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[2008] 2 P. & C.R. 225–344; D25–D36 Part 3

Property, Planning and Compensation Reports

Editors:

The Hon. Mr Justice Lewison
John Pugh-Smith

Cases reported in this Part cover:

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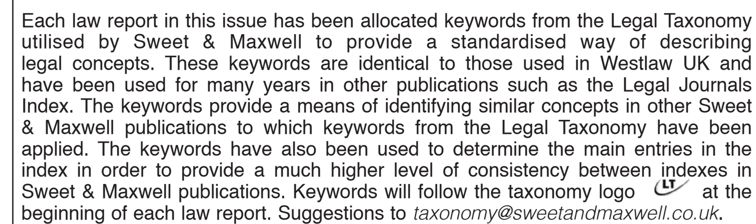

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TOWN AND COUNTRY PLANNING

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exclusion clause was voidand the tenancies had not expired. On appeal to the Court of Appeal:

H3 **Held,** dismissing the appeal, that this was not one of those cases where statutory requirements in relation to a notice or a declaration were so clearly and unequivocally expressed that any deviation from strict compliance, however insignificant, would be required. It would be "bordering on the absurd" if a statutory declaration was held to be ineffective on the grounds that it differed from the prescribed form because (i) it was both expressly and in law in a more solemn form than required; and (ii) although it stated that notice had been served before the lease was entered into, it did not state that it was served more than 14 days before the lease was entered into. It would be equally unreal if, assuming the statutory declaration was effective, what was contained in cl.8.2 of the lease was ineffective because it applied to a statutory declaration rather than a declaration and because it irrelevantly mentioned the wrong paragraph of Sch.2 to the Order. It was clear on the facts that Sch.2 para.3 of the Order applied and not Sch.2 para.4. However, para.3 did not require that a declaration must be "in the form set out in paragraph 7" but that it must be "in the form *or substantially in the form* set out in paragraph 7". The purpose of the declaration under para.7 was to convey information. The form prescribed by para.7 must be looked at in its statutory and commercial context to see whether the departures from that form, individually or collectively, resulted in any of the essential purposes of the prescribed form being thwarted or significantly blunted. The statutory declaration in para.8, as used in this case, performed all the essential functions of the para.7 form and was, therefore, substantially in the form of the declaration in para.7.

H4 **Cases referred to in the judgment:**
(1) *Davis v Burton* [1883] 11 Q.B.D. 537, CA

H5 **Legislation referred to in the judgment:**
(1) Landlord and Tenant Act 1954, ss.23–28 and 38
(2) Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 Sch.2

H6 **Appeal** by the defendant, Mrs Bella Patel, tenant of business premises, from a decision of H.H. Judge Peter Cowell given in the Central London County Court on May 24, 2007. The learned judge thereby held that the tenant's rights under Pt II of the Landlord and Tenant Act 1954 had been excluded effectively and granted orders for possession of the said premises to the claimant landlord, the Chiltern Railway Company Ltd. The facts are stated in the judgment of Lord Neuberger.

H7 *Salim Merali*, instructed by S. Merali & Co for the appellant.
Alexander Winter, instructed by Hollingworth Bissell, for the respondent.

JUDGMENT

1 **LORD NEUBERGER OF ABBOTSBURY:** This is an appeal against orders for possession made on May 24, 2007 in respect of two shops, by H.H. Judge Peter

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Cowell in the Central London County Court. Those orders were made in the light of his conclusion that the leases of those shops granted to the appellant, Mrs Bella Patel by the respondent, Chiltern Railway Co Ltd, were excluded from the protection of Pt II of the Landlord and Tenant Act 1954.

2 The legal background is as follows. The Act applies to tenants who occupy business premises (see s.23). By s.24 such a tenant has the right to apply to the court for a new tenancy which can only be refused on specified grounds, some of which carry with them a right to compensation from the landlord. Section 24 also provides that a business tenancy shall continue past its contractual term date unless and until determined by a notice, which complies with the requirements of ss.25, 26 or 27. Section 38 generally renders void any agreement (which I shall call an "exclusion agreement") which precludes a tenant of business premises from exercising her rights under the Act.

3 However, since 1969 the Act has included provisions whereby parties who are to be the landlord and the tenant under a tenancy of business premises can enter into a valid exclusion agreement. Certain formalities have always been required before such an exclusion agreement can be effective. Until 2003, the prior sanction of the court on the application of both parties was required. However, a different regime now applies. Section 38A(3) now provides that an exclusion agreement:

> "... [s]hall be void unless—
>
> (a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order; and
> (b) the requirements specified in schedule 2 to that Order are met."

4 The form of notice in Sch.1 to the Order explains that the tenant is giving up the rights given by the Act and emphasises the importance of getting professional advice. The notice also states that, if it is received more than 14 days before the tenant is committed to the lease, he or she must sign a declaration and (in bold type) that, if the notice is received later than that, the tenant must sign a "statutory" declaration, and for that purpose a visit to a solicitor (or someone empowered to administer oaths) will be required.

5 The principally relevant part of the Order for present purposes is Sch.2, and all references to paragraphs in this judgment are to paragraphs in that schedule. Paragraph 2 says that the notice referred to in s.38(A) must, subject to para.4, be served "not less than fourteen days before the tenant enters into the tenancy". Paragraph 3 which applies "if the requirement in paragraph 2 is met" stipulates that the tenant must, before entering into the tenancy, "make a declaration in the form, or substantially in the form, set out in paragraph 7". Paragraph 4 applies "if the requirement in paragraph 2 is not met": in other words if a notice is not served on the tenants at least 14 days before the tenancy is granted. It states that before the tenancy is granted, the landlord must serve a notice on the tenant and the tenant must:

> "make a statutory declaration in the form, or substantially in the form, set out in paragraph 8."

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Paragraph 5 provides:

> "A reference to the notice, and, where paragraph 3 applies, the declaration, or, where paragraph 4 applies, the statutory declaration, must be contained in or endorsed on the instrument creating the tenancy."

6 In the form of declaration set out in para.7, the tenant and the tenant's address must first be stated. The tenant must then "declare" first, that he or she proposes to take a tenancy of the premises as identified from the landlord who must be named for a term whose commencement date must be stated; secondly, that the tenant proposes to agree the provisions of ss.24–28 of the Act areto be excluded from the tenancy; thirdly, that the landlord has, "not less than fourteen days before" the tenant is committed to the tenancy, served a notice; and fourthly, that the tenant has read the notice and accepts the consequences of the proposed agreement. The form ends: "DECLARED This . . . day of . . ."

7 The form of statutory declaration set out in para.8 is very similar, but it has the following differences. First, the tenant must not merely declare but must "solemnly and sincerely declare". Secondly, the service of a notice by the landlord is not stated to have been effective at any particular time. Thirdly, before the words "DECLARED . . . day of . . ." are the words "AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1835". And fourthly, after the words "DECLARED . . . day of . . ." are the words "before me," (*signature of person before whom declaration is made*) and then:

> "A commissioner for oaths or A solicitor empowered to administer oaths or (*as appropriate*)."

8 The relevant facts of the present case are as follows. On March 15, 2005 Chiltern granted Mrs Patel leases of two shops on the concourse of Marylebone Station in London. Each lease was for a term contractually expiring on July 17, 2006, and each lease was subject to an exclusion agreement. On August 3, 2004, long before the 14-day period referred to in para.2, Chiltern served a notice on Mrs Patel in respect of each lease. Those notices clearly comply with the requirements of s.1 to the Order.

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9 On March 10, 2005, five days before the execution of each lease, Mrs Patel made a statutory declaration in respect of each lease in the form stipulated in para.8. When the leases were granted, each of them contained—purportedly pursuant to the provisions of para.5—in cl.8 a statement that the landlord, Chiltern, had served a notice under s.38A(3) on August 3, 2004 and a statement that the tenant Mrs Patel had made a statutory declaration in accordance with para.8 on May 10, 2005. When the leases expired contractually in July 2006, Chiltern claimed possession of the two shops. Mrs Patel resisted the claims on the basis of two arguments. The first argument relied on an alleged estoppel; the second argument was that the requirements of s.38A(3)(b) had not been satisfied and so the tenancies were continuing under s.24. Both these arguments were rejected by H.H. Judge Cowell. My Lady, Arden L.J., refused permission to appeal on the first argument, as she considered that the judge was plainly entitled to reject the contention that an estoppel had been established on the facts he had found. However, she granted permission to appeal on the second argument which raises a short point of law to which I now turn to consider.

10 Mrs Patel's argument is, of course, the same in relation to each lease, and for the sake of clarity I shall deal with it by reference to one of them. She relies on the fact that the notice in the present case was served in accordance with the requirements of para.2, i.e. more than 14 days before the lease was entered into, that it follows that para.3 applied, that she should therefore have made a declaration in accordance with para.7, and that under para.5 that declaration should have been recorded in the lease. As it is, however, she contends that no such declaration was entered into and no such declaration was recorded as having been entered into in the lease. Instead, she says, first, contrary to para.3, she did not make a declaration pursuant to para.7 but a statutory declaration purportedly pursuant to para.8; and secondly, contrary to para.5, there was no record in the lease of a declaration under para.7 having been made. Accordingly, her argument is that neither the requirements of para.3 nor those of para.5 have been met and consequently s.38A(3)(b) has not been satisfied, with the result that the exclusion agreement is "void" under s.38A(3), so that the tenancy has not expired, as no notice pursuant to s.25, 26 or 27 has been served.

11 In agreement with H.H. Judge Cowell, and despite Mr Merali's commendably concise and clear submissions to the contrary, I consider that this argument is not only unattractive in common sense terms, but that it is bad in law. It would, to use the judge's words, be "bordering on the absurd" if a statutory declaration was held to be ineffective on the grounds that it differed from the prescribed form because a) it was both expressly and in law in a more solemn form than that form; and b) although it stated that notice was served before the lease was entered into, it did not state that it was served more than 14 days before the lease was entered into. It would be equally unreal if, assuming the statutory declaration was effective, what was contained in cl.8.2 of the lease was ineffective, because it applied to a statutory declaration rather than a declaration and because it irrelevantly mentioned the wrong paragraph of Sch.2 to the order.

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12 Of course, the statutory requirements in relation to a notice or a declaration could be so clearly and unequivocally expressed that strict compliance would be required and that any deviation, however insignificant, from those requirements would render a purported notice or declaration invalid. Sometimes, indeed, although it conflicts with common and commercial common sense, this may be the result because it is correct as a matter of law. However, this is not such a case.

13 It is clear that on the facts of this case that para.3, and not para.4, applied. However, the requirement of para.3 is not that a declaration must be "in the form set out in paragraph 7," but that it must be "in the form *or substantially in the form* set out in paragraph 7". Accordingly, the first issue is whether the statutory declaration in para.8, as used in this case, is substantially in the form of the declaration in para.7. The answer to that question must, in my view, ultimately turn on whether the para.8 form performs all the essential functions of the para.7 form. After all, the purpose of the declaration under para.7, like that of a contractual or statutory notice, is to convey information. In this case, the declarant must confirm certain facts and show that he or she has received and understands certain facts and their legal consequences. One must therefore look at the form prescribed by para.7, in its statutory and commercial context, and see whether the departures, either individually or taken together, from that form, in the statutory declaration used in

this case, result in any of the essential purposes of the prescribed form, being thwarted or even significantly blunted. To say that this test is one of substance rather than form may well be correct, but he should not mask the point that the style, even the layout in the prescribed form, may at least in some respects be of the essence.

14 It is unnecessary to develop or explore the application of the test further on the facts of this case. However, it is worth mentioning *Davis v Burton* [1883] 11 Q.B.D. 537, a decision of this court to which attention has been drawn by Arden L.J. and which appears to endorse the test suggested. In that case the issue was whether a bill of sale complied with s.9 of the Bills of Sale 1878 Act 1882, which provided that a bill of sale would be void if it did not comply with s.9, which stated that a bill of sale should be "in accordance with the form in the schedule". At 540, having said that this "must mean that every bill of sale should be substantially like the form in the schedule". The then Lord Brett, Master of the Rolls, observed that "nothing substantial must be subtracted from it and nothing actually inconsistent must be added to it".

15 I turn then to apply this approach to the facts of this case. Despite the submissions to the contrary on behalf of Mrs Patel, I find it quite impossible to accept that the differences between the two documents justify the conclusion that a para.8 statutory declaration is not "substantially in the form" of the para.7 declaration. As my lord, Mummery L.J. said in argument, those four words underline the intention of the legislature that mere technical defects, with no substantive effect, should not render invalid a document which performs the task which legislature requires.

16 The fact that a document is a statutory declaration obviously does not prevent it from being a declaration. The fact that, under para.8, the declarant "solemnly and sincerely declares" rather than merely "declares", the fact that the declaration is said to be made pursuant to the 1835 Act, and the fact that the form is witnessed by a solicitor or a Commissioner for Oaths, cannot in any way prevent a para.8 declaration being substantially in the form of a declaration under para.7. The para.8 form carries the same message of the para.7 form, but in more emphatic and solemn form. What the judge referred to, arguably a little extravagantly, as a general principle of our law that the greater includes the less does seem to me to be in point.

17 As to the fact that the para.8 declaration refers to the notice having been served rather than to its having been served "not less than 14 days before" the date of the lease, that does not seem to me to be close to representing a significant departure from the para.7 declaration. It is an accurate statement. At worst it may be said to suggest that the tenant had been a little less-protected or informed than was in fact the case. However, in no way can any purpose in the statutory scheme embodied in s.38A(3) and the Order be said to be weakened, let alone thwarted, by that departure from the form of the para.7 declaration. After all, the very fact that an exclusion agreement can satisfy s.38A(3)(b), even where the landlord serves notice less than 14 days before the tenant became committed to the lease, demonstrates that the fact that whether or not the notice is served before those 14 days is not an essential factor itself. Accordingly, it appears to me that the para.8 statutory declaration is in the same form as the para.7 declaration, save in the arid

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sense, that the wrong form of declaration was used, but that is precisely catered for by the words "or substantially in the form" in para.3.

18 Permission to appeal was given in this case because the point is of some significance in relation to the statutory scheme, and indeed of potentially wider significance insofar as it applies to statutory forms generally. It may, therefore, be sensible to add that I find it very hard to see how it could be said, in a para.4 case, that a simple para.7 declaration would be "substantially in the form" of a para.8 declaration. In other words, the converse of the conclusion I have reached in this case does not appear to me to apply. At least part of the thinking behind the two different declarations, as demonstrated by the contents of the notice in schedule 1 to the order, was that the prospective tenant should either be given at least 14 days between receipt of the notice and being committed to the lease (paras 3 and 7) or, where less time is given, the tenant should have access to a solicitor or Commissioner for Oaths and should have the consequences of the exclusion agreement emphasised before being committed to the lease (paras 4 and 8). Clearly, the latter purpose is, at least on the face of the declaration, thwarted if a para.7 declaration, rather than a para.8 declaration, is used in a para.4 case.

19 This leads to another argument raised on behalf of Mrs Patel, namely that, where legislature provides for two different forms appropriate for two different circumstances, one of the forms cannot logically be in substantially the same form as the other. I do not see why that is right. I can see that it would be surprising if the conclusion was that either form could be used in either circumstance, but that is not my view. As I have said, a para.8 form will do in a para.3 case, whereas a para.7 form will not do in a para.4 case.

20 Indeed, as Mr Winter for Chiltern says, the structure of Sch.2 supports the notion that a para.8 statutory declaration will suffice in a para.3 case. Paragraph 2 indicates that the notice should be served more than 14 days before the tenant is committed to the lease, although the schedule as a whole clearly permits it to be served later. Accordingly, one would expect the provisions of para.8 to give greater protection in a para.4 case than the protection given by para.7 in a para.3 case. It would therefore be surprising if para.8 protection was not good enough in a para.3 case, and (I add) it would be equally surprising if para.7 protection sufficed in a para.4 case.

21 Mr Winter also made the valid practical point that, when the notice is served, in many cases the parties may not know whether or not the tenant will in fact be committed to the lease in the next 14 days, either because the precise date of service of the notice on the tenant may not be known to the landlord or, even where it is known, neither party may know precisely when they would be committed to the lease. It could therefore represent something of an unfair trap, particularly for a landlord, if the parties were required to use a para.7 form, and could not use a para.8 form, in a case to which para.3 applied. It would lead to practical difficulties, such as either preventing the parties from entering into the lease when they wanted to, having to delay for 14 days, or the tenant being put to the rather absurd expense of having to execute a para.7 declaration and a para.8 statutory declaration, to wait to see whether more than 14 days elapsed between the service of the notice and the tenant being committed to the lease.

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22 That leaves the second point, namely that, even if the para.8 statutory declaration satisfied the requirements of para.3, it is said by Mr Merali that cl.8.2 of the lease did not satisfy the requirements of para.5. Again that argument appears to me to fail once one identifies the alleged failure and considers it in the light of the statutory wording and purpose. A statutory declaration is a declaration, and as the contents of cl.8.2 were otherwise accurate, this argument stands or falls on whether the reference to para.8 in cl.8.2 of the lease means para.5(d) is not complied with because this was a para.7 case, not a para.8 case. Although para.5 undoubtedly requires a reference in the lease to the declaration which was made, it does not state in that reference that the parties must identify the specific paragraph under which the declaration was made. I do not consider that the reference to para.8 in cl.8.2 of the lease—which was otherwise accurate and which otherwise complied with para.5—means that para.5 was not satisfied. Apart from the arid point that it refers to the wrong paragraph of Sch.2 to the Order, the only criticism that can be made of the reference to para.8 is that it implies that Mrs Patel was given notice less than 14 days before she became committed to the lease, whereas she was given more than 14 days. Nobody would be confused by this in this case because cl.8.1 given the date when she was served with the notice.

23 But in any event, that point goes nowhere as, whatever is the case, the legal consequences are identical. If a successor to either party or another interested third party, read cl.8.2 of the lease, he or she would reach precisely the same conclusion as to the legal position, namely that there was a valid exclusion agreement whether the clause contained a reference to para.7 or to para.8, or to neither paragraph. The simple and, to my mind, conclusive point is that the essential information required by para.5—namely that a notice and a declaration, as required by s.38(3)(b), had been respectably served and made—was contained in the lease.

24 A shorter way of reaching the same conclusion on the second issue is that if (as I consider to be the case, for reasons already given) a para.8 statutory declaration would satisfy the requirements of para.3, then cl.8.2 records that an effective declaration for the purposes of para.5 was made in any event.

25 Accordingly, for these reasons, which are essentially the same as those given by the judge, I for my part would dismiss this appeal.

26 **ARDEN L.J.:** I agree for all the reasons which Lord Neuberger has given. In particular, I agree with him that a simple declaration under para.7 in Sch.2 to the Regulatory Reform (Business Tenancies) England and Wales Order 2003 would not suffice in a case to which para.4 of that schedule applies. I would add that the appellant was unable to point to any policy interest that could possibly be served by accepting the appellant's submission in this case. Mrs Patel received what Parliament, in the 2003 order, clearly regarded as superior protection for a prospective business tenant.

27 **MUMMERY L.J.:** I agree. The appeal is dismissed.

Order: Appeal dismissed

Reporter—David Stott

R. (ON THE APPLICATION OF HEATH AND HAMPSTEAD SOCIETY) v CAMDEN LBC

COURT OF APPEAL

(Waller, Sedley and Carnwath L.JJ.): March 19, 2008[1]

[2008] EWCA Civ 193; [2008] 2 P. & C.R. 13

Building footprints; Green wedge; Planning permission; Planning policy; Residential development

H1 *Planning policy—Green Belt—Metropolitan Open Land—replacement of existing dwelling—PPG 2—"not materially larger than"*

H2 On January 23, 2006, Camden LBC (the Council) granted planning permission for the "demolition of the existing part1, part 2 storey dwelling-house with associated terraces and brick shed and erection of part 2, part 3-storey dwelling-house with associated landscaping". The existing dwelling-house was on a backland site to the rear of 7–12 Heath Villas and sloped down towards the Hampstead pond to the east. The site was on land designated as Metropolitan Open Land (MOL). The new building would be substantially larger than the existing building, although no higher. Depending on how the calculations were done, there would be a three-fold increase in floor space, perhaps a four-fold increase in built volume, and between two and two-and-a-half times increase in its footprint. The Council were satisfied that the proposal was consistent with the relevant policies, because it would not be materially larger. They were advised by their planning officer that the limited increase to the existing residential use was acceptable in planning terms, that the extension would not have any impact on the buildings in Heath Villas, that the proposed architectural treatment would "significantly break down the perceived bulk of the building in views across the pond", and that "the enlarged footprint of the proposed dwelling would be largely achieved towards the rear of the site and, as this would not be visible from the ponds, it was considered that this would only have a minimal impact on the character and setting of the MOL".

H3 Development on land designated as MOL was strictly limited, but less restrictive policies applied to what was known as "appropriate development". The concept of "appropriate development" was well-established in the context of Green Belt policy, the relevant policy being found in PPG 2. There was a general presumption against "inappropriate development" which should not be approved "except in very special circumstances". Construction of new buildings in the Green Belt was "inappropriate" unless it was for certain purposes. These included

[1] Paragraph numbers in this judgment are as assigned by the court.

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the "limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)". Paragraph 3.6 provided that, "The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces". Policy N1 in the revised Camden Unitary Development Plan stated that the Council would "only grant planning permission for appropriate development" on MOL. It was not in dispute that this policy was to be interpreted by reference to para.3.6 of PPG 2. Accordingly, it was common ground that the relevant test, to decide whether a proposed replacement dwelling was "appropriate", was whether it would be "not materially larger than the dwelling it replaces".

H4 The Heath and Hampstead Society (the Society) contended that the advice given by the Council's planning officer and the decision based on it reflected a misinterpretation of the applicable policy. Sullivan J. agreed, and quashed the permission. The issue for determination was whether the "materially larger" test imported, solely or primarily, a simple comparison of the size of the existing and proposed building, or whether it required a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which the MOL policy was designed to protect.

H5 **Held,** dismissing the appeal,

H6 (1) It was noteworthy that, in an otherwise admirably clear and comprehensive report, the treatment of the MOL issue was at best incomplete. In the body of the report, the MOL policy was referred to in only two places, first, in relation to residential use, secondly, in a passage leading to a conclusion about "loss" of MOL. Inferentially, one could add the "Conclusion", where again the emphasis was on the limited extension of residential use. It was striking that nowhere did the report ask or answer the critical question whether the replacement building would be "materially larger".

H7 (2) The words "materially larger" in para.3.6 of PPG 2 could not be read in isolation. There were two important aspects of the context. First was that para.3.6 was concerned with the definition of "appropriate development", as contrasted with inappropriate development, which was by definition harmful to the Green Belt. The first stage of the analysis was concerned principally with categorisation rather than individual assessment. The second aspect of the context was that of para.3.6 itself. It was part of the test for a category which covered limited extension, alteration or replacement. "Limited" implied a limitation of size. Size was the primary test. The general intention was that the new building should be similar in scale to that which it replaced.

H8 (3) The Council had misunderstood and misapplied MOL policy. Had they properly understood the policy, they could not reasonably have concluded that a building more than twice as large as the original (in terms of floor space, volume and footprint) was not "materially larger".

H9 **Cases referred to in the judgment:**

(1) *Northavon DC v Secretary of State for the Environment* [1993] J.P.L. 761
(2) *R. v Derbyshire CC Ex p. Woods* [1997] J.P.L. 958; [1998] Env.L.R.277

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(3) *South Bucks DC v Porter (No.2)* [2004] UKHL 33; [2004] 1 W.L.R. 1953; [2005] 1 P. & C.R. 6
(4) *Surrey Homes Ltd v Secretary of State for the Environment*, (unreported), CO/1273/2000; [2001] J.P.L. 379 (note)
(5) *Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; (1995) 70 P. & C.R. 184

H10 **Appeal** by the appellants, Messrs. Alex and Thalis Vlachos, against the decision of Sullivan J. quashing the planning permission granted on January 23, 2006, by the Camden LBC. The facts are as stated in the judgment of Carnworth L.J.

H11 *David Elvin Q.C. & Charles Banner*, instructed by Messrs David Cooper & Co, for the first and second appellants.
Peter Harrison Q.C. instructed by Camden LBC for the third appellant.
Anthony Porten Q.C. instructed by Messrs Hunt & Lisners for the respondent.

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JUDGMENT

CARNWATH L.J.:

Introduction

1 This appeal raises a short question on the interpretation of the Metropolitan Open Land (MOL) policy. It concerns a planning permission granted by Camden Council on January 23, 2006 for:

> "demolition of the existing part 1, part 2-storey dwellinghouse with associated terraces and brick shed and erection of a part 2, part 3-storey dwellinghouse with associated landscaping".

2 The existing dwellinghouse is known as The Garden House in the Vale of Health, London, NW3. It is on a backland site to the rear of 7–12 Heath Villas. The site slopes down towards the Hampstead pond to the east. The house itself is a 1950s dwelling-house with two storeys and a pitched roof, described as "modest and unassuming" and "architecturally uninspiring". There is a high brick wall separating the house from the houses in Heath Villas, the top floors of which overlook the site. On the other side in front of the house facing the pond, there is a raised patio with steps down to the substantial garden.

3 The new building would on any view be substantially larger than the existing, although no higher (because much of the increase would be below ground level). Depending on how the calculations are done, there would be a three-fold increase in floor space; perhaps a four-fold increase in built volume; and between two and two-and-a-half times increase in its footprint. However, the council were apparently satisfied that the proposal was consistent with the relevant policies, because it would not be "materially larger". They were advised by their planning officer that the limited increase to the existing residential use was acceptable in

planning terms (para.6.4), that the extension would not have any impact on the buildings in Heath Villas (para.6.5.5), that the proposed architectural treatment would "significantly break down the perceived bulk of the building in views across the pond" (para.6.6.1), and that:

> "... [T]he enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL ..."

4 The officer's reasoning was specifically incorporated into the statutory reasons for the grant of permission, and accordingly must be taken as representing the formal view of the council itself.

5 The Society contends that this advice and the decision based on it reflected a misinterpretation of the applicable policy. The judge agreed, and quashed the permission.

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Green Belt and MOL policy

6 The applicable planning policies were described in detail by Sullivan J., and it is unnecessary to repeat them. Most importantly, in the present context the site is on land designated as Metropolitan Open Land. On such land new development is strictly limited, but less restrictive policies apply to what is known as "appropriate development".

7 The concept of "appropriate development" is well-established in the context of Green Belt policy. It reflects a distinction between two stages of the analysis: whether development is "appropriate" in the Green Belt and how much harm to the Green Belt a particular proposal will do (see e.g. per Keene L.J., *Kemnal Manor Memorial Garden v Secretary of State* [2005] J.P.L. 1568 at [28]). Certain categories of development, such as agricultural buildings, recreational facilities, and cemeteries, have traditionally been regarded as acceptable in principle, subject to other planning considerations. "Inappropriate development", which includes most forms of residential or commercial development, is unacceptable in principle, and is permitted only in "very special" circumstances. The same policy approach is applied to land in the MOL. It follows that an important first step, or "threshold" question (as the judge described it), in relation to an application for development in the Green Belt or the MOL, is to decide on which side of the appropriate/inappropriate line it falls.

8 The relevant Green Belt policy is found in PPG 2: Green Belts. There is a general presumption against "inappropriate development" which should not be approved "except in very special circumstances". Paragraph 3.3 states:

> "Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations." (para.3.2)

Under para.3.4, construction of new buildings in the Green Belt is "inappropriate", unless it is for certain purposes, which are defined with varying degrees of specificity. They include, for example, "agriculture and forestry"; and:

> "—essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it . . .;"

9 The relevant category for present purposes is:

> "—limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below);"

The expression "not materially larger" comes in para.3.6, to which the latter category is said to be "subject":

> "3.6 Provided that it does not result in disproportionate additions over and above the size of the *original* building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

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10 Even when a building has been accepted as "appropriate", there remains a second question whether it is acceptable on other grounds. Thus, para.3.15 of PPG 2 deals with "visual amenity":

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

11 In relation to MOL policy, the corresponding definition is found in Policy N1 in the revised Camden Unitary Development Plan, which states that the council "will only grant planning permission for appropriate development on Metropolitan Open Land". The categories are similar, but not identical, to those defined by PPG2 for Green Belts, but they include in the same words:

> "g) the limited extension, alteration or replacement of existing dwellings."

It is not in dispute that this, like the same category in PPG2, is to be interpreted by reference to para.3.6 of the PPG. It is also accepted that, since PPG2 is a national policy document, the criterion should be given a consistent interpretation across the country.

12 Accordingly, it is common ground that the relevant test, to decide whether a proposed replacement dwelling is "appropriate", is whether it would be "not materially larger than the dwelling it replaces".

The Issue

13 The issue is a short one: whether the "materially larger" test imports, solely or primarily, a simple comparison of the size of the existing and proposed buildings; or whether it requires a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which MOL policy is designed to protect. Mr Elvin's case, in a nutshell, is that, in the context of policies designed to protect the MOL, the development cannot said to be "materially" larger, if the increase has no "material" impact on the objectives of the MOL; or at least that the authority could reasonably take that view.

14 The approach of the court to such issues was explained by Brooke L.J. in *R. v Derbyshire CC Ex p. Woods* [1997] J.P.L. 958 at 967 (a case concerning the application of Departmental Planning Guidance Note of Minerals):

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy . . . If there is room for dispute about the breadth of the meaning the words may properly bear, then there may in particular cases be material considerations of law which will deprive a word of one of its possible shades of meaning in that case as a matter of law."

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15 He referred to this as "the underlying principle of law" which had been the basis of the decision of Auld J. in *Northavon DC v Secretary of State for the Environment* [1993] J.P.L. 761. He had been concerned with the meaning of the expression "institutions standing in extensive grounds", in an earlier version of PPG 2 on Green Belt policy, of which he had said (at 763):

> "The words spoke for themselves and were not readily susceptible to precise legal definition. Whether a proposed development met the description was in most cases likely to be a matter of fact or degree and planning judgment. He [the judge] said 'in most cases' because it was for the Court to say as a matter of law whether the meaning given by the Secretary of State or one of his Officers or Inspectors to the expression when applying it was outside the ordinary and natural meaning of the words in their context . . .. The test to be applied by the court was that it should only interfere where the decision-maker's interpretation was perverse in that he has given to the words in their context a meaning that they could not possibly have or restricted their meaning in a way that the breadth of their terms could not possibly justify."

16 There is perhaps a slight difference of emphasis between the two statements, in that Brooke L.J. places more weight on the role of the court in determining the "breadth of meaning" of the words. This may reflect the fact that Auld J. was concerned with a decision of the Secretary of State interpreting his own policy. In

that context it is understandable that, short of perversity, the court will respect his interpretation of his own words. By contrast, where, as in *Derbyshire* and in the present case, the decision is that of a local authority applying national policy, the importance of consistency of interpretation as between different authorities becomes a significant, additional factor.

The judgment below

17 Sullivan J. rejected Mr Elvin's argument ([19]–[22]). He thought that the exercise was "primarily an objective one by reference to size". Adopting what he understood to be the reasoning of Deputy Judge Christopher Lockhart-Mummery Q.C. in *Surrey Homes Ltd v Secretary of State for Environment* (unreported) CO/1273/2000, he said:

> "Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the particular case. It may be floor space, footprint, built volume, height, width, etc. But, as Mr Lockhart-Mummery said in *Surrey Homes*:
>
> > '... In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion.'
>
> It is one thing to say that in a case where the increase in dimensions is marginal in quantitative terms, some regard may be had to other matters 'such as bulk, height, mass and prominence'; it is quite another thing to set consideration of the physical increase in size to one side altogether, and, in effect, to substitute a test such as 'providing the new dwelling is not more visually intrusive than the dwelling it replaces' for the test in paragraph 3.6: 'providing the new dwelling is not materially larger than the dwelling it replaces.'
>
> Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact ..."

18 Applying this approach to the facts of the present case he said ([24]–[25]):

> "Since the exercise is primarily an objective one by reference to size rather than visual impact, the replacement dwelling is 'plainly materially' larger than the existing dwelling ....
>
> ... looking simply at the replacement building, it was, depending on whether one measured footprint, floor space or volume, between two and four times as large as the existing dwelling. This increase in size was so substantial that there could be no doubt whatsoever that the replacement dwelling was 'materially larger' than the dwelling it was to replace. The only way in which one could come to a contrary conclusion would be to set aside all measurements and approach the question 'is the replacement dwelling materially larger than the existing dwelling?' solely by reference to a qualitative judgment as to its visual impact. That was the erroneous approach that was adopted in the officer's report and subsequent advice to the committee."

The Surrey Homes case

19 Mr Elvin contended that the judge was wrong to think that his approach was consistent with reasoning in *Surrey Homes* and that the latter is to be preferred. To examine that contention it is necessary to consider the decision in that case in a little more detail.

20 The case concerned the refusal of permission, on appeal, for a replacement dwelling in the Green Belt. The new building would be larger by only 7.9 per cent than the existing, and it was accepted that "in purely floor space terms", there would not be a material increase. The Council argued that floor space was not the only factor, but that "bulk and massing" were also important. The inspector directed himself (following an earlier decision) that it was reasonable to "assess the term in the context of what Green Belt policies are seeking to achieve" and that accordingly a replacement buildings should be regarded as "materially larger"—

> "if it would conflict with those statements of policy, rather than by any quantitative criteria" ([13]).

21 Applying that approach, he considered that the proposal failed the test. The new building would have "a much more bulky form"; its greater height would make it appear "far larger in terms of bulk and massing than the existing building", an impression which would be "accentuated" by its location. It would be "very large by any standards", and would have "a far greater prominence in the street scene" than the existing building; and its effect would be "to reduce the openness of the Green Belt in this location" ([16]).

22 The judge was faced with the (to my mind) extreme submission that the term "materially larger" was to be judged "exclusively" by reference to "floor space", so that such matters as height, bulk and massing, and positioning on the site, were irrelevant. Not surprisingly, he rejected that submission:

> "In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion.
>
> But I entertain no doubt that the concept of whether the dwelling is 'materially larger' can be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arises, namely Green Belt policy.
>
> Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on the Green Belt. It would give a strange result, in my judgment, if an inspector were debarred from concluding that the proposed structure harmed openness and was inappropriate development." ([23])

23 That decision seems to me with respect undoubtedly right, but it is of little help in the present case. In that case it was held that a *small* increase in floor space in absolute terms could be judged "material" in planning terms, because of the design of the building and its position on the site. The converse does not necessarily follow. The case is no authority for the proposition that design and location can

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procure the result that a very *large* increase in absolute terms, as here, is to be treated as "not material".

The officer's report

24 Before coming back to the interpretation of the policy, it is helpful to consider how the officer dealt with the issue.

25 Her first reference to MOL policy comes under the heading "Residential Use" (para.6.4) where she states:

> "The replacement single-family dwellinghouse raises no land use policy issues. Where existing dwellings do occur in MOL, it seems right to acknowledge that extensions etc, may be appropriate, and this is specifically referred to in PPG 2 on Green Belts. This guidance in paragraph 3.6 specifically states: [the guidance is then set out]. The proposed residential use and its limited extension in size are therefore considered to be appropriate. This is further discussed in paragraph 6.8 below . . ."

Under the same "residential use" heading, she notes also that in terms of habitable rooms there would be only "a marginal increase in density", which was acceptable under housing policies.

26 There is then a separate section dealing with "Bulk, height, footprint and layout" (para.6.5). This contains no specific reference to MOL policy. She accepts that "the overall size and bulk of the front elevation visible from the pond" would be greater than the existing front elevation. However, earthworks on the pond side would result in the basement storey and the part of the ground floor being obscured from views across the pond. Most of the increased bulk would be directed towards the rear of the site, and which is "not visible from the public realm". The increased footprint would cover part of the existing hard surface and raised terracing, and "would not result in a material loss of front garden space". The new building would appear from the pond as:

> ". . . [A]n essential 2-storey flat roofed building, located to the rear of the site and partially screened by greenery".

27 She concludes on this aspect (para.6.5.6):

> "On balance, it is considered that, in the light of the existing part 1, part 2-storey pitched roof building, the proposed massing and bulk of the new building together with its form and design in the sensitive location, would not cause demonstrable harm to the character and appearance of this part of Hampstead Conservation Area."

28 The report next deals with "Design" and "Impact on Hampstead Conservation Area and the Heath". On the latter, she concludes that "the perception of a greater mass of building bulk in respect of the front elevation" would not "seriously harm" views from the fringes of the Heath or its setting; and that the green roof would assist in assimilating the new building into the natural setting in this view.

29 The next section (para.6.8) deals with "Development on Metropolitan Open Land and Private Open Space". Having commented on the purposes of the MOL designation, and the general need to protect openness, she notes that "residential

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extensions/alterations" may be appropriate development if "they would not result in a significant (*sic*) increase in size of the original dwelling" (referring to Policy N1). She continues (para.6.8.4–5):

> "The MOL in question is the private garden of the existing residential property, which is not available to the public for general enjoyment and recreation. The contribution that this private garden makes to the MOL as a whole is not considered to change as a result of the proposed replacement scheme, although the footprint of the new building will result in a minor decrease in the area designated MOL (i.e. the existing building occupies less MOL). However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL and the Heath. The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land, or to the nature and form of development and land uses in the vicinity of the MOL. The proposed house is not considered to alter the balance between built and open space and, on balance, the proposed replacement house on MOL & POS is therefore considered acceptable.
>
> On balance, it is considered that the extent of the 'loss' of MOL is not significant and it will not harm the integrity of the MOL nor result in demonstrable harm to the character and appearance of the Heath at Hampstead Conservation Area."

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30 In her final Conclusion (para.7.1), she considers that on balance the proposal complies with the relevant policies. There is no specific reference to MOL policy, but I take that as encompassed in her first sentence:

> "There is no objection in principle to the replacement of the existing 4-bedroom dwellinghouse with a 5-bedroom dwellinghouse."

The remainder of the concluding paragraph summarises her views on the design and the limited impact on the surroundings and adjacent occupiers (without reference to MOL policy as such), leading to her recommendation to approve.

31 We were rightly urged not to read the report like a statute (see *South Bucks DC v Porter (No.2)* [2004] 1 W.L.R. 1953 at [36], per Lord Simon Brown). I also bear in mind that we are focussing, with the spectacles of hindsight, on one particular issue of many. However, it is noteworthy that, in an otherwise admirably clear and comprehensive report, her treatment of the MOL issue is at best incomplete. In the body of the report, MOL policy is referred to in only two places, first in relation to residential use, secondly in a passage leading to a conclusion about "loss" of MOL. Inferentially, one may add the "Conclusion", where again the emphasis is on the limited extension of residential use. It is striking that nowhere does she ask or answer the critical question whether the replacement building would be "materially larger".

32 I would not attach great weight to the fact that she misstates the relevant policy criterion, by substituting the word "significant" for "material". In most contexts, there may well be no real difference. The problem is that in the report she never answers the relevant question in either form.

Discussion

33 Mr Elvin's case can be simply and attractively stated. The word "material" is deeply embedded in planning law as meaning "material in planning terms". It is a settled principle that matters of planning judgment, including the weight if any to be given to "material" considerations are for the local planning authority not the courts (see Lord Hoffmann's discussion of "Materiality and planning merits" in *Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at [13]). The authority correctly identified the increased size of the building, in all its aspects, as a relevant consideration in accordance with the MOL policy, but they decided that on the facts of the case it was not "material". That was a judgment for them, and involves no issue of law justifying the intervention of the court.

34 Although I see the force of that submission, it ignores the context in which the word is used. The words "materially larger" in para.3.6 should not be read in isolation. There are two important aspects of the context. First is that para.3.6 is concerned with the definition of "appropriate development", as contrasted with inappropriate development, which is "by definition harmful to the Green Belt" (see [8] above). This first stage of the analysis is concerned principally with categorisation rather than individual assessment.

35 As Mr Elvin points out, the distinction is far from clear-cut. He is able to point, for example, to the sports and cemeteries category (see [8] above), where one part of the test is whether the particular uses "preserve the openness of the Green Belt" and "do not conflict with the purposes of including land in it". Even more pertinent, perhaps, is the category of "redevelopment of major existing developed sites". There "appropriateness" depends on meeting the criteria set out in Annex C1 para.C4, including a requirement that redevelopment should:

> "... [H]ave no greater impact than the existing development on the openness of the Green Belt and the purposes of including land in it."

To my mind, however, those examples point a contrast with the narrower language of para.3.6. The test is whether the replacement is "materially larger". Had it been intended to make appropriateness dependent on a broad "no greater impact" test, as in Annex C1, the same words could have been used. Instead the emphasis is on relative size, not relative visual impact.

36 That leads to the second aspect of the context, which is that of para.3.6 itself. It is part of the test for a category which covers "limited extension, alteration or replacement ..." "Limited" to my mind implies a limitation of size. Paragraph 3.6 deals with both extension and replacement. An extension must be "proportionate" to the size of "the *original* building". The emphasis given to the word "original" shows how tightly this is intended to be drawn, in order presumably to avoid a gradual accretion of extensions, each arguably "proportionate". It would be impossible, in my view, to argue that "proportionate" in this context is unrelated to relative size. For example, an extension three times the size of the original,

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however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word.

37 The words "replacement" and "not materially larger" must be read together and in the same context. So read, I do not think that the meaning of the word "material", notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size as Sullivan J. said is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The *Surrey Homes* case illustrates why some qualification to the word "larger" is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula. However, that flexibility does not justify stretching the word "materially" to produce a different, much broader test. As has been seen, where the authors of PPG2 intend a broader test, the intention is clearly expressed.

Conclusion

38 For these reasons, which are in line with those of Sullivan J., I conclude that the council misunderstood and misapplied MOL policy. Had they properly understood the policy, in my view, they could not reasonably have concluded that a building more than twice as large as the original (in terms of floor space, volume and footprint) was not "materially larger".

39 I would dismiss the appeal, and uphold the order of the judge.

40 **SEDLEY L.J.:** I agree.

41 **WALLER L.J.:** I also agree.

Reporter—Janet Briscoe

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LASKAR v LASKAR

COURT OF APPEAL

(Tuckey, Neuberger and Rimer L.JJ.): February 7, 2008[1]

[2008] EWCA Civ 347; [2008] 2 P. & C.R. 14

Beneficial interests; Contributions; Co-ownership; Discounts; Mortgages; Presumptions; Resulting trusts; Right to buy

H1 *Real property—Joint purchase of property as an investment—Purchase price discounted under Housing Act 1985—Mortgage in joint names of mother and daughter—Determination of respective beneficial interests—Whether beneficial interests in equal shares—Whether presumption of equality rebutted—Allocation of discount—Contributions represented by joint mortgage*

H2 The respondent and her husband had been tenants of a council-owned property since before the appellant, their daughter, was born in 1977. In 1996 the tenancy was transferred into the sole name of the respondent and she became the sole secure tenant. In 1997 the respondent applied to the council to buy the property at a discount under the 1985 Housing Act. As the respondent could not fund the purchase alone, the parties agreed to buy the property together and the application proceeded in both their names. The property was duly transferred to them both. The discounted purchase price was £50,085, the full purchase price being £79,500 and the discount being £29,415. The discounted purchase price was funded by a mortgage of £43,000 in joint names. The balance of some £7,000 was funded as to £3,400 by the appellant and £3,600 by the respondent, who also paid costs and expenses of some £1,000. It was anticipated that the property would be let out and the rental income applied to service the mortgage. The respondent effected all the lettings, kept the rents, paid for repairs and other outgoings and paid the mortgage. In 2003 the appellant sought to realise her interest in the property and an account of the rental income. The respondent subsequently severed the joint tenancy and the appellant issued proceedings. H.H. Judge Levy concluded that the appellant had an equitable interest in the property based solely on her contribution of £3,400 towards the undiscounted purchase price of £79,500. Accordingly, he determined that the appellant owned 4.28 per cent of the beneficial interest in the property. He further concluded that there should not be an account of the rental income. On appeal to the Court of Appeal:

H3 **Held,** allowing the appeal in part, that the appellant was entitled to 33 per cent of the beneficial interest in the property, her contribution to the total purchase price of

[1] Paragraph numbers in this judgment are as assigned by the court.

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£79,500 being the aggregate of £21,500 (half the mortgage) and £3,400 (her share of the balance), for the following reasons: (i) the judge below had been right to conclude that that the presumption that a house which is jointly owned in law is beneficially owned in equal shares was rebutted on the facts of this case. The decision of the House of Lords in *Stack v Dowden* ([2007] UKHL 17) was to be distinguished as the parties had purchased the property primarily as an investment for rental income and capital appreciation, despite their family relationship. In any case, the presumption of equality would have been rebutted. The parties kept their financial affairs separate, the property was not purchased primarily as a home for either party, let alone for the parties to share, the respondent had other children and there was no reason to think that she intended the appellant to receive such a significant gift not shared by the other children, the discount was to be treated as a contribution to the purchase by the respondent, the parties' contributions to the purchase price were significantly different and, finally, the appellant had only been brought in as co-purchaser because the respondent could not afford the purchase on her own. Accordingly, the parties' respective beneficial shares should reflect, on principles of resulting trust, the size of their contributions to the purchase price; (ii) the judge was right to treat the discount of £29,415 as in effect a contribution by the respondent to the purchase. The discount was to be attributed solely to the respondent as the reason why the property could be bought at a discount was that the respondent had been the secure tenant of the property. The fact that she exercised her privilege under s.123 of the 1985 Act to share her statutory right to buy with the appellant did not in any way alter that conclusion; (iii) the judge was wrong, however, to treat the £43,000 as a contribution to the purchase price by the respondent alone and the mortgage of £43,000 should, in this case, be treated as representing a contribution of £21,500 by each party as the two joint purchasers. There was no agreement or understanding between the parties that one or other was to be responsible for the repayments which had been met effectively out of the income from the property and the property had been purchased and retained primarily as an investment. The judge's decision not to order an account of the rental income was upheld.

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H4 **Cases referred to in the judgment:**

(1) *Adekunle v Ritchie*, unreported, August 28, 2007
(2) *Ashe (Trustee in Bankruptcy of Henry Samuel Mumford) v Mumford (No.2)* [2001] 33 H.L.R. 67, CA
(3) *Evans v Hayward* [1995] 2 F.L.R. 511, CA
(4) *Pettitt v Pettitt* [1970] 1 A.C. 777; (1969) 20 P. & C.R. 276, HL
(5) *Springette v Defoe* [1992] 2 F.L.R. 388, CA
(6) *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432; [2008] 2 P. & C.R. 4, HL

H5 **Legislation referred to in the judgment:**

(1) Housing Act 1995 ss.118, 119, 122, 123, 127 and 129

H6 **Appeal** by the claimant, Miss Rini Laskar, from a decision of H.H. Judge Dennis Levy Q.C. given in the Central London County Court on February 7, 2007.

The learned judge thereby found in favour of the defendant, Mrs Zubera Laskar, that the claimant, although named as a joint tenant of a property at 70 Wood Close, Hatfield, did not have an equal beneficial interest in the proceeds of sale of the said property. The facts are stated in the judgment of Neuberger L.J.

H7 *Simeon Thrower* and *Andrew Veen* for the appellant.
Richard Colby for the respondent.

JUDGMENT

1 **NEUBERGER L.J.:** This is an appeal from the decision of H.H. Judge Dennis Levy Q.C. given in the Central London County Court on February 7, 2007. His decision principally concerned the beneficial ownership of a property, 70 Wood Close Hatfield, registered in the joint names of the appellant, Miss Rini Laskar, and the respondent, her mother Mrs Zubera Laskar. The application for permission to appeal sought to challenge many of the primary findings of fact made by the judge, but Chadwick L.J. refused permission to appeal against those findings. However, he permitted an appeal on the conclusion reached by the judge on those facts, namely:

> "... [T]hat the appellant who was named as a joint tenant of the property at law did not have a joint or beneficial interest in the proceeds of sale."

The relevant facts

2 There were substantial disputes at the trial as to the source of the purchase price for the property, as to what was said about the beneficial ownership of the property, and as to what happened after the property was purchased. For reasons that he fully explained, the judge found neither party a satisfactory witness but he managed to reach conclusions that can be summarised as follows.

3 The respondent and her husband, the appellant's father, had been tenants of the property since before the appellant was born in 1977. Their landlord was the Welwyn Hatfield Council (the council). In 1996, the year the appellant went away to study at university, the respondent applied successfully to the council for the tenancy to be transferred into the respondent's sole name as her husband had left her. Accordingly, she and her husband having been secure tenants under the Housing Act 1985, with effect from 1996 the respondent became the sole secure tenant.

4 A secure tenant who has been in possession of a property for more than two years is entitled to buy the property, pursuant to Pt V of the 1985 Act—see ss.118 and 119. That right is to be exercised by serving a notice under s.122. Section 123(1) entitles a secure tenant to nominate up to three members of his or her family to join in the purchase in certain circumstances. Section 123(3) provides that where a tenant does make such a nomination:

> "... [T]he right to buy belongs to the tenant and those members jointly and he and they shall be treated for the purposes of this power during the tenancy."

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5 The purchase price payable is the fair market value of the property concerned, on certain assumptions—see s.127—subject to a discount under s.129, which is based on the number of years the secure tenant concerned has occupied the property.

6 Following a previous unsuccessful attempt to do so, the respondent applied to the council in October 1997 to exercise her right to buy the property at a discount. In or about February 1998, apparently after she had realised that she could not fund the proposed purchase alone (the judge said that she was earning £11,000 a year at the time), the respondent agreed with the appellant that they would purchase the property together, and the application to buy proceeded in the name of both parties.

7 The property was duly transferred by the council to the respondent and the appellant on July 6, 1998 pursuant to a transfer which sheds no light on the beneficial ownership of the property. The parties became the registered proprietors 17 days later. The purchase price (£50,085) was £29,415 less than the value of the property (£79,500) because of the discount under s.129. The £50,085 was partly funded by a loan made jointly to the partner by Barclays Bank Plc in the sum of £43,000, which was secured on the property by way of mortgage. The balance of the purchase price (about £7,000) was funded as to about £3,400 by the appellant, and £3,600 by the respondent. As one would expect, there were costs and expenses in relation to the purchase, and they amounted to some £1,000, which was, it appears, paid by the respondent.

8 Despite evidence to the contrary from the appellant, the judge found that there were no discussions between the parties as to the ownership of the beneficial content in the property. The judge also found that while the appellant was jointly liable on the mortgage, the liability "was one which in fact she was never likely to be asked to meet". It appears that this was on the basis that it was anticipated that the property would be let out, and that the rental income would be applied to service the mortgage. At the time of the purchase the respondent was in occupation of the property as her home with, I think one of her children; the appellant was at university and her room was occupied by a lodger. There were probably other tenants there at the time.

9 Shortly after the property was purchased, as was anticipated at the time of the purchase, another of the respondent's daughters, Jessie, purchased a house in St Albans, and the mother moved to the St Albans house. Thereafter, the property was let to successive tenants, and it seems clear that there were a number of tenants in the property at any one time. All the lettings were effected by the respondent, who kept the rents. She paid for the repairs and other outgoings in relation to the property, and met the instalments on the mortgage.

10 In 2003 there was a serious falling-out between the parties and in September of that year the appellant sought to realise her interest in the property and an account of the rental income from it. After some discussion the respondent severed the joint tenancy in June 2004 and the appellant then began these proceedings. Meanwhile, there were other proceedings afoot between the appellant and Jessie in relation to the St Albans house. In those proceedings the respondent supported Jessie's case. Some of the evidence at the hearing before H.H. Judge Cowell in relation to the St Albans house proceedings related to the property. On November 30, 2004 H.H. Judge Cowell gave a full judgment in which he concluded that the appellant's case

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in those proceedings was "wholly fabricated". Not surprisingly H.H. Judge Levy relied on some of H.H. Judge Cowell's findings in that judgment.

11 In the present case, H.H. Judge Levy concluded that the appellant had an equitable interest in the property based on—and solely based on—her contribution of £3,400 towards the purchase price, which he took as the undiscounted value at the time of purchase of £79,500. Accordingly he decided that the appellant owned 4.28 per cent of the beneficial interest in the property. He also concluded that the appellant should not be called to account in respect of the rent received on the property.

The issues to be resolved

12 The arguments which the appellant advances as to the beneficial ownership of the property are threefold. First, that the judge should not have concluded that the presumption that a house which is jointly owned in law is beneficially owned in equal shares was rebutted on the facts of this case. In other words it is said that there is a presumption that the beneficial interests were the same as the legal interests, and that that presumption was not rebutted in this case. If that is wrong, then two further points are made. It is said that the judge should have held that, insofar as it was treated as a contribution to the purchase price, the discount of £29, 415 should have been apportioned equally between the parties. Similarly it is said that the judge should have treated each party's joint liability under the mortgage of £43,000 as a contribution of £21,500 towards the purchase price.

13 As to the rejection of her claim for an account, the appellant says that the judge ought to have ordered an account. Even on his findings as to the beneficial ownership of the property, she says she was entitled to a share of the income; if she is right on any of her three points on the issue of beneficial ownership, she says her case for an account is even stronger.

14 I will take these four arguments in turn.

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The presumption of joint ownership

15 The appellant contends that the reasoning of the majority of the House of Lords in *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 compels a finding in the present case that the beneficial ownership of the property was held in equal shares by the parties. As Chadwick L.J. pointed out when giving permission to appeal, *Stack* was decided after H.H. Judge Levy gave his decision in this case. In *Stack* the two parties who purchased the house in question were living together in a long-term sexual relationship, and had children when they purchased the house, which they intended to be, and indeed was occupied as, their family home. It is by no means clear to me that the approach laid down by Baroness Hale of Richmond in that case was intended to apply in a case such as this. In this case, although the parties were mother and daughter and not in that sense in an arm's length commercial relationship, they had independent lives, and, as I have already indicated, the purchase of the property was not really for the purpose of providing a home for them. The daughter hardly lived there at the time it was purchased, and did not live there much if at all afterwards, and the mother did not live there for long. The property was purchased primarily as an investment.

16 Lady Hale's speech began by identifying the problem to be addressed as relating to "a cohabiting couple"—see [40] (and see [14] of the speech of Lord Walker of Gestingthorpe). But a number of the remarks in the course of her speech indicate that her reasoning was intended to apply to other personal relationships, at least where the property is purchased as a home for two (or indeed more than two) people who are the legal owners—see especially at [58] with the reference to "the domestic consumer context". Accordingly I think H.H. Judge Behrens was right to conclude in *Adekunle v Ritchie* [2007] in the Leeds County Court that the reasoning in *Stack* applied to a case where a house was purchased by a mother and a son in joint names as a home for them both.

17 It was argued that this case was midway between the cohabitation cases of co-ownership where property is bought for living in, such as *Stack*, and arm's length commercial cases of co-ownership, where property is bought for development or letting. In the latter sort of case, the reasoning in *Stack v Dowden* would not be appropriate and the resulting trust presumption still appears to apply. In this case, the primary purpose of the purchase of the property was as an investment, not as a home. In other words this was a purchase which, at least primarily, was not in "the domestic consumer context" but in a commercial context. To my mind it would not be right to apply the reasoning in *Stack v Dowden* to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one.

18 If, however, the presumption in *Stack* would apply here, then I consider that it would have been rebutted anyway. On the facts in *Stack* there was a departure from the presumption of equality, and the outcome was that the shares of the beneficial interest were substantially proportionate to the financial contributions of the parties. This, in my opinion, would be a stronger case for departing from the presumption of equality even if it does apply.

19 First, as in *Stack* (see [90]–[92]) the two parties in this case kept their financial affairs separate. Secondly, unlike in *Stack*, the property was not primarily purchased as a home for either party let alone for the parties to share. As I have explained, the property was primarily purchased as an investment. Thirdly, the respondent had three or four other children, one of whom was under 10 at the time; there is no reason to think that she intended the appellant to receive what would have amounted to a significant gift not shared with the other children. Fourthly, if, as I believe to be correct, for the reasons I shall shortly give, the discount is treated as a contribution to the purchase by the respondent, the parties' contributions to the purchase price were significantly different, as in *Stack* (see [89]). Fifthly, it appears that the reason that the appellant was brought in as a co-purchaser was primarily because the respondent could not afford the purchase on her own.

20 It is right to mention that there is another presumption, rather longer established than that in *Stack*, which could be said to apply here, namely the presumption of advancement as between parent and child. As the property was purchased in the joint names of mother and daughter, it seems to me that, insofar as the respondent's contribution was greater and would have led to her having in excess of a 50 per cent share of the beneficial interest, there is a presumption that she intended a gift of that excess to her daughter. The presumption of advancement still exists, although it

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was said as long ago as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence (see per Lord Upjohn in *Pettitt v Pettitt* [1970] 1 A.C. 777 at 814). I would add that it is even weaker where, as here, the child was over 18 years of age and managed her own affairs at the time of the transaction. Mr Thrower, for the appellant, made it clear that he accepted that the presumption was not applicable and was not pressing it here. In my judgment that was realistic.

21 Accordingly, even if the presumption of equality laid down in Stack does apply in this case, or even if the presumption of advancement could apply, it seems to me that, for the reasons I have given, either presumption would be rebutted on these facts. Accordingly, as in *Stack* (as explained by Lord Hope in [11]) I can see no reason not to fall back on the resulting trust analysis, namely that in the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price, subject to any subsequent actions or discussions having the effect of varying those shares.

The discount

22 When it comes to assessing the contributions to the purchase price the appellant argues either that no account should be taken of the discount of £29,415 or that it should be attributable equally to both parties. I do not agree. In the absence of authority the position seems to me to be this. The reason the property could be bought at a discount—indeed, the reason the property could be bought at all—was that the respondent had been the secure tenant of the property and had resided there in that capacity for a substantial period; see the sections of the Housing Act 1985 to which I have referred. It was therefore the respondent, and solely the respondent, to whom the discount of £29,415 could be attributed. The fact that she exercised her privilege under s.123 of the 1985 Act to share her statutory right to buy with her daughter does not seem to me in any way to alter that conclusion. Sharing with a third party the right to buy in law as against the council is not the same thing as sharing the consequences of the right to buy in equity as against a third party.

23 As pointed out in argument by my Lord, Rimer L.J., s.123(3) is concerned to emphasise that the parties are joint tenants, and it identifies their rights in terms of the legal estate. However, it goes no further than that so far as the consequences of their beneficial interests are concerned. Indeed, during the course of his argument I rather understood Mr Thrower to accept that his argument on this aspect was simply another way of making the point he was seeking to make more generally in reliance on *Stack v Dowden*.

24 My view as to how the discount should be attributed is strongly reinforced by authority. In particular, it was clearly assumed to be correct in the decision of this court in *Springette v Defoe* [1992] 2 F.L.R. 388, especially at 395. Although some of the reasoning in that case was disapproved in *Stack*, nothing in *Stack* called that aspect of the decision into question. It also seems to me that this conclusion is consistent with the subsequent decision of this court in *Evans v Hayward* [1995] 2 F.L.R. 511, where the reasoning of Dillon L.J. at 515A led to the conclusion that the tenant whose occupation gave rise to the discount was entitled to be credited

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with the discount when assessing the parties' shares in the beneficial interest, even though at the time the right to buy was exercised the two parties were joint tenants. It was a stronger case for arguing that the discount should be apportioned equally between the parties than this case, because in this case, of course, the appellant was never a tenant of the property: she was merely deemed to be a joint tenant under s.123(3).

25 It is true that in *Ashe v Mumford* [2001] 33 H.L.R. 67 this court upheld the trial judge's decision that the discount should not be apportioned in this way between the parties. However, it seems clear to me from the judgment of Jonathan Parker L.J. at 769–770, that he accepted that it was the prima facie solution, but that the facts of that case were very unusual indeed and justified a different conclusion.

26 In those circumstances I think the judge was right to treat the discount as in effect a contribution by the respondent to the purchase.

The effect of taking the mortgage in joint names

27 There is obvious force in the appellant's contention that, as she and the respondent took out a mortgage in joint names for £43,000, for which they were jointly and separately liable, in respect of a property which they jointly owned, this should be treated in effect as representing equal contributions of £21,500 by each party to the acquisition of the property. It is right to mention that I pointed out in [118]–[119] in *Stack* that, although simple and clear, such a treatment of a mortgage liability might be questionable in terms of principle and authority.

28 However, it appears to me that in this case it would be right to treat the mortgage loan of £43,000 as representing a contribution of £21,500 by each of the parties as the two joint purchasers of the property.

29 There was no agreement or understanding between the parties that one or other of them was to be responsible for the repayments. The repayments had effectively been met out of the income from the property, which so far as one can gather, was intended from the inception, and the property was, as I have mentioned, primarily purchased and has been retained as an investment. In those circumstances I would have thought that there was a very strong case for apportioning the mortgage equally between the parties when it comes to assessing their respective contributions to the purchase price.

30 The judge's remark that the appellant would not have expected to pay any sums due under the mortgage was attributable to the fact that the mortgage was anticipated to be serviced from the rental income from the property (as happened). Therefore that conclusion applies equally to the respondent and the appellant. It may be that the judge does not extend his remark to the respondent as she was to collect the rent and pay the mortgage instalments.

31 In these circumstances, not merely because it has the advantage of simplicity and appears to be initially correct, but because on the facts of this case it would be right, the £43,000 mortgage should be treated as a joint contribution to the purchase price. On any view it seems to me that it was clearly wrong to treat the £43,000 as a contribution to the purchase price by the respondent alone, which is what the judge did.

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Conclusions on the beneficial interest

32 In light of these conclusions on these three points, I am of the view that it would be right to substitute for the judge's decision that the appellant has 4.28 per cent of the beneficial interest in order that she has a 33 per cent interest in the property. I arrive at that conclusion on the basis that the respondent's contribution was the aggregate of £21,500 (half of the mortgage) £29,500 (the discount) and £3,600 (her share of the balance), and that the appellant's contribution was £21,500 (half the mortgage) and £3,400 (her share of the balance). My mathematics may be flawed but I think that produces a share of 33 per cent.

33 It is sensible to stand back and see whether that looks a fair result. It was pointed out in *Stack*, that what seems fair to the court is not the basis upon which one reaches a decision in this sort of case but it does seem to me that it is not unhelpful to see whether the outcome looked at in this way seems unjust, because, if it is, it may be worth revisiting the reasoning. In my view, the appointment of 2:1 does reflect the overall justice of the case. It can be said that there is to some degree a trade off between giving the mother the whole of the discount and dividing the mortgage on a 50–50 basis. Each involves a relatively strict mathematical approach, which, in the context of a property bought primarily as an investment, seems not unreasonable. If one were to adopt a more flexible approach, which could lead to greater unpredictability so far as other cases are concerned, one might have been more generous to the respondent on the mortgage and less generous to the respondent on the discount.

The account

34 That leaves the question of an account. The judge decided not to order an account. Mr Thrower submits that there should be an account, particularly, no doubt, in the light of the conclusion I have reached on the beneficial interests. I consider, however, that he was correct in not pressing particularly hard for this. It is a discretionary remedy, and I do not think that it would be appropriate to order an account for the following reasons.

35 First, it would be disproportionate to order an account. It appears clear that the bulk of the rent which has been produced from the property will have been used for servicing the mortgage and paying for the upkeep and other outgoings on the property. Secondly, the respondent has managed the property, maintaining it, letting it, organising all the outgoings and so on. While no doubt that could be credited in some way in her favour on any account, it would significantly reduce the amount of money, if any, to be paid to the appellant. It would also lead, I suspect, to a great deal of argument and expense in determining how much should be so allowed.

36 Thirdly, on any view it would seem to me quite inappropriate to order an account, going back much before 2004. The appellant must have known what was going on from the beginning and she was initially quite happy to leave matters as they were. There was no formal claim for an account until 2004. For much of the subsequent period, the respondent would have presumed that she was not going to be obliged to account namely from the date of H.H. Judge Levy's refusal to order an account. Finally, nowhere in the judge's analysis or in my alternative analysis,

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has the £1000 contribution the respondent made to the costs and expenses of purchase of the property been taken into account in her favour. It seems to me that that is not irrelevant when considering whether to order an account.

37 In those circumstances, I would refuse to order an account, but, in fairness to the appellant, I would add that, as she has a 33 per cent beneficial interest in the property, that will from now on justify her seeking an account of the income and outgoings in respect of the property.

Disposition

38 To conclude, I would vary H.H. Judge Levy's order, to the extent of declaring that the appellant's beneficial interest is, subject to having my maths corrected, 33 per cent rather than 4.28 per cent, but I would uphold his decision to refuse an account.

39 **RIMER L.J.:** I agree.

40 **TUCKEY L.J.:** I also agree.

Order: Appeal allowed

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H4 (1) By 1542 (or at the latest 1660) any privileges that had belonged to the Bishops of St Davids in their capacity as Lords Marcher or as tenants in capite had been abolished. The status of Lord Marcher had essentially been a jurisdictional franchise: the King's writ did not run within the March in question; and the Lord Marcher was empowered to administer justice (with immaterial exceptions) within his lands. The status of Lord Marcher did not carry with it any proprietary rights, the source of which would have to be found elsewhere (for example in a royal charter). The jurisdictional privileges of the Lords Marcher were abolished by The Act of Union 1535, and their franchises restricted by that Act. No new franchises were created by s.30 of the Act of 1535, s.101 of the Laws in Wales Act 1542, and s.6 of the Lord Marches in Wales Act 1554; they merely preserved such of the franchises as were already existing. Any privileges attaching to the status of Lord Marcher which survived those Acts were removed by the abolition of feudal tenure effected by s.1 of the Abolition of Tenures Act 1660, which removed all the "fruits and consequents" of tenure in capite of the Crown.

H5 (2) A franchise is an incorporeal hereditament: as a branch of the Royal prerogative, subsisting in the hands of a subject, it can be created only by express grant, or by presumed grant arising from prescription at common law. A franchise can be lost by non-use for a protracted period; though a distinction was to be drawn between cases in which the occasion to exercise the franchise has arisen but has not been taken, and cases in which the occasion to exercise the franchise has not arisen; and franchises that would give the franchisee the right to object to activities that are openly taking place, and one that confers no such right.

H6 (3) The right to wreck is a franchise. Evidence from the 14th century onwards established that the Bishops of St Davids had a franchise entitling them to a moiety of wreck (the other moiety being the Crown's) in their capacity as Lords of the Manors of Trevine and of the Manor of the City and Suburbs of St Davids (and not as Lords Marcher).

H7 (4) A several fishery is a franchise. R failed to prove that the Bishops ever had a right of several fishery. The Bishops predecessors, the Welsh princes and kings, had not enjoyed such a right; there was no evidence that such a right had been granted to the Bishops before Magna Carta prohibited the creation of such; and there was no evidence that the Bishops had ever exercised or claimed a several fishery. If they had enjoyed such a right, its surrender would have been inferred from the fact it had been infringed consistently for over a hundred years.

H8 (5) The statutory presumption under the Treasure Act 1996 is that treasure belongs to the Crown, unless there is a franchise of treasure, and R had not rebutted the presumption. Although there was some evidence the Welsh princes and kings had claimed a legal right of treasure, there was no evidence the Bishops ever did.

H9 (6) The Manor of Trevine had a right to estrays.

H10 (7) The Manors of Trevine and of the City and Suburbs of St Davids had, in the 19th century, been vested by statute in the Ecclesiastical Commissioners, and were subsequently transferred to the Welsh Commissioners and then the University of Wales. In 2000, the University sold them, as separate lots, by auction. They were purchased by R's company, T Ltd, which subsequently conveyed them to R. The

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Manor of the City and Suburbs of St Davids was described in the auction's memorandum of sale as "the Lordship Marcher of St Davids, commonly called the Manor of St Davids." The subsequent conveyance by the University purported to convey "the Lordship Marcher of St Davids", but no such thing existed. The conveyance was to be construed, by reference to the prior contract, as conveying the manor of the City and Suburbs of St Davids.

H11 (8) R therefore owned (a) the Manor of the City and Suburbs of St Davids, and with it the right to a moiety of wreck, and (b) the Manor of Trevine, and with it the right to a moiety of wreck and a right to estrays. As Lord of the Manors of Trevine and of the City and Suburbs of St Davids. R was also entitled to the statutory rights of the Lord of the Manor under the Game Act 1831.

H12 (9) A manor can include the foreshore; but whether it does so is a question of ascertaining the limits of the Crown grant with the aid of evidence of subsequent actual use. The presumption is that foreshore is vested in the Crown, and there was insufficient evidence to rebut the presumption in the case of the Manors of Trevine and of the City and Suburbs of St Davids. The only right exercisable by R over the Crown's foreshore adjoining those manors was therefore the moiety of wreck.

H13 (10) Since the Crown had always had title to the foreshore and seabed, it had not acquired title to it by adverse possession. If it had, R's manorial rights would have been extinguished over it, but not his non-manorial franchises. Where the freehold of any land forming part of the manor is severed from the lordship, any right of the lord that is restricted to lands forming part of the manor ceases to be exercisable over the severed land. That applies whether the severance takes place voluntarily (as by a conveyance) or involuntarily (as by extinguishment of title by adverse possession). The statutory rights of the lord of the manor under the Game Act 1831 were limited to land within the manor, and would have been extinguished if the Crown had acquired title to the foreshore by adverse possession. The franchise of estrays was also a manorial right, and would likewise have been extinguished. The franchises of wreck and treasure were not manorial rights, exercisable only within the confines of a manor, and would not have been extinguished by the severance of the foreshore from the lordship. Franchises were expressly excluded from the definition of "land" in s.38 of the Limitation Act 1980, and hence would not have been not extinguished by s.17 of that Act.

H14 **Cases referred to in the judgment:**

(1) *Attorney General of Hong Kong v Fairfax Ltd* [1997] 1 W.L.R. 149
(2) *Attorney General v Parmeter* (1811) 10 Price 378
(3) *Attorney General v British Museum's Trustees* [1903] 2 Ch. 598
(4) *Anon* (1704) 6 Mod. 149
(5) *Berkeley Peerage* case (1858–61) 8 H.L.C. 21
(6) *Case of the Royal Fishery of the Banne* Dav. 149
(7) *Corpus Christi College Oxford v Gloucestershire CC* [1983] Q.B. 360
(8) *Delacherois v Delacherois* (1864) 11 H.L.Cas. 62
(9) *Dickens v Shaw* (1822)
(10) *Duke of Devonshire* (1882)
(11) *Duke of Somerset v Fogwell* (1826) 5 B. & C. 875

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(12) *Feather v R* (1865) 6 B. & S. 257
(13) *Great Eastern Railway v Goldsmid* (1883–84) 9 L.R. App. Cas. 927
(14) *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep. 161
(15) *Jolly, Re* [1900] 2 Ch. 616
(16) *Mount Carmel Investments Ltd v Thurlow* [1988] 1 W.L.R. 1078 in
(17) *Neill v Duke of Devonshire* (1882–83) L.R. 8 App. Cas. 135
(18) *The Rebeckah* (1799) 1 Ch. Rob. 227
(19) *Reg. v Duchess of Buccleuch* (1704) 1 Salk. 358
(20) *Roberts v Swangrove Estates Ltd* [2008] 2 W.L.R. 1111
(21) *Spook Erection Ltd v Secretary of State for the Environment* [1989] Q.B. 300
(22) *Viscountess Rhondda's Claim* [1922] 2 A.C. 339
(23) *Swayne's case* (1609) 8 Co.Rep. 63a

H15 **Legislation considered in the judgment:**
The laws of Hywel Dda
(1) Act of Union 1535
(2) Administration of Estates Act 1925 Sch.2
(3) Bishops Resignation Act 1869
(4) Game Act 1831 ss.10, 13
(5) Law of Property Act 1925 ss.62, 205
(6) Law of Property (Miscellaneous Provisions) Act 1989 s.2 (5)(b)
(7) Laws in Wales Act 1542
(8) Limitation Act 1980 s.17, 38
(9) Lords of Marches of Wales Act 1354
(10) Lord Marches in Wales Act 1554
(11) Merchant Shipping Act 1995, s.241
(12) Statute of Quia Emptores 1290
(13) Suppression of Monasteries Act 1540
(14) Tenures Abolition Act 1660
(15) Treasure Act 1996
(16) Welsh Church Act 1914

H16 **Claim** by the claimant that he was entitled, as the Lord Marcher of St Davids, Lord of the Manor of the City and Suburbs of St Davids, and Lord of the Manor of Trevine, to exercise ancient royal prerogative rights over the Pembrokeshire foreshore and the narrow sea. The facts are set out in the judgment of Lewison J.

H17 *Frank Hinks, Q.C.* and *Thomas Braithwaite* for the claimant.
Stephanie Tozer for the defendants.

H18 Solicitors—Farrer & Co LLP; Darwin Gray.

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right to have this dispute decided by specially assigned judges. The pleaded defence was that:

- i) Mr Roberts is the Lord Marcher of St Davids as successor in title to the Bishop of St Davids;
- ii) The Lordship Marcher of St Davids is a manor or lordship held *in capite* of the Crown in right of its dominion in Wales;
- iii) By grants, especially a charter of 1115 and a confirmation in 1384, and by ancient use and reputation the Lordship Marcher of St Davids included a freehold estate in the land to which the Commissioners claimed title;
- iv) That in any event Mr Roberts and his predecessors had been in possession of a freehold estate in those lands; and that anything which the Crown might have done which was inconsistent with that possession was "by way of intrusion upon their prior possession";
- v) But if any of the acts relied on by the Crown were sufficient to vest possession in the Crown at the time they were done, then the Crown only acquired possession in a freehold estate in the parcel over which the act in question was done.

5 There was no separate plea that any particular right (such as a right of wreck or a right to treasure trove) was exercisable over the land to which the Crown claimed title; and no counterclaim for any declaration as to the existence of any rights. However, in her skeleton argument, served on the day before the trial was due to begin, Ms Tozer, who appeared for Mr Roberts, said that the Crown's claim to have acquired title by adverse possession was now conceded in the light of the decision of the Court of Appeal in *Roberts v Swangrove Estates Ltd* [2008] 2 W.L.R. 1111; and the skeleton argument advanced reasons why Mr Roberts was entitled to exercise rights over the land. It was unclear to me from the skeleton argument precisely what rights Mr Roberts was claiming to be entitled to, but fortunately on the following day Ms Tozer produced a table setting out the rights that Mr Roberts then claimed. They were:

- i) Wreck de mer;
- ii) Wharfage;
- iii) Sporting rights;
- iv) A several fishery;
- v) Treasure trove;
- vi) Mises and profits consisting of chief rents paid by freeholders;
- vii) Court baron;
- viii) Court leet and lawdays; and
- ix) Estrays.

6 The Commissioners did not object to the raising of a wholly new and unpleaded case, although the start of the trial was deferred for a few days. However, the report of their expert, Mr Fletcher-Tomenius, had been prepared on the basis of Mr Roberts' pleaded case (namely a claim to ownership of the foreshore) with the result that it did not address the individual rights that Mr Roberts claimed. After Mr Hinks, appearing with Mr Braithwaite for the Commissioners, had concluded his opening address some of Mr Roberts' claims were abandoned, with the result that

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what now remains in issue are the rights I have set out at the beginning of this judgment.

Historical overview

7 As every schoolboy knows (or at least used to know) William the Conqueror defeated King Harold at the battle of Hastings in 1066. Part of his transformation of Anglo-Saxon England was the introduction of the feudal system of landholding. The theory was that all land in England was held of the Crown, radical title having been acquired by conquest. In order to reward his followers, William made grants of land to them. The immediate grantees were called tenants in chief (although they held in fee) and they held directly from the Crown (*in capite*). In return for their grants they were required to provide services. Typically the services would be the provision of knights to serve in the royal army ("knight service"); but they could also include other services, such as carrying the king's banner or holding his head when he felt seasick ("grand sergeanty"). The tenants in chief, in their turn, were able to make sub-grants of lands to others who held of them, again in fee, and again in return for services. These were called mesne tenants, and the process of sub-grants was called subinfeudation. Thus there was created what is called the feudal pyramid, with the king at the apex and the occupants of the land at the base. All land was held of a lord. This was summed up in the maxim; "*Nulle terre sans seigneur*." The status of lordship, including the right to receive the tenant's services, was called seignory.

8 In addition to these types of tenure there were also what were known as spiritual tenures. The one that is relevant for present purposes was called frankalmoign ("free alms"). This type of tenure arose if no fealty was demanded and no specific services were reserved. The tenant's only obligation was to pray for the soul of the grantor. There were restrictions on the alienation of land held in frankalmoign. Since the only obligation was the tenant's obligation to pray, it followed that, if the tenant ceased to be a spiritual person or corporation, tenure by frankalmoign could no longer exist, and the land became held in socage: Co Litt 98a.

9 One of the units of grant was the manor. Manors were known in Anglo-Saxon times. Within the manor the lord kept land for his own use, known as demesne land. He would also grant out land to tenants, in return for services. Typically these were agricultural services; and the tenants held by customary tenure. Over time this evolved into the form of tenure known as copyhold, and this, in turn, was eventually abolished in 1922. The uncultivated residue of the manor was the waste of the manor and was held by the lord of the manor, although it might be held subject to customary rights, such as rights of common. One of the essential ingredients of a manor was its court. The principal court was the court baron, which amongst other things settled property disputes between the tenants of the manor. It also dealt with succession to copyhold land by recording changes of copyholder. The free tenants of the manor were the jury. The suitors were also drawn from among the free tenants. Since no one can be both suitor and juror, it followed that the court could not be held once the number of free tenants fell below two. As Blackstone put it (2 Bl. Comm 91):

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> "This court is an inseparable ingredient of every manor; and if the number of suitors should so fail, as not to leave sufficient to make a jury or homage, that is two tenants at the least, the manor itself is lost."

10 In the modern law a manor that has been lost in this fashion is known as a reputed manor.

11 I cannot resist quoting Lord Denning M.R.'s typically picturesque description of the manor in *Corpus Christi College Oxford v Gloucestershire CC* [1983] Q.B. 360 which I think bears out what I have said:

> "In mediaeval times the manor was the nucleus of English rural life. It was an administrative unit of an extensive area of land. The whole of it was owned originally by the lord of the manor. He lived in the big house called the manor house. Attached to it were many acres of grassland and woodlands called the park. These were the 'demesne lands' which were for the personal use of the lord of the manor. Dotted all round were the enclosed homes and land occupied by the 'tenants of the manor'. They held them by copyhold tenure. Their titles were entered in the court rolls of the manor. They were nearly equivalent to freehold, but the tenants were described as 'tenants of the manor'. The rest of the manorial lands were the 'waste lands of the manor'. The tenants of the manor had the right to graze their animals on the waste lands of the manor. Although the demesne land was personal to the lord of the manor, nevertheless he sometimes granted to the tenants of the manor the right to graze their animals on it, or they acquired it by custom. In such a case their right to graze on the demesne land was indistinguishable from their right to graze on the waste lands of the manor, so long as it remained open to them and uncultivated, although there might be hedges and gates to keep the cattle from straying. So much so that their rights over it became known as a 'right of common' and the land became known as 'common land'.

In the course of time, however, the lordship of the manor became severed from the lands of the manor. This was where the lord of the manor sold off parcels of the land to purchasers. He might, for instance, sell off the demesne lands and convey them as a distinct property. Thenceforward the land ceased to form part of the manor and was held by a freeholder: see *Delacherois v Delacherois* (1864) 11 H.L.Cas. 62 at 102–103 by Lord St. Leonards. But no such conveyance could adversely affect the rights of common of those who were entitled to them as tenants of the manor or otherwise. No lord of the manor could, by alienation, deprive those entitled of their rights over it or in respect of it: see *Swayne's* case (1609) 8 Co.Rep. 63a and *Reg. v. Duchess of Buccleuch* (1704) 1 Salk. 358."

12 A collection of manors was called an "honour" or a "barony" (although such a barony was not a dignity and conferred no right to attend Parliament, for example). What happened at the level of the manor could also happen at the level of the honour or barony. Thus the grantee of an honour or barony could subinfeudate some of the manors comprised within the honour or barony, and retain others in hand. The retained manors were analogous to demesne land within the individual

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manor. In relation to the retained manors, there was no mesne tenant. The grantee was simply the lord of the manor of the retained manors. Indeed, there could be no additional layer of tenure in relation to retained manors, because a person could not be both a lord and a tenant in relation to the same land.

13 Within a few years after the conquest of England, the Normans turned their attention to Wales. They established castles in the border lands, notably at Chester and Shrewsbury. From there, and also from Hereford and Gloucester, the Norman barons made relatively steady advances into Wales. In the far west of Wales lay the cathedral of St David (in Welsh Dewi Sant), with which this case is concerned. It was in the ancient Welsh kingdom of Deheubareth. The cathedral was founded at some time before St David's death in 589. Little is known of its early years, apart from a list of bishops. There is some indication that the bishop may have been granted lands by Rhys ap Tewdwr consisting of Pebidiog (also known in English as Dewsland or Dewisland, and in Latin as Menevia) in 1082. But whoever the benefactor was, it is clear that the bishops held land before the Normans came. William the Conqueror himself visited south Wales in 1081. He prayed at St Davids. He seems to have come to some accommodation with Rhys ap Tewdwr, because the Domesday Book (of 1086) records "Riset of Wales" (generally thought to be Rhys ap Tewdwr) rendering an annual rent or ferm of £40.

14 The Normans were at least formally pious and did not harry or ravage the lands of the church. The lands of the bishops of St Davids were not therefore acquired by conquest. As Francis Jones puts it in *The Lordship and Manors of Dewsland* (Journal of the Historical Society of the Church in Wales vol.XVI p.15):

> "Those who inhabit Dewsland today may truly claim that this is the only cantref in Wales that was never conquered by Norman or Englishman, king or baron, that they have retained a cherished freedom from time immemorial. Dewslanders are the oldest free folk in Wales."

15 But the Anglo-Norman monarchy was none the less keen to incorporate the see within the ecclesiastical framework of the realm. When, therefore, Bishop Wilfred died in 1115, King Henry I appointed a Norman, Bernard, as the bishop even though it seems that he had not been ordained at the time of his appointment. Bernard recognised the authority of the Archbishop of Canterbury over the see, although later on he unsuccessfully attempted to win recognition for St Davids as a metropolitan see.

16 The first extant charter relating to the Bishops of St Davids is that granted by Henry I in 1115 to Bishop Bernard. Its full text, translated from Latin, in is Appendix II. It granted to Bishop Bernard the bishopric of St Davids:

> "with all its appurtenances and lands both cultivated and uncultivated roads and trackless areas meadows marshlands pastures woods hunting areas and the right to pass through such places in hunting or driving animals to pasture watering places and watercourses mills fisheries (*piscationibus*) the revenues and incomes and with every easement that can be derived from them for all time either on land or on water (*per aquam*) together with all customary rights as the aforesaid church or any of its bishops had on better terms and held in the time of my father and King Edward [the Confessor] and Griffin [Griffith ap Llywelyn] or at any other time."

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17 During the reign of King John, on the vacancy of the bishopric, the Crown asserted a right to and enjoyed the temporalities of the see, and these were returned to the incoming bishop on his appointment.

18 In 1241 Henry III granted a further charter also reproduced in translation in Appendix II. It confirmed the bishopric to Bishop David and:

> "all the lands and tenements chattels and possessions in the lands that are cultivated and the cultivated lands (sic) in woodlands in areas clear of woodland in fields and meadows and marshland and hunting areas and stretches of water together with the right to pass through such places in hunting or driving animals to pasture in mills and fisheries with regard to all revenues and incomes and easements deriving therefrom by land and by water in roads and paths and in all other places and other things together with all their appurtenances and freedoms and customary rights free from obligation just as the aforementioned King my grandfather granted to the aforesaid Bishop Bernard and as his charter proves."

19 This charter also granted the bishop a free court of their men "so that they shall not be bound to answer any plaint elsewhere than in the court of their lord the said bishop unless before the king or his justices".

20 Until the statute of Quia Emptores of 1290 a common method of dealing with land was by subinfeudation as I have already described. The bishops of St Davids were no exception. The statute of Quia Emptores of 1290 put an end to subinfeudation for the future; and remains one of the foundations of English property law to this day. What is peculiar (although I think that nothing actually turns on it in this case) is that there is evidence that the statute of Quia Emptores either did not apply to the Marches of Wales or was routinely ignored there, at least until the incorporation of Wales and the Marches into the realm.

21 The Bishops of St Davids were tenants in chief of a number of baronies. Chief among them were the baronies of Pebidiog (or Dewsland) and the barony of Llawhaden. As a result of their dealings with the lands comprised within their baronies the various manors within them came to be divided into three main categories. The first consisted of what have been called "Episcopal manors"; the second consisted of "Capitular manors" and the third of "Lay manors". The Episcopal manors were those that remained in the hands of the Bishops, never having been subinfeudated by them. The Capitular manors were held by ecclesiastical corporations, and the lay manors were, for the most part, knight's fees.

22 In 1326 the Bishops caused a survey of their lands to be undertaken. The survey is commonly known as the Black Book of St Davids. The Bishop's lands were predominantly in what later became Pembrokeshire (approximately two thirds in value) but included lands in other parts of Wales as well. Using the English county names, the breakdown given in the Introduction to Mr Willis-Bund's translation of the Black Book is as follows:

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County	Number of tenants
Pembrokeshire	1,095
Cardiganshire	260
Carmarthenshire	249
Glamorganshire	21
Archdeaconry of Brecon	220

23 The survey is a survey of the lands manor by manor. Although Welsh customs survived in parts of the Bishop's lands, Pembrokeshire was by far the most Anglicised. The survey examined the various services that tenants were required to provide. Some of the services were agricultural: gathering hay, making hay, mowing, reaping, ploughing, carrying corn, washing sheep, making fences and so on. Others were non-agricultural. These included suit at mill, guarding a town in war, escorting prisoners to prison or to the gallows, guarding markets and so on. In relation to some manors, these non-agricultural services included dealing with wrecks. Thus in the case of Treflywyth it is said of the tenants:

> "And if there is a wreck on the sea they are bound to attend on the sea shore at the sound of the horn and guard the goods there."

24 Similar statements are made in relation to tenants of other manors (e.g. Tywaldy, Crughely, Castle Poncius and Wolf's Castle). However, this service did not apply universally. There is no reference in the survey to a right of several fishery on the foreshore or in the sea. One point, which is critical for present purposes, is that the survey records services owed to the lord of the manor, and not to the holder of any superior interest. The Black Book also records a number of knights' fees, held by way of subinfeudation.

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25 In 1354, during the reign of Edward III, Parliament passed the first of the Acts relevant to the Lords Marcher. It was the Lords of Marches of Wales Act, and it said:

> "That all the Lords of the Marches of *Wales* shall be perpetually attending and annexed to the Crown of *England*, as they and their Ancestors have been all Times past, and not to the Principality of *Wales*, in whose Hands soever the same Principality be, or hereafter shall come."

26 The effect of this Act was that if there were any Lords Marcher who were not tenants in chief of the Crown, they became tenants in chief by virtue of this Act.

27 There is also evidence that Edward III, fearing an invasion by the Scots, wrote to the "Lords of the Liberties in Wales" requiring them to cause the sea coasts to be watched, the men of their country to be armed, their castles to be strengthened, and appointing them lieutenants within their lordships. Among the addressees of this letter was the Bishop of St Davids, described as "domino terrarum Sancti David et de Pebidiog".

28 In 1383, as a result of a petition by Bishop Adam, Richard II confirmed that the bishop exercised the jurisdictional liberties of the Lords Marcher. It is, I think, worth quoting in translation at length:

> "Adam bishop of St Davids has petitioned the king setting forth that he holds his bishopric and a certain parcel thereof of the king as of his crown wholly and that he and his predecessors have always used royal jurisdiction in all their demesnes of the said bishopric in cognisance of all pleas personal and real and those of the crown of their own prosecution and that of others with all the profits thence arising after the custom of those parts and that king Henry III by his charter granted A bishop of that church that he and his successors should be quit of all pleas plaints and suits save before the king and his heirs or justices specially assigned and that they should have their free court of their men who should not be bound to answer of any plaint elsewhere than in the court of the said bishop save before the king and his heirs or justices specially assigned therefore and that this by the king's special mandate saving always the king's dignity; and the said bishop thereupon prayed the king to provide against any infringement of these liberties.
>
> And the king at the special request of the archbishop of Canterbury and all the clergy of that province of special grace has hereby granted that the said bishop and his successors shall have all the foregoing liberties as fully as any of Lords Marchers in the marches of Wales have them and that all their tenants and all those dwelling in their demesnes shall not be bound to answer elsewhere than in the said court of the bishop and his successors; and that the said bishop and his successors shall be quit of all pleas plaints suits and impeachments moved against them save before the king and his council saving always the king's dignity."

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29 Richard II granted a further charter in the following year, 1384. It is in much the same terms as the 1383 charter, and an extract from it is quoted in Appendix 2.

30 This grant was confirmed again by Henry IV in 1401, and by Henry V in 1421.

31 Within Pembrokeshire the most valuable of the baronies was the barony of Pebidiog or Dewsland; but the Bishop also held the barony of Llawhaden. According to the *Pembrokeshire County History* (Vol.2 p.148):

> "Here in particular the bishop appeared in his role as marcher lord. By the end of the thirteenth century Llawhaden was the main administrative centre of the bishop's estates, the seat of his chancery and exchequer and his principal court."

32 It is necessary at this stage to say something in general terms about Lords Marcher. Although it is possible for me to give a general account of the Lords Marcher, I should sound a strong cautionary note. As Professor Rees Davies explains (*Lordship and Society in the March of Wales 1282–1400* pp.8–9):

> "Each Marcher lordship was an internally sovereign lordship, a law unto itself both literally and metaphorically. There was not common supervisory authority to give an overriding unity to the area. All the attributes of public life were here fragmented into private hands . . . It is a fragmentation which means that, looked at from one angle, the March as such has no history: it is

never more than the individual and highly diversified histories of its constituent lordships."

33 The distance of Wales from the seats of government in England together with the sometimes fraught military situation led to the emergence of the Lords Marcher. They were tenants *in capite*, each holding directly from the king. They occupied a special status, however. Their holdings did not form part of the realm of England, and within them, they enjoyed an almost complete immunity from royal interference. The royal lawyers recognized the peculiar status of these lordships "in the marches, where the King's writ does not run." In addition, despite the fact that they were feudal vassals of the kings, the marcher lords denied the necessity of referring their quarrels to the king's court. On the contrary, they claimed the right of settling their disputes among themselves, according to their own customary law, the Law of the March, or even by arms. Their immunity from royal authority was not absolute but the conditions under which the king could interfere were extremely limited. A lordship escheated to the Crown if there were no heir of age at the death of the lord, if the lord rebelled or was convicted of felony or treason, if the lord deserted his lordship in time of war, or if the lordship were in dispute.

34 This almost complete freedom from royal interference allowed the marcher lords to exercise within their lordships many powers which were elsewhere in England the sole prerogatives of the crown. They appointed their own sheriffs, possessed their own chanceries and their personal great seals. They had jurisdiction over all cases, high and low, civil and criminal, with the exception of crimes of high treason. They established their own courts to try these offences, executed sentences, and amerced fines. They could establish forests and forest laws, declare and wage war, establish boroughs, and grant extensive charters of liberties. They could confiscate the estates of traitors and felons, and regrant these at will. They could establish and preside over their own petty parliaments and county courts. Finally, they could claim feudal dues such as aid, grant, and relief. In the case of most Lords Marcher these rights and franchises appear to have been claimed by right of conquest. The pioneer of scholarship about the Lords Marcher, George Owen who wrote in about 1600, gave three reasons why most of the Lords Marcher could not claim their rights and franchises by virtue of any charter, which Mr Fletcher-Tomenius describes as "convincing". They are; first "advance geographical definition of future conquests was self-evidently impossible, as territorial certainty is the prerequisite of a valid grant; secondly, the uncertainties of retention following conquest made lords reluctant to seek purchase or grant of specific liberties and, thirdly, the validity of Crown grants of "... so highe a nature, so royall and so united to the Crowne" was doubtful." However, as George Owen goes on to explain, this did not apply to the Bishops of St Davids. As he puts it (*A Treatise of Lordshipps Marchers in Wales* p.150, with spelling modernised):

"The like liberties did diverse Bishops and Abbotts ... purchase who held diverse Lordships in Wales, as the ancient dower of their Sees and Abbeys and never came to the same by Conquest as the Lords Marcher did but the same being given them by the ancient Princes of Wales (but not with any such liberty and jurisdiction as may be presumed). In which Lordships they did not in the Welsh princes time execute such Regal authority as the Lords marcher

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did as is thought, but afterwards purchased the same of the kings of England, as may appear by diverse ancient charters by them thereof obtained and by some of the said charters it appeareth that after the government of the Princes of Wales was expelled, that those Bishops Abbotts and other religious men were forced to take upon them the like regal power of government within their Lordships, as their neighbours the Lords marchers did before the obtaining of any such charters and this appeareth by the Charter of [Richard II] to Adam Bishop of St Davids . . .”

35 Thus at least in this respect the Bishop of St Davids was an atypical Lord Marcher, reflective of the fact that, as Mr Jones pointed out, Dewsland was never conquered. Nevertheless, the preamble to the charter of 1383 contains the Bishop’s claim to have what is in effect a prescriptive right to exercise royal jurisdiction. Mr Fletcher-Tomenius comments:

> “The confirmation by Henry III of the Bishop of St. Davids lord marcher status in 1241 . . . should therefore be construed as merely a confirmation and not a conferment. This accords with the historical emergence of marcher lords . . . Thus, the existing lordship of Dewisland became surrounded by marcher lordships and the most likely explanation is that the Bishops simply behaved as and were recognised as equals. Turvey suggests that the *iura regalia* of the Earl of Pembroke “. . . benefited from the residual effects of the Crown’s overlordship and simply continued to exercise the jurisdictional authority established by his royal predecessor.” There seems no reason to doubt that a similar process established Dewisland’s marcher status.”

36 It is common ground that the charter of 1241 recognised the Bishop of St Davids as having the same jurisdictional franchise as other Lords Marcher and that this was again confirmed by the charter of 1383. One of the issues in the case is whether the Bishop of St Davids exercised all or any of these rights and privileges.

37 Again according to Francis Jones (op. cit. p.16), the Bishop of St Davids did exercise and enjoy these rights and privileges within the barony of Pebidiog or Dewsland:

> “He held his temporal lands in chief of the king; he had his own chancery and issued his own writs; all revenues within his territories were paid into his exchequer; all judicial proceedings were conducted in the courts of his lordships: he had power of life and death, his own prison and gallows; for his lordships he had superior courts from which there was no appeal; for the mesne manors there were courts barons, leets and lawdays, from which an appeal lay to the bishop’s superior court. The bishop enjoyed all feudal rights, reliefs, aids, wardship, marriage, escheats, waifs and strays, goods and chattels of felons, fugitives, condemned and outlawed persons, deodands, wharfage, tolls of markets and fairs, customs, ligam, flotsam and jetsam, wreck of the sea, rights of admiralty, of hunting and fishing, free warren, and the right to incorporate boroughs. He could raise armies to defend his own frontiers or to swell the king’s army. Like De Clare and Bohun, Mortimer and Braose, the bishop was a lord marcher. The king’s writ did not run in his territories. In Dewsland the bishop was king.”

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38 This is the high point of Mr Roberts' case. Mr Fletcher-Tomenius thought that this list of rights and privileges was unsurprising (apart from "rights of admiralty" which he said had no recognised legal meaning), and was typical of many lordships (not just Marcher Lordships). He agreed with Mr Jones that it was probable that the Bishops of St Davids exercised these rights. It is, however, noticeable that absent from this very long list of rights and franchises is any right to treasure trove. Nor is there any hint that the Bishops enjoyed an exclusive right to fish in the sea. It is also noticeable that Mr Jones says that the Bishops enjoyed the right of "wreck of the sea", whereas it is common ground that the Bishop's right of wreck extended to only half of the wreck, which he shared with the Crown.

39 We now move forward to Tudor times. The Tudors were, of course, of Welsh origin themselves; and as I have noted, tradition has it that Rhys ap Tewdwr was a benefactor of St Davids. But by the 1530s Wales and the Marches had become lawless as is graphically described in one of the preambles to The Act of Union 1535:

> "And forasmuch as there be many and divers Lordships Marchers within the said County or Dominion of Wales, lying between the Shires of England and the Shires of the said County or Dominion of Wales, and being no Parcel of any other Shires where the Laws and due Correction is used and had, by reason whereof hath ensued, and hath been practised, perpetrated, committed and done, within and among the said Lordships and Countries to them adjoining, manifold and divers detestable Murthers, brenning of Houses, Robberies, Thefts, Trespasses, Routs, Riots, unlawful Assemblies, Embraceries, Maintenances, receiving of Felons, Oppressions, Ruptures of the Peace, and manifold other Malefacts, contrary to all Laws and Justice; and the said Offenders thereupon making their Refuge from Lordship to Lordship, were and continued without Punishment or Correction; for due Reformation whereof, and forasmuch as divers and many of the said Lordships Marchers be now in the Hands and Possession of our Sovereign Lord the King, and the smallest Number of them in the Possession of other Lords, It is therefore enacted by the Authority aforesaid, That divers of the said Lordships Marchers shall be united, annexed and joined to divers of the Shires of England, and divers of the said Lordships Marchers shall be united, annexed and joined to divers of the Shires of the said Country or Dominion of Wales, in Manner and Form hereafter following . . ."

40 The overall effect of the Act was to incorporate Wales into the English system of law and governance. It did so in the following way:

- the marcher lordships were abolished as political units and five new counties were established, thus creating a Wales of 13 counties;
- other areas of the lordships were annexed to existing counties;
- the borders of Wales were established;
- the courts of the marcher lordships lost the power to try serious criminal cases;
- English became the only permitted language in the law courts;
- the office of Justice of the Peace was introduced;

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- Wales elected members to the English (Westminster) Parliament;
- the Council of Wales and the Marches was established on a legal basis;
- the Court of Great Sessions were established, a system peculiar to Wales;
- a Sheriff was appointed in every county, and other county officers as in England.

41 Section 17 of the Act provided:

> "And that the Lordships, Towns, Parishes, Commotes, Hundreds and Cantreds of *Haverfordwest, Kilgarran, Lansteffan, Langeharne* otherwise called *Tallangherne, Walwynscastle, Dewysland, Lannehadein, Lansey, Herberth, Slebeche, Rosmarket, Castellan* and *Landofleure*, in the said Country of *Wales*, and every of them, and all Honours, Lordships, Castles, Manors, Lands, Tenements and Hereditaments, lying and being within the Compass or Precinct of the said Lordships, Towns, Parishes, Commotes, Hundreds and Cantreds, or any of them, in whose Possession soever they be or shall be, and every Part thereof, shall stand and be guildable for ever, from and after the said Feast of *All-Saints*, and shall be united, annexed and joined to and with the County of *Pembroke*; (2) from and after the said Feast of All-Saints, Justice shall be ministred and executed to the King's Subjects and Inhabitants of the said County of Pembroke, according to the Laws, Customs and Statutes of this Realm of England, and after no Welsh Laws, and in such Form and Fashion as Justice is ministred and used to the King's Subjects within the three Shires of North Wales."

42 "Dewysland" refers to the barony of Dewisland or Pebidiog; and "Lannehadein" refers to the barony of Llawhaden. Section 30 of the Act contained saving provisions. It said:

> "That all and every Lay and Temporal Person or Persons, then being Lords Marchers, and having any Lordships Marchers or Lordships Royal, should from and after the said Feast of All Saints, have all such Mises and Profits of their Tenants, as they have had, or used to have, at their first Entry into their Lands in Times past: And Also should have, hold and keep within the Precinct of their Lordships, Courts Baron, Courts Leet and Lawdays, and all and every thing to the said Courts belonging; and also should have within the said Precinct of their Lordships or Lawday, Waife, Straif, Infang-thefe, Outfang-thefe, Treasure-trove, Deodands, Goods and Chattels of Felons, and of Persons condemned or outlawed of Felony or Murder, put in Exigent for Felony or Murder, and also Wreck de mere, Wharfage and Custom of Strangers, as they have had in Times past, and as though such Privileges were granted unto them by Point of Charter; any Thing in this Act to the contrary notwithstanding . . ."

43 This saving provision was limited to lay and temporal Lords Marcher. The Bishop of St Davids was not a lay or temporal Lord Marcher, so the saving provision did not apply to him. However, the omission of spiritual Lords Marcher appears to have been an oversight ("against all reason and good equity"), which was corrected by Lord Marches in Wales Act 1554.

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44 George Owen (op. cit. p.141 with spelling modernised) explained the effect of this legislation as follows:

> "...[I]n the time of [Henry VIII] the country was brought into such quietness and subjection and the people there became so obedient that the Kings of England well perceived that the country might be governed by civil and politic laws as the rest of the Realm, and therefore in the 27th year of [Henry VIII] he resumed all or most of those regal jurisdictions into his hands, and deprived the Lords marchers of the same, and left them in effect but as Lords of manors in England, and then ordained justices himself, and Justices of the peace, Sheriffs, and other officers and divided the country into Shires and erected great Sessions, Quarter sessions and other courts for the government of the country by officers of his own, and by the Laws of England, and left little or no authority to the Lords marchers."

45 In 1536 commissioners appointed by Henry VIII surveyed ecclesiastical lands, including those of the Bishop of St Davids. The survey is called the Valor Ecclesiasticus. Among the parts they surveyed was "Meneven" (a derivative of the Latin name for Dewisland, "Menevia"). They described the barony of St Davids and the demesne lands of Pebidiog. A fuller extract is reproduced in Appendix II, but the most relevant parts of it read:

> "In this barony demesne lands and manor the aforementioned bishop has his own prison for all kinds of felons offenders and clerks convicted or attainted and to be tried by anyone and his own treasury within the aforementioned castle and a seal of his own chancery for all kinds of original documents by means of his own chancellor in and throughout all his manors and demesne lands as mentioned above wherever they are acquired and put into effect. He also has one session every month to be held at Lanhayden in the presence of the chief seneschal of this same bishop or his deputy and also one other Hundred Court and other lower courts for common pleas and pleas of the crown. He will also have people to carry out the offices of castellan viscount or constable coroner and escheator for the pleas for the said offices and for whatever offenders appear before his constable or his deputy to be held and fixed in perpetuity according to the privileges of the Kings in England and the Princes of Wales granted to him in this way in pure and perpetual alms."

46 Thus in the sixteenth century the Bishop continued to hold his court at Llawhaden rather than in Pebidiog itself. There is no mention in this survey of any right to treasure trove, or any exclusive right to fish in the sea. The puzzling feature of this survey is the reference to the land being held "in pure and perpetual alms", which is the traditional way of describing tenure in frankalmoign. There is certainly no explicit reference to tenure of this kind in any earlier document.

47 Following the Suppression of Monasteries Act 1540, which sought to preserve the privileges of "Sanctuaries" taken into Crown hands on the dissolution of the monasteries, The Laws in Wales Act 1542 was passed. Section 101 of the Act provided:

> "Where divers Lordships Marchers, as well in *Wales*, as in the Borders of the same, now being by Act of Parliament annexed to divers Shires of *England*,

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be lately come to the King's Hands by Suppression of Houses, by Purchase or Attainders, and now be under the Survey of the Court of Augmentations, or of the King's general Surveyors, the Liberties, Franchises, and Customs of all which Lordships be lately revived by Act of Parliament made in the thirty-second Year of his most gracious Reign; nevertheless his Majesty willeth and commandeth, that no other Liberties, Franchises, or Customs shall from henceforth be used, claimed, or exercised within the said Lordships, nor any other Lordships within *Wales*, or the County of *Monmouth*, whosoever be Lord or Owner of the same, but only such Liberties, Franchises and Customs, as be given and commanded to the Lords of the same Lordships, by Force and Virtue of the said Act of Parliament made for *Wales*, in the said twenty-seventh Year of his Grace's Reign, and not altered ne taken away by this Ordinance; the said Act made in the said thirty-second Year, or any other Act, Grant, Law, or Custom to the contrary thereof notwithstanding."

48 This restricted the rights of the Lords Marcher to those rights that were expressly preserved by s.30 of the Act of Union 1535.

49 As mentioned, the omission of the spiritual Lords Marcher from the Laws in Wales Act 1535 was remedied by the Lord Marches in Wales Act 1554. Section 5 of the Act conferred on them the right to "the Moiety and Half of every Forfeiture of all and every common Mainprise, Recognisance for the Peace or Appearance, forfeited by any their Tenants inhabiting within any of their Lordships Marchers or Lordships Royal". Section 6 confirmed that they should:

"have all such Mises and Profits of their Tenants, as the Lords Marchers, Spiritual or Temporal, respectively or severally had or used to have at their first Entry into their Lands in Times past before the Making of the said Act or Statute: (2) And also shall have, hold and keep within the Precinct of their said Lordships all such Courts Baron, Courts Leet and Lawdays, and all and every Thing and Things to the same Courts belonging: (3) And also shall have within the Precinct of their said several Lordships or Lawdays, all such Waife, Straife, Infang-thefe, Outfang-thefe, Treasure-trove, Deodands, Goods and Chattels of Felons, and of Persons condemned or outlawed of Felony or Murder, put in Exigent for Felony or Murder, and also all such Wreck de mere, Wharfage, and Customs of Strangers, as the Lords Marchers Spiritual and Temporal respectively and severally had and used in Times past . . ."

50 During the Commonwealth period following the English Civil War the lands of the Bishop of St Davids were sequestered; but they were returned to the Bishop at the Restoration. During the period of sequestration in 1652 the lands of the Bishop were conveyed to Humphrey Hill, a mercer in London. Part of the conveyance is quoted in Mr Jones' article (op. cit p.20):

"the manor, dominion and lordship of Dewisland otherwise Pebidiog, with the rights, members and appurtenances therefore in the county of Pembroke . . . with all and singular the commons and commons of pasture, wastes and waste grounds, wood, underwoods timber and other trees, mines, quarries, waters and watercourses, rivers, streams, mill dams, pools, ponds, weirs,

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hunting, hawking, fishing, fowling, courts leet, courts baron and other courts whatsoever . . .”

51 There is no mention in the quoted part of the conveyance of any right to treasure trove, or any exclusive right to fish in the sea. Upon the return of the lands to the Bishop at the Restoration he caused “A True and Perfect Survey” to be made in 1660. This survey (or at least part of this survey) has survived. It refers to both the barony of Dewisland and also to the barony of “Lowhadden” (i.e. Llawhaden). Trevine is described in the survey as a manor “holding under the barony of Dewisland”. There is no mention in this survey of any right to treasure trove, or any exclusive right to fish in the sea.

52 Following the restoration of the monarchy in 1660, Parliament and the Crown reached a financial accommodation. The Crown gave up its rights to feudal dues, and instead was granted the right to excise duty on alcohol. This compromise led to the passing of the Tenures Abolition Act 1660, confirming a resolution of the Long Parliament, which for the most part abolished feudal land tenure. This was achieved by s.1 of the Act which provided (with spelling slightly modernised):

> “that all Tenures by Knights service of the King, or of any other person and by Knights service in Capite, and by Socage in Capite of the King and the fruits and consequents thereof happened or which shall or may hereafter happen or arise thereupon or thereby be taken away and discharged Any Law Statute Custom or Usage to the contrary hereof any wise notwithstanding, And all Tenures of any Honours Manors Lands Tenements or Hereditaments of any Estate of Inheritance at the common Law held either of the King or of any other person or persons Bodies Politique or Corporate are hereby Enacted to be turned into free and common Socage to all intents and purposes from [24 February 1645] and shall be so construed adjudged and deemed to be from the said [24 February 1645], and for ever thereafter turned into free and common Socage, Any Law Statute Custom or Usage to the contrary hereof notwithstanding.”

53 However, s.7 of the Act made an exception in the case of frankalmoign:

> “Provided also and be it further Enacted that this Act or any thing therein contained shall not take away or be construed to take away Tenures in Franke Almoigne or subject them to any greater or other services then they now are . . .”

54 Two hundred years later, in 1874 the Bishop of St Davids resigned on the ground that he was incapacitated by age and infirmity, thus triggering a vacancy in the see; and on July 7, 1874 Queen Victoria declared, in pursuance of the Bishops Resignation Act 1869, that the see was vacant. Under the Act the lands and hereditaments belonging to the bishopric vested in the Ecclesiastical Commissioners. On November 28, 1874 the Privy Council ratified a scheme propounded by the Commissioners. The scheme, among other things, gave the Commissioners power to dispose of the property. If any part of the lands of the Bishops had previously been held in frankalmoign, the vesting of those lands in the Ecclesiastical Commissioners must have converted the tenure into socage tenure.

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55 Under the influence of non-conformist politicians, notably David Lloyd-George, pressure to disestablish the church in Wales grew during the early part of the twentieth century. In 1914 Parliament passed the Welsh Church Act 1914, although the intervention of the First World War delayed its entry into force until 1920. Under s.4 of the Act property that was vested in the Ecclesiastical Commissioners and identified as Welsh ecclesiastical property vested in the Welsh Commissioners. What property was Welsh ecclesiastical property was to be ascertained by the Ecclesiastical Commissioners under s.5 of the Act. Section 8 of the Act provided for the transfer of property by the Welsh Commissioners. After making provision for specific types of property, s.8(1)(e) provided that all other property was to be transferred to the University of Wales.

56 On March 30, 1920 the Ecclesiastical Commissioners made an order under s.5 of the Act declaring that "all the property rights and interests vested in them as Lords of Manors in Wales and Monmouthshire together with any other rights or interests in the same area" were ascertained to be Welsh ecclesiastical property.

57 Most of s.7 of the Tenures Abolition Act 1660 was repealed by Sch.2 to the Administration of Estates Act 1925, which finally abolished tenure in frankalmoign.

58 On March 17, 1946 another order made by the Welsh Commissioners transferred the property rights which had been transferred to them by the Ecclesiastical Commissioners to the University of Wales. A schedule of those that could be identified was contained in the 1946 order. In Pembrokeshire they included the manors of Dewisland (Upper and Lower) and the City and Suburbs of St Davids. In preparation for the transfer to the University, while war was raging in Europe, the District Valuers prepared detailed reports on the medieval rights appurtenant to each of the manors. There was also a more general report dated 15 April 1944 which began:

> "the Manors within the Episcopal Barony of Dewisland can . . . be classified as follows:
>
> 1. *Episcopal Manors* in the hands of the Lord of the Barony i.e. the Honor of Dewisland. These included:
>
> (1) St Davids (Dewisland otherwise Pebidiauk) and
> (2) the City and Suburbs of St Davids . . .
>
> 2. *Capitular Manors* which were ecclesiastical manors held of the Lord of the Barony by the Cathedral Chapter, and really served to endow certain ecclesiastical offices. They were about 11 in number in this Lordship
>
> 3. *Lay Manors* (all mesne manors) which would appear to have been sub-infeudated by the Lords of the Barony to Laymen, of which there appear to have been 35 in the Barony."

59 On September 9, 1944 the District Valuer reported on the Manor of the City and Suburbs of St Davids, which he said was a manor over which the bishops "appear to have exercised at all times direct Lordship". The report discussed the boundaries of the manor (in so far as they could be ascertained) and the rights that the Lord of the Manor might have.

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The sales to Mr Roberts

60 For 20 years or more the University of Wales has been selling Lordships of the Manor. In 1987 it sold the Lordship of the Manor of Dewisland (Upper & Lower) to Doreen Bowie. In the same year it sold the Lordships of the Manors of Brawdy, Pointz Castle and Loughvaine to Barry Zee. In 1988 it sold the Lordships of the Manors of Trellys and Grandiheno to Basil Williams. These manors were all Episcopal manors, and all were coastal.

61 On July 6, 2000 the University of Wales was due to sell a number of other Lordships of the Manor at a public auction. The University caused a catalogue to be prepared which included a historical note on "*The Welsh Church, its Lands and Ecclesiastical Feudalism*" and a further historical note on the manors for sale by Dr John Davies. The latter note stated:

> "By the twelfth century, Pebidiog was an Episcopal barony held directly of the English crown by the bishop of St Davids. Considerable parts of it were subinfeudated from time to time by succeeding bishops, thus creating mesne manors within the barony. The manors of the bishops of St Davids were minutely surveyed in the Black Book of St Davids which was compiled in 1326. Of the Episcopal manors of Pebidiog, Brawdy, Cearfarchell, Priskilly and Llanridion were sold in 1987, and Dewisland, Nun Street and Trefflys and Grandiheno were sold in 1988. The three remaining manors of Pebidiog **—the City and Suburbs of St Davids, Trevine** and **Knwch Craig**—are on offer in this sale."

62 The auction also included three other manors which the bishops held, but these were said to be outside the Episcopal barony of Pebidiog.

63 On July 2 Mr Roberts wrote to Mr Charles, the solicitor acting for the University. He said that he was hoping to attend the auction himself and "to acquire one or two of the Manors being offered." He added:

> "We discussed the matter of corporeal and incorporeal hereditaments. It is my understanding that the incorporeal hereditaments (e.g. Waifs, Estrays, Rights of Fair etc.) are not being excepted but that the corporeal hereditaments (e.g. Freehold Land and Minerals) are being excepted, although you mentioned that you did not consider that there were any."

64 He asked whether the University would be prepared to amend the exception so that waste and commons could be included, and added that as "an eccentric antiquarian" he was hoping to keep the Manor alive.

65 At the auction Mr Roberts was the successful bidder for a number of lots including Lot 8. This was described as "the Manor of the City and Suburbs of St Davids." It was described as consisting of most of the ancient city of St Davids together with tracts of land to the south between the city and the sea. Condition 8 of the conditions of sale stated:

> "Any Commons and Wastes and Mines and Minerals forming part of the Manors or Lordships are **NOT** included in the sale, and also, for the avoidance of doubt, it is declared and agreed that **NO** other freehold or leasehold land is included in the sale."

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66 Where an interest in land is sold at a public auction a binding contract comes into existence when the hammer falls without the need for any writing (Law of Property (Miscellaneous Provisions) Act 1989 s.2 (5)(b)). However, in this case as in the case of most auctions, the buyer signs a memorandum of sale. The memorandum of sale described Mr Roberts as the buyer of Lot 8 as described in the particulars of sale, but whereas the printed form described it as "the Manor of . . .", Mr Roberts altered the memorandum in manuscript so that the lot was described as:

> "Lot 8 described in the Particulars of Sale being The Lordship Marcher of St Davids, commonly called the Manor of St Davids."

67 Among the other lots for which Mr Roberts successfully bid was the Manor of Trevine. Mr Charles was in the auction room, accompanied by two representatives of the University. Mr Roberts went up to speak to them and had a short conversation, lasting some two to three minutes. In his witness statement Mr Roberts said that during the course of this conversation he explained to Mr Charles and the University representatives details about St Davids; he referred to the District Valuer's report and the reference to a superior interest; to the 1946 Transfer Order, the Laws in Wales Act 1535. He showed them a copy of Professor Pugh's map of Lordship Marchers, including St Davids, and referred to the fact that the Lordship Marcher had not previously been sold and that sale was supposed to rid the University of its remaining feudal interests. Mr Charles' recollection was that he did have a conversation with Mr Roberts at the auction. Mr Roberts mentioned Lordships Marcher (an expression which meant little if anything to Mr Charles) but did not explain what the difference was between that and a Lordship of the Manor. He did not refer to the District Valuer's report, nor to the Transfer Order, nor to the 1535 Act. He said that Mr Roberts had altered the wording of the auction memorandum, but he and the University were content with the alteration. I prefer the evidence of Mr Charles. I do not consider that it would have been possible within the short space of time in which the conversation took place for Mr Roberts to have explained all that he said he explained. Moreover the subsequent correspondence does not suggest that there was any discussion of the concept of a Lordship Marcher; and Professor Pugh's map (in the version that Mr Roberts showed Mr Charles) does not in fact show St Davids as a Lordship Marcher. The City of St Davids is merely on the map as a topographical feature. Mr Robert's insistence to the contrary in the witness box was, to my mind, unconvincing.

68 In due course a conveyance of July 24, 2000 conveyed to Tacticall Radio Hire Ltd (a company owned by Mr Roberts):

> "The Lordship Marcher of St Davids . . . and for the avoidance of doubt it is hereby declared that this Conveyance does not include or convey transfer or assign and there is expressly excluded from this Conveyance any corporeal demesne land appurtenant to the manor and any Mines and Minerals thereunder (if any) now forming part of the Manor."

69 The expression "the Lordship Marcher of St Davids" was not further defined. However, the conveyance included provisions for "clawback" in the event that the "Property" (also undefined) was exploited.

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70 By a conveyance of January 2, 2001 Tacticall Radio Hire Ltd conveyed to Mr Roberts (styled in the conveyance as "the Lord Marcher of Trelleck") the Lordship Marcher of St Davids. This time, however, the Lordship Marcher was elaborately defined as follows:

> "...[T]he Lordship Marcher of St Davids in the former Counties of Pembrokeshire Brecknockshire Cardiganshire Carmarthenshire Glamorganshire Radnorshire or elsewhere in Wales or England with its right members and appurtenances including for the avoidance of doubt (but not by way of reduction to the aforementioned express grant) all corporeal demesne land parcel of or appendant to the Lordship Manor and all cantrefs commotes lordships manors baronies castles towns hamlets messuages houses tenements edifices orchards gardens dovecots forests chases parks warrens vivaries piscaries fishings mills meadows feedings pastures woods underwoods commons waste lands mountains heaths moors marshes wharfs grounds void grounds foreshore and bed of the sea and rivers and all oblations pensions portions rents services fee farms knights fees revenues escheats reliefs heriots courts courts leet views of frankpledge and whatsoever to courts leet and views of frankpledge belonging or appertaining courts baron perquisites and profits of courts fines issues amerciaments liberties franchises free customs rights jurisdictions pre-eminences prerogatives regalities profits commodities emoluments and hereditaments demised occupied or enjoyed with it or reputed or known as part parcel or members of it and together with (but not by way of reduction to the aforementioned express grant) all matters specified in the Law of Property Act 1925 Section 62 and together with (but not by way of reduction to the aforementioned express grant) all regalities confirmed to the Lords Marchers of Wales by the Act 1 & 2 Phil. & Mar. c. 15 other than those excepted from this Conveyance."

71 There was nothing excepted from the conveyance.

Did the status of a Lord Marcher carry privileges with it?

72 Mr Hinks submitted that the status of Lord Marcher was essentially a jurisdictional franchise. The essence of the franchise was that the King's writ did not run within the March in question; and the Lord Marcher was empowered to administer justice (with immaterial exceptions) within his lands. The status of Lord Marcher did not carry with it any proprietary rights, the source of which would have to be found elsewhere (for example in a royal charter).

73 More particularly, in the case of the Bishop of St Davids the charter of 1115 was a land grant, and the jurisdictional franchises were not conferred upon the Bishop until later charters, notably the charter of 1241 and 1383.

74 The jurisdictional privileges of the Lords Marcher were abolished by The Act of Union 1535, and their franchises restricted by that Act. I agree. I agree also that the franchises that were mentioned in s.30 of that Act (and again in s.101 of the Laws in Wales Act 1542 and s.6 of the Lord Marches in Wales Act 1554) were not created by those Acts, but that they merely preserved such of the franchises as were already existing.

75 In addition, in so far as any privileges attaching to the status of Lord Marcher survived the Tudor legislation, they were removed by the abolition of feudal tenure effected by s.1 of the Abolition of Tenures Act 1660 which removed all the "fruits and consequents" of tenure *in capite* of the Crown. As Lord St Leonards explained in the *Berkeley Peerage* case (1858–61) 8 H.L.C. 21:

> "Not only were all tenures *in capite* . . . taken away, but the lands were for ever turned into free and common socage. How can the Castle and Estate of Berkeley, holden as it now is by free and common socage, and not *in capite* or in chief, carry with it a right in its possessor to sit in this House? It confers upon him just the same right, but no higher than the humblest cottage confers on its owner. The feudal tenure being abolished, of course the privileges annexed or flowing from it have ceased."

76 Ms Tozer sought to meet this latter point by arguing that as at 1660 the Bishops held their lands in frankalmoign, relying on the statement to that effect in the Valor Ecclesiasticus of 1536; and hence that their privileges survived because of the exclusion of frankalmoign in s.7 of the 1660 Act. However, as I have said, there is no express grant of any lands in frankalmoign, and I do not consider that the single reference to free and perpetual alms in the Valor Ecclesiasticus is a sufficient foundation upon which to conclude that the Bishop did indeed hold all his lands in frankalmoign. The fact that the Crown enjoyed the temporalities of the see during the reign of King John is also inconsistent with tenure in frankalmoign. It was common ground that, if the Bishops ever held their lands in frankalmoign, that tenure was converted into socage by the vesting of the lands in the Ecclesiastical Commissioners. It was not argued (although it might have been) that the conveyance during the Commonwealth to Mr Hill, the London mercer, (and hence before the passing of the Abolition of Tenures Act) had that effect.

77 In my judgment, therefore, by 1542 (or at the latest 1660) any privileges that had belonged to the Bishops in their capacity as Lords Marcher or as tenants *in capite* had been abolished. This, I might add, coincides with the view of George Owen writing in about 1600.

The approach to the construction of grants by the Crown

78 In thecase of ambiguity in a contract of grant between subjects, the ambiguity may be resolved by recourse to the principle of interpretation against the grantor (one of the meanings of the phrase *contra proferentem*). Traditionally that principle has been inverted in the case of grants by the Crown. In *Feather v R* (1865) 6 B. & S. 257 Cockburn C.J . said:

> "It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule prevails. Nothing passes except that which is expressed, or which is matter of necessity and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant. And in no species of

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grant does this rule of construction more especially obtain than in grants which emanate from and operate in derogation of, the prerogative of the Crown."

79 Similarly, Lord Birkenhead L.C., speaking in the Committee of Privileges of the House of Lords in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339 said:

> "The rule that the words of an instrument shall be taken most strictly against the party employing them -*verba chartarum fortius accipiuntur contra proferentem*- does not apply to the Crown such a grant is construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words."

80 According to Lord Stowell in *The Rebeckah* (1799) 1 Ch Rob 227 the rationale behind the inversion of the normal principle is that:

> "the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away."

81 It is also the case that a medieval charter was a public document, as shown by the opening words of the 1115 charter:

> "Henry King of the English sends greetings to the archbishops bishops earls and barons and all his loyal subjects French and Welsh and English. May you know that I have granted and given . . ."

82 The public, to whom the charter was addressed, would have only the words of the charter to rely on.

83 In those circumstances, whatever might nowadays be the position, it seems to me that I should apply the traditional rule in interpreting the ancient charters which evidence the title of the Bishops of St Davids. Accordingly, I should not interpret the charters as conferring rights on the Bishops unless they do so by express words or necessary implication.

Welsh customary law

84 Mr Roberts places some reliance on what is said to be Welsh customary law ante-dating the Norman Conquest. This is derived from that part of the 1115 charter which says that the Bishops were to have:

> "all customary rights as the aforesaid church or any of its bishops had on better terms and held in the time of my father and King Edward and Griffin or at any other time."

85 The Welsh customary laws survive to some extent in a collection of manuscripts known as the laws of Hywel Dda, who reigned in Wales in the middle of the tenth century. Henry VIII's commissioners were scathing about these laws in the Valor Ecclesiasticus, calling them the "most imperfect law of all laws". The surviving manuscripts of the laws of Hywel Dda begin with a manuscript of the late twelfth

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century, some 250 years after his death. There are three law codes, which have been given different names at different times by scholars. Mr Fletcher-Tomenius examined the scholarly literature and concluded that Welsh scholars are uncertain about the content of the original laws of Hywel Dda. He also drew attention to the scholars' conclusion that the surviving manuscripts are likely to have been influenced by Anglo-Norman law. His conclusions were not challenged. He drew attention to the description in two of the codes to references to the sea and the fruits of the sea. The first is from the Book of Cyvnarth (formerly called the Gwentian Code, which seems to have applied to the ancient kingdom of Deheubarth):

> "Eight packhorses of a king are: the sea, and a waste, and an irremediable pauper, and a thief, and a marwdy, and dirwy and camlwrw and ebediw."

86 The same code states:

> "If a ship be wrecked on the land of a lord, the lord has it; and if a ship be wrecked on the land of a bishop, it is divided between the king and the bishop."

87 The Book of Iowerth (formerly called the Venedotian Code, which appears to have applied in North Wales) also refers to the sea as the "packhorse of the king". It says:

> "Whoever possesses land upon the margin of the shore owns as much of the beach as the breadth of the land and he may make a weir or other things thereon if he will; but if the sea threw any things upon that beach they belong to the king: for the sea is a pack-horse of the king."

88 Mr Roberts produced further extracts from the Book of Iowerth published by the Record Commission in 1831. They also refer to the sharing of wreck between the bishop and the king if a ship is wrecked on the land of a bishop. It also states:

> "It is free for every body to fish in the sea; what the sea casts ashore however, whether alive or dead belongs to the king from the day they are cast up until the third day forth if not taken by the king, let them be a booty to such as may find them."

89 What customary rights have been established? Ms Tozer relied on an extract from *The Legal History of Wales*, by Professor Thomas Glyn Watkin. The relevant extract (p.62–3) reads:

> "The law books also discuss the acquisition of other forms of property in a manner which is very reminiscent of the works of the Roman jurists. From these discussions, it is learnt that fishing in rivers, fish being a very important product in the Wales of that time, was freely open to lords and free tenants, permission only being necessary to build traps or weirs. If fish were caught by such devices when no permission for their use had been given, then the fish caught had to be divided between the lord and the captor, the latter still getting two thirds. . .

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> In Welsh law, everything a *priodawr* [a landowner] found concealed on his land belonged to him, apart from gold and silver which went to the king. . .
>
> A ship which was wrecked before port dues had been paid belonged to the king if he claimed it, but otherwise went to the first taker. If the wreck grounded on bishop land, the property was shared half-and-half between the bishop and the king, an interesting and unusual compromise with the ecclesiastical authorities. Once port dues had been paid, the owner of the vessel could claim the property as his own. Likewise dead fish washed up on the shore were available to the king for three tides, but then available to the first taker. These rules were justified on the basis that the sea was the king's packhorse, a principle which may hark back to ancient native ideas of what came from the water being a divine gift. The same might be true of living things found upon land, for an animal which was found did not become the property of the finder. Instead, it had to be taken to the lord and proclaimed as lost property. If claimed, it went back to its owner; if not it became part of the lord's waste. . ."

90 Professor Watkin does not say that the native princes or kings had an exclusive right to fish in the sea. On the contrary, his only reference to fishing relates to fishing in rivers, and he stresses the importance of fish as a means of sustenance of the people. The only reference he makes to sea fish is to dead fish washed up on the shore. It would be very unlikely that the king or prince asserted an exclusive right to fish in the sea. In addition the extract from the Book of Iowerth asserts in terms that it is free for every body to fish in the sea. In my judgment Mr Roberts has not proved the existence of any exclusive customary right to fish in the sea.

91 On the other hand I am prepared to accept that the native princes asserted a right to treasure trove and to ownerless straying animals (estrays). The right to a moiety of wreck is not, in principle, in dispute. However, George Owen asserted that in the time of the Welsh princes the Bishops did not "execute such Royal authority as the Lords marcher did" (see [34] above).

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Franchises

92 A franchise is a branch of the Royal prerogative, subsisting in the hands of a subject. Being derived from the Royal prerogative, a franchise can be created only by express grant or by prescription which itself presupposes a grant at an ancient date.

93 The nature of a franchise was described by Nourse L.J. in *Spook Erection Ltd v Secretary of State for the Environment* [1989] Q.B. 300:

> "The right which was granted to one Anthony Bourchier by the letters patent of 29 June 1637 was a franchise; an incorporeal hereditament which has been authoritatively defined as a royal privilege or branch of the royal prerogative subsisting in the hands of a subject, by grant from the King: see Chitty: *The Prerogatives of the Crown* (1820), p. 119."

94 A franchise is thus an incorporeal hereditament.

95 One issue that arose in the present case was whether a franchise can be lost by non-use for a protracted period. Mr Hinks submitted that it could. One of the

pragmatic compromises of the common law is to give legal effect to long-established facts. The underlying principle manifests itself in many ways. Long possession of land gives rise to title by adverse possession. Long and open exercise of a right over land gives rise to the acquisition of an easement by prescription. Upon the same principle, long and open use in breach of covenant may give rise to a presumption that the covenant has been released: *Attorney General of Hong Kong v Fairfax Ltd* [1997] 1 W.L.R. 149. As Lord Selborne put it in *Great Eastern Railway v Goldsmid* (1883–84) 9 L.R. App. Cas. 927 at 938:

> "In the first place, if there be a valuable principle in our law, the observation of which within its proper limits is of cardinal importance, it is this, that all reasonable presumptions shall be made in support and not in destruction of long enjoyment and usage ... It is, as I have said, a principle of vital importance to the maintenance of public and private rights in this country, where no law can be repealed by mere desuetude, that reasonable presumptions shall be made of all things which are reasonably possible in support of such long enjoyment."

96 Thus it was held in that case that the City of London Corp had implicitly given up a franchise consisting of an exclusive right to markets within London that had apparently been conferred on it by an Act or charter of Edward III in circumstances in which it had acquiesced for centuries in the holding of other markets.

97 Mr Hinks also relied on *Attorney Genral v Parmeter* (1811) 10 Price 378. The defendants in that case claimed rights under a charter granted by Charles I in 1628. The grant was a grant of lands and marshes subject to the overflowing of the sea. The charter declared that it had been granted in consideration and as compensation for the future expense of reclaiming the land from the sea. In fact nothing had been done under the charter until 1784, when the defendants began to build a wharf. MacDonald C.B., delivering the judgment of the Court of Exchequer said:

> "Let us next examine the common doctrine in the case of a grant made, and of which no advantage has been taken, and which has never been acted upon for a century and a half. It is most manifestly clear, either that the grant was never acted upon at all, or we must presume that it was surrendered, if ever the grantees did avail themselves of it. It has been argued thus: that supposing this was the case of a subject who had not acted upon such a grant for one hundred and forty years, the presumption must be the same as it was in the case of *The Mayor of Kingston-upon Hull v Horner* and the case of *The Advowson of Chester-le-Street*. In those cases there was nothing produced but a grant made at a distant time. The Court said, time must determine the title. Whenever we see a length of possession of this time, we must presume from the lapse of time, that an adverse grant is surrendered. So where we find the King by his subjects still in possession of this soil, by the passing and repassing of such vessels as can pass and repass, we must conclude that if it ever existed in force this grant had been in the interim surrendered to the Crown."

98 This is, in my judgment, consistent with the general policy of the law in recognising the legality of a long-standing state of affairs. It is also supported by the statement in 3 Cruise's *Digest: Franchises* para.109:

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"Free chase and warren may, I presume, like other franchises, be lost by non-use when claimed by prescription or even by express grant. As the non-user creates a presumption that the franchise has been surrendered, it is therefore necessary, where a claim of this kind is made, to prove a continued exercise of the right."

99 There is a similar statement in Scriven on Copyholds (7th edn p.287). This principle is also consistent with the decision of the House of Lords in *Neill v Duke of Devonshire* (1882–83) L.R. 8 App. Cas. 135 (to which I refer later), although the underlying reasoning is, perhaps, not so clearly articulated in that case.

100 In principle, therefore, I consider that Mr Hinks' submission is correct. There is, however, one note of caution that should be sounded. It is, I think, important to distinguish between a case in which the occasion to exercise the franchise has arisen but has not been taken, and a case in which the occasion to exercise the franchise has not arisen. It is also, I think, necessary to distinguish between a franchise that would give the franchisee the right to object to activities that are openly taking place, and one that confers no such right. For example, a franchise of treasure trove may not have been asserted in a particular locality for centuries, because no treasure has ever been found. In such circumstances the mere absence of any claim to treasure trove would not, I think, give rise to any inference of surrender. Likewise if a franchise entitling a franchisee to hold a fair or a market has not been exercised for many years, that of itself may not give rise to any inference of surrender, but it may be different if, during the period of non-exercise, a rival market has been consistently and openly held in the area of the franchise.

The right of wreck

101 The general position is governed by s.241 of the Merchant Shipping Act 1995 which says:

"Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in the United Kingdom or in United Kingdom waters except in places where Her Majesty or any of Her Royal predecessors has granted the right to any other person."

102 "Wreck" is defined by s.255(1) as including:

"jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water."

103 The right to wreck is a franchise. Thus it may be created either by express grant, or by presumed grant arising from prescription at common law.

104 There is no express reference to the right of wreck in the charter of 1115. However, the survey of 1326 records that the tenants of a number of the manors had an obligation to guard the wreck. This is at least consistent with a right in the lord to the wreck. However, in the case of some coastal manors (St Davids, Upper Pebidiauk and Lower Pebidiauk) no obligation to guard wreck is recorded in the survey. This indicates that, in respect of those manors, the Bishops did not claim a right of wreck. The manor of St Davids just referred to is not the same as what is now called the Manor of the City and Suburbs of St Davids. There is, however,

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undoubtedly evidence that the Bishops of St Davids claimed a right of wreck and that that right was recognised by the Receiver of Wreck. The first dispute between the parties is whether that right was claimed or exercised by the Bishops as Lords Marcher or as Lords of the Manor of particular manors.

105 In 1855 The Receiver of Wreck acknowledged the Bishop of St Davids claim to a right of wreck. The extent of the claim was described as:

> "From the north side of Newgale Sands in the parish of Brawdy to a stream on the northern extremity of White Sand Bay in the parish of St David's (where the Prince of Wales' manor commences) and thence from the north side of St Davids (where the Prince of Wales' manor commences) to Goodwick Sands at Fishguard Bay."

106 The capacity of the Bishops as claimants was described as "Lord of the Manor of Dewsland from time immemorial". Thus the acknowledgement was an acknowledgment of a prescriptive title apparently appurtenant to a particular manor. Some twenty years later, just after the resignation of the Bishop in 1874, the Ecclesiastical Commissioners were asked by the Board of Trade to produce evidence of the exercise of the right. The evidence related to payments that had been made to the Bishop from the proceeds of sale of wreck that had been washed ashore "on his manor of Dewisland." This time, on July 8, 1875 the Board of Trade acknowledged that the Ecclesiastical Commissioners had proved title to one moiety of unclaimed wreck washed ashore. The capacity in which the claim was acknowledged was "Lords of the Manor or Lordship of Dewisland". The extent of the acknowledged claim was in the same terms as in 1855. The evidence presented in support of the claim included a summary of a court roll from 1834 which recorded:

> "A court roll dated 1834 of the manor of Trefine which is a sub-manor of Dewsland. In this book under date 4 November 1846 there is a presentment of a boat having come on shore at Aberweller, when the question as to the right of the Lord was referred to the Stewards, who gave charge to the Bailiffs to look after, take charge of and report all wreckage to the Stewards of this Manor."

107 This seems to me to indicate clearly that the right of wreck was being claimed as a franchise vested in the Lord of the Manor of Trefine (or Trevine) and as Lord of the Manor of Dewisland, rather than in some supra-capacity as Lord Marcher.

108 During the 1920s questions arose about the precise limits of the Bishops' claims. By then of course, the manors had passed to the Welsh Church Commissioners under the Welsh Church Act 1914. By a letter dated August 9, 1928 the Welsh Church Commissioners wrote to the Mercantile Marine Department at the Board of Trade saying that they had "no reason to dispute the limits within which the Board admitted the title of the Lord Bishop of St Davids to the moiety of the proceeds in 1862". These limits, as I understand it, include the foreshore abutting the manor of Trevine and the manor of the City and Suburbs of St Davids. In the

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case of the latter manor this is a very small stretch at the mouth of the river Alan and also around St Non's Bay.

109 Neither side asserted that the acknowledgement by the Receiver of Wreck of the Bishop's right to a moiety of wreck in his capacity as "Lord of the Manor of Dewisland" should be accepted literally. The fact is that the University sold the Manor of Dewisland (Upper & Lower) in 1988 to Mrs Doreen Bowie. Accordingly, if the right of wreck were indeed enjoyed by the lord of the manor of Dewisland over the whole of the foreshore within the limits admitted by the Receiver of Wreck, it would be enjoyed by Mrs Bowie (or her successors) rather than Mr Roberts.

110 The stretch of coastline over which the Bishop's right of wreck was recognised extended well beyond the boundaries of the manor of Dewisland. With two exceptions it encompasses 30 miles or more of coastline from Newgale right round the peninsula of St Davids Head and on past Strumble's Head to Fishguard itself.

111 However, the very fact that there were two breaks in the stretch of coastline also seems to me to indicate that the Bishops' right to a moiety of wreck was not being recognised as a unitary entitlement. Moreover, the fact that the Black Book of the Bishops of St Davids records obligations about wrecks in some but not all manors indicates that the right of wreck attached to the lordship of a particular manor rather than to any superior interest held by the Bishops. Ms Tozer suggested that this latter fact could be explained on the basis that the Bishops organised the guarding of wreck on a barony-wide basis. Not only was there no evidence to support this speculation, but it is, in my judgment, quite impractical. If a valuable wreck were washed up on the Pembrokeshire coast, it would almost inevitably have been looted before the tenants of a manor some 20 or 30 miles away could have been alerted and then travelled the twenty or thirty miles to guard it. Likewise the record of the court roll of the Manor of Trevine strongly suggests that the right of wreck was claimed on a manor by manor basis. In addition, as I have explained, in the case of Episcopal manors, there was no superior interest: the Episcopal manors were simply manors that the Bishops had not subinfeudated.

112 Mr Fletcher-Tomenius' conclusions on the right to wreck are as follows:

> "8.4.6 The manorialised character of the residual holdings of the See was reflected in the disposals of lordships by the University of Wales in recent years. For example, in 1988, the Lordship of the Manor of Dewisland (Upper and Lower) was auctioned (as Lot 9) and this area, although still substantial, no longer included tracts of land forming a number of adjoining manors, which were disposed of as separate lordships. Although Dewisland did include a section of coast, the section to the west of Fishguard, including Goodwick, formed part of the Manor of Trellys and Grandiheno which was disposed of in the same auction as Lot 6. Both manors were sold with "... all such rights as are now subsisting and are vested in the Grantor ...". There were separate reports for each manor accompanying the auction particulars and these similarly emphasised the uncertainty of the residual manorial rights, not surprisingly in view of the contents of Bishop Lucy's survey from the seventeenth century and the equivocal content of the various sources of

> the laws of Hywel Dda. From this information, the only firm conclusion is that any particular manor might or might not currently enjoy a right of wreck. In the absence of direct evidence, therefore, the matter is moot and the answer not to be derived from mere identification of the ancient rights of the marcher lord of St. Davids. In any event, if the right of wreck had remained vested in the successor in title to the Bishop Lord Marcher, it was expressly conveyed with each sale of manorial lordships by the University of Wales."

113 Mr Fletcher-Tomenius also points out that according to the Black Book of St Davids the lord of the manor of Trellys and Grandiheno (and other manors) claimed the right of wreck and that the Black Book also discloses three coastal manors (referred to above) where there was no duty to guard the wreck. He concludes:

> "The only apparent explanation is that either the Bishop did not claim a right of wreck or that he had granted this away in the grant of manor. Given the complexity of the hierarchy of mesne and sub-manors, the latter explanation seems more likely."

114 I accept these conclusions. I find that the Lord of the Manor of Trevine had a franchise entitling him to a moiety of wreck. I find that the Lord of the Manor of the City and Suburbs of St Davids had a similar franchise.

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Several fishery

115 Despite its rather misleading title, a several fishery is an exclusive right of fishing. In the absence of a several fishery, the general public has the right to fish in tidal waters. A several fishery is a franchise, which must derive from a Crown grant. As in the case of a right of wreck it may be created either by express grant, or by presumed grant arising from prescription at common law. However, there is one critical difference. Given the importance of the fishing industry both in ancient times and also today several fisheries were not popular. It is common ground that the creation of a several fishery was prohibited by Magna Carta. However, Mr Roberts claims to be entitled to a several fishery granted to the Bishops of St Davids by the charter of 1115. The extent of the right of several fishery claimed is along the whole of the sea coast bounding the ancient lands of the Bishops, together with the exclusive right to fish in the sea as far as the sea was customarily fished in 1115. The claimed right includes the right to make weirs or fish traps on the foreshore.

116 The claim is put in two ways. First, Mr Roberts relies on the express grant of "fisheries" in the charter itself. Secondly, he relies on the express grant of:

> "all customary rights as the aforesaid church or any of its bishops had on better terms and held in the time of my father and King Edward and Griffin or at any other time".

117 He says that the customary rights of the Bishops, inherited from the native princes, included an exclusive right to fish in the sea, up to the limits of whatever was the customary limit of fishing in 1115. I have already rejected the second basis of putting the case on the ground that it has not been proved that the native princes

asserted such an extravagant right, and that the Welsh customary law indicates that everyone had a right to fish in the sea. I might also add that there is no evidence about the extent to which fishermen ventured into open waters in 1115, so that the extent of the right claimed on this basis is uncertain.

118 What then of the word "fisheries" (*piscationibus*) in the charter? The word appears in a long list of general words. Mr Hinks submitted that, having regard to the principle that Crown grants are construed in favour of the Crown, a right as extravagant as a right of exclusive fishing over a large stretch of coastal waters should not be held to have passed by a general word tucked away in a long list. In my judgment he is right. In the *Case of the Royal Fishery of the Banne* Dav. 149 it was held that a royal fishery did not pass by a general grant of all fisheries, because general words in a grant did not pass "special royalty which belongeth to the Crown by prerogative". That was followed in *Duke of Somerset v Fogwell* (1826) 5 B. & C. 875 at 885. It is also the case that ancient conveyancing practice was to describe a right of several fishery as "*separalem piscarium*", thus emphasising the extraordinary nature of the right: Co Litt. 4b. In addition a general reference in the charter to fisheries might well refer to fisheries in non-tidal rivers (e.g. the River Alan which flows through the city and meets the sea at Porthclais).

119 Mr Hinks also submitted that the ancient grant of 1115 should be construed in the light of subsequent acts of possession and enjoyment. I agree with that too. In *Neill v Duke of Devonshire* (1882–83) L.R. 8 App. Cas. 135 what was in issue was the right to a several fishery in the river Blackwater. There was evidence of title in the shape of letters patent that had been granted by James I and Charles I. Lord Selborne L.C. said at 143:

> "These written titles (if the possession and enjoyment has been consistent with them) afford irresistible ground for a presumption that the fishery, either in all the tidal waters of the river Blackwater, or at all events in that part of them which is now immediately in question, was "put in defence" before Magna Charta; and having become vested in the Crown by forfeiture of the private rights from time to time acquired in it, was well and effectually granted to the predecessor in title of the Duke of Devonshire ... Under the circumstances which I have stated, the real controversy in this case is as to the sufficiency of the evidence of possession and enjoyment, without which, even the clearest apparent title to a several fishery, on paper only, would not exclude the public right."

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120 In the present case there is no evidence at all that the Bishops ever exercised a right of exclusive fishing in the sea. No such right is recorded in any of the surveys of their lands in 1326, 1536 or 1660. There is no evidence of any income from the grant of licences to fish in the sea. None of the scholarly historical research that has been shown to me hints at the existence of such a right. It is also the case that in the detailed saving provisions contained in the Act of Union 1535 and in the Lord Marches in Wales Act 1554 there is no preservation of any right of several fishery.

121 Ms Tozer was able to point to an Admiralty chart of 1748 which showed a weir on the foreshore between Goodwick and Fishguard. The chart showed what was visible on the ground at the time that it was made. It says nothing about who constructed the weir, or when it was constructed or who had the benefit of it. In fact

the site of the weir is now underneath part of the Port of Fishguard. The Commissioners' unchallenged evidence is that when the Ecclesiastical Commissioners claimed compensation for their lands taken in order to enable the port to be constructed, they claimed only in respect of land above high water mark and made no claim for the loss of any fishing rights. Ms Tozer also relied on a lease of the manor of Brawdy granted by the Bishop in 1861. The parcels comprised in the lease were, according to the lease plan, a coastal area. The description of the parcels included:

> "all manner of lands and messuages tenements barrows meadows woods underwoods furze heath commons liberties easements warrens waters watercourses weirs ponds rents of land services commodities emoluments advantages and all other the appurtenances . . ."

122 In a lease granted before the Conveyancing Act 1882 this is, in my judgment, no more than verbose conveyancing. Mr Hinks drew my attention to Mr Giles Jacob's work "*The Accomplished Conveyancer*" of 1750 in which the author advised his readers that "it is best and safest to have too many general words than too few". Parliament has battled against conveyancers' verbosity since at least the Leases Act 1845, without a great deal of success. I cannot regard the inclusion of "weirs" in the list, without any indication on the lease plan as to the whereabouts of the weirs (if there were any) as evidence of a several right of fishery in the sea.

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123 On the other side of the line, I heard the evidence of Mr Coates, the director of the South Wales Fisheries Committee. The Committee is constituted under the Sea Fisheries Regulation Act 1966 to manage and develop inshore fisheries within six nautical miles of the coast. The area for which it is responsible runs from Cardiff in the east to Cardigan in the west. It thus encompasses the area with which I am concerned. Its records go back to 1892. It has no record of any private fishery within its area. The Committee has the power to make byelaws, but those byelaws must not prejudice any right of several fishery. In fact the Committee has made byelaws closing fisheries over the land in dispute in the present case for certain purposes (e.g. fishing for scallops); and no one has ever complained. Mr Coates' evidence was that so far as the records of his Committee and its predecessors go, the public has always fished freely in the sea. They have in addition enforced the byelaws within the areas over which Mr Roberts claims to have the exclusive right to fish.

124 Mr Coates fairly accepted in cross-examination that if a person had a several fishery but chose not to exercise it, he or his Committee would not necessarily know of its existence. But in my judgment the fact that such a right has not been exercised for (at least) over a hundred years is powerful evidence that the claimed right does not exist.

125 In my judgment Mr Roberts has failed to prove that the Bishops ever had the right of exclusive fishing that he claims. If the Bishops never had it, it follows that Mr Roberts does not have it either. If the Bishops ever had a right of exclusive fishing, it has been infringed consistently for over a hundred years. In those circumstances I would have presumed that it had been surrendered.

Treasure

126 Rights in treasure are now governed by the Treasure Act 1996. Section 1 of the Act defines "treasure" in terms which are wider than the traditional definition of treasure trove. Section 4(1) provides:

> "When treasure is found, it vests, subject to prior interests and rights—
>
> (a) in the franchisee, if there is one;
> (b) otherwise, in the Crown."

127 A "franchisee" is defined by s.5(1) which provides:

> "The franchisee for any treasure is the person who—
>
> (a) was, immediately before the commencement of section 4, or
> (b) apart from this Act, as successor in title, would have been, the franchisee of the Crown in right of treasure trove for the place where the treasure was found."

128 Mr Roberts claims to be entitled to a franchise of treasure as one of the customary rights of the Bishops in 1115. Although there is some evidence that the ancient Welsh princes or kings claimed a legal right to treasure, there is no evidence that the Bishops ever did. In *Attorney General v British Museum's Trustees* [1903] 2 Ch. 598 Farwell J. held that a right to treasure trove did not pass by general words in a Crown charter, but had to be expressly granted. No right to treasure is expressly conferred by any of the ancient charters, and there is no evidence that the Bishops claimed a right of treasure before 1115. As noted, George Owen asserts that during the time of the Welsh princes they did not. Again no such right is recorded in the surveys of 1326, 1536 or 1660. Even Mr Jones' extensive catalogue of the rights that he asserted were enjoyed by the Bishops did not include a right to treasure or treasure trove.

129 As Mr Hinks submitted, the customary legal position in pre-Norman times, so far as the material goes, is that the king had the right to treasure. That is the same as the current legal position; namely that there is a presumption that treasure belongs to the Crown. In my judgment Mr Roberts has not rebutted the presumption.

130 I should add, however, that there is no evidence that treasure has been found in the area over which Mr Roberts asserts the right to treasure. This absence of evidence means that if (contrary to my conclusion) the Bishops ever had a right to treasure, it would not be right to presume a surrender of it.

Sporting rights

131 The sporting rights to which Mr Roberts claims to be entitled are those created by ss.10 and 13 of the Game Act 1831. Section 10 provides so far as material:

> "the lord or steward of the crown of every manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall have the right to pursue and kill the game upon the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty, and to authorize any other person or persons . . . to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon."

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132 Section 13 provides so far as material:

> "It shall be lawful for any lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, by writing under hand and seal, or in case of a body corporate, then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers to preserve or kill the game within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty, for the use of such lord or steward thereof."

133 It is not, I think, in dispute that Mr Roberts is entitled to these rights in relation to each of the manors that he has acquired. The issue on this part of the case is whether the rights conferred by the Game Act 1831 are exercisable over the foreshore. That is an issue with which I deal later.

Estrays

134 There is evidence of a right to estrays in relation to some of the manors into which research has been conducted. The most extensive research into the manors of Dewsland was that carried out by Mr Francis Jones (op. cit.) He recorded references to the entitlement of the Lord of the Manor to estrays in relation to the following manors:

- i) Letterston (an Episcopal manor)
- ii) Trevine (an Episcopal manor)
- iii) Patricksford, St Edrins and Tyleror (all lay manors)
- iv) Skyfog (a lay manor)
- v) Tregadwgan (a lay manor).

135 In the course of his research Mr Jones examined the records of the court of the Manor of Trevine. He records that at the court held on May 8, 1738 the jury presented that a black ewe stray had been for a year and a day unchallenged and became forfeited to "the lord of the manor".

136 Mr Roberts is now the lord of the manor of Trevine.

The effect of the conveyance

137 As I have said the University of Wales has been selling lordships of the manor for the last 20 years. Although it is convenient to call them manors, they are almost certainly reputed manors, as are most manors today. The conveyance to Tacticall Radio Ltd purported to convey "The Lordship Marcher of St Davids". Was there such a thing?

138 Apart from the auction memorandum (as altered by Mr Roberts himself) there is not a single document, amongst documents that go back for nearly 900 years, that refers to The Lordship Marcher of St Davids. The lordship or barony held by the Bishops of St Davids in this part of Pembrokeshire is consistently called the Episcopal lordship or barony of Pebidiog (with variant spellings such as Pebidiauk, Pebidiawk, Pebidiewk etc.) or, using the English equivalent, the Episcopal lordship or barony of Dewisland or Dewsland. As Mr Hinks pointed out,

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when ancient charters such as the charters of 1241 or 1386 confirmed or conferred jurisdictional franchises on the Bishop and his successors personally, and the court that he was entitled to hold was a court of "his men". Since the Bishops held land in more than one county the jurisdictional franchises extended to all their lands in all those counties. I find it impossible to construe the phrase The Lordship Marcher of St Davids as meaning the Episcopal barony of Pebidiog or Dewsland. Ms Tozer suggested that The Lordship Marcher of St Davids was no more than Mr Roberts' translation of the Lordship Marcher of Dewisland, pointing out that "Dewi" in Welsh was the equivalent of "David". She pointed out that "Dewysland" was specifically mentioned in s.17 of The Act of Union 1535. So it was, but it was mentioned as one of a collection of "Lordships, Towns, Parishes, Commotes, Hundreds and Cantreds". It was not specifically described as a Lordship Marcher. Moreover, the effect of s.17 was to unite, annex and join it to the county of Pembroke. It cannot, thereafter, have had any separate existence. There was in fact a Manor of Dewisland (Upper & Lower) but that, as I have said, was sold by the University in 1988. In addition to "Dewysland" the Act of Union also mentioned "Lannehadein" (i.e. the barony of Llawhaden). At the time of the Act it seems that the Bishop actually exercised such jurisdiction as he had as Lord Marcher in Llawhaden rather than at St Davids. That was where he held his court, and had his chancery and his exchequer. In so far as any one of the lordships should be singled out as being "the" lordship marcher, Llawhaden has a better claim than Dewysland.

139 What effect, then, should be given to the conveyance? Mr Hinks submitted that the auction memorandum contained an agreed definition of the phrase "the Lordship Marcher of St Davids" which otherwise had no recognisable meaning. The conveyance must, of course be construed objectively, and not merely by reference to the subjective intention of one party. As I have said, Mr Hinks relies on the auction memorandum. That is not a document that was written in the course of negotiation. It is a record of a contract that had actually been made. Recourse to a prior contract between the parties is permissible in construing a later contract: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep. 161. Ms Tozer submitted that the auction memorandum was unhelpful because the transaction moved on between the date of the auction and the date of the eventual conveyance. So it did, but the meaning of "the Lordship Marcher of St Davids" was not revisited; and certainly not revisited in a way that amounted to an agreed variation. In my judgment I should construe the phrase the Lordship Marcher of St Davids by reference to the auction memorandum. For convenience, I set it out again:

> "Lot 8 described in the Particulars of Sale being The Lordship Marcher of St Davids, commonly called the Manor of St Davids."

140 There are three elements in this description of the subject matter of the sale. First, it is described as Lot 8 as described in the Particulars of Sale. That is undeniably a reference to the Manor of the City and Suburbs of St Davids. Second, Lot 8 as so described is said to "be" The Lordship Marcher of St Davids. In other words, The Lordship Marcher of St Davids is synonymous with the description of Lot 8. Third, The Lordship Marcher of St Davids is said to be

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commonly called the Manor of St Davids. What was commonly called the Manor of St Davids was the Manor of the City and Suburbs of St Davids, and nothing else. Since the expression "Lordship Marcher" had not been used, except by historians, for the best part of five hundred years before the sale, that is hardly surprising. That this is the correct construction is supported by the fact that the conveyance also refers twice to the "manor":

i) In excluding corporeal demesne land "appurtenant to the manor" and
ii) In excluding mines and minerals "forming part of the manor".

141 My preferred construction therefore means that the conveyance is internally consistent. I hold therefore that what was conveyed by the conveyance to Tacticall Radio was the manor (or reputed manor) of the City and Suburbs of St Davids.

142 Section 62(3) of the Law of Property Act 1925 provides:

> "A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quitrents, rentscharge, rents seek, rents of assize, fee farm rents, services, royalties jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or, at the time of conveyance, demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof."

143 Section 205 (1) provides that:

> "'manor' includes a lordship, and reputed manor or lordship"

144 By virtue of these provisions Tacticall Radio acquired such of the rights of the Lord of the Manor of the City and Suburbs of St Davids as existed at the date of the conveyance. The only relevant right was a right to a moiety of wreck.

145 Mr Roberts was also the buyer of the Manor of Trevine. I have found a right to estrays and a right to a moiety of wreck proved in the case of that manor. Section 62(3) of the Law of Property Act 1925 thus operated to convey to him the right to estrays within the manor and the right to a moiety of wreck. In my judgment he is therefore entitled to estrays within that manor; and a right to a moiety of wreck. As Lord of the Manors of Trevine and of the City and Suburbs of St Davids he is also entitled to the statutory rights of the Lord of the Manor under the Game Act 1831.

Are Mr Roberts' rights exercisable over the foreshore?

146 This question raises two issues:

i) Was the foreshore included in the grant to the Bishops of St Davids?
ii) What is the effect on such rights of the acquisition of title by adverse possession?

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147 It is not in dispute that a manor may include the foreshore. Whether it does is a question of ascertaining the limits of the Crown grant with the aid of evidence of subsequent actual use.

148 If the foreshore was never a part of the lands granted to the Bishops of St Davids it must follow that, with the exception of the right to a moiety of wreck (which necessarily means wreck washed up on the foreshore), none of Mr Roberts' rights are exercisable over the foreshore. If on the other hand, the foreshore was once part of the Bishops' lands, the Commissioners contend that the effect of the Crown's acquisition of title by adverse possession is that the rights (including the right to a moiety of wreck) have been extinguished in so far as they affect the foreshore.

149 The starting point is the presumption that the foreshore is vested in the Crown. Although this presumption has been questioned in Halsbury's Laws of England (vol.12(1) para.242) in relation to land within the Marches of Wales (on rather slender grounds), it is admitted on the pleadings in this case. The question, then, is whether the presumption has been rebutted. In Lord Hale's work *De Jure Maris* he states that the grant of a right of wreck tends to show a grant of the soil, as the grantee would otherwise have no right to recover the wreck. However, in *Dickens v Shaw* (1822) (reprinted in Hall on the Seashore) Holroyd J. said:

> "I think it may be evidence of ownership, particularly if coupled with other acts of ownership of the right of soil. Where the crown grants the right of wreck it is probable the crown grants the right of soil also; but if the crown grant the right of wreck alone, by that grant the party would have the right to come and take the wreck, as incidental to the grant, otherwise the grant of the right could not be the grant of anything whatever."

150 Likewise in *Anon* (1704) 6 Mod. 149 it was held that if a man has a right of wreck thrown upon another's land he has a right of way over the same land to take it. The court held in that case:

> "Originally all wrecks were in the Crown and the King has a right of way over any man's ground for his wreck; and the same privilege goes to the grantee thereof."

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151 What makes the present case unusual (if not unique) is that the rights that the Bishops claimed to wreck were not rights to the whole of the wreck, but only a right to half. The remaining half belonged to the Crown. In those circumstances, it seems to me that the presumption mentioned by Lord Hale is weakened to the point of non-existence, for just as the Bishop must have had the right to recover his half of the wreck, so also must the Crown have had the right to recover its half. It is, I think, common ground that the origin of this most unusual division of the right to wreck is to be found in Welsh customary law. I have therefore considered whether Welsh customary law shed any light on the question. It will be recalled that the relevant statement of Welsh customary law said:

> "If a ship be wrecked on the land of a lord, the lord has it; if a ship be wrecked on *the land of a bishop*, it is divided between the king and the bishop."

152 It might be said that it is a precondition to the sharing of the wreck between the bishop and the king that the land on which the wreck is found is the land "of" the

bishop; and that therefore the foreshore must belong to the bishop. However, this part of the Welsh code seems to treat the whole of the foreshore as belonging either to a lord or to a bishop. That may or may not have been the position before the Norman Conquest; but it is admitted on the pleadings that the Crown has prima facie title to the foreshore. I do not therefore think that the shared entitlement to wreck tends to rebut the presumption.

153 There is nothing in the charter of 1115 that expressly refers to the foreshore or the sea. As Mr Hinks pointed out, the Latin word used to describe water and water rights is *aqua* rather than *mare*.

154 Ms Tozer also relied on some other evidence to rebut the presumption. She pointed to the request by Edward III to the Lords Marcher to guard the sea coasts against the Scots. But even if the King's intention, like Mr Churchill's, was to "fight them on the beaches", I cannot regard action taken in defence of the realm as indicative of land ownership. As evidence of ownership, this piece of evidence is worthless.

155 There is some evidence that the Bishops built a pier at Porthclais and owned the seawall there and a landing stage at Ramsey Island. But this evidence, slender as it is, is overwhelmed by the quantity of evidence showing that since Elizabethan times (if not before) the Crown has owned and controlled the ports of the Welsh coast. Ms Tozer also relied on the weir shown on the Admiralty chart of 1748; but as I have said when the harbour at Fishguard was built the Ecclesiastical Commissioners only claimed in respect of land above the high water mark. The same is true in respect of other land acquired for port and harbour improvements. The fact that the Bishops and their successors never claimed compensation when part of the foreshore was taken for public works is strong evidence that they did not own it.

156 Next Ms Tozer pointed to a conveyance in 1974 from the University of Wales to the National Trust of a parcel of land at Porthydwr Common. The conveyance included "all the Vendor's right and interest (if any) in the foreshore" adjacent to the property. The common was the subject of an inquiry by the Commons Commissioner. On the basis of a poor copy of a map it was suggested that the foreshore might have been registered as a common and that the National Trust might have been registered as owners of it. However, closer inspection of a better copy of the map, and an examination of the definitive plan revealed that no part of the foreshore had been registered as common. Accordingly, this evidence goes nowhere.

157 Lastly Ms Tozer relied on the grant by the Welsh Commissioners to the Postmaster-General in 1923 of a wayleave at one shilling a year for a cable on the foreshore at Caerfai bay. However, some 25 years earlier the Post Office had sought and obtained from the Board of Trade (in right of the Crown) a wayleave for the very same cable. This evidence is at best equivocal and is, in my judgment, consistent with the presumption.

158 Having considered the evidence, I have concluded that the presumption has not been rebutted; and that the foreshore never belonged to the Bishops. Thus the foreshore was never part of any manor of which the Bishops were lords. In the light of this conclusion it follows that with the exception of the right of wreck, none of the rights that Mr Roberts claims is exercisable over the foreshore or seabed. Since

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title was always that of the Crown it follows, on this hypothesis, that the Crown never did acquire title by adverse possession, for there was no need for it to do so. Nothing therefore can have removed the entitlement of the Bishops' successors to the exercise of the right to a moiety of wreck. Mr Roberts is entitled to that right in his capacity as Lord of the Manor of Trevine and as Lord of the Manor of the City and Suburbs of St Davids in so far as wreck is found on the foreshore adjoining those manors.

159 Let me assume that (contrary to my conclusion) title to the foreshore did pass to the Bishops and that the Commissioners' entitlement to register their title rests solely on adverse possession. The question then is: what effect did the acquisition of title by adverse possession have on rights exercisable by the paper owner over the land?

160 Section 17 of the Limitation Act 1980 provides so far as material:

> "at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished."

161 The word "land" is defined by s.38 as follows:

> "'land' includes corporeal hereditaments, tithes and rent-charges and any legal or equitable estate or interest therein . . . but except as provided above in this definition does not include any incorporeal hereditament".

162 Mr Hinks relied on two cases dealing with the consequences of the extinguishment of title by adverse possession. In *Jolly, Re* [1900] 2 Ch. 616 Anne Jolly let a farm to her son R. T. Jolly. He paid rent until 1881, but not thereafter. Accordingly, Anne Jolly's title to the farm was extinguished in 1893. She died in 1898. The question which arose was whether at her death any money was owing to her by R. T. Jolly in respect of rent. The Court of Appeal held that the extinction of title also determined Mrs Jolly's entitlement to arrears of rent. Lord Alverstone M.R. said:

> "In the year 1893 R. T. Jolly obtained, by virtue of the Real Property Limitation Act 1874, s. 1, an absolute title to the property. It is, I think, inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Limitation Acts of 1833 and 1874 is, in my opinion, that, after the expiration of the statutory period of 20 and 12 years respectively, all rights which the reversioner would have had in respect of the land have come to an end; and I do not think that it would be consistent with that position that rent, the non-payment of which has given the occupier a title to the land, should still be deemed to be owing."

163 Rigby L.J. said:

> "It seems to me to be plain that on the expiration of the twelve years all the rights of the owner of the land are determined."

164 That case was followed and applied by the Court of Appeal in *Mount Carmel Investments Ltd v Thurlow* [1988] 1 W.L.R. 1078 in which Nicholls L.J. said that, having regard to principle:

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"When title to land is extinguished by the statute, the rights which that title carried must also be extinguished."

165 As Lord Denning M.R. explained in *Corpus Christi College Oxford v Gloucestershire CC*, referring to *Delacherois v Delacherois* (1864) 11 H.L. Cas. 62 at 102–103, when the freehold of what had formerly been waste of the manor became severed from the lordship, it ceased to be part of the manor. In my judgment this applies whether the severance takes place voluntarily (as by a conveyance) or involuntarily (as by extinguishment of title). It follows, in my judgment, that any right of the lord of the manor that is restricted to lands forming part of the manor ceases to be exercisable over the severed land.

166 The statutory rights given to lords of the manor under the Game Act 1831 were rights:

i) To pursue and kill game "upon the wastes or commons within such manor" and
ii) To appoint a gamekeeper "to preserve or kill the game within the limits of such manor."

167 These rights were therefore limited to land within (or within the limits of) the manor. Once the foreshore was severed from the manor upon the extinguishment of the lord of the manor's title, the rights given by the Game Act ceased to apply to it. Accordingly Mr Roberts has no sporting rights exercisable over the foreshore.

168 The right of wreck and the right to estrays present different problems. They are franchises which, as explained, are incorporeal hereditaments. Incorporeal hereditaments (apart from tithes and rentcharges) are expressly excluded from the definition of "land" for the purposes of the Limitation Act 1980. Accordingly, the extinguishment of title to "land", as defined for those purposes, ought not in principle to extinguish title to an incorporeal hereditament.

169 As I have said, the grant of a franchise of wreck carries with it a right of access to the foreshore to take the wreck. As I see it there is no rule of law that restricts the grant of the franchise of wreck to a person who has title to the foreshore, or indeed to any particular parcel of land, or to the lord of a coastal manor. Nor is the franchise of wreck in any sense a manorial right or a right that is exercisable only within the confines of a manor. That being so, it seems to me that the extinguishment of title to the foreshore would not operate to extinguish the incorporeal hereditament consisting of the right of wreck. If, therefore, I had held that the Bishops had once had title to the foreshore, I would not have held that extinguishment of that title extinguished the franchise of entitlement to a moiety of wreck. For similar reasons, if I had concluded that the Bishops ever had a franchise of treasure trove, I would have held that that franchise would not have been extinguished by the extinguishment of title to the foreshore itself.

170 Although a right to estrays is also a franchise (and hence an incorporeal hereditament), the nature of the right is manorial. The definition of estrays is given in Halsbury's Laws of England vol.12 (1) para.372 as follows:

"Estrays are valuable animals of a tame or reclaimable nature *which are found wandering in any manor or lordship*, and whose owner is unknown." (Emphasis added)

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171 The same definition is found in Scriven on Copyholds (7th edn p.267). It is, therefore, an integral part of the franchise that the animal be found wandering in a manor. It seems to me, therefore, that if former waste of a manor is severed from the manor by extinguishment of the lord's title, the franchise of estrays must cease to be exercisable over that land. If, therefore, I had held that the Bishops had once had title to the foreshore, I would have held that extinguishment of that title also extinguished the franchise of estrays in relation to the foreshore.

Result

172 Mr Roberts has established a right to a moiety of wreck in his capacity as Lord of the Manor of Trevine and in his capacity as Lord of the Manor of the City and Suburbs of St Davids, but otherwise has established no rights over the foreshore or seabed.

Appendix I

Glossary

Cantref (or Cantred)	100 trefs. A tref was a township or village in pre-conquest Wales. The cantref was midway between a shire and a hundred in the English system.
Court Baron	A civil court held in a manor, in which the free tenants were the judges and the Steward of the manor was the Registrar. It dealt with cases concerning the manor.
Court leet	A criminal court with jurisdiction over the tenants resident within a manor. The Steward of the manor was the judge, and the jury was formed from the inhabitants.
Deodand	The right to forfeit a chattel which was the cause of a death.
Estrays	A valuable animal of a tame or reclaimable nature found straying in a manor and whose owner is unknown. However, the absolute property in estrays does not vest until they have been proclaimed in the church and two market towns next adjoining the place where they are found and nobody has claimed them within a year and a day.
Heriot	The right to the best beast of a tenant on his death. Sometimes the right to the best beast of the tenant on the lord's death.

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Infangthief	The right of a lord to punish a thief caught within the bounds of his jurisdiction.
Mainprise	A form of bail, allowing a person to remain at large on providing sureties (mainpernors)
Outfangtheif	The right of a lord to pursue a thief outside the lord's own jurisdiction and bring him back within his jurisdiction to be punished.
Straifs	Another words for estrays
Treasure trove	The right to money or coin, gold, silver, plate, or bullion, deliberately hidden or concealed where the owner is unknown.
Waifs	Things stolen and thrown away by a thief in flight. Goods hidden by a thief are not waifs.
Wreck	(In law French wreck de mer or wreck de mere). Goods cast upon land by the sea after a shipwreck, and left there within some county, so as not to belong to the jurisdiction of the admiralty, but to the common law. The term also includes goods found at low water, between high and low water mark.

Appendix II

The Charters

Charter granted by Henry I in 1115:

"Henry King of the English sends greetings to the archbishops bishops earls and barons and all his loyal subjects French and Welsh and English. May you know that I have granted and given to Bishop Bernard the bishopric of St. Andrew the Apostle and of St David in the city of St David's in Wales to have and lawfully to hold with all its appurtenances and lands both cultivated and uncultivated roads and trackless areas meadows marshlands pastures woods hunting areas and the right to pass through such places in hunting or driving animals to pasture watering places and watercourses mills fisheries the revenues and incomes and with every easement that can be derived from them for all time either on land or on water together with all customary rights as the aforesaid church or any of its bishops had on better terms and held in the time of my father and King Edward and Griffin or at any other time. And I wish and give orders that he should hold and have all the aforesaid things in peace and honour and quiet. And let no one attempt to appropriate any of this from him or withhold it. In the presence of Queen Matilda my wife and William our son and as witnesses Ralph Archbishop of Canterbury and Geoffrey Archbishop of Rouen and Turstin Archbishop elect of York etc. at Westminster in council

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in the one thousand one hundred and fifteenth year since the incarnation of the Lord on the fourteenth day before the Kalends of October (September 18) in the eighth indiction on the twenty-third epact with the concurrent number four in the fifteenth year of the aforesaid King."

Charter granted by Henry III in 1241:

"Henry by the grace of God King of the English etc. sends greetings to the archbishops etc. You should know that I have granted and by means of the present charter confirmed to the church of St Andrew the Apostle and blessed David of the city of St David's in Wales and to David the Bishop of that same church that bishopric and all his lands and feudal holdings and chattels and possessions as King Henry my grandfather granted them to Bernard the Bishop of that church the predecessor of the aforementioned Bishop David. For which reason I wish and give strict orders that this church and the aforesaid Bishop David should have and hold property etc. all the lands and tenements chattels and possessions in the lands that are cultivated and the cultivated lands (sic) in woodlands in areas clear of woodland in fields and meadows and marshland and hunting areas and stretches of water together with the right to pass through such places in hunting or driving animals to pasture in mills and fisheries with regard to all revenues and incomes and easements deriving therefrom by land and by water in roads and paths and in all other places and other things together with all their appurtenances and freedoms and customary rights free from obligation just as the aforementioned King my grandfather granted to the aforesaid Bishop Bernard and as his charter proves. Witnessed by Reginald Earl of Cornwall etc.

Grant also of the king's gift to A. bishop of the said church that he and his successors and the said church shall be quit of all pleas plaints and suits unless before the king and his justices specially assigned; and that they shall have their free court of their men so that they shall not be bound to answer any plaint elsewhere than in the court of their lord the said bishop unless before the king or his justices saving in all things the royal dignity."

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Charter granted by Richard II in 1384

"Richard, by the grace of God King of England [etc]. The Venerable Father Adam, Bishop of St David's, has besought us that as he holds his bishopric and every parcel of the same freely from us as of our Crown, both in the hearing of all manner of pleas, whether personal or royal, and in enforcing rights of the Crown, at their own prosecution, and that of others, with all manner of profits arising therefrom, according to the custom of those parts in all former times have been used and enjoyed, so that neither without that we nor our progenitors, nor any other Lord Marcher or their Officers, have been accustomed or ought to intrude by reason of any Lordship in Wales within the said Lordships of the Bishop . . . Now we . . . have by our special grace granted and by this charter have confirmed for us and our heirs, that the aforesaid Bishop and his successors shall for ever possess enjoy and use all and singular the aforesaid liberties and all other liberties soever as fully and freely as the same are held and enjoyed by any Lords Marcher in their Lordships and

Marches of Wales and that all tenants of the said Bishop and his successors, whether residing in their Lordships within the Bishopric or not, shall not be compelled, held or bound to answer elsewhere than in the courts of the said Bishop and his successors."

Valor Ecclesiasticus Henry VIII

"A review of the value of all and each of the manors lands and tenements and other possessions both spiritual and temporal of the lord ... by divine permission of the Bishop of St. David's relating to and regarding the Episcopal seat of St David's conducted in the presence of the undersigned commissioners appointed for this purpose in accordance with the set form of words of the statute enacted and supplied on the twentieth day of the month of February in the twenty seventh year of the reign of the Lord King Henry the Eighth etc.

The same bishop maintains and is obliged to have and to hold for himself and for his successors the bishops of St David's the demesne lands manors lands tenements and possessions mentioned below namely the castle and manor of Layhayden through the full power of the barony the towers the city or town of St David's and the demesne lands of Pebydianke Diffryntolby and Diffrynteiby with their component parts. Also the manor of Lantesey and the deer park there and also his own palace provided with battlements next to his cathedral church of St Davids. In this barony demesne lands and manor the aforementioned bishop has his own prison for all kinds of felons offenders and clerks convicted or attainted and to be tried by anyone and his own treasury within the aforementioned castle and a seal of his own chancery for all kinds of original documents by means of his own chancellor in and throughout all his manors and demesne lands as mentioned above wherever they are acquired and put into effect. He also has one session ever month to be held at Lanhayden in the presence of the chief seneschal of this same bishop or his deputy and also one other Hundred Court and other lower courts for common pleas and pleas of the crown. He will also have people to carry out the offices of castellan viscount or constable coroner and escheator for the pleas for the said offices and for whatever offenders appear before his constable or his deputy to be held and fixed in perpetuity according to the privileges of the Kings in England and the Princes of Wales granted to him in this way in pure and perpetual alms.

And there are within the said barony demesne lands and manors some tenants who hold the manors lands and tenements from the said bishop by means of military service namely wardship the right to give in marriage and feudal relief when they occur. And there are some other tenants who hold by charter. And others who hold their inheritance by the ancient form of land tenure known as Gavelkind. The inheritances are to be divided after the death of the possessor both among the males and among the females and to the said inheritance accrues feudal relief only namely from each caricate of land 10 shillings and thus according to several or the lesser even though the heir is under age or outside. There are other tenants who hold their inheritance by means of tenure by Borough English and in that place the lord will have a

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double rent for his relief alone. There are also others who are tenants of someone else's land namely at Welsh Hundred of St David's and they are said to be of Tydwaldy. They perform customary service and are accustomed to serve the bishop with their ploughs for the necessities of the lord with regard to the rebuilding of his buildings and similar things. After the death of the said tenants there accrues in heriot just five shillings and no more even if he is a possessor of things and cattle. Others also hold by the rod and they will make an agreement in order to have possession and entry (into possession) in their lands. They pay heriot and relief and for the right to give in marriage and according to the customs of the manor they will perform their tenant services. For the rest the tenants by the pure Welsh form hold and possess according to the law of Howel Da recently Prince of Wales. This is the most imperfect of all laws—it is not written down it is without order and contains numerous defects; it has a form of reason which is definitely useless. More deplorable is the fact that among a great multitude of peoples there has been no united peace and high quality government; yet among them the lord bishop has every three years among them one great session to be held in the presence of his justices in eyre in his domains in Llanddewy Brevi Aberguilly Dyffryntolby and Diffrynteiby with their component parts. Etc."

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assessment. Regulation 48 of the Conservation (Natural Habitats &C) Regulations 1984, implemented this provisions by requiring a competent authority, firstly, to screen applications for plans or projects for likely significant effects and, secondly, to make an appropriate assessment (AA) of any such implications found. Natural England drew to the Council's its attention research on the combined effect of multiple residential schemes on the ecological function of the SPA through recreational uses associated with such schemes. The council considered it had insufficient information to allow it to make the requisite AA and was not satisfied that the proposed development on its own or in combination with other projects would not have an adverse impact on the integrity of the SPA. On October 20, 2006, Natural England wrote to the council indicating that further mitigation information provided, including a proposal for a suite of Suitable Accessible Natural Greenspace (SANGS), described as equally attractive for recreational purposes. EN advised that this enabled the council to conclude, without requiring an AA, that deleterious effects upon the heathland SPA arising from the development would be avoided.

H3 After the public inquiry into the appeals in December 2006, the council and EN withdrew their objections on this ground, and the Secretary of State allowed the appeal, despite the Inspector's contrary recommendation. In doing so, she stated that great weight had been given to EN's withdrawal of its objection. She therefore did not accept the Inspector's view that all four appeals should be dismissed on the basis that significant adverse effects could not be discounted, and that an AA was required.

H4 Her decision was challenged on three grounds. First, it was argued that NE and the Secretary of State had erred in considering mitigation proposed as part of the package at the screening stage to determine the significance of effects on the SPA and consequent need for an AA. The Secretary of State had failed to have regard to a number of material considerations, including a contrary view of the Technical Assessor of the Draft Delivery Plan for the SPA as to whether a SANGS of appropriate size and quality could avoid the need for an AA where significant effects were otherwise likely. Undue weight had been given to the views of EN. Secondly, the Council challenged the manner in which the Secretary of State dealt with the issue of housing land supply in Hart District. Ground 3 alleged that the Secretary of State had failed to impose an appropriate condition to secure a road works upgrade.

H5 **Held,** dismissing the claim that:

H6 (1) There was no legal requirement under reg.48(1) that an SPA screening assessment had to be carried out disregarding of any mitigation measures that formed part of a plan or project. Consideration of mitigation measures at this stage did not frustrate the purpose of the legislation or pre-empt any necessary form of inquiry in conjunction with an AA. It was significant that an AA under Art.6(3) and reg.48(1), unlike an environmental impact assessment, did not have to be in any particular form. Obtaining the opinion of the general public was optional.

H7 (2) It was open to the Secretary of State to conclude that the Dilly Lane development's mitigation measures would avoid potential effects upon the SPA. She was entitled to prefer NE's view to that of the Inspector in this regard.

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Similarly, the weight attributed to the Technical Assessor's view in the Draft Delivery Plan, which could not be regarded as definite and which was concerned with the efficacy of SANGS as a strategic concept, was entirely a matter for her planning judgement.

H8 (3) As regards Ground 2, the Secretary of State's conclusion that the five-year supply of housing was fragile was eminently reasonable.

H9 (4) Having concluded, in relation to Ground 3, that undertakings offered by the second and third defendants were perfectly adequate, and there was at least a reasonable prospect of the action in question being performed within the time limit imposed, it was for the Secretary of State to decide how the improvements should be secured. Her conclusion that a negatively worded condition was unnecessary, and that undertakings entered into were sufficient, was upheld.

H10 **Case referred to in the judgment:**

(1) *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij Main v Swansea City Council* (C-127/02) [2004] ECR I-7405
(2) *Gillespie v First Secretary of State* [2003] EWCA Civ 400; [2003] Env. L.R. 30
(3) *R. (on the application of Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298
(4) *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 603
(5) *WWF UK Ltd v Secretary of State for Scotland* [1999] Env. L.R. 632
(6) *R. (on the application of Merricks) v Secretary of State for Trade and Industry* [2006] EWHC 2698 (Admin)

H11 **Statutes referred to in the judgment:**

(1) The Town and Country Planning Act 1990
(2) EC Directive 79/409 on conservation of wild birds
(3) EC Directive 92/43 on the conservation of natural habitats and of wild fauna and flora

H12 **Statutory Instruments referred to in the judgment:**

(1) Conservation (Natural Habitats &C) Regulations 1984
(2) Planning (Listed Buildings and Conservation Areas) Act 1990

H13 **Statutory Guidance referred to in the judgment:**

(1) Circular 11/95

H14 **Application** by the claimant, Hart District Council, under s.288 of the Town and Country Planning Act 1990 to quash the decision of the First Defendant dated July 24, 2007 to allow four appeals made by the second and third defendants under s.78 of the Act. The four appeals comprised an application for outline planning permission for 170 dwellings, a detailed application for planning permission for 170 dwellings, related proposals to widen and surface footpaths and convert

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agricultural land to recreational space at Dilly Lane, Hartley Wintney, Hampshire. The claimant argued, inter alia, that the Secretary of State had erred in considering mitigation proposals as part of the package of the project at the first, screening stage when deciding whether the proposed development was likely to have a significant effect on the SPA. The facts are set out in the judgment of Sullivan J. below.

H15 *Stephen Hockman Q.C.* and *Anne Williams*, instructed by Sharpe Pritchard for the claimant.
James Maurici and *Robert Turner* (instructed by the Treasury Solicitor) for the defendant.
Mary Cook and *Asitha Ranatunga* (instructed by Boyes Turner) on behalf of the second and third defendants.
Keith Lindholm Q.C. and *Craig Howell-Williams* (instructed by Addlesham Goddard) on behalf of the first interested party.
Richard Drabble Q.C. and *Graham Machin* (instructed by Browne Jacobson) for the second interested party.

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JUDGMENT

SULLIVAN J.:

1

Introduction

2 This is an application under s.288 of the Town and Country Planning Act 1990 (the Act) to quash the decision of the first defendant to allow four appeals made by the second and third defendants under s.78 of the Act. The first defendant's decision is contained in a decision letter dated July 24, 2007 (the decision letter).

3 The first defendant appointed an inspector to hold a public inquiry into the four appeals. The Inspector held an inquiry between December 12 and 15, 2006 and on December 19, 2006, and reported to the first defendant on January 23, 2007. In her report, the Inspector recommended that all four appeals should be dismissed.

4 The Inspector said that the appeal proposals were "in effect a package of proposals to achieve the residential development of land off Dilly Lane." (Paragraph 1). Dilly Lane is on the southern edge of Hartley Wintney, which is one of the larger villages in Hart District. The four appeals were referred to as Appeal A, Appeal G, Appeal E and Appeal F in both the Inspector's Report and the decision letter.

5 As amended, Appeal A related to an application for outline planning permission for 170 dwellings, with an affordable housing content of 40 per cent on the "main appeal site" to the south of Dilly Lane.

6 Appeal G related to a detailed application for planning permission for 170 dwellings, including 68 affordable dwellings on the main appeal site.

7 Appeal E related to proposals to widen and surface footpath 18A King John's Ride, to upgrade it to a 2.5m wide footpath and cycle path, and to create two links from the upgraded path into the northern and southern parts of the main appeal site.

King John's Ride runs to the west of the main appeal site, between it and existing housing in Wier Road, and then runs in a southwesterly direction and joins the B3016 Road, which leads to Winchfield Station, some 1.6km to the south.

8 Appeal F related to an application to change the use of the field ("the field site") to the east of and adjoining the main appeal site from agricultural use to informal recreational space to serve the proposed residential development and for use by the local community. In total, 9.52 hectares of new open space was included in the package of proposals, 3.36 hectares as buffer zone in the main appeal site, and 6.16 hectares in the field site. Other mitigation measures that form a part of the package are listed in para.4.9 of the Inspector's Report.

9 On March 9, 2005, the Thames Basin Heaths were classified as a special protection area (SPA) under Art.4 of EC Directive 79/407/EEC on the conservation of wild birds (the Birds Directive) for three species listed in Annex 1 to the Directive: the nightjar, the woodlark and the Dartford warbler, because the SPA is regularly used by 1 per cent or more of Great Britain's population of those bird species.

10 Since the adoption of the Habitats Directive 92/43/EEC (the Habitats Directive), and as a result of Art.7 of that Directive, SPAs classified under the Birds Directive are protected by the obligations contained in Arts 6(2) and (3) of the Habitats Directive. Articles 6(2) and (3) of that Directive impose the following obligations:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

11 These provisions are transposed into domestic law by reg.48 of the Conservation (Natural Habitats, &C) Regulations 1984 (the Regulations). So far as relevant, Regulation 48 provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site in Great Britain ... either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site,

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shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site . . .

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

12 The main appeal site lies about 1.5km south of the nearest point of Hazeley Heath, which is on the north side of Hartley Wintney. Hazeley Heath is a heathland site of Special Scientific Interest (SSSI), and a component of the Thames Basin Heaths SPA. Bramshill SSSI, Castle Bottom to Yateley and Hawley Commons SSSI are also components of the SPA, within 5km of the appeals site (para.2.3 of the Inspector's Report).

Factual background: The effect on the SPA

13 The planning history of the four appeals is lengthy and complicated. For present purposes, it may be summarised as follows. Having considered the potential for increased visitor pressure on the healthlands within the SPA as a result of permitting residential development some distance away from the SPA, English Nature, now Natural England (NE), indicated in January 2004 that competent authorities should undertake appropriate assessments for proposed residential developments up to 5km from the (then proposed) SPA.

14 The outline application, which was the subject of Appeal A, was made on July 29, 2004. In a letter dated August 12, 2004, NE stated that the Dilly Lane site was too far from the SPA for there to be an effect on the Annex 1 bird species, and that the proposals were not likely to cause significant damage to Hazeley Heath SSSI. NE, therefore, did not object to the outline application, which subsequently became Appeal A.

15 Mr Colebourn, the ecological consultant instructed by the second and third defendants, explained in his proof of evidence at the inquiry how NE had altered its stance when the detailed application (Appeal G) was made on March 1, 2006:

> "2.12 Towards the end of 2005, Natural England reconsidered its policy and 'decided to take a stronger line' in relation to the 'in-combination' effect of multiple residential schemes on the ecological function of the . . . SPA. In particular, NE's letter to HDC [Hart District Council] dated 25 October 2005 drew attention to further research on heathlands, especially the work of Liley, Clarke, and others, in Dorset; and, in particular, on the mechanisms by which

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recreational impacts including dog-walking, might affect bird breeding success, and thus be considered a deleterious effect on the habitat.

2.13 Natural England then considered that although it might potentially be possible to mitigate such effects through each site providing appropriate alternative recreational facilities, the present Dilly lane application did not provide such Alternative Greenspace, and therefore, in NE's view must fail the Regulation 48 tests.

2.14 On that basis, Natural England advised HDC that it objected to the Full Planning Application for Dilly Lane."

16 Although Appeal G was made on the basis of the claimant's failure to determine the detailed application within the prescribed period, the claimant subsequently considered the application and its second deemed reason for refusal was as follows:

> "The LPA has insufficient information to allow it to make an Appropriate Assessment under the Conservation (Natural Habitats &c) Regulations 1994. As such it can not be satisfied that the proposed development (on its own and/or in combination with other plans and projects), will not have an adverse impact on the integrity of the Thames Basin Heaths Special Protection Area. Therefore the proposal is contrary to [a number of policies in the development plan] . . ."

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17 In his proof of evidence, Mr Colebourn described the assessments that had been carried out by his company, Ecological Planning and Research Ltd (EPR), and by consultants appointed by the claimant, Jonathan Cox Associates, the latter as part of the claimant's consideration of the first alteration to the plan. It has never been contended that, considered individually, the development of the main appeal site for 170 dwellings would be likely to have a significant effect on the SPA. The issue was whether, in combination with other proposed residential developments in the area, it would be likely to have such an effect.

18 The results of Mr Colebourn's final assessment were contained in a report dated November 2006: "Land at Dilly Lane Hartley Wintney, Measures to Avoid Effects on the Thames Basin Heaths SPA" ("the EPR Report"). The EPR Report described the surveys that had been undertaken by EPR: visitor surveys of the origins of visitors to Hazeley Heath, Bramshill, Warren Heath and Yateley Common; visitor surveys of the users of the common land within Hartley Wintney, and a door-to-door survey of residents of the south-western part of Hartley Wintney. A draft of the EPR Report was sent to NE. NE's questions about the research, and EPR's interpretation of the results, were answered in a technical note from EPR, which was, in substance, incorporated into the final version of the EPR Report.

19 On October 20, 2006, NE wrote to the claimant:

> "Further to our response of 18th August to EPR, who are working for Luckmore Ltd on the above proposals, Natural England has received further information on the mitigation offered. We have also had sight of a draft S106

agreement designed to, amongst other matters, secure the mitigation identified.

I therefore write to clarify the position of Natural England ahead of the deadline for Proofs of Evidence for the Inquiry into the proposals.

The outstanding matters on the mitigation offer related to whether the site was adequate, in terms of its size and quality, to fully mitigate for the development. This is specifically in terms of whether the space offers the length of walks and varied nature provided by the SPA sites, to ensure that it provides a real alternative for those new residents which may also choose to use the SPA.

On the 12th September EPR provided maps illustrating footpaths in and around the village of Hartley Wintney which may be linked to the mitigation space to provide for longer walks of up to 4 km.

After a great deal of consideration, it has been concluded that on balance a competent authority, in view of the additional information provided on links to the local footpath network, would probably be in a position to conclude that the effects on the SPA arising from this development would be avoided, if the proposals are put in place.

It should be noted that the need for other larger sites, as would be provided by a strategic suite of SANGs [Suitable Alternative Natural Greenspace], to be co-ordinated by the local authority is not a new idea. It is consistently applied through the Delivery Plan and acceptance of mitigation packages prior to the Plan being put in place is on the basis that they are considered in light of highly local circumstances."

The remainder of the letter dealt with the proposed s.106 agreement and other matters that are not relevant for present purposes.

20 Mr Colebourn wrote to NE suggesting that its advice as the statutory nature conservation adviser was not entirely clear. He suggested that it would be helpful if a Statement of Common Ground could be agreed between NE and EPR. The Statement of Common Ground is dated November 2, 2006. So far as relevant, it said:

"1. For the purposes of this Inquiry, the appellants accept that, consistent with the provisions of the Thames Basin Heaths Delivery Plan, a package of mitigation measures sufficient to avoid a likely significant effect on the Thames Basin Heaths SPA is required.

2. The package of measures offered by the developer, to ensure that the proposed development and associated mitigation and avoidance measures at Dilly Lane does not have an adverse effect on the integrity of the Thames Basin Heaths SPA or any component SSSI, is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the Thames Basin Heaths SPA, and that no appropriate assessment under the Habitat Regulations is necessary.

3. The package of measures is set out in the following documents:"

Those documents include the EPR Report.

21 On November 10, 2006 NE wrote to the claimant. The letter referred to the provisions in the draft s.106 agreement and concluded:

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> "Therefore, we are satisfied that the S 106 agreement draft of 10 November 2006, as attached, has been improved through the recent amendments and is now a suitable means to secure the impact avoidance measures.
>
> With reference to the Statement of Common Ground of 2 November 2006 (also attached), we accept this as it is clear that the appellant accepts that the avoidance measures are necessary. We interpret this as an indication of their acceptance of Natural England's opinion; that should the measures not be put in place, and were the development still to go ahead, an adverse effect on the integrity of the SPA may arise.
>
> Given this progress, our concerns have been resolved and we are able to withdraw our objections to the proposals in relation to the Thames Basin Heaths SPA. For this reason it is our expectation that it would not be necessary or helpful for us to attend the inquiry."

The claimant's reply on November 14, 2006 said:

> "As you are aware, Hart District Council has relied on evidence from Natural England in relation to the mitigation package. Given the uncertainty surrounding these issues, and hence, whether adequate mitigation can be secured, we must assume and strongly request that Natural England submit evidence to the Inquiry and give evidence on these matters."

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22 NE replied on November 17, 2006, reaffirming its position as to the adequacy of the s.106 agreement and saying:

> "The applicants have accepted that without the measures secured by the s106 agreement there is likely to be a likely significant effect on the SPA. This can be inferred clearly from the statement of common ground. This leaves a clear position. That is, with those measures secured, Natural England's objection is resolved.
>
> If for some reason the Inspector was to conclude that the measures would not reliably secured, then given the accepted possibility of an adverse effect, we believe the Inspector would have no choice but to dismiss the appeal. Given this position, and in particular the indication given by the statement of common ground that the appellants will not dispute the possibility of impact, it does not appear necessary for Natural England to submit evidence to the inquiry."

That was the position when the inquiry opened on December 12, 2006. NE did not give evidence at the inquiry. The Inspector said in para.1.2 of her report:

> "The second deemed reason for refusal in Appeal G concerns the Thames Basin Heaths Special Protection Area . . . Subsequently in November 2006 Natural England withdrew its objections on the basis of the proposed package of measures and the controls on their implementation and retention achieved through planning obligations. In view of the advice from Natural England the Council no longer raises any objections to the proposed mitigation plan. The deemed reason for refusal on Appeal F, on the need to secure a management plan for the long term maintenance of the open space, has also been overcome by a planning obligation."

23 The claimant did not challenge Mr Colebourn's evidence at the inquiry. The only reference to the SPA in the claimant's closing submissions to the Inspector was in these terms:

> "HDC does not raise any objections to the technical mitigation plan proposed. Nor does HDC seek to introduce a fresh reason for refusal. However HDC does consider it right to draw the Inspector's attention [to] the fact that [NE's] Draft Delivery Plan is the subject of scrutiny at the South East Plan proceedings."

24 The Inspector reached the following conclusions as to the effect of the proposals on the SPA:

> "12.5 The Appellants have accepted that, because there is not enough current data to confirm otherwise, the Dilly Lane development may, without mitigation and in combination with other developments, contribute to a significant effect on the SPA. Therefore their approach has been to develop a package of mitigation measures to ensure avoidance of any contribution to such adverse in combination effects. The Appellants are confident that the proposals are able to proceed independently of the Natural England Delivery Plan and its application within Hart. Natural England has advised that the package is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA. In Natural England's opinion no appropriate assessment under the Habitats Regulations is necessary.
>
> 12.6 The JCA Assessment and the evidence of EPR suggest that the most likely in combination pressures to be placed on the SPA would be through increased recreational pressure and more particularly disturbance by people and dogs. The HWAG [Hartley Wintney Action Group] highlighted the threat of fire. However, the evidence suggests that heathland fires are most likely to be started by children and young people. The distance between the site and Hazeley Heath is such as to discourage easy access by unaccompanied youngsters from the development.
>
> 12.7 The Appellants, through EPR, have developed the mitigation package over a period of several years. The proposals have been informed by the specifications in the Draft Delivery Plan and by research into human behaviour with regard to informal recreation. The specific local research and survey work undertaken by EPR came later in June/July 2006 in response to comments by Natural England. Therefore rather than informing and guiding the proposals for the SANGS this later work was undertaken with the purpose of establishing likely levels of its future use.
>
> 12.8 As explained by the Appellants at the inquiry the objective has not been to provide replacement heathland but to provide alternative green space that would be equally attractive for some of the purposes people visit the heaths. The field site has been designed to be attractive to walkers and more particularly dog walkers, although able to accommodate other informal recreation activity. I consider the informal recreation area would be of a reasonable size, fenced off from the road, with defined footpaths and open

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areas to allow dogs to be let off the lead. The hay meadow and areas of additional planting would reinforce local landscape character. However, it would have a quite different character to the heaths, being more enclosed and within a farmland and village setting. It would therefore be more akin to some of the commons and open spaces within the village and to the footpaths through the farmland nearby. The links to the informal amenity areas on the housing site and to the surrounding footpath network would offer opportunities for walks of varying length. Again these walks would not generally replicate the openness and semi-wild character of the heathlands.

12.9 A fundamental conclusion of the Appellants, supported they say by 2006 EPR survey work, is that the measures will avoid any net effect of recreational activity on the SPA. My understanding is that reliance is placed on the SANGS drawing existing users away from the Heath to compensate for the new residents using the Heath on occasion. I have serious doubts about these conclusions. In my view an equally valid conclusion from the EPR survey is that the SANGS, because of its convenience and character, would act as an alternative to the use of the Hartley Wintney commons and green spaces for dog walking and walking by existing residents in the locality of the site. There is little I can see to suggest that it would be successful in diverting existing trips by these residents away from the Heath. Taking a wider view, the residents living closest to Hazeley Heath and who form the greater proportion of visitors, are unlikely to be attracted to the SANGS. It would offer nothing significant over and above the Heath, while being less convenient and with less opportunity for longer walks with dogs off a lead. For new residents the SANGS may well provide opportunities for shorter walks close to home but Hazeley Heath and other components of the SPA remain a convenient and unique destination to satisfy a wider range of recreation needs.

12.10 The timescales associated with providing the informal recreation area on the field site are also relevant to the ability to avoid any net effect of recreational activity on the SPA. The intention is to carry out the planting and associated works to create this key component of the SANGS before occupation of the first dwelling. The Appellants' expert witness on ecology outlined the timescales for establishing the areas of grass, scrub and trees. In his opinion the spaces would have quite a natural appearance after about 3 or 4 years, although the benefits to biodiversity would take a longer period ranging over 5 to 15 years. I consider the less attractive, newly formed appearance of the open space in its early years will not encourage existing residents to take advantage of the SANGS rather than visiting the more attractive Heath, with its particular landscape qualities. The attractiveness for new residents would also be less. Consequently the likelihood of achieving a net positive effect would be reduced in the short term.

12.11 The proposals also include the provision of information about alternative recreation sites and on the SPA. Whilst a positive measure there is little specific evidence to support the view that the provision of the information would be effective in significantly reducing the number of trips to the SPA. The impression I have gained through all the representations is that

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local residents are very aware of their surroundings and their particular attributes.

12.12 The Natural England Draft Delivery Plan points out that research has indicated that altering the existing recreational patterns by promoting or providing alternatives is harder to achieve than establishing new use patterns amongst new residents. Bearing this in mind, I do not share the confidence of the Appellants that existing residents will be enticed away from the Heath in any significant numbers. In my opinion, because of the character of the SANGS, it will probably be only successful in attracting existing residents who would otherwise use the local commons and green spaces in the village. Whilst I agree new residents will be likely to use the SANGS to fulfil recreation requirements for convenient walks and exercising the dog, the SPA is not far away and has the advantages of its unique character and opportunities for a wider range of recreations. I do not accept that the measures will avoid any net effect of recreational activity on the SPA.

12.13 The JCA Assessment anticipated that measures would be taken to develop access management plans for the component SSSI in the SPA and to ensure appropriate habitat management across the SPA. These measures were envisaged to be in addition to mitigation directly linked with any planning application. Evidence at the inquiry confirmed that such strategic measures have not been put in place. In my view this consideration would be relevant after carrying out an appropriate assessment rather than in an initial appraisal to establish if the proposal would be likely to have a significant effect on the SPA.

12.14 The SPA is of international importance to nature conservation. It enjoys a high level of protection, consistent with the aim of ensuring biodiversity through conservation of natural habitats, fauna and flora. Accordingly, a precautionary approach is to be taken in assessment. Having regard to the conservation objectives for the SPA I am unable to conclude that the proposed package of measures could lead to a judgement of no likely significant effect on the SPA. The probability of the proposals having a significant effect on the SPA in combination with other plans or projects cannot be discounted. It follows that an appropriate assessment should be carried out in order to ascertain if the proposal would adversely affect the integrity of the site.

12.15 However, there is inadequate information available at this time to enable an appropriate assessment to be carried out. Furthermore, there are alternative sites on which dwellings could be built in the Country or South East region which would have a lesser effect or avoid an adverse effect on the integrity of the SPA. Given these circumstances and the uncertainties over the effect of the proposals on the SPA it follows that the development would not be compliant with the Habitats Regulations. To permit the scheme without formal appropriate assessment would be contrary to LP Policy CON 1 and national policy in PPS9. In the light of these conclusions it is not necessary or appropriate to address the criticism raised by the HWAG on the assessment approach used by Natural England."

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25 HWAG's criticism of NE's approach to appropriate assessment was summarised by the Inspector in para.9.12 of her report:

> "9.12 The Appellants have agreed a mitigation package with Natural England but the package is not environmentally acceptable and sustainable. Firstly, the approach used by Natural England in assessing significant effect on Hazeley Heath is flawed. Account was taken of the package of mitigation and avoidance measures in concluding that they will succeed in avoiding a net adverse effect on the SPA and therefore pass the Preliminary Stage Assessment. Referring to the opinion by Robin Purchas QC, consideration should not be given to possible mitigation at that stage (*Document 69*)."

For completeness I should also refer to para.9.13 of the Inspector's Report, where the Inspector summarised HWAG's case that:

> "9.13 Hazeley Heath has an inherent attraction that draws people to it, as indicated by a recent survey (*Document 14 p. 3, Document 64*). The SANGS will not provide the attributes of biodiversity, peacefulness, wilderness, safety, openness, beauty or freedom to roam over a wide area. Even though the SANGS will offer additional recreation land it would be small in comparison to the Heath and be mainly used by dog owners. The field will take some 10 years to take on a natural appearance and the surrounding farmland and woodland has not the same landscape quality as the SPA. The SANGS would not have the same attractiveness and residents will still wish to visit Hazeley Heath. The extra numbers of people will add pressure, primarily through disturbance and the increased risk of fire."

26 The response of the second and third defendants to HWAG's submissions is recorded by the Inspector in para.8.7 of her report:

> "8.7 In the later stages of the inquiry the HWAG introduced a new point and suggested that the approach of Natural England, one accepted by the Council and endorsed by EPR, is fundamentally flawed. Reliance was based on an opinion of Robin Purchas QC, who concluded that when considering whether an appropriate assessment is necessary one should disregard any mitigation or the manner in which the proposals are intended to be carried out (*Document 69*). However, there is no reason why the Secretary of State should take a different approach to that used by her statutory consultee and which was applied in the Franklands Drive case. In any event whichever way the issue is approached the answer remains the same. Granting permission for the current proposals is not likely to have a significant effect on the SPA either alone or in combination with other plans or projects. Compatibility with the Directive and Habitats Regulations is secured. The net effect will be beneficial in that the likelihood of the Dilly Lane residents (some 400) to use the SPA for recreation will be more than offset by the likelihood of the population in the immediate locality (some 800) to use the proposed open space as part of their recreation. The proposed leaflets and information boards will be the first active steps aimed at educating the public and thus better managing the SPA."

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27 In a letter dated April 4, 2007, the first defendant stated that she was minded to disagree with the Inspector's conclusions and recommendations, and was minded to allow the appeals and grant planning permission, subject to conditions and to s.106 planning obligations, but that before reaching a final decision she required further evidence clarifying the housing supply position within Hart District ("the minded to grant letter"). Paragraphs 13–15 of the minded to grant letter dealt with the effect on the SPA:

> "13. The appeal site is located within 2km of Hazeley Heath, which forms a part of the Thames Basin Heaths Special Protection Area (SPA). The Thames Basin Heaths SPA is protected by the Conservation (Natural Habitats &c.) Regulations 1994, commonly referred to as the Habitats Regulations. These require the consideration of effects of plans or projects on the SPA, which are not directly connected with, or necessary to, its management. Those that are likely to have a significant effect on the European site, either alone or in combination with other plans or projects, must be subject to an appropriate assessment of the implications in view of the European site's conservation objectives.
>
> 14. The Secretary of State has therefore taken account of the possible impact that allowing these proposals may have on the features of the Special Protection Area that are of conservation interest, namely nightjar, woodlark and Dartford Warbler. In considering this matter she has taken into account the fact that Natural England has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. These measures will provide 'suitable alternative natural green space' (SANGS) to serve the residential development and for use by the local community (IR4.8). The Secretary of State gives great weight to Natural England's views as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. She is therefore satisfied she can proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, the Secretary of State has concluded that there is no need to consider further the Inspector's deliberations in IR12.5–IR12.15 on the effect of the current proposals on the integrity of the habitat. She has gone on to assess the proposals against the other issues identified in paragraph 12 of this letter.
>
> 15. The Secretary of State is aware that the report of the Assessor on the Thames Basin Heaths Special Protection Area and Natural England's draft Delivery Plan was made available in February to the Panel conducting the Examination in Public into the South East plan. She gives the report little weight at this stage, however, given its purpose in informing the SEP Panel, who will in turn report to her. She is therefore not currently in a position to rely upon the Assessor's conclusions and recommendations."

28 Although the Secretary of State had not invited further representations about the effect of the proposals on the SPA, the claimant, in addition to making lengthy

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representations as to the housing supply and position within its district (see below), also made representations in respect of the SPA:

> "With regard to the SPA there are two issues of particular concern that are explored in further detail in this section of the Council's Statement: i) the SoS's view that there is no requirement for an appropriate assessment in association with the Appeal proposals and that planning permission can be granted in the absence of such an assessment; and
>
> ii) the SoS's failure to consider the conclusions of her Inspector relevant to the impact of development on the SPA."

29 Having referred to the Inspector's conclusions, and to another appeal decision in which the Secretary of State had allowed residential development on appeal on the basis that an appropriate assessment (AA) was not required, the claimant's representations said that:

> "3.5 … Since that time, matters relevant to the SPA have moved on significantly having regard to the availability of new information and the better level of understanding relevant to the requirements of Article 6 (3) of the Habitats Directive.
>
> 3.6 In terms of the availability of additional information, the primary development relates to the consideration of a significant body of evidence on the SPA by Peter Burley, a Senior Planning Inspector (the Technical Assessor) between November 2006 and February 2007 as part of the South East Plan Examination in Public. Mr Burley considered all submissions and concluded in his report entitled 'The Thames Basin Heaths Special Protection Area & Natural England's Draft Delivery Plan' published in February 2007 (supported by a clarification note produced in March 2007 and a more recent Addendum issued on the 13 April 2007), that Natural England's approach to the requirements of Article 6(3), namely that the provision of SANGS absolved a Competent Authority from carrying out an AA for a development that would otherwise be considered likely to have a significant effect, was incorrect in law. This conclusion was based on the fact that there was no objective evidence to show that the provision of SANGS would be sufficient to ensure that residential development would be unlikely to have a significant effect on the SPA, and therefore a Competent Authority could not avoid carrying out an AA. This is effectively the position also reached by the Inspector at the Dilly Lane Inquiry.
>
> 3.7 The second change since the Franklands Drive decision relates to the increased level of understanding of the procedures required to comply with the requirements of the Article 6(3) of the Habitats Regulations. To this end there have been a number of eminent legal opinions produced as follows:"

Those were opinions by Mr Elvin Q.C., Mr Griffiths Q.C., Mr Purchas Q.C. and Mr Drabble Q.C.. The claimant's representations continued:

> "3.8 These opinions come to different conclusions relevant to the need to undertake an AA in circumstances where an unmitigated development would

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have a likely significant effect on the SPA. However in considering these opinions, the Technical Assessor came to the view that,

> 'in order to comply with the *Waddenzee* test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment' . . ."

The representations referred to the Technical Assessor's response to Mr Drabble's opinion and said:

> "3.10 In the light of this additional information and the clarification in terms of the application of Article 6(3), HDC considers that the appeal proposals require an AA as a matter of law . . .
>
> 3.11 For these reasons, HDC is of the view that the SoS's conclusion in terms of the need, or lack thereof, for an AA is flawed and that by failing to carryout an AA, the SoS has acted outside the limits of her discretion as set by . . . both the EU and UK legislative regime."

30 The claimant then contended, in its representations, that the first defendant had failed to consider the Inspector's conclusions and had instead been guilty of "an unacceptable delegation of her authority" to NE:

> ". . . [T]he significant and overriding weight given by the SoS to the views of Natural England . . . led her to take the view, without challenge or further consideration, that she need not consider her own Inspector's conclusions (which notably conflicted with Natural England's but which have subsequently been supported by the Technical Assessor), or to come to a conclusion herself on the matter . . ."

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31 Mr Purchas in his opinion dated December 8, 2006, and the Technical Assessor in his report published in February 2007, were both considering the Draft Delivery Plan published by NE's predecessor, English Nature, on May 26, 2006, in the context of the examination in public into the regional spatial strategy for the South East ("the South East Plan"). In his opinion, Mr Purchas said that reg.48 (above) should be approached in three distinct and sequential stages. In the first stage, the question was whether the project (either alone or in combination with other plans or projects) was likely to have a significant effect on the SPA.

32 In [17] of his opinion, Mr Purchas said:

> "Consideration should not be given at this stage to possible mitigation. This is made clear by the European Commission Environment DG publication *Assessment of plans and projects significantly affecting Natura 2000 sites* which states at 2.6 that 'it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site. . . . Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported."

33 Paragraph 1.1 of the document (the Methodological Guidance) explains the nature of the document referred to by Mr Purchas:

"This document has been produced to provide non-mandatory methodological help to carry out or review the assessments required under Article 6(3) and (4) of the habitats directive . . .

This guidance must always be read in conjunction with the directives and national legislation, and within the context of the advice set out in the Commission services' interpretation document 'Managing Natura 2000 sites: The provisions of Article 6 of the "Habitats" Directive . . . (referred to in this guidance as MN2000). MN2000 is the starting point for the interpretation of the key terms and phrases contained in the habitats directive and nothing in this guidance document should be seen as overriding or replacing the interpretations provided in MN2000. Furthermore, this guidance should not be read as imposing or suggesting any procedural requirements for the implementation of the habitats directive. Its use is optional and flexible since, under the principle of subsidiarity, it is for individual Member States to determine the procedural requirements deriving from the directive."

The reasons given in para.2.6 of the document for the proposition that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of the project or plan, and are designed to avoid or reduce the impact of a project or plan on the Natura 2000 site, are as follows:

"The proponents' notion of effective levels of mitigation may vary from that of the competent authority and other stakeholders. To ensure the assessment is as objective as possible, the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and level of mitigation are appropriate."

34 The Draft Delivery Plan (or to give the document its formal title: The Thames Basin Heaths SPA: Draft Mitigation Standards for Residential Development) sets out a strategic approach to the provisions of SANGS. For example, in Zone A (within 400m of the SPA) no effective avoidance or mitigation is possible; in Zone B (between 400m and 2km away from the SPA) 16 hectares of SANGS per 1,000 of new population is required, with further requirements as to the minimum size of the SANGS and their maximum distance from the proposed development; in Zone C (between 2 and 5km from the SPA) the standard of provision required reduces to 8 hectares of SANGS per 1,000 of the new population, with further stipulations as to minimum size and maximum distance from the proposed development.

35 The Draft Delivery Plan does not prevent individual assessments of particular proposals. Under the subheading "Individual Assessments", para.2.2.9 says:

"The Delivery Plan **does not** preclude the local authority deciding to assess a particular individual residential application separately under the Habitats Regulations. Equally, when making an application, a developer could ask the authority to assess the application separately from the Delivery Plan, whether or not mitigation is included. Given the likelihood of significant effect on the SPA, without mitigation, the application would need to be subject to an

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appropriate assessment, unless for good reasons, the authority is satisfied it would not be likely to have a significant effect on the SPA ... Such a conclusion should be recorded, with reasons, by the planning authority and should have regard to the advice in Circular 06/2005 and to the findings of the European Court of Justice referred to in paragraph 13 of the Circular." (Emphasis as in the original).

36 Circular 06/2005 provides administrative guidance on the application of the law relating to planning and nature conservation. For present purposes, paras 13 and 14 of the Circular, which deal with the issue or "likely significant effect", are relevant:

> "13. If the proposed development is not directly connected with or necessary to site management, the decision-taker must determine whether the proposal is likely to have a significant effect on a European site. The decision on whether an appropriate assessment is necessary should be made on a precautionary basis. An appropriate assessment is required where there is a probability or a risk that the plan or project will have significant effects on a site. This is in line with the ruling of the European Court of Justice in Case C-127/02 (the Waddenzee Judgment) which said '*any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects*'.
>
> 14. The decision-taker should consider whether the effect of the proposal on the site, either individually or in combination with other projects, is likely to be significant in terms of the conservation objectives for which the site was classified. The European Commission has also issued guidance, which local planning authorities may wish to consider."

A footnote to the final sentence in para.14 refers to managing the Natura 2000, but not to the Methodological Guidance referred to in the opinion of Mr Purchas.

37 The Technical Assessor considered four main criticisms of the Draft Delivery Plan (DDP). They were:

> "... [F]irstly that NE is wrong to hold that developments which provide SANGs of appropriate size and quality would avoid any likely significant effect and therefore not require an appropriate assessment; secondly that its operation of the 'in combination' requirement is unreasonably rigorous; thirdly that its application of the 'precautionary principle' is not proportionate; and finally that the failure to set clear conservation objectives makes it impossible to accurately apply the requirements ..."

38 Under the subheading "Avoidance or mitigation" the Technical Assessor said:

> "4.1.11 It is argued, most forcibly by Runnymede Borough Council, that NE's approach to avoidance and mitigation is wrong in principle. In particular, it is contended that to maintain that the provision of SANGs would

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avoid any likely significant effect subverts the intention of the legislation since it means that an appropriate assessment is thereby avoided. It is also suggested that NE has confused avoidance and mitigation.

4.1.12 It is clear from the wording of the DDP and what was said at the technical meetings by NE that the primary reason it adopted its approach was in an attempt to provide greater certainty for the house building industry and to make the process of complying with the requirements of the legislation easier. I have no reason to doubt that this was a genuine attempt by NE to facilitate the delivery of housing, albeit that it has largely had the opposite effect . . .

4.1.14 Whether or not appropriate assessment is more complicated or allows for more flexibility is not the issue. The question is whether the approach adopted by the DDP complies with the legislation. In this regard, I have some doubts that it does. While I accept that in some circumstances steps can be taken to avoid a likely significant effect, for instance by re-siting a proposed development, I am not satisfied that it has been demonstrated on an objective basis that the provision of SANGs would in principle avoid any likely significant effect on the SPA."

39 On this issue, the Technical Assessor concluded in para.4.1.17:

"It seems to me therefore that, until there is a clearer objective basis for concluding that the provision of SANGs would avoid any likely significant effect, the correct approach would be to undertake an appropriate assessment. It may well be that at that stage the provision of alternative open space either individually or in combination with other measures could be demonstrated to provide sufficient mitigation to avoid any adverse affect on the SPA. However taking into account the precautionary principle I am not satisfied that it can be shown at the initial screening stage that such provision would avoid any possibility of there being a likely significant effect."

In his overall conclusions in para.4.1.43 the Technical Assessor said:

"I find that the DPP fails to correctly interpret the requirements of the relevant European and UK legislation in a number of respects. In my view its indication that the provision of SANGs will avoid the need for an appropriate assessment is incorrect and its application of the 'in combination' requirement unduly rigorous. More worryingly its application of the precautionary principle would not appear to comply with the advice of the European Commission in terms of proportionality and consistency."

40 As part of its response to the Technical Assessor's report, NE asked Mr Drabble and Mr Machin to provide an opinion. Their joint opinion dated March 21, 2007 said, so far as relevant:

". . . [W]e do not consider that NE are wrongly conflating avoidance and mitigation. Although both words are commonly used, and used in context are helpful, it must be remembered that neither appear in Article 6 itself. If a proposal includes as an integral part of the development a measure which will

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avoid any significant effect, then in our opinion the competent authority is entitled to so hold at the significant effect stage. If a development was proposed with a wall that could in practice be guaranteed to prevent anybody from reaching the SPA, then it would clearly be right to hold that there was no likely significant effect. The people, put simply, would not reach the site. The example is of course improbable, but it does illuminate the legal principle; and the same principle applies to the provision of SANGs if the ecological assumption that SANGs is effective is accepted."

41 The Technical Assessor's response in an Addendum Report dated April 13, 2007 included the following:

> "7. The comments made under issue 1 of the opinion imply that I concluded that the provision of SANGS could never avoid the need for assessment. This is a misreading of my original report. I accept that in principle the need for such an assessment could be avoided in certain circumstances. However, such an approach would only accord with the principles of *Waddenzee* if objective evidence existed to demonstrate that the provision of SANGS, either on their own or together with other measures, would be sufficient to ensure that new residential development of significant scale would be unlikely to have a significant effect on the SPA. It is clear from the ecological evidence presented to me at the technical meetings that no such *objective* evidence exists at present.
>
> 8. Consequently, I hold to the view that in order to comply with the *Waddenzee* test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment. If objective evidence is subsequently forthcoming, which confirms that a specific level and quantity of SANGS per head of population would avoid any likely effect on the SPA, then clearly there would be no need for an appropriate assessment to be undertaken, if the requisite SANGS is to be provided as part of the development . . .
>
> 10. I accept that the lack of objective evidence of the efficacy of SANGS, as a principle, will make it more difficult for any scheme, which seeks to provide SANGS as mitigation, to demonstrate that there will be no significant adverse effect on the SPA at the appropriate assessment stage. Nevertheless, if one is looking at the circumstances of a specific scheme in detail, rather than at the general principle, it seems to me that it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA. In the circumstances, I do not share the view of the opinion that it would not be possible to conclude through an appropriate assessment that the test in *Waddenzee* was met."

42 The Technical Assessor's reference to the *Waddenzee* test is a reference to the decision of the European Court of Justice in *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staassecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2004] Env. L.R. 14.

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43 The ECJ dealt with the meaning of the words "likely to have a significant effect" on a protected site under the Habitats Directive in [40]–[45] of its judgment:

> "40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
>
> 41. Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive does not presume—as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive(92/43/EEC)"—that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.
>
> 42. As regards Art.2(1) of Directive 85/337, the text of which, essentially similar to Art.6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] E.C.R. I-0000, [85]).
>
> 43. It follows that the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, *inter alia* Case C-180/96 *United Kingdom v Commission* [1998] E.C.R. I-2265, paras 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it

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cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

44 On June 11, 2007, NE responded to the claimant's representations to the first defendant, saying:

> "Natural England considers that it is perfectly reasonable for the Secretary of State to conclude, on the evidence, and despite the Inspector's recommendations, that the development would not be likely to have a significant effect on the SPA. We understand that, on the basis of our carefully considered advice to the Council and the Inspector, the Secretary of State has concluded that the suitable alternative natural green space (SANGS) offered by the appellants would avoid any net increase in recreational visits to the SPA heathlands (thereby avoiding any increased disturbance to the Annex 1 bird species). We believe that on that basis it is not only appropriate, but legally correct to conclude no likelihood of a significant effect in terms of Regulation 48(1) of the Conservation (Natural Habitats &c) Regulations 1994. No appropriate assessment is necessary and permission can lawfully be granted in respect of these Regulations and the Habitats and Birds Directives."

45 NE's representations then refer to Mr Drabble's opinion and continue:

> "The Secretary of State's letter indicates that she has not considered it necessary to consider the Inspector's deliberations in IR12.5 to IR12.15 on the integrity of the habitat. We assume that this is intended to indicate that having considered the Inspector's conclusions, as to the effects on the SPA, she has preferred the advice of Natural England as the appropriate nature conservation body, and therefore there is no need to consider the effects on the integrity of the site, because there is no need to undertake an appropriate assessment . . .
>
> Natural England supports the Secretary of State's application of the Habitats Regulations in this case and her conclusion that, in view of the adequacy of SANGS provided, there is no need to undertake an appropriate assessment in light of there being no likelihood of a significant effect on the SPA."

46 The first defendant responded to the claimant's representations, following the minded to grant letter, in [9]–[11] of her decision letter dated July 24, 2007, under the heading "Effect on the SPA":

> "9. For the reasons given in paragraphs 13–15 of her 'minded' letter of 4 April, the Secretary of State was satisfied she could proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, she did not consider further the Inspector's deliberations in IR12.5–IR12.15 on the effect of the current proposals on the integrity of the habitat.
>
> 10. Although not a matter on which the Secretary of State sought further representations, Hart District Council took issue with the Secretary of State's approach in their response of 14 May. In particular, it stated that matters

relevant to the Special Protection Area (SPA) have moved on significantly, having regard to the availability of new information, and better understanding relevant to the requirements of Article 6(3) of the Habitats Directive. The primary development cited in terms of new information is the report of the Assessor on the Thames Basin Heaths SPA and Natural England's Draft Delivery Plan. In fact, this document was specifically mentioned by the Secretary of State in her 'minded' letter of 4 April. She gave the report little weight, given its purpose in informing the South East Plan Panel, who will in turn report to her. She concluded that she was therefore not currently in a position to rely upon the assessor's conclusions and recommendations. She considers that that remains the position.

11. The Secretary of State continues to give great weight to the views of Natural England as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. That body has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. The Secretary of State therefore retains the position set out in her 'minded' letter."

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The claimant's challenge to the decision letter

47 In its claim form the claimant contended that the defendant's decision was unlawful on a number of grounds. In the claimant's skeleton argument those grounds were grouped under three headings: Ground 1 related to the manner in which the first defendant had dealt with the effect of the proposed development on the SPA; Ground 2 related to the manner in which the first defendant dealt with the issue of housing land supply in Hart District; Ground 3 alleged the first defendant had failed to impose an appropriate condition to secure the works to upgrade King John's Ride. The principal ground of challenge was Ground 1. I will deal with the subsidiary Grounds 2 and 3 below (see [85]–[93] and [94]–[99] respectively).

48 In respect of Ground 1, the claim form contended that:

(a) NE, and the first defendant in agreeing with NE, erred in considering the mitigation proposed by the second and third defendants as part of the package at the first, or "screening" stage when deciding whether the proposed development was likely to have a significant effect on the SPA;
(b) the first defendant had erroneously failed to find that an appropriate assessment should be carried out as required by reg.48(1);
(c) the first defendant failed to have regard a number of material considerations, namely
    (i) paras 12.5–12.15 of the Inspector's Report,
    (ii) the claimant's representations following the minded to grant letter on the Technical Assessor's report which, it was said, cast "severe doubts" as to whether NE's approach in the Draft Delivery Plan, as adopted by the first defendant in the decision letter, was "correct in law";

(d) the first defendant had given "undue weight" to the views of NE that the package of proposals, including SANGS, would not have a significant effect on the SPA, and therefore that an appropriate assessment was unnecessary.

49 It was not suggested that the complaint in subpara.(b) (above) added anything of substance to the complaints in paras (a), (c) and (d), which explained why it was being said that the first defendant had erred in concluding that an appropriate assessment was not necessary. The complaint in subpara.(d) (above) was not pursued in the claimant's skeleton argument or in the oral submissions of Mr Hockman Q.C. on behalf of the claimant. Mr Hockman rightly accepted that the weight to be given to the views of NE was a matter of planning judgment for the first defendant. Since NE is the "appropriate nature conservation body", as defined by reg.4 of the Regulations, the first defendant was entitled to give "great weight" to its views if she chose to do so. Indeed it would have required some cogent explanation in the decision letter if the first defendant had chosen not to give considerable weight to the views of NE.

50 In the claimant's skeleton argument it was submitted that, as a matter of law, mitigation measures had to be disregarded at the screening stage. At the commencement of the hearing this appeared to be the claimant's principal submission (see subpara.(a) above). However, in his oral submissions Mr Hockman accepted that there was "no absolute legal rule" that one could never take avoidance or mitigation measures into account at the screening stage. Rather, he submitted that once it was accepted, as it had been accepted in the present case, that avoidance or mitigation measures were necessary, then it would be "difficult" for the competent authority to conclude, without first carrying out an appropriate assessment, that there was no risk that there would be a significant effect on the SPA.

51 The claimant's skeleton argument also contained a number of criticisms of the approach adopted by Mr Colebourn in his evidence at the inquiry, and contended that in agreeing to the measures proposed by Mr Colebourn NE had misdirected itself as to the *Waddenzee* test and had failed to ask itself whether there was a risk of a significant adverse effect. In agreeing with NE, the first defendant had similarly misdirected herself, and moreover, in agreeing with the advice from NE, the first defendant had failed to realise that since NE's advice was based in turn upon its agreement with Mr Colebourn's evidence, the criticisms of that evidence in the Inspector's conclusions applied equally to NE's advice. Thus, the first defendant could not rationally have come to the conclusion that there was no need to consider further the Inspector's conclusions in paras 12.5–12.15 of her report.

52 It was also contended that the first defendant had disregarded a relevant consideration because she had given little weight to the Technical Assessor's report. The reason given in the decision letter for attaching little weight to that report, that its purpose was to inform the South East Plan Panel, was not rational, given that the claimant had relied on the report in its representations to the first defendant.

53 It will be noted that the claimant's grounds of challenge have changed (Mr Hockman would say, "have been refined") since the original grounds in the claim

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form. Insofar as those changes consisted of alleged errors of law which could be addressed on the face of the documents before the court, none of the other parties objected to them. However, Mr Hockman rightly accepted that since the claimant had not challenged Mr Colebourn's evidence at the inquiry (with which NE had agreed) it could not now argue that such evidence was flawed, save to the extent that the claimant could of course rely upon the criticisms of the evidence in the Inspector's conclusions.

Effect on the SPA: Discussion and conclusions

54 In my judgment, Mr Hockman's concession that avoidance or mitigation measures forming part of the plan or project can, as a matter of law, be considered at the screening stage was correct. Since the point is of general importance and has led NE to participate in these proceedings as an interested party represented by Mr Drabble, I will set out in some detail my reasons for concluding that the claimant's concession was correctly made.

55 The first question to be answered under Art.6(3) or reg.48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.

56 No authority is given for the proposition in para.2.6 of the Methodological Guidance that "the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site". If the screening assessment should consider all of the other components or characteristics of the proposed plan or project, why should a particular component or characteristic be ignored because it has been incorporated into the project as a mitigation measure? Article 6.3 and reg.48(1) require the competent authority to consider whether the project, not some part of the project (shorn of any mitigating features incorporated within it), is likely to have a significant effect on the SPA. No support for the proposition in para.2.6 of the Methodological Study can be found in the EC's interpretation guide for Art.6: "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC", which is the guidance referred to in para.14 of Circular 06/2005 (see above). The Circular does not refer to the Methodological Guidance.

57 In *Waddenzee* the ECJ did not consider mitigation measures since none were put forward, and there is nothing in the court's judgment which might suggest that mitigation measures forming part of a project should not be considered at the screening stage (see [40]–[45] of the court's judgment above). The claimant referred to [71] in the Advocate General's Opinion, where he said:

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"In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."

58 It is not surprising that that passage is not reflected in the court's judgment, because the issue did not arise on the facts of that case. The licence for cockle fishing under consideration did not contain any mitigation measures. The Advocate General was responding, in [71] of his opinion, to a question which the plaintiffs understood was being asked by the Raad Van State:

"... [W]hether the *possibility* of measures to minimise damage could be taken into account as earlier as this stage of the application of Art.6(3) of the habitats directive." (Emphasis added).

To which the plaintiffs answered:

"However, such measures can be taken effectively only on the basis of an appropriate assessment. In the present case the questions posed in connection with an ongoing government study already show that cockle fishing is likely to have significant effect." (See [65] of the Advocate General's Opinion).

59 No specific mitigation measures were being put forward, much less were such measures incorporated into, so that they formed part of, the cockle fishing licence. There can be no dispute that the mere *possibility* that mitigation measures might be devised which might reduce the effect of a project on an SPA would not be sufficient to enable a competent authority to conclude, without an appropriate assessment, that the project would not be likely to have a significant effect on the SPA.

60 The two reasons given for the proposition in para.2.6 of the Methodological Guidance do not bear scrutiny, and in any event do not appear to be directed at the kind of measures incorporated into the appeal proposals in the present case. The fact that, in some cases, the proponent's notion of effective levels of mitigation may vary from that of a competent authority and other stakeholders does not mean that, in those cases where the competent authority does agree with the proponent's assessment of the effectiveness of proposed mitigation measures, such measures should be ignored at the screening stage. If the competent authority does not agree with the proponents of the project as to the likely effectiveness of any mitigation measure incorporated into the project, it will not have been able to exclude the risk, on the basis of objective information, that the project will have a significant effect on the SPA, and therefore will require that an appropriate assessment be carried out.

61 While it is true that "effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported", if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary. Under reg.48(2), the competent authority may ask the proponent of a plan or project for more information about the plan or

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project, including any proposed mitigation, not merely for the purposes of carrying out an appropriate assessment, but also in order to determine whether an appropriate assessment is required in the first place. If for any reason the competent authority is still not satisfied, then it will require an appropriate assessment. As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents' point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA, and incorporating those proposals into the project, if the competent authority was then required to ignore them when considering whether an appropriate assessment was necessary?

62 It is also important to appreciate the kind of measures that were incorporated into the package of proposals put forward by the second and third defendants in the present case. The Draft Delivery Plan draws a distinction between "avoidance measures" and "mitigation measures":

> "1.5.7 Measures to avoid or reduce the effects of a development proposal on the SPA (here referred to as **avoidance measures** and **mitigation measures** respectively) can be proposed as part of the planning application and the Council will take these into account in the assessment. Avoidance measures eliminate the likelihood of any effects on the SPA. Mitigation measures would be designed to reduce likely significant effects to a level that is insignificant or in a way that makes them unlikely to occur. It may be that the project could have an adverse effect on site integrity, but conditions, restrictions or other legally enforceable obligations, would ensure mitigation measures can be included in the project to remove the potential for adverse effects on site integrity.
>
> 1.5.8 The difference between avoidance and mitigation measures is not an academic one. If avoidance measures are proposed, and they are considered to be fully effective and guaranteed by way of legally enforceable conditions or obligations, then the proposal is not subject to the further tests of the Habitats Regulations . . ."

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63 In the present case, there was never any question of there being a direct effect on the SPA. The concern was that, when considered in combination with other proposed residential developments in the area, there might be an indirect effect by reason of increased visitor pressure on the SPA as a result of additional, new, residents using the SPA for recreational purposes, including, in particular, dog walking. The purpose of the SANGS was not to lessen the increase in visitor pressure, but to avoid it altogether by drawing some existing users away from the Heath to compensate for those new residents who might use it on occasion (see para.12.9 of the Inspector's Report).

64 As Mr Colebourn explained in his supplementary evidence in response to the claimant's planning witness:

> "1.2 Through a process of extensive research and development the Appellants have put together a very detailed mitigation package whereby any

effects, that might have the potential to occur on the SPA, are avoided. This package has been approved by Natural England.

1.3 HDC do not have any objection to the technical nature of the package, and therefore it can be concluded that if implemented the development at Dilly Lane is not likely to have a significant effect on the SPA."

In response to supplementary evidence produced by the claimant, Mr Colebourn produced further supplementary evidence in which he said:

"1.8 The Delivery Plan seeks to establish a mechanism for addressing in-combination effects across the SPA. It says that developers can either contribute to the provision of strategic Suitable Alternative Natural Greenspace (SANGS), or can provide their own comprehensive mitigation/ avoidance package, and warns that such packages will be rigorously tested.

1.9 The discussions about the Delivery Plan at the EiP Technical Session on the SPA, through which EPR has been present, have focussed largely on the first of these courses of action; strategic provision of SANGS, and on the evidence base for some of the presumptions about the effects of human recreation on Annex 1 bird species.

1.10 The Appellants, however, with our advice, have adopted the second course of action. Through a process of extensive research and development the Appellants have developed their own free-standing and very detailed and comprehensive mitigation package, outside the process of implementing the Delivery Plan strategically through SPDs.

1.11 The measures to avoid effects on the SPA have been researched in great detail through survey work on patterns of use relevant to the local situation in Hartley Wintney and the surrounding area ... The degree of research undertaken has allowed the Appellants to understand the local effects on the SPA and predict the likely effect of new development at Dilly Lane. Measures have then been further adapted and progressively redesigned to ensure that the package will avoid the development having any adverse effect on the SPA.

1.12 The package and the underlying research demonstrate that it can be concluded that the Dilly Lane development would avoid any potential effects on the SPA.

1.13 Natural England has accepted this, and has approved the avoidance measures package. I can assure the Inquiry that NE have rigorously tested our proposals over many months through extensive discussions and meetings, have sought further clarification on a number of occasions, and have now pronounced themselves satisfied.

1.14 In sum, therefore, the Appellants do not seek to rely solely—or at all—on the strategic mechanisms set out in the Natural England Delivery Plan or any future Supplementary Planning Document that may be prepared ..."

65 If the first defendant, as the competent authority, agreed with that conclusion, then there was simply no point in conducting an appropriate assessment. As Mr Drabble pointed out in the joint opinion and his skeleton argument:

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> "... [I]f it is established, on an appropriately rigorous basis, that there will be no net increase in visitor numbers, it has been established that the housing development will not produce any effect within the site at all. In those circumstances, carrying out an appropriate assessment would not further matters in any way. The routine characteristics of an appropriate assessment, typically involving survey work within the site to establish ecological base-line conditions, would, even if undertaken, have no effect on the conclusion."

NE's skeleton argument makes the point that although the provision of SANGS is referred to as a mitigation measure:

> "... [I]t is not a mitigation measure designed to mitigate effects taking place within the site (eg controls on methods of working or replacement planting). There are no such effects."

Mitigation measures of that kind, that is to say measures designed to mitigate effects taking place within the SPA, appear to be the kind of mitigation measures with which the Methodological Guidance was primarily, if not exclusively, concerned.

66 In [42] of its judgment in *Waddenzee*, the ECJ drew attention to the similarities between Art.6(3) of the Habitats Directive and Art.2(1) of Directive 85/337, the Environmental Impact Assessment Directive, which requires Member States to ensure that certain "projects likely to have significant effects on the environment" are subjected to a process of environmental assessment.

67 The Court of Appeal has made it clear that it is permissible for a local planning authority or the Secretary of State to have regard to proposed mitigation measures when deciding, at the screening stage, under the Town and Country Planning (Assessment of Environmental Effects) Regs 1988 (which implemented the EIA Directive) whether a project is likely to have significant effects on the environment.

68 In *Gillespie v First Secretary of State* [2003] Env. L.R. 30 ([2003] EWCA Civ 400), Pill L.J. said in [36] and [37]:

> "36 When making his screening decision, the Secretary of State was not in my judgment obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal. That would apply whatever the scale of the development and whether (as in *BT*) some harm to the relevant environmental interest is inevitable or whether (as is claimed in the present case) the development will actually produce an improvement in the environment. As stated in *Bozen*, it is the elements of the specific project which must be considered and all the elements of the project relevant to the EIA. In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision. If the judges in the cases cited took a contrary view, I respectfully disagree, though it appears to me that both Sullivan J. in *Lebus* and Richards J. in the present case did not require all remedial or mitigating measures to be ignored.

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37 The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

69 Laws L.J. said in [46]:

"46 I would express my reasons for dismissing the appeal very shortly as follows. Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."

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70 Pill L.J. returned to the subject in *R. (on the application of Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298, which was concerned with the impact of a proposed football stadium:

"31 Relying on a commentary in the Journal of Planning Law, at [2007] J.P.L. 81, on the decision of Collins J. in the present case, Mr Upton [counsel for the applicant] seeks a 'neat distinction' between routine measures and project specific provisions. Neat distinctions may be a comfort to decision makers but carry the danger that they may distract decision makers from their central duty, which is to examine the actual characteristics of the particular project. In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them . . .

33 This is a very different development from that proposed *Gillespie*. Developments come in all forms and the approach to the screening opinion

must have regard to the development proposed. There will be cases, such as *Gillespie*, where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.

34 On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence . . .

35 I repeat my statements in *Gillespie* . . . that the decision maker is not 'obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal', and that 'in making his decision, the Secretary of State . . . is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision'. Laws L.J. was considering the facts in *Gillespie* and I do not consider he was asserting a general principle that, only when remedial measures are 'uncontroversial', can they be taken into account when giving a screening opinion.

36 Having referred to *Gillespie*, Dyson L.J., at [39] in *Jones* [[2004] Env LR 2, [2003] EWCA Civ 1408], stated:

> 'The uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.'

37 When forming a screening opinion, the Council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but, as Collins J. noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. On the basis of that, and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did."

71 Maurice Kay and Wilson L.JJ. agreed. Unlike an EIA, which must be in the form prescribed by the EIA Directive, and must include, for example, a non-technical summary, enabling the public to express its opinion on the environmental issues raised (see *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 603 per Lord Hoffmann at 615), an appropriate assessment under Art.6(3) and reg.48(1) does not have to be in any particular form (see [52] of *Waddenzee* judgment), and obtaining the opinion of the general public is optional. Thus, considering proposed mitigation measures at the screening stage under Art.6(3) would not be frustrating the purpose of the legislation by pre-empting any

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particular form of inquiry, which was the particular concern expressed by Laws L.J. in *Gillespie* (above).

72 The underlying principle to be derived from both the *Waddenzee* judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.

73 The fact that reg.48(6) refers to the manner in which it is proposed that the plan or project is to be carried out, or to any conditions or restrictions subject to which it is proposed that consent et cetera shall be given, does not mean that those matters may not be considered at the first stage under reg.48(1), if they are incorporated into the application for planning permission when the competent authority is deciding whether the project for which planning permission is being sought is likely to have a significant effect on the SPA.

74 In *WWF UK Ltd v Secretary of State for Scotland* [1999] Env. L.R. 632, Lord Nimmo Smith, having noted that "plan or project" was not defined in the Regulations, said at 699:

> "Regulation 49(1) and (2) speak of it as something for which 'consent, permission or other authorisation' is applied, and in my opinion this means that the plan or project is that which is the subject-matter of an application and can thus be identified by reference to the application. This appears to me to be consistent with the provisions of the 1988 regulations, and in particular regulation 6(2), which I shall discuss in due course. Thus in the present case the 'plan or project' is as set out in CCC's application for planning permission. I therefore reject the suggestion which counsel for the petitioners made at one point that the 'plan or project' included all the conditions to which it was made subject at the time when planning permission was granted."

75 Lord Nimmo Smith then considered what had to be ascertained under reg.48(5) and concluded that reg.48(6) enabled proposed conditions to be taken into consideration when considering whether the integrity of the European site would be adversely affected. Lord Nimmo Smith was considering the local planning authority's power to impose conditions, when granting permission, upon the project as described in the planning application, not proposed mitigation measures which had, from the outset of the process, been incorporated into the application itself. Regulation 48(6) merely reflects the reality that in some, perhaps very many,

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cases where an appropriate assessment has been carried out, changes to the manner in which it is proposed to carry out the project, or to the conditions or restrictions to be imposed in the consent for the project, will be proposed by the proponents or by the competent authority in response to the findings of the assessment. Regulation 48(6) makes it clear, for the avoidance of doubt, that regard must be had to such matters when considering, under reg.48(5), whether the plan or project will adversely affect the integrity of the SPA.

76 For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under reg.48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see *Waddenzee* above).

77 That leads me to the second complaint made by the claimant about the manner in which the first defendant dealt with the SPA issue. Mr Hockman submitted that in agreeing with NE's conclusion "that there is not likely to be a significant effect on the SPA" (see para.11 of the decision letter), both the first defendant and NE had failed to apply the *Waddenzee* test; they had merely considered whether a significant effect was likely rather than whether there was a risk of a significant effect (see [44] of *Waddenzee* above). I do not accept that submission for the following reasons. Both NE, in agreeing to the Statement of Common Ground, and in its letter dated June 11, 2007, following the minded to grant letter, and the first defendant in both the minded to grant letter and the decision letter, used the statutory formulation in Art.6(3) and reg.48(1) "likely to have a significant effect".

78 To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a "standard of proof" is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof. Since the ECJ's decision in *Waddenzee*, it has been clear that, applying the precautionary principle, significant harm to an SPA is "likely" for the purposes of Art.6 and reg.48 if the risk of it occurring cannot be excluded on the basis of objective information. Since the *Waddenzee* test is set out in Circular 06/2005, which was specifically referred to in para.10 of the minded to grant letter, which was in turn incorporated into the decision letter (see para.6 of the latter), and Circular 06/2005 is also referred to in NE's Draft Delivery Plan (para.1.5.3), it is impossible to conclude that, when using the correct statutory formulation, both the first defendant and NE did not appreciate that the issue of likelihood had to be approached on the basis set out in *Waddenzee*.

79 There is nothing in the material before the court which suggests that NE (whose advice was accepted by the first defendant) approached the issue in any other way in its lengthy and detailed discussions with Mr Colebourn, which led eventually to the Statement of Common Ground.

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80 Although Mr Hockman made other criticisms of the phraseology used in that statement, for example, the apparently cautious statement that the package of measures was sufficient to "allow a competent authority to conclude", the claimant was in no doubt at the inquiry that NE was satisfied that there was not likely to be a significant effect on the SPA, and any forensic, as opposed to real, doubt as to its position is removed by NE's letter dated June 11, 2007 (see above).

81 The first defendant was entitled to prefer NE's view to that expressed by the Inspector. The fact that the Inspector had expressed "serious doubts" about EPR's conclusion that the measures incorporated in the package, including the SANGS, would avoid any net effect of recreational activity on the SPA (para.12.9 of the Inspector's Report) did not mean that the first defendant was obliged to accept that there were such doubts, or that they could not, as NE had concluded, "be excluded on the basis of objective information": see, for example, *R. (on the application of Merricks) v Secretary of State for Trade and Industry* [2006] EWHC 2698 (Admin) at [6]. Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient.

82 It is important to appreciate that the Inspector was expressing her doubts on essentially the same "objective information" as had satisfied NE. HWAG had submitted a questionnaire and responses in respect of Hazeley Heath (the Inspector's document no.64), but apart from establishing that Hazeley Heath "has an inherent attraction that draws people to it" (see para.9.13 of the Inspector's Report), a matter which was never in dispute, that survey did not add to the objective information prepared by EPR and agreed by NE.

83 The first defendant clearly considered the Inspector's key conclusion in para.12.9 of the Inspector's Report, with which NE disagreed. Once the first defendant decided that she agreed with NE's conclusion, based on the objective information that there would be no net increase in recreational activity on the Heath, and hence no significant effect on the SPA, she did not need to consider *further* the Inspector's deliberations in paras 12.5–12.15 of her report.

84 Mr Hockman submitted that in deciding that she did not need to consider further the Inspector's conclusions, the first defendant failed to appreciate that, insofar as the Inspector's criticisms of EPR's evidence were valid, they applied equally to NE's conclusions because those conclusions were based in turn upon EPR's evidence. I do not accept that submission. It would have been obvious, even on the most cursory perusal of the Inspector's Report and accompanying documents, that the "objective information" had been compiled by EPR and agreed, after discussion, by NE. Thus, insofar as the Inspector's doubts were justified, they applied equally to NE's advice to the first defendant. On any common-sense reading of the decision letter, the first defendant did not consider that the Inspector's doubts were justified.

85 Lastly, under this heading, I deal with the complaint that the first defendant accorded little weight to the views of the Technical Assessor on The Draft Delivery Plan. The starting point must be the proposition that the weight to be given to the views of the Technical Assessor was entirely a matter for the first defendant's planning judgment. In saying that she gave the Technical Assessor's report little weight on the basis that its purpose was to inform the South East Panel, who would in turn report to her, the first defendant was not unreasonably refusing to give little

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weight to a document simply because it was a report to another body. The purpose of the report is reflected both in its status and in its subject matter. Considering the former, the Technical Assessor's report was only the first stage of the examination process. The report was circulated, representations were made by NE and others, and the Technical Assessor responded to those representations in his Addendum Report. All of that information would then be considered by the panel, which would reach its own conclusions on the issue and advise the first defendant accordingly. The first defendant would then decide whether or not to accept the panel's report. In these circumstances, the Technical Assessor's report could not be regarded as definitive. Moreover, it was concerned with the efficacy of SANGS as a strategic concept. As the Technical Assessor made clear in para.10 of his Addendum Report dated April 13, 2007:

> "... [I]f one is looking at the circumstances of a specific scheme in detail, rather than at the general principle ... it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA."

That was precisely what was being proposed by the EPR in the appeal package in the present case (see Mr Colebourn's supplementary evidence cited above). For these reasons, I reject the claimant's criticisms, whether as originally formulated or as subsequently refined, of the manner in which the first defendant dealt with the SPA issue.

Ground 2

86 PPS3: Housing came into effect on April 1, 2007, after the Inspector delivered her report to the first defendant. In the minded to grant decision, the first defendant said in [19] and [20]:

> "The Secretary of State does not agree with the Inspector's assessment at IR12.25–12.26, that the balance of the evidence suggests that housing supply over a five year period will provide a small but significant excess against development plan requirements. She notes the Inspector, like the Council, has made allowance for contributions from the Queen Elizabeth Barracks site, which is subject to inquiry following the Council's refusal of planning permission. The Secretary of State does not in the circumstances consider that site to be deliverable as defined in PPS3. She also does not have information on the likely level of housing completions delivered by the Council in 2006/07, and the impact that that might have on the average annual requirement for the remainder of the Structure plan period.
>
> The Secretary of State concludes that the housing supply position seems to her to be marginal, and that the Council has not demonstrated a five year supply of specific deliverable sites for housing. In the light of this, and given her conclusions elsewhere in this letter on the impact of the proposal on the Special Protection Area and the benefits of the proposed affordable housing, the Secretary of State considers there are material considerations weighing in favour of a grant of planning permission."

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87 The first defendant asked for "up to date evidence concerning whether or not the Council has identified the five year supply of specific deliverable sites for housing for the period April 2007 to end March 2012" ([21]). The claimant and the second and third defendants made detailed representations. In the decision letter the first defendant said in [13]:

> "Evidence was provided by Hart District Council on this issue in its response of 14 May. The Secretary of State has paid careful regard to this assessment, and sets out below her own assessment of housing land supply, based on that information, and that provided by Barton Willmore on behalf of the appellants on 11 June."

88 The decision letter then contained a number of tables: table 1 set out the first defendant's view of the five-year supply figure (854); table 2 set out the supply figures where the claimant and the second and third defendants agreed (557); table 3 then set out the disputed supply figures, giving the views of the claimant, the second and third defendants, and finally the first defendant's assessment. The total figure under this heading was 558 in the first defendant's assessment, of which 420 were provided by one site, the Queen Elizabeth II Barracks site at Church Crookham. In respect of that site, para.14 of the decision letter said:

> "14. The Secretary of State has carefully considered the arguments put forward by Hart District Council, and accepts its assertion that, notwithstanding the outcome of the particular appeal proposals currently being heard at inquiry, there is a reasonable prospect of this site delivering housing within 5 years. Evidence provided from the inquiry Statement of Common Ground between Hart and the QEII developer indicates that if a decision to grant the appeal is made, the site could deliver over 700 units by 2012. The Secretary of State accepts as reasonable the assumption that if the current appeal proposals were refused, then 420 units could still be delivered by this site. The Secretary of State does not accept the appellant's argument that the Council's reasons for refusal amount to an 'in principle' objection to the development of this site. In particular, she considers that the issue of impact on the Thames Basin Heath SPA does not transcend other matters. In that respect, she draws attention to the fact that the issue of impact on the SPA is among the matters she has determined in this case."

The figures were then drawn together in table 4 in the decision letter, in which the first defendant concluded that there was a supply of 1,115 units or a 6.52 years' supply.

89 In [21] of the decision letter the first defendant said:

> "The Secretary of State considers that, on the evidence submitted, it would be reasonable to assert that the Council has demonstrated that it has identified a 6.5 year supply of deliverable housing land at this time, and this accords with the advice in paragraph 54 of PPS3. However, the Secretary of State notes that in order to deliver this supply the Council will be dependent on the QEII Barracks site producing some units by 2012. While she finds that it is reasonable to assume a figure of 420 units is likely to be achievable, she is concerned about the consequences should there be delay in bringing this site

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> forward for development. If the timetable set out in the Council's response proves to be over optimistic, then the 5-year supply could be threatened. Her overall conclusion is that although the 5-year supply has been demonstrated, it is fragile and she is concerned about the Council's ability to maintain a continuous five year supply of deliverable sites as advised in paragraph 57 of PPS3."

90 Having considered the provisions of the development plan and PPS3, the first defendant concluded in [28] of the decision letter:

> "The Secretary of State has considered the greenfield status of the appeal site, and whether allowing the appeal proposals on this site might prevent developable brownfield sites from coming forward. Given her conclusion in paragraph 21 of this letter that the 5-year supply of deliverable sites, while demonstrated, is fragile, and considering the need to maintain a continuous 5-year supply of deliverable sites, she concludes that the development of this site for 170 units would not have the effect of preventing or delaying developable brownfield sites from coming forward."

91 The claimant's sole criticism of this very careful and detailed analysis by the first defendant of the housing supply position is the first defendant's conclusion that, although a five-year supply had been demonstrated in terms of PPS3, that five-year supply was "fragile". Paragraph 54 of PPS3 sets out the circumstances in which sites are considered "deliverable" for the purpose of deciding whether there is "an up-to-date 5-year supply of deliverable sites" in accordance with para.70 of the Circular:

> "To be considered deliverable, sites should, at the point of adoption of the relevant Local Development Document:
>
> —Be Available—the site is available now.
> —Be Suitable—the site offers a suitable location for development now and would contribute to the creation of sustainable, mixed communities.
> —Be Achievable—there is a reasonable prospect that housing will be delivered on the site within five years."

92 Mr Hockman submitted that since the first defendant had concluded that it was reasonable to assume a figure of 420 units was likely to be achievable at the Queen Elizabeth II Barracks by 2012, it was illogical or unreasonable also to conclude that the five-year supply was fragile. The first defendant was adding a further test, fragility, which was not referred to in PPS3. In my judgment, the first defendant was doing no such thing; she was merely responding to the particular circumstances of this case, where a very significant proportion of the five-year supply (420 out of 1115 units, or some 38 per cent of the five-year supply) was dependent on one site producing units by 2012 and where, despite reasonable assumptions to the contrary, there might be slippage in the timetable put forward by the claimant for bringing the site forward for development. Far from being unreasonable, the first defendant's observation that this particular five-year supply is "fragile" was eminently reasonable on the facts of these appeals. A "reasonable prospect" that

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housing will be delivered on a particular site in five years may range from a near certainty (insofar as that is possible in an uncertain world), that housing will be delivered, to it merely being more likely than not that housing will be delivered on a particular site. The first defendant's approach merely reflects the wisdom of not putting too many of one's eggs into the same planning basket.

93 It was also submitted that the first defendant had failed to consider the Inspector's conclusion that there would be possible disadvantages in prematurely releasing the main appeal site for housing "through the unnecessary development of greenfield land" (see paras 12.31 and 12.55 of the Inspector's Report). Having concluded that there was a five-year supply of deliverable sites, the first defendant considered, in accordance with the advice in para.70 of PPS3, whether granting planning permission would undermine the achievement of wider policy objectives. The Inspector's conclusion that harm would be done through the "unnecessary release of greenfield land" was reached in the context of her assessment of policy H4 of the structure plan. The purpose of that policy was "to ensure sufficient housing land is provided throughout the structure plan period to meet identified needs while avoiding the unnecessary use of greenfield land" (see para.12.27 of the Inspector's Report). In para.23 of her decision letter, the first defendant explained why she had assessed the appeal proposals against the more recent policies in PPS3:

> "She concludes that as the appeal site is a greenfield site, and as she has identified a greater than 5 year supply of deliverable housing land, of which the majority of sites are previously developed land, that the appeal proposals are not in accordance with the development plan. However, the relevant policy in the development plan predates PPS3, which is the latest statement by the Government on national policy towards the delivery of housing. The Secretary of State considers that the correct approach to take in this case is to consider the appeal proposals against PPS3 policies, which supersede those of the development plan."

94 Hence the first defendant's approach in [28] of the decision letter (above) to the "greenfield issue" raised by the Inspector in her report. For these reasons, there is no force in the second ground of challenge.

Ground 3

95 In the minded to grant decision the first defendant agreed with the Inspector's conclusion that all the proposed improvements to King John's Ride (KJR) were "a necessary and important element of the overall housing scene" ([23]). At the inquiry the claimant had sought a "Grampian" condition prohibiting the commencement of development until works were carried out. The Inspector thought that this requirement was excessive:

> "In order to ensure the housing is served by the necessary infrastructure the improvements need to be in place before the first occupation of the dwellings, not prior to commencement of development. The works would take place on Council owned land and the Council is also able to grant cycle rights. The Council as local planning authority has endorsed the improvements and the

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planning brief suggests the improvements would be achieved by way of a commuted contribution. The Council as landowner did not make objections to the planning application. On that basis Council consent may be anticipated. To the best of my knowledge the Appellants have also followed the only available procedure open to them to establish whether permission would be required to carry out the works on common land. Therefore there are reasonable prospects of the improvements being secured within the necessary timescale. The Grampian form of conditions put forward by the Council in relation to Appeals A and G would be unreasonable and would therefore fail one of the tests in Circular 11/95. I am satisfied that the planning obligations in the unilateral undertakings offer an appropriate procedure for securing the improvements." (Paragraph 12.34 of the Inspector's report).

96 The s.106 obligations put forward by the second and third defendants require them to use "all reasonable endeavours" to obtain the claimant's consent as landowner to the proposed improvements: lighting, widening, permitting it to be used as a path by cyclists and creating the two new links. The second and third defendants also agreed to use all reasonable endeavours to obtain, if required, planning permission, consent for works on common land and a licence from NE under the Habitats Regulations. There was no suggestion that NE would object to the proposed improvements and the claimant did not submit that consent would be required under the Commons Act, merely that there was no certainty about that matter (see para.7.18 of the Inspector's Report). In reality, therefore, whether or not various improvements to King John's Ride could be implemented depended on obtaining the council's consent as landowner and the authority able to grant cycle rides. It had not objected to the appeals in its capacity as landowner, but in its representations in response to the minded to grant letter, the claimant maintained its position that the Grampian conditions it had put forward were necessary, and that the obligation to use reasonable endeavours was inadequate to secure the improvements. The representations criticised the obligations on the basis that:

"... [T]he Undertakings as drafted and submitted to the Inquiry commit only to use 'reasonable endeavours' to secure these improvements. Notably, the Undertakings commit only to use reasonable endeavours to the point initially of first occupation and then, if necessary, to completion of the development. However, if these improvements have not been secured by this time the submitted Undertakings provide for these obligations to cease. Whilst HDC accepts that there is a reasonable prospect of these essential improvements being delivered in accordance with the Undertakings submitted, there is clearly some potential for any or all of these obligations to cease without the essential improvements being secured."

97 The claimant also complained that the first defendant had not explained why its suggested Grampian condition did not comply with Circular 11/95. The explanation should have been obvious, but the first defendant nevertheless provided it in [36] of the decision letter:

"36. The Council's proposed Grampian conditions would require the improvements to King John's Ride to be in place prior to the commencement

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of development. The Secretary of State considers that the need for the identified improvements to King John's Ride to be in place arises from the point at which the dwellings are first occupied, and considers that requiring the improvements to be in place before development commences is requiring them at too early a stage in the process. She therefore finds this to be unreasonable, and concludes that the proposed Grampian conditions would fail the sixth test of paragraph 14 of Circular 11/95."

98 The first defendant also considered the claimant's criticisms of the obligations put forward by the second and third defendants in [33] and [34] of the decision letter:

"33. . . . She accepts that the improvements are a necessary and important element of the overall housing scheme: She has considered the evidence put forward at the time of the inquiry by the Council and the appellants. She finds the proposed improvements to be in line with the planning brief for the site, adopted by the Council as Supplementary Planning Guidance in 2000. The planning brief also allows for the improvements to be promoted by means of a commuted contribution. The Council is the owner of the land and, as such, is able to grant cycle rights. It has also endorsed the improvements as the local planning authority, and it did not object to the planning application in its capacity as landowner.

34. The Secretary of State considers that, in these circumstances, it is reasonable to retain the view that there are reasonable prospects of the improvements being secured within the necessary timescale."

99 Although it was not suggested by the claimant at the inquiry, or in its representations following the minded to grant letter, or even in the claim form, which merely referred to the first defendant's failure to impose "an appropriate Grampian or other condition", Mr Hockman submitted that the first defendant should have imposed a Grampian condition which prevented occupation of the dwellings prior to implementation of the improvement works. Whether it was expedient to impose such a condition was a matter for the first defendant's planning judgment. In the particular circumstances of this case, where the only significant potential obstacle to the implementation of the improvement works was the need to obtain the claimant's consent to them as landowner, it is not surprising that both the Inspector and the first defendant considered that the undertakings offered by the second and third defendants were perfectly adequate.

100 Although Circular 11/95 makes it clear that, as a matter of policy, Grampian conditions should be imposed on a planning permission only if there are at least reasonable prospects of the action in question being performed within the time limit imposed by the permission (see para.40 of the Circular), it does not follow that a Grampian condition must be imposed in all cases where it has been concluded that some action is necessary, and that there are reasonable prospects of the action being carried out within the timescale of the planning permission. Had the first defendant not been satisfied that there were reasonable prospects of the improvements being secured, she would not have been willing either to impose a Grampian condition or to accept the undertakings entered into by the second and

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third defendants. Once she accepted that there were such prospects, it was for her to decide how the improvements should be secured. Since the ability of the second and third defendants to carry out the relevant action in the present case is largely, if not entirely, dependant on obtaining the claimant's agreement as landowner, and as the authority with the power to grant cycle rights, the first defendant was entitled to conclude that a Grampian condition was unnecessary and that the undertakings entered into by the second and third defendants would be sufficient to secure the necessary improvements. It follows that there is no substance in Ground 3 of the challenge.

A last word

101 For the sake of completeness, I should mention that in Mr Hockman's skeleton argument he submitted that there was no evidence in the decision letter that the first defendant had actually granted planning permission. The decision letter states that the four appeals are allowed, but does not expressly state that the planning permission is granted for the developments that are the subject of the appeals. Mr Hockman drew attention to the powers conferred on the first defendant by s.79(1) of the Act: on an appeal under s.78 she may allow or dismiss the appeal "and may deal with the application as if it had been made to [her] in the first instance". Wisely, this submission was not pursued in oral argument. It is true that [39] of this decision letter does not contain the usual form of words "and grants planning permission for . . ." after "the Secretary of State hereby allows your appeals", but the decision letter has to be construed as a whole and in a common-sense way.

102 Under the subheading "Overall conclusions", paragraph 38 of the decision letter is in these terms:

> "Following her consideration of the further evidence and representations submitted by the parties pursuant to her minded letter of 4 April, the Secretary of State is now satisfied that the Council has demonstrated it has an identifiable five year supply of deliverable housing land, but it is one that is dependent upon timely delivery from a single site. She therefore finds the five year supply of deliverable housing land to be fragile. She also concludes that a grant of planning permission would not undermine the achievement of relevant policy objectives, and that when this is weighed together with those considerations she has identified above which point in favour of granting planning permission, these are of sufficient weight to overcome the proposal's conflict with the development plan."

Having so concluded, it would have been perverse for first defendant not to have granted planning permission. The failure to include a formal statement to that effect in the decision letter was clearly an oversight, but that oversight is of no consequence because the decision letter incorporates the minded to grant decision, in which the first defendant had said that she was "minded to allow the appeals and to grant planning permission subject to conditions . . ." It also incorporates Annexes 1–4, which set out the first defendant's conditions, and which refer to "the development hereby permitted". In construing the document as a whole, regard may be had to the conditions in Annexes 1–4. Once that is done, there can be no

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doubt that the first defendant did not merely allow the appeals, she also granted planning permission for the development comprised in the four appeals. It is with some relief that I reach this conclusion since it means that this very lengthy judgment has not been entirely in vain.

Conclusion

103 The claimant's application is dismissed.

Reporter—Colin Thomann

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DIGEST

The digest aims to cover details of property law and planning cases that will not be reported in full but which are of interest, and notes of recent cases that will be dealt with in a full report at a later date.

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Jones v Merton LBC—*tolerated trespasser—cessation of possession—liability to pay mesne profits*

Close Trustees (Switzerland) SA v Vildersola—*trustees future litigation costs—proposed retention from income of life tenant—whether trustees acted reasonably in reaching their decision*

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Transview Properties Ltd v City Site Properties Ltd—*rectification of sale agreement—unilateral mistake—absence of sharp practice*

Hanoman v Southwark LBC—*secure tenant's right to long lease under Housing Act 1985—relevance of rent paid by housing benefit—effect on the premium to be paid—collateral contract—jurisdiction of county court*

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JONES v MERTON LBC

COURT OF APPEAL

(Arden, Wall & Wilson L.JJ.): June 16, 2008

[2008] EWCA Civ 660; [2008] 2 P. & C.R. DG10

Intention; Mesne profits; Notification; Possession; Secure tenancies; Tolerated trespass

Mr Jones (the appellant) was the tenant of a flat under a secure tenancy within Pt IV of the Housing Act 1985. His landlord was Merton LBC (the respondents). In 2005, by virtue of a possession order Mr Jones became a tolerated trespasser. In 2006, Mr Jones was ordered by the county court to pay to his former landlord £3,200 by way of mesne profits for the period between October 3, 2005 to September 25, 2006. Mr Jones appealed against this order, claiming that he had given up possession of the flat no later than October 3 and that he was not liable to pay mesne profits in respect of any period thereafter. The former landlord argued that Mr Jones' liability continued until it was notified of the cessation of occupation.

Wilson L.J. noted that the term "tolerated trespasser" was coined by Lord Browne-Wilkinson in *Burrows v Brent LBC* [1996] 1 W.L.R. 1448 and referred to a former secure tenant against whom a possession order has been made order in which the specified date for giving up possession has now passed, but which has not been executed. The tenancy can be revived at any time before the execution of the order and the effect of such revival is retrospective. Wilson L.J. acknowledged that the former tenant can be tolerated in three ways. First, he can be actively tolerated by the former landlord who enters into an agreement with him not to seek to enforce the possession order. Secondly, and as on the present facts, he can be passively tolerated by the former landlord who neglects to take steps to enforce the possession order. Thirdly, he can be tolerated by the court which stays or suspends execution of the order. The appellate court accepted that there were as many as 750,000 tolerated trespassers in public sector housing in England and Wales and that, in inner London, between 10 per cent and 20 per cent of occupants of local authority housing are tolerated trespassers rather than tenants.

The former landlord submitted that it was in the public interest that public sector housing authorities should be made aware as soon as possible that the rights of a tolerated trespasser are at an end. It was argued that, analogous with secure tenants, the giving of a notice was required at law. Wilson L.J. observed, "Thus, although the tolerated trespasser may give up possession, his liability for mesne profits is said to continue until his former landlord is notified thereof." Mr Jones argued that notice was irrelevant. The appellate court rejected the landlord's contention. The

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CLOSE TRUSTEES (SWITZERLAND) SA v VILDERSOLA

HIGH COURT

(Deputy Judge Mark Herbert Q.C.): June 9, 2008

[2008] EWHC 1267 (Ch); [2008] 2 P. & C.R. DG11

Costs; Future liabilities; Income; Life tenants; Retention; Trustees' powers and duties

This was an application by trustees for the approval of a step to be taken in the administration of a trust. The trustees proposed to make a retention of one-third of the future income of the life tenant. The purpose of this was to form a reserve out of which the trustees could reimburse themselves in respect of costs connected with overseas litigation. The litigation had been commenced by the life tenant and the trustees were the defendants. The claim was that the trustees had so poorly supervised the activities of appointed investment management companies that this amounted to a breach of trust or breach of duty involving wilful misconduct or fraud. At the outset the Deputy Judge admitted some scepticism:

> "... [I]t strikes me immediately as a strong thing for trustees to withhold income from the beneficiary in these circumstances. The ultimate outcome of the proceedings is currently unknown, and the trustees may in the end not be entitled to reimburse themselves out of the trust assets for their costs. In addition the costs of litigation, if they are allowable, and to the extent that they are not recoverable from another litigant, are in my experience ordinarily deductible, at least in part, from the capital of trust assets, not wholly from the income. Also, if the trustees are in due course authorised to recover their costs out of the life tenant's income during the remainder of her lifetime, she may live for many years and, depending on the sums involved, her income may prove to be adequate without any retention being made now in anticipation."

Nevertheless, the powers of the trustees were drafted in extremely broad terms and the question before the Deputy Judge was not whether the court would itself make the requested retention. Instead, the court had to decide three different issues. First, did the trustees have the power to make the retention? The Deputy Judge's answer to this question was in the affirmative. The Trust Deed gave the trustees a broadly expressed indemnity for outgoings and the discretionary power to withhold payment if conflicting claims arose. Under the Trust Deed the trustees were entitled to a lien over trust income as well as trust capital. The Deputy Judge felt that the position was the same under the general law:

> "If trustees have actual or contingent liabilities, and if those liabilities, when and if they materialise, will or may be payable out of the income of the trust

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> fund, then the trustees have power to withhold income by way of retention against that liability. The retention will not alter the beneficial entitlement to the income retained, nor will it alter its character as income. The sum retained will be held until circumstances change so as to enable the trustees to appropriate it towards the liability, if they are then entitled to do so, or so as to require them to release it to the beneficiary."

Secondly, was the decision made one which a reasonable body of trustees could properly reach? The answer to this was no. In part, this turned upon the assessment of likelihood or probability of future events. It was submitted that, in assessing these likelihoods, the court should make reasonable assumptions in favour of trustees when the claims of trustees and beneficiaries were in conflict. The Deputy Judge admitted that this was correct in principle, but emphasised that the issue of a possible retention was different in that it was a matter between income and capital. The Deputy Judge explained, "In that context the trustees and the court should not favour one party against the other, and they should both approach the question by making reasonably sensible and prudent estimates about future development based on the information which is, or should be, before them at the time." The trustees did not have sufficient information as to the life tenant's needs and resources to justify a step that would reduce her income by one-third. Their decision to withhold income in these circumstances could not be made without taking proper account of this relevant factor. In addition, there was a need to make a genuine estimate of the life tenant's state of health and life expectancy. The Deputy Judge concluded, "That is not a process which has been presented to the court in these proceedings, and it is not one which the trustees appear to me to have undertaken." The trustees had not made out their case for retention out of income.

Thirdly, was the decision made was vitiated by any conflict of interest? The answer to this question was no. Although in one sense there was an obvious conflict, the trustees' proposal was not designed to frustrate her claim. The retention was largely a matter between the beneficiaries and, accordingly, the trustees were not labouring under a relevant conflict.

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GOVERNORS OF THE PEABODY TRUST v REEVE

HIGH COURT

(Deputy Judge G. Moss Q.C.): June 2, 2008

[2008] 2 P. & C.R. DG12

Landlords' rights; Residential tenancies; Service charges; Social landlords; Unfair contract terms; Variation

This was a test case relating to the ability of the claimant social landlord (the Peabody Trust) unilaterally to alter the terms of its tenancies for approximately 10,000 tenants. Mr Reeve was a representative defendant. Clause 5(a) of the standard form tenancy agreement dealt with altering the agreement. With the exception of rent, this clause provided that the agreement could only be altered by the written agreement of both parties. Clause 5(b) went on, however, to allow for variation of terms by landlord's notice as if s.103 of the Housing Act 1985 applied to the agreement. Section 103 allows local authorities (but not social landlords) to vary periodic tenancy agreements in accordance with a notice procedure. There were two issues which arose in this test case. First, whether cl.5 gave the claimant the ability to effect unilateral variations of the agreement using the s.103 procedure. Secondly, and if the claimant enjoyed such a right, that the clause was not binding upon the claimant by reason of being an unfair term in the context of reg.8 of the Unfair Terms in Consumer Contracts Regulations 1999.

First, as to the interpretation of cl.5 it was noted that its two limbs were directly contradictory. The claimant asserted that the court should look to the surrounding circumstances prevailing at the time the tenancy agreement was entered. It was a social landlord with thousands of properties which now sought to levy a charge for services that it had previously provided at no cost to the tenants. By way of an aside, the Deputy Judge assumed that the market rent could be varied to include the value of the services rendered. He did admit, however, that there may in practice be restraints upon what rent could be charged. The Deputy Judge felt it important that the claimant's standard form tenancy did not oblige the landlord to provide services. Hence, the services could cease if payment was not made for them. Nevertheless, it was more convenient for the landlord to be able to set out an express and detailed means of calculating and recovering service charges in the tenancy agreement. The claimant contended that a social landlord with such a large number of properties needed to have a unilateral method of varying tenancy agreements in order to manage its housing stock. The Deputy Judge emphasised that social landlords now fell beyond the scope of s.103, "Accordingly, Parliament does not appear to have thought it any longer appropriate for registered social

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landlord, as opposed to local authorities, to have such a statutory power as part of their ability to manage their housing stock ... that is a risk that Parliament as chosen to take." In addition, a private landlord who owned a large number of properties could never be said to enjoy the s.103 power. The first limb of cl.5 was clear and easy to understand. Rent apart, the tenancy agreement could only be altered in writing with the agreement of both parties. The second limb, however, was meaningless to a tenant who was unaware of the s.103 provisions. Even if the tenant had understood the workings of s.103, the tenant would be signing up to flatly contradictory and irreconcilable provisions. The tenant could not be taken to be agreeing to allow a unilateral variation by the claimant.

The claimant asserted that the tenants would not be prejudiced by the proposed changes as they should be expected to pay for the services that they receive. The Deputy Judge was unimpressed and pointed out that the clause upon which the claimant sought to rely was not limited to the payment of services already rendered. He explained, "It is an extremely wide right of unilateral variation. I would take considerable persuasion that any tenant would agree or should be taken objectively to agree to such a wide clause without a clear and unambiguous term to that effect." Regulation 7 provided the answer to the conflicting sub-clauses of cl.5. It states that, when there is doubt as to the meaning of a written term, the interpretation most favourable to the consumer will prevail. It also provides that the seller/supplier shall ensure that any written term of a contract is to be expressed in plain, intelligible language. It is, moreover, established that the Regulations apply to contracts affecting land: *R. v Newham LBC* [2005] Q.B. 37. As there was doubt as to the meaning of cl.5, the Deputy Judge felt obliged to favour the consumer. Hence, there could be no variation of the tenancy agreement without the written agreement of both parties. The Deputy Judge felt that the Regulation appeared analogous to the *contra proferentem* principle which is that, in the case of ambiguity, a document is construed against the party putting it forward. The present case was unusual in that it involved two flatly contradictory provisions immediately next to each other. Nevertheless, when there is no compelling reason to choose one sub-clause over the other, the *contra proferentem* principle "does enable the court to break the deadlock and apply the provision less favourable to the party putting the terms forward ... in cases not covered by the Regulations or its predecessor, the principles of English domestic law achieve the same result". The Deputy Judge agreed also that, as a last resort, the concept of "repugnancy" would ensure that, when two provisions conflict, the earlier will prevail over the later provision. He admitted, however, that the sub-clauses could just as easily have appeared in the reverse order and added, "It is hardly satisfactory for the true agreement of the parties to be ascertained on grounds which may be arbitrary and I suspect it is only in rare cases that this approach will be applied."

Secondly, the Deputy Judge tackled the issue of whether the term would not, in any event, be binding because it was an unfair term. In the light of his finding that cl.5 did not give the claimant a right of unilateral variation, this consideration was not strictly necessary. Nevertheless, the Deputy Judge acknowledged that a unilateral variation in favour of the landlord caused a significant imbalance in the parties' rights and obligations to the detriment of the tenant. To rely upon one of two contradictory terms in this way would be contrary to the concept of "fair and

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open dealing". The claimant would be unconsciously taking advantage of the tenant by relying upon a term that had not been individually negotiated. The Deputy Judge added:

> "I cannot myself think that it can be fair to give a registered social landlord, which does not operate in the same statutory context or with the same statutory powers and duties as a local authority, the ability to change almost any term of the contract to the prejudice of the tenant."

The claim was dismissed.

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TRANSVIEW PROPERTIES LTD v CITY SITE PROPERTIES LTD

High Court

(Briggs J.): June 6, 2008

[2008] EWHC 1221 (Ch); [2008] 2 P. & C.R. DG13

Contract terms; Contracts for sale of land; Intention; Overage; Rectification; Unilateral mistake

This was a claim for rectification of a sale agreement of property in North London. The claim was made by the purchaser (Transview Properties) against the vendor (City Site Properties). Immediately prior to the sale Transview Properties was the tenant of the whole property. The tenant was, however, in arrears with rental payments and the sale agreement made provision for the arrears to be discharged by six equal monthly instalments. The purchase price was £13.5 million. Although not mentioned in the agreement, £2.5 million was provided by the purchaser's parent company (Woodvale Estates Ltd), secured by a charge on the property. Schedule 3 of the agreement also provided for payment of overage to City Site Properties upon the resale of the property by Transview Properties and/or the obtaining of planning permission for the residential development of the site. In each case City Site Properties was to be entitled to 50 per cent of the increase in value. Disposal Overage was payable only if the sale preceded the grant of planning permission. Planning Overage was to be reduced by the amount of any Disposal Overage already paid. Transview Properties sought rectification of the agreement in order to have a term inserted into Sch.3. This proposed term was to the effect that, if both the rent arrears to City Site Properties and the legal charge to Woodvale Estates were discharged before the application for planning permission was made, no overage payments became due. As these events had occurred before the planning application, Transview Properties claimed that the overage rights had ceased.

The case for rectification was framed around unilateral mistake. Transview Properties alleged that this provision had been included in a travelling draft of the sale agreement and had been removed by City Site Properties by means of conduct amounting to sharp practice. The defendant countered that the term had been removed deliberately by mutual consent. Instead, a broadly similar provision had been renegotiated. This entailed that the rent arrears had to be paid by June 1, 2005 before the overage rights ceased. As the arrears had not been discharged by this date, the rights to overage payment thereby persisted. Briggs J. felt that the most important factual issues concerned a series of telephone calls between the parties which took place in late 2004. He noted that, because of the lapse of time, it was important for the court to have regard to contemporary documents and to overall

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probabilities. The veracity of the witness evidence fell to be tested by reference to objective facts proved independently of the testimony. Briggs J. felt that, on a proper appreciation of the overall probabilities and the possible motives of the parties, the term had been removed by City Site Properties in the belief that the removal had been agreed with Transview Properties. He also concluded that someone at Transview Properties must have been well aware that the term had been removed from Sch.3. He inferred that its solicitors would have pointed this omission out to its client. The result was that the sale agreement was executed in a form which was precisely in accordance with the parties' intentions. Accordingly, Briggs J. rejected the assertion that the removal of the term was achieved by some form of trick or by anything which could be described as sharp practice. Transview Properties' account as a whole failed to satisfy the balance of probabilities, "let alone the requirement for convincing proof appropriate for a rectification claim, especially one necessarily involving proof of an allegation of sharp practice". Accordingly, the rectification claim wholly failed. There was no intention by either party, at the time of the execution of the agreement, that it should contain an overage abatement clause. Briggs J. added that, even if there had been such an intention on the part of Transview Properties, the evidence did not establish any sharp practice sufficient to ground a case in unilateral mistake rectification. Indeed, City Site Properties had taken appropriate steps to draw the removal of the term to the attention of both the purchaser and its solicitors.

The claim was dismissed.

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HANOMAN v SOUTHWARK LBC

COURT OF APPEAL

(Master of the Rolls and Arden & Jacob L.JJ.): June 12, 2008

[2008] EWCA Civ 624; [2008] 2 P. & C.R. DG14

Collateral contracts; Consideration; County courts; Delay; Housing benefit; Jurisdiction; Leaseholds; Leases; Rent; Right to buy

Mr Hanoman appealed against the dismissal of his action for damages against Southwark LBC arising out of the exercise of his right to acquire a lease of his rented flat under Pt V of the Housing Act 1985. The dispute concerned whether the price fell to be reduced by reference to housing benefit used to pay off the rent in like manner to the reduction he would have received if he had paid rent personally. On appeal, the landlord raised a jurisdictional issue to the effect that the county court enjoyed no jurisdiction to grant relief in proceedings once the lease was executed. In response, Mr Hanoman sought to invoke a collateral contract between himself and his landlord which was intended to obviate any jurisdictional problem.

The right to buy contained in Pt V of the Housing Act 1985 entitles secure tenants to purchase their rented homes from the local authority at heavily discounted prices. If the tenant is living in a flat, he can require the local authority to grant him a long lease of the flat. The price payable for the flat is its value less any discount to which the purchaser is entitled. The discount is dependent on the length of time the purchaser has been a public sector tenant. Mr Hanoman was originally notified that he was able to exercise his right to buy and £17,000 was the premium payable for the lease. This represented the then market value of £55,000 less a discount of £38,000. By 2003, the flat was worth £95,000 and, at the time of the appeal, was valued at £190,000. Mr Hanoman duly exercised his right to buy, but lodged several notices of delay. He alleged that the premium payable under the lease should be reduced to nil under s.153 of the 1985 Act. He eventually proceeded with the completion of the transaction, but reserved the right subsequently to apply to court for a declaration as to the application of s.153. In the lower court, it was held, first, that the collateral contract went no further than to elicit the landlord's agreement to Mr Hanoman's initiating proceedings, which he had not been prevented from doing so. Secondly, that the collateral contract was rendered unenforceable because it contradicted the provision in the lease for the payment of a premium. Thirdly, a reduction in premium could not be obtained when the rent was paid by housing benefit. The county court concluded that the purpose of s.153 was to prevent a tenant being prejudiced by the payment of rent because of the local authority's delay. This prejudice could not apply when the rent was paid by housing benefit.

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As to whether the payment of housing benefit was to count as the payment of rent by the tenant, Arden L.J. felt that the answer hinged upon the provisions of the 1985 Act and of the Social Security Administration Act 1992. She concluded that s.153 did not exclude the payment of rent by third parties. She explained, "Where an enactment refers to a person, it is to be taken to include a reference to that person's agent, unless that principle is excluded . . .." Although s.153A(5) speaks of payment of rent by the tenant, s.153B(1) alludes to "any payment of rent". As Arden L.J. observed, "This is an indication in itself that the identity of the maker of the rent payment is not significant . . .." There was nothing to limit s.153 to those who pay rent other than by housing benefit. Arden L.J. added, "It would, moreover, be illogical if . . . a tenant who is paid housing benefit in cash and pays that cash to his landlord as rent thereby obtains the benefit of s.153A(5), but a tenant, who is paid by the more secure route of a credit made direct to his rent account, does not." There was no material difference between the two methods. The effect so far as the tenant is concerned is the same. Section 153 encompasses all rent duly paid, whatever the source of payment.

In relation to the collateral contract point, it was submitted that the agreement (collateral to the execution of the lease) was that the Mr Hanoman would still be able to argue the outstanding dispute before the county court. Arden L.J. felt it clear that the consensus was that Mr Hanoman should be able to preserve his rights after completion. The intention to create legal relations was evident when the parties made the collateral contract. The proper inference to be drawn was that each party intended there to be an effective reservation of rights, that is, to allow Mr Hanoman to see his dispute referred to the court through to its conclusion without objection from the local authority. It went beyond merely permitting the tenant to issue proceedings. As Arden L.J. noted, "That would be a singularly useless protection." She also considered whether the collateral contract was governed by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 in that it contradicted the terms of the lease as regards the payment of a premium. Arden L.J. felt it crucial that rectification was not sought by Mr Hanoman. Instead, he wished for damages or restitution. She explained, "The collateral contract is not an agreement as to the terms on which the lease would be granted. It operates in parallel with the lease." The consideration for the collateral contract was the entering into the lease. There was no need for a genuine detriment to be proved.

Turning her attention to the jurisdiction point, Arden L.J. considered s.181 of the 1985 Act and whether the jurisdiction of the county court was co-terminous with the secure tenancy. The secure tenancy ended with the execution of the long lease. If the court had no jurisdiction, the parties could not confer such jurisdiction on the court. Arden L.J. acknowledged that, "the object of s.181 is to allocate jurisdiction to the county court and not to take away any rights or to confer any new rights". There had been no agreement between the parties as to the point of law concerning the housing benefit. The parties had, however, agreed that Mr Hanoman should be free to have the issue decided by the court even after completion. The present dispute, therefore, fell within s.181.

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