



Neutral Citation Number: [2020] EWCA Civ 578

Case No: A3/2019/1977

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST
HIS HONOUR JUDGE HODGE QC
[2019] EWHC 2272 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2020

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ROSE
and
SIR TIMOTHY LLOYD

Between:

BORWICK DEVELOPMENT SOLUTIONS LIMITED

Claimant
Respondent

- and -

CLEAR WATER FISHERIES LIMITED

Defendant
Appellant

Nathan Wells (instructed by **Brown Turner Ross**) for the **Appellant**
Guy Vickers (instructed by **Naphthens**) for the **Respondent**

Hearing date: 3 March 2020

Approved Judgment

- “Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 29th day of April 2020.”

Sir Timothy Lloyd:

Introduction

1. This appeal from an order of His Honour Judge Hodge QC, made in Manchester on 24 July 2019, requires the court to consider the nature and extent of proprietary rights in relation to fish. The fish in question are in nine enclosed lakes at Borwick in Lancashire, from which they cannot escape. They provide sport for anglers who try to catch prized specimens which, if they succeed, they weigh and photograph before returning them to the lake. The respondent, BDS, carried on a commercial fishery on this basis which had been in operation for some 12 years by 2016. In that year the land comprising the lakes was sold to the appellant, CWF, by way of enforcement of the security of BDS' mortgagee. No rights in respect of the fish were granted or reserved on the transfer to CWF. BDS claims that it retained the proprietary rights over the fish which it held beforehand, notwithstanding the sale of the land. The judge accepted this argument and gave judgment for damages for conversion against CWF, the amount to be determined at a later trial if necessary.
2. The law as to proprietary rights in respect of fish is of ancient origin and we had the benefit of citations from Roman law, from early English authors and from cases of a wide range, both in date and in jurisdiction, in support of able and helpful submissions from Mr Wells for CWF and Mr Vickers for BDS.
3. For the reasons set out below, my conclusion is that the judge was wrong to hold that BDS retained any proprietary rights in respect of the fish after the land had been transferred to CWF. I would therefore allow the appeal and dismiss the claim as regards the fish.

The relevant facts

4. The Borwick lakes were created in voids resulting from the extraction of gravel for the construction of the M6 motorway. BDS bought the land in about 1997 and obtained planning permission for the development of the land as a commercial fishery in 2002. The lakes are stocked with carp and other fish. Under the terms of a section 106 agreement, the nine lakes were to be kept separate and isolated from each other, so that, in practice, the fish stock would be confined to the relevant lake and could not escape from it either to another of the lakes or to the outside world, nor could extraneous fish enter the closed system. There were pipes between the various lakes so that water could flow to and fro, but grates within the pipes prevented all but the very smallest fish from passing from one lake to another. The stock of fish included a number of large specimens, some of which became well known and identified, and acquired given names. BDS contends that the fish are (or were) of great value; it puts the value of its claim in damages at more than £1.1 million.
5. In 2003 BDS granted a lease of the relevant land, including the lakes, to British Waterways Board (BWB), which was to, and did, run a commercial fishery there. There may already have been some relevant fish in the lakes at that time, but BWB spent money on buying fish so as to stock the lakes. BWB's lease came to an end in 2005 in circumstances which do not matter, save to note that BDS paid nothing to BWB for the fish then in the lakes.

6. BDS then ran the fishery itself from 2005, spending money on adding to the stock of fish and on maintaining the lakes and the fish within them. In 2012 it constructed a restaurant and café facility to expand its business. In order to do so, it borrowed money from a lender on the security of a legal charge over the land. In January 2016 the lender appointed receivers under the Law of Property Act 1925 in relation to the site. BDS was already trying to sell the land itself and entered into negotiations with CWF on the basis of a sale of the land for (initially) £700,000 and of “all stock of fish in the lakes” for £200,000. These negotiations came to nothing and on 29 June 2016 the LPA receivers sold the land to CWF for £625,000. The receivers told Mr Smith, BDS’ director, that they did not consider that the lender’s charge extended to the fish and that they had given no warranties to the purchaser in relation to the transfer of ownership of the fish on completion.
7. CWF’s solicitors took the position that BDS had no right to the fish following the sale, but BDS’ solicitors protested, demanding that CWF should not operate a business using what they claimed to be BDS’ fish stocks, which BDS intended to remove. However, the removal would have been a difficult and time-consuming process, which BDS was advised would take between 4 and 6 months and would have to be carried out between October and March. Because of the cost and disruption that this would have involved, later in 2016 BDS changed its position, so as to leave the fish in place but to claim damages against CWF for conversion rather than an injunction. BDS brought these proceedings accordingly, which it commenced in August 2018. The proceedings also related to other assets, but the judge’s decision on that aspect of the case is not challenged on this appeal.

The classification of animals in English law

8. Legal issues as regards animals may arise in a variety of circumstances, including (as here) proprietary claims, or claims arising from damage caused either by or to animals. For these purposes, English law draws a distinction between wild animals and domestic animals. Into which category an animal falls is a question of law, not of fact – a question for the judge in a criminal trial, not for the jury. Despite the disapproval of the use of Latin in court proceedings, it seems to me sensible to use the traditional Latin labels, namely animals *ferae naturae* and animals *domitae naturae*, to mark this distinction, because merely to refer to wild animals, as if it were an ordinary use of English rather than a term of art, might be misleading.
9. There may be some species of which some examples are classified as *ferae naturae* and others as *domitae naturae*, but all fish have always been categorised, in this classification, as animals *ferae naturae*. For BDS Mr Vickers submitted that the fish in the lakes which we have to consider cannot sensibly be referred to as wild: they have never lived in the wild, they are not free to escape from the lakes, and they are not in any sense dangerous to man. He submitted to us, as he had done to the judge, that these fish ought to be regarded as in the category of animals *domitae naturae*, and that the established classification should be regarded as out of date and should be adapted so as to allow such treatment.
10. Pressed during argument for a formula which the court might adopt as a variation of the traditional classification as a matter of law, he put forward the following proposition:

“An animal normally falling within an established category of *ferae naturae* shall nevertheless be classified as *domitae naturae*

- (a) if it is born, spawned or hatched in captivity; or
- (b) having been brought into captivity after birth, spawning or hatching, its captor or such other person to whose custody it is transferred evinces an intention to retain the same in captivity,

in either case unless and until it is released from captivity by its captor or such other person.”

11. The judge rejected the similar submission which Mr Vickers had made to him, saying at paragraph 66 of his judgment that it “would involve rewriting the whole established basis of the existing law”. Only one other case was cited to us in which a court has been invited to adapt the established classification. This is *Buckle v Holmes* (1925) 134 LT 284. (The case went to the Court of Appeal, reported at [1926] 2 KB 125, but this particular point was not pursued on the appeal.) The defendant’s cat had killed what were said to be valuable racing and homing pigeons and some bantams of the plaintiff. The plaintiff sued for damages for the loss, but was unable to prove that the defendant knew the cat to have any specially vicious propensity as compared with cats generally. He therefore argued that, although cats were to be regarded as *domitae naturae* in general, they should be classified as *ferae naturae* in relation to birds such as pigeons and bantams. Shearman J and Sankey J, sitting on appeal from the county court, both held that the distinction was too long and firmly settled as a matter of law for the court to qualify or modify the established classification, however well-disposed they might have been to the proposition if it had not been settled law for a very long time.
12. I agree with the judge on this point. It is not open to the court to alter the long established classification of animals in this respect and to regard certain fish as animals *domitae naturae*. Whatever their individual characteristics, propensity and circumstances, all fish are and must continue to be treated as animals *ferae naturae* as a matter of law. Any change to that would have to be a matter for legislation.
13. For these reasons the argument in BDS’ Respondent’s Notice must be rejected.

The nature of proprietary rights in relation to animals

14. The classification of animals has consequences for property rights as well as for liability for damage done by animals. An animal *domitae naturae* can be the subject of ownership just like an inanimate chattel, whereas live animals *ferae naturae* cannot.
15. The law as to proprietary rights in relation to animals *ferae naturae* is derived from Roman law. It is summarised in Halsbury’s Laws of England, vol. 2 (2017) paragraph 8, as follows:

“There is no absolute property in wild animals while living, and they are not goods or chattels. There may, however, be what is known as a qualified property in them, either:

- (1) *per industriam*;
- (2) *ratione impotentiae et loci*; or
- (3) *ratione soli* and *ratione privilegii*.

This qualified property is defeasible, for if the animal has no intention to return, but resumes its wildness and is at large again and not under pursuit, it is free and may be taken by another person. Thus the special right of property, called qualified property, if conferred *ratione impotentiae et loci*, *ratione soli* or *ratione privilegii*, is in substance an exclusive right to reduce the wild animal into possession, but if acquired *per industriam* it is an exclusive right to the possession of the wild animal which, in the case of a living animal, will continue while it has the intention to return.”

16. Property *ratione impotentiae et loci* refers to the young of animals *ferae naturae* born on the land until they are old enough to fly or run away. Property *ratione privilegii*, according to Lord Westbury LC in *Blades v Higgs*, (1865) 11 HLC 621 at 631, is a right by virtue of “a peculiar franchise anciently granted by the Crown in virtue of its prerogative”, of which examples include a free warren. Neither of these categories requires further attention for present purposes. *Ratione privilegii* is sometimes spoken of as applying to the case of a profit à prendre (for example in paragraph 11 of Halsbury’s Laws), but it seems to me that the rights arising from the grant of a profit à prendre are correctly to be regarded as a particular example of rights *ratione soli*, as they are derived from the rights of the freehold owner of the land.
17. Mr Vickers contended that BDS had an established qualified property right in all the fish before the land was sold, which it had acquired *per industriam*, and that this did not pass to CWF nor did it cease to exist on the sale of the land. He relied on rights acquired *per industriam* because if BDS only had rights *ratione soli* those must have passed to CWF on the sale of the land. It is therefore necessary to compare the two kinds of rights, to consider what are the necessary elements of rights *per industriam*, and then to address the critical question namely whether, if BDS did have such rights before the sale of the land, those rights could and did remain vested in BDS notwithstanding the sale.
18. For CWF Mr Wells did not dispute that BDS had a qualified property right in the fish while it owned the land, but he submitted, first, that there was no relevant difference between the incidents of such a right according to how it was acquired, if acquired by the owner of the land over which the bodies of water lay in which the fish were to be found, so that it mattered not whether BDS’ rights were classified as *per industriam* or *ratione soli*, secondly that BDS had not reduced the fish into its possession sufficiently for this purpose, and thirdly, in any event, that whatever rights BDS had held in relation to the fish ceased to exist once BDS no longer owned the relevant land, being replaced by CWF’s rights *ratione soli*.

19. It is striking that, among all the cases that have been cited to us, only one, the oldest, *Greyes Case* (1593), arose from the transfer of ownership of the land, in that case by way of succession on death. The point before us has never had to be decided in a reported case, and we must seek assistance from observations by authors and judges as to the relevant principles.

Rights held *ratione soli*

20. The freehold owner of land has, as an incident of his rights as such, the exclusive right to hunt, take, keep and kill animals *ferae naturae* while they are on his land. This is the right *ratione soli*. If he or a predecessor in title has granted such rights to another as a profit à prendre, then of course his own rights are limited by the effect of that grant, and the grantee has the relevant rights so far as the grant extends. In *Ewart v. Graham* (1859) 7 HLC 331, the dispute was as to the scope and extent of a reservation to the respondent's father in an Act of Parliament of "all rights of hunting, shooting, fishing and fowling" over certain specified land which had been owned by the respondent's father and later came into the ownership of the appellant. Having taken the opinion of the judges on the point, Lord Campbell LC described the sporting rights in question as being "an interest in the realty which is well known to the law" (page 344). He went on to say:

"The property in animals *ferae naturae* while they are on the soil belongs to the owner of the soil and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth; that right may be granted by the owner of the fee simple, and such a grant is a licence of a profit à prendre."

21. In 1865 the House of Lords again considered the rights of the landowner, where poachers had killed some 90 rabbits on the defendant's land and had sold them to the plaintiff, from whom the defendant's servants recovered them by force: *Blades v Higgs*. It was held that animals *ferae naturae* killed by a trespasser became the property of the landowner. Lord Chelmsford said at 638-9:

"With respect to wild and unreclaimed animals therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed."

22. Thus the qualified right of property which is said to exist *ratione soli* is exclusive, so that the landowner is entitled to control who may take animals *ferae naturae* found on his land. He can grant to others the right to exercise any or all of the sporting rights, either to the exclusion of himself and others, by way of a profit à prendre, or as a mere licence which may or may not be exclusive.
23. The rights of the holder of a profit à prendre of fishery have been described as "the right to fish in the water and when the fish are caught it is a right to the property in the fish": *Fitzgerald v Firbank* [1897] 2 Ch 96, at 102, per Lopes LJ. No doubt the

particular kind of fishery practised at the Borwick fishery was not foreseen in 1897, and Lindley LJ said this at 101:

“If a person chooses to pay for the amusement of catching fish and leaving them in the water of course he can do so, but that is not what is understood by lawyers or men of sense as a right of fishing.”

24. However, the idea of catching other animals for the sake of keeping them alive was not in itself foreign to earlier times. Evershed LJ in *Hamps v Darby* [1948] 2 KB 311, at 322, quoted from Holdsworth’s History of English Law about keeping a singing bird which is of value even though not in monetary terms:

“For if I have a singing bird, though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches. So if anyone takes it from me he does me much damage for which I shall have an action.”

25. The distinction drawn in the passage quoted at paragraph 15 above from Halsbury’s Laws between an exclusive right to reduce the animal into possession, on the one hand, and an exclusive right to possession of the animal, on the other, appears clearly from the decided cases, as in the passage cited above from Lord Chelmsford in *Blades v Higgs*, but it is also clear that the latter right survives only as long as the possession does.

Rights acquired *per industriam*

26. Returning to the propositions set out in Halsbury’s Laws, the qualified rights of property *per industriam* arise when an animal is in someone’s possession, and they last for so long as the animal remains in such possession, and no longer except that it may continue over animals which have the habit of going away and returning, such as bees, in those cases lasting for so long as they intend to return. If the right is claimed by a landowner, it is a more specific right than that which he has over animals not yet taken into possession, but it is no more an absolute right (while the animal is alive) than it is if the animal has not been taken into possession. One of the issues debated in this appeal is what amounts to sufficient possession in circumstances such as those with which we are concerned.
27. Rights acquired *per industriam* are shown in the cases to be valuable in two particular situations. One is where there is no relevant land ownership, for example fishing in the open sea, so there can be no rights *ratione soli*. Another is the case of animals which may roam but return home, such as bees from a hive, or pigeons from a pigeon loft, where the qualified right may prevail even if the animal is away from its home territory.
28. The first of these categories is illustrated by several decided cases. In *Young v Hichens* (1844) 6 QB 606 the plaintiff was fishing in the sea for pilchards and had drawn his net around a large number of fish, but at a moment when his net remained open by some seven fathoms and he was about to close it, the defendant rowed up to the opening of the net and disturbed the fish so that they escaped. The court held that

the defendant was not liable for the plaintiff's loss of the fish, because at the critical moment the plaintiff had not yet taken possession of the fish, which he could only do by closing the net. In *The Ship Frederick Gerring Jr v The Queen*, in the Supreme Court of Canada (1897) 27 SCR 271, the issue was whether the vessel was forfeit to the Crown on the grounds that it had been used for fishing within a three mile limit from the Canadian coast. The fishing process had started outside the limit. A large quantity of mackerel had been collected in a seine, and the crew proceeded to bale the fish from the seine into the vessel. While that process was under way the vessel moved to within the three mile limit. The question was whether "fishing or catching fish" was happening within the limit, it being argued that the fishing was complete when the fish were within the seine. The majority of the Supreme Court of Canada held that the process of fishing was not yet complete while the fish were being baled out from the seine into the vessel. Sedgewick J, with whom King J and Girouard J agreed, spoke of the process continuing until the moment when the fish "are finally reduced to actual and certain possession", which he held did not happen in that case until all the fish were on board the vessel. King J and Girouard J both held that the case before that court was analogous to that which had been at issue in *Young v Hichens*.

29. A third case, decided in the Supreme Court of Ireland, is *Purcell v Minister for Finance* [1939] IR 115. This arose under legislation providing for compensation for malicious injury causing actual damage to property, payable out of public funds. Mr Purcell caught eels in a river, not being the owner of the land over which the river ran nor, so far as the report discloses, holding any right such as a profit à prendre of fishery. He put the eels into a large wooden box, referred to as a trunk, floating in the river and secured to the bank by chains. He kept the eels there, alive, until there were enough of them to take to the market for sale, a process which Johnston J on the first appeal from the circuit court described as involving acquisition of the eels *per industriam*. In his absence, a third party destroyed the trunk, thereby releasing the eels from their captivity back into their natural element. The particular issue in the case does not matter for our purposes, turning on a point of statutory construction on which both of the appellate courts divided equally. It arose in relation to a claim for compensation for the loss of the eels, which so far as the evidence went had not themselves been injured in any way but certainly ceased to be the subject of any proprietary rights on the part of Mr Purcell when they escaped from captivity. The case provides a clear example of a situation in which animals had been taken or reduced into possession, giving the taker rights arising from the possession, which however lasted only for so long as the possession did. Mr Purcell was able to get at eels in the trunk readily and with ease in order to take them on the next stage of their journey to market. Until the destruction of the trunk he had rights over the eels *per industriam*, without having had any rights *ratione soli*.
30. The second category, of what I refer to as roaming animals, is mentioned in early authors. Bracton mentions bees, which he says are understood to be mine if but only if I have shut them up in a hive, but they remain mine if they have flown away from the hive "as long as it is in my sight and the overtaking of it is not impossible" (Edition by Sir Travers Twiss QC, 1878, p.67). This is very close to the text of Justinian, Book II, Of Things, paragraph 14 (see paragraph 67 below in the judgment of Lord Justice Peter Jackson). Blackstone's Commentaries, Book II, chapter 25 is to similar effect at page 392 in the 4th edition: there may be a qualified property in bees,

once they have been reduced into possession so long as they are in the hive, and if they fly out of my hive they remain mine so long as I have power to pursue them.

31. Gaius mentions bees and other animals which have a tendency to return, as a special case, after setting out the general rule, as follows:

“§67. For wild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power; after breaking from his custody and recovering their natural liberty, they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.

§68. In the case of those wild animals, however, which are in the habit of going away and returning, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down, that only the cessation of the intention of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the intention of returning is held to be lost when the habit of returning is discontinued.”

32. Two English cases are of relevance. In *Kearry v Pattinson* [1939] 1 KB 471 the Court of Appeal had to decide on the rights and wrongs arising where bees had left a hive on the plaintiff's land and had swarmed, first to the defendant's land and then farther on. The plaintiff asked the defendant for permission to come onto his land to recover the swarm, which was denied at first. By the time the defendant had given permission, the next day, the bees had moved on and could not be recovered. The defendant was held not liable to the plaintiff for the loss of the bees on the basis that he had no obligation to allow access onto his land. Counsel cited Justinian and Blackstone, and both Slessor LJ and Goddard LJ relied on Blackstone's proposition to the same effect, which I have summarised in paragraph 30 above. Slessor LJ spoke of ownership of bees as being *rationale soli* and said “thus a qualified property may be had in bees in consideration of the property whereon they are found” (page 479). But lower on the same page he said “they are *ferae naturae* before being hived but they may be taken into the disposition of the owner *per industriam* by hiving and so become his property”.

33. Blackstone's propositions were also relied on by the Court of Appeal in *Hamps v Darby*, where a plaintiff sued successfully for loss of and damage to his racing pigeons which the defendant had shot at while they were damaging his crop. Evershed LJ quoted several passages from Blackstone at pages 320-321, including the following:

“A qualified property may subsist in animals *ferae naturae per industriam hominis*; by a man's reclaiming and making them tame by art, industry and education, or by so confining them within his own immediate power that they cannot escape and

use their natural liberty. ... it may happen that [animals *ferae naturae*] shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases unless they have *animum revertendi*, which is only to be known by their usual custom of returning.”

What amounts to possession for the purpose of property rights *per industriam*?

34. The distinguishing characteristic of rights *per industriam* is apparent from the name: some industry or effort must have been used in relation to the animal. As appears from Lord Chelmsford’s observation in *Blades v Higgs*, quoted above at paragraph 21, this may be no more than taking possession of the animal: catching a bird, fish, or other animal and retaining it alive rather than releasing it back to its former freedom. In the present case, a good deal more by way of effort and expense is relied on, the fish having been acquired from elsewhere, in many cases at significant expense, brought to the lakes, released into the lakes and looked after there by appropriate husbandry. I have no difficulty in accepting all of that as amounting to industry for this purpose.
35. The judge interpreted *per industriam* as meaning by industry in the sense of diligence and hard work: paragraph 66. He said at paragraph 68 that he could adapt the formulation of property rights *per industriam* to the relatively recent concept of a commercial fishery in which the point is not to catch the fish and take them away for food, but to face the challenge of catching them merely for the sake of it, the fish once caught and recorded being returned to the lake for future sport. He said that “fish reared and / or introduced into a closed commercial fishery are wild animals in which a qualified property exists through industry, diligence and the hard work of the owner or operator of that fishery”: paragraph 69. Accordingly he held that the owner of the land had a qualified property in the fish. I do not disagree with that, though in some cases it may not require much by way of work to take the animal into the necessary degree of possession, and I would not wish to set up a test which involved differentiating according to the degree of difficulty or effort involved in the task.
36. Mr Wells submitted to us, as he had to the judge, that this is not sufficient unless the animal is under the close control of the person claiming the property rights, who must be able to exercise immediate power and control over them. For this purpose he relied on the cases discussed above: *Young v Hichens*, the Canadian case about seine fishing for mackerel, and the Irish case about Mr Purcell and the captive eels in his trunk. All of those show that close control was needed, and one can see why on the facts of those cases. No rights arising from ownership of the underlying soil were or could be relevant. The fish were at liberty in nature and it was necessary to bring them into captivity if any property right was to be exercised over them. In such a situation it is entirely understandable that a test of close control should be applied, and that the rights should be described as lasting only for as long as the animal remained

in such close control, coming to an end if the animal regained its natural liberty, as Mr Purcell's eels did.

37. Mr Vickers submitted, and the judge held, that such concepts are foreign to the position of the fish in the Borwick lakes. They may never have been at liberty. Certainly many of them had been acquired by BDS from undertakings which had them in captivity, and when they had been brought to Borwick and released into the lakes they were in captivity (albeit not close confinement) and had no realistic possibility of escaping and acquiring any form of real liberty. Why, Mr Vickers asked rhetorically, should that not qualify as the degree of possession sufficient to establish property rights *per industriam*?
38. We were shown some passages from writers on Roman and English law which bear on this topic. The passage from Blackstone, cited by Evershed LJ in *Hamps v Darby* at 320 and set out at paragraph 33 above, refers to "so confining them within his own immediate power that they cannot escape and use their natural liberty". Savigny, quoted by Girouard J in the Canadian case at 304, said this:
- "It is not every *custodia*, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents, whether he can actually catch them when he wishes, consequently possession is not here retained; quite otherwise with fish kept in a stew¹ or animals in a yard, because then they may be caught at any moment."
39. In *Greyes case* (1593) Owen 20, a man bought fish including carp, tench and trout and put them into his pond for store. He then died. The dispute was between the heir, who succeeded to the land, and the executors on whom other property devolved. The executors had removed the fish with nets, and the heir sued them in trespass and was held entitled to succeed on the basis that "the heir shall have the deer in the park and by the same reason the fish", and "he which hath the water shall have the fish". Popham CJ is recorded as drawing a distinction between fish in "a trunk or some narrow place where they are put to be taken at will and pleasure", on the one hand, and fish in a pond on the other.
40. As to these three sources, the report of *Greyes case* is so brief that it would be rash to place too much reliance on a particular phrase, such as "to be taken at will and pleasure". Moreover, the reference to a stew does not tell us anything about the size or nature of the area of water in question. Lord Justice Peter Jackson has drawn my attention since the hearing of the appeal to a body of water near Epsom called the Stew-pond which is three quarters of an acre in size, a lot smaller than the biggest of the Borwick lakes but a great deal bigger than Mr Purcell's trunk, and too big for it to be necessarily easy to take fish from it as and when required. The passage from Blackstone is mainly concerned with deprivation of liberty. It seems to me that it would be wrong to place too much reliance on the use of the phrase "immediate power" in that passage. As for Savigny, on the one hand the discussion in the

¹ "Stew" in this context means "a pond or tank in which fish are kept until ready for the table": Oxford English Dictionary, meaning 2a.

judgments in the Canadian case itself shows that Roman law authorities were not necessarily at one on points in this area, and on the other hand Lord Chelmsford observed in *Blades v Higgs* at 637 that English law had not followed Roman law in all respects as regards “the right of property in wild animals captured”. Therefore I cannot accept Mr Wells’ submission that in order to establish rights of property *per industriam* it is essential in all cases to be able to show a close degree of control over the animals in question.

41. I do not, however, question those authorities that do justify a test of close control, namely *Young v Hichens*, the Canadian case and Mr Purcell’s case in Ireland, in relation to the type of facts with which those cases were concerned. In all of those cases close control was decisive, because, absent such a degree of control, the relevant fish were free and unconstrained in nature and were available for anyone to take. In such a case, in order to establish any rights over the fish it is essential to prove that possession has been taken, and possession for that purpose requires close control.
42. By contrast, in the case of roaming animals, what is necessary is to show that they have an established home territory, so to speak, bees in a hive, pigeons in a pigeon loft or the like and perhaps other animals in an equivalent base, provided by the person who claims the relevant rights.
43. BDS was able to control the fish in the Borwick lakes and keep them in captivity without having to keep them under anything that could be called close control. The reason for that was that it owned the land over which the lakes lay, and was therefore able to exclude any possibility of their escaping. They were in BDS’ possession and they could not escape from that, either into anyone else’s possession or into any kind of natural liberty.
44. In my judgment, possession amounting to close control is necessary in order to establish qualified property rights *per industriam* in relation to animals *ferae naturae* where the person asserting the right does not have any title to the land on which the animals are found, or any relevant right derived from the owner of that land.
45. The cases of roaming animals, including bees and pigeons, do not depend on close control, but on the application of industry required, of hiving bees or taming and homing pigeons or the like. When the animal is on home territory the property rights do not differ from those arising *ratione soli*, but rights *per industriam* are important and can be asserted when the animal has gone away, so long as it appears to have an intention to return. In the nature of things that cannot apply to the fish in the Borwick lakes.
46. Leaving aside those two types of case as irrelevant for present purposes, we have a case in which the landowner, BDS, brought fish to the Borwick lakes, released them into the lakes from which they could not escape, and retained possession of them because they were, and had to remain, in the lakes. They could not regain any kind of liberty, assuming that they were not removed from the lakes by human agency and taken away. BDS had all the rights of the landowner in relation to them. Since its control over and possession of the fish depended entirely on its ownership of the land, it does not seem to me that its rights over the fish differed from those that any other person would have over fish in closed lakes, situated entirely within land of which he is the owner.

47. Thus, I accept that a test of close control is necessary in cases of rights *per industriam* only where the rights are asserted over animals where there is no relevant land ownership. But, that being so, (and leaving aside the cases of bees, pigeons and the like) I question whether, in cases where land ownership is relevant, there is any need to distinguish between rights *per industriam* and rights *ratione soli*, or any point in doing so. Rights *ratione soli* give the landowner (or someone whose rights derive from those of the landowner, for example BWB during the subsistence of its lease) the ability to invite anglers to come to fish at the lakes and to pay for this facility, and correspondingly also the right to prevent unauthorised persons from coming onto the land and from taking fish, as well as the right to sue for loss of the fish or interference with them or with the lakes in trespass, conversion or nuisance as the case may be. In all those respects it is sufficient to assert rights *ratione soli*. Rights *per industriam* do not afford any additional benefits in these respects.
48. Mr Vickers argues, and the judge held, that qualified property *per industriam* does give the holder a different and better right, because such rights survive even after the holder of the rights no longer has the rights of the landowner or any rights derived from such ownership. That is the critical question to which I now turn.

Did BDS' rights in relation to the fish survive the sale of the land?

49. Having held that BDS had a qualified property in the fish *per industriam*, the judge went on to say that this property did not pass when the land was conveyed to CWF. At paragraph 71 he said that BDS retained its qualified property in the fish because the transfer of the land did not specifically address or purport to transfer title to the fish. He did not explain why or how BDS could retain this qualified right when it was no longer the owner of the land and had not retained or obtained any right to go on to the land in CWF's ownership in order to get access to the lakes and the fish, and CWF had the landowner's exclusive right to fish for whatever fish there might be in the lakes on its land.
50. Mr Wells relied both on the general proposition that BDS ceased to have possession of the fish when it ceased to own the land, and also on the decision in *Kearry v Pattinson* where at 479 Slesser LJ said of bees that they "may remain his property while they are swarming so long as they are in his sight and he has lawful power easily to pursue them". There are references elsewhere to the need for the animal to remain within sight, but I cannot regard those as essential. The main focus of the court's attention in *Kearry* was on the question whether the plaintiff had the lawful power to pursue the bees, not on whether they were within his sight. Goddard LJ said at 481: "The whole of this argument comes down to what Blackstone means when he says 'and have power to pursue them'" and later "It follows, therefore, that you cannot demand entry upon another man's land for the purpose of retaking animals". That was also the essence of the reasoning of Slesser LJ at 480, with whom Clauson LJ agreed. The claim failed because the plaintiff was not entitled to insist that the defendant allow him on to the latter's land for such pursuit.
51. It is clear that the qualified right of property *per industriam* depends for its acquisition and its retention on possession of the relevant animals. I have discussed what amounts to such possession in different types of case, and I accept that where the person asserting the rights owns the land on which the animals are located (or has sufficient rights derived from the landowner), and can therefore prevent them from

leaving his land, he does not need to show that they are in his close control. But he must still show that he has them in his possession to some extent. The judge put forward the test of separation and control, and that may suffice for present purposes.

52. However, after the sale of the land to CWF, in what sense or respect could it be said that BDS had any kind of control over the fish, and therefore possession of them? If the transfer of ownership of the land had been the result of a transaction negotiated between BDS and CWF directly, the terms of that transaction would have determined the parties' respective rights. Of course, BDS was in name and in law the seller of the land, but it acted through the agency of the receivers appointed by its mortgagee under the Law of Property Act 1925, and we should not ignore the commercial reality that BDS itself, through its directors and shareholders, was not involved in the negotiation. As a result, neither in the contract for sale of the land on the part of BDS by the receivers nor in the transfer on completion was there any express reference to the fish, nor to any rights in relation to the fish, and in particular there was no reservation to BDS of any right of access over the land in connection with the fish. It was said that the receivers gave no warranty to CWF in respect of the fish, which is not surprising, and that they had taken the view that the lender's security did not include the fish. This is likely to have been right, given that the legal charge created by BDS was expressed to charge the Scheduled Property, consisting of the land comprised in two titles registered at HM Land Registry, "and all Rights relating to the Scheduled Property in existence at the date of this mortgage", those Rights as defined being irrelevant for present purposes. The charge of the registered titles will have included the landowner's rights *ratione soli* in respect of fishery within the land comprised in the titles, but cannot have included any specific rights in respect of all or any of the fish in the lakes.
53. Absent any reservation of rights in the transfer of the land, BDS had no right to enter the land and do anything with or in respect of the fish after the sale to CWF. Mr Vickers compared the position of the fish after the sale with that of chattels owned by a vendor of land which are not included in the sale but, for whatever reason, are left on the land at the time of the sale. He submitted that the sale of the land would not transfer title in the chattels to the purchaser, and that accordingly the transfer of the land in the present case need not and should not be taken to transfer any rights in relation to the fish to CWF. The difference between the two cases lies in the different nature of the relevant ownership rights. Chattels are the subject of absolute rights of ownership such that they do not pass with the land, assuming that they are not fixtures and are not comprised in the sale itself in which case they would pass contractually and by delivery. What the position may be between vendor and purchaser in respect of chattels of the vendor left by mistake or otherwise on the land would depend on the terms of the transaction, but in general the vendor would not be entitled to insist on going on to the land to recover the chattels, but might be able to demand that the purchaser deliver them to him (subject perhaps to reimbursement of any cost incurred) and might assert a claim in conversion if their return is refused.
54. The judge drew a different analogy, at paragraph 71, with a domestic rabbit in a hutch on the property, saying that title to the rabbit could not pass automatically on a transfer of the land on which the hutch stood. As to that, I agree, but a domestic rabbit may be an animal *domitae naturae* of which absolute ownership is possible, in which case it (and the hutch) would be in the same position as any other chattel of the

vendor which is not included in the sale but is not removed from the property sold before completion of the sale.

55. Animals *ferae naturae* are not the subject of such absolute property rights. The rights that can exist in them *per industriam* depend on continued possession, with the sole exception of roaming animals while they retain an intention to return. If the keeper's possession of the animal depends on his ownership and control of the land on which they are found (or on some right derived from the landowner), then it must follow that, once he is not entitled to the land on which they are kept, or to any relevant right derived from the landowner, he no longer has the possession which is essential to the continuance of his rights. Mr Vickers laid emphasis on references in the cases to animals regaining their natural liberty as being the case in which the former keeper loses his qualified rights based on possession. That is no doubt a common situation, as it was with Mr Purcell's eels. But it does not seem to me to be any more essential to the legal position than is the reference to the animal remaining in sight. The real issue, except in the case of roaming animals, is whether they are sufficiently in possession or not as a matter of fact. Where rights acquired *per industriam* depend on the ownership of the land, or of some rights derived from the landowner, with the result that it is not necessary to prove close control of the animals, the rights cease to exist when the ownership of the land (or of the derived rights) itself comes to an end, because from that moment on the possession which is essential to the continuance of the rights no longer exists.

Conclusion

56. The fish in the Borwick lakes, from which they cannot escape, were and are the subject of a general and exclusive right of the landowner to catch them, and then either to kill them or to do whatever else he pleases with them. He can exclude all others, and can authorise such others as he may choose to come on to the land and take the fish. They are in his possession because they are on his land and cannot escape of their own accord, although he cannot get at them without considerable effort.
57. It seems to me that BDS' rights in relation to the fish during its ownership of the land should properly be regarded as arising *ratione soli*, because such ownership was both necessary and sufficient as the basis of the asserted rights. But even if BDS' rights were treated as having arisen *per industriam*, these rights were qualified and could subsist only for so long as the fish were within BDS' possession. The classic case referred to in the books is where they escape from possession as Mr Purcell's eels did, but in my judgment the case is the same when ownership of the land comes to an end, without the reservation of any right of access over the land such as would enable the previous owner to come and take the fish himself. From that moment on the former owner no longer has possession of the animals in any sense, and his former rights acquired *per industriam* no longer exist.
58. For these reasons, I disagree with the judge and would hold that BDS' qualified rights over the fish, whether they were regarded as arising *per industriam* or as *ratione soli*, came to an end when the ownership of the relevant land passed to CWF in June 2016.
59. This might be seen as an unsatisfactory result, BDS having expended substantial sums on acquiring the fish so as to stock the lakes and on their husbandry thereafter. As to

that, while the receivers were no doubt correct to take the position that the mortgage security did not include any fish as such, the security over the freehold estate in the land did include the exclusive rights of fishery *ratione soli*, which enabled the commercial fishery to be operated at the lakes. That feature would, presumably, have contributed to the value of the land on the open market. Before the sale BDS was entitled to take any of the fish and place them elsewhere, if it had anywhere to put them, or to sell them to another fishery business. That would have been an exercise of the qualified rights over the fish which BDS then held. As it did not do so, its rights came to an end on the transfer of the land.

60. For these reasons I would allow the appeal.

Lady Justice Rose:

61. I am grateful to Sir Timothy and Lord Justice Peter Jackson for their erudite and interesting judgments dealing with this difficult case. I agree that the appeal must be allowed because whether the rights that BDS enjoyed over the fish in the lakes were enjoyed *ratione soli* or *per industriam*, they came to an end when the land was sold to CWF. If the rights were enjoyed *ratione soli* they came to an end because CWF now owns the land and if they were rights *per industriam* they came to an end because BDS no longer has the right to go onto the land to claim the fish and so is no longer in possession of them.

62. The precise nature or closeness of the control that must be exercised in order for a person who has exerted the effort to reduce the fish to possession to retain his rights *per industriam* is not determinative of this case. I agree, however, with Peter Jackson LJ's comment that we are applying the common law in new circumstances here and that the test applied by the judge was a suitable one. The purposes for which and the conditions in which animals *ferae naturae* are kept in captivity in modern times are very different from those when many of the authorities cited to us were decided.

63. I also share Peter Jackson LJ's caution that the circumstances in which rights over fish can be rights *per industriam* may not be limited to circumstances where the animal remains in the wild or the fish in the sea such that rights *ratione soli* have not arisen in relation to them. I prefer to leave that point open for a case in which it arises on the facts.

Lord Justice Peter Jackson:

64. I also agree that the appeal must be allowed. As Sir Timothy Lloyd has shown, the judge was wrong to find that BDS's qualified property in the fish survived the transfer to CWF of the land on which the lakes stood. Given its investment in the fishery, that is indeed a hard result for BDS, but it is not a consequence of the law relating to wild animals but of the circumstances in which its land came to be sold by receivers. Had there been a normal commercial sale, BDS could have demanded payment for the fish, as indeed it did in the negotiations with CWF before matters were taken out of its hands. But with the sale, possession of the fish was lost and its qualified property rights came to an end.

65. In relation to the other matters argued before us, I further agree that the judge was right to decline Mr Vickers' invitation to extend the classification of animals beyond

wild animals and domestic animals by creating a third classification of captive wild animals that can be subject to absolute ownership.

66. Sir Timothy and the judge have concluded that the conditions in which the fish in the lake were kept are capable of supporting a conclusion that they were the qualified property of BDS *per industriam*. I agree with that and add something of my own in support. I will also briefly touch on the interrelationship of rights *per industriam* and rights *ratione soli*.
67. As to the degree of control necessary to sustain rights *per industriam*, English law concerning wild animals has its origins in statements of civil law that contrast captivity with natural liberty. The earliest is that of Gaius in his Second Commentary (AD 161), cited at paragraph 31 above. In similar terms, Justinian in his Book of Things (AD 535) wrote:
- “12. Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course anyone who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your power, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty, if it has either escaped out of your sight, or if, though not out of your sight, it yet could not be pursued without great difficulty.”
68. Upon these foundations stand a variety of later formulations: “as long as it is in my sight and the overtaking of it is not impossible” and “because they are coerced under my keeping, and by the same reason, if they escape from my keeping and recover their natural liberty they cease to be mine” (Bracton); “whether they may be... caught at any moment” (Savigny); “so confining them within his own immediate power that they cannot escape and use their natural liberty” and “while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases” (Blackstone, cited in *Hamps v Darby* and applied in *Purcell*); “so long as they are in his sight and he has lawful power easily to pursue them” (*Kearry v Pattinson*); “reduced to actual and certain possession” (*The Ship Frederick Gerring Jr*, following *Young v Hichens*). These formulations, of which the last is perhaps the high-water mark, suppose an outside world of liberty in which the wild creature is living or into which it might escape if it was not kept in close confinement. The pilchards, mackerel and eels were lost if they were not captured. The swarmed bees were lost if they chose not to return. In the present case that is not so. The fish in the Borwick lakes were not under close control but they were sufficiently in the possession of BDS for rights *per industriam* to exist, in the same way as fish in stew ponds and rabbits in (managed) warrens were considered subject

to rights *per industriam*, though in each case some effort would be required to catch them, if indeed it could be done at all.

69. Although *Greyes case*, discussed at paragraph 39 above is perhaps the closest factual precedent to the present case, in that a pond was stocked with fish for keeping and it was apparently possible to remove them with nets, the nub of the decision appears to be that the fish belonged with the land *ratione soli*, a distinction being drawn with fish in a trunk. But as Sir Timothy says, it is a short report and cannot cast a long shadow.
70. The issue of what amounts to sufficient possession to found property rights was considered in a celebrated American case that was cited in *The Ship Frederick Gerring Jr* by Girouard J. [*Pierson v Post*](#) (1805) 3 Caines 175 is as well known to every law student in the United States as *Donoghue v Stevenson* is here. Post and his hounds were pursuing a fox on waste ground in Long Island when Pierson intercepted and killed it. Post sued, claiming ownership of the fox, and won at trial. On appeal, the judgment was reversed by the New York Supreme Court, the majority view being given by Justice Tompkins. His elegant judgment cites Justinian, Bracton, Puffendorf and others, and concludes that

“The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.”

71. Tompkins J then considered other possible authorities on the nature of possession (which he called ‘occupancy’) and, having remarked that little satisfactory aid was to be derived from the English cases, noted that the French jurist Barbeyrac argued (in 1729) for a somewhat more flexible interpretation:

“To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf’s* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them.”

72. But even this degree of flexibility did not avail Post. Although the justices clearly did not think much of Pierson’s conduct, his appeal was allowed by the majority; the lively dissent of Justice Livingston also repays reading.
73. I mention this decision as an example of the common law searching the civil law for guidance on the true extent of property rights of this kind, and also because Tompkins

J elsewhere noted that Barbeyrac had relied upon Hugo Grotius's statements in respect of hunted wild beasts in Chapter VIII of Book II, of *On the Law of War and Peace* (1625). Of interest to us, in the previous paragraph, Grotius spoke of fish:

“2. *That fish in ponds and wild animals confined in parks are private property.*

First under this head, the capture of wild beasts, birds, and fish comes up for discussion. The question is by no means settled, how long these may be said to belong to no one. Nerva the son said that the fish which are in our fish-ponds belong to us, but not those in a lake; also that wild beasts which are confined in a park are our property, but not those which wander at large in forests that are fenced in. But fish in a private lake are no less shut in than in a fishpond, and well-fenced forests detain wild beasts no less effectively than parks; ... and these differ in no other respect than that one is a narrower, the other a less restricted confinement. Therefore in our time with greater justice the opposite opinion has prevailed, so that it is understood that we have right of ownership over wild beasts in private forests, and fish in private lakes, just as we have possession of them.”

(Cambridge University Press 2012, ed. Stephen C. Neff)

74. This opinion of Grotius shows that the classical legal scholars and philosophers were not unanimous on the question of the degree of control necessary for the acquisition of qualified rights. Keeping wild animals in what he described as “a less restricted confinement” is not in my view inconsistent with maintaining rights *per industriam*.
75. I would reject Mr Wells' argument that if one needs to sport for fish, they cannot by definition be property *per industriam*. He understandably relied on the statements from the authorities requiring a degree of close control, but they must be seen in the light of the circumstances then in contemplation and they cannot be transposed literally to every situation. In this case, we are called upon to apply the common law in new circumstances. Coarse fishing (fishing with bait) has a long history but, as *Fitzgerald v Firbank* shows, the thought of fishing with the object of catching and returning fish to the water baffled our judicial forebears only a century ago. Today it is one of our most popular sports. A 2018 Environment Agency report states that coarse anglers in England and Wales fished for 19 million days in the previous year and that the industry was worth £1.4 billion to the economy. The fish in many inland waters are therefore objects of some value. The test of separation and control adopted by the judge for qualified property *per industriam* is in my view a suitable one. It is satisfied where creatures cannot escape the confinement in which the possessor of the right has placed or maintained them, and from where they could by reasonable means be recovered by him. In my view there is no reason why the test should not apply irrespective of ownership of the land.
76. This interpretation is, in the words of the late Lord Nicholls of Birkenhead in *In re Spectrum Plus Ltd* [2005] 2 AC 680 at [33], “a development of the common law [that]

comprises the reasoned application of established common law principles ... in current social conditions.”

77. The other question concerns the interrelationship of rights *per industriam* and rights *ratione soli*. I incline to the view that BDS’s rights prior to the sale are better described as rights *per industriam* because they were so naturally associated with the purchase, introduction and cultivation of the fish, and not merely with its ownership of the land on which the lakes stood. I would in any case be cautious about limiting rights *per industriam* to cases where there is no relevant land ownership (e.g. the sea) or cases of animals that roam and return. On this point, Halsbury’s Laws at paragraph 9 is instructive:

“9. Qualified property per industriam.

A qualified property in living animals *ferae naturae* obtained *per industriam* arises by lawfully taking, taming, or reclaiming them. Animals *ferae naturae* become the property of any person who takes, tames, or reclaims them, until they regain their natural liberty. Animals such as deer, swans, and doves are the subjects of this qualified property, which is lost if they regain their natural liberty, and have not the intention to return.

Thus a claim for trespass or conversion will lie for taking a captive thrush, singing bird, muskrat, parrot or ape, because, although they are *ferae naturae*, they have been held to be merchandise and valuable when in a state of captivity; and for taking doves out of a dovehouse, hares, pheasants, or partridges in a warren or inclosure, deer in a park, a hawk if tame, fish in a stew pond, rabbits in a warren, swans marked or in private waters, or bees in a hive. ...”

78. It can be seen that captive wild creatures are considered to be qualified property *per industriam*, even though they are also on land presumably owned by the same person. As explained by Sir Timothy at paragraph 25 above, the two rights are not symmetrical. One is an exclusive right to reduce the animal into possession by virtue of land ownership, the other an exclusive right to possession of the animal by virtue of some effort. I would therefore not exclude the possibility of a person enjoying rights *per industriam* in unusual circumstances where the ownership of the land lay elsewhere. However, this is not an issue that needs to be resolved in the present case as BDS’s claim in conversion must in any event fail.
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