensity. The damage that might be caused if landowners were lackadaisical in their excavation works could be astronomical, not to mention the cost in human lives or injury to property …
>
> In the event, we are of the view that the principle in question operates to give a landowner a right of support in respect of his buildings by neighbouring lands from the time such buildings are erected, and we so hold. Lee Quee Siew v Lim Hock Siew is thereby overruled, and any part of Dalton v Angus which is incompatible with this holding should in future not be followed.

Since the Court of Appeal held that the right to support in respect of buildings arises from the time such buildings are erected, the court commented that 'there is scant justification for the 20-year gestation period for a right of support in respect of a building'.

Accordingly, it was held that the first respondent was under a duty not to interfere with the right of support enjoyed by the appellant's property, which included any buildings on it, and they had breached that duty by causing their soil to be removed without sufficient alternative means of support.

Taking the Lead Among Common Law Jurisdictions

The landmark decision of the Singapore Court of Appeal in *Xpress Print Pte Ltd v Monocrafts Pte Ltd & Anor* has not gone unnoticed outside Singapore. The judgment has received favourable comment by Kevin Gray in the third edition of the leading text, Elements of Land Law for 'spearheading the abandonment of an age-old (and controversial) restriction on the natural right of support for land'. The author said:

> Most common law jurisdictions have indicated that the dogmatic restriction of the natural right of support is now over-ripe for reversal by supreme appellate tribunals. The lead has finally been taken by the Court of Appeal of Singapore in *Xpress Print Pte Ltd v Monocrafts Pte Ltd & Anor …*

> It is likely that this enlightened approach, imposing a strict and non-delegable duty on landowners, will now be followed by other final appellate courts.

The emphasis of the Court of Appeal on 'the principles of reciprocity and mutual respect' is also consistent with the modern view subscribed to by writers and commentators alike, that in the urban context, 'property' in land is not autonomous or absolute, but is rooted in mutual restraint and social accommodation.

It is also noted that the stance adopted by the Singapore Court of Appeal, if accepted in English law, would render redundant the prescriptive acquisition of rights of support after 20 years.

Elizabeth Wong
Allen & Gledhill

Rights of Way – an Open and Shut Case?

Added in Property & Land Law by Paul Tapsell

The Facts

I acted recently in a case involving a right of way over an access running along the back of a terrace of houses and out to a public highway; my client ("D", the Defendant) owned a house towards the "mouth" of the right of way and his neighbour ("C", the Claimant) owned a derelict property further along the access, formerly the coach house of an adjoining property. C had owned her property for some years and had done nothing with it, her attempts to get planning permission having failed, and the previous owner of my client's property ("X") had erected a gate across the access many years before in order to improve the security of his, and other neighbours' properties, as it was frequently used by local drunks and drug-users for a variety of unneighbourly activities. X erected the gate even though he did not actually own the land at the rear of his property which the gate closed across or have a formal right of way over the access himself.

It's fair to say that relations between C and X (and most of the other neighbours) had not been good for a variety of reasons, including the gate, and there had been various threats of legal action by C to remove the gate and to restrain X (and others) from all sorts of alleged behaviour, of which my client had very little knowledge before he purchased his property. However, within a week of moving in, D received a demand from C for an "inherited debt" of £127,000 arising, it was claimed, because X's gate had prevented C from developing and using her property and shortly thereafter C's partner arranged for the removal of the gate (and then sought to bill D for the storage of it).

My client decided to erect a new gate in the same position as the old one and in fairly short order it was damaged by C's partner (he was subsequently convicted of criminal damage) and C issued a claim for an injunction for the removal of the gate and preventing my D from interfering with or obstructing her right of way.

The Judge dealing with the initial hearing made an interim injunction order (my client having agreed to keep the gate locked open until the matter was resolved) and eight months later the matter came before the Court for final determination.

The Law

It is well-established that a gate can be erected across a right of way (Pettey v Parsons (1914)) and such a gate can even have a lock (Johnstone v Holdway (1963)); the question for the court is whether the gate amounts to a substantial interference with the convenient use of the right of way compared with the situation prior to the gate (or other obstruction) being erected (see B&Q v Liverpool & Lancashire Properties (2001), Siggery v Bell (2007) or Bradley v Heslin (2014)) which, in turn, is a question of fact and degree on the particular circumstances of the case.

A situation where it was proposed to have a series of either four or two gates within 50 yards has been considered to be unreasonable (Siggery), as has an arrangement which might require a user to park his or her car, get out to open the gate, drive through the gate and then get out of the car again to close the gate (Bradley), particularly if gate is so close to the highway that it creates a traffic hazard.

The Decision

In this case, C said she was unable to open the gate (although in cross-examination it became evident she had never actually tried) and that she needed regular access (again, in evidence she indicated that, at most, the property would only be used for storage and so accessed infrequently). She also had to accept, having stated when applying for the injunction that the gate was always locked, that in fact she had no evidence that it had ever been locked. She also accepted that the demand for the "inherited debt" had been sent by her partner with her knowledge and agreement, although she conceded that it was an entirely unmeritorious and spurious claim. In short, the Judge found her to be an entirely unreliable and dishonest witness.

The net result was that the Claim was dismissed and C was ordered to pay my client's costs (of some £14,000) in addition to her own legal costs of over £46,000 (the bill was nearly twice the value of C's property) to say nothing of the damage to C's reputation in the light of the Judge's assessment of her evidence!

As Norris J said in Bradley:

"Rather to my surprise I find myself trying a case about a pair of gates in Formby: surprise on at least two counts. First, that anyone should pursue a neighbour dispute to trial, where even the victor is not a winner (given the blight which a contested case casts over the future of neighbourly relations and upon the price achievable in any future sale of the property). Second, that the case should have been pursued in the High Court over three days. It is not that such cases are somehow beneath the consideration of the court. They often raise points of novelty and difficulty and are undoubtedly important to the parties and ultimately legal rights (if insisted upon) must be determined. But at what financial and community cost?"

Conclusion

Boundary and other neighbour disputes are almost invariably expensive, emotionally charged, time-consuming and stressful for all involved, and often both parties end up out of pocket and dissatisfied with the result: before embarking on such a claim (or when defending one) it is essential to get professional, independent, expert advice as to your prospects and the value of the case at an early stage (and thereafter) and, ideally, to consider alternatives to litigation, e.g. mediation or arbitration.

Becket Chambers provide impartial expert advice and can deal with cases under the Direct Access Scheme or via a solicitor. Contact the clerks for more information.

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JUDGMENT

Regency Villas Title Ltd and others (Respondents/Cross-Appellants) *v* Diamond Resorts (Europe) Ltd and others (Appellants/Cross-Respondents)

before

Lady Hale, President
Lord Kerr
Lord Sumption
Lord Carnwath
Lord Briggs

JUDGMENT GIVEN ON

14 November 2018

Heard on 4 and 5 July 2018

Appellants/Cross Respondents	*Respondents/Cross-Appellants*
Tim Morshead QC Toby Watkin Andrew Latimer (Instructed by Pannone Corporate LLP (Manchester) and Osborne Clarke LLP)	John Randall QC Marc Brown Katie Longstaff (Instructed by Shakespeare Martineau LLP (Birmingham))

Appellants/Cross Respondents:-

(1) Diamond Resorts (Europe) Limited
(2) Diamond Resorts Broome Park Golf Limited
(3) Summit Developments Ltd

Respondents/Cross Appellants:-

(1) Regency Villas Title Limited
(2) George Edwards
(3) Victor Roberts
(4) The Estate of William Malcolm Ratcliffe Deceased
(5) Brian Andrews

LORD BRIGGS: (with whom Lady Hale, Lord Kerr and Lord Sumption agree)

1. This appeal offers an opportunity for this court to consider, for the first time, the extent to which the right to the free use of sporting and recreational facilities provided in a country club environment may be conferred upon the owners and occupiers of an adjacent timeshare complex by the use of freehold easements. In the well-known leading case of *In re Ellenborough Park* [1956] Ch 131 the Court of Appeal decided that the shared recreational use of a communal private garden could be conferred upon the owners of townhouses built around and near it by means of easements. The use of the same conveyancing technique in the present case in relation to a much wider range of activities was, if not misguided, at least a more ambitious undertaking. The essential question, if that case was rightly decided, is whether the same underlying principles work in the present context (as the trial judge and the Court of Appeal both held) or whether the attempt to do so falls foul of the necessary limitations upon the scope of easements in English law, most of which, as recently as 2011, the Law Commission has advised should not lightly be put aside.

2. The essence of an easement is that it is a species of property right, appurtenant to land, which confers rights over neighbouring land. The two parcels of land are traditionally, and helpfully, called the dominant tenement and the servient tenement. The effect of the rights being proprietary in nature is that they "run with the land" both for the benefit of the successive owners of the dominant tenement, and by way of burden upon the successive owners of the servient tenement. By contrast merely personal rights do not generally have those characteristics. Although owing much to the Roman law doctrine of servitudes, easements have in English law acquired an independent jurisprudence of their own, the essentials of which have been settled for many years, even if the uses of land during the same period have not stood still. Since the question whether a particular grant of, or claim to, rights is capable of having the enduring proprietary quality of an easement is usually (as here) fact intensive, it is convenient to begin with a summary of them.

The Facts

3. Broome Park, formerly the home of Field Marshal Lord Kitchener of Khartoum, is a substantial country estate near Canterbury, with a large 17th century Grade I listed house ("the Mansion House") at its heart, and a much smaller house, Elham House, nearby. Prior to 1967 Broome Park had been in common ownership. In early 1967 Elham House together with land around it lying entirely within the Park was conveyed off and its separate title was first registered on 30 March 1967.

I shall call the house and its surrounding land "Elham House". It is the alleged dominant tenement in relation to the disputed easement. I will refer to the rest of Broome Park, retained by the vendor in 1967, including the Mansion House, as "the Park". It is the alleged servient tenement in relation to the disputed easement.

4. In or before 1979 the Park was acquired by Gulf Investments Ltd ("Gulf Investments"), a subsidiary of Gulf Shipping Lines Ltd ("Gulf Shipping"), for the purposes of developing a timeshare and leisure complex. The essential features of the development scheme included, first, the creation of 18 timeshare apartments on the upper two floors of the Mansion House; secondly, the creation of a communal club house for the timeshare owners and other paying members of the public on the ground floor and basement of the Mansion House including restaurant, TV, billiards and gymnasium facilities; and thirdly, the construction and laying out within the surrounding grounds of the Park of sporting and recreational facilities including an 18 hole golf course, an outdoor heated swimming pool, tennis and squash courts, and formal gardens. Individual purchasers of timeshare units within the apartments on the upper floors of the Mansion House formed themselves into the Broome Park Owners Club ("the BPOC").

5. On 13 August 1980, Gulf Investments granted a 35-year lease of the first and second floors of the Mansion House to Gulf Leisure Developments Ltd, which was to hold the residential accommodation within the Mansion House on behalf of the BPOC. I will call it "the BPOC Lease". It was drafted so as to confer upon owners of the timeshare units within the Mansion House the free use of the communal and leisure facilities within the lower part of the Mansion House and its surrounding grounds, including the golf course and other sporting and recreational facilities, for the full 35 year of the term, and Gulf Investments covenanted as landlord "to keep properly maintained repaired constructed and reconstructed" the ground floor and basement of the Mansion House and the sporting and recreational facilities provided within the Park, including the swimming pool, golf course, squash courts, tennis courts and formal gardens. The solicitor responsible for the conveyancing in connection with the development gave evidence at trial that a leasehold structure was chosen for this purpose because of the need to make appropriate provision for what might prove to be the large repairing and maintenance obligations arising from the status of the Mansion House as a Grade I listed building of some antiquity.

6. The early success of this development, centred on the Mansion House timeshare apartments, led Gulf Investments to plan a second timeshare development, this time centred upon Elham House. For that purpose, Elham House was re-acquired so as to be integrated within Broome Park in November 1980, and planning permission was obtained for the conversion of the house into two timeshare apartments, and for the building of 24 further timeshare apartments in its grounds, the whole to be re-named Regency Villas. It is evident from contemporary marketing materials that a main attraction held out to prospective buyers of timeshare units

within the Regency Villas development was the same free use of the sporting and recreational facilities within the ground floor and basement of the Mansion House and within the Park, as had been afforded to the owners of timeshare units on the upper two floors of the Mansion House.

7. On this occasion however, it was decided to use a freehold rather than leasehold structure for Regency Villas, apparently because it was not anticipated that Elham House or the newly-built apartments in its grounds would give rise to the potentially onerous repairing obligations associated with the Mansion House. Thus, by a transfer dated 11 November 1981 ("the 1981 Transfer") Gulf Investments transferred Elham House to Elham House Developments Ltd, another member of the Gulf Group headed by Gulf Shipping. On the following day, and as part of a pre-planned series of transactions, Elham House Developments Ltd transferred Elham House to Barclays Bank Trust Co Ltd, to be held for the benefit in due course of the members of the Regency Villas Owners Club ("RVOC") to be constituted by the purchasers of timeshare units within the Regency Villas development.

8. The 1981 Transfer included the grant of rights which is the subject of the present dispute. I shall refer to that grant of rights as "the Facilities Grant". The transfer itself has been lost, but the relevant terms of the Facilities Grant were duly recorded at HM Land Registry, on the Property Register in respect of the title to Elham House, and on the Charges Register against each of the two registered titles together constituting the Park. The words of the Facilities Grant appear in the last of three paragraphs, all of which it is appropriate to set out in full, so that the last paragraph appears in its context:

> "TOGETHER WITH firstly the right of way for the Transferee its successors in title its lessees and the occupiers from time to time of the property at all times with or without vehicles for all purposes in connection with the use and enjoyment of the property over and along the drive ways and roadways (hereafter called 'the roadways') shown coloured blue on the plan attached hereto.
>
> AND Secondly all the right to the full and free passage of gas water soil electricity and any other services from and to the property in and through any pipes drains wires cables or other conducting media now in under or over the Transferee's adjoining land or constructed within 80 years of the date hereof.
>
> AND thirdly the right for the Transferee its successors in title its lessees and the occupiers from time to time of the property

> to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of the Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called 'the facilities') on the Transferor's adjoining estate."

9. The 1981 Transfer also contained a covenant by Gulf Investments to maintain the sporting and recreational facilities within the Park, but it is common ground that the burden of this covenant, being positive in nature and unsupported by a leasehold structure, did not bind successors in title to the Park, including the appellants.

10. By the time of the 1981 Transfer, there had already been constructed within the Park most of the relevant sporting and recreational facilities, including the golf course, the outdoor heated swimming pool, three squash courts, two tennis courts, a restaurant, billiard/snooker room and TV room on the ground floor of the Mansion House and a gymnasium, including sauna and solarium, in the basement. There were also Italianate gardens, a putting green, a croquet lawn, an outdoor jacuzzi/spa pool, an ice/roller skating rink, platform tennis courts, a soft ball court and riding stables. These facilities did not cover the whole of the Park, as defined. There remained about 90 acres of undeveloped farmland, which remain undeveloped to this day.

11. An officious bystander in 1981 might well have been prompted to ask how it was envisaged by the promoters of these two timeshare schemes that the extensive sporting and recreational facilities of which the timeshare owners were to be afforded the free use were to be managed, maintained and when necessary renewed by the owners of the Park, to the high standards promised in the contemporary promotional materials, without any contribution from them. Although nowhere clearly stated in the evidence, the answer appears to be that the promoters envisaged that the operation of the leisure complex within the Park as a golf course and county club would attract sufficient paying members of the public (other than timeshare owners in either of the two timeshare developments) to fund its ongoing operating costs. If that was the expectation, it does not appear to have been fulfilled.

12. Correspondence in and after 1998 between the RVOC and Broome Park Golf & Country Club, then owning or at least managing the Park, describes a reduction in the number of available facilities, a lack of investment in the Park, and a perception that, without some significant contribution to running costs by the RVOC members, whether or not under legal obligation, the facilities offered at the Park would be likely to deteriorate further.

13. The outdoor swimming pool became disused and was filled in by 2000. The failure to maintain a swimming pool within the Park was a breach of the landlord's

covenants in the BPOC lease and, pursuant to an order of HHJ Pelling QC in proceedings brought by the BPOC, a new pool was constructed in part of the basement of the Mansion House, where the gymnasium had previously been situated. Some other facilities, such as the putting green, croquet lawn, jacuzzi/spa pool and roller skating rink had been closed and the riding stables were demolished. Apart from the major change constituted by the erection of the indoor swimming pool, other minor changes occurred to the facilities within the ground floor and basement of the Mansion House.

14. Meanwhile, a third timeshare development was constructed within the Park in about 2003, bringing the total number of timeshare apartments within the Park (including the Regency Villas development) to some 58. Finally, the BPOC lease expired by effluxion of time, shortly after the trial, in 2015. The Mansion House was then temporarily closed for refurbishment and reopened as an hotel.

15. From time to time, beginning in about 1983, RVOC made voluntary payments on behalf of timeshare owners within the Regency Villas development to the owners and operators of the Park towards the cost, including upkeep, of the facilities. While made under a reservation of rights, these payments were usually in agreed amounts, at least until the end of 2011. Thereafter, and in the absence of any agreement to amounts, individual timeshare owners were charged fees from time to time for the use of specific facilities, which they paid notwithstanding their case that they were entitled to the use of those facilities free of charge.

The Litigation

16. The first claimant (and first respondent in this court) is the freehold owner of Elham House. The remaining claimants are individual timeshare members of the RVOC. They sue upon their own behalf and on behalf of all other members. They claimed a declaration that they were entitled, by way of easement, to the free use of all the sporting or recreational facilities from time to time provided within the Park, and an injunction restraining interference with them by the defendants (and appellants in this court) who are the current freehold and leasehold owners of the Park and parts thereof. In addition the claimants sought the return of sums paid by them or on their behalf by the RVOC for the use of those facilities since 2008, as damages for interference with their easement, or by way of restitution.

17. The defendants denied that the claimants had the benefit of any easement in relation to the facilities, and counterclaimed for a *quantum meruit* in respect of the provision of those facilities in and after 2012, to the extent not paid for, or not paid for in full.

18. At the trial before the late Judge Purle QC sitting as a High Court judge in 2015 the claimants succeeded in all their claims, save only for the recovery of payments made for the use of facilities before 2012, which the judge found had been made by agreement rather than under protest, in circumstances giving rise to no restitutionary claim: [2016] 4 WLR 61. That monetary claim has not been further pursued by the claimants.

19. In the Court of Appeal (Sir Geoffrey Vos C, Kitchin and Floyd LJJ) [2017] Ch 516 the claimants were again successful on the main issue about whether the rights over the facilities granted by the 1981 Transfer constituted an easement or easements, but the judge's decision was reversed on matters of detail. In particular, the claimants were held to have no rights in relation to the new swimming pool constructed in the basement of the Mansion House. The Court of Appeal's declaration confirmed their rights to specific existing facilities, namely the golf course, squash courts, tennis courts, croquet lawn, putting green and Italianate gardens, but excluded rights in relation to anything provided on the ground floor and basement of the Mansion House. The claimants' monetary entitlement in relation to payments in and after 2012 was correspondingly reduced, and the defendants obtained judgment for a *quantum meruit* in respect of those facilities provided in and after 2012 to which the claimants' rights did not extend, of which the most important was the swimming pool.

20. In this court the appellant defendants pursue their contention that the 1981 Transfer granted no enduring rights in the nature of easements in relation to any of the facilities within the Park, while the claimants by respondents cross-appeal seek to restore the judge's conclusion as to the full extent of their rights in relation to the facilities, including the new swimming pool, and accordingly seek to have dismissed the Court of Appeal's order for a *quantum meruit* in favour of the defendants.

The Issues

21. Much the most important group of issues (which have given rise to almost all the oral argument on this appeal) are those which govern the question whether the Facilities Grant is capable in law of amounting to one or more easements. Those are the issues which justified the grant of permission to appeal. The subordinate issues, relating to the claimants' rights if any in relation to the ground floor and basement of the Mansion House, and in particular to use of the new swimming pool, give rise to no general issues of law of public importance, but all the issues turn to a greater or lesser extent upon the true construction of the Facilities Grant, to which I now turn.

Construction of the Facilities Grant

22. The main features of the matrix of fact against which the 1981 Transfer has to be construed are, in my view, as follows. First, the 1981 Transfer was part and parcel of a collaborative exercise undertaken by two associated companies within the same Gulf Group for a common purpose, namely the development of timeshare apartments and the profitable sale of timeshare units on land immediately adjacent to an already up-and-running leisure complex, containing sporting and recreational facilities in a clubhouse and associated parkland adjacent to and entirely surrounding the subject matter of the 1981 Transfer.

23. Secondly, not least because they shared a common conveyancing solicitor, both parties to the 1981 Transfer may be taken to have known about the leasehold structure underpinning the development of the timeshare units within Mansion House itself, including the obligation, binding on Gulf Investments as landlord, and upon its successors in title as owners of the Park, to maintain, repair, construct and (where necessary) reconstruct all the sporting or recreational facilities provided within the Park (including within the Mansion House), for the full period of 35 years provided for in the BPOC Lease, which expressly contemplated that the rights of the BPOC timeshare owners would extend to all those facilities provided within the Park at any time during that term (see Schedule 3, paragraph 8). Gulf Investments had therefore committed both itself and its successors in title to the provision, operation and maintenance of those facilities by binding obligations which, if necessary, could be enforced against them by a large number of timeshare owners, constituting the BPOC.

24. Thirdly both parties also knew, by their common conveyancing solicitor, of the planned structure under which, only one day after the 1981 Transfer, the interest of the grantee was to be transferred on to a successor in title, for the benefit of the future timeshare owners within the Regency Villas scheme whom both parties wished to attract as purchasers.

25. Construed against that contextual background, the following points emerge as aspects of the true construction of the Facilities Grant in the 1981 Transfer. First, it is abundantly plain that, whether successfully or not, the parties intended to confer upon the Facilities Grant the status of a property right in the nature of an easement, rather than a purely personal right. It was expressed to be conferred not merely upon the Transferee, but upon its successors in title, lessees and occupiers of what was to become a timeshare development in multiple occupation. That being the manifest common intention, the court should apply the validation principle ("*ut res magis valeat quam pereat*") to give effect to it, if it properly can.

26. Secondly, and although reference is made to a number of different specific facilities within the Park, the Facilities Grant is in my view in substance the grant of a single comprehensive right to use a complex of facilities, and comprehends not only those constructed and in use at the time of the 1981 Transfer, but all those additional or replacement facilities thereafter constructed and put into operation within the Park as part of the leisure complex during the expected useful life of the Regency Villas timeshare development for which the 1981 Transfer was intended to pave the way. It is, in short, a right to use such recreational and sporting facilities as exist within the leisure complex in the Park from time to time. In that respect I agree with the judge's analysis of this point (at para 44 of his judgment) and disagree with the approach of the Court of Appeal, which treats each facility as the subject of a separate grant of rights, referable only to the separate *locus in quo* of each relevant facility at the time of the grant. I shall explain my full reasoning for this conclusion when dealing with the cross-appeal, below, but the main point is this. The Court of Appeal regarded the absence of words of futurity in the language of the Facilities Grant (in contrast with the grant relating to the passage of services in the immediately preceding paragraph) as a strong pointer to a construction which limited the rights granted only to those facilities already in existence. This was also a main plank in the written submissions of the appellants on this point. In my view the absence of express words of futurity is amply compensated by the inherent nature of the subject matter of the third paragraph, namely the combination of sporting and recreational facilities in a leisure complex which would be bound to be subjected to significant alterations and changes during its business life.

27. It may be that in this respect the Court of Appeal was encouraged to depart from the judge's more coherent analysis because of a fear on the part of those advising the claimants that to construe the Facilities Grant as extending to the provision of additional or different facilities in the future might give rise to a risk of the grant being held to be void for perpetuity. In written submissions delivered at the court's invitation following the hearing, the appellants submit that this would indeed be the consequence of the judge's construction. Although by 1981 the Perpetuities and Accumulations Act 1964 had intervened to provide a period of "wait and see", the new swimming pool was in fact erected more than 21 years after the 1981 Transfer. In my judgment that concern of the claimants and submission of the appellants is misplaced, in relation to what appears to me to be a single grant of rights over a leisure complex comprising sporting and recreational facilities, which may be changed and adjusted from time to time to suit customer demand without giving rise to separate and distinct grants of rights taking effect only in the future.

28. The main authorities relied upon by the appellants in support of their submission on perpetuity are *Dunn v Blackdown Properties Ltd* [1961] Ch 433 and *Adam v Shrewsbury* [2006] 1 P & CR 27. They show that where (in the case of a pre-2010 instrument) there is a grant of a future easement, or (which is in substance the same thing) a present easement which can only be enjoyed if and when, in the

future, something is done on the servient land to make the easement useable, then the rule against perpetuities applies. In the *Dunn* case the grant was of sewerage rights, but no sewers existed at all at the time of the grant. In the *Adam* case the grant was the use of a garage yet to be constructed, on ground to be excavated by the grantor, accessible only from a roadway which was only partly constructed, at the time of the grant. In both cases the grants failed for perpetuity.

29. In the present case, by contrast, the grant consisted of an immediately effective grant to use the sporting and leisure facilities in a leisure complex which existed as a complex at the time of the grant. The fact that the precise nature and precise location of those facilities within the Park might change thereafter, but the grant still apply to the complex as a whole, does not bring the grant within the rule. If by analogy there had already been a sewerage system on the servient land at the time of the grant in the *Dunn* case, the drainage easement would not have been defeated or rendered subject to perpetuity merely because, thereafter, the dominant owner made a change to the routeing of the pipework.

30. Thirdly, there is no express provision requiring the grantee or its successors or timeshare owners to contribute to the cost of operating, maintaining, renewing and replacing facilities, and there has been no challenge to the judge's conclusion that an attempt to discover them by way of implied term would fall foul of the necessity test. Nor is there, in the Facilities Grant itself, any such obligation imposed upon the grantor, although there is a separate, purely personal, covenant to that effect elsewhere in the 1981 Transfer.

31. Much has been made of this personal covenant by the appellants in their written submissions on the judge's construction. They say that it shows that the Facilities Grant was really intended only to be a grant of personal rights to the free use of a serviced sporting and leisure complex, and that the drafter wrongly assumed that the grantor could impose the servicing obligation on its successors in title as owners of the Park. This meant that the Facilities Grant would in law be of utility for as long (only) as the grantor should remain the owner of the Park, and dependent upon the purely personal covenant of the grantor, the benefit of which could be assigned to successors in title of the grantee as owners of Elham House. If this meant that the Facilities Grant was vulnerable to an early demise (for example on an early sale of the Park or its transfer to an associated company of the grantor) that was just the result of a conveyancing mistake which the court should do nothing to correct, and certainly not by the use of the validating principle of construction.

32. I do not accept that submission. The personal covenant commits the Transferor to the maintenance, repair and cleansing of "the roadways and the facilities". The roadways were plainly the subject of a conventional easement in the first of the three paragraphs (quoted above) the last of which contains the Facilities

Grant. It cannot therefore be said that the existence of the personal covenant somehow reduces the Facilities Grant to a purely personal obligation, if it does not (and cannot) do so in relation to the right of way over the roadways. Although it is not clear, it may be that the conveyancer thought that the burden of a positive maintenance covenant ran with the land, but this does not impact upon the clear intention, manifest in relation to both the roadways and the facilities, that proprietary rights were being granted over them. I have sought to explain above how, in commercial terms, the parties to the 1981 Transfer may have anticipated that the leisure complex would be self-financing (from the contributions of paying members of the public) without need to have recourse to contributions from the two groups of timeshare owners. In my judgment the common intention to be inferred from the absence of any provision in the Facilities Grant itself for such maintenance or funding obligations is that the parties to the 1981 Transfer (both of which were timeshare experts) were content to leave that as a matter of commercial risk, while seeking to maximise the capital receipts expected to be derived from the sale of timeshare units in connection with the Regency Villas apartments shortly thereafter to be constructed. Plainly, the imposition of a payment obligation on the timeshare owners would have had a dampening effect on the purchase prices likely to be obtained.

The Appeal

33. Mr Tim Morshead QC for the appellants described the Facilities Grant as one which conferred the right of free access for the Regency Villas timeshare owners to a high-class leisure complex providing recreational and sporting attractions otherwise being provided by the appellants within the Park for paying members of the public. He submitted that such a grant of rights was incapable of amounting to an easement or easements for three main reasons:

> i) The rights did not accommodate Elham House, the dominant tenement;
>
> ii) Their exercise by the RVOC timeshare owners would amount to an ouster of the appellants as owners of the Park;
>
> iii) The enjoyment of the rights by the RVOC timeshare owners depended upon substantial expenditure by the appellants in managing and maintaining the facilities.

34. Recognising that the decision in *In re Ellenborough Park* would be likely to constitute the sheet anchor in any case for treating the Facilities Grant as an

easement (as it had been in both the courts below), the appellants in their printed case submitted that the decision was contrary to principle, in so far as it suggested that rights conferred for the pure (or mere) enjoyment of their exercise, rather than the better enjoyment of the dominant tenement as such, could satisfy the requirement that they accommodate the dominant tenement. In his oral submissions in this court, Mr Morshead preferred to focus on the private nature of the use of the communal garden in that case as that which, in sharp contrast with the Facilities Grant in this case, made it (just) legitimate to describe the rights conferred as accommodating the townhouses surrounding the garden.

35. Before addressing the *Ellenborough Park* case directly, it is convenient first to summarise what, by the 1950s, were the well-established conditions for the recognition of a right as an easement. Writing in 1954, Dr Cheshire described the four essential characteristics as follows:

i) There must be a dominant and a servient tenement;

ii) The easement must accommodate the dominant tenement;

iii) The dominant and servient owners must be different persons;

iv) A right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.

Aspects of these requirements are better understood when it is appreciated that easements may be created, not only by express grant, but also by implied grant, upon the transfer of part of land formerly in single ownership under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, under section 62 of the Law of Property Act 1925 and by prescription. In the present case, as in *In re Ellenborough Park*, it is the second and fourth of those requirements with which the court is concerned.

The Second Requirement

36. The requirement that the right, if it is to be an easement, should accommodate the dominant tenement has been explained by judges, textbook writers and others in various ways. In his *Modern Law of Real Property*, 7th ed (1954) at p 457, Dr Cheshire expressed it in this way:

> "One of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement but also connected with the normal enjoyment of the dominant tenement."

Citing from *Bailey v Stephens* (1862) 12 CB(NS) 91, at 115, he continued:

> "It must … have some natural connection with the estate as being for its benefit ..."

37. In its report "Making Land Work: Easements, Covenants and Profits à Prendre" (2011) Law Com No 327 (HC 1067) at para 2.25 the Law Commission advised:

> "The easement must accommodate, or accommodate and serve, the dominant land. The requirement is that the right must be of some practical importance to the benefited land, rather than just to the right-holder as an individual: it must be 'reasonably necessary for the better enjoyment' of that land."

38. In the present case, the Court of Appeal described this requirement, at para 56, as follows:

> "In our view, the requirement that an easement must be a 'right of utility and benefit' is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there."

39. Save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be inhibited by flooding.

40. The following general points may be noted. First, it is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement. Thus for example, a right granted to the owners and occupiers of a house in Kennington to have free access to the Oval cricket ground on test match days might be annexed to the ownership of that house, and add significantly to its value. But it would have nothing to do with the normal use of the property as a home.

41. Secondly, the "normal use" of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use: see for example *Moncrieff v Jamieson* [2007] 1 WLR 2620, per Lord Neuberger of Abbotsbury, at paras 132-133.

42. Thirdly, it is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump (*Pomfret v Ricroft* (1668) 1 Saund 321), a lock and a sluice gate (*Simpson v Godmanchester Corpn* [1897] AC 696), and even a lavatory (*Miller v Emcer Products Ltd* [1956] Ch 304).

43. Fourthly, although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact: see per Eversheд MR in *In re Ellenborough Park* at p 173.

Recreational rights

44. The main controversy in the present case arises because the Facilities Grant conferred recreational and sporting rights, the enjoyment of which may fairly be described as an end in itself, rather than a means to an end (ie to the more enjoyable or full use of the dominant tenement). The origin of the controversy lies in the Roman law doctrine that a *ius spatiandi* cannot constitute a servitude: see per Eversheд MR giving the judgment of the Court of Appeal in *In re Ellenborough Park*, at p 163. For present purposes that Latin phrase may simply be translated as meaning a recreational right to wander over someone else's land. The difficulty arises as an aspect of the requirement that the right must accommodate the dominant tenement precisely because, generally speaking, the sporting or recreational right will be enjoyed for its own sake, on the servient tenement where it is undertaken, rather than as a means to some end consisting directly of the beneficial use of the dominant tenement.

45. Prior to *Ellenborough Park*, there were inconclusive dicta for and against the recognition of recreational rights as easements. *Duncan v Louch* (1845) 6 QB 904 was about the alleged obstruction of a right of way granted in 1675 over a close called the Terrace Walk. Lord Denman CJ said this, at p 913:

> "I think there is no doubt in this case. Taking the right, as Mr Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure, they paying the necessary rates for keeping it in order, I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction, and a stranger would not be permitted to say that the plaintiff's right was only conditional."

46. By contrast, in *Mounsey v Ismay* (1865) 3 H & C 486, it was decided that a customary public right to hold horse races was not an easement within the meaning of section 2 of the Prescription Act 1832 (2 & 3 Will 4, c 71). Baron Martin, delivering the judgment of the court, said, at p 498:

> "… we are of opinion that to bring the right within the term 'easement' in the second section it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement."

47. On opposite sides of the same debate may be found *Keith v 20th Century Club Ltd* (1904) 73 LJ Ch 545 (in favour); *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 172, and *Attorney General v Antrobus* [1905] 2 Ch 188 at 198 (Farwell J in both cases, against).

48. I consider that *In re Ellenborough Park* should be taken to have been dipositive of this issue for the purposes of English common law, to this extent, namely that it is not fatal to the recognition of a right as an easement that it is granted for recreational (including sporting) use, to be enjoyed for its own sake on the servient tenement. The question in every such case is whether the particular recreational or sporting rights granted accommodate the dominant tenement.

49. In *In re Ellenborough Park* the right was to the full use of a garden square (surrounded on three sides by houses and on the fourth by the sea), and the dominant tenements were all the houses surrounding the garden together with a small number of additional houses nearby which did not front onto the square. The rights granted

did not accommodate those additional houses on the basis that the garden could be seen by persons from the dominant tenement. It was only by the permitted use of the garden that the requisite accommodation could be established. Evershed MR described the enjoyment contemplated by the "full enjoyment" of the pleasure ground as follows, at p 168:

> "The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such - the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or upon seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation: but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park."

50. He continued:

> "Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred upon members of the public, when they are open to the public, of parks or gardens such as St James's Park, Kew Gardens or the Gardens of Lincoln's Inn Fields."

51. Turning to the question of accommodation, he continued, at p 174, by contrasting the right granted to the purchaser of a house to use the Zoological Gardens free of charge or to attend Lord's cricket ground without payment, with a sale of part of the freehold of a house and garden with a right to the purchaser to use the garden in common with the vendor. He said, at pp 174-175:

> "In such a case, the test of connection, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold. Such, we think, is in substance the position in the present case. The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close

> proximity. … It is the collective garden of the neighbouring houses, to whose use it was dedicated by the owners of the estate and as such amply satisfied in our judgment, the requirement of connection with the dominant tenements to which it is appurtenant. The result is not affected by the circumstance that the right to the park is in this case enjoyed by some few houses which are not immediately fronting on the park. The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which its enjoyment is annexed."

52. This careful and compelling judgment of the court repays reading in full. I have cited the above passages because they demonstrate the following points. First, and contrary to the main submission for the appellants in the present case, the Court of Appeal's conclusion did not depend upon the rights granted being essentially private in nature. On the contrary, they were described as broadly similar to those enjoyed by the public over well-known parks and gardens in London. Secondly, the rights granted were essentially recreational, although they included limited sporting elements. Thirdly, the reason why the accommodation requirement was satisfied was not because the rights were recreational in nature, but because the package of rights afforded the use of communal gardens to each of the townhouses to which the rights were annexed. They provided those houses with gardens, albeit on a communal basis, and gardens were a typical feature serving and benefiting townhouses as dominant tenements.

53. In the present case the dominant tenement was to be used for the development, not of homes, still less townhouses, but of timeshare apartments. Although in terms of legal memory timeshare is a relatively recent concept, timeshare units of this kind are typically occupied for holidays, by persons seeking recreation, including sporting activities, and it is to my mind plain beyond a doubt (as it was to the judge) that the grant of rights to use an immediately adjacent leisure development with all its recreational and sporting facilities is of service, utility and benefit to the timeshare apartments as such, just as (although for different reasons) the grant of rights over a communal garden is of service, utility and benefit to a townhouse.

54. The appellants submitted that the grant of such extensive recreational and sporting rights (including the use of a fully serviced and maintained 18-hole championship golf course) could not be regarded as accessory to the timeshare apartment, in the same way that a garden is accessory to a house. Rather, Mr Morshead submitted, use of the timeshare apartment was an accessory to the enjoyment of the recreational and sporting rights, so that to treat the rights as an easement for the benefit of the timeshare unit was to allow the tail to wag the dog.

Reliance for that purpose was placed on *Hill v Tupper* (1863) 2 H & C 121, in which the owner of the Basingstoke Canal granted the exclusive right to operate a pleasure-boating business on the whole canal, annexed to a small strip of land on the canal-side near Aldershot, upon which the grantee intended to erect a boathouse. Giving the leading judgment Pollock CB said:

> "I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd v Smith* (1850) 10 CB 164 expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee."

55. The case had been argued on the basis that the exclusive right to operate a pleasure-boat business on the canal was in the nature of a profit rather than an easement, by way of analogy with a several fishery or a right of turbary. Unlike easements, there is no invariable requirement that a profit accommodate neighbouring land: see *Gale on Easements*, 20th ed (2017), at para 1-149. It appears from the full report of the submissions of counsel, and the judicial interventions therein, that it was not argued that the right granted accommodated the plaintiff's land on the canal-side. The members of the court appear to have assumed that it did not, although, following *In re Ellenborough Park,* at least one commentator has suggested that the same facts might now give rise to an easement on that basis: see R N Gooderson, writing in the Cambridge Law Journal [1956] CLJ 24, 25.

56. In my view *Hill v Tupper* was decided on the basis that the grant of a monopoly to carry on a pleasure boat business on the whole length of a canal (which ran from Chertsey to Basingstoke) was by its very nature incapable of constituting a proprietary right, merely by being annexed to the lease of a tiny section of the canal bank, regardless whether it did or did not accommodate the supposed dominant tenement. It was held to have been a perfectly valid grant of a personal right, as between the canal owner and the plaintiff lessee. But to sue for an infringement of it by another pleasure boat operator would have required the plaintiff to sue in his landlord's name as the owner of the canal.

57. *Hill v Tupper* is not therefore authority for the proposition that the grant of rights which accommodate land cannot be an easement unless their enjoyment is capable of being described (in proportionate terms) as subordinate or ancillary to the enjoyment of the dominant tenement. Providing that the rights are for the benefit or utility of the dominant tenement as such, it matters not that their enjoyment may be a primary reason why persons are attracted to acquire rights (such as timeshare units) in the dominant tenement.

The Fourth Condition

58. At first sight, the condition that the rights must be capable of forming the subject-matter of a grant appears more apposite for testing the validity, as easements, of rights said to have been acquired otherwise than by grant, for example by prescription. In *In re Ellenborough Park* the exact significance of this fourth condition was described, at p 164, as "at first sight perhaps, not entirely clear". But it has come to be a repository for a series of miscellaneous requirements which have been held to be essential characteristics of an easement. They include the requirements that the right is defined in sufficiently clear terms, that it is not purely precarious, so as liable to be taken away at the whim of the servient owner, that the right is not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement, and that the right should not impose upon the servient owner obligations to expend money or do anything beyond mere passivity.

59. It used to be said that this fourth condition included the proposition that a "mere right of recreation and amusement" which conferred no quality of utility or benefit, could not be an easement. I have dealt with this supposed condition by reference to the question whether the grant accommodates the dominant tenement. If, as here, the accommodation test is satisfied, then the fact that it may be a right to use recreational or sporting facilities does not, as the *Ellenborough Park* case makes clear, disable it from being an easement. Furthermore, the advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression "mere right of recreation and amusement, possessing no quality of utility or benefit" has become a contradiction in terms, viewed separately from the issues as to accommodation of the dominant tenement. Recreation, including sport, and the amusement which comes with it, does confer utility and benefit on those who undertake it.

60. Returning to the other aspects of this fourth condition, there is no doubt in this case that the Facilities Grant was in sufficiently clear and precise terms, and it is not said to have been merely precarious. The appellant's objections have been formulated under the headings of ouster and mere passivity. These requirements serve a common public policy purpose, namely to prevent freehold land being permanently encumbered by proprietary restrictions and obligations which inhibit its utility to an unacceptable degree.

61. The precise extent of the ouster principle is a matter of some controversy, which it is unnecessary to resolve on this occasion. The view of the Law Commission, in its 2011 paper "Making Land Work: Easements, Covenants and Profits à Prendre" at paras 3.207-3.211, is that the scope for litigation created by its uncertainties sufficiently outweighs its utility that it should be abolished. The controversy usually causes difficulty in the context of parking rights, and its extent

is sufficiently summarised (for present purposes) in the speech of Lord Scott in *Moncrieff v Jamieson* (supra) at paras 54 to 61 (in which he treated the Scottish law of servitudes as for all relevant purposes the same as the English law of easements). Leaving aside cases where the grant confers exclusive possession, which cannot by definition be an easement, the ouster principle rejects as an easement the grant of rights which, on one view, deprive the servient owner of reasonable beneficial use of the servient tenement or, on the other view, deprive the servient owner of lawful possession and control of it.

62. In the present case the appellants' ouster argument focused upon possession and control rather than reasonable beneficial use. It may be summarised as follows. The grant of the facilities rights, particularly in relation to the golf course, must be assumed to carry with it a "step-in" right of the dominant owner to manage and maintain the relevant recreational and sporting facilities in the event that, being under no obligation to the dominant owner to do so, the appellants as servient owners ceased to do so themselves. A championship golf course requires not merely occasional maintenance but day to day management and supervision, to an extent that would require the dominant owners to take control of the golf course, and other facilities such as tennis and squash courts, if only to regulate their use in accordance with a booking system. Thus, the exercise of those step-in rights would deprive the appellants of possession or control of the Park, or substantial parts of it, thereby amounting to ouster.

63. The judge and the Court of Appeal rejected these submissions, on the basis of a concurrent factual analysis. Even the golf course could have been kept in a playable condition (although not as an immaculate championship course) by the exercise of those step-in rights, without the dominant owners taking possession or control: see in particular paras 77 and 78 of the judgment of the Court of Appeal, and the analogy drawn with *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13, where the right to take-off and land airplanes on an airfield enabled the dominant owners to step in and mow the field sufficient to create and maintain runways when the servient owners discontinued its use as an airfield. This was held not to amount to an ouster.

64. No basis was shown in the appellants' submissions to justify this court taking a different view of that essentially factual question. But I would go further. In my view it is wrong in principle to test the issue whether a grant of rights amounts to an ouster of the servient owner by reference to what the dominant owner may do by way of step-in rights if the servient owner ceases to carry out the necessary management and maintenance of the servient tenement. This is for two reasons. The first is that the ouster question should be addressed by reference to what may be supposed to have been the ordinary expectations of the parties, at the time of the grant, as to who, as between dominant and servient owners, was expected to undertake the management, control and maintenance of the servient tenement. In the

present case, as the judge held, the plain expectation was that the relevant part of the Park would be managed, controlled and maintained as a leisure complex by its owners, rather than by the owners of Elham House or by the timeshare owners as members of the RVOC. The exercise of step-in rights by the dominant owners would arise only in the event that the owners of the Park gave up the management, control and maintenance of the recreational and sporting facilities. Nothing in the terms of the Facilities Grant impinged upon those rights of management and control in any way.

65. The second reason is that step-in rights are, by definition, rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used: see *Gale on Easements*, 20th ed, at para 1-93 and *Carter v Cole* [2006] EWCA Civ 398; [2006] NPC 46 per Longmore LJ at para 8(6). The dominant owner's right is "to enter the servient owner's land for the purpose, but only to do necessary work in a reasonable manner …". Provided that, as the courts below have held, the recreational and sporting facilities in the Park could be used by the RVOC timeshare owners without taking control of the Park, then no question of ouster arises.

Mere Passivity

66. It is well settled that (subject to irrelevant exceptions) an easement does not require anything more than mere passivity on the part of the servient owner: see *Gale* (op cit) at para 1-96 and *Jones v Price* [1965] 2 QB 618 at 631, per Willmer LJ:

> "… properly speaking, an easement requires no more than sufferance on the part of the occupier of the servient tenement, …"

In *Moncrieff v Jamieson* (supra) at para 47, Lord Scott of Foscote said:

> "the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not, in my opinion, be a servitude."

He then referred to a right to use a neighbour's swimming pool as an example of such a right.

67. This does not mean that easements cannot be granted if they involve the use of structures, fixtures or chattels on the servient tenement, which, in the ordinary course, the parties to the grant expect that the servient owner will manage and maintain. All it means is that the grant of the easement does not impose upon the servient owner an obligation to the dominant owner to carry out any such management or maintenance. The servient owner may do so because he wishes to use the structures, fixtures or chattels for the same purpose as the dominant owner, and has both the possession and control of the servient tenement and more resources than the dominant owner with which to do so. The grantor may or may not choose to make enjoyment of the easement conditional upon the dominant owner making a contribution towards the cost of management and maintenance, but no such contribution obligation will lightly be implied. There may, as in the present case, be a commercial expectation that the servient owner will undertake the cost and other burdens of management and maintenance, but the fact that the shared commercial expectation may have been (as in the present case) built upon sand rather than rock, so that those burdens prove uneconomic for the servient owner, will not affect the question whether the grant of the relevant rights constitutes an easement.

68. I have already mentioned examples of easements calling for the use of fixtures or chattels, such as the lock gates and sluices in *Simpson v Godmanchester Corpn*, the pump in *Pomfret v Ricroft* and the humble lavatory in *Miller v Emcer*. Perhaps the most telling example is the grant of a right of way over a route which includes a substantial bridge: see *Jones v Pritchard* [1908] 1 Ch 630 at 637. This may require significant regular maintenance, and (in connection with a freehold easement) the large expense of occasional reconstruction. If granted by the owners of a substantial landed estate in favour of the owners of a cottage to which the right of way is the only means of access, it may be inconceivable in the real world that the maintenance, repair and replacement of the bridge will in fact be undertaken by anyone other than the servient owners. Nonetheless the grant of the easement carries with it no obligation on the part of the servient owners to carry out maintenance, repair or replacement, even if the bridge were, in the absence of it, to become unusable.

69. There is therefore nothing inherently incompatible with the recognition of a grant of rights over land as an easement that the parties share an expectation that the servient owner will in fact undertake the requisite management, maintenance and repair of the servient tenement, and of any structures, fittings or even chattels located thereon. The only essential requirement (imposed to prevent land being burdened to an extent contrary to the public interest) is that the servient owner has undertaken no legal obligation of that kind to the dominant owner.

70. There plainly was in the present case a common understanding between the respective grantor and grantee of the rights over the recreational and sporting facilities in the Park that the significant cost of the management, maintenance, repair

and replacement of the structures, fixtures and, if necessary, chattels, requisite for the enjoyment of those rights would be undertaken by the successive owners of the Park. That was the express basis upon which the Regency Villas timeshare units were offered for sale to the public in the promotional materials put in evidence at the trial. But the concurrent analysis of the judge and of the Court of Appeal that the Facilities Grant did not of itself impose such obligations on the servient owners of the Park cannot in my view be faulted. True it is that, in the same document, the original grantor undertook a personal maintenance obligation to the original grantee, but this was (or should have been) known at the time of the conveyancing to have a one-day limited life, because of the intention that there should be an immediate further transfer of Elham House. This personal covenant did not form part of the Facilities Grant.

71. The appellants submitted nonetheless that the Facilities Grant was no more than illusory as a grant of rights of practical utility for an unlimited period unless the owners for the time being of the Park undertook responsibility to the dominant owners for the substantial cost of management, maintenance, repair and renewal. They relied on Lord Scott's example of the swimming pool, although it was only an obiter observation in a case about parking rights. The courts below rejected this on the facts, concluding that some meaningful use, even of the golf course and the swimming pool, could be enjoyed by the RVOC timeshare owners, even if the appellants or their successors as owners of the Park were altogether to discontinue the business of operating the relevant part of the Park as a leisure complex. Greens and even fairways on the golf course could be mown. The swimming pool could be kept full of water. Timeshare owners could provide their own nets for the tennis courts, hoops for the croquet lawn and (if necessary with the use of a generator) lighting for the squash courts. The appellants submitted with force that this would be nothing like the proffered use of a high-quality leisure complex held out to prospective timeshare owners in and shortly after 1981, but nothing in their submissions provided a basis upon which this court could properly depart from the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances. This conclusion, that meaningful use of the rights granted did not depend upon the continued provision of management, maintenance, repair and renewal by the servient owners, is also sufficient to confirm that use of the facilities was granted by way of right, rather than merely by way of temporary offering, revocable by the servient owners at any time, by discontinuing management and maintenance.

72. It is not difficult to imagine recreational facilities which do depend upon the active and continuous management and operation by the servient owner, which no exercise of step-in rights by the dominant owners would make useable, even for a short period. Free rides on a miniature steam railway, a covered ski slope with artificial snow, or adventure rides in a theme park are examples which would probably lie on the wrong side of the line, so as to be incapable of forming the subject

matter of an easement. But the precise dividing line in any particular case will be a question of fact.

73. It is in this context to be borne in mind, as already explained, that the Facilities Grant extended only to such sporting or recreational facilities as existed within the Park from time to time. It did not oblige the servient owner to maintain or operate any particular facilities, or any facilities. It is perfectly possible that, in relation to some of them, the exercise by the dominant owners of step-in rights, after discontinuation of operation and maintenance by the servient owners, would not make them useable by the dominant owners indefinitely. That was an inherent limitation in the value of the Facilities Grant, but it does not deprive it of the character of an easement.

Overview

74. My analysis thus far demonstrates, as it did to the courts below, that the Facilities Grant exhibited all the well-settled essential characteristics of an easement or easements, viewing each of the four characteristics (and the sub-characteristics of the fourth) separately. But it still leaves open the wider question whether the grant for timeshare owners of comprehensive rights to the use and enjoyment of recreational and sporting facilities in an adjacent leisure complex is something which the law of easements ought to comprehend, looking at the matter in the round rather than in a series of compartments. The facilities granted in the present case undoubtedly broke new ground within the context of easements, beyond that established in *In re Ellenborough Park*, and this court is in any event not bound to follow that decision, if it considers it to have been wrong, either on its facts, or in the application of settled principles undertaken by Court of Appeal.

75. The Facilities Grant in the present case may be treated as breaking new ground by comparison with *In re Ellenborough Park*, in three main respects. First, as Lord Carnwath points out, the nature and extent of the recreational and sporting facilities granted at Broome Park was much greater, and their full enjoyment called for much more intensive management, than that afforded in Ellenborough Park. An 18-hole golf course and a heated swimming pool by their nature require more management and maintenance than an ornamental garden, even if Ellenborough Park may also have included tennis courts and a bowling green. Secondly, Ellenborough Park was made available to a limited number of dominant owners, whereas the facilities at Broome Park were available to two, later three, different groups of timeshare owners and to paying members of the public. Thirdly, the cost of managing and maintaining Ellenborough Park was shared among the dominant owners, whereas in Broome Park it was at least expected to be undertaken by the servient owners. Additionally, the grant in this case can only be described as a right of “recreation and amusement”. It is a recreational right pure and simple (treating

sport as part of recreation) whereas in *In re Ellenborough Park* the Court of Appeal fought shy of describing it in those terms, preferring to identify its essential feature as the provision of a communal garden for townhouses.

76. Before expressing a conclusion, I must briefly identify factors pointing in favour of, and against, this extension of the law to recognise this new species of easement. In favour of doing so is the principle that the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land. The timeshare development, which is quintessentially for holiday and recreational use, is just such a new type, and the common law should accommodate it as far as it can.

77. Secondly, recreational easements have become widely recognised in the common law world. Thus in *Riley v Penttila* [1974] VR 547, the Supreme Court of Victoria recognised as an easement the grant of land within a residential development "for the purposes of recreation" over a garden or a park, in favour of residential lots, enthusiastically following the lead given in *In re Ellenborough Park*. In *Dukart v Corpn of the District of Surrey* [1978] 2 SCR 1039 the Supreme Court of Canada recognised as easements the grant in favour of residential lots on a development plan of rights to use "foreshore reserves" separating the lots from a bay, treating the analysis in *In re Ellenborough Park* as applying "all the more emphatically in the case of a beach pertinent to a resort development" (p 1052), and treating it as well settled that a *ius spatiandi* could be the subject matter of an easement. The Supreme Court stated in its declaratory order that "the right so granted includes the right to promenade freely across the whole of the 'Foreshore Reserves' and not merely to cross directly from the edge or front of Lot 38 to the waters of Boundary Bay": pp 1070-1071. Furthermore, the rights were not exclusive to the lot owners but were to be shared with certain more limited rights of public access from roads terminating short of the bay, and therefore across the foreshore reserves.

78. In *Blankstein v Walsh* [1989] 1 WWR 277 the High Court of Manitoba recognised as an easement, acquired by prescription, recreational rights to use a communal playground, in favour of the owners of adjoining holiday cottages. In *City Developments Pty Ltd v Registrar General of the Northern Territory* [2000] NTSC 33, 135 NTR 1 the Supreme Court of the Northern Territory (affirmed by the Court of Appeal of the Northern Territory) recognised as an easement the grant of rights over a lakeside resort near Darwin for "private recreational purposes", treating it as "clearly established that a right of recreation may be the subject of a valid easement" by reference to Halsbury's Laws of Australia: [2001] NTCA 7, para 18.

79. Against the broad recognition of recreational rights over a leisure complex as easements are two main factors. First, if annexed to a freehold, they are

indeterminate in length, whereas a timeshare structure is frequently set up for a limited number of years. Furthermore the rights conferred are likely to burden the servient land long after the leisure complex in question has outlived its natural life. There is at present no statutory basis for the modification or discharge of easements, such as exists in relation to restrictive covenants, although the Law Commission's 2011 report proposes that there should be.

80. Secondly, the use of easements as the conveyancing vehicle for the conferring of recreational rights for timeshare owners upon an adjacent leisure complex is hardly ideal, by comparison for example with a leasehold structure of the type used in this case for the BPOC timeshare owners. Although obligations to share the cost of management, maintenance, repair and renewal may be attached as conditions for the enjoyment of an easement (as they were in *In re Ellenborough Park*) there is no way in which enforceable obligations of that kind may be imposed upon the servient owners so that the burden of them runs with the servient tenement, in the same way that the burden of positive covenants may be made to run with a leasehold reversion. I have described how effective the leasehold scheme was for the BPOC timeshare owners, in enabling them to take proceedings to require the owners of Broome Park to construct a swimming pool, after the original open-air pool had been filled in.

81. In my view this court should affirm the lead given by the principled analysis of the Court of Appeal in *In re Ellenborough Park*, by a clear statement that the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement, provided always that they satisfy the four well-settled conditions which I have described. Where the actual or intended use of the dominant tenement is itself recreational, as will generally be the case for holiday timeshare developments, the accommodation condition will generally be satisfied. Whether the other conditions, and in particular the components of the fourth condition, will be satisfied will be a question of fact in each case. Whatever may have been the attitude in the past to "mere recreation or amusement", recreational and sporting activity of the type exemplified by the facilities at Broome Park is so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit.

82. I would therefore dismiss the appeal.

The Cross-appeal

83. The essence of the disagreement between the judge and the Court of Appeal which has led to the cross-appeal may be summarised as follows. The judge regarded

the Facilities Grant as, in substance, the grant of a single easement to use all such recreational and sporting facilities as might be provided from time to time within the leisure complex (including the Mansion House). At para 44 of his reserved judgment he explained this conclusion in the following way:

> "There is nothing vague or of excessive width in the present rights. They clearly extend to all recreational and sporting facilities on the estate, and to the gardens, and must in my judgment include facilities that were not there or planned in 1981, or which may have been significantly improved since then. To construe the rights as limited to the actual facilities which were on site or planned in 1981 is unrealistic and might inhibit the servient owner from introducing improvements or replacements or adding facilities which would be for everyone's benefit. I say that because any alteration to the facilities, if the rights did not extend to the new or replacement facilities, might amount to a substantial interference with the claimants' existing rights. That cannot have been intended on any sensible construction of the rights. Moreover, such a construction would allow the defendants to advantage from their own default or that of their predecessors, who filled the outdoor pool in before the defendants constructed a new one in the basement of the Mansion House. The point is perhaps academic as the rights under the 1981 Transfer expressly extend to the basement, where the pool now happens to be."

84. The Court of Appeal said that this was the wrong approach. It was held, at para 40 of the judgment of the court, that the most natural meaning of the words of the grant was a grant of rights in the nature of separate easements only over those sporting and recreational facilities already in existence on the Park at the time of the grant. This would therefore exclude new or substitute facilities constructed or laid out in a different part of the complex from the location of the original facilities, and also exclude rights over the ground floor and basement of the Mansion House which were not, viewed separately, recreational or sporting facilities, so as, for example, to exclude the use of the restaurant. The court then went on to look at each facility in turn, treating it as the subject of a separate grant of rights relating to a separate part of the Park. Thus the rights granted over the Italianate gardens, the tennis courts, the squash courts, the putting green and croquet lawn, the outdoor pool and the golf course all qualified as easements. By contrast the rights claimed over the reception area, billiard room and TV room on the ground floor of the Mansion House, and over the restaurant, bar, gymnasium, sun bed and sauna area in the basement, all failed to qualify. This was, because, viewed individually, none of them amounted to a sporting or recreational facility, the court observing in passing that "a restaurant is not like a toilet" and that "the modern approach to taking physical exercise is not

really applicable to recreational indoor games such as snooker or to watching television": para 80. Furthermore, the Court of Appeal concluded that, if the leisure business was closed, and the Park owners' chattels removed, it would be stretching language to describe the bare room occupied in 1981, but no longer occupied, by a billiard table, as a billiard room. The same analysis was applied in relation to the gymnasium. The result was that the court concluded that there had not in 1981 been any valid grant of an easement over the ground floor or basement of the Mansion House. Since the new basement swimming pool replaced the original pool but on a different part of the leisure complex, the dominant owners acquired no rights over it.

85. I have already indicated my clear preference for the judge's simple and common-sense analysis. There is in my view no answer to the judge's pithy observation that to construe the rights as limited to the actual facilities on site or planned in 1981 is unrealistic, and that it would be likely to inhibit the servient owner from introducing improvements or replacements, or adding facilities, for the benefit of all users of the leisure complex in the Park. In my view the Court of Appeal's approach, looking at the facilities grant as if it were a grant of separate rights to each facility, affecting separate and distinct parts of the complex, failed to see the wood for the trees.

86. It is fair comment that counsel for the respondents provided less than full-blooded support during oral argument for the judge's simple analysis, although they did in subsequent written submissions. This reluctance was apparently because of a concern about the effect of the law relating to perpetuities upon what, on one view, might be regarded as the grant of future easements. But this concern was, in my view, misplaced for the reason which I have already given. I have also explained why, in my view, the absence of express words of futurity in the Facilities Grant is more than compensated for by the nature of the subject matter, namely rights to use sporting and recreational facilities in a leisure park on an indefinite basis. The timeshare owners in the Mansion House were plainly granted rights to use all such facilities as might be there from time to time, and it makes no sense at all to think that the parties to the grant of rights to the Regency Villas timeshare owners over the same leisure complex actually intended that they should have a steadily reducing set of rights, as alterations, replacements and improvements were made to the leisure complex over time.

87. In written submissions after the hearing the appellants advanced additional reasons why the judge's construction could not be correct. First, it was said that the Regency Villas timeshare owners would then benefit from a later decision by the servient owner to construct leisure or sporting facilities within that large part of the Park (as defined) to which the leisure complex did not extend in 1981. Part of it remained farmland, and still does. Secondly it was submitted that if the Transferor (or a successor) sold off parts of the Park for residential development and houses

were built with private gardens or swimming pools, then the Regency Villas timeshare owners would have the free use of them as well.

88. It may be that developments of that kind (none of which appear to have occurred) might throw up issues of construction with which the court might have to grapple. A possible answer might have been that the ambit of the locus in quo to which the Facilities Grant extended was confined to the Mansion House and the curtilage of the rest of the leisure complex as it then stood, but still leaving the servient owner free to substitute and re-locate particular facilities within that curtilage, without either depriving the Regency Villas timeshare owners of their use, or enabling them to veto any such changes. Another answer (to the private gardens and pool point) may be that the facilities grant applied only to facilities constructed for multiple use, as part of the leisure complex. But these considerations do not in my view stand in the way of recognising the good sense and practicality of the judge's interpretation, in preference to that of the Court of Appeal.

89. It also makes no sense to conclude that the Regency Villas timeshare owners were to have no enduring rights to the facilities in the ground floor and basement of the Mansion House, which constituted the heart of what was plainly intended to be a country club. While it may be that a restaurant, viewed on its own, is not a recreational or a sporting facility, it is perfectly capable of being viewed as part of a sporting or recreational complex. There were no doubt communal lavatory facilities in the Mansion House to which the same analysis would apply. The parties to the 1981 Transfer cannot sensibly have intended to exclude the RVOC owners from access to the restaurant, the lavatories, or to any other communal parts of the ground floor and basement of the Mansion House.

90. There is also in my view no real basis for the sharp distinction which the Court of Appeal drew between outdoor and indoor recreational and sporting facilities. A gym, a sauna, a billiard room and a TV room are no less recreational than a formal garden or a golf course. An enclosed squash court is no less sporting than an open-air tennis court.

91. Furthermore, the focus of the Court of Appeal on the importance of the servient owners' chattels to the use of the billiard room, gymnasium and sauna within the Mansion House, while correct as a matter of fact, does not justify their exclusion from the appropriate subject matter of a recreational easement. For the reasons already given, it is no objection to the recognition of a right as an easement that it may be exercised over, or with the use of, chattels or fixtures on land, rather than merely over the land itself.

92. My preference for the judge's construction of the Facilities Grant over that adopted by the Court of Appeal is decisive of the outcome of the cross-appeal. The new indoor swimming pool was, from the moment of its completion, a recreational or sporting facility constructed and made available within the leisure complex in the Park. The dominant owners already enjoyed rights over the communal parts of the ground floor and basement of the Mansion House which, viewed as part of the grant of a recreational easement over the leisure complex as a whole, were perfectly capable of having the enduring quality of an easement, or part of an easement. The result is, that for both of those reasons, but primarily the first of them, the respondents' recreational easement extended to the new indoor swimming pool from the moment of its completion, as the judge held.

93. I would therefore allow the cross-appeal, and restore the judge's consequential orders, including his order for monetary compensation, to be assessed, for the payment under protest by the respondents for the use of the facilities, in particular the swimming pool, in and after 2012.

LORD CARNWATH: (dissenting)

94. Since I am in a minority, I will explain my thinking relatively briefly. I gratefully adopt Lord Briggs' comprehensive account of the factual and legal background. With one important qualification I agree with, or am prepared to accept, his analysis. I would be very happy to go further, since the merits seem all one way. There is no doubt that the respondents were intended to have free access to the recreational facilities on the estate. But for an elementary conveyancing error by the original vendor's solicitors, they should also have had the benefit of a covenant by the owner of the estate to maintain those facilities. Instead they have been faced with years of uncertainty and dispute. However our view of the merits should not allow us to distort the correct understanding of a well-established legal concept. Nor is there any need to do so. Whatever our conclusion on this appeal, no-one suggests that the conveyancing technique used in this case is a suitable model for future time-share arrangements of this kind.

95. The important qualification relates to the nature of the right asserted. An easement is a right to do something, or to prevent something, on another's land; not to have something done (see *Gale on Easements*, 20th ed (2017), para 1-80). The intended enjoyment of the rights granted in this case, most obviously in the case of the golf course and swimming-pool, cannot be achieved without the active participation of the owner of those facilities in their provision, maintenance and management. The same may apply to a greater or lesser degree to other recreational facilities which have been or might be created, such as the skating-rink or the riding stables (who provides and keeps the horses?). Thus the doing of something by the servient owner is an intrinsic part of the right claimed.

96. Neither principle, nor any of the 70 or so authorities which have been cited to us, ranging over 350 years, and from several common law jurisdictions, come near to supporting the submission that a right of that kind can take effect as an easement. This point is if anything underlined by Lord Briggs' use of such expressions as "country club" and "leisure complex" (paras 1, 83) to describe the enterprise. In effect what is claimed is not a simple property right, but permanent membership of a country club. He recognises that it would be a "new species of easement", but sees it as justified by the need to accommodate "new ways of enjoying the use of land" and as a natural development of the "recreational easements … widely recognised in the common law world" (paras 76-77). However, none of the cases which he cites (paras 77-78) involves more than access to land for the purposes of walking and enjoyment as a garden or park in much the same way as in *In re Ellenborough Park* [1956] Ch 131. I agree that those cases lend support to the affirmation at this level of the Court of Appeal's reasoning in that case, but not for extending it to create a wholly new form of property right. Furthermore, as Lord Briggs accepts, there are other and better legal procedures for dealing with this "new way of enjoying land", if that is what it is.

97. This limitation was clearly recognised (albeit obiter, and in the context of the Scottish law of servitudes) by Lord Scott of Foscote in *Moncrieff v Jamieson* [2007] 1 WLR 2620, at para 47. Subject to "a few qualifications" he saw no reason why -

> "any right of limited use of the land of a neighbour that is of its nature of benefit to the dominant land and its owners from time to time should not be capable of being created as a servitudal right in rem appurtenant to the dominant land …"

His second qualification is directly relevant and merits quotation in full:

> "A second necessary qualification to the proposition afore-stated would be that the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not, in my opinion, be a servitude. Thus the grant of a right of way over a driveway cannot place on the servient owner the obligation to keep the driveway in repair: see *Jones v Pritchard* [1908] 1 Ch 630, 637. The dominant owner would be entitled, although not obliged, as a right ancillary to his right of way to do such repairs to the driveway as were necessary or desirable. On the other hand I doubt whether the grant of a right to use a neighbour's swimming pool could ever qualify as a servitude. The grantor, the swimming pool owner, would be under no obligation to keep the pool full of water and the

> grantee would be in no position to fill it if the grantor chose not to do so. The right to use the pool would be no more than an in personam contractual right at best."

98. That passage draws a significant distinction between two situations. The first is where the position of the servient owner is essentially passive, but the dominant owner is able, as a "right ancillary to his right of way", to make good any failure to keep the way in repair. The availability of such a limited, and clearly defined, ancillary right does not detract from the validity of the servitude or easement. The second, by contrast, is where active participation by the servient owner is an intrinsic part of the intended right. Lord Scott referred simply to filling the pool, but he might have added a reference to the active maintenance which is needed to keep a modern pool in safe and useable condition.

99. Sir Geoffrey Vos C [2017] Ch 516 acknowledged the problem but did not see it as insuperable:

> "We accept that modern swimming pools will often have sophisticated filtration, heating, chlorination, and water circulation systems. But such systems are not essential to the benefit and utility of using the pool. Water is obviously essential, but that can, as the judge indicated, be provided by the owner of the dominant tenement if the servient owner closes his business or allows the pool to fall into disrepair. The same applies to any desirable filtration or other plant. Simply providing the necessary water or even one's own filtration plant cannot be regarded as sharing possession of the land on which the pool is constructed ..." (para 72)

100. Similarly in respect of the golf course, he recognised that:

> "… contemporary golf courses have sophisticated networks of landscaped, manicured and irrigated tees, bunkers and greens, punctuated by sheds and shelters, tarmacked paths, sand boxes, pro-shops and club houses.
>
> 76. The difficulty posed by an easement of this modern kind of golf course, which we assume for this purpose was closer to the one that was opened at Broome Park Estate in mid-1981, is the large amount of maintenance required to keep it in what many would regard as a 'playable' condition. We are all

> familiar with the teams of groundsmen and greenkeepers that such courses need to employ to maintain them to the high standard that players frequently desire."

However again he thought the problem not insuperable:

> "77. As regards the validity of an easement to use a fully maintained golf course, we take the view that it is necessary to consider what would occur if, as was common ground could happen, the servient owner closed or ceased to maintain it. As with providing the water for the swimming pool, the dominant owners could mow the grass and take any other necessary steps to make the course playable. Such mowing was accepted by the Court of Appeal to be appropriate in relation to a grass airfield in *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13." (para 77)

He did however (unlike the judge) accept some limits to this approach, in respect of facilities on the ground floor of the Mansion House (such as the billiard and TV rooms), when rejecting the respondents' submission that this was no more than a right to use the common parts:

> "We think this submission proves too much. It shows that the right granted is really not in the nature of an easement at all. It is not about the use of any land, but the use of facilities or services that may for the time being exist on the land. As with the case of the restaurant which was in the basement in 1981, we cannot see how there can properly be an easement over such a service area. A restaurant is not like a toilet (over which an easement may exist as we have mentioned). It can only be useful and a benefit if someone cooks the food and sells it to the user. Likewise, a TV room is of no benefit without a TV. The tennis court and golf course are both proper uses of the servient land. The grant of the right to use recreational facilities on the ground floor of the Mansion House was really no more than a personal right to use chattels and services provided by the defendants …" (para 80)

This is a false distinction in my view. The essence of the grant, in respect of the golf course and swimming pool, no less than the others, was to use recreational facilities provided by the servient owners.

101. Lord Briggs deals with this issue first in the context of arguments about "ouster" (paras 62-65). I am inclined to agree with him, contrary to the appellants' submissions, that the ouster question should be judged by reference to the ordinary expectations at the time of grant, rather than to possible exercise of step-in rights. However it is with the following passage, under the heading "Mere passivity", that I feel bound to take issue. Having accepted that an easement requires "no more than sufferance" on the part of the servient owner, he dismisses the appellant's reliance on Lord Scott's observations in *Moncrieff*, by reference to what he deems -

> "… the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances." (para 71)

102. I find this difficult to accept. It is not clear to me that the courts below made any true "factual findings" on this question, nor indeed that there was any evidence on which they could properly to do so. There was plenty of evidence about the nature and cost of the maintenance actually carried out by the estate. (See for example the evidence of Mr Robson, Head of Maintenance, para 10, as to the contracts for the maintenance of the pool.) There appears to have been no evidence as to what might realistically have been done by the residents, collectively or individually, in the absence of such central management. What is involved is not simply maintenance or repair, as in the case of a right of way, or even the mowing of a disused airstrip as in *Dowty Boulton* (see below); but taking over the organisation and management of a "leisure complex" (in Lord Briggs' words).

103. The judge dealt with this point very briefly, but by reference to legal theory rather than practical evidence:

> "Mr Latimer also says, as is not disputed, that the rights cannot take effect as easements if the existence of the easements requires expenditure of money by the defendants, or the carrying on of a business by them. Yet the existence of the rights claimed produces no such requirement. The defendants could (as happened in the past) neglect the maintenance and upkeep of the estate allowing it to fall into disrepair. They could cease carrying on business at the estate for that reason, or on purely economic grounds, whether or not disrepair required the closure. In that case, if the rights take effect as easements, the claimants could intervene and, at their own expense, maintain and repair the facilities themselves, and tend the gardens: see generally *Carter v Cole* [2006] EWCA Civ 398 at para 8 ..." (para 52)

Carter v Cole does indeed contain an authoritative summary by Longmore LJ of the ancillary rights of the dominant owner, but that was in the context of rights of way. The case tells one nothing about the practicalities of running and maintaining a modern golf-course or swimming-pool. The judge did, it is true, say that he saw no reason why the claimants could not provide their own water supply "if necessary from a tanker" (para 64); but this appears to have been his own suggestion rather than one based on any evidence of what would be required in practice to maintain the pool in safe condition.

104. The only case relied on by Sir Geoffrey Vos C in this context, *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13, is of no assistance. The actual decision turned on other issues, so that anything said about the claimed easement was obiter. It seems to have been assumed that the disused airfield could be made suitable for the limited use to be made of it by the appellants by no more than mowing. On that basis Russell LJ was prepared to proceed on the assumption (p 24C-D) that the right to use the airfield was capable of existing as an easement with the ancillary right to mow to make it useable. The case tells one nothing about the view that would have been reached if the right had been claimed over an operational, commercial airfield.

105. The appellants raise a related problem concerning the element of choice. In respect of a right of way over a strip of land, or even over a bridge, there is no doubt about what is required by way of step-in rights. Here there is no such clarity. As submitted in their case:

> "A right to enjoy facilities being run by the servient owner is defined by the active choice and implementation of the servient owner. It chooses the location of the bunkers, the layout of the gardens from time to time, the temperature and depth of the water in the pool - no less than it chooses the menu in the restaurant, the range of equipment in the gym and the loudness of the music within it. There is no right in the dominant owner to exercise its right in any different, or any particular way. The scope of the right is defined by the active choices and implementation of the servient owner from time to time."

This perhaps is a less strong point in respect of the swimming-pool, the physical characteristics of which are clearly defined, and unlikely to change. However, in respect of the golf-course it seems to me unanswerable.

106. It is true that in *Ellenborough Park* the use was to some extent subject to decisions made by the servient owner as to the layout of the garden, and included the possibility of some sporting activity. The use was described by Evershed MR:

> "The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such - the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or upon the seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation; but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park …" (p 168)

However, these matters seem to have been treated as no more than incidental to the enjoyment of the garden as a place for walking, rather than as here essential to the purpose of the grant. Further, the enjoyment was subject to the dominant owners' obligation to contribute to the cost of maintenance, and there was no discussion of what might happen in the event of failure to maintain. The court was not faced, as in this case, with the commercially incoherent position that the dominant owner is under no obligation to operate and maintain the recreational facilities which are essential to the grant, but has no right to recover the costs if he does so.

107. I also find it difficult to see the limits of the majority's approach. One could imagine, for example, similar time-share apartments built on a theme-park, and offering free access to the various rides on the park. It would I think be quite clear that the rides and other attractions could not be sensibly and safely enjoyed without active management and supervision of their owner. In theory, no doubt, if the owner defaulted, the dominant tenants could form their own management company and take over the running of the park. But it would in my view be unarguable that such a right could take effect as an easement or property interest.

108. I accept that are some elements of the recreational facilities, notably the Italianate gardens, which lend themselves much more readily to a traditional understanding of an easement. However, like the majority, and in disagreement with the Court of Appeal, I would be inclined to regard this as a composite package of rights which stands or falls as a whole. Since I am in a minority it is unnecessary to pursue that issue further. It is also unnecessary to consider further the issues relating to the claimed quantum meruit.

109. Finally, I comment briefly on the issues raised by the post-hearing exchanges in connection with the rule against perpetuities (Lord Briggs paras 27ff). These arose from the interest shown by some members of this court in the question of future facilities.

110. The background as I understand it is as follows. The judge held that the rights extended not only to recreational facilities existing at the date of grant, but to future replacements or additions. He said:

> "There is nothing vague or of excessive width in the present rights. They clearly extend to all recreational and sporting facilities on the estate, and to the gardens, and must in my judgment include facilities that were not there or planned in 1981, or which may have been significantly improved since then. To construe the rights as limited to the actual facilities which were on site or planned in 1981 is unrealistic and might inhibit the servient owner from introducing improvements or replacements or adding facilities which would be for everyone's benefit …" (para 44)

111. In this passage he seems to have gone beyond the case as advanced at trial by the present respondents. Although their pleadings had asserted rights over any sporting or recreational facilities "which may from time to time be provided on the Broome Park Estate", their case at trial was more limited. The right was said to extend to facilities existing at the date of grant, and to later facilities constructed either in direct substitution for existing facilities, or as extensions of them.

112. In the Court of Appeal the present respondents supported the judge's view, but there seems to have been some doubt as to how far it went. In their submission, as understood by the court, the grant would not extend to wholly new facilities on a part of the estate where none had previously existed, but would include, for example, an extension onto new land of the golf-course (para 36). The court took a more limited view:

> "The question of whether a minor or de minimis extension to the land used by the existing or replacement facilities does not arise on the facts of this case. But we would be inclined to accept that such an incremental increase in the land used by the golf course or, say, a small extension to the existing land used by the swimming pool or to the run back used by the tennis courts, would be covered on the proper construction of the grant. A completely new facility on new ground would not be

> covered, but a replacement facility, even one that had been slightly extended beyond the ground used by the original facility, would be." (para 44)

113. The appellants' submissions support this limited view. I note three points in particular. Firstly, they rely on the ordinary construction of the words of the grant which are expressed in the present tense, and say nothing about future facilities. They contrast para 2 which refers in terms to pipes and drains now in the land "or constructed within 80 years of the date hereof". Secondly, they point out that the "Transferor's adjoining estate" (the expression used in the grant) extends to a large area (some 90 acres) of mainly agricultural land. It cannot sensibly have been intended that this large area would be burdened for ever with rights to future recreational facilities created anywhere at any time in the future. Thirdly, such a construction would come into direct conflict with the rule against perpetuities. As they point out, there is authority for the proposition that the rule is not offended by a right which may allow for future substitutions (see eg *Dunn v Blackdown Properties Ltd* [1961] Ch 433, 440 per Cross J), but none for a right over wholly new facilities which may be created anywhere over an area of this size.

114. I see considerable force in all these points. Although it is not necessary for the purposes of this appeal to reach a definitive view on the future extent of the grant, the Court of Appeal were right in my view to construe it narrowly. Lord Briggs seeks to avoid the problem by treating the grant as limited to the "leisure complex". However, that is not what the document says, nor indeed is it clear precisely what physical area would be so defined.

115. For these reasons, in respectful disagreement with the majority, I would have allowed the appeal.

Land registration – benefit and burden of easement – claim to right of way acquired by prescription – whether use was as of right or with permission – the legal burden of proof on the claimant – whether evidential presumption that use was as of right? – extent of the right acquired by use – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2016/0209**

BETWEEN:

(1) DAVID WELFORD
(2) DIANE CAROLINE WELFORD
(3) ADRIANE DIANE WELFORD

Appellants

and

(1) DAVID JOHN GRAHAM
(2) ELIZABETH JANE GRAHAM

Respondent

Tribunal: Hon Mr Justice Morgan

Sitting in public in London on 26 June 2017

Mr Howard Smith, counsel, instructed by Punch Robson, for the Appellants

Mr Stephen Fletcher, counsel, instructed by Macks, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FtT") (Judge Elizabeth Cooke), [2017] UKFTT 0058(PC), released on 20 May 2016 and against the order which Judge Cooke made, on 3 June 2016, to give effect to her decision. On 26 September 2016, Judge Cooke granted the Appellants permission to appeal on two of the six grounds of appeal they had put forward. On 9 November 2016, the Upper Tribunal (HHJ Behrens) granted permission on the Appellants' other grounds of appeal. In relation to the points of law which the Appellants raise, the appeal is pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007 and, in relation to other matters, the appeal is pursuant to section 111 of the Land Registration Act 2002.

The decision of the FtT

2. The reference to the FtT arose out of an application by the Appellants for the registration of the benefit of an easement, a right of way, as appurtenant to their land (Title No. CE192088) on which stood a building, to which the FtT referred as "the workshop", and for that easement to be noted as a burden on the adjoining land owned by the Respondents (Title No. CE214143) to which the FtT referred as "the yard".

3. The Appellants' case before the FtT, and on this appeal, was that their predecessors in title had acquired the benefit of a right of way by long use of the way, as of right. They relied upon the principles as to prescription by lost modern grant and they did not rely on section 2 of the Prescription Act 1832. This was because the relevant use had not continued up until the time that the dispute arose but had ceased some years earlier so that section 4 of the 1832 Act was not satisfied. The Appellants did not suggest that a right of way had arisen in any other way.

4. The history of the ownership of the workshop was that the persons named below were the owners of the workshop for the following periods:

    (1) Before 1935, Mr Richard Cowie;

    (2) From 1935 to 1947, Mr Herbert Jarvis;

    (3) From 1947 until 2006, Mr Herbert Raymond Jarvis;

    (4) From 2006 to 2012, Mr and Mrs Meeson; Mrs Meeson was the daughter of Mr Herbert Raymond Jarvis and the grandaughter of Mr Herbert Jarvis;

    (5) From 2012 to date, the Appellants.

5. The history of the occupation of the workshop was that it was occupied by the persons named below for the following periods:

    (1) Before 1947, Mr Herbert Jarvis;

(2) From 1947 to 1959, Mr Herbert Raymond Jarvis or his company;

(3) From 1959 to 1971, Mr Whitehead;

(4) From 1971 to 2012, Mr and Mrs Meeson;

(5) From 2012, the Appellants.

6. The history of the ownership of the yard was that the persons named below were the owners of the yard for the following periods:

(1) Before 1978, Mr Richard Cowie or his son Robert Cowie;

(2) From 1978 to 1988, Mr and Mrs Marshall;

(3) From 1988 to 2003, Mr and Mrs Lyell;

(4) From 2003 to 2012, Nerbrek Ltd;

(5) From 2012, the Respondents.

7. The Appellants relied on the evidence of three witnesses to prove that the yard had been used for many years, with and without vehicles, as a means of access to and egress from the workshop. These witnesses were Mr Marshall, Mrs Meeson and Mr Pawson. The judge summarised the evidence which they gave and she appears to have accepted their evidence as to the nature of the use and the period of the use of the yard.

8. Mr Marshall was able to give evidence about the position from 1964 when he became the tenant of certain stables to which the yard gave access. Further, Mr Marshall and his wife were the joint owners of the yard (and the stables behind the yard) from 1978 to 1988. He gave evidence that, from the 1960s, Mr Whitehead, as tenant of the workshop, drove across the yard to gain access to and egress from the workshop.

9. Mrs Meeson gave evidence that at least since the mid-1970s there had been vehicular use of the yard as a means of access to and egress from the workshop. Mr Pawson gave evidence that, from the 1980s, Mr Meeson drove across the yard to gain access to and egress from the workshop.

10. The judge made specific findings as to the use of the yard as an access to and egress from the workshop for a shorter period of time than was supported by the evidence of these witnesses. I do not understand the judge to have rejected their evidence as to the period of the use. Instead, the judge reduced the period which was relevant to her decision for three reasons.

11. The first reason was that the judge concentrated on the position prior to the coming into force of the Land Registration Act 2002. She said that reliance on use after that time "would run into difficulties because of the technical requirements of the Act". It is possible she had in mind the provisions of the 2002 Act which, in some cases, treat easements as overriding interests. The judge's second reason was that she considered that all that the Appellants had to show was a period of 20 years of relevant use. The judge's third reason was that she directed herself that the Appellants had to prove that the use of the

yard as a means of access to and egress from the workshop was without the permission of the owner of the yard and, as will be seen, she held that the Appellants could prove that matter for only part of the period of use on which they relied.

12. The judge made the following specific findings:

    (1) Mr Whitehead had used the yard for vehicular access to and egress from the workshop before 1978;

    (2) Mr Meeson drove across the yard to the workshop for many years, certainly from 1978 onwards and for at least 20 years before 2002.

    (In this paragraph, I have recorded how matters were described by the judge in her decision but I was told by Mr Fletcher for the Respondents that the year in which Mr Whitehead stopped using, and Mr Meeson started using, the workshop was 1971. The judge referred to 1978 as a relevant year because that was when Mr and Mrs Marshall became the owners of the yard and, as will be seen, she regarded 1978 as a significant date in relation to her later findings as to the use of the yard being without permission.)

13. Accordingly, the judge found that there had been use of the yard with vehicles to gain access to and take egress from the workshop from, at least, 1978 to 2002. On the evidence which she accepted, I consider that she could have found that there was such use from the 1960s to 2002 and, indeed, after 2002.

14. The judge next considered whether the Appellants had shown that the use relied upon was without the permission of the owner of the yard. She held that she only had evidence of the absence of such permission during the period 1978 to 1988 when Mr and Mrs Marshall were the owners of the yard. She made that finding because Mr Marshall had given evidence that he had not given permission for the use of the yard and, indeed, he had not appreciated that he was the owner of the yard, as distinct from the stables, to which the yard gave access. Accordingly, the judge held that the Appellants had established what she called “prescriptive use” from 1978 to 1988.

15. The judge then considered the position as to permission to use the yard before 1978 and after 1988. Mrs Meeson had been asked in the course of her evidence whether Mr Meeson had ever had permission to use the yard to access the workshop. She replied that he did not. She was then asked if it was possible that he had made arrangements with the owner of the yard to have access to the workshop and she replied: “No, he just did it”. The Respondents did not call any evidence to support a finding that the use of the yard as an access to the workshop had been with the permission of the owner of the yard.

16. The judge considered the position as regards the presence or absence of permission before 1978. She said that Mr Marshall’s evidence about what he did when he and his wife were the owner of the yard (from 1978 to 1988) told one nothing as to the position in relation to permission in the period before 1978. She held that she could not make a finding to the effect that the use of the yard as an access to the workshop was without permission before 1978 and that 1978 therefore became “a starting point from which a period of prescriptive use can run”.

17. From 1988 to 2003, the owners of the yard were Mr and Mrs Lyell. In relation to the period from 1988 onwards, the judge said there was "an absence of evidence" as to whether the use of the yard as a means of access to the workshop was with the permission of the owner of the yard. As to whether Mr and Mrs Lyell had given such permission, she said:

> "There is no evidence that they did and no evidence of any value that they did not, because I can see no reason why a conversation between Mr Meeson and Mr or Mrs Lyell about his access across the yard would have been reported to Mrs Meeson. It might have been but it might well not have been. It is impossible to prove a negative, but there must be something to tip the balance of probabilities and to show me that it was more likely than not that Mr Meeson did not have permission to use the yard during the Lyells' ownership and there is simply no evidence either way."

Later she said:

> "Accordingly, the Applicants' application fails because they have not proved that the requirements for prescriptive use were met for a period of twenty years before the end of 2001."

18. Although the judge held that the Appellants had failed to establish any right of way acquired by prescription, she went on to consider two further points which had been argued but which only arose if the Appellants had established a right of way. These two issues concerned the extent of any right of way which might have been acquired by prescription and whether any such right of way had been abandoned.

19. As to the extent of any right of way, the judge held that any right of way would not have been "for all purposes". She said:

> "The use acquired by prescription would have been limited to loading and unloading material for the purposes of a single business conducted at the workshop."

The judge then made certain findings as to the use of the yard to gain access to the workshop. She referred to Mr Meeson parking his van half in and half out of the workshop for the purposes of loading and unloading. I interpose that it was explained to me that the part of the van parked outside the workshop was on part of the curtilage of the workshop which was owned by the owner of the workshop itself. She said:

> "There is no evidence that Mr Meeson drove across the yard in order to keep a vehicle inside the workshop with the doors closed."

And later she said:

> "Accordingly, the evidence points to use predominantly in order to get materials in and out of the workshop."

20. The judge then held that any right of way acquired by prescription had not been abandoned. There is no appeal against that finding.

The grounds of appeal

21. The Appellants put forward lengthy grounds of appeal which can be summarised as raising the following four contentions:

    (1) That the FtT was wrong in relation to the burden of proof in respect of the presence or absence of permission for the use of the yard;

    (2) If, contrary to (1) above, the burden was on the Appellants to prove that the use of the yard to gain access to the workshop was without permission, that they had adduced sufficient evidence to discharge that burden;

    (3) The FtT was wrong to hold that any easement would be limited to access for loading and unloading; and

    (4) The FtT was wrong to hold any easement would be limited to use of the dominant tenement as a single business workshop.

The first ground of appeal: the burden of proof

22. The Appellants' case before the FtT was that their predecessors in title had acquired a right of way by prescription. The principles relied upon were the principles relating to prescription by lost modern grant. This is one of three modes by which an easement may be acquired by prescription. The other two modes are prescription at common law and prescription under the Prescription Act 1832. The 1832 Act deals with rights of way in section 2 and deals with rights of light in section 3. Apart from the acquisition of rights of light under section 3 of the 1832 Act, all modes of prescription require there to have been relevant use for a sufficient period of time and the use must be "as of right".

23. In order for the use in question to be relevant use for the purposes of prescription, it must have certain qualities and have been of a certain character. In particular, the use must be such as to carry to the mind of a reasonable person, in possession of the servient tenement, the fact that a continuous right of enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended: see Hollins v Verney (1884) 13 QBD 304 at 315.

24. The use must be "as of right". It has been explained that "as of right" does not mean "by right" but instead it means "as if of right": see R (Beresford) v Sunderland City Council [2004] 1 AC 889 per Lord Walker of Gestingthorpe at [72] and R (Barkas) v North Yorkshire County Council [2015] AC 195 at [14]. "As of right" means, in Latin, *nec vi, nec clam, nec precario,* or in English, not contentious, not secret and not with permission: see Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238 and 239; R v Oxfordshire CC ex parte Sunningwell PC [2000] AC 335 at 350H.

25. In the present case, the FtT held that the burden of proving that the use in question was "as of right" was on the party claiming to have acquired the right by prescription. This was not in dispute at the hearing of this appeal, provided

that it was understood that it was subject to the all-important qualification that what was being discussed was the legal burden of proof and not the burden of adducing evidence in relation to the question of the presence or absence of permission. Although the incidence of the legal burden of proof was not in dispute, it is worth addressing the authorities which establish that proposition.

26. Megarry & Wade, The Law of Real Property, 8th ed., at para. 28-048 states that the burden of proving that the use was "as of right" is on the party claiming the easement and cites Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 and Patel v W.H. Smith (Eziot) Ltd [1987] 1 WLR 853.

27. Gardner v Hodgson's Kingston Brewery Co contains a number of statements to the effect that the burden of proving that the use was without permission was on the party claiming the easement. In that case, the claimant had proved use of a way across a yard for a sufficient period of time but the servient owner adduced evidence that a payment had been regularly made by the user of the way to the owner of the yard. There was a dispute as to why the payment was being made. The servient owner contended that the payment was a rent or a licence fee for the use of the way; if so that use would have been permissive and could not be relied upon for the purpose of prescription. The claimant contended that the payment was in the nature of a perpetual payment attached to some original grant of the right of way. Some members of the House of Lords took the view that the payment was clearly a rent or licence fee and that finding meant that the claim to prescription failed. Other members of the House of Lords held that, at best from the claimant's standpoint, the position was ambiguous and therefore the claimant had failed to discharge the burden on her of explaining the reason for the payment and showing that the use of the way had been made without the permission of the owner of the yard: see at 233, 234, 238 and 239.

28. In Patel v W.H. Smith (Eziot) Ltd, Balcombe LJ approved the statement in an earlier edition of Megarry & Wade in the same terms as in the current 8th ed. to the effect that the burden of proving that the use was as of right was on the claimant. He expressly mentioned the burden of proving that the use was *nec precario* and he referred to Gardner v Hodgson's Kingston Brewery Co.

29. Balcombe LJ also referred to Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd [1959] 2 Lloyd's Rep 472. In that case, there was an issue as to whether the use in question was permitted by an earlier deed. The judgment of the Court of Appeal was given by Harman LJ. He held, at page 477, that it would be a strange result that something done under a claim to have a contractual right to do it could be treated as an adverse act when it had been done on the assumption of a permission by the other party to the grant. On the issue as to whether there had been an assumption of permission, there was no direct evidence and so the court was left to inference. He concluded, at 477:

> "It seems to us that, in the absence of all evidence the appellants have not discharged the burden which lies on them to show that their user was not *precario*, but was a deliberate invasion of the respondents' property. On this footing, no prescriptive rights were acquired."

30. These cases do establish that a claimant bears the legal burden of proof that the use relied on was use as of right. This is the position even though the claimant had the legal burden of proving a negative state of affairs, i.e. that the use was *nec vi* and *nec precario.* In the case of proving use *nec clam,* this may not involve proof of a negative state of affairs as one is required is to prove that the use was carried on openly and that involves proof of a positive state of affairs. Although the case of Thomas W Ward is consistent with the other cases in holding that the claimant bears the legal burden of proof, the reasoning in that case must be reconsidered in the light of the later decision in Bridle v Ruby [1989] 1 QB 169 at 177.

31. Mr Smith, for the Appellants, submitted that although the legal burden of proving that the use was without permission was on the party claiming the easement, that party could be assisted in discharging the legal burden by relying on an evidential assumption that was established by a long line of authority. The evidential presumption for which he contended was that if the putative easement was used for the necessary period of time in the requisite manner, i.e. openly and so as to bring home to a reasonable owner of the servient tenement that a right was being asserted, then there was a rebuttable presumption that the easement had been enjoyed as of right and, in particular, without permission. It was then open to the servient owner to call evidence that there had been permission, or that the use was contentious, to rebut that presumption. If such evidence were given, the court would then decide on the evidence whether the presumption had been rebutted.

32. Mr Smith submitted that the above cases dealing with the legal burden of proof did not discuss this evidential presumption but it was established by a separate line of authority. In the present case, the FtT did not have the benefit of the citation of these authorities. In the following discussion of the authorities, I will refer to the person claiming the easement as "the claimant", whether he was the Plaintiff or the Defendant in the action, I will refer to the right claimed as "the easement" and the owner of the land over which the right is claimed as "the servient owner" although, of course, the issue in the cases was whether the claimant had established an easement.

33. It is helpful to begin the reference to authority by considering the decision in Campbell v Wilson (1803) 3 East 294, 102 ER 610. This case is cited in Gale on Easements, 20th ed., at para. 4-103 as authority for the evidential presumption for which Mr Smith contends. The statement in the 20th ed. appeared in the same terms in the first edition of Gale on Easements (1839) at page 121.

34. The report of Campbell v Wilson has the following headnote:

> "Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above 20 years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 26 years, as all former ways were at that time extinguished by the operation of an Inclosure Act."

35. In Campbell v Wilson, the defendant was claiming a right of way acquired by prescription. He had proved the use of the way for 26 years. The servient owner contended that the use could be explained by the fact that the persons using the way had the benefit of an express right of way under an inclosure award. However, the express right of way was over different land from the way actually used. The report of the case says that the evidence showed that the use in question was "adverse" and that is explained by reference to evidence which referred to the use having an adverse effect on the servient tenement. The report also says that: "no leave was proved to have been at any time asked" by the users of the way and the use was not interrupted although this part of the report does not make it wholly clear whether this is a reference to the fact that the servient owner failed to prove the grant of leave or the claimant proved that no leave had been asked for.

36. The trial judge directed the jury:

> "That the use of a road as a matter of right by those who claimed it, and submitted to as a matter of right by the possessor of the land over which it was used, was to be considered as an adverse enjoyment.
>
> …
>
> But that if the jury were satisfied from the whole of the evidence that the defendant's enjoyment had been only by leave or favour, or otherwise than under a claim or assertion of right, it would repel the presumption of a grant, and in that case, or if they thought it had not been enjoyed adversely for 20 years, they must find for the plaintiff."

37. The jury having found for the defendant that he had established a right of way by prescription, the servient owner challenged the judge's direction to the jury. Counsel for the servient owner referred to a number of cases, Lewis v Price, Dougal v Wilson, Darwin v Upton and Griffiths v Matthews which, he accepted, established that the enjoyment of an easement for 20 years, uninterrupted and not explained, was evidence for the jury to presume a grant but evidence which went to explain the enjoyment and to show that it originated by mistake or licence or in any other manner than on a claim of right, would rebut the presumption of a grant. The four earlier cases to which counsel referred are not all independently reported but they are discussed in a lengthy note by Serjeant Williams in his report of Yard v Ford 2 Wms. Saund. 172, 129 ER 1124.

38. Lord Ellenborough CJ held that the trial judge had correctly directed the jury. He held at pages 300-301 that the case was like "the common case of adverse enjoyment of a way for upwards of 20 years, without any thing to qualify that adverse enjoyment" and that there was "no reason why the jury should not make the presumption, as in other cases, that the defendant acted by right". Grose J held, at page 301, that the judge had correctly left the question to the jury to decide on the evidence. Lawrence J said at pages 302 that: "if there were an adverse possession for above 20 years, and not explained by any evidence, why might not the jury presume a grant?" Le Blanc J said at 302:

> "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favour, or otherwise than under a claim or assertion of right, and indeed unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant."

39. Mr Fletcher for the Respondents submitted that, in Campbell v Wilson, there was a positive finding that the use was "adverse" to the servient owner. He then submitted that such use would not have been adverse if it had been permitted by the servient owner and therefore I should consider that case as one where there was a positive finding that the use was without permission. I do not accept that submission. The court referred to the matters which made the use adverse to the servient owner. Those matters related to the physical impact of the use on the land and did not concern the presence or absence of permission. Further, the comments in the case as to when it was appropriate to hold that there was a presumption that the use was without permission would not make any sense if, on the facts of that case, there was an earlier positive finding that the use was without permission.

40. In Cross v Lewis (1824) 2 B&C 686, 107 ER 538 the claimant relied on the fact that windows on his land had enjoyed the passage of light over the adjoining land for 38 years. This case was prior to the 1832 Act so that it was necessary to show that the use of the light had been as of right. There was no specific discussion about the possibility of there being permission for the opening of the windows and there was no specific evidence either way as to whether the use had been made with the permission of the owner of the land over which the light passed. It was held that proof of the use for 38 years raised a presumption of right and in the absence of evidence to rebut that presumption the right was established. Bayley J said at 689:

> "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of Darwin v Upton, it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it."

Holroyd J's judgment at 690 was to the same effect.

41. The earlier cases to which I have referred were considered at various levels of decision in Angus & Co v Dalton. The decision of the trial judge (Lush J) is reported at (1877) 3 QBD 85 and the decision of the Court of Appeal is reported at (1878) 4 QBD 162. The decision of the House of Lords is reported as Dalton v Angus & Co at (1881) 6 App Cas 740. The various judgments discuss the presumptions which are to be made in a case where a claimant to an easement has proved that he has used the putative easement openly for the requisite period of time. The majority judgments in the Court of Appeal and the decision of the House of Lords are to the effect that:

(1) such use gives rise to a presumption of an earlier grant of an easement;

(2) that presumption may be rebutted by certain matters such as showing that the use was with the permission of the servient owner; but

(3) the presumption may not be rebutted by proving that there had not been an actual grant prior to the commencement of the use.

It can be seen from this case that the presumptions arising from the fact of long use are of different kinds. The presumption that the use was as of right is an evidential presumption which can be rebutted by evidence which shows that the use was not as of right because, for example, it was with permission. However, if it is established (with the aid of this evidential presumption) that there was use as of right for the requisite period, then there is a legal presumption, or a legal fiction, that there had been an earlier grant of an easement and this presumption or fiction cannot be rebutted by showing that there had not in fact been such a grant.

42. It may also be relevant to refer to one case as regards the evidence to be given, as to the presence or absence of permission, following the 1832 Act. Section 5 of the 1832 Act introduced rules as to what parties had to plead in a disputed claim to an easement alleged to have been acquired by prescription. Under section 5, it was held that the claimant should plead use as of right. It was also held that even if the defendant only pleaded a general traverse of that allegation, without a positive pleading that the use was with permission, the defendant could call evidence that the use had been with permission. The case which illustrates the operation of section 5 in this respect is Beasley v Clarke (1836) 2 Bing. NC 70, 132 ER 271. Simplifying the facts somewhat, the party claiming the right of way had proved use of the way for the requisite period. The trial judge permitted the servient owner to call evidence to show that the use had been with permission. This evidence having been admitted, the jury found that the claimant had not established an easement by prescription. The claimant then appealed contending that the evidence should not have been admitted because the servient owner had only pleaded a general traverse of the claim that there had been use as of right. The appeal failed, on the true interpretation of section 5 of the 1832 Act. However, for present purposes, what is relevant is that the argument and the decision only make sense if the evidential burden was on the servient owner to call evidence that the use had been with permission.

43. Turning to more modern times, the way in which the matter was described by Lord Hope in R (Lewis) v Redcar & Cleveland BC (No. 2) [2010] 2 AC 70 at [67] (a case concerning whether use of land as a town or village green was "as of right") was as follows:

> " … they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—

> either because it has not been asked, or because it has been answered against the owner—that is an end of the matter."

I consider that this passage is consistent with the servient owner having the burden of raising, and calling evidence to support, the contention that the use in question was with permission and therefore was not as of right.

44. I was also referred to a number of well-known cases concerning claims to rights of way by prescription where the reasoning of the court is consistent with the approach that there is an evidential burden on the servient owner to call evidence to show that the use of the way, which has been proved by the claimant, was use pursuant to a permission granted by the servient owner. The authorities to which I was referred (and some others which I have added) included Tehidy Minerals Ltd v Norman[1971] 2 QB 528, Bridle v Ruby [1989] QB 169 at 177F (referring to "otherwise unexplained), Mills v Silver [1991] Ch 271 at 285D-E, and London Tara Hotel ltd v Kensington Close Hotel Ltd [2012] 2 All ER 554 at [29].

45. In Jones v Price and Morgan (1992) 64 P&CR 404 it was held that there was permissive use where the use of a track took place on the basis of a common understanding that the use was permissive: see at page 407. Parker LJ added at page 408:

> "Even therefore, if the judge was not entitled to make a positive finding that the user *was* permissive, the first defendant's case [i.e. the case of the party claiming the easement] would fail on the ground that he had not discharged the onus of proof upon him."

I do not regard this statement as contrary to the existence of the evidential presumption for which the Appellants contend. The statement involved an application of what had been said in Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238 to the effect that where the facts are open to two explanations, the burden is on the claimant to establish the explanation which is consistent with the use being as of right.

46. The existence of the evidential presumption relied upon by the Appellants makes very good practical sense and the absence of such an evidential presumption would make little sense. If there were not such an evidential presumption, then the claimant would have to adduce evidence that there was no permission at any point during the period of use. In the light of recent authorities, use is *precario* if there was either an express permission or an implied permission for that use. If the Respondents were right that the burden of proving *nec precario* was on the claimant, without the benefit of the evidential presumption, the claimant would have to call evidence to disprove the existence of an express permission at any time during the period of use and also to disprove the existence of any facts from which a permission could be implied during the same period. The claimant would often be unable to prove these matters, particularly during the time the dominant land was owned by a predecessor in title, even where there never had been any express or implied permission. I consider that whatever the legal requirement is in relation to *nec precario*, the same must apply to *nec vi*. As regards *nec vi*, there can be *vi* if there was force or certain other contentious acts, for example, use which was

contrary to letters written by the servient owner or signs erected by the servient owner. If the Respondents were right, then then burden would be on the claimant to call evidence to disprove the existence of such matters. As with *precario,* the claimant would often be unable to prove these matters, particularly during the time the dominant land was owned by a predecessor in title, even where there never had been anything which made the use *vi*. Further, it should be remembered that with a claim to prescription at common law, the period of user which might be relied upon by the claimant might be a very lengthy period indeed.

47. I consider that the Appellants' submission as to the existence of an evidential presumption is supported by the authorities and by good sense. I therefore accept the submission that, having called evidence to establish that the yard had been used openly and without interruption for a sufficient period of time, the Appellants had the benefit of an evidential presumption that such user was as of right. The Respondents did not call any evidence to rebut that presumption. It follows that the FtT ought to have held that the Appellants had discharged the legal burden of showing relevant use, as of right, for a sufficient period.

48. I would allow the appeal on this first ground and direct the Land Registrar to give effect to the application which had been made by the Appellants.

The second ground of appeal

49. The second ground of appeal only arises if I rejected the first ground of appeal. In the event, therefore, the second ground of appeal does not need to be considered.

50. Although I heard detailed submissions on the second ground of appeal, I have concluded that I should not consider whether this ground of appeal could be established. It is not necessary for me to deal with this ground of appeal and, if I had had to deal with it, there would have been difficulty in assessing the findings of the FtT as to the state of the evidence when I have not been provided with a note of the cross-examination of the witnesses called by the Appellants.

The third and fourth grounds of appeal

51. As I have held that the Appellants have established a right of way over the yard for the purposes of access to and egress from the workshop, I need to consider the third and fourth grounds of appeal. Both of these grounds of appeal involve the question as to the extent of a right of way which has been acquired by prescription. It is convenient to take these two grounds of appeal together.

52. The long-established principle is that where a right of way is acquired by use, the extent of the right is measured by the extent of the use. For more modern statements to this effect, see Mills v Silver [1991] Ch 271 at 287B and Loose v Lynn Shellfish Ltd [2016] 2 WLR 1126 at [36] and [44]-[46].

53. The judge held that the use which had been made of the yard was for the purpose of access to and egress from the workshop, with and without vehicles.

She described the workshop as a joinery workshop. She also held that such access was typically for the purpose of loading and unloading materials. She said that she wanted to make it clear that any easement which might have been acquired by prescription would not have been an easement "for all purposes". She then said:

> "The use acquired by prescription would have been limited to loading and unloading material for the purposes of a single business conducted at the workshop."

54. It is not completely clear what the judge meant by the passage quoted above. If she was simply describing the use which had been made of the yard, then she was making a finding of fact which was not challenged before me. However, if she was saying that the easement acquired by prescription could only be exercised while the dominant tenement was used for the purposes of a single business as a workshop and, further, that the easement could only be exercised for the purposes of loading and unloading, then such a conclusion is challenged by the third and fourth grounds of appeal and, indeed, the challenge is not really resisted by the Respondents.

55. As stated above, it is clear that the extent of the easement acquired by prescription in this case is to be measured by reference to the extent of the use which gave rise to that easement. The judge has made findings as to the extent of the historic use. Issues may arise in the future as to the extent of the easement if, and when, the owner of the dominant tenement wishes to change the use of the dominant tenement from a joinery workshop to something else. If such issues arise, they will have to be addressed by asking two questions, which are:

(1) Does the intended change of use of the dominant tenement represent a "radical change in the character" or a "change in the identity" of the dominant tenement, as opposed to a mere change or intensification in the use of the dominant tenement? and

(2) Would the intended use of the dominant tenement result in a substantial increase or alteration in the burden on the servient tenement?

56. Mc Adams Homes Ltd v Robinson [2004] 3 EGLR 93 establishes that these are the two relevant questions which need to be considered. The same case acknowledges that these questions involve matters of degree and evaluation which require close attention to the facts and circumstances of the case. Accordingly, it is not possible in advance of a detailed identification of an intended change of use to be more specific as to the outcome of answering these two question in relation to some future change of use.

57. Notwithstanding the fact that the position as to future changes of use cannot be definitively resolved at this stage, the register of the relevant titles has to say something about the extent of the easement which has been acquired in this case. It is plainly possible to identify the dominant and servient tenements and to say that the easement is a right of way, with and without vehicles. As regards further attempts to spell out the extent of the easement, the practice of the Land Registry, as explained in Practice Guide 52: Easements claimed by Prescription, is to state in the register entry:

> "The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen."

The register entry then, typically, refers to the statutory declaration which was lodged in support of the application for the register entry. In the present case, it would be possible for the register entry to refer to the decision of the FtT and also this decision and to make those documents available for inspection. However, I consider that it will suffice in the present case if the register entry states:

> "The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen which was use for the purposes of access to and egress from the dominant tenement when being used as a joinery workshop."

58. The judge also referred to the historic use being limited to loading and unloading material for the purposes of the workshop. I do not see that as a relevant limitation which needs to be expressed in the register entry. The easement is a vehicular right of way for the benefit of the dominant tenement. The precise reasons why it was beneficial for the owner of the workshop to use that right of way to go to and from the workshop do not affect the character or extent of the use. At one point, I questioned whether the judge was intending to widen the extent of the easement by holding that the right of way carried with an ancillary right to station a vehicle on the yard for the purposes of loading and unloading: for such a possibility, see Bulstrode v Lambert [1953] 1 WLR 1064. However, Mr Smith for the Appellants told me that no such additional ancillary right was claimed. He accepted that when a vehicle was stationed for the purpose of loading and unloading, and only part of the vehicle was within the workshop building, the remaining part of the vehicle was still on land which was part of the dominant tenement and he did not assert that any part of the vehicle was stationed on the yard itself.

The result

59. I will allow the appeal and direct the Land Registry to make the register entries which are sought in the terms set out in paragraph 57 above.

MR JUSTICE MORGAN

DATE OF RELEASE: 14 July 2017

Neutral Citation Number: [2017] EWCA Civ 95

Case No: B2/2015/0751

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HHJ Faber
3LB00212

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2017

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE DAVID RICHARDS
The Rt. Hon. SIR STEPHEN TOMLINSON

- -

Between :

	Juliette Malisz Wodzicki	**Appellant**
	- and -	
	Monique Wodzicki	**Respondent**

- -
- -

Michael Paget (instructed by **Fisher Meredith**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing dates : 3 November 2016

- -

Judgment Approved**DAVID RICHARDS LJ :**

1. 1. This appeal arises out of a claim by the appellant to be the sole beneficial owner of a house (the property) registered in the joint names of the appellant's late father and his second wife, the respondent, but occupied since its purchase in 1988 exclusively by the appellant and her children.

2. 2. Following a trial with oral evidence from the appellant and other witnesses called by her, HH Judge Faber, sitting in the County Court at Central London, held that, following the death of the appellant's father (George), the respondent held the property on trust for the appellant and herself as beneficial owners. Paragraph 5 of the judge's order provides that "[t]o determine the extent of the parties' beneficial interest[s] there be an account taken at a further hearing before a District Judge." Although not stated in the order, the basis of the account was set out in the judgment:

> *"that there should be an accounting process to determine the extent of the parties' beneficial interests to be carried out by a District Judge who must determine as best as can be done the respective contributions invested by the Claimant in mortgage payments and the amount invested by the Defendant in*

maintenance and utilities and any other equitable payments due to the Claimant by way, for example, of occupation rent. To that end the Defendant will probably have to spend time and money on getting her full bank statements to show the extent of her investment over the years and the Claimant will have to produce hers to evidence the extent of her contribution to the mortgage payments."

1. 3. The appellant appeals with leave granted by Arden LJ against the order as to beneficial ownership. She seeks an order that she is the sole beneficial owner of the property. The judge also declared that, in addition to her beneficial interest in the reversion, the appellant has a life interest in the property and is entitled to occupation of it. There is no appeal against that part of the order.

2. 4. The appellant was born in 1962. After her parents (George and his first wife) were divorced in 1971, she had a somewhat disrupted childhood, living first with her mother in Mexico until 1974, when she was sent to Switzerland to live with her father shortly after his marriage to the respondent. However, the respondent did not accept this arrangement and from 1975 the appellant lived in Poland with her paternal grandparents until they died in 1978-79. She continued to live in Poland, marrying in 1983 and having two children, in 1983 and 1984. She left Poland in 1985 and her husband and children left Poland for Italy in 1986 where the appellant joined them. Her marriage broke down in 1987 and after living for a short time in Switzerland in a flat owned by her father, the appellant moved to the UK with her two children in 1987. She has lived in this country since then and has four further children, born in 1988, 1990, 1992 and 2000.

3. 5. Meanwhile, George and the respondent had moved from Switzerland to France, where they lived until George's death in 2010 and where the respondent still lives. George was a successful theatre designer and his work brought him to the UK from time to time.

4. 6. The property was purchased in 1988. George was named as the sole purchaser in the contract but the property was registered in the joint names of George and the respondent. The funds for the purchase were provided by an eight-year term loan by a bank in France to George and the respondent, secured by a mortgage on their jointly-owned house in France. The mortgage stated that the purpose of the loan was "to partially finance the purchase of a house located in England....to be occupied as a primary residence by the daughter of the borrower: Ms Malisz born Juliette Wodzicki". Repayment was due in eight annual instalments, and the respondent said in her witness statement that she and George repaid the loan over its term.

5. 7. The appellant was actively involved in the process of purchasing the house. The survey report was addressed to her, and the solicitors instructed on the purchase reported to her as well as to George.

6. 8. The appellant provided evidence that between 2001 and 2007 she spent some £5,000 on improvements to the property. She also provided evidence of loans totalling a larger amount taken out for the stated purpose of home improvements. She paid the

outgoings for the property, such as council tax, service charges and utility bills.

7. 9. George visited the appellant and his grandchildren at the property from time to time but never stayed there, while the respondent never visited the property at all. In her witness statement, the respondent described her contact with the appellant as sporadic.

8. 10. George died intestate in France in 2010. The appellant was informed by the respondent in a letter dated 26 August 2010. In that letter, the respondent suggested that if the appellant gave up any entitlement under French inheritance law, "I could gift the London house to you through a solicitor (without declaring it in France). You would have the house for yourself alone without sharing it." This suggestion was not pursued by the appellant.

9. 11. The proceedings were commenced in 2013 by the respondent for possession of the property. The appellant defended and counterclaimed on the basis that she was the sole beneficial owner of the property and was in any event, by reason of an agreement made when the property was purchased, entitled to occupy it indefinitely. As to her claim to beneficial ownership, the appellant's pleaded case was that George had promised her that when he had finished repaying the loan and when he thought she was "ready", he would transfer the property to her and in return she would pay for the upkeep, maintenance and outgoings. But for this promise she would have obtained other accommodation and would not have spent money on the property. The claim was put on the basis of either a common intention constructive trust or proprietary estoppel.

10. 12. The respondent's solicitors came off the record in March 2014 and thereafter the respondent has played no part in the proceedings. Her claim was subsequently struck out for non-payment of court fees. The claim proceeded on the counterclaim only and came on for trial before Judge Faber in July 2014, with judgment given on 24 September 2014.

11. 13. The judge heard oral evidence from the appellant and three other witnesses called by her. The respondent had filed a witness statement in August 2013, which the judge read and dealt with in her judgment, but the respondent did not attend the trial and did not give oral evidence, nor was she represented.

12. 14. The judge rejected the respondent's evidence that the property had been bought as a pied-a-terre for George when he was in England, that the appellant's name had been inserted in the mortgage simply because they needed to name an occupier in order to obtain the loan, and that they let the appellant live in the property provisionally as they had no immediate plans to live there. The judge found that George, the respondent and the appellant intended the property to be the appellant's long-term home.

13. 15. The judge did not, however, accept that the appellant was the sole beneficial owner of the property. She said in her judgment at [30]-[31]:

> *"30. The fact that it was put in joint names of George and the Claimant militates against that intention because it was not necessary to put it in their joint names to secure the mortgage. The loan was secured on the house which they had built in France. The fact that George put the English house in joint names is evidence that he intended his wife to be the joint owner*

and never made known to her expressly or impliedly that his daughter was to be the sole owner.

31. That would explain the content of the August 2010 letter from the Claimant to the Defendant offering that if the Defendant disclaimed her share of the French inheritance the Claimant would transfer the London house to her alone. That suggests to me that at that time the Claimant was proceeding on the basis that she was not the sole beneficial owner of the London house and that she and the Defendant both had beneficial interests in it. This is contrary to the case pleaded for her that the Defendant had no beneficial interest in the house."

1. 16. The judge held that the appellant and the respondent beneficially owned the property in the proportions to which they had respectively contributed to its purchase, maintenance and outgoings. As observed by Mr Paget, appearing on this appeal as he did below for the appellant, the judge determined the question of beneficial interests on the basis of a resulting trust.

2. 17. There are two principal grounds of appeal. First, it is said that the judge should not have adopted a solution based on a resulting trust but should have followed the steps set out in *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 to determine the extent of the beneficial interests under a common intention constructive trust. The judge should have properly considered the evidence with a view to inferring an agreement between the parties as to their respective beneficial interests, rather than proceeding straight to imputing an agreement. The adoption of a resulting trust in non-commercial setting was disapproved in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432. Secondly, the judge failed to consider the appellant's case that she was entitled to sole beneficial ownership by way of proprietary estoppel.

3. 18. As to the first ground of appeal, the starting point is that the appellant was not a registered proprietor of the property. The onus was therefore on her to establish that she had *any* beneficial interest in the property. Mr Paget relies on the appellant's evidence summarised above.

4. 19. The difficulty for the appellant in that evidence, which was accepted by the judge, is that George agreed to transfer the property to her once he had repaid the loan and "when he thought she was ready". The judge did not ignore this evidence but concluded, in view of the fact that the mortgage loan had been repaid in 1996 but George did not transfer the property, that she could "only infer that he never thought that [the appellant] was ready to take sole ownership". That was clearly a finding open to the judge on the evidence.

5. 20. There is the further difficulty that there was no evidence that George had told the respondent that it was his wish or intention to transfer ownership to the appellant in due course or that she had agreed to that course. As the judge found, the fact that the property was in the name of the respondent as well as George was evidence that George "intended his wife to be the joint owner and never made known to her expressly or impliedly that his daughter was to be the sole owner." The judge considered that the respondent's letter

dated 26 August 2010 was consistent with a belief by the respondent that she had a beneficial interest in the property. Again, those were, as it seems to me, findings open to the judge on the evidence.

6. 21. Nonetheless, Mr Paget submitted that it could be inferred that it was the common intention of all three parties that the appellant was to own the entire beneficial interest, because of the following facts and circumstances: although the funds were provided from a loan secured on the French property of George and the respondent, the property was purchased to provide a permanent home for the appellant: the appellant took the lead in the arrangements for the purchase; George made the promise to the appellant that he would transfer the property to her; the respondent never visited the property; neither George nor the respondent made any contribution to the maintenance or improvement of the property or had anything to do with it beyond servicing and repaying the loan used to purchase it; the Judge rejected the appellant's evidence and she did not attend the trial to support her witness statement.

7. 22. In my judgment, none of these facts and circumstances, whether taken singly or together, are sufficient to set aside the judge's findings which, as I have said, were open to her on the totality of the evidence.

8. 23. Mr Paget further submitted, as I understood him, that rather than proceeding on a basis of resulting trust, the judge should have gone on to impute to the parties an intention that the appellant should be the sole beneficial owner on the basis that this was in all the circumstances the fair outcome and it can therefore be assumed that it was intended by the parties. This, he submitted, was the course required by the decision and reasoning in *Kernott v Jones*, applied as here in a non-commercial context.

9. 24. This submission meets insuperable obstacles. First, the judge made a finding on the evidence as to the *actual* intention of the parties. It was not an intention that she imputed to the parties, but was an intention that she felt able to infer as a fact on the evidence. If that finding was fairly open to her on the evidence, as I consider it was, it leaves no room to go on to consider, essentially as a fall-back, the intention that may be imputed to the parties on a basis of fairness.

10. 25. Secondly, this is not, in my view, a case that is appropriate for an application of the approach laid down in *Kernott v Jones* as applicable to cases of co-habiting couples. I accept that the approach may be applied outside the precise confines of a co-habiting couple, notwithstanding the terms of the judgments in that case. It was, for example, applied in the case of two close friends in a platonic relationship sharing a flat that they had jointly bought: *Gallarotti v Sebastianelli* [2012] EWCA Civ 865. However, there was nothing close about the relationship between the appellant and the respondent. There is no evidence that they even saw each other once the appellant had settled at the property. It would stretch credulity too far to think that the respondent would have intended to make a gift to the appellant if she were in fact to repay the loan or any part of it or if the security against her jointly-owned French property were enforced.

11. 26. On the basis that the judge's finding that the respondent did not know of the promise made by George to the appellant stood, Mr Paget advanced in the course of his submissions in this court an argument that, as George and the respondent held the property as joint tenants, the respondent was bound by the promise as against the appellant. Relying on *Megarry and Wade: The Law of Real Property* (8th ed.) at 13-002,

he submitted that she was so bound because joint tenants are treated indivisibly by the world at large. He relied also on the decision of the House of Lords in *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478 that one joint lessee under a periodic lease can give a notice to quit which is binding on the other lessee(s)

12. 27. It is a startling proposition that the beneficial interest of one joint owner of a freehold property could be terminated without his knowledge by the other joint owner. It gains no support either from the general statement in *Megarry & Wade*, which is of course correct in the sense intended by the authors, or from *Hammersmith & Fulham LBC v Monk.* That case turned on the analysis of the position of joint lessees under a periodic tenancy. The tenancy could continue only with the consent of all the lessees, so a notice to quit served by one constituted his notice that the lease should not continue. It has no application to a purported disposal of a beneficial interest, as is apparent from what Lord Bridge said at page 490G-H. This submission was also at odds with Mr Paget's submission to the judge, correctly recorded by her in her judgment at [27].

13. 28. In those circumstances, the most generous conclusion available on those findings from the appellant's point of view was the conclusion reached by the judge, namely that the respondent's beneficial interest was limited to the contributions (if any) that the respondent had made to the repayment of the mortgage loan and, beyond that, the appellant was the sole beneficial owner of the property. It may, of course, be that the respondent made no contributions, in which case she will not, under the terms of the judge's order, have any beneficial interest in the property. The order treats any interest that George may have had as having passed in equity to the appellant. The judge does not explain how that was achieved, although paragraph 35 seems to suggest that it results from George's death, a conclusion that is not self-evident as a matter of legal analysis. Be that as it may, it is not challenged by the respondent and it is a conclusion that is highly favourable to the appellant.

14. 29. The alternative case advanced by the appellant before the judge, and repeated on this appeal, is that, even in the absence of a common intention constructive trust entitling her to sole beneficial ownership of the property, she was entitled to sole ownership by way of proprietary estoppel. The appellant complains that the judge did not deal with this alternative case in her judgment.

15. 30. A case for sole beneficial ownership based on proprietary estoppel founders for precisely the same reason as the case based on a common intention constructive trust, and this may well explain why the judge did not separately address it.

16. 31. Mr Paget rightly cites the celebrated statement by Oliver LJ in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 to the effect that proprietary estoppel requires A to act to his detriment, to the knowledge of B, as a result of an expectation created or encouraged by B. To establish this case against the respondent, the appellant must establish that George's promise was made with the knowledge of the respondent, for the reasons given above in relation to the common intention constructive trust. The judge found that the respondent did not know about the promise and, for reasons already given, the finding is not open to successful challenge.

17. 32. Accordingly, I would dismiss the appeal on all grounds.

18. 33. There is a curious feature of this case. Pursuant to the order made by the judge, a hearing was fixed to determine the respective financial contributions of the appellant and the respondent. The appellant filed evidence to establish her contributions but, in keeping with her past disengagement from the proceedings, no evidence was filed by the respondent. A hearing was fixed before Deputy District Judge Whiteley for 18 February 2015, which was attended by counsel for the appellant, with the respondent being neither present nor represented. In those circumstances, the outcome would seem to have been clear: subject to the possibility of an occupation rent (as to which I express no view) mentioned in the judge's order, the appellant was entitled to a 100% interest in the property. However, on being informed that the appellant was seeking an order to that effect, the Deputy District Judge, of his own motion, stayed the account and enquiry pending the determination of this appeal.

19. 34. It is wholly unclear to me why the Deputy District Judge thought that this was the appropriate course, given the terms of Judge Faber's order. When asked why the appellant had not sought to appeal against the stay, Mr Paget informed us that the appellant's position was that the Judge Faber's order was wrong for the reasons advanced on this appeal. Even if the order were wrong, it seems to me that this appeal was, as a practical matter, unnecessary. Unless the respondent seeks belatedly to file evidence as to any financial contribution she in fact made, the appellant should at the resumed hearing of the account and enquiry be entitled to a determination that she has a 100% interest in the property.

SIR STEPHEN TOMLINSON:

1. 35. I agree.

LADY JUSTICE GLOSTER:

1. 36. I also agree.

COMPULSORY ADR

JUNE 2021

Contents

INTRODUCTION

1. We have been asked by the Civil Justice Council (CJC) to report on the issues in relation to compulsory ADR. This request is not made in the context of any specific proposals for the introduction or extension of compulsory ADR but in order to inform possible future reform and development in this area. The views expressed here are those of the authors. The report has been shared with the Judicial ADR Liaison Committee and we are grateful for their very helpful input.[1]

2. This report addresses two questions:

   - **Can the parties to a civil dispute be compelled to participate in an ADR process? (The "legality" question)**
     This is fundamentally a question of the law of England and Wales and human rights law in particular.

   - **If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The "desirability" question)**
     We will suggest factors which, in our view, could point to compulsion being appropriate and others which may militate against it. We will not attempt a full review of every possible application of ADR or of compulsion to participate.

   We have set out a short summary of our conclusions below.

3. The debate over compulsion has been dominated by the Court of Appeal decision in ***Halsey v Milton Keynes*** [2004] 1 WLR 3002. In ***Halsey,*** the Court of Appeal reviewed the role of mediation, in particular, in the civil justice system. Rules were developed around the principle established in ***Dunnett v Railtrack plc*** [2002] 1 WLR 2434, of penalising victorious parties in costs if they had unreasonably refused to mediate. In

[1] The report and its conclusions have the support of the individual members of the Committee but obviously the organisations and professional bodies whom they represent have not yet responded officially. We hope they will do so in due course.

the course of the judgment, Dyson LJ (as he then was)[2] who gave the judgment of the Court answered both of the questions posed above (both the "legality" question and the "desirability" question) with a resounding "no".

4. In relation to the "legality" question, Lord Dyson said this:

> *"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court…"*

5. In relation to the "desirability" question, he said this:

> *"…Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. …If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. ...if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. …the court's role is to encourage, not to compel."*

6. The remainder of this report is structured as follows:

- **Section II** outlines the key concepts applicable to this report, including what we mean by "ADR" and "compulsion" and frames the key issues which fall to be considered in determining whether and how it may be introduced.

- **Section III** addresses the "legality" question. It summarises the cases, extra-judicial commentary and academic literature which consider the decision in ***Halsey*** and the lawfulness of compulsory ADR more generally. It also identifies areas of civil justice where, despite ***Halsey***, a form of compulsory ADR (or

[2] Although Lord Dyson was a Lord Justice of Appeal at the time that he gave the judgment of the court in *Halsey,* became a member of the Supreme Court and subsequently, was Master of the Rolls, we will refer to him in the remainder of this report as Lord Dyson.

something close to it) has been adopted. It concludes with a brief discussion of where the law stands on the legality of compulsory ADR.

- **Section IV** addresses the "desirability" question. It considers the key arguments made against compulsory ADR (other than legality), including concerns as to its efficacy when participation is not voluntary, and objections based on the relationship between ADR and the court's constitutional role in developing the law and dispensing justice.

Executive Summary

7. To summarise our responses to the two key questions outlined above:

   - **The legality question:** we have concluded that parties can lawfully be compelled to participate in ADR.

   - **The desirability question:** we think we have identified conditions in which compulsion to participate in ADR could be a desirable and effective development. In doing so we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted.

8. In our view, appropriate forms of compulsory ADR, where a return to the normal adjudicative process is always available, are capable of overcoming the objections voiced in the case law and elsewhere and could be introduced.

9. The rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted.

10. Provided certain factors are borne in mind in designing the scheme, a procedural rule which requires parties to attempt ADR at a certain point or points, and/or empowers the court to make an order to that effect, is, in our opinion, compatible with Article 6 of the European Convention on Human Rights. The factors requiring consideration whenever compulsion is being considered will include:

- the cost and time burden on the parties;
- whether the process is particularly suitable in certain specialist areas of civil justice;
- the importance of confidence in the ADR provider (and the role of regulation where the provider is private);
- whether the parties engaged in the ADR need access to legal advice and whether they have it;
- the stage(s) of proceedings at which ADR may be required; and
- whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.

11. It is appropriate to permit sanctions for breach of a rule or order requiring participation in ADR. If ADR is no longer "alternative" or external to civil justice, then parties can surely be compelled to participate in ADR as readily as they can be compelled to disclose documents or explain their cases. The sanction for failure to participate may be to prevent the claim or defence continuing, either by making the commencement of proceedings conditional on entering ADR, or empowering the court to strike out a claim/defence if a party fails to comply with a compulsory ADR order at a later stage in the proceedings. Any strike-out could be set aside if there was a valid reason for non-compliance.

12. This is consistent with the use of initial prompts towards settlement in an online procedure and the active role of a case officer or judge in seeking to facilitate settlement.

13. We do not make detailed proposals for reform in this paper, but make three specific observations on the form compulsory ADR might take:

- First, where participation in a suitable and effective form of ADR occasions no expense of time or money by the parties, making it compulsory will not usually be controversial.

- Second, we foresee that greater use of compulsory judge-led ADR processes will prove acceptable, given they are free and appear effective in the contexts in which they are already compulsory.

- Third, compulsory mediation may be considered, provided it is sufficiently regulated and made available where appropriate in short, affordable formats.

II. FRAMING THE DEBATE: WHAT IS COMPULSORY ADR?

14. Perhaps because the compulsion debate has been framed against the decision in ***Halsey***, it is customary to think of compulsion in the context of case management in High Court proceedings and mediation as the relevant form of ADR. But it is clear that the question can arise in a huge variety of different types of dispute, involve different forms of ADR and different forms of "compulsion". Given the variety of contexts in which the question can arise, it is plainly difficult to identify a single simple answer to the questions: how, where, when and in what circumstances is compulsory ADR permissible and/or desirable?

Types of dispute

15. Whether and how the use of ADR can be encouraged or required will vary widely depending on the context, the value of the claim, the different subject matters in dispute and, to some extent, upon whether the parties are likely to be advised or represented. What works in employment cases may not be appropriate in disputes between neighbours, family disputes, commercial court claims or possession proceedings.

Types of ADR

16. We define ADR broadly as including any dispute resolution technique in which the parties are assisted in exploring a settlement by a third party, whether an agent external to the court process (e.g. a mediator) or a judge playing a non-adjudicative role. This might also be through an online system or a combination of an online system and a mediator available as necessary. In such a system the parties at all times

retain the ability to decline to settle and return to the adjudicative process if they choose to do so.[3] Within that definition, the most relevant ADR processes will include:

- The archetypal mediation conducted usually over the course of a day by a neutral individual (who may be a commercial provider or may even be a judge).
- Short-form telephone mediations, typically time-limited, as under the Small Claims Mediation scheme.
- Evaluative appraisals, typically, but not necessarily, conducted by a judge, in the form of Early Neutral Evaluations (***ENE***s) and Financial Dispute Resolution hearings in the Family Court.
- Ombudsmen performing a function which may blend elements of conciliation with an evaluation. (Where the ombudsman's recommendation is binding on one or both sides, as it is in several consumer contexts, then as with arbitration the schemes are likely to raise different constitutional questions and to be governed by statute).
- Online processes. These may be as simple as blind bidding systems. They may involve more sophisticated tools such as AI, and may be more proactive in generating or suggesting solutions. These systems may be available *ad hoc,* or they may be built into online court systems and be available and accessible throughout the court process. Online systems may also incorporate stages at which traditional mediation is conducted by a neutral third party.

17. It will be obvious that these processes vary widely as to: (i) the cost and time burden they place on the parties; (ii) the nature and extent of the court's involvement; (iii) the kind of neutral third party who might be involved; and (iv) the kinds of solutions and

[3] This definition excludes arbitration even though arbitration is sometimes listed as a form of ADR. Arbitration is an adjudicatory process in its own right and represents a permanent diversion from the court process. It culminates in an award from which there is typically only a very limited right of appeal. Arbitration therefore inevitably raises different issues in relation to constitutionality.

remedies that the process can provide (and the extent to which that differs from what is on offer in ordinary court proceedings).

Forms of compulsion and timing

18. Compulsion need not simply involve the exercise of a case management power by a judge in a given case. Compulsion can equally well be achieved by simply mandating participation in ADR as an automatic requirement for commencing or proceeding with litigation.

19. Thought must also be given to the stage of proceedings at which parties may be required to attempt ADR. In some areas of civil justice, it might be appropriate to make ADR a pre-condition to issuing a claim, or a compulsory part of the early stages of the procedure: such early-stage ADR may promote swift and cost-efficient resolution of the dispute. In other kinds of cases – particularly legally and factually complex claims – it may be that ADR can only sensibly take place later in the process, for example after the case has been pleaded, after at least some disclosure has taken place, or even after the exchange of witness statements. On the other hand, these are the very cases in which costs can rapidly outstrip the sums in issue.

20. Moreover, a "hard-and-fast" procedural rule might be workable only in some areas; in others, it may be better to leave it up to the court or tribunal to decide precisely if and when to make an order compelling parties to enter ADR. As Sir Geoffrey Vos, the Master of the Rolls, has recently commented, in some cases it might be appropriate to direct parties towards ADR more than once in the same set of proceedings.[4]

[4] *The Relationship between Formal and Informal Justice*, speech to Hull University, Sir Geoffrey Vos MR, 26 March 2021 (at [46]). See here.

III. CAN THE PARTIES TO A CIVIL DISPUTE BE REQUIRED TO PARTICIPATE IN AN ADR PROCESS WITHOUT THEIR CONSENT?

21. Before we can embark on any significant reform in this area, it is important to answer the obvious preliminary question: can parties lawfully be forced to participate in ADR without their consent?

22. In this section, we examine the way this question has been answered in the courts of England & Wales, juridical commentary and the academic literature. We focus in particular on Article 6 of the Convention, which is generally perceived to be the key potential impediment to compulsory ADR across the civil justice landscape. We also identify the specific contexts in which, exceptionally, some form of compulsory ADR has already been adopted in certain kinds of proceedings. Finally, we draw the strands together and discuss the current status of the law.

Halsey and Deweer

23. As we have already mentioned, the "legality" question was addressed in ***Halsey***, in the context of the mediation of a High Court action and was answered in the negative. We note that the views expressed did not strictly form part of the Court's reasoning. The full citation from the Article 6 part of the Judgment in ***Halsey v Milton Keynes General NHS Trust*** [2004] 1 WLR 3002 is as follows (at [9]):

> *"It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6."*

24. As this quotation makes clear, Lord Dyson's conclusion on the Article 6 issue relied heavily on the European Court of Human Rights' decision in ***Deweer***. It is therefore helpful briefly to outline the facts of that case and the Strasbourg Court's conclusions.

25. Mr Deweer was a Belgian butcher who faced a prosecution over a breach of trading regulations. He was told that if he paid a fine, he could avoid the prosecution and also avoid the immediate closure of his shop. Mr Deweer paid the fine, but brought proceedings against the Belgian authorities alleging that his rights under Article 6 had been denied because he had not been given a fair trial. The Strasbourg Court agreed. It found (at [49]-[54]) that although a party could (in principle) waive his right to a criminal or civil trial by entering into an agreed settlement, Mr Deweer's waiver had been procured by constraint, and was not voluntary. The consequences of having his business closed were so severe that the butcher had no practical alternative but to agree to pay the 10,000 francs; in effect, the state had inflicted a penalty on the butcher without a trial.

26. It is fair to say that the Strasbourg Court's decision was focused on the specific circumstances in ***Deweer***, and does not obviously address the broader question of whether parties can *ever* be compelled to submit to ADR. Various commentators have doubted whether ***Deweer***, properly understood, supported Lord Dyson's conclusions in that regard in ***Halsey***. At the very least, Lord Dyson's reference to arbitration is hard to understand, as the ***Deweer*** case was not about arbitration (it merely makes an oblique reference to the Belgian courts' view of arbitration clauses). Arbitration is a "cul de sac" which removes disputes from the court process entirely, unlike the forms of ADR considered here; it raises quite different issues in terms of access to the court.

Subsequent case-law in England Wales

27. A series of judgments from the Court of Appeal took different views on the status of ***Halsey***. In ***Ghaith v Indesit Co UK Ltd*** [2012] EWCA Civ 642, Longmore LJ, in a postscript to his judgment which criticised the parties for failing to mediate prior to the hearing of the appeal, noted that there was a new mediation pilot in the Court and said (at [26]): "*the Court has … decided that any claim for less than £100,000 will be*

the subject of compulsory mediation." However, this comment is something of an outlier. The ***Halsey*** orthodoxy was swiftly reaffirmed by Lloyd LJ in ***Swain Mason v Mills & Reeve*** [2012] EWCA Civ 498 at [76]: "*In Halsey, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate*."

28. Thereafter, Sir Alan Ward gave the leading judgment in ***Wright v Michael Wright (Supplies) Ltd*** [2013] C.P. Rep. 32, in which he queried whether ***Halsey*** required revision.

> *"3. … [The first instance judge] attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? … You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, for which I am partly responsible, where at [9] in the Judgment of the Court (Laws and Dyson L.JJ. and myself), Dyson L.J. said:*
>
> > *"It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."*
>
> *Was this observation obiter? Some have argued that it was….*
>
> *Does CPR r.26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which Halsey did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really "an unacceptable obstruction" to the parties' right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field."*

29. The White Book notes that in some cases, the courts have drawn a distinction between orders for compulsory mediation and orders which direct parties to *attempt* mediation.[5] Thus, in ***Uren v Corporate Leisure (UK) Ltd*** [2011] EWCA Civ 66 Smith LJ

[5] White Book 2021 Vol. II, paragraph 14-7.

remitted an action for retrial in the High Court and stated (at 73]): "*I would also direct that, before the action is listed for retrial, the parties should attempt mediation*." Moreover, in ***Mann v Mann*** *[2014] EWHC 537 (Fam)*, Mostyn J considered the implications of ***Halsey*** and Sir Alan Ward's comments in ***Wright*** in deciding whether to order a stay for a specified period, expressly for the parties to consider mediation. He accepted that he could not compel the parties to mediate, but such an order – even when supported by an "Ungley" order which made clear that an unreasonable refusal to participate in the ADR would attract a costs sanction – did not amount to unlawful compulsion (see [16]-[17], [36]). Norris J applied the same logic to boundary disputes in ***Bradley v Heslin*** [2014] EWHC 3267 (Ch), stating at [24]:

> *"The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice."*

30. The court's power to make an order for a stay of its own motion is embedded in CPR 26.4, which provides that if a court considers a stay for the parties to attempt ADR is appropriate, it will "*direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate*" (CPR r.26.4(2A).[6]

31. More recently, in ***Lomax v Lomax*** [2019] 1 WLR 6527, the Court of Appeal considered ***Halsey*** in the context of an appeal concerning the court's power to order ENE where one party did not consent. The case turned on the interpretation of CPR 3.1(2)(m), which makes express provision for the court to order ENE. It may:

> "*take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case*."

32. Lord Justice Moylan (with whom Rose and McCombe LJJ agreed) gave the leading judgment. At [21], Moylan LJ noted that it was put to the court that, following ***Halsey***,

[6] Similarly, in proceedings started at the County Court Business Centre and the County Court Money Claims Centre, authority to stay proceedings for up to 28 days for ADR is expressly granted to Legal Advisers (Paragraph 15, Schedule to Practice Direction 2E).

the court had no power to order a party to submit their dispute to ADR if they did not consent. However, he distinguished ***Halsey*** at [25] on the basis that it dealt only with the power to order parties to submit to mediation. He went on:

> *"26. In any event, ENE does not prevent the parties from having their disputes determined by the court if they do not settle their case at or following an ENE hearing. It does not, in any material way, obstruct a party's access to the court. In so far as it includes an additional step in the process, this is not in any sense an "unacceptable constraint", to use the expression from Halsey v Milton Keynes. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases."*

33. Although he had implied that mediation, as opposed to ENE, might not be compellable, Moylan LJ noted further that "*the court's engagement with mediation has progressed significantly since* ***Halsey v Milton Keynes*** *was decided*", and extolled the virtues of compelling parties to engage in some form of ADR:

> "*29. Looking at the issue more generally, as I have already described, the great value of a judge providing parties with an early neutral evaluation in a case has been very well demonstrated in financial remedy cases. Further, the benefits referred to above have been demonstrated not only in cases where the parties are willing to seek to resolve their dispute by agreement and are, therefore, willing to engage in an FDR. In my experience and that, I would suggest, of every other judge who has been involved in financial remedy cases, the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR. As Norris J said in Bradley v Heslin [2014] EWHC 3267 (Ch) at [24]:*
>
> > *'I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.'"*

34. At [31] he concluded that the court could order ENE even against a party's will, and allowed the appeal.

35. Although Moylan LJ noted Lord Dyson's conclusions on Art. 6 in ***Halsey*** at [11] of his judgment, he did not address the Article 6 issue at any great length. Nonetheless, it is notable that at [26] of his judgment, he considered the implications of a compulsory

ENE order for the parties right of access to the court, and concluded that it was not an "unacceptable constraint" on that right.

36. Last year, in *McParland v Whitehead* [2020] Bus LR 699,[7] the then Chancellor, Sir Geoffrey Vos gave a short judgment following a Disclosure Guidance Hearing under the new Disclosure Pilot regime. He raised the possibility that, following ***Lomax***, a court may make an order for compulsory mediation (although such an order was not necessary in the instant case):

> *"42. Finally, the court encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred… In this connection, I mentioned the recent Court of Appeal decision of Lomax v Lomax [2019] 1 WLR 6527 to the parties. The question in Lomax was whether the court had the power to order parties to undertake an early neutral evaluation under CPR r 3.1(2)(m). It was held that there was no need for the parties to consent to an order for a judge-led process. I mentioned that Lomax inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002. In the result, the parties fortunately agreed to a direction that a mediation is to take place in this case after disclosure as I have already indicated."*

Subsequent European Decisions

37. *Rosalba Alassini* [2010] 3 C.M.L.R. 17[8] was a preliminary reference to the Court of Justice from Italy. Customers brought proceedings against two telephone companies, seeking damages for breach of contract, under the EU Universal Service Directive.[9] The telephone companies contended that the actions were inadmissible as the applicants had not first attempted mediation in accordance with the Italian implementing legislation. The Italian law made such legal actions conditional on a prior attempt to achieve an out-of-court settlement. If the parties declined to submit to mediation, then they would forfeit their legal right to bring proceedings before the Court.

[7] Master McCloud has provided detailed guidance on the procedure for conducting judicial ENE in the Queen's Bench Division in *Telecom Centre (UK) Limited v Thomas Sanderson Limited* [2020] EWHC 368 (QB).

[8] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, judgment of 18 March 2010 ECLI:EU:C:2010:146.

[9] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

38. The Italian court made a preliminary reference to the Court of Justice, which asked whether the Italian law complied with Article 6 and Universal Services Directive.[10] The Court first considered whether the Italian legislation contravened the principle of effective judicial protection of rights under EU law. It held that it was compliant with that principle:

> *"52. As regards the principle of effectiveness, it is admittedly true that making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals by the Universal Service Directive.*
>
> *53. However, various factors show that a mandatory settlement procedure, such as that at issue, is not such as to make it in practice impossible or excessively difficult to exercise the rights which individuals derive from that directive.*
>
> *54. First, the outcome of the settlement procedure is not binding on the parties concerned and thus does not prejudice their right to bring legal proceedings.*
>
> *55. Secondly, the settlement procedure does not, in normal circumstances, result in a substantial delay for the purposes of bringing legal proceedings. The time-limit for completion of the settlement procedure is 30 days as from the date of the request and, on expiry of the deadline, the parties may bring legal proceedings even if the procedure has not been completed.*
>
> *56. Thirdly, for the duration of the settlement procedure, the period for the time-barring of claims is suspended.*
>
> *57. Fourthly, there are no fees for the settlement procedure before the Co.re.com. In the case of the settlement procedures before other bodies, there is nothing in the documents before the Court to suggest that they entail significant costs."*

39. The Court then turned to Article 6, and whether the Italian legislation was a proportionate restriction on the right to a fair trial of the customers seeking to claim from the telephone companies. It concluded that it was proportionate, given the legitimate cost- and time-saving aims:

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[10] *Rosalba Alassini*, [21].

"61. … it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the ECHR and which has also been reaffirmed by art.47 of the Charter of Fundamental Rights of the European Union …

62. In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.

63. Nevertheless, it is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed…

64. However, as the Italian Government observed at the hearing, it must first be noted that the aim of the national provisions at issue is the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, and they thus pursue legitimate objectives in the general interest.

65. Secondly, the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem—in the light of the detailed rules for the operation of that procedure, referred to in [54]–[57] of this Judgment—disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.

66. In the light of the foregoing, it must be held that the national procedure at issue in the main proceedings also complies with the principle of effective judicial protection, subject to the conditions referred to in [58] and [59] of this Judgment".

40. In *Menini v Banco Popolare Società Cooperativ* [2018] C.M.L.R 15,[11] the Court of Justice provided further detail in relation to what it considered to be the necessary features of a scheme which renders access to the courts conditional on attempting ADR:

> *"60. … the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.*
>
> *61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires..."*

The wider discussion of *Halsey*

41. In a speech to the solicitors' firm SJ Berwin in June 2007,[12] Mr Justice Lightman described Lord Dyson's comments in Art. 6 in ***Halsey*** as "wrong and unreasonable", for two reasons:

> *"(1) the court [in Halsey] appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division."*

[11] Case C-75/16, judgment of 14 June 2017, ECLI:EU:C:2017:457.
[12] *Mediation: An Approximation to Justice*, Mr Justice Lightman, 28 June 2007, at [8].

42. Lightman J's criticisms were echoed in a speech by Lord Phillips (then Lord Chief Justice) which he made at the International Centre for Dispute Resolution in New Delhi in March 2008.[13]

> *"The facts of Deweer are a long way away from the imposition of a mediation order. That case demonstrates that a coerced agreement that involves waiving the right to trial will infringe Article 6.*
>
> *Does if follow from Deweer that it is contrary to the citizen's right to have his dispute resolved by a court to compel him first to try to reach an agreement by mediation? I think that it depends what you mean by 'compel'. This involves considering the sanctions if the litigant does not comply with the court order to attempt mediation. It is of the essence of mediation that the parties are prepared to consider foregoing their strict legal rights. What of the litigant who simply refuses to contemplate this? Who when the court orders him to attempt mediation simply says 'no I won't'. If you commit him to prison for contempt of court then you can truly say that you are compelling him to mediate. What if you say – unless you attempt mediation you cannot continue with your court action. In quite a lot of jurisdictions mediation is ordered by the court on this basis.*
>
> *I think that if a litigant in Europe was subjected to such an order, refused to comply with it and was consequently refused the right to continue with the litigation, the European Court of Human Rights at Strasbourg might well say that that he had been denied his right to a trial in contravention of Article 6. … Whether such a scenario is a very likely is another matter. Experience shows that where a court directs the parties to attempt mediation they usually comply."*

43. Thus, Lord Phillips' view was that compulsory ADR *might* infringe Article 6, depending on the sanctions for non-compliance: an order preventing a party continuing with its case if it did not attempt ADR might cross the line.

44. In a speech to the Civil Mediation Council National Conference a few months after Lord Phillips' speech,[14] Sir Anthony Clarke MR also opined on ***Halsey*** and Article 6. He turned first to Lightman J's point that compulsory ADR was a feature of other legal regimes in Europe and elsewhere, which he felt was "*clearly right*":

[13] *Alternative Dispute Resolution: An English Viewpoint*, speech by Lord Phillips of Worth Matravers of 29 March 2008, pp13-15.

[14] *The Future of Civil Mediation*, speech by Sir Anthony Clarke MR, 8 May 2008.

> *"9. … A number of European states such as Belgium and Greece, both signatories to the Human Rights Convention, have introduced compulsory ADR schemes without, as far as I am aware, any successful Article 6 challenges. Equally, Germany's federal states can legislate to require litigants to either engage in court-based or court-approved conciliation prior to the formal commencement of litigation. The European Union itself acknowledges in Article 3.2 of its Directive on Mediation that the encouragement it offers to mediation is made 'without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system. . .' Equally, compulsory ADR schemes have been introduced in a number of US jurisdictions. For instance, New York has established mandatory arbitration in claims coming before a trial court where an official arbitration programme has been established for claims of a certain value. Similar schemes have been introduced in other states, for instance California. The federal district courts can also require parties to mediate disputes under a power granted by section 652 of the Alternative Dispute Resolution Act (28 USC).*
>
> *10. Taken together, what could be described as the European and US approach to ADR, appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6 or of the equivalent US constitutional right of due process. This suggests, admittedly without hearing argument, that the Halsey approach may have been overly cautious. This was not a point that was investigated in detail in Halsey and (who knows) may be open to review – either by judicial decision or in any event by rule change."*

45. Sir Anthony then turned to ***Deweer***, and the statement of the Strasbourg Court at [49] of its judgment that "*any measure or decision alleged to be in breach of Article 6 calls for careful review*":

> "*13. This statement is a long way away from declaring that mediation is contrary to Article 6 ECHR."*

46. Ultimately, some years later (in a speech in 2010), Lord Dyson concluded that his comments on Article 6 in ***Halsey*** had been wrong, although he defended his overall decision:[15]

> *"What I said in Halsey was that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction to*

[15] *A word on Halsey v Milton Keynes*, speech by Lord Dyson given at the CIArb's Third Mediation Symposium in October 2010, and published in the journal *Arbitration* (2011, 77(3), 337-341).

their right of access to the court in breach of art.6. I think those words need some modification not least because the European Court of Justice entered into this territory in March this year in the case of Rosalba Alassini."

47. Lord Dyson went on to discuss the European Court of Justice's decision in *Rosalba Alassini*,[16] to which we have referred above. As we mentioned, the Court held that Italian telecoms legislation which required customers suing phone companies to attempt mediation did not breach Article 6. Lord Dyson also noted Article 5(2) of the EU Mediation Directive,[17] which provides that Member States may make mediation compulsory provided it does not prevent parties from exercising their right of access to justice. On that basis, Lord Dyson conceded: "*it is clear that in and of itself compulsory mediation does not breach art. 6*."

48. Accordingly, Lord Dyson accepted that some of Lord Clarke's criticisms of the decision in ***Halsey*** were well-founded, but suggested that there could still be circumstances in which compulsory ADR would breach Article 6:

> *"[Lord Clarke] said "we can safely say that there may well be grounds for suggesting that Halsey was wrong on the Article 6 point". He put that in a typically restrained way, but it is interesting to see that he based that conclusion on two points; the first was a European point that compulsory mediation existed in other Member States, and secondly an understanding of mediation, unlike arbitration, as forming part of court proceedings. I see the force of these points which have now been reinforced as I say by recent developments in Europe. It is undoubtedly true that compulsory mediation exists in the legal order of the Council of Europe Member States and indeed other common law jurisdictions, but this is not in itself proof that ordering parties to mediate or forfeit their access to the court would not breach art.6 and I emphasise, "or forfeit their access to the court". That would be a very strong thing to do. As far as I am aware this issue has not been litigated in other jurisdictions. As regards the second point made by Lord Clarke, that mediation is an integral part of the civil procedure rights process, I would say that it all depends on the nature of the court's order for mediation. In his view, at worst, an order to mediate delays the trial if mediation is unsuccessful. I think that the form of compulsory mediation which Lord Clarke appeared to be describing, namely where courts order parties to mediate, but do not penalise them for not taking part in the mediation (so that at worst the trial is delayed) would certainly not fall foul of art.6. If Lord Clarke was suggesting that mediation does not breach art.6 because it is an integral part*

[16] *Rosalba Alassini v Telecom Italia* [2010] 3 C.M.L.R. 17.

[17] Directive 2008/52/EC of the European Parliament and Council on certain aspects of mediation in civil and commercial matters.

of civil procedure process, I would say that this does not necessarily mean that an order for mediation involves no breach of art.6. It all depends on the terms of the court order for mediation."

49. Indeed, later in his speech he sought to minimise the implications of *Rosalba Alassini*:

> *"… it is one thing to compel parties to consider mediation, it is quite another to frogmarch them to the mediation table, specifically, if the result of a refusal to be frogmarched is to deny them access to the courtroom. The Judgment of the ECJ in Rosalba Alassini does not rule that compulsory mediation will never breach art.6. I am of the view that in some circumstances where, for example, the costs of mediation were very high (and it is interesting that in the Rosalba Alassini case the compulsory mediation was free) compelling a party to mediate could still perhaps be considered a denial of access to justice.*
>
> *…*
>
> *"The ECJ has settled the art.6 issue for cross-border cases. Its decision has not settled the question of whether compulsory mediation coupled with a denial of access to the court would breach art.6. But I accept that it would appear to have settled the art.6 issue in a case where there is merely a preliminary step which the parties are required to go through which, if unsuccessful, would leave them free to litigate; and as I said earlier, I would no longer adhere to what I said about art.6."*

50. Lord Dyson concluded that overall, his view had not changed since ***Halsey*** and he continued to believe that ADR should not be compulsory.

51. Lord Neuberger took a similar line to Lord Dyson in a 2015 speech to the Civil Mediation Conference in 2015.[18] Whilst he did not refer expressly to the Article 6, he did suggest that compulsory mediation could interfere with a fundamental constitutional right of access to the courts, if it was used as a substitute for litigation:

> *"9. The right of access to courts is fundamental and, like all rights, it has to be genuinely available to all. And so mediation must not be invoked and promoted as if it was always an improved substitute for litigation. People plainly should have the constitutional right to refuse to agree terms because they want their day in court: by the same token, they have the same constitutional right to refuse to mediate if they want their day in court. The delivery of justice is a fundamental constitutional function of any civilised government: it is not just a service, while the provision of mediation is just a service – and, I must emphasise, that in*

[18] *Keynote Address: A View From On High,* Civil Mediation Conference 2015, Lord Neuberger, 12 May 2015.

no way denigrates mediation. Indeed, in practical terms, although I have characterised it as a disadvantage, it can be said to be an advantage, because the constitutional role of the courts leads to significant constraints on litigation which do not apply to mediation (or indeed to arbitration): the requirement for public hearings, the relatively inflexible rules and the constraint on remedies are but three examples."

Academic Discussion

52. Recent academic opinion appears to favour the view that provided parties retain the right to proceed to court at all stages participation in ADR can be made compulsory without any breach of Article 6.[19] A slightly different view is taken by Shipman in *Compulsory Mediation: The Elephant in the Room* (CJQ 2011 30(2), 163-191), which concludes a lengthy analysis by suggesting that provided sanctions for non-compliance are proportionate and considered there should be no breach of Article 6.

Existing examples of compulsion to use ADR in the civil justice system in England & Wales

53. It seems to us important as context for this paper to note that at a number of points – despite the fact that the views expressed in ***Halsey*** have not subsequently been doubted by any appellate court – litigants are already to a greater or lesser extent being compelled to take part in ADR. As the CJC Working Party on ADR observed:[20]

"If compulsory ADR represents a constitutional rubicon then it does seem to have been crossed a number of times already."

54. A detailed summary of existing procedural rules which establish some form of compulsion – or at least encouragement – to engage in ADR is set out in **Appendix I**. In brief summary, the following are worthy of note:

- **Early Neutral Evaluation (*ENE*) hearings**: ENE involves a neutral individual with relevant legal expertise – typically a judge – convening a hearing in which s/he expresses an opinion about a dispute (or one element of it). As noted at

[19] Ahmed, *A more principled approach to compulsory ADR* (JPIL 202, 4, 277-289. Feehily, *Creeping Compulsion to mediate, the Constitution and the Convention* (NILQ 69(2): 127-146).
[20] ADR and Civil Justice, Interim Report, October 2017, para 8.5.8.

paragraph 31 above, in the contentious probate case ***Lomax* v *Lomax*** the Court of Appeal held that under CPR 3.1(2)(m), the Court has the power to order the parties to attend an ENE without their consent, in an appropriate case (and ENE is particularly likely to be appropriate in financial remedy cases).

- **Financial Dispute Resolution (*FDR*) appointments:** FDR is a court-assisted negotiation process in family cases, where the parties appear before a District Judge in a without prejudice meeting/hearing, intended to facilitate settlement between parties and *"reduce the tension that inevitably arises in family disputes*".[21] It is a standard – and compulsory – part of the procedure to be followed when a party makes an application for a financial remedy under Part 9 FPR, and usually takes place following the first directions hearing. Both parties must attend the FDR unless the Court orders otherwise.

- **The new RTA Small Claims Protocol:** from May 2021, claimants in very low-value (less than £5,000) personal injury claims arising from road traffic accidents must follow a new pre-action protocol. Before initiating a claim, the claimant must provide certain information via a new, dedicated online portal, and – in cases where liability is admitted – the defendant's insurer must make a settlement offer within a set time frame. The Protocol makes clear that parties are expected to attempt to settle the claim, and failure to follow the Protocol by either party will result in costs consequences in any related litigation. Moreover, the claim can move back and forth between the portal and the court. Where the parties at different stages of the process fail to reach an agreement within the portal – for instance on liability – the case goes back to the court. Then, if the court determines there is liability, the default setting is that the case has to return to the portal.[22]

[21] Paragraph 6.1, Family Practice Direction 9A.

[22] See PD27B, paragraph 2.16(2), which provides: "*Where the court finds that the defendant was either liable in full or in part and does not reallocate the claim under sub-paragraph (3) below, the court— (a) will stay the proceedings and direct that the parties use the procedure set out in sections 7, 8 and 9 of the RTA Small Claims Protocol to progress the claim*". Thus, the court will direct the parties to use the portal to progress the claim: essentially a form of order that the parties must submit to engage in ADR.

- **ACAS Early Conciliation**: a person may not present an application to institute Employment Tribunal proceedings (of almost all types) without first obtaining an early conciliation certificate from ACAS. This is not truly *compulsory* ADR: the individual is required only to provide contact information to ACAS, and may refuse to engage in any conciliation process from the outset. However, it amounts at least to compulsory initial contact with an ADR provider.[23] Indications are that ACAS is frequently successful in developing a substantial engagement with the parties. Sometimes the ACAS involvement can continue over weeks or months and ACAS remain available throughout the life of any proceedings.

- **Mediation Information and Assessment Meetings (*MIAM*)**: A MIAM is a short meeting[24] conducted by a trained mediator, intended to provide information to litigants about mediation as a means of solving disputes. Before making certain applications in family proceedings (including private law applications relating to children and proceedings for a family remedy), an applicant must attend a MIAM. The MIAM process is more demanding of litigants than the ACAS process: the applicant is obliged to meet with a trained mediator, and his/her application will not be progressed without that taking place (unless one of the limited exemptions such as that for cases with a risk of domestic violence applies). However, like the ACAS process, it is obviously not a full-blown mediation. Only the applicant is required to attend (the respondent is merely "expected" to participate and generally does not do so). The mediator provides information about the process and together with the party considers whether mediation would be useful or appropriate in the immediate case.

- **Localised small claims "DRH[25]" hearings**: Certain County Court hearing centres in Hampshire, Dorset, Wiltshire and Romford have established a process whereby cases in the small claims track are called in for a compulsory

[23] The Employment Tribunals in England and Wales also run a judge led facilitative mediation for complex cases in addition to the pilot commenced in Birmingham which is referred to below.

[24] During the Covid-19 pandemic, MIAMs have generally been conducted via videoconference in lieu of an in-person meeting.

[25] "DRH" stands for Dispute Resolution Hearing.

conciliation and case management hearing led by a District Judge (akin to an ENE). Attendance is compulsory, and parties who do not attend may have their claims struck out. For the moment, this is a localised strategy which is still far from universal across the County Court jurisdiction. However, these so-called "DRH hearings" appear to have enjoyed success at least in certain hearing centres (such as Birmingham, where settled rules and standard paperwork have been developed). The hearings are within the scope of a review by a working party of the Civil Justice Council chaired by HH Judge Cotter, which has recently published its interim report.[26]

- **West Midlands Employment Tribunal pilot**: Since July 2020, Tribunal Judge Lorna Findlay has overseen a pilot ADR scheme for employment cases listed for trial lasting more than 6 days. A 2-hour ADR hearing is listed six weeks after the exchange of witness statements, in which a judge trained in mediation (who will not conduct the trial) seeks to narrow the issues and facilitate settlement. If the parties do not reach agreement at the hearing, the judge may also list the matter for a longer judicial mediation hearing. Like the ENE hearing ordered in ***Lomax***, these hearings constitute a judge-led form of ADR that is "baked in" to the ordinary court process; albeit they occur somewhat later in the proceedings. The pilot is ongoing and has been extended to a number of other regions.

- **Court of Protection:** we understand that compulsory DRH hearings are held in the Court of Protection in property and affairs cases on a similar model to FDRs in family proceedings.

55. As Sir Anthony Clarke MR noted in extra-judicial comment (see paragraph 44 above), various jurisdictions, within the Council of Europe and beyond, have adopted forms of compulsory ADR. The lessons which may be learned from experiences in other jurisdictions are considered in Section III below. However, it is worth briefly outlining the key features of such schemes, which – at least in their present form – do not

[26] *The Resolution of Small Claims: Interim Report*, Civil Justice Council, April 2021.

appear to have encountered significant issues in terms of parties' Convention or constitutional rights of access to the courts:

- **Italy**: Italian judges have the power to order parties to attempt mediation in any civil dispute, requiring them to file a request for mediation with an accredited mediator within a set time-frame. Moreover, in some kinds of civil disputes – including certain real estate and family matters – parties are required to attend an "initial mediation session" as a pre-condition for pursuing their claim. This consists of a meeting with a mediator in which s/he explains the mediation process and its benefits, and is similar to MIAMs in English family proceedings, albeit under the Italian system, both parties are required to attend (and the court may impose financial sanctions for non-attendance).[27]

- **Ontario**: the Ontario Mandatory Mediation Program applies to most kinds of civil disputes initiated in the state (excluding family matters). Absent a court order to the contrary, parties are required to attempt a mediation, convened by an approved mediator, within 90 days of the filing of the first defence. If a party refuses to participate, they will likely be liable for the wasted costs of the mediation and may be subject to further sanctions by the court.[28]

- **Australia**: At the Federal level, the Civil Dispute Resolution Act 2011 (Cth) requires parties to take "genuine steps" to resolve their dispute before commencing proceedings (although it does not specify what those "steps" must involve but rather sets out a non-exhaustive list of as to what *may* constitute genuine steps). Courts in all Australian jurisdictions have the power to refer parties to mediation without their consent, and in some States, parties to certain kinds of disputes are required to attempt ADR before they are permitted to commence proceedings. The courts have the power to impose

[27] *Italy's 'Required Initial Mediation Session': Bridging The Gap between Mandatory and Voluntary Mediation*, Leonardo D'Urso, International ADR Vol. 3, 4 April 2018 (available here).

[28] Public Information Notice - Ontario Mandatory Mediation Program - Ministry of the Attorney General (gov.on.ca), accessed 25 March 2021.

costs sanctions on parties who refuse to mediate, and may even sanction those who attend a mediation, but fail to participate in good faith.[29]

- **Greece**: Since 2010, there have been several attempts to legislate for compulsory mediation in Greece. The current law finally came into force in 2020, making it compulsory for parties to attend an information session with a mediator (similar to a MIAM) in any claim with a value of over EUR 30,000, and certain specific disputes (including trademark disputes and some family proceedings) irrespective of value. Failure to comply can result in the action being declared inadmissible and/or costs sanctions.[30]

Discussion: where does the law now stand on whether parties can be compelled to participate in ADR?

56. The firm views briefly expressed in ***Halsey*** about Article 6 have proved to be the beginning of a debate rather than the conclusion. It would be helpful if the issue were to be addressed afresh by an appellate court and/or the legislature as soon as possible so that procedural reform can proceed with some certainty. What follow here are the views of the authors.

57. It is, we think, now accepted that the Strasbourg authority cited in ***Halsey*** does not mean that compelling parties to engage in ADR will necessarily violate Article 6. Moreover, there is a tension between treating an order to mediate as a breach of Article 6 but then giving the court power when dealing with costs to penalise a party financially for unreasonably failing to mediate. That was an approach which Lord Dyson held to be permissible in ***Halsey***,[31] and has been followed in other cases,[32] although in our experience, the use by courts and tribunals of their powers to impose costs sanctions for unreasonable conduct has been mixed. However, one might view

[29] Commercial mediation in Australia | Commercial mediation – a global review | Linklaters, accessed 25 March 2021.
[30] Mandatory mediation in Greece – the saga continuous - Kluwer Trademark Blog (kluweriplaw.com), accessed 25 March 2021.
[31] [2001] 1 WLR 3002, [16]-[19].
[32] See, for example *Garritt Critchley v Ronnan [2014] EWHC 1774 (Ch)* where the court held that an unreasonable refusal to engage in mediation justified an order for indemnity costs. See, generally, the discussion in the White Book 2021 Vol. II at paragraph 4-14.

the distinction between orders for compulsory ADR, which are unlawful under ***Halsey***, and orders which require parties to attempt ADR under threat of costs sanctions, an approach which Lord Dyson held to be permissible, and which was considered permissible in ***Mann v Mann*** and ***Bradley v Heslin***, to be a relatively fine one.

58. The authors of this report suggest that any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not, in the words of Moylan LJ in ***Lomax***, "an unacceptable constraint" on the right of access to the court. We think that the logic of the ***Lomax*** decision is capable of applying to other forms of ADR as well as ENE.

59. The logical corollary of the above analysis is that an order for participation in an ADR process that was disproportionately expensive or took an excessively long time, or was otherwise burdensome would obstruct access to the court and breach Article 6. We note that in ***Rosalba Alassini*** the Court of Justice attached importance to the fact not only that the parties retained a free choice as to whether to settle or not but also that the ADR process was free and caused no delay to the ultimate resolution. The Court did not suggest those were *pre-conditions* for compliance with Article 6, and we would not go that far: what matters is that any cost and delay is *proportionate*.

60. Subject to that important proviso, we think the balance of the argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR.

61. Nevertheless, the issue of sanction requires special consideration. The theme of some of the arguments against compulsory mediation is that parties might be struck out or sanctioned for failing to comply and that sanction would breach Article 6. Both Lord Phillips and Lord Dyson have suggested that in order to stay on the right side of the Article 6 line, courts could order parties to engage in ADR, but refrain from penalising them if they do not take part.

62. In our view, that approach is overly cautious; a voluntary obligation is not a *legal* obligation. Courts and tribunals routinely make orders requiring parties to do things that they would prefer not to do such as give disclosure and answer requests for further information. Complying with such orders is a condition of continuing their claim or defence. Defaulting parties are liable to be struck out if they are guilty of serious disregard of such orders. What the "no-sanction compulsory ADR" approach contemplates is a situation in which only orders of the court directed to the successful completion of a contested trial are worthy of sanction.

63. That is not attractive. ADR can no longer be treated as external, separate, or indeed alternative to the court process. For our part, an order that is made requiring participation in ADR should be enforced and parties who fail to attend in breach of such an order should be sanctioned. If the parties failed to attend an FDR presumably they could be sanctioned.[33] If the ***Lomax*** parties had failed to appear at the Early Neutral Evaluation, presumably they would have been sanctioned.[34]

64. Further, it is no great step from the kind of order made in ***Mann v Mann*** and ***Bradley v Heslin*** (which, as noted in paragraph 29 above, stayed proceedings for a specific period and directed the parties to take all reasonable steps to attempt ADR) to an order compelling the parties to do so. The ***Mann*** and ***Bradley*** orders were supported by the threat of costs sanctions for non-compliance, and it would seem odd if that tool were not equally available to a court if it went one step further and required the parties to enter into an ADR process.

65. The issue is less stark where the participation in ADR is not compelled by a specific order of the court, but rather is a required procedural step under the rules applicable to the particular procedure. If you fail to attend a MIAM in family proceedings or fail to contact ACAS in employment proceedings the claim is simply not allowed to proceed further. This is a matter of sequencing to a large extent. The "defaulting" party is denied its remedy as surely as if it had issued and then been struck out. It is

[33] Anecdotally, we gather that in most cases if a party fails to attend (which may well happen because they have left the jurisdiction) the matter is simply listed for final hearing.
[34] We are aware of one case in which a party attended a mediation without its insurers in breach of an agreed mediation order. They were made to pay the costs of the wasted exercise.

somewhat academic whether the sanction for not engaging in ADR is categorised as a punishment and whether the obligation stems from a court order or procedural rules. In all cases the obligation is a precondition to obtaining a binding adjudication from the court.

66. In our view, we do not understand how orders could be made for ADR against the background that it was understood by all that no consequence followed, or sanction applied, if the order was disregarded.

67. Moreover, there seems no reason why the sanction for non-compliance with an order or a procedural rule should not be striking out the claim/defence. As we note above, there are a number of (presently limited) circumstances in which litigants are liable to be denied access to court if they disregard a rule or a direction of the court for participation in ADR. The most striking of the examples listed above and in Appendix I is the mass listing of small claims cases for review and ENE in certain County Courts (the so-called DRH hearings) where non-attendance (which occurs fairly frequently) is dealt with by striking out the claim (or defence as appropriate). We are not aware that this has given rise to unease in the professions or more widely. There are a range of procedures under the CPR where automatic sanctions, and judgments in default, can be set aside by courts exercising their discretion, including when there is a good reason for the non-compliance. Such procedures could be adapted to deal with the obligation to participate in ADR as well. In meritorious cases where a case has been struck out for non-attendance at a DRH we understand that the Birmingham practice is that the strikeout should be set aside. If appropriate a costs sanction could always be substituted.

Beyond Article 6: are there other legal impediments to compulsory ADR?

68. Thus far, this report has focused very much on whether compulsory ADR can comply with Article 6. That echoes the debate about compulsory ADR that has played out in the caselaw and elsewhere, which – as discussed above – has focused on the same issue.

69. The authors are not aware of any other legal principle – whether in legislation or at common law – which may impede the introduction of compulsory ADR generally. In 2015, Lord Thomas LCJ (speaking extra-judicially) raised a question as to whether diverting too many disputes away from the courts would be compliant with principles articulated in the Magna Carta;[35] but his concerns were directed primarily at procedures which removed the role of the court from disputes entirely (like arbitration). There is nothing in his reading of the Magna Carta that would suggest that introducing compulsory ADR as an essential part of the court procedure would contravene fundamental principles about the proper provision of justice through the court system.

70. However, clearly there may be some kinds of disputes, and some forms of ADR processes, where the mechanics of introducing compulsory ADR would require amendments to primary legislation. Pre-commencement obligations may also require a statutory basis, given the limits on the court's pre-action jurisdiction. Issues may also arise in Tribunal jurisdictions, which are creatures of statute and where aspects of the procedural rules may be embedded in primary legislation. The issue will require jurisdiction-by-jurisdiction analysis.

[35] *The Legacy of the Magna Carta: Justice in the 21st Century*, Lord Thomas LCJ, speech to the Legal Research Foundation, 25 September 2015 (at [17]-[21]).

IV. IN WHAT CIRCUMSTANCES, IN WHAT KIND OF CASE AND AT WHAT STAGE SHOULD ADR BE IMPOSED?

71. If as we suggest above unwilling parties could lawfully be required to participate in ADR, then should rule-makers or individual judges impose such requirements and if so when?

The general debate

72. Much of the debate about the desirability of compulsion is focused on compulsory mediation. Before reviewing that debate, we would re-emphasise that this is only part of the picture.

73. For the most part, the discussion is reflected in the passages quoted already in relation to the Article 6 issue. After the Article 6 passage in ***Halsey*** quoted above (see paragraph 23) Lord Dyson goes on to say this as to the desirability of compelling parties to mediate:

> *"10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it."*

74. Indeed, parties' reluctance in the face of compulsory ADR appears to have scuppered a previous pilot, the Automatic Referral to Mediation (or "ARMS") scheme, trialled in the Central London County Court in 2004-5. 1,232 randomly selected claims were referred to mediation under the threat of costs sanctions for failure to comply, although parties were given the right to apply to the court for an opt-out albeit with a warning that this would only rarely be granted. Despite that warning, parties in

around 80% of the cases that were referred to mediation objected, requiring considerable District Judge time to deal with opt-out applications. Only 172 cases were actually mediated, with a settlement rate of 53%.[36]

75. The failure of the ARMS pilot scheme has been attributed to an unfamiliarity with the mediation process.[37] In truth it operated less as a compulsory scheme than as an opt-out scheme. It may be that 15 years later, unfamiliarity will pose somewhat less of a problem. But there are still major challenges ahead in ensuring that sufficient information about and understanding of the relevant form(s) of ADR is available to litigants.

76. In his *Review of Civil Litigation Costs Final Report* dated 1 December 2009,[38] Lord Justice Jackson noted that whilst ADR was not appropriate in every case, it was a "*highly efficacious means of achieving a satisfactory resolution of many disputes*" and was under-used. However, ultimately he came out against making ADR compulsory, recommending instead that judges should merely *encourage* ADR (particularly mediation) by directing the parties to consider it and imposing costs sanctions for unreasonable failures to engage:

> *"3.4 … In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and (d) to penalise in costs parties which have unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting."*[39]

[36] See *ADR and Civil Justice: Interim Report*, the Civil Justice Council ADR Working Group, October 2017 (available here).
[37] *Ibid.* paragraph 8.9.
[38] Available here.
[39] Pages 361-62

77. Six years later, Lord Justice Briggs noted that the courts continued to resist compulsory ADR in his *Civil Courts Structure Review: Interim Report* of December 2015, and suggested this was "*as it should be*":[40]

> *"2.86. The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects (described below), it has now reached a relatively steady state. I would describe it as "semi-detached". The civil courts do a reasonable amount to encourage parties to settle their disputes by an appropriate form of ADR, but do not as yet act as primary providers of it, save in certain modest respects. Thus most judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory.*
>
> *2.87. This is, in many ways, both understandable and as it should be. First, the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service. As I have said, the fact that the civil courts will provide and enforce a just outcome to civil disputes within a reasonable time is a fundamental foundation for the effectiveness and approximation to justice of the dispute resolution services available from ADR providers, for the reasons given earlier in this chapter.*

78. Those "reasons" were as follows:

> *"2.23. … the availability of an affordable recourse to an expert, experienced and impartial court for the obtaining of a just and enforceable remedy in reasonable time remains an essential guarantor of the rule of law, for at least six main reasons. First, the very existence of access to civil justice forms an essential constitutional foundation for respect for civil rights, and the performance of civil duties, in a law-abiding national culture. It is in short the guarantor of the rule of law in the civil context. Secondly, the higher civil courts continue to develop and declare the law, against an increasingly complex background of domestic and European legislation. Thirdly, the court strictly upholds and applies the law, whereas other ADR systems frequently use different criteria, such as the fair and reasonable test applied by the Financial Ombudsman Service. Fourthly, the court underpins most forms of voluntary ADR. Mediation would potentially yield justice to the richer, more powerful or risk-tolerant litigant if the weaker party could not refuse an unjust offer by saying: "see you in court". Early neutral evaluation would be meaningless unless it was a reliable prediction of the just outcome in court. Fifthly, there are gaps in the effectiveness of ADR and regulation which can only be filled by a*

[40] Available here.

court, as a last resort. Finally the court is the place for enforcement of agreements to settle disputes made during ADR."

79. This echoes concerns raised by Professor Hazel Genn in her 2008 Hamlyn Lectures, [41] who cautioned against over-zealous attempts to divert civil and commercial disputes into private dispute resolution (including compulsory ADR). She concluded:

> *"The challenge is in understanding that, in civil justice at least, there is an interdependency between the courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping. A well-functioning civil justice system should offer a choice of dispute resolution methods. We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination. This is not impossible. But it requires recognition of the social and economic value of civil justice, an acknowledgement that some cases need to be adjudicated, and a vision for reform that addresses perceived shortcomings rather than simply driving cases away."*[42]

80. Drawing together the strands, this commentary points to a number of potential concerns about the introduction of compulsory ADR. First, there is a risk it might not work, either because the parties are simply intransigent or because they do not know enough about it, and are therefore unlikely to engage in the process. Second, at a more fundamental level, there is a concern that pushing more disputes into ADR undermines the value of the adjudicative system, which is the foundation on which the effectiveness any form of ADR ultimately relies.

81. In our view, these concerns are not decisive. As to the first point, querying the efficacy of compulsory ADR: much has been written about the effect of compulsion on settlement, without a clear picture emerging. Professor Genn's analysis of the failed ARMS pilot scheme led her to conclude that "*parties are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process*".[43] However, the practical concerns raised by Professor Genn and the others quoted above appear to be rooted largely in principled objections to the idea of

[41] Genn, H 2008 *Judging Civil Justice*, Cambridge University Press (available here).
[42] *Ibid*, p.125.
[43] *Ibid*, p113.

compulsory ADR, rather than empirical evidence of failure. A more recent Civil Justice Council report on ADR[44] noted the difficulty of measuring the success of compulsory ADR, but took a more positive view:

> *"7.19. The much-debated question whether evidence from overseas experience shows settlement rates suffering in compulsory systems is very difficult to answer definitively.*
>
> *7.20. In Lord Woolf's interim report he noted that the evidence from the United States suggest that mediation was less effective where it was compulsory. Indeed supporters of the principle of voluntariness will often assert that settlement rates suffer where the parties do not attend of their own volition. Intuitively this may seem not unlikely.*
>
> *7.21. But other evidence suggests that there may be no real difference in settlement rates. Thus in Maine one study showed that 43% of compulsory and 42% of voluntary cases settled. There is also an oft-cited body of Australian statistics from a set of schemes, four of which were voluntary (for example the New South Wales Department of Fair Trading Scheme) and four of which were mandatory (for example the New South Wales Farm Debt Mediation Act). The schemes show various settlement rates between 70% and 90% but there was no correlation between voluntariness and success. But none of these are scientific experiments and comparisons are very difficult between schemes with different subject areas.*
>
> *7.22. Ultimately a better guide for us may be the limited domestic experience of members of the working party who have mediated with parties who attend unwillingly (often because of an ADR clause in a contract). This shows that in a surprisingly large number of cases they are in fact drawn into the process, become engaged and frequently settle."*

82. Anecdotally, mediators also report that settlement rates did not suffer in the period after the decision in ***Dunnett*** (where the court first held it could penalise victorious parties in costs where they unreasonably refused to mediate).

83. Lack of public familiarity can be said to weigh in favour of introducing compulsion rather than against it. Greater education about the process and its advantages are essential. But few litigants will find the concept of an FDR or DRH hearing a familiar or

[44] See *ADR and Civil Justice: Interim Report*, the Civil Justice Council ADR Working Group, October 2017 (available here).

culturally normal one, but they have to participate, and they do participate with positive results.

84. As to the second concern, regarding the constitutional role of the court: we do not consider that the introduction of compulsory ADR, in appropriate cases and subject to appropriate rules, will undermine the primary purpose of the courts in dispensing justice, or their vital role as guardians of the rule of law. We agree with Professor Genn that a well-functioning civil justice system should offer a choice of dispute resolution methods, and that adjudication in the courts should always be available; but that is not incompatible with compulsory ADR. Provided the compulsory ADR mechanism does not lead effectively to parties being coerced into settlement against their will, and a litigant is free to refuse any settlement offer and revert to the adjudicative process, courts will remain for the assertion of a litigant's rights, and will continue to apply, uphold and develop the law accordingly. Particularly at a time when the civil justice system in general and the court system as a whole are struggling to cope with its case-load, concerns about diverting too many parties into settlement seem misplaced.

85. Tony Allen in his book Mediation Law and Civil Practice argues for a reconsideration of the issue of compulsion. Before citing ***Bradley v Heslin*** (see paragraph 29 above) he says this:

> *"A civil justice system is surely able to protect its users from themselves and to try to make sure that whatever is litigated in front of the courts justifies that level of judicial input. Moreover it should only do so if all parties unshakeably resolve to litigate despite examining every alternative*."[45]

86. The reason that mediation is the focus of such resistance must, we think, be that of all of the forms of ADR under consideration, it imposes the greatest burden in terms of cost, time and energy on the parties, and is dispensed by a body of neutrals who are not yet recognised by the wider public as a profession. We will consider these disadvantages further below.

[45] Mediation law and Civil Practice 2nd Edition, p. 125.

87. Looking, as we must, at ADR more widely it is inescapable that compulsion to participate is now an accepted and successful part of the system, at a number of points. It has been introduced in response to particular challenges in particular jurisdictions and has not been the subject of either legal challenge or public or professional disquiet. The introduction of these measures has not been surreptitious but equally has not attracted melodrama. Some of the compulsory ADRs, such as perhaps MIAMs, have their critics in various respects and may well be capable of improvement. But we would suggest that it is not the element of compulsion that is the focus of that criticism.

88. The overseas experience of compulsion, which we have touched upon in paragraph 55 above, shows that in jurisdictions not dissimilar to England and Wales (such as Ontario) there are now long-established and successful arrangements for participation in ADR to be the default in all cases across a wide range of civil disputes.

89. ADR also appears to enjoy widespread uptake and success in certain online marketplaces. For example, the auction platform eBay operates an online "Resolution Centre", which provides a form of private arbitration[46] to buyers and sellers using its platform to resolve disputes arising from issues such as (for example) a buyer's failure to pay, a seller's failure to deliver a product and inaccurate product descriptions. Strictly speaking, the eBay process is not compulsory ADR: it is not a pre-requisite to, and nor does it displace, a party's right to initiate ordinary proceedings against the counterparty.[47] However, it will often be the only realistic option for resolving the low-value disputes that typically arise on the eBay platform, given the costs (and potential jurisdictional issues) of issuing court proceedings. More broadly, it is worthy of note as an example of a simple ADR procedure which appears to have enjoyed very significant

[46] Resolution Centre - eBay. Details on how eBay's dispute system works are available here, but in brief, parties are encouraged to communicate with each other to resolve disputes. If the complaint is not resolved within 3 business days, it can be escalated to eBay, which will assess the information provided by the parties in relation to the complaint and come to a decision within 48 hours. That decision can be appealed to a final decision-maker within eBay.

[47] See User Agreement | eBay (accessed 25 March 2021).

take-up amongst eBay users: a 2014 article[48] suggested the eBay Resolution Centre processes more than 60 million claims per year globally.[49]

Our approach: the relevant factors

90. As we stated in section II the question posed here is not a single question but a myriad of different questions. We do not seek here to set out a comprehensive set of prescriptive factors or requirements.

91. We think it is critical to look at those areas in which elements of compulsion have been introduced successfully and are accepted in our jurisdiction. Why have they been successful and what lessons can we draw?

92. In the course of future reforms it seems to us that certain critical questions will arise when we consider putting greater pressure on parties to participate in ADR or compelling them to do so. We consider each in turn below.

Is the form of ADR proposed or required too burdensome or disproportionate in terms of cost or time?

93. This issue has already arisen in the context of the Article 6 discussion, but it is worth reiterating that litigants should not be required to engage in ADR which is a disproportionate burden on their time or resources.

94. It need not be. At the extreme, consider an online process that simply prompted the party at an appropriate stage or stages, to consider settlement and consider making a blind bid or communicating an offer to the other side. It might also extend to suggestions made by the case officer or the supervising judge at later stages. Those could be compulsory: the party would have to address those questions before they could continue with the claim or to defend it. However, the time spent will be minimal

[48] *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, Del Duca, Rule and Rimpfel, Arbitration Law Review 2014 Vol. 6, 10.

[49] In another context again, the International Chamber of Commerce (***ICC***) has encouraged commercial parties towards mediation by published a series of model clauses for commercial contracts in which parties agree to mediate under the ICC's Mediation Rules before commencing court or arbitration proceedings. Of course, this is not compulsory mediation *per se*, but encourages parties to make firm commitments in that regard at the outset of their commercial relationship. See here.

and the costs burden almost nil. The starting point for all of these discussions is obviously that ADR should reduce the ultimate burden in terms of cost and time imposed by disputes on individuals, businesses and the community.

95. Of the existing examples of compulsion listed above only a MIAM imposes a direct cost on the parties. Any subsequent mediation takes place privately and the cost falls upon the parties, but the compulsory MIAM session is obviously short and limited in scope; that represents a conscious decision not to require the parties to engage in a full mediation process. Legal aid is available in some circumstances.

96. The others, all forms of ENE, FDR, DRH, ACAS etc are free to the parties, although if the parties are legally represented there may well be an additional cost, and participation will involve a time cost for the parties themselves (which may be significant in complex disputes).

97. Privately provided mediation services cause more difficulty in this regard, unless they are publicly funded. Unless that is the case, the fees may represent a disproportionate cost in many low value cases. But if fixed cost mediation schemes continue to develop for use in low value claims this objection may lose its force.

98. In overseas systems which have a compulsory initial mediation meeting – such as Italy – that meeting is very low cost but any full-blown mediation which ensues will require a fee.[50] In other jurisdictions, such as Ontario, there is a roster of approved mediators who will carry out the compulsory mediation at set rates.[51]

Are particular specialist jurisdictions better suited to compulsion than general litigation?

99. In some kinds of cases, the value of a neutral third party may lie primarily in their impartiality and ability to manage emotionally charged situations. FDRs and ACAS conciliation are good examples of specialist areas where a group of particular issues repetitively arise, where the emotional level may well be high and the resistance to

[50] See paragraph 55 above. There is a small administrative fee for the initial mediation session (40 Euros for claims below a value of 250,000 Euros, and 80 Euros above).

[51] Public Information Notice - Ontario Mandatory Mediation Program - Ministry of the Attorney General (gov.on.ca).

compromise considerable. Boundary and neighbour disputes may well belong in the same category, as noted in ***Bradley v Heslin***. Contentious probate may also be an example. An experienced neutral person, whether a judge, an ACAS official or a specialist mediator can be hugely effective in these cases and yet some element of compulsion may be needed to achieve appropriate uptake.

Is there sufficient confidence in the neutral person, the ADR provider?

100. If we are going to compel participation in an activity, we need to be confident as to who is providing the service and what is involved. Many of the overseas systems that compel mediation have court rosters of approved mediators who can be engaged if the parties fail to agree on their own choice.[52]

101. Where the neutral or the ADR process involved is court-sponsored or is indeed a judge it is plainly easier to justify compulsion. ACAS conciliators are highly trained specialist employees.

102. The one compulsory form of ADR which is privately provided is the MIAM. Permission to conduct MIAMs is the subject of strong regulatory requirements as to training and experience. Indeed, family mediation itself, which is not compulsory, is actually a less heavily regulated activity.

103. Mediation in general civil disputes has historically been less regulated, but the Civil Mediation Council has taken steps to establish a scheme of regulation which allows mediators to demonstrate their professional status.[53] The Council also operates a complaints system. We think that if mediation is to be compulsory, more systematic regulation is required.

Do the parties taking part in the ADR have access to legal advice?

104. Linked to the previous question of confidence in the neutral is the issue of access to legal advice. In low-value cases where the parties are unrepresented there may be a concern that some forms of ADR will leave them without any legal input to assist

[52] Such as Ontario: see paragraph 55 above.
[53] See: Membership – Civil Mediation Council.

either with assessing the position or concluding a valid settlement agreement. One of the early lessons of the possession ADR pilot[54] has been that because no legal advice is available during the mediation, duty solicitors are reluctant to advise clients to mediate under the pilot scheme and litigants-in-person were very reluctant to take part.

105. The advantage of a hearing like the DRH is obviously that the Judge is available and trusted. But formal legal training is not always essential to success: Small Claims Mediators[55] are not trained lawyers but do achieve satisfactory (and binding) settlements in a large number of their cases.

At what stage should ADR be required?

106. A fundamental principle for the design of any new process or rule must be the need to protect vulnerable parties.

107. The pre-action protocols emphasise that litigation should be a last resort and encourage the parties to consider whether negotiation or some other form of ADR might enable them to settle their dispute. It might be suggested that there were risks in being too prescriptive about requiring ADR before proceedings have commenced, as requiring parties to put significant effort into ADR could be disproportionate in those cases which are in truth going to be undefended. On the other hand, there may be some value in requiring parties to engage in some form of ADR, broadly defined, before embarking on litigation. We note the CJC is currently conducting a review of pre-action protocols, and we would not wish to pre-empt the outcome of that review. We note the new RTA Small Claims Protocol (see paragraph 54 above) prompts parties to attempt settlement in cases where liability is admitted through the online portal before they initiate court proceedings. A similar approach could be adopted in other

[54] A free, voluntary mediation scheme launched in February 2021 to address the significant backlog in possession disputes arising from the Covid-19 pandemic. See here.

[55] A free, voluntary mediation service offered by HMCTS as set out in CPR 24.4A. The scheme is available for all County Court claims that would be allocated to the small claims track – i.e. claims of up to £10,000 – except road traffic accident, personal injury and housing disrepair claims. A referral to the Small Claims Mediation Service is made where all parties indicate they agree to mediation (CPR 24.4A(4)), and a referral results in an automatically stay (CPR 24.4A(5)). See Small claims mediation service - GOV.UK (www.gov.uk)

cases which are, or will be, administered via an online portal. Moreover, in the Family Division there are proposals for introducing an "ante-room" to facilitate discussions before proceedings commence.

108. Thereafter we think there is much to be said for early ENE in all cases other than the most complex, combined with a straightforward requirement of participation in ADR at an appropriate stage of the procedure.

109. Compulsion through ad hoc case management can cater for the case where it can be said that, for example, one side is manifestly so unreasonable that mediation is unlikely to succeed. But that flexibility comes at a cost. Parties will often be tempted to resist ADR to emphasise to the other side their belief in the strength of their case. Procedural wrangling adds cost.

110. In an online system the option to try to settle the case can be offered at virtually all stages of the process. Why should the parties not be prompted to consider the possibility of making offers throughout their engagement?

111. If, however what is being discussed is the imposition of an obligation to take part in a particular form of ADR such as a mediation under threat of sanction then that would need to be required at a specific stage.

How do we cope with perfunctory performance?

112. It is obviously vital when it comes to rule-making or making orders in this area that there is clarity as to what does and does not constitute compliance with a duty to participate. We have to acknowledge the risk that parties will not fully engage with whatever process they have to participate in, that they simply "sit on their hands". We have to acknowledge too that there are difficulties with making judgments on the level of participation where the process is likely to be protected by without prejudice privilege. What will constitute compliance with the court's order will depend upon the type of ADR being considered.

113. Moreover, careful thought must be given to the sanctions the court may impose in response to perfunctory performance. Similar considerations to those set out in

paragraphs 61-67 above, in relation to sanctions for a complete failure to comply, apply here. The most obvious sanction is strike-out, with the flexibility to impose a costs sanction instead, either of which may be preceded by an “unless” order in appropriate cases. However, there may be other responses to perfunctory compliance that the court should consider, and its response may depend on the context and the stage of proceedings.

CONCLUSION

114. This paper is plainly not an overall review of the role of ADR in civil justice. The recognised need to promote the use of ADR has to be met on a number of different fronts.

115. Inside the courts the existing nudges and prompts leading the parties towards ADR still have a significant role to play. No doubt cost penalties against those who unreasonably refuse ADR will continue to play an important part. Continued and, if possible, increased funding and support for the Small Claims Mediation scheme is absolutely vital.

116. Outside the court system there is plainly a need for significant public legal education about ADR, however elusive that goal can sometimes seem. The need for a proper online resource to be available to the public detailing the various different forms of ADR and the ways of accessing them is, we think, now well recognised. There remains too the clear need for the provision and delivery of appropriate, proportionate and trustworthy ADR services.

117. This paper therefore deals with the relatively narrow but nonetheless, significant question of compulsion.

118. We think that introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development. We will not make detailed proposals for reform as these require a wider perspective than is possible here. But we have sought in Section IV to develop a set of principles relevant to the use of compulsion. We would make three specific observations:

    1) Where participation in ADR occasions no expense of time or money by the parties (as with answering questions in an online process as to a party's willingness to compromise) it is very unlikely that the compulsory nature of the system will be controversial – as long as the ADR is otherwise useful and potentially productive.

2) Judicial involvement in ENE, FDR and DRH hearings is proving highly effective and these are of course available free to the parties. Again as long as they seem appropriate for the particular type of case being considered and can be resourced within the court system, we cannot see that compulsion in an even wider range of cases will be unacceptable.

3) We think that as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats we see no reason for compulsion not to be considered in this context also. The free or low-cost introductory stage seems the least likely to be controversial.

119. Above all, as long as all of these techniques leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then we think that the greater use of compulsion is justified and should be considered.

Lady Justice Asplin DBE
William Wood QC
Professor Andrew Higgins
Mr Justice Trower

We would like to acknowledge the considerable assistance we have received from Michael Quayle, Lady Justice Asplin's judicial assistant, and from the Civil Justice Council secretariat.

APPENDIX 1: EXISTING PROCEDURAL RULES REQUIRING PARTIES TO ENGAGE IN ADR

Early Neutral Evaluation

A1. As already noted at paragraph 31 of the main body of this report, the Court of Appeal in ***Lomax* v *Lomax*** [2019] 1 WLR 6527 held that under the CPR the Court has the power to order the parties in an appropriate case to attend an ENE. CPR 3.1(2)(m) empowers the Court to "*take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case*." The overriding objective of course includes at CPR 1.4 a duty actively to manage cases by inter alia:

> *"(e) encouraging the parties to use an alternative dispute resolution(GL)procedure if the court considers that appropriate and facilitating the use of such procedure;*
>
> *(f) helping the parties to settle the whole or part of the case;"*

A2. The Court had the encouragement that this particular form of ADR is specifically mentioned in the relevant rule (while for example mediation is not) and clearly felt that in this category of case compulsion was merited. As Moylan LJ put it at [29]:

> *"In my experience and that, I would suggest, of every other judge who has been involved in financial remedy cases, the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR."*

A3. ENE under CPR 3.1(2)(m) represents the best example of the current law recognising compulsory ADR at the discretion of the court. Unlike the other examples listed in this Appendix, the CPR does not specify the stage of proceedings at which the parties must engage in an ENE; the court may simply make an ENE order where it considers it appropriate (whether on the application of one of the parties or its own volition). However, clearly the court will only be able to make an ENE order once the claim has

at least been issued (rather than as a pre-requisite to commencing litigation, like the ACAS conciliation process).

Financial Dispute Resolution appointments

A4. FDR is a court-assisted negotiation process in family cases, where the parties appear before a District Judge in a without prejudice meeting/hearing, intended to facilitate settlement between parties and *"reduce the tension that inevitably arises in family disputes*".[56] It is a standard – and compulsory – part of the procedure to be followed when a party makes an application for a financial remedy under Part 9 FPR, which arises at a predetermined juncture in the process and requires both parties to comply.

A5. Pursuant to r. 9.15(4) FPR, the court has a duty to order an FDR appointment at the first "appointment" after the application is made:

> "(4*) The court must direct that the case be referred to a FDR appointment unless—*
>
> *(a) the first appointment or part of it has been treated as a FDR appointment and the FDR appointment has been effective; or*
>
> *(b) there are exceptional reasons which make a referral to a FDR appointment inappropriate."*

A6. Seven days prior to the FDR appointment, the parties must file with the court details of all offers and proposals (and responses made), whether "open" or "without prejudice" (r. 9.17(3) FPR). Both parties must personally attend the FDR appointment unless the court orders otherwise (r.9.17(10) FPR). At the FDR appointment, the parties "*must use their best endeavours to reach agreement on matters in issue between them*" (r.9.17(6) FPR). Pursuant to paragraph 6.3 of Practice Direction 9A:

> "*Courts will therefore expect –*
>
> *(a) parties to make offers and proposals;*
>
> *(b) recipients of offers and proposals to give them proper consideration; and*

[56] Paragraph 6.1, Family Practice Direction 9A.

(c) (subject to paragraph 6.4), that parties, whether separately or together, will not seek to exclude from consideration at the appointment any such offer or proposal."[57]

A7. The Family Justice Council has published detailed guidance on best practice for FDR appointments.[58] This provides further detail on the expectations of parties during the hearing, including the following:

> *"28. Practitioners must remember that, at FDR stage, there is still a continuing duty of full and frank disclosure of all material facts (including where disclosure of such facts may be adverse to the disclosing party) and that this duty remains throughout the life of the proceedings. It is important for practitioners to remember, and for lay clients to be made aware, that failing to comply with this duty can lead to cost penalties and/or an application to set aside any consent order subsequently made."*

A8. The FPR and the Practice Direction are largely silent on the role of the judge during the FDR appointment. However, the Family Justice Council Guidance suggests (at [29]) that the judge should outline the principles to be applied, identify key facts, identify the issues between the parties, and (where appropriate) express an opinion as to the probable outcomes of the remaining issues.

A9. If the FDR appointment does not result in a settlement, the parties are expected to keep trying to engage to find a resolution. Paragraph 6.5A of the PD 9A provides:

> "*Where at a FDR appointment a settlement is not reached, the parties have an obligation to make open proposals for settlement in accordance with rule 9.27A. The normal direction would be that each party must file and serve their open proposals within 21 days of the FDR appointment. The court must consider whether it is appropriate to give any further directions about the filing and service of open proposals."*

[57] Paragraph 6.4 provides that this requirement does not apply to offers made during "non-court dispute resolution", so it follows that parties are only obliged to consider "open" offers.

[58] Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (December 2012). Available here.

The new RTA Small Claims Protocol

A10. The new Small Claims Protocol came into force in May 2021, and applies to low-value (below £5,000) personal injury claims arising from road traffic accidents.[59] It requires claimants to use a new dedicated online portal for such claims (see https://www.officialinjuryclaim.org.uk/).

A11. The new pre-action protocol applicable to these claims[60] provides detailed information regarding the process claimants and defendants (or rather "compensators", i.e. insurers) must follow before a claim is issued, and the information the parties must provide using the new portal.

A12. Notably, the pre-action protocol makes clear that parties are expected to try and settle the claim: see, for example, paragraph 8.1(1): "*This section explains— (a) the steps both the claimant and the compensator must take to try to settle the claim".* See also paragraph 8.1(4): *"The parties are reminded that court proceedings are a last resort. It is expected that the parties will try to negotiate settlement of claims without starting court proceedings.*"

A13. This aim is firmly embedded in the pre-action rules themselves. In cases where liability is admitted, paragraph 8.7(1) of the protocol requires that proposed defendant "*must make an offer to settle the claim*" within 20 days of the claimant providing the requisite information (including a medical report). Following receipt of that offer, a claimant may accept or reject the offer, or make a counter-offer. Parties may make up to 3 offers each through the online portal (paragraph 8.1(3)). If no offer is made in time, or no offer nor counter-offer is accepted, the claimant may commence court proceedings (paragraph 8.19).

A14. The claimant is required to comply with the protocol before initiating proceedings. If it is necessary to issue proceedings protectively, due to limitation issues, the claimant must immediately apply for a stay in order to complete the steps in the protocol

[59] The new rules are brought into force under the Civil Procedure (Amendment No. 2) Rules 2021. They amend CPR 26.6, 27.2 and introduce a new Practice Direction 27B and a new pre-action protocol, the RTA Small Claims Protocol.

[60] Available here.

(paragraph 5.6). If a claimant issues a claim without complying with the RTA Small Claims Protocol, that will impede the claimant's ability to recover costs (new CPR r. 45.29M).

A15. It is also worth noting that the new Practice Direction 27B introduced in respect of the RTA Small Claims Protocol provides for claims to move back and forth between the court and the portal. Where the parties fail to reach an agreement within the portal at a particular stage of the process – for instance on liability – the issue goes back to the court for the issue to be resolved. Then, if the court determines there is liability, the default setting is that the case has to return to the portal, paragraph 2.16(2) PD 27B, which provides:

> *"(2) Where the court finds that the defendant was either liable in full or in part and does not reallocate the claim under sub-paragraph (3) below, the court— (a) will stay the proceedings and direct that the parties use the procedure set out in sections 7, 8 and 9 of the RTA Small Claims Protocol to progress the claim"*.

A16. Thus, to move the claim back to the portal, the court will direct the parties to use the portal to progress the claim: essentially a form of order that the parties must submit to engage in ADR.

A17. The RTA Small Claims Protocol constitutes something close to compulsory ADR. It might be described as "asymmetrical" given there is a requirement at least on one party – the defendant's insurer – to make a settlement offer in relevant claims. However, the consequences of failing to observe the Protocol are limited to costs sanctions (rather than e.g. strike-out), and its scope is narrow: it applies only to very low value claims in which liability is admitted.

ACAS Early Conciliation

A18. ACAS Under s.18A(4) ETA 1996, a person may not present an application to institute Employment Tribunal proceedings (of almost all types) without an early conciliation

certificate. Section 13 of the ET1 claim form includes a box for the claimant to provide the certificate number.[61] That certificate is obtained from ACAS as follows.

A19. The process that must be followed is set out in the Early Conciliation Rules.[62] The proposed claimant need provide only their name and address (and the name and address of the proposed respondent) to ACAS; s/he does not need to provide ACAS with information on (e.g.) the nature of the dispute. The claimant can provide the information by filling out a form submitted online or by post, or over the telephone.[63]

A20. The information must be provided to ACAS within the normal time limit for presenting a claim to the Employment Tribunal (3 months for most claims). Otherwise – subject to the Tribunal's narrow discretion to extend time – any subsequent claim in the Tribunal will be time-barred. Complying with the conciliation requirement will "stop the clock" for the purposes of Tribunal proceedings.[64]

A21. Once ACAS has received the information, it will allocate a conciliation officer, who will endeavour to promote a settlement (ss. 18A(2) and (3) ETA 1996), for a period of six weeks (r.6(1) Early Conciliation Rules). If the conciliation officer concludes that settlement of the dispute (or part of it) is not possible – or if settlement has not been reached in the six-week period – ACAS must issue an early conciliation certificate to the proposed claimant and respondent (r.7 Early Conciliation Rules).

A22. However, whilst it is compulsory to provide information to ACAS, *participation* in ACAS conciliation is ultimately voluntary.[65] A proposed claimant or respondent can simply refuse the conciliation officer's invitation to take part in any discussions. Indeed, the online ACAS form includes an option for the proposed claimant to refuse conciliation

[61] Available here: ET1 - Employment tribunal claim form (publishing.service.gov.uk).
[62] The Rules are set out in the schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, SI 2014/254, as amended by Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014 SI 2014/847. They are available here.
[63] See: https://tell.acas.org.uk/apply-for-a-certificate.
[64] For example, for unfair dismissal claims, s.207B Employment Rights Act 1996 provides that the "clock is stopped" on the day the proposed claimant provides the requisite information to ACAS, and remains "stopped" until the conciliation certificate from ACAS is provided.
[65] *Science Warehouse v Mills* [2016] IRLR 96, per EAT Judge Eady QC at [30].

at the same time as they provide the required information.[66] These provisions are currently under review.

A23. If one or both of the parties declines to take part, the officer will be entitled to conclude that settlement is not possible and issue an early conciliation certificate accordingly (which may be prior to the expiry of the six-week period: r.7(1) Early Conciliation Rules).

A24. Clearly the compulsion extends only to giving ACAS the opportunity to engage with the parties and certainly does not extend to requiring full participation in a conciliation process.

Mediation Information and Assessment Meetings

A25. Section 10(1) of the Children and Families Act 2014 provides: "*Before making a relevant family application, a person must attend a family mediation information and assessment meeting.*" A MIAM is a short meeting conducted by a trained mediator, intended to provide information to litigants about mediation as a means of solving disputes.[67] A list of "relevant family applications" is set out in Practice Direction 3A (***PD 3A)*** to the Family Procedure Rules (***FPR***). It includes private law proceedings relating to children (paragraph 12) and proceedings for a family remedy (paragraph 13).

A26. Under r.3.7 FPR, the applicant must provide one of the following when making a relevant application: confirmation from an authorised mediator that the prospective applicant has attended a MIAM; a claim for a valid exemption to the MIAM requirement; or confirmation from an authorised mediator that a "mediator's exemption" applies.

A27. A list of the permissible exemptions to the MIAM requirement which an applicant may claim is set out in r. 3.8 FPR. The list includes (for example) where there is evidence[68] of domestic violence, child protection concerns, where there is an urgent risk to life,

[66] See: Try to find a solution to your dispute before employment tribunal | Tell Acas.
[67] Paragraph 2, Practice Direction 3A to the Family Procedure Rules (available here).
[68] PD 3A includes a list of acceptable forms of evidence at paragraph 20, which includes (for example) evidence of a police caution. The evidence need not be provided with the application form, but the applicant must bring the evidence to the first hearing.

liberty or home, and where the applicant has attended a MIAM or other ADR procedure in the previous 4 months.

A28. The Court will scrutinise the applicant's exemption claim, and if it is not satisfied, it may direct the parties to attend a MIAM. Per r.3.10 FPR:

> *"3.10.— MIAM exemption not validly claimed*
>
> *(1) If a MIAM exemption has been claimed, the court will, if appropriate when making a decision on allocation, and in any event at the first hearing, inquire into whether the exemption was validly claimed.*
>
> *(2) If a court finds that the MIAM exemption was not validly claimed, the court will—*
>
> *(a) direct the applicant, or direct the parties to attend a MIAM; and*
>
> *(b) if necessary, adjourn the proceedings to enable a MIAM to take place;*
>
> *unless the court considers that in all the circumstances of the case, the MIAM requirement should not apply to the application in question."*

A29. "Mediator's exemptions" are set out in r.3.8(2) FPR:

> *"(2) an authorised family mediator confirms in the relevant form (a "mediator's exemption") that he or she is satisfied that—*
>
> *(a) mediation is not suitable as a means of resolving the dispute because none of the respondents is willing to attend a MIAM; or*
>
> *(b) mediation is not suitable as a means of resolving the dispute because all of the respondents failed without good reason to attend a MIAM appointment; or*
>
> *(c) mediation is otherwise not suitable as a means of resolving the dispute."*

A30. If no exemption applies, the applicant is obliged to attend the MIAM. The respondent is not obliged, but is "*expected to attend a MIAM, either with the prospective applicant or separately*" (PD 3A, paragraph 32).

A31. Alongside the requirements on an applicant, the court has a duty – and case management powers – to promote the use of MIAMs. It has the power to adjourn proceedings so that the parties can take part in a MIAM (FPR r 3.4).

A32. The MIAM process is more demanding of litigants than the ACAS process: the applicant is obliged to meet with a trained mediator, and his/her application will not be progressed without that taking place (unless one of the limited exemptions applies). However, like the ACAS process, MIAMs are not truly compulsory ADR: the respondent is not compelled to participate, only "expected" to do so. It is fair to say that the "expectation" may be reinforced by the Court exercising its powers to adjourn proceedings until ADR has been attempted by both parties, but that does not amount to "compulsion" in its true sense; the court would not (and probably could not) stay proceedings in perpetuity simply because one party refuses to attend a MIAM.

Small claims DRH hearings

A33. Lord Justice Briggs (as he then was), in the Final Report of his Civil Courts Structure Review,[69] drew attention to a process being adopted locally whereby small claims listed were listed for compulsory resolution hearings:

> *"2.17. There is a form of small claims conciliation (to use an umbrella term) carried out by District Judges in certain County Courts hearing centres in the Hampshire, Dorset and Wiltshire area, and also in Romford. It works in the following way.*
>
> *2.18. First, all cases in the small claims track are routinely called in for a conciliation and case management session. Attendance is compulsory, and parties not attending have their claims (or defences as the case may be) dismissed or struck out, with liberty to restore which is only very rarely exercised.*
>
> *2.19. The DJ conducting the list (which will include up to twelve cases in a morning's session) then invites each pair of parties to consider settlement, and provides assistance in the form of informal early neutral evaluation, in much the same way as is done at financial dispute resolution hearings in the Family Court.*
>
> *2.20. Those cases which do not settle there and then are given the benefit of case management directions designed to enable the parties to prepare for a final hearing much more effectively than is customary in the Small Claims Track.*
>
> *2.21. Statistics kept by the originator of the scheme in the Hampshire, Dorset, Wiltshire area (now HH Judge Dancey, but then a DJ) suggest that 25% of the entire small claims track list is disposed of due to non-attendance,*

[69] *Civil Courts Structure Review: Final Report*, Lord Justice Briggs, July 2016.

50% at the conciliation hearing, and a significant proportion of the remaining 25% settles before trial, due (anecdotally) to progress towards settlement achieved at the conciliation hearing.

2.22. This scheme bears an interesting relationship with the Small Claims Mediation service. While it is operated by judges, at much greater expense per hour to the court service than that provided by the small claims mediators, it brings about settlement of a much higher proportion of the small claims issued and deals in half a day with more than double the number of cases dealt with by a typical small claims mediator in a whole day.

2.23. I have found no convincing explanation why this form of judicial conciliation is being practised only in a small number of specific parts of England. It is possible that there are other parts where it is being practised, of which I remain unaware. The main argument against its more general use which has prevailed to date appears to be that cases which do not settle by means of this process therefore have to receive two doses of judicial attention, one at the conciliation hearing, and the other (which has to be by a different judge) at the trial. This is, of course, correct as far as it goes, but it does not follow that the overall economic analysis ought to be regarded as adverse to the use of this form of judicial conciliation."

A34. These hearings, now known as DRH hearings, are still far from universal. However, they appear to have proven successful at least in certain hearing centres, including in Birmingham, where a settled process (and paperwork) has been established, including a standard summons which makes clear that non-attendance could be met with a strike-out. DRH hearings are within the scope of a review by a working party of the Civil Justice Council chaired by HH Judge Cotter, which has recently published its interim report.[70]

The West Midlands Employment Tribunal ADR pilot

A35. The West Midlands Employment Tribunal is operating a pilot scheme for cases listed for trial lasting more than 5 days, whereby a 2-hour ADR hearing is listed six weeks after the exchange of witness statements.[71] The hearings are conducted by a judge trained in judicial mediation (who will not conduct the trial). The purpose of the ADR

[70] *The Resolution of Small Claims: Interim Report*, Civil Justice Council, April 2021.

[71] The pilot is overseen by Tribunal Judge Lorna Findlay, who has produced a detailed pilot plan dated 30 December 2019 (updated on 22 December 2020), including draft directions for the ADR hearing.

hearing is to encourage the parties to resolve the dispute via agreement: the judge may provide directions before the hearing for the parties to produce certain documents, including a "position statement" setting out what each part wishes to achieve. At the hearing, the judge may give a preliminary, non-binding view on the merits of the parties' positions. If the parties do not reach agreement, the judge may also list the matter for a longer judicial mediation hearing.

A36. These ADR hearings are akin to an ENE hearing of the kind ordered in ***Lomax***, in that they constitute a judge-led form of ADR that is "baked in" to the ordinary court process; albeit they occur somewhat later in the proceedings, after evidence has been exchanged.

A37. The pilot commenced in July 2020. On 15 March 2021, Tribunal Judge Findlay reported on the results of the scheme, stating that it had resulted in 11 successful settlements, with 20 cases proceeding to trial. She noted the extensive resource-saving achieved by the scheme and proposed extending the pilot.

Easter Term
[2021] UKSC 19
On appeal from: [2019] EWCA Civ 475

JUDGMENT

Matthew and others (Appellants) *v* Sedman and others (Respondents)

before

Lord Hodge, Deputy President
Lady Arden
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

21 May 2021

Heard on 19 January 2021

Appellants	*Respondents*
Jeremy Cousins QC Christopher McNall (Instructed by Steele & Son with Bagot Heyes (Clitheroe))	Clare Dixon QC Nicholas Broomfield (Instructed by Mills & Reeve LLP)

Appellants:-

(1) Peter Matthew
(2) Scott Nixon (as Trustee of the Will Trusts of Evelyn Hammond)
(3) Diana Rose Cook
(4) Sally Ann Evelyn Selby
(5) Colin Richard Henry Cartledge
(6) Philip Cartledge

Respondents:-

(1) Barrie Sedman
(2) Thomas William Hallam
(3) Peter James Roberts

LORD STEPHENS: (with whom Lord Hodge, Lady Arden, Lord Sales and Lord Burrows agree)

Introduction

1. This appeal relates to the calculation of the limitation period in respect of causes of action which accrued at, or on the expiry of, the midnight hour at the end of Thursday 2 June 2011. The respondents contend that part of the proceedings brought against them by the appellants, and which is the subject of this appeal, and which I shall refer to as the "Welcome Claim", had been issued outside the limitation period of six years contained in sections 2, 5 and 21(3) of the Limitation Act 1980. The respondents sought, and Judge Hodge QC ("the judge"), sitting as a judge of the High Court, granted, summary judgment in relation to that part of the proceedings ([2017] EWHC 3527 (Ch)). The Court of Appeal (Underhill and Irwin LJJ) dismissed the appellants' appeal ([2019] EWCA Civ 475; [2020] Ch 85) and subsequently refused the appellants' application for permission to appeal to the Supreme Court. On 17 December 2019, a panel of the Supreme Court (Lady Hale, Lady Black and Lord Briggs) granted permission to appeal.

2. The issue before this court is whether Friday 3 June 2011, the day which commences at or immediately after the midnight hour, counts towards the calculation of the six-year limitation period.

3. The proceedings were commenced by a claim form issued on Monday 5 June 2017. If Friday 3 June 2011 is included for the purposes of calculating the limitation period, then as the High Court and the Court of Appeal held, the period expired six years later at the end of Friday 2 June 2017 so that the Welcome Claim is statute barred. If that day is excluded, then the limitation period expired six years later at the end of Saturday 3 June 2017. Since the necessary act on the part of the appellants was the issue of the claim form in the legal action, something which can only be done when the court office is open, and the office is shut at the weekend, then it is common ground, following *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, that the final day for issue would be Monday 5 June 2017. That was the date of the issue of proceedings. Hence, on this basis the commencement of the action would be within the limitation period of six years and not statute-barred.

Factual background

4. The first and second appellants are the current trustees of a trust established under the 1948 will of Mrs Evelyn Hammond, who died in 1952 ("the Trust"). They replaced the respondents, who were the trustees until their retirement on 1 August 2014. Each of the respondents was a professional trustee, being employees or partners of the accountancy firm Forrester Boyd, Chartered Accountants.

5. Pursuant to the terms of the Trust: (a) the income is payable to the third appellant during her lifetime; and (b) upon the third appellant's death the Trust assets will be distributed to the fourth, fifth and sixth appellants.

6. The Trust had a shareholding in Cattles plc ("Cattles"), which was listed on the London Stock Exchange. In 1994 Cattles acquired Welcome Financial Services Ltd ("Welcome"). By April 2004 the Trust owned 161,900 ordinary shares in Cattles.

7. In 2007 Cattles published an annual report. Information in that report was then included in a rights issue prospectus which was released to potential investors in April 2008. The Financial Services Authority subsequently found that the information contained in the annual report and prospectus had been misleading.

8. In April 2009 trading in Cattles' shares was suspended and in December 2010, Welcome and Cattles each commenced proceedings for court-sanctioned schemes of arrangement ("the Welcome Scheme" and "the Cattles Scheme" respectively).

9. On 28 February 2011 the court made orders approving the Welcome Scheme and the Cattles Scheme. The terms of each scheme included provision for claims to be submitted by shareholders. As a consequence of the misleading information in the annual report and prospectus, the Trust had a claim in both the Cattles Scheme and the Welcome Scheme.

10. The respondents made a claim in the Cattles Scheme, but the appellants allege that the respondents were in breach of trust and negligent in failing to properly formulate and evidence that claim. I will refer to that part of the proceedings as "the Cattles Claim". The respondents accept that the Cattles Claim was commenced within the limitation period, and so it is not the subject of this appeal.

11. The Welcome Scheme rules provided by clause 3.6 that "in order to be entitled to any Scheme Payment, Scheme Creditors must, on or prior to the Bar Date, submit a Claim Form". It is common ground that the Bar Date was Thursday 2 June 2011. Accordingly, a valid claim in the Welcome Scheme could have been made up to midnight (at the end of the day) on Thursday 2 June 2011.

12. The respondents did not make a claim in the Welcome Scheme on or before Thursday 2 June 2011. This failure has led to that part of these proceedings which relates to the Welcome Scheme and which I have been referring to, and will continue to refer to, as "the Welcome Claim". The Welcome Claim is couched in the tort of negligence and breach of trust, though on behalf of the appellants it was submitted that it was also couched in breach of contract.

13. These proceedings were commenced by a claim form issued on Monday 5 June 2017 in which the appellants sought damages and/or equitable compensation and other remedies and relief in relation to both the Welcome Claim and the Cattles Claim. In response to the proceedings, on 4 July 2017 the respondents:

> a. Issued an application for strike out/summary judgment in relation to the Welcome Claim ("the application") on the basis that it had been issued out of time and was consequently statute-barred pursuant to sections 2 and/or 5 and/or 21(3) of the Limitation Act 1980, it had no real prospect of succeeding, and there was no other reason why the Welcome Claim should proceed to trial; and
>
> b. Filed and served a defence that: (i) did not plead to the Welcome Claim, except to admit its existence; and (ii) set out a substantive defence to the Cattles Claim; which the respondents accept was brought in time.

As I have indicated, the judge granted the application and the Court of Appeal dismissed the appeal.

The limitation periods

14. The relevant limitation periods are set out in materially identical terms in the Limitation Act 1980 for each of the causes of action in these proceedings. Section 2 provides a time limit for actions founded on tort: "An action founded on tort shall not be brought *after the expiration of six years from the date on which the cause of action accrued*". Section 5 makes provision for a time limit for actions founded on simple contract: "An action founded on simple contract shall not be brought *after the expiration of six years from the date on which the cause of action accrued*".

Finally, section 21 makes provision for a time limit for actions in respect of trust property. It is common ground that the relevant time limit is contained in subsection (3) which, in so far as material, provides that "an action by a beneficiary … in respect of any breach of trust, …, shall not be brought *after the expiration of six years from the date on which the right of action accrued*" (emphasis added to each).

The judgments of the High Court and the Court of Appeal

(a) The High Court judgment

15. In an ex tempore judgment handed down on 27 November 2017 the judge granted the application. He proceeded on the basis, at para 28, "that, if the cause of action arose during the course of a day, you exclude that day for the purpose of calculation for Limitation Act purposes". He explained the reason for this as being that "If you do not exclude [that] day, then the claimant would not have a full six year period within which to bring his cause of action". He held, at para 28, that this reason did not apply whenever the cause of action accrues at the very first moment of a day because "if the cause of action accrues at the very first moment of that day, then [the appellants do] have the full six years …". He added at para 31 that "At any moment during that day the [appellants] can bring a claim; and to exclude that day from the calculation for Limitation Act purposes would have the effect of giving [them] an extra day over and above the statutory limitation period for bringing the claim". Relying on *Gelmini v Moriggia* [1913] 2 KB 549 he held, at para 31, that "where it is absolutely clear that the cause of action arises at the very beginning of a particular day, that day should not be excluded from the calculation for Limitation Act purposes".

16. The judge concluded, at para 26, that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011, that this day was to be included for the purposes of calculating the limitation period so that the last day for issuing the claim form was Friday 2 June 2017 (para 31), and on this basis the Welcome Claim, which was issued on Monday 5 June 2017, was out of time. The respondents were therefore entitled to summary judgment on their Limitation Act defence.

17. The judge gave the appellants permission to appeal on the issue of "whether the date when the cause of action accrued in the Welcome Claim (being 3 June 2011) is or is not included in the calculation of when the limitation period expired".

(b) The judgments in the Court of Appeal

18. The Court of Appeal handed down reserved judgments on 20 March 2019 dismissing the appeal. The lead judgment was delivered by Irwin LJ and Underhill LJ delivered a concurring judgment. The Court of Appeal accepted, as was common ground, that in cases where the cause of action accrues part-way through a day, that day is to be ignored in the reckoning of time for limitation purposes: see para 17 Irwin LJ and para 38 Underhill LJ. However, Irwin LJ differed from the judge's conclusion that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Irwin LJ, relying on *Dodds v Walker* [1981] 1 WLR 1027, held at para 16 that "in the case of a 'midnight' deadline, it is wrong to attribute the accrual of an action … to the day after the relevant midnight, and the analysis must proceed from there". He added at para 32 that "the [midnight] deadline provides a categorical indication that the action accrued by that point in time, *rather than accruing on the day following midnight*" (emphasis added). In this way in a midnight deadline case Irwin LJ did not attribute the cause of action to 3 June 2011. Underhill LJ also differed from the judge's finding that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Underhill LJ held, at para 38, that "the cause of action arises at, not after, midnight". Both members of the Court of Appeal held that there was a discrete category of cases which could be termed "midnight deadline" cases, which were distinct from cases in which the cause of action accrues part-way through a day. That distinction justified including 3 June 2011, being the day after midnight, in the calculation of time.

Whether 3 June 2011 should have been included or excluded for the purposes of calculating the limitation period

(a) The appellants' submissions

19. The appellants submit that the cause of action accrued on 3 June 2011 and that long-standing authority establishes a rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time in all cases ("the rule"). It was submitted that the rule could be discerned from landmark cases such as *Mercer v Ogilvy* (1796) 3 Pat App 434, *Lester v Garland* (1808) 15 Ves Jun 248 (33 ER 748), *The Goldsmiths' Co v The West Metropolitan Railway Co* [1904] 1 KB 1 and *Stewart v Chapman* [1951] 2 KB 792. Based on this rule, it was also submitted that *Gelmini v Moriggia* was wrongly decided being, it was said, inconsistent with *Radcliffe v Bartholomew* [1892] 1 QB 161, and having been expressly disapproved in *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336.

20. The appellants also relied on the wording of sections 2, 5 and 21(3) of the Limitation Act 1980, and specifically on the following part of sections 2 and 5: "after the expiration of six years from the date on which the cause of action accrued" and the equivalent part of section 21(3), which is identical save that "right of action" is substituted for "cause of action". Three key propositions were advanced, which were said to be derived from the use of the words "from" "date" and "accrued" in those sections.

21. The first key proposition related to the word "date", it being said that it was necessary to identify the date upon which the cause of action or right of action accrued. In that respect Mr Cousins QC, on behalf of the appellants submitted that there was never a moment in time that was neither 2 June 2011 nor 3 June 2011. Relying on *Dodds v Walker* [1981] 1 WLR 1027, he submitted that the law did not recognise the metaphysical concept of a separate point in time between two days. He stated that it was only after midnight at the end of 2 June 2011 that the cause of action accrued, so that the relevant date was 3 June 2011, not some metaphysical point in time between those dates. He also submitted that the suggestion made on behalf of the respondents that the expiry of 2 June 2011 and the loss suffered by the appellants happened simultaneously could not be correct, as the two events were incapable of mutual co-existence. Rather, these events were sequential, so that upon the expiry of the last moment of 2 June it was already the 3 June 2011, when the loss was sustained, and so, it was submitted, the relevant date which should be identified was 3 June 2011.

22. The second key proposition related to the word "from". The appellants submitted that once the date of the accrual of the cause of action was correctly identified as 3 June 2011 the appellants in accordance with sections 2, 5 and 21(3) of the Limitation Act 1980, had six years "from" that date to bring an action. On the basis of long-standing authority, it was submitted that "from" signifies a period subsequent to the date of the event itself, so that the date of the event is to be excluded from the reckoning of time.

23. The third key proposition related to the word "accrued". The appellant submitted that the statutory language focuses not on the time of day at which accrual occurs but rather on the day upon which it occurs, and that day is an indivisible unit of time which is to be excluded from the reckoning of time. Furthermore, if the date is to be excluded in some cases, then it must be excluded in all cases as, it was submitted, it serves no purpose to have a different result in different cases.

(b) The respondents' submissions

24. The respondents' submissions approached the question on the basis that the Welcome Claim was based on negligence by omission (namely the omission to submit a claim form in the Welcome scheme on or prior to 2 June 2011). On this basis it was contended that two things happened at precisely the same moment. First, the time for submitting the claim in the Welcome scheme elapsed, and second, the cause of action arose. These, it was said, were not consecutive events but rather were inextricably linked, so that they occurred simultaneously at the last moment of 2 June 2011. It was also said to be strictly unnecessary to determine whether that moment is "properly ascribed to 2 June 2011 or the very first moment of 3 June 2011", as one can "either look back and call it the end of 2 June 2011 or look forward and call it the beginning of 3 June 2011." In either event, there was no fraction of a day, and the appellants had the entirety of 3 June 2011 in which proceedings could have been commenced so that whether the cause of action arose at the end of the 2 June 2011 or the very start of 3 June 2011, the outcome should be the same.

(c) The case law on which the appellants rely

25. The appellants primarily relied on four authorities to establish what they submitted was a long-standing rule that the day of accrual of the cause of action should be excluded from the reckoning of time. However, on analysis none of those cases considered the position in relation to midnight deadlines.

26. The first is the decision of the House of Lords in *Mercer v Ogilvy* (1796) 3 Pat App 434. On its facts this case involved a fraction of a day. On 22 February 1791 at 8.00 pm Robert Mercer, executed a deed of entail of his lands of Lethindy, in favour of Katherine Mercer his niece, and various substitutes. He died between 10.00 and 11.00 pm on the 22 April 1791. Sir John Ogilvy brought an action against Miss Mercer and the other substitutes to set aside the entail, on the basis that Mr Mercer had not survived its execution for the 60 days required by a statute of 1696 for regulating deeds executed on deathbeds. The question arose as to whether the day of death was to be included or excluded from the calculation of 60 days. The decision of the House of Lords in relation to the computation of time was stated by Lord Thurlow as follows (p 442):

> "The terminus a quo mentioned in the act, is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *60 days after* is descriptive of another and *subsequent* period, which begins when the first period is completed. The day of making the deed must therefore be excluded, so the maker only lived 59 days of the period

> required. Had he seen the morning of the 60th, or subsequent day, it would have been sufficient; the rule of law above mentioned, (dies inceptus pro completo habetur,) then applying and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed."

I consider that, as Lord Thurlow stated, "the date or day of the deed … is indivisible" so that if there is a fraction of a day then that day is to be excluded. However, *Mercer v Ogilvy* did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

27. The second is *Lester v Garland* (1808) 15 Ves Jun 248 (33 ER 748). This case concerned the calculation of time in relation to a condition in a will which had to be fulfilled within six calendar months after the testator's death. The question was whether the six months were to be calculated inclusive or exclusive of the day of the testator's death. The Master of the Rolls, Sir William Grant, concluded that the day of the testator's death should be excluded from the period of six months, so that the condition was fulfilled in time. In his judgment he stated that "It is not necessary to lay down any general rule upon this subject". However, he went on to state that (p 257, ER p 752):

> "upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects *fractions of a day* more generally than the civil law does. … The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed." (Emphasis added)

I make two observations. First, despite the Master of the Rolls disavowing any general rule, subsequent authorities have consistently adopted the principle of rejecting fractions of a day. Second, the factual situation in that case involved a fraction of a day. The Master of the Rolls did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

28. The third is *The Goldsmiths' Co v The West Metropolitan Railway Co* [1904] 1 KB 1. The issue was whether, as required by the terms of a statute passed on 9 August 1899, a notice to treat for compulsory purchase given on 9 August 1902 was

given within three years from the date on which the Act was passed. That in turn depended on whether the day of the passing of the Act was to be excluded in the computation of the three years. The Court of Appeal held that the day of passing should be excluded, and that the notice was therefore valid. Collins MR stated (p 5):

> "It appears to me that no distinction can be drawn between the day determined by the passing of the Act, and any other day from which time might be reckoned. If this view is correct, then the day from which the period is to run must be excluded in computing the three years."

Mathew LJ in a concurring judgment referred to *Lester v Garland* and later authority. He stated (p 5):

> "The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded."

Here again, however, it appears from the report of submissions of counsel that the facts of *Goldsmiths' Co* involved a fraction of a day, because Royal Assent was given part-way through the day of passing of the Act. Mulligan, KC, is reported, at p 4, as submitting that "If in this case one day were substituted for three years the effect of the argument for the plaintiffs would be, not to give a day, *but only to give the portion of it between the time when the Royal assent was given and midnight*" (emphasis added). In any event, the Court of Appeal did not consider the position that arises in a midnight deadline case. I note, for completeness, that section 4 of the Interpretation Act 1978 now makes provision as to the time at which an Act comes into force by providing that "An Act or provision of an Act comes into force - (a) where provision is made for it to come into force on a particular day, at the beginning of that day; (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent."

29. The fourth is *Stewart v Chapman* [1951] 2 KB 792 which again on its facts involved a fraction of a day. The question in that case was whether a notice of intended prosecution had been served in time under section 21 of the Road Traffic Act 1930. That section provided that "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating … to careless driving he shall not be convicted unless … (b) *within 14 days of the commission of the offence* a summons for the offence was served on him; or (c) *within the said 14 days* a notice of the intended prosecution … was served on or sent by registered post to him …" (emphasis added). Lord Goddard CJ delivering the judgment of the Divisional Court, with which Ormerod J agreed, held that it was not enough to post the letter

within the 14 days, but rather that it must be posted within such time that in the ordinary course of post it would reach the person to whom it is addressed within the 14 days. The alleged offence was committed at 7.15 am on January 11, 1951. The prosecutor did not send the notice of intended prosecution by registered post until 1 pm on January 24, and it was not delivered to the defendant until January 25 at about 8.00 am. The outcome of the issue as to whether the notice of intended prosecution had been served in time depended on whether the date of commission of the offence was to be excluded from the calculation of the period of 14 days. The Divisional Court held that in calculating the 14 days the date of the commission of the offence was to be excluded. Lord Goddard CJ stated at 798-799:

> "[The earlier] cases were all considered by the Court of Appeal in *The Goldsmiths' Co v The West Metropolitan Railway Co* in 1903; and it was in that case that the Master of the Rolls … held that it was now well established that, whatever the expression used, the day of the doing of the act was to be excluded. Mathew, LJ, put it very succinctly and shortly in his judgment; he said:
>
> > 'The true principle that governs this case is that indicated in the report of *Lester v Garland*, where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke B, in *Russell v Ledsam*, and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.'
>
> That case, which is binding on this court, seems to me entirely to apply to the words of this section. This letter was received on the morning of January 25. It follows, in my opinion, that the notice was served in time, and accordingly this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case."

Stewart v Chapman did not consider the position that arises if the day of the commission of the offence was undivided. Furthermore, it did not consider the

position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

30. I consider that none of the cases relied on by the appellants establishes a general rule applicable to a midnight deadline case. The only midnight deadline case is *Gelmini v Moriggia*, which the appellants submit was wrongly decided.

(d) Gelmini v Moriggia

31. The case of *Gelmini v Moriggia* concerned an action upon a promissory note. The time for payment of the promissory note expired at midnight on 22 September 1906 and the writ in the action against the makers was issued on 23 September 1912. Section 3 of the Limitation Act, 1623 provided that "All actions … shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) … within six years next after the cause of such actions or suit." Channell J held that the cause of action was complete at the commencement of 23 September 1906. On that basis the question whether the action was commenced in time depended on whether the six-year period was inclusive or exclusive of 23 September 1906. Channell J was referred to authorities including *Lester v Garland* and *Goldsmiths' Co v West Metropolitan Railway Co*, but not to *Radcliffe v Bartholomew*, in support of the proposition that the 23 September 1906 ought to be excluded. Channell J held that that day must be included in calculating the six years within which the action could be brought, so that the six years expired on 22 September 1912, which meant that the writ was issued too late. Channell J's reasoning was expressed in the following terms in the Kings Bench report (pp 552-553):

> "An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because *the cause of action is complete at the commencement of that day*. If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are 'within six years next after the cause of such action or suit.' Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises, and *on that day an action can be brought, and that day is the first of all the days in the six years*. Therefore, assuming that the day

> upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is the previous day which is excluded, ie, the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it. Therefore, so far as the cause of action arises on the promissory note, the writ was issued too late." (Emphasis added)

32. In this passage Channell J addressed the question as to the date upon which the cause of action accrued, though there is a degree of confusion in relation to that issue. Channell J stated that "until the expiration of that day an action cannot be brought because until then there is no complete cause of action". That could be interpreted as a finding by him that there was a complete cause of action *on the expiration of the day* rather than there being a complete cause of action on the next day. However, he goes on to state "The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day". That is a finding that the cause of action accrued at the commencement of the next day, rather than on the expiration of the previous day. He also stated: "Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises …". Again, that is a finding that the cause of action accrued on the next day. However, he went on to hold that "It is the previous day which is excluded, ie, the day at the expiration of which the cause of action becomes complete" which could again be interpreted as a finding by him that there was a complete cause of action on the expiration of the previous day. The reports in (1913) 109 LT 77 and (1913) 29 TLR 486 do not resolve this confusion. However, regardless as to whether the cause of action accrued at the very end of 22 September 1906 or at the very start of 23 September 1906 the essential point being made by Channell J is that the action could have been brought throughout the 23 September 1906. In practical terms there was no fraction of a day on the facts in *Gelmini*.

33. Another aspect of the decision in *Gelmini* which is unclear is as to whether Channell J was determining that the decision in that case was an exception to the general rule applicable in midnight deadline cases, or whether the decision could be seen as endorsing a wholesale departure from the general rule in all cases. In his ex tempore judgment Channell J did not expressly state that this was a midnight deadline case not involving any fraction of a day, and therefore an exception to the general rule. I nonetheless consider that a fair reading is that he was defining an exception to the general rule. However, in considering any subsequent judicial

expressions of disapproval of *Gelmini*, one should bear in mind that such expressions of disapproval could have assumed that Channell J was incorrectly departing from the general rule.

(e) Was Gelmini inconsistent with earlier authority or subsequently disapproved?

34. The appellants submit that *Gelmini* was inconsistent with *Radcliffe v Bartholomew*, expressly disapproved in *Marren v Dawson Bentley & Co Ltd* and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd*.

35. The decision of the Divisional Court in *Radcliffe v Bartholomew* concerned the question as to whether a criminal complaint under the Prevention of Cruelty to Animals Act 1849 had been made within one calendar month after the cause of complaint had arisen. That question in turn depended on whether the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made. Willis J, giving the judgment of the court with which Lawrence J agreed, held that the day was to be excluded so that the complaint was therefore made in time, and the justices had jurisdiction to hear the case. In arriving at that conclusion Wills J (p 163) referred to the remarks at the end of the judgment of Parke, B in *Young v Higgon* (1840) 6 M & W, 49, as follows:

> "Apply the criterion which has been before suggested - reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted."

Wills J then considered that those remarks were entirely applicable to the decision in *Radcliffe v Bartholomew* stating that "The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity".

36. I do not consider that the decision in *Gelmini* is inconsistent with *Radcliffe*, as the decision in *Radcliffe* did not involve a midnight deadline. Furthermore, if one applied the criterion of reducing the time limit to one day in the present case then there would still be a complete day in which to commence an action. Indeed, if one excluded the day after midnight from the calculation of a one-day time limit then there would be two complete days in which to commence an action. On that basis the decision in *Gelmini* is consistent with the criteria suggested in *Radcliffe*.

37. *Marren v Dawson Bentley & Co Ltd* concerned an industrial accident in which the plaintiff sustained personal injuries. The accident occurred at 1.30 pm on 8 November 1954. On 8 November 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the negligence of his employers, the defendants. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on 8 November 1954, and that the proceedings had not been commenced within the three-year limitation period contained in section 2(1) of the Limitation Act, 1939. Havers J was referred to a number of authorities including *Gelmini v Moriggia* but he did not approach that case as being an exception to the general rule applicable in midnight deadline cases. This meant that Havers J did not consider distinguishing *Gelmini* from the facts before him where there was a fraction of a day, the accident having occurred at 1.30 pm. Rather, Havers J considered that the approach in *Gelmini* was in conflict with *Radcliffe v Bartholomew*. He considered that he was bound by the decision in *Radcliffe*, but even if he were not bound by it, then he preferred the decision in *Radcliffe* and the reasons on which it was based to that in *Gelmini*. He accordingly declined to follow *Gelmini*. However, as I have indicated, I consider that the principle in *Gelmini* is an exception to the general rule applicable in midnight deadline cases. In this way the decision in *Marren* is consistent with *Gelmini*, which ought to have been distinguished.

38. *Pritam Kaur v S Russell & Sons Ltd* concerned a plaintiff who was the widow and administratrix of a foundry worker who had been killed at work on 5 September 1967. The writ was issued against her late husband's employers, claiming damages for negligence and breach of statutory duty. The defendants claimed that the cause of action did not accrue within three years before the commencement of the action so that it was statute barred by virtue of section 2(1) of the Limitation Act 1939. Whether the action had been commenced within the limitation period depended on whether the day of the accident was included or excluded in the computation of time. Lord Denning succinctly stated at p 348E that "The first thing to notice is that, in computing the three years, you do not count the first day, September 5, 1967, on which the accident occurred. It was so held by Havers J in *Marren v Dawson Bentley & Co Ltd* … The defendants here, by their cross-notice, challenged that decision; but I think it was plainly right". Karminski LJ agreed with Lord Denning. Megarry J addressed the issue more fully at p 350F-H not only by reference to *Marren* but also by reference to the statutory wording. He stated:

> "At one time there was some argument on whether or not the period was to be reckoned by excluding the date on which the accident occurred, but in the end the point was not pressed. The decision of Havers J in *Marren v Dawson Bentley & Co Ltd* …, based on section 2(l) of the Limitation Act 1939, was that the day of the accident was to be excluded in the computation of the time; and in the present case the judge applied that decision.

> The language of section 2(1) with the phrase 'after the expiration of three years from the date,' plainly supports that view. If the wording of the Fatal Accidents Acts, with the phrase 'within three years after the death,' is less apt, it would nevertheless be regrettable to introduce any fine distinctions, especially as the period of three years was inserted into each statute by the same Act, that of 1954. I would therefore agree with the judge in excluding the day of the accident from the computation under both heads."

On behalf of the appellants, it is submitted that the express approval of *Marren* by the members of the Court of Appeal implicitly carried with it the disapproval of *Gelmini*. I do not agree. Rather, the court in *Pritam* based their decision on *Marren* which was a case involving a fraction of a day. There was no analysis in *Pritam* or indeed in *Marren* of whether the day of accrual of the cause of action would be included in the computation of time when that day was a complete undivided day as it was in *Gelmini*.

39. I consider that the decision in *Gelmini*, when viewed as an exception to the general rule, is consistent with *Radcliffe*, ought to have been distinguished in *Marren* and was not disapproved in *Pritam*.

(f) Megarry J's reasoning in Pritam

40. In *Pritam* Megarry J also based his reasoning on the statutory wording which included the word "from". However, the question as to whether the word "from" is inclusive or exclusive was considered by Lord Mansfield in *Pugh et, Uxor v Duke of Leeds* (1777) 2 Cowp 714, 725 (98 ER 1323, 1329). Lord Mansfield having reviewed the authorities concluded "that 'from' may in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive". I consider that it would be inappropriate to decide the present case purely on a textual analysis of the meaning of the word "from".

(g) McGee on Limitation Periods, 8th ed (2018), paras 2.005-2.007

41. In addition to *Gelmini*, the respondents relied on *McGee on Limitation Periods*, 8th ed (2018), paras 2.005-2.007) where the editors wrote:

> "2.005 The general rule in calculating the expiry of a limitation period is usually expressed as being that parts of a day are ignored. This formulation is ambiguous, and needs to be

clarified by example. In *Gelmini v Moriggia* the defendant had given a promissory note. The time for payment of this expired on 22 September 1906. The claimant's writ on the note was issued on 23 September 1912. Channell J held that the cause of action was complete at the beginning of 23 September 1906, since that was the earliest moment at which proceedings could have been commenced, notwithstanding that the court office obviously would not have been open at midnight. Consequently the six-year limitation period expired at the end of 22 September 1912, and the writ issued on the following day was out of time. This is the simplest possible example, since the cause of action was held to accrue at the very beginning of a day.

…

2.006 … Perhaps the most satisfactory of the authorities on this point is *Marren v Dawson Bentley & Co*. The claimant was injured in an accident at 13.30 on 8 November 1954, and the writ was issued on 8 November 1957. The question was whether time had expired at the end of 7 November 1957, and Havers J held that it had not. The day on which the cause of action accrues is to be disregarded in calculating the running of time. It therefore followed that time began to run at the first moment of 9 November 1954 and expired at the end of 8 November 1957. Havers J expressly declined to follow *Gelmini v Moriggia*, but it is not clear whether his decision is inconsistent with that in *Gelmini*. The latter case deals with one very specific situation, namely where the cause of action must accrue on the stroke of midnight. It is arguable that here there is no question of disregarding any part of a day; the cause of action was in existence throughout 23 September 1906. Consequently, it may be argued that on those very special facts the decision is still good law.

2.007 The alternative is to say that time did not begin to run until the start of 24 September, which seems a very odd conclusion, given that the time for payment expired at the end of 22 September. It is submitted that the cases are reconcilable and that both are correct on this point. The rule is that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period. Strictly speaking this will normally lead to the extension of the limitation period by a few hours but it could

equally be argued that the contrary rule would lead to the shortening of that period."

(h) The extent of the Limitation Act 1980 and a comparison with the legislative provisions in Scotland and Northern Ireland

42. The Limitation Act 1980 has no provision addressing the issue we have to decide in this case. Section 41(4) of the Limitation Act 1980 provides, subject to one limited exception in relation to Northern Ireland, that "this Act does not extend to Scotland or to Northern Ireland". There are separate legislative provisions in relation to limitation in both Scotland and in Northern Ireland.

43. In Scotland section 14(1)(c) of the Prescription and Limitation (Scotland) Act 1973 provides that "if the commencement of the prescriptive period would, apart from this paragraph, fall at a time in any day other than the beginning of the day, the period shall be deemed to have commenced at the beginning of the next following day". The respondents submit that section 14(1)(c) applies the approach in *Gelmini* of including the day after midnight in the computation of time.

44. In Northern Ireland article 2(1) of the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (NI11)) provides that the computation of time is governed by the Interpretation Act (Northern Ireland) 1954. Section 39(2) of that Act provides that: "Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period". Therefore, the respondents submit that the Northern Ireland legislation expressly excludes the day on which the cause of action accrues. However, that raises the question as to the day upon which the cause of action accrues in a midnight deadline case. For instance, does it accrue at, not after, midnight?

45. I mention these different legislative provisions in Scotland and Northern Ireland solely for the purpose of explaining that specific statutory provisions apply in those jurisdictions to the situation which arises in this case, and that this judgment addresses the issue identified in para 2 above in relation to the law in England and Wales only.

(i) Conclusion

46. It is not surprising that there are conflicting views as to the date upon which the cause of action accrues in a midnight deadline case. There were potentially differing answers to that question in *Gelmini* (see para 32 above). In this case the issue was decided in different terms both at first instance (see para 16 above) and in

the Court of Appeal (see para 18 above). For my own part I would prefer the approach of Underhill LJ that "the cause of action arises at, not after, midnight". However, it is not necessary to endorse any of the competing answers to that issue and I do not do so, because, as in *Gelmini*, whether the cause of action accrued at the expiry of 2 June 2011 or at the very start of 3 June 2011 there is no significant difference, in that 3 June 2011 was for practical purposes a complete undivided day.

47. I consider that the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in this case it was, in my opinion correctly, submitted that in a midnight deadline case even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day. I consider that it would impermissibly transcend practical reality if the stroke of midnight or some infinitesimal division of a second after midnight, led to the conclusion that the concept of an undivided day was no longer appropriate. In that sense this would not only be impermissible metaphysics but also, in this context, such a minimum period of time does not cross the threshold as capable of being recognised by the law. Whether the issue is framed in terms of metaphysics, which the common law eschews, or of the principle that the law does not concern itself with trifling matters, the conclusion is the same: realistically, there is no fraction of a day. That being so, the justification in relation to fractions of a day does not apply in a midnight deadline case. During oral submissions Mr Cousins QC, in answer to an enquiry from Lady Arden seeking to identify the rational justification for excluding a whole indivisible day from the calculation of the reckoning of time, sought to do so based on continuing the application of the rule, as he submitted it had been understood since the 18th century, so that in relation to something as important as limitation there should be continuity of interpretation. I reject the premise to that submission. As I have indicated there is no long-standing authority which excluded a whole indivisible day. Furthermore, I consider that the premise is undermined by the decision of Channell J in *Gelmini*. So, I reject this argument as a sufficient justification for excluding a whole day from the reckoning of time in a midnight deadline case. Rather, I prefer to consider the impact of holding that a full undivided day in a midnight deadline case is to be excluded from the reckoning of time. If that day were excluded from the computation of time then the limitation period would be six years and one complete day. I consider that would unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.

48. I also consider that the impact of excluding 3 June 2011 can be seen by applying the criteria suggested in *Radcliffe* of imagining a limitation period of one day. If in this case 3 June 2011 were excluded from the computation and if the

limitation period were a single day, then the impact would be to allow two complete days within which to commence an action (see para 36 above).

49. I consider that *Gelmini* is an exception to the general rule so that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period for the purposes of the provisions of the Limitation Act with which this appeal is concerned. The 3 June 2011 was a whole day so that it should be included in the computation of the limitation period.

Disposal of the appeal

50. I would dismiss the appeal.

HM Land Registry

Guidance

Practice guide 52: easements claimed by prescription

Updated 6 December 2021

Contents

Print this page

> Please note that HM Land Registry's practice guides are aimed primarily at solicitors and other conveyancers. They often deal with complex matters and use legal terms.

1. How prescriptive easements may be acquired

Prescription is the acquisition of a right through long use or enjoyment; the law presumes that the right was lawfully granted. There are 3 methods of acquiring an easement by prescription:

- at common law

- by lost modern grant
- under the Prescription Act 1832

Whichever method is relied on, the user must be for at least 20 years and the points set out below apply.

1.1 User as of right

The use must be without force, without secrecy and without permission (nec vi, nec clam, nec precario). Use while the same person is in possession of the benefitting and the burdened land cannot be use as of right.

1.2 Use by or on behalf of a freehold owner against another freehold owner

There are 2 points here.

Firstly, a tenant's use can establish an easement but it attaches to the freehold estate. This means a tenant cannot acquire an easement over other land owned by their landlord, as a landlord cannot have rights against themself, and this applies whether or not that other land also has a tenant. It also means any easement that does arise will not end with the lease.

Secondly, where the burdened land is occupied by a tenant, whether a prescriptive easement arises depends on whether the freehold owner of the burdened land acquiesced in the use. The position is explained in Williams v Sandy Lane (Chester) Ltd [2006] EWCA Civ 1738; see in particular para.24. In short, this means that:

- if the tenancy started before the period of use, the application will be cancelled unless the freeholder had actual or imputed knowledge of the use and could have taken steps to stop use during the tenancy
- if the tenancy started after the period of use, the application will be cancelled unless (i) the freeholder had actual or imputed knowledge of the use before the grant or (ii) the freeholder had actual or imputed knowledge of the use only after the grant but could have taken steps to stop the use

1.3 Use must be continuous

The use need not be constant but long, unexplained periods of non-use will prevent an easement from arising. Where the claim is made under the Prescription Act 1832, a break is not treated as an interruption in use until acquiesced in for 1 year.

1.4 The right claimed must be one that could have been lawfully granted

This point was considered by the House of Lords in Bakewell Management Ltd v Brandwood ([2004] UKHL 14).

If the right could not have been lawfully granted by deed, such as a right to pollute a river contrary to a statutory prohibition, then it cannot be acquired by prescription.

Section 193(4) of the Law of Property Act 1925 makes it a criminal offence to drive a vehicle over a common. Section 34 of the Road Traffic Act 1988 makes it a criminal offence to drive a motor vehicle over land that is not a road, that is a restricted byway, or over which a public footpath or bridleway runs. However, both offences are committed only if driving over the land is 'without lawful authority'. Since a right to drive over the land concerned could have been lawfully granted, it can be acquired by prescription.

1.5 Railway land

Since the passing of the British Transport Commission Act 1949, it has not been possible to acquire a right of way by prescription over land owned by the commission and forming an access or approach to, among other things, any station, depot, dock or harbour belonging to the commission (section 57 of the British Transport Commission Act 1949). The references to the commission must now be read to include successor rail authorities and the Canal & River Trust.

2. The operation of the easements when no register entries are made

There is no requirement for register entries to be made in respect of prescriptive easements.

The benefit of all interests subsisting for the benefit of an estate vests in the registered proprietor on first registration (sections 11(3) and 12(3) of the Land Registration Act 2002) and will then pass on a transfer of the registered estate.

Easements arising by common law prescription or the doctrine of lost modern grant will be legal interests. The purchaser of unregistered burdened land is bound by legal interests. Following first registration of the burdened land most legal easements are overriding interests (section 29 and Schedule 3 of the Land Registration Act 2002) and so capable of binding successive registered proprietors of the burdened land.

It is possible for an easement to cease to have effect on a registered disposition if the transferee had no actual knowledge of it, it was not obvious on a reasonably careful inspection of the land, and it had not been exercised within 1 year of the transfer. This does not, however, apply to easements that were overriding interests in relation to a registered estate on the coming into force of the Land Registration Act 2002 on 13 October 2003.

Most prescriptive easements will not fall into the category of easements that cease to have effect as they will be used on a regular basis. However, the possibility of an easement being lost in this way should not be ignored. The entry of a notice in the register of the burdened title will ensure that the easement does not cease to have effect on registration of a future disposition of the burdened land.

3. The register entries that can be made in respect of the easements

Broadly, the register entries we make depend on:

- whether both the benefitting land and burdened land are registered or only one of them is registered
- where the burdened land is unregistered, whether satisfactory evidence of title has been produced

3.1 The claimant's interest in the benefitting land and the freehold estate in the burdened land are both registered: registering the benefit and noting the burden

A registered proprietor may apply to be registered as proprietor of a legal easement appurtenant to their registered estate. In other words, they may apply to register the benefit of the easement. If the application is in order and, from the evidence we have seen, we consider it to be more likely than not that the claimant is entitled to apply to be so registered, we serve notice of the application on the registered proprietor of the burdened land and on other persons, such as registered chargees, who appear from the register to be interested in the land.

Provided we receive no objection to the notice or notices, we make an entry in the property register for the benefitting land to the effect that this land has the benefit of the easement. If the benefitting land is only part of the land in the title, the entry specifies the part of the registered title that has the benefit of the easement. Such an entry guarantees the existence of the right for the purpose of the indemnity provisions of the Land Registration Act 2002.

At the same time, we enter a notice in the charges register for the burdened land. If the burdened land is only part of the land in the title, the entry specifies the part of the registered title that is subject to the easement.

The entry may not be in the same terms as the right claimed by the applicant in their application. This is because the nature of the prescriptive right is determined by the use (or "user") from which it has arisen.

Both the entry in the property register for the benefitting land and the notice in the charges register for the burdened land will state that the right was acquired through long use and will refer to the statement(s) of truth or statutory declaration(s) lodged in support of the application, which will be open to inspection.

Typical entries of the benefit and burden might be:

(Benefit)

> "The land [tinted pink on the title plan] has the benefit of a right of way with or without vehicles over the road at the rear leading into Smith Street. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.

Note 1: A statement of truth dated 2 January 2014 made by Maria Garcia was lodged in support of the claim to the benefit of the right.

Note 2: Copy statement of truth filed."

(Burden)

"The [land tinted blue on the title plan] is subject to a right of way with or without vehicles in favour of 33 Smith Street. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.

NOTE: Copy statement of truth made on 2 January 2014 by Maria Garcia filed under CS259591".

The claims made in support of the application will be apparent from the supporting statutory declaration or statement of truth.

(A claimant whose interest in the benefitting land is registered could also apply simply to note the burden, and not to register the benefit. They would not need to deduce title to the benefitting land.)

3.2 Only the claimant's interest in the benefitting land is registered: registering the benefit

As explained in section 3.1, a registered proprietor may apply to be registered as proprietor of a legal easement appurtenant to their registered estate. In addition to the evidence of continuous use as of right, by or on behalf of and against the freehold owners, for a period of at least 20 years, the claimant will need to deduce the title to the burdened land and supply us with the address of the freehold owner. The claimant can deduce title by way of the examined or certified epitome or abstract that would be produced on a sale of the freehold estate in the burdened land. If the application is in order and, from the evidence we have seen, we consider it to be more likely than not that the claimant is entitled to apply to be so registered, we serve notice of the application on the freehold owner of the burdened land as well as on any other person who may have an interest in the land.

If we receive no objection to the notices served and have no reason to believe that any notice has not been received, we can register the benefit of the easement in the same way as if the burdened land had been registered.

Generally, where the claimant does not deduce title to the burdened land and supply the address of the freehold owner, we do not serve any notices. The entry we make in the property register for the benefitting land is in the following terms:

> “[Date] The registered proprietor claims that the land has the benefit of a right [terms of right as claimed by claimant]. The right claimed is not included in this registration. The claim is supported by [dates and details of statement(s) of truth or statutory declaration(s) and who has made them].
>
> NOTE: Copy/copies filed.”

We make a similar entry in cases where we have reason to believe that notices that have been served by us may not have been received.

As the form of the entry indicates, we will file copies of the statements of truth or statutory declarations lodged in support of the claim and they may be inspected and official copies obtained in the same way as most other categories of document referred to in the register. Where we similarly noted a claim to an easement in the property register of the benefitting land before 25 March 2002 (under rule 254 of the Land Registration Rules 1925), the entry does not refer to the statutory declarations lodged in support of the claim. However, it is open to the registered proprietor to apply in writing for the entry to be modified so as to refer to the relevant statutory declarations (statements of truth were not then used).

3.3 Only the freehold estate in the burdened land is registered: noting the burden

If the claimant claims to have acquired an easement over registered land, we may enter an agreed or unilateral notice in respect of the easement claimed, in the charges register of the burdened land.

If the claimant is applying for an agreed notice without the registered proprietor of the burdened land consenting to the entry, they should supply an up-to-date, examined or certified epitome or abstract of their title to the benefitting land, as well as the necessary statement of truth or statutory declaration. The registrar must be satisfied as to the validity of the applicant’s claim to enter an agreed notice without the consent of the registered proprietor.

For the difference between an agreed and a unilateral notice, as well as example entries, see practice guide 19: notices, restrictions and the protection of third party interests.

Whether the application is for a unilateral notice or an agreed notice, we will normally serve notice of the entry on the registered proprietor of the burdened land. We may also serve notice of the entry on other persons appearing to be interested in the land.

If a unilateral or agreed notice is entered in the register of the burdened land, any subsequent disposition of the burdened land will take effect subject to the easement, but only if the interest is valid (section 32(3) of the Land Registration Act 2002).

3.4 Burdened land is unregistered

An application for a caution against first registration can be made if the burdened land is unregistered. Seepractice guide 3: cautions against first registration for information on how to lodge a caution against first registration.

4. Applying for register entries to be made

Original documents are normally only required if your application is a first registration. A conveyancer may, however, make an application for first registration on the basis of certified copy deeds and documents only. For information about this see practice guide 1: first registrations – Applications lodged by conveyancers – acceptance of certified copy deeds.

If your application is not a first registration, we will only need certified copies of deeds or documents you send to us with HM Land Registry applications. Once we have made a scanned copy of the documents you send to us, they will be destroyed. This applies to both originals and certified copies.

However, any original copies of death certificates or grants of probate will continue to be returned.

4.1 Prescribed forms

An application to register the benefit of a prescriptive easement must be made either informFR1 (at the time the benefitting land is first registered) or form AP1 (at any time subsequently).

When the application is being made in form FR1 the application should be set out in brief terms in panel 5, for example:

> "Registration of the benefit of an easement, being a right of way with or without vehicles for the benefit of the applicant's land over the driveway shown coloured brown on the attached plan."

If the burdened land is registered the title number of the burdened land must be given in panel 2. It may be necessary to extend the depth of the panel in an electronically produced form or to use a continuation sheet form CS.

When the application is made in form AP1, it should be set out in panel 4, for example:

> "Registration of the benefit and noting of the burden of an easement, being a right of way on foot only for the benefit of the applicant's registered title number AB123456 over the passageway leading from the rear over registered title number AB654321 to

Acacia Avenue."

If the burdened land is registered the title number of the burdened land must be given in panel 2. If necessary, either expand the panel on an electronic version of the form or continuation sheet CS.

Where the application is only to note the burden of an easement, the nature of the right claimed should be set out in form AN1 (panel 8) or form UN1 (panel 11 or 12) as appropriate.

Where a verbal description leaves any doubt as to the location or extent of the easement, a plan must be supplied based on the largest scale Ordnance Survey map for the area in question. The description of the right claimed should refer to a plan on which it is clearly and carefully marked.

As explained, we may have to make some alteration to the wording used in the application form when drafting the register entries.

When on first registration, or registration of a disposition, entries in respect of prescriptive easements are desired but it is not clear from the form FR1, form AP1 or form AN1 or otherwise that such entries are sought, none will be made. Inclusion of a statutory declaration or statement of truth in the documents accompanying the application, with no explanation in the application form or a covering letter why it has been included, will not be taken as an application to make register entries. Such applications are often time-consuming and in many cases require notices to be served on other landowners. This will only be done where the applicant has made it clear that they are seeking the registration of the benefit of a prescriptive right.

If the benefitting land is jointly owned, any application must be made by or on behalf of all the owners.

4.2 Statements of truth or statutory declarations

Before we register the easement or enter an agreed notice when the registered proprietor is not the claimant and has not consented to the entry, we need to be satisfied that the easement has been acquired.

For this purpose, the claimant must produce evidence, in a statement of truth or statutory declaration, of continuous use as of right, by or on behalf of and against the freehold owners, for a period of at least 20 years. The statement of truth or statutory declaration must set out in detail the use and enjoyment relied upon to substantiate the claim. The right claimed must be one that could have been lawfully granted. The application will proceed no further and will be cancelled if such evidence is not produced.

(Of course, even if the claimant produces this evidence, it does not mean an easement has necessarily been acquired. Where the claim is based on common law prescription, the owner of the burdened land may be able to establish that the right could not possibly have been exercised from 1189 onwards. Where the claim is based on lost modern grant, the owner may be able to establish that nobody could have lawfully granted the easement. In these cases, there is no easement.)

In some cases, 2 or more statements of truth or statutory declarations may be necessary (for example, by successive estate owners where evidence of use during their respective periods of ownership is required to make up the required period of 20 years or more).

All statements of truth or statutory declarations drawn up for the purposes of a prescriptive easement application should either:

- include a statement that, to the best of the knowledge and belief of the declarant or person making the statement, the right has always been exercised without force, secrecy or permission
- give details of the facts that prevent the claimant from being able to make this statement

Form ST4 is a statement of truth designed to provide a framework for the information that must be included within an application concerning a prescriptive easement. Its use is not obligatory, and using it will not guarantee the success of the application it accompanies, but it will help you ensure that nothing has been overlooked.

However, any statement of truth that meets the requirements of rule 215A of the Land Registration Rules 2003 (seeStatement of truth) will be acceptable, as will a statutory declaration.

It should be appreciated that a prescriptive right of way can only be acquired to the same extent as the use which is relied upon. Therefore, if the statutory declaration shows that the use was limited to being on foot only, or for some particular purpose (for example, to get to and from a garage on the benefitting land), the register entries will reflect that limitation.

If the statement of truth or statutory declaration is made by one of the joint owners it should be made clear that it is being made on behalf of all the owners, if such be the case.

4.3 Fees

To find out which fees you need to pay under the current Land RegistrationFee Order, see HM Land Registry: Registration Services fees.

An inspection fee may be payable in addition to the application fee if we decide an inspection is necessary. If so, we shall request it once that decision has been made and the application will not be able to proceed until the inspection fee is received.

5. The effect of an objection to the application

If we receive an objection from any person on whom we have served notice of an application to register the benefit of an easement, and the objection is not groundless, we cannot proceed with the application unless and until that objection is disposed of in the claimant's favour. The claimant is notified of the objection and the grounds on which it is made. The claimant then has the 3 options listed below.

Similarly, if an agreed or unilateral notice is entered, a person on whom we have served notice of the entry (or any other person) applies for cancellation of the agreed or unilateral notice, and the claimant objects to the cancellation, we cannot proceed with the application for

cancellation and the applicant has the same 3 options.

5.1 Withdraw the application altogether

In this event, we cancel the application, return scanned copies of the papers lodged and advise the objector of the cancellation.

5.2 Seek to negotiate a settlement of the dispute direct with the objector

Parties are encouraged to resolve disputes without the need for formal procedures wherever possible. HM Land Registry does not provide any formal mediation but efforts will be made to identify the issues in any dispute and see whether there is any common ground between the parties and whether agreement could be achieved. However, disputes cannot be allowed to continue indefinitely and, unless progress towards a settlement is being made, the dispute will be referred to the tribunal.

5.3 Have the dispute referred to the tribunal

Under section 73(7) of the Land Registration Act 2002 any dispute that cannot be dealt with by agreement must be referred tothe tribunal. Unless the parties reach agreement beforehand it will either:

- hold a formal hearing and give a ruling on the dispute that is binding on the parties (subject to any appeal) in the same way that a court judgment would be
- order one of the parties to the dispute to commence court proceedings to have the dispute resolved. practice guide 37: objections and disputes: HM Land Registry practice and procedures and practice guide 38: costs in disputed applications give more information on this subject.

6. Rights of way acquired under the Vehicular Access Across Common and Other Land (England) Regulations 2002 and the Vehicular Access Across Common and Other Land (Wales) Regulations 2004

These regulations, made under section 68 of the Countryside and Rights of Way Act 2000, provided for the creation of a legal easement, giving a right of way for vehicles in cases where the use would have given rise to a prescriptive easement had it not constituted an offence.

Section 51 of the Commons Act 2006 repealed section 68 of the Countryside and Rights of Way Act 2000 with the effect that the regulations lapsed at the same time. Section 51 came into force on 1 October 2006.

7. Statement of truth

A statement of truth is a method of providing evidence in support of an application. As a result of changes made by the Land Registration (Amendment) Rules 2008, it can be accepted for land registration purposes instead of a statutory declaration.

Its adoption by HM Land Registry follows the precedent set by the civil courts in accepting a statement of truth as evidence in place of an affidavit or statutory declaration.

See Applying for register entries to be made regarding retention of documents sent to us.

7.1 Requirements

For land registration purposes, a statement of truth is defined as follows (see rule 215A of the Land Registration Rules 2003):

- it is made by an individual in writing
- it must be signed by the person who makes it (unless they cannot sign – seeStatement of truth made by an individual who is unable to sign it)
- it need not be sworn or witnessed
- it must contain a declaration of truth in the following form: 'I believe that the facts and matters contained in this statement are true'
- if a conveyancer makes the statement or signs it on someone's behalf, the conveyancer must sign in their own name and state their capacity – see Signature by a conveyancer

7.2 Statement of truth signed by an individual who is unable to read

Where a statement of truth is to be signed by an individual who is unable to read, it must:

- be signed in the presence of a conveyancer
- contain a certificate made and signed by that conveyancer in the following form:

> "I [name and address of conveyancer] certify that I have read over the contents of this statement of truth and explained the nature and effect of any documents referred to in it and the consequences of making a false declaration to the person making this statement who signed it or made [his] or [her] mark in my presence having first (a) appeared to me to understand the statement (b) approved its content as accurate and (c) appeared to me to understand the declaration of truth and the consequences of making a false declaration."

7.3 Statement of truth made by an individual who is unable to sign it

Where a statement of truth is to be made by an individual who is unable to sign it, it must:

- state that individual's full name
- be signed by a conveyancer at the direction and on behalf of that individual
- contain a certificate made and signed by that conveyancer in the following form:

> "I [name and address of conveyancer] certify that [the person making this statement of truth has read it in my presence, approved its content as accurate and directed me to sign it on [his] or [her] behalf] or [I have read over the contents of this statement of truth and explained the nature and effect of any documents referred to in it and the consequences of making a false declaration to the person making this statement who directed me to sign it on [his] or [her] behalf] having first (a) appeared to me to understand the statement (b) approved its content as accurate and (c) appeared to me to understand the declaration of truth and the consequences of making a false declaration."

7.4 Signature by a conveyancer

Where a statement of truth is made by a conveyancer, or a conveyancer makes and signs a certificate on behalf of someone who has made a statement but is unable to read or sign it:

- the conveyancer must sign in their own name and not that of their firm or employer
- the conveyancer must state the capacity in which they sign and where appropriate the name of their firm or employer

8. Things to remember

> We only provide factual information and impartial advice about our procedures. Read more about the advice we give.

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SOME THINGS MAY BE BETTER MEDIATED THAN LITIGATED: NEIGHBOUR DISPUTES FOR INSTANCE

October 9, 2014 · by gexall · in Applications, Civil Procedure, Costs, Mediation & ADR

There are some very important observations in the judgment of Norris J in the case of Bradley -v- Heslin [2014] EWHC 3276 (Ch) today. This was given in a neighbour dispute over access and

gates which could have been remedied by the installation of electronically controlled gates costing around £5,000. Here are extracts from the judgment. The particular points to look at are the recommended draft directions in neighbour and right of way disputes.

THE JUDGMENT

1. Rather to my surprise I find myself trying a case about a pair of gates in Formby: surprise on at least two counts. First, that a**nyone should pursue a neighbour dispute to trial, where even the victor is not a winner (given the blight which a contested case casts over the future of neighbourly relations and upon the price achievable in any future sale of the property). Second, that the case should have been pursued in the High Court over 3 days.** It is not that such cases are somehow beneath the consideration of the Court. They often raise points of novelty and difficulty and are undoubtedly important to the parties and ultimately legal rights (if insisted upon) must be determined. But at what financial and community cost?

21. **Sensible neighbours would have sat round a table and worked out either a regime for closing the gates at agreed hours (the one party suffering a diminution in security and the other an increase in inconvenience) or the installation of remotely operated electric gates (which might have cost £5000).** There were some desultory attempts at exploring the possibility of electric gates, but (when they came to nothing) in August 2012 Mr Heslin simply padlocked the northern gate open and refused to allow the Bradleys to shut it: and in July 2013 the Bradleys commenced proceedings for declarations as to their right to use the gates and for an injunction requiring the Heslins to remove the padlock and restraining them from interfering with it. The Bradleys say that the southern pillar at the driveway entrance is built on land forming part of No.40, and they base their claimed legal rights to ownership of the northernmost pillar and gates and to close the gates upon proprietary estoppel (or alternatively upon adverse possession as to the pillar and upon prescription or "lost modern grant" as to the right to close the gates). In their

Defence the Heslins deny that the Bradleys have any right to close the gates at all (asserting that the gates are purely ornamental), assert that the gates have never been closed on any regular basis and were never closed until July 2012, and claim that both of the pillars that flank the driveway belong to No.40A (as does the gate itself), though there is no counterclaim for relief.

22. This entrenchment of positions is a regrettable characteristic of neighbour disputes. I add my voice to that of many other judges who urge that, even when proceedings have been issued to preserve the position, the engagement of a trained mediator is more likely to lead to an outcome satisfactory to both parties (in terms of speed, cost, resolution and future relationships) than the pursuit of litigation to trial. In Oliver v Symons [2012] EWCA Civ 267 (a disputed easement case) Ward LJ said at [53]:-

> *"I wish particularly to associate myself with Elias LJ's pointing out that this is a case crying out for mediation. All disputes between neighbours arouse*

deep passions and entrenched positions are taken as the parties stand upon their rights seemingly blissfully unaware or unconcerned that that they are committing themselves to unremitting litigation which will leave them bruised by the experience and very much the poorer, win or lose. It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come."

SUGGESTED DIRECTIONS IN BOUNDARY AND RIGHT OF WAY DISPUTES

23. Perhaps in times of scarce resources and limited (and in any event expensive) representation it is time to give those who know the worth of mediation in this context (both to the parties and to all Court users) some help. **If in any boundary dispute or dispute over a right of way,**

where the dispute could not be disposed of by some more obvious form of ADR (such as negotiation or expert determination) and where the costs of the exercise would not be disproportionate having regard to the budgeted costs of the litigation, any District Judge (a) imposed a 2 month stay for mediation and directed that the parties must take all reasonable steps to conduct that mediation (whatever the parties might say about their willingness to engage in the process) (b) directed that the fees and costs of any successful mediation should be borne equally (c) directed that the fees and costs of any unsuccessful mediation should form part of the costs of the action (and gave that content by making an "Ungley Order") and (d) gave directions for the speedy further conduct of the case only from the expiration of that period, for my own part (recognising that certainly others may differ) I think that such a case management decision would be difficult to challenge on appeal.

24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and

neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.

25. But mediation is not always successful: and this case has gone to trial. I do not by so stating intend any criticism of the case managing judges or the legal representatives. The confidentiality attending the mediation process means the trial judge can know nothing of what has gone on.

ASSESSMENT OF WITNESSES

It is worthwhile taking a quick look at the manner in which the judge assessed the witness evidence.

26. t. The evidence on these matters was given

(for the most part) by family, friends or employees or each of the contending parties. I had no doubt that each of these witnesses intended their evidence to be honest, and none came consciously to lie or to deceive. **But from the judge's point of view, all such evidence runs the risk (a) that considerations of loyalty lead to selective recollection and emphasis and (b) that the close connections between the witnesses means that matters are inevitably the subject of discussion in which a "collective memory" unconsciously emerges and truly independent properly nuanced evidence becomes difficult to discern**. Some of the evidence (particularly that of Mrs Rosemary Bradley and of Dr Laura Bradley) had obviously been the subject of extensive consideration, self-review and analysis with a view to enhancing its credibility: but the resulting apparent precision was no more persuasive than the more raw-edged and generalised recollection of others who gave evidence about the state of a pair of gates over a 30 year period as remembered by busy people to whom they were of no immediate

significance.

27. By some way the most impressive witness was Margaret Cairney, who lives at 42 Freshfield Road and is the local "Homewatch" co-ordinator. She gave careful evidence supported by records as to her visits to and observations of No.40 and No.40A as a result of her being asked to keep an eye on the properties when the Bradleys and the Heslins were away. I accept her evidence.

WHAT HAPPENED

Well either no party (or both parties) won. The issue was whether the gates could be kept open or locked.

83. Mr Heslin was accordingly not entitled to padlock the northern gate open. But the Bradleys are not entitled to a declaration that they are entitled to an easement permitting the opening and closing of the gates at all times and for all purposes; but only a declaration of the right indicated.
84. **The law expects neighbours to behave reasonably toward one another and that the rights they have over each other's lands will be reasonably exercised and reasonably allowed.** The Court cannot

write a rulebook for what may or may not be done in every eventuality. What is substantial interference with the user of the driveway has to be determined by what may be inferred about the mutual understanding of Mr Thompson and Mr Ewing at the time the arrangement was made (as to which subsequent user during the time of the Thompson and Field ownerships may throw some light). It cannot be determined by the personal need of the Bradleys for security or the personal need of the Heslins to use the driveway at 1.00am.

85. But it would be unhelpful simply to leave the parties with their rights declared without indicating how they might be applied on the ground in daily life. If it helps, it is my view that until such time as adequate opening arrangements are put in place it would not be a substantial interference with the rights of the owners of No.40A if the gates were closed from 11.00pm until 7.30am, were closed whilst they were staying away from No.40A, were closed on a few additional days when there was a heightened risk of intrusion from revellers, and were closed when there was

a particular need to keep someone or something within No. 40 and away from Freshfield Road. **By "adequate opening arrangements" I mean an electric system that can be operated from within the car or from within No.40A such that the gate can be opened as a car approaches it and without the driver having to get out.**

HOW MUCH DID IT ALL COSTS TO GET A ROTA FOR GATE OPENING AND CLOSING?

That will be interesting to find out. After it this was an open and shut case.

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2 Responses

Tim · October 10, 2014 at 00:31:50 · →

I, for one, am thorougly bored of judges moaning about neighbour disputes not settling. If people want to settle, fine. If they cannot settle, the judge is there to try the case. If the judge was unhappy about it being in the High Court, he might have wondered why it had not been transferred to the County Court at an earlier case management hearing.

legalorange · October 10, 2014 at 21:53:07 · →

Am interested in whether there was a pre-trial review hearing? If so, that may have been a missed opportunity to force the parties into ADR (with some strongly worded judicial observations).

Also it would be useful to know if the parties were LEI funded. If so, neither may have been on the hook for costs up to the indemnity limit (likely to be £100k) and therefore explain why they went to trial as the costs risk was technically nil, but the bragging rights over their neighbours would have been priceless.

It's the same old story though – boundary disputes tend to involve people who are:

– over 50;
– retired or semi retired;
– have limited or zero hobbies and therefore a lot of time on their hands
– are generally bitter about how their life has turned out;;
– read the Daily Mail; and

– have a daughter in Canada or Australia (surprisingly true).

Comments are closed.

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