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Case No: A3/2020/1247
A3/2020/1248

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Stephen Jourdan QC sitting as a Deputy Judge of the High Court
[2020] EWHC 930 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2021

Before :

LORD JUSTICE DAVIS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NUGEE

- -

Between :

Sir George Hugh Pigot	**Claimant and Respondent**
- and –	
The Environment Agency	**Defendant and Appellant**

- -
- -

Richard Turney and **Rupert Cohen** (instructed by **Environment Agency Legal Services**) for the **Appellant**

Nigel Thomas (instructed by **Aaron & Partners LLP**) for the **Respondent**

Hearing date: 14 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30 am on 19 February 2021

Lord Justice Nugee:

Introduction

1. This appeal is concerned with the respective rights of the parties in relation to the River Kennet in Berkshire.

2. The Respondent, Sir George Pigot, (**"Sir George"**) owns a property at Padworth on the River Kennet. His property includes a weir or dam across the river, and a turbine house which houses a turbine which he uses to generate electricity.

3. In 1999 the Appellant, the Environment Agency, constructed a "fish pass" at Padworth. A fish pass is a conduit, channel or other structure which enables fish to pass up and down the river past an obstruction. In order to enable fish to use the fish pass, some of the water from the river must flow down the pass. At the time the fish pass was constructed Sir George had a turbine called a Francis turbine (**"the Francis turbine"**). This was a relatively simple design, which was used for generating electricity for his house, and Sir George did not object to the construction of the fish pass.

4. In 2011 however Sir George replaced the Francis turbine with a new turbine based on an Archimedes screw design (**"the Archimedes turbine"**). He uses this to generate electricity which he sells to the grid. In 2014 he became aware that at certain conditions of low water flow the effect of keeping the fish pass open was that he could not operate his turbine at full power.

5. In these proceedings Sir George claims that the Environment Agency was not entitled to keep the fish pass open when the effect was to prevent him operating his turbine at full power, and would be liable to him for damages for nuisance or breach of statutory duty if it did so; or in other words that his claim to use the water for his turbine took priority over the use of the water for the fish pass. He sought a number of declarations along these lines. The Environment Agency contends that it is entitled to priority use of the water for its fish pass. We were told by Mr Richard Turney, who appeared with Mr Rupert Cohen for the Environment Agency, that the point is one of some general importance for the Agency, which has constructed, or is now responsible for, many fish passes throughout England; he told us that there are at least 57 fish passes which compete with the use of water for hydroelectric power.

6. In a conspicuously lucid judgment (**"the Judgment"** or **"Jmt"**, [2020] EWHC 930 (Ch)), to which I would like to pay tribute as a model of its kind, Mr Stephen Jourdan QC, sitting as a Deputy Judge of the High Court, (**"the Judge"**) rejected Sir George's contention that any claim lay for breach of statutory duty, but otherwise upheld his contentions and granted declarations accordingly.

7. The Judge granted both parties permission to appeal. Sir George has not appealed the rejection of his claim for breach of statutory duty. The Environment Agency has however appealed against the remainder of his judgment.

8. Two questions are raised by the appeal, which form the subject of the two grounds of appeal. The first is whether the Environment Agency, when it operates the fish pass, is doing so in discharge of its statutory duties and therefore has a defence of statutory

authority to any claim in nuisance. The second is whether the Environment Agency can defeat any claim in nuisance on the basis that when constructed in 1999 the fish pass caused no appreciable injury to the operation of the Francis turbine, and that Sir George's subsequent replacement of it by the Archimedes turbine does not entitle him to require closure of the fish pass when the water flow is low.

Background

9. The natural energy carried in the water of a river flowing downhill from source to sea has long been exploited for the purposes of generating power. In England the modification of rivers by building dams or weirs and mills dates back to at least Roman times, and at Padworth there was a mill recorded in the Domesday Book. At common law the owner of land adjoining a river (a "riparian owner") had a right to dam the stream for the purpose of a mill so long as he did not injure the rights of other proprietors above or below him. In addition to traditional milling activities there are other reasons to dam a river: to assist in making rivers navigable, or for irrigation or flood control purposes, or for hydroelectric power, or for amenity value.

10. Weirs, sluices, dams and other such obstructions are however an obstacle to fish migrating up and down the river. As is well known, certain species need to migrate to complete their lifecycle; salmon, in particular, spawn in freshwater but then migrate to sea to grow and mature, returning upstream to breed and spawn; eels by contrast spawn at sea but come into rivers to grow and mature. But the evidence is that all fish, even those that spend their entire life cycle in freshwater, undertake some form of migration.

11. Salmon, large powerful fish with high swimming and jumping ability, are known to be able to jump quite substantial obstructions, but not all individual salmon have the ability or strength to do so, and many other species of fish do not have the same ability. Eels cannot jump at all. In practice therefore if a river is obstructed and it is necessary to pass a large proportion of a migrating population, or a variety of fish species, a fish pass will be needed.

12. The Environment Agency's evidence was that there are around 680 fish passes in England and Wales, the majority built, or rebuilt, in the last 50 years; the Agency understands that about half of these may have been built pursuant to the powers in s. 10 of the Salmon and Freshwater Fisheries Act 1975 (**"the 1975 Act"**), which was the section under which it constructed the fish pass at Padworth, or at any rate under which it claimed to be acting at the time. Historically fish passes were predominantly for salmon and migratory trout, but in the last 40 years multi-species fish passes have been built.

13. Fish passes are of various designs and complexity. The costs vary accordingly and (leaving aside eel passes which are much simpler and can be very cheap to install) range from about £50,000 for the construction of a small fish pass with good access to as much as £1m for the construction of a large fish pass with difficulties of access; in recent years many of the fish passes constructed have cost between £100,000 and £200,000. To this must be added the costs of annual maintenance, ranging from a few hundred pounds per year to perhaps £1,000 a year. In the case of the Environment Agency, this money is all public money.

The 1975 Act

14. Given the potential for conflict between the interests of riparian owners and those interested in the free migration of fish, it is perhaps unsurprising that there has been a long history of legislation regulating their respective rights. We were provided with a copy of the Report dated May 1961 of the Committee on Salmon and Freshwater Fisheries under the chairmanship of Viscount Bledisloe QC (Cmnd 1350) (**"the Bledisloe Report"**), which at paragraphs 13 to 28 recounts the history, starting with Magna Carta and continuing down to the Act then in force, the Salmon and Freshwater Fisheries Act 1923 (**"the 1923 Act"**). The 1923 Act has since then been consolidated with certain other legislation in the 1975 Act, which remains the Act currently in force.

15. Although the Judge referred to some of the history of the legislation in his judgment, neither counsel before us placed any reliance on it and it is not necessary to refer to the detail of the successive provisions. It is sufficient to say that as long ago as 1861 s. 23 of the Salmon Fishery Act 1861 permitted the proprietor of a fishery with the consent of the Home Office to attach a fish pass to existing dams subject to not injuring the milling power, and s. 25 obliged anyone constructing a new dam in salmon rivers to attach a fish pass as approved by the Home Office; in the 1923 Act, s. 20 conferred power on fishery boards with the consent of the relevant Minister to construct and maintain fish passes; and in the 1975 Act as originally enacted, s. 10 conferred a similar power on water authorities, again with the consent of the relevant Minister.

16. In its current form, s.10 of the 1975 Act provides as follows:

> **10 Power of appropriate agency to construct and alter fish passes**
>
> (1) The appropriate agency may construct and maintain in any dam or in connection with any dam a fish pass of such form and dimensions as it may determine, so long as no injury is done by such a fish pass to the milling power, or to the supply of water of or to any navigable river, canal or other inland navigation.
>
> (2) The appropriate agency may abolish or alter, or restore to its former state of efficiency, any existing fish pass or free gap, or substitute another fish pass or free gap, provided that no injury is done to the milling power, or to the supply of water of or to any navigable river, canal or other inland navigation.
>
> (3) If any person injures any such new or existing fish pass, he shall pay the expenses incurred by the appropriate agency in repairing the injury, and any such expenses may be recovered by the appropriate agency in a summary manner.

17. There are definitions in s. 41(1) of the 1975 Act, the effect of which is that the Environment Agency is the "appropriate agency" for England. The section in its current form only dates from 2013 when a separate body was established for Wales, but it was common ground before us that the section applied to the Environment Agency before 2013. The Agency was established by the Environment Act 1995 (**"the 1995 Act"**) which transferred to it various existing powers and duties including some of those previously held by the National Rivers Authority. Although the precise

legislative provisions under which the Agency succeeded to the powers initially conferred on water authorities by the 1975 Act were not detailed before us, there was no dispute that by 1999 when it constructed the fish pass at Padworth, it did so (or at any rate purported to do so) under the power in s. 10(1) which then applied to it in similar terms to those set out above.

18. Other relevant definitions in s. 41(1) of the 1975 Act are that of "dam" as including any weir or other fixed obstruction used for the purpose of damming up water, and that of "mill" as follows:

> *"mill"* includes any erection for the purpose of developing water power, and *"milling"* has a corresponding meaning.

19. s. 10 is one of a number of sections in Part II of the 1975 Act, headed "Obstructions to Passage of Fish". Other sections in Part II to which we were referred included ss. 9 and 18, which in their current form read respectively as follows:

> **9 Duty to make and maintain fish passes**
>
> (1) Where in any waters frequented by salmon or migratory trout—
>
> (a) a new dam is constructed or an existing dam is raised or otherwise altered so as to create increased obstruction to the passage of salmon or migratory trout, or any other obstruction to the passage of salmon or migratory trout is created, increased or caused; or
>
> (b) a dam which from any cause has been destroyed or taken down to the extent of one-half of its length is rebuilt or reinstated,
>
> the owner or occupier for the time being of the dam or obstruction shall, if so required by notice given by the appropriate agency and within such reasonable time as may be specified in the notice, make a fish pass for salmon or migratory trout of such form and dimensions as the appropriate agency may approve as part of the structure of, or in connection with, the dam or obstruction, and shall thereafter maintain it in an efficient state.
>
> (2) If any such owner or occupier fails to make such a fish pass, or to maintain such a fish pass in an efficient state, he shall be guilty of an offence.
>
> (3) The appropriate agency may cause to be done any work required by this section to be done, and for that purpose may enter on the dam or obstruction or any land adjoining it, and may recover the expenses of doing the work in a summary manner from any person in default.
>
> (4) Nothing in this section—
>
> (a) shall authorise the doing of anything that may injuriously affect any public waterworks or navigable river, canal, or inland navigation, or any dock, the supply of water to which is obtained from any navigable river, canal or inland navigation, under any Act of Parliament; or
>
> (b) shall prevent any person from removing a fish pass for the purpose of repairing or altering a dam or other obstruction, provided that the fish pass is restored to its former state of efficiency within a reasonable time; or

(c) shall apply to any alteration of a dam or other obstruction, unless—

(i) the alteration consists of a rebuilding or reinstatement of a dam or other obstruction destroyed or taken down to the extent of one-half of its length, or

(ii) the dam or obstruction as altered causes more obstruction to the passage of salmon or migratory trout than was caused by it as lawfully constructed or maintained at any previous date.

18 Provisions supplementary to Part II.

(1) If any person obstructs a person legally authorised whilst he is doing any act authorised by section 9, 10 or 15 above, he shall be guilty of an offence.

(2) The appropriate agency shall not—

(a) construct, abolish or alter any fish pass, or abolish or alter any free gap, in pursuance of section 10 above, or

(b) do any work under section 15 above,

unless reasonable notice of its intention to do so (specifying the section in question) has been served on the owner and occupier of the dam, fish pass or free gap, watercourse, mill race, cut, leat, conduit or other channel, with a plan and specification of the proposed work; and the appropriate agency shall take into consideration any objections by the owner or occupier, before doing the proposed work.

(3) If any injury is caused—

(a) to any dam by reason of the construction, abolition or alteration of a fish pass or the abolition or alteration of a free gap in pursuance of section 10 above; or

(b) by anything done by the appropriate agency under section 15 above,

any person sustaining any loss as a result may recover from the appropriate agency compensation for the injury sustained.

(4) The amount of any compensation under section 10 or 15 above shall be settled in case of dispute by a single arbitrator appointed by the Minister.

(5) In any case in which the appropriate agency is liable to pay compensation under this Part of this Act in respect of injury or damage caused by the making or maintaining of any work, compensation shall not be recoverable unless proceedings for its recovery are instituted within two years from the completion of the work.

The 1995 Act

20. The principal legislation governing the Environment Agency is the 1995 Act, which established the Agency, and transferred various functions to it.

21. s. 4 of the 1995 Act sets out the principal aim of the Agency which, to summarise, is

to protect or enhance the environment so as to make a contribution to sustainable development. s. 6(1) and (6) impose duties on the Agency in relation to water as follows:

> **6 General provisions with respect to water**
>
> (1) It shall be the duty of an appropriate agency, to such extent as it considers desirable, generally to promote—
>
> (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters;
>
> (b) the conservation of flora and fauna which are dependent on an aquatic environment; and
>
> (c) the use of such waters and land for recreational purposes
>
> …
>
> (6) It shall be the duty of an appropriate agency to maintain, improve and develop fisheries of—
>
> (a) salmon, trout, eels, lampreys, smelt and freshwater fish, and
>
> (b) fish of such other description as may be specified for the purposes of this subsection by order under section 40A of the Salmon and Freshwater Fisheries Act 1975.

22. We were not referred to any statutory definition of fishery, and nothing turns in this appeal on the precise meaning, but my understanding is that a fishery can refer either to a place where fish may be caught or a legal right to fish, and it would seem likely that it is used in the former sense here; Mr Turney told us, no doubt accurately, that it included anywhere where fish may be caught, whether they are taken for consumption, or to be caught and released.

23. The Environment Agency is also the licensing authority for the grant of licences to impound or abstract water. It is not necessary to set out the details of the licensing regime at this stage: some reference is made to it below.

The facts

24. The claim was issued as a Part 8 claim for the determination of points of law and declaratory relief on the basis of certain agreed facts. In those circumstances there was no oral evidence and the Judge was not asked to resolve any dispute of fact, although it was apparent that certain matters might be in dispute in any subsequent claim by Sir George for damages. The Judge, aptly to my mind, said that he had considerable misgivings about this procedure, and that it was unsatisfactory to claim declaratory relief with a view to seeking the determination of points of law in preparation for a possible later claim for damages and an injunction; the normal and better course would have been to issue a claim for damages and an injunction and then apply for the determination of preliminary issues, which might well not have been ordered: Jmt at [30]. He nevertheless felt obliged to determine the issues which had been referred to, and argued before, him. I share his misgivings but we too have

to deal with the points of law raised by the appeal despite the unorthodox procedure that the parties adopted below.

25. With those limitations, the facts were as follows. Sir George is the registered freehold owner of the Mill House at Padworth. He acquired it in about 1977, along with other land on which he developed a trout farm. He sold the trout farm to Padworth Trout Farm Ltd in 1995, retaining the Mill House.

26. The Mill House is a residential property adjoining the River Kennet which lies to the south of the house. The historic use of the property is as a mill and there are records of a mill there in the Domesday Book, and in the 1890s, 1927 and 1935. Sir George's property includes a substantial dam or weir with sluice gates, and a turbine house. The dam and main sluices lie across the main channel of the river, between the Mill House and a small island to the south where the turbine house is. The Judge annexed to the Judgment a schematic plan of the property which shows these features, and I have annexed a copy of this plan.

27. The dam, sluices and turbine house date from the 1930s, and when Sir George acquired the property the turbine house housed the Francis turbine. This was used to generate electricity for the house.

28. The Francis turbine was still in situ in 1999 when the Environment Agency installed a fish pass at Padworth as part of its Kennet Millennium Salmon Pass project. The aim of the project was to restore a self-sustaining population of salmon to the River Thames, of which the River Kennet is a key tributary and the one considered by the Agency to have the greatest amount of suitable spawning habitat. The project involved the installation of a number of new fish passes on the Kennet forming part of a chain of 37 fish passes between the spawning grounds and the sea. Each pass must of course be open if salmon are to migrate all the way from the sea to the spawning grounds.

29. It was one of the agreed facts at trial, recorded by the Judge (Jmt at [8]), that the Environment Agency constructed the fish pass pursuant to the power in s. 10(1) of the 1975 Act. By s. 18(2) of the 1975 Act, the Agency could not construct a fish pass pursuant to s. 10 without having first given reasonable notice of its intention to do so to the owner of the dam, and was obliged to take into considerations any objections by the owner. The Agency duly gave Sir George notice, and he did not object. In fact, his evidence was that although the Francis turbine was fully operational, it was not at the time being used on a daily basis because it required continual monitoring and management and he was often abroad. The Judge said (Jmt at [9]) that the fish pass did not adversely affect the operation of the Francis turbine.

30. The fish pass, consisting of two lengths of pass with a resting pool between them, was constructed through the island in the river. The Judge was told that the island was part of the property sold by Sir George to Padworth Trout Farm Ltd (Jmt at [6]), although it appears that Sir George retained ownership of the turbine and a working strip alongside it. After he had circulated his judgment in draft, the Judge was told that the Environment Agency in fact held a lease of the island, and submissions were made to him as to what effect, if any, this might have had on the Agency's power to construct and maintain the fish pass. But the lease had not been mentioned in the agreed facts; it had not been referred to in evidence or considered in submissions; and

the Judge had not even seen it (Jmt at [106], [109]). In those circumstances the Judge confined himself, in my view entirely appropriately, to the issues raised by the claim form and addressed in evidence and submissions, and left open the question whether the Agency might be able to rely on some power other than that in s. 10 to keep the fish pass open (Jmt at [109]-[111]). There has been no appeal against that aspect of the Judgment and we have heard no argument on the effect of the lease. I will therefore proceed, as the Judge did, on the assumption that the Environment Agency did construct the fish pass pursuant to s. 10(1) of the 1975 Act and without reference to the possible effect of the lease.

31. In 2011 Sir George replaced the Francis turbine with the Archimedes turbine. This required demolition and rebuilding of the turbine house, but the dam, sluices and intake all remained unchanged. The Archimedes turbine is much more sophisticated and powerful than the Francis turbine. It is used by Sir George to generate electricity which is sold to the National Grid.

32. A system of licensing was introduced for the impoundment of water by the Water Act 1963 and then re-enacted under the Water Resources Act 1991 (**"the 1991 Act"**). It did not apply to existing impoundments and Sir George had not needed a licence for the Francis turbine. But in correspondence between Sir George and the Environment Agency in 2010/2011, the Agency took the view that since the Archimedes turbine involved the alteration of impoundment works, Sir George needed an impoundment licence under s. 25 of the 1991 Act. Sir George applied for such a licence, pointing out in his covering letter that there was an existing fish pass and that an eel pass would be constructed as part of the new turbine; his application form referred to there being "no change to current flows / levels". The Environment Agency duly granted an impoundment licence to Sir George on 22 June 2011. It contained a number of conditions, one of which was that no abstraction should take place when the flow in the River Kennet was equal to or less than 4.31 m^3 per second – this being referred to as a "hands off flow" condition. (There was another condition relating to river levels which was later the subject of considerable correspondence, but this dispute formed no part of the present proceedings).

33. Sir George's evidence was that he did not initially notice any problems with the Archimedes turbine as he was not operating it at full power but in 2014 he became aware that in certain river conditions there was insufficient flow of water available to run the turbine at full power unless the fish pass was closed; the Environment Agency, which controls the fish pass, had refused to allow the fish pass to be closed and as a result his turbine had been unable to operate at full capacity and he had lost revenue.

34. The Judge explained that since some water flows through the fish pass when it is open, the amount of water flowing through the turbine channel is reduced and in conditions of low water flow, the electricity generating power of the turbine could be affected. He referred to the situation where the amount of water flow was such that the electricity generation of the turbine was adversely affected if the fish pass were open as compared with what it would be if the fish pass were closed as "low water".

35. Because of the way the case was conducted, the Judge made no findings as to what rate of flow equated to "low water" (although it must be higher than the hands off flow point as the terms of Sir George's licence would prevent him using the turbine at

all at that rate), or what the impact on Sir George's ability to generate electricity in fact was, but Sir George's evidence was that if he had been permitted to close the fish pass at low water, then over 2015 to 2017 there would have been between 27 and 43 days a year when the pass was closed. We were told that since the judgment, an agreement had been put in place pending the outcome of this appeal, the practical effect of which was that the fish pass had been closed on certain days, but we were not given any details. Mr Turney explained that quite apart from the position at Padworth, the Environment Agency wished to ensure that it understood what it could and could not do in general under s. 10 of the 1975 Act.

The Judgment

36. As already explained the claim was brought for declaratory relief. Sir George sought declarations that if the fish pass injured the milling power of his Archimedes turbine, then the Environment Agency would be liable for nuisance and/or breach of statutory duty; that the Agency was not entitled to raise the defence of statutory authority; and that the Agency was not entitled to raise the defence that the appropriate milling power was that applicable to the Francis turbine in 1999 rather than that applicable to the Archimedes turbine. The Environment Agency sought the converse declarations that it could raise the defence of statutory authority to any claim; and that the appropriate milling power was the potential to power the mill in situ in 1999, that is the Francis turbine.

37. The Judge helpfully identified, and agreed with counsel, 6 issues which he had to determine (Jmt at [32]). Issues (3), (4) and (5) concerned the potential claim for breach of statutory duty: the Judge held on issue (3) that s. 10 of the 1975 Act did not impose any duties on the Environment Agency and hence that it could not be liable for breach of statutory duty (Jmt at [112]-[113]), which meant that issues (4) and (5) did not arise (Jmt at [114]). As already explained there is no appeal against those conclusions, and no more need be said about the suggested claim for breach of statutory duty.

38. Issue (6) was concerned with whether the ability of the Environment Agency to vary the conditions attaching to Sir George's impoundment licence affected the relief to which Sir George was entitled. The Judge decided that it would not be appropriate to resolve the issues that arose under this head (Jmt at [115]-[123]). Again that is not challenged on appeal, and it is not necessary to consider it further.

39. Issues (1) and (2) were as follows:

> "(1) Subject to any defences arising out of statutory provisions that the Defendant may be able to establish, is the Defendant prima facie liable to the Claimant for the tort of nuisance by diverting the flow of the river through the fish pass and away from the Claimant's turbine?
>
> (2) If so, would it be a defence for the Defendant to prove that the fish pass was kept open pursuant to statutory duties imposed by the Environment Act 1995 and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, which duties could not reasonably have been performed in a way which avoided the nuisance?"

40. The Judge addressed Issue (1) at Jmt [33]-[43]. He answered it Yes for reasons

expressed with clarity, conciseness and precision. There has been no appeal against, or criticism made, of this part of his Judgment, but it is helpful to summarise his reasoning.

41. He first set out the law as follows. A riparian owner who owns an estate in land adjacent to water flowing in a defined channel of a natural watercourse is entitled to a number of natural rights [33]. These include a right of user and a right of flow [34]. The right of user entitles the riparian owner to use the flow of water to turn the wheels of a mill or turbine on his land provided he does not thereby adversely affect the flow of the stream past the land of other riparian owners [35]. This right is well established and not dependent on proof of long user [36]-[39]. The right of flow is the right to have the water flow to him in its natural state in flow, quantity and quality [40]. Any person who affects the right of flow without a right to do so by making the flow materially stronger or weaker commits the tort of nuisance [40]. This type of nuisance is actionable without proof of damage [40].

42. He then applied the law to the present case as follows. It was unnecessary to decide if the construction of the fish pass in 1999, or its maintenance between 2011 and 2015, constituted a nuisance because Sir George made no claim save for the period from 2015 on [41]. On the evidence it was clear that the effect of the fish pass at low water was to materially reduce the flow of water over Sir George's property (this was not disputed). That was an interference with Sir George's right to the flow of water in its natural state in flow and quantity; and hence, subject to the impact of any relevant statutory provisions, the Environment Agency was prima facie liable for the tort of nuisance in keeping the fish pass open at low water in respect of the period from 2015 on [42]-[43].

43. That leaves Issue (2), namely whether the Environment Agency could defend the claim by raising a statutory authority defence, which the Judge dealt with in a number of sections.

44. He first considered the statutory duties relied on (Jmt at [43]-[48]). These were the duties in s. 6(1)(b) and (6) of the 1995 Act, namely to promote the conservation of flora and fauna in an aquatic environment, and to maintain, improve and develop salmon and other fisheries (see paragraph 21 above). The Agency also relied on a duty under successive sets of regulations requiring it to perform its duties so as to secure compliance with an EU directive known as the Water Framework Directive. The Judge however considered that the regulations did not add anything to the duties under s. 6 of the 1995 Act [46]. Before us Mr Turney accepted that the regulations (which were not in force at the time of the construction of the pass, the first dating from 2003) imposed duties that were both wider and less specific than the duties under s. 6 of the 1995 Act, and that if his argument based on the s. 6 duties did not succeed, then the regulations would not assist him either. In those circumstances I agree with the Judge that they do not add anything material and there is no need to consider them.

45. The Judge then set out the law on the defence of statutory duty (at Jmt [49]-[61]). It is not suggested that his consideration of the law was wrong, but there is no need to set it out as I will have to consider the principles relied on by the Environment Agency when dealing with Ground 1 of the appeal. It is worth however noting what he says at [61], namely that although the authorities did not discuss how one

distinguishes between a statutory duty or authority which can confer immunity from a nuisance claim and a statutory power which does not, it was not necessary to explore the question as it was common ground before him (as it was before us) that s. 6 of the 1995 Act imposes a statutory duty (or duties) while s. 10 of the 1975 Act confers a statutory power.

46. In the next two sections of the Judgment, the Judge (i) identified the principles applicable to the construction of s. 10 of the 1975 Act (Jmt at [64]-[66]) and (ii) considered in some detail the legislative history (at [67]-[82]), both counsel having agreed that it was relevant to consider the statutory origins of what is now s. 10 of the 1975 Act. As I have already referred to, we were not taken to the history and no reliance was placed on it before us, and it is unnecessary to consider it.

47. The Judge then addressed the Environment Agency's first argument, which was that a fish pass could be installed under s. 10(1) of the 1975 Act even if there was a reduction in milling power, so long as that was inevitable from the installation of the fish pass (Jmt at [83]-[90]). Mr Turney's argument was that the section was otherwise unworkable as any fish pass would be bound to affect the milling power to some degree.

48. The Judge rejected this argument. He said that Parliament clearly thought when enacting s. 10 of the 1975 Act (and its predecessors) that it would be possible for a fish pass to be constructed without causing an injury to the milling power of the river, and that an interpretation which made it impossible ever to construct such a fish pass would produce a result contrary to the purpose of s. 10 and therefore should be avoided if possible [88]. He continued at [89]:

> "The most straightforward way of avoiding that result is to interpret "injury" as requiring that the alteration in the flow of the water caused by the fish pass actually causes a tangible injury to someone seeking to take advantage of the milling power of the river. In my judgment, there will only be "injury" done by a fish pass to the milling power of a watercourse if there is a mill or turbine making use of the flow of the river, the operation of which will be adversely affected by the construction or operation of the fish pass, *or that is likely to be the case in the future.* A reduction in the flow of the river which causes no present harm to anyone, *nor is likely to cause any harm in the future,* should not be treated as an "injury". Nor would a minimal and inconsequential effect on the operation of a mill or turbine count as an "injury"." (italics added)

49. It was not suggested to us that the Judge was wrong in interpreting "injury" as requiring some tangible injury, more than minimal and inconsequential, to a person seeking to take advantage of the milling power of the river. I agree that he was right on that point. As pointed out in the Bledisloe Report at paragraph 118 when considering similar language in s. 20 of the 1923 Act:

> "A fish pass without a supply of water is, of course, useless, and the difficulty arises from the fact that any diversion of water for a pass must cause some degree of injury, however slight, to the milling power or to the needs of navigation. If strictly construed, therefore, the requirement that no injury be done to these interests can render this provision of the Act of 1923 unworkable."

They recommended amending the section accordingly. This recommendation was not

however acted on and Parliament re-enacted the provision in similar terms when consolidating the legislation in 1975, which might suggest that Parliament was content that the wording did not have the effect that any diminution in the flow, however minimal, would be an injury to the milling power. Whether that is so or not, the requirement that the injury be tangible and more than minimal seems to me the only sensible interpretation. At common law it is not every interference with the enjoyment of land, nor every interference with an easement, that constitutes an actionable nuisance but, generally speaking, only one that is a substantial or material interference,[1] and I see no reason why the same should not apply when considering if the diversion of water down a fish pass does or does not cause an injury to the milling power of a river.

50. Whether the Judge was also right to extend this from the case of an adverse effect on the operation of a present mill to one that is likely to be there in the future, as he did by the words I have italicised, is a separate question which raises more difficult issues, and which I come back to below when considering Ground 2 of the appeal.

51. The Judge concluded at [90] that the Environment Agency's first argument did not succeed. He then considered the Environment Agency's second argument, which was that s. 10 of the 1975 Act should be read as referring only to the milling power supplied to a mill in existence at the time of construction of the fish pass (Jmt at [91]-[97]). He rejected that for reasons that I will look at in more detail when considering Ground 2 of the appeal.

52. He then reverted to the question whether the Environment Agency had a defence of statutory authority. Having construed s. 10 of the 1975 Act as not conferring any power on the Agency to keep the fish pass open when it caused a tangible injury to the flow to Sir George's Archimedes turbine, he rejected the defence for the simple reason that the Agency could not be said to be keeping the fish pass open in performance of its statutory duties because it had no statutory duty to do something that it had no power to do [102]-[105]. His reasoning can be seen from [104]-[105] as follows:

> "104. The rationale for the defence of statutory authority is this. If Parliament has imposed a duty on a person, to be performed in the public interest, it would be wrong for that person to be liable for any harm caused as a result of performing the duty, provided it can be demonstrated by the person that their actions were reasonably necessary to perform the duty, that the duty was properly performed in all respects, and that, if it resulted in damage, there was, in the light of scientific knowledge then available, no reasonable way in which the end directed could have been achieved without doing the damage which in fact resulted.
>
> 105. That rationale has no application if the person seeks to perform the duty by doing something they have no power to do. In those circumstances, it cannot be said that the duty is being properly performed. A statutory duty cannot require or authorise a person to do something they have no right or power to

[1] It is to be noted that this requirement (that any interference must be material or substantial) is to be distinguished from the question whether a nuisance is actionable without proof of damage: this is well illustrated by *Nicholls v Ely Beet Sugar Factory Ltd (No 2)* [1936] Ch 343 where at 349 Lord Wright MR held that in relation to nuisance of the type there alleged (interference with a fishery) damage was not the gist of the action, and yet at 353 referred to there having to be a substantial interference.

> do. I do not think the defendant has a duty under s.6 of the 1995 Act or otherwise to keep the fish pass open if it has no power to keep the fish pass open."

53. By his Order dated 5 June 2020 (as corrected under the slip rule) he therefore made declarations, the first three of which were as follows:

> "IT IS DECLARED that:
>
> (1) The Defendant is prima facie liable for the tort of nuisance by diverting the flow of the River Kennet through the fish pass at Padworth Mill and away from the Claimant's turbine at Padworth Mill when the amount of water flowing down the river is such that the electricity generation of the turbine is adversely affected if the fish pass is open, but not if it is closed ("low water").
>
> (2) Section 10 of the Salmon and Freshwater Fisheries Act 1975 ("the 1975 Act") does not entitle the Defendant to keep open the said pass at low water.
>
> (3) Unless the Defendant has a power other than that derived from s. 10 of the 1975 Act to keep the fish pass open at low water, the Defendant cannot rely on the defence of statutory authority."

Ground 1 of appeal

54. There are two grounds of appeal. Ground 1 is that the Environment Agency is entitled to a defence of statutory authority to any claim in nuisance arising from the installation and operation of the fish pass, the fish pass having been installed pursuant to legal duties including s. 6 of the 1995 Act.

55. The defence of statutory authority is summarised in *Clerk & Lindsell on Torts* (23rd edn, 2020) at §19-87 as follows: where a statute has authorised the doing of a particular act, or the user of land in a particular way, which act or user will inevitably involve a nuisance, any resulting harm is not actionable, providing every reasonable precaution consistent with the exercise of the statutory power has been taken to prevent the nuisance occurring.

56. In *Department of Transport v North West Water Authority* [1984] AC 336 (**"the *NWAA* case"**) Webster J in the Divisional Court formulated four propositions at 344A-D, which were described as a correct summary of the law by Lord Fraser in the House of Lords (with whom the other members of the House agreed) at 359E-H. Omitting citations, they are as follows:

> "1. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed on it by statute.
>
> 2. It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance.
>
> 3. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance.
>
> 4. A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either

made liable, or not exempted from liability, for nuisance."

In this formulation, "negligence" is used in the special sense explained by Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011 of requiring the undertaker, as a condition of obtaining immunity from action "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons": per Lord Fraser at 359H-360A.

57. It is suggested in *Clerk & Lindsell* (op cit) at §19-92 and fn 481 that proposition 4. should be reformulated to read:

> "A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly … made liable … for nuisance"

on the grounds that otherwise it conflicts with proposition 3. I do not agree and think this is a misreading of what Webster J said. Proposition 3. concerns the case where there is no relevant statutory provision (that is neither one expressly providing that the body is liable for nuisance, nor one expressly providing that it is not exempted from liability for nuisance); proposition 4. is concerned with the converse case where there is such an express statutory provision. That to my mind is clear from the reasoning in the House of Lords in the *NWAA* case.

58. Mr Turney suggested that the present case was closely analogous to the *NWAA* case, and it is therefore helpful to consider the case in more detail. The defendant (NWAA) was a water authority which was responsible for a four inch water main which had been laid underneath a stretch of the A57; the plaintiff (the DoT) was responsible for the road as the highway authority. The main had been laid by NWAA's predecessor, the Rainhill Gas and Water Co under the Rainhill Gas and Water Act 1870. That must have been before 1927 when the water undertaking was transferred from the Rainhill company to the local district council; it was later transferred again, ultimately to NWAA. It was agreed that there was no negligence in respect of the laying of the main, or in the subsequent maintenance of it. NWAA used the main to supply water to local residents. In 1978 the main burst, causing damage to the road which the DoT repaired at some expense. The question was whether NWAA was liable to compensate the DoT for the cost of repairing the damage caused by the escape of water.

59. It was agreed that the question turned on the application of s. 18(2) of the Public Utilities Street Works Act 1950 (**"the 1950 Act"**). That provided, so far as material:

> "If any nuisance is caused … (b) by … discharge of water … required for the purposes of a supply … afforded by any undertakers which at the time of or immediately before the event in question was in apparatus of those undertakers the placing or maintenance of which was or is a code-regulated work … nothing in the enactment which confers the relevant power to which section 1 of this Act applies … shall exonerate the undertakers from any action or other proceedings at the suit … (i) of the street authority."

For these purposes NWAA was an undertaker, the maintenance of the water main was a code-regulated work, and the DoT was the street authority; and it was accepted that the escape of water would have been a nuisance at common law.

60. It can be seen that s.18(2) of the 1950 Act was an example of an express non-exoneration provision, that is a statutory provision expressly providing that the relevant body is not exempt from nuisance. That meant that it was relevant to know whether NWAA was acting pursuant to a duty (so that the case would *prima facie* fall within Webster J's propositions 1. and 2. and NWAA would not be liable in the absence of negligence), or pursuant to a power (so that it would fall within his proposition 4. and NWAA would be liable even in the absence of negligence). NWAA were under statutory duties under s. 11 of the Water Act 1973 to supply water within their area, and to maintain a constant and sufficient pressure. Webster J dealt with this question as follows (at 344H-355B):

> "Counsel on behalf of the plaintiffs submitted that, whereas the defendants may have been under a duty to make water supplies available under section 11 of the Water Act 1973, nonetheless neither they nor their predecessors were under any duty to lay the water pipe in the highway: they had no more than a power to do that, so that the escape of water from the main was attributable not to the exercise of a statutory duty but of a statutory power. But in my view the burst and the consequent nuisance occurred not because of the laying of the main but because of the pressure of water in the main; and, in my judgment, if the question be material, the burst and escape of water was attributable to the exercise by the defendants of a statutory duty, not of a statutory power."

Lord Fraser (at 359B) referred to the importance of this finding and said that in his opinion it was clearly correct. It meant that the DoT could only succeed by contending (as they successfully did before Webster J) that words should be read into s. 18(2) of the 1950 Act effecting a substantial change in the previously established law. Lord Fraser held that that was unjustifiable and the House allowed an appeal.

61. Mr Turney sought to draw an analogy between the *NWAA* case and the present case as follows:

(1) The power to construct the fish pass conferred by s. 10(1) of the 1975 Act was admittedly a power, just as the power to lay the water main in the road was. But Sir George's complaint was not that there had been any negligence or actionable nuisance in the construction of the fish pass pursuant to that power. He had had the opportunity to object at the time and did not do so, and was not now complaining of the original construction in 1999. That was analogous to the finding in the *NWAA* case that the DoT's claim, properly understood, was not about the laying of the main, which was neither negligent nor the cause of the burst.

(2) What Sir George was complaining of was the operation of the fish pass from 2015 on. That required one to ask why the Environment Agency had kept the fish pass open in that period. The answer was to enable fish, and in particular salmon, to pass the obstruction caused by Sir George's dam; and if one asked why the Environment Agency was doing that, the answer was in fulfilment of its statutory duties in s. 6 of the 1995 Act to promote the conservation of aquatic fauna and specifically to maintain, develop and improve salmon and other fisheries. That was analogous to the duty on NWAA to supply water at a constant and adequate pressure.

(3) Just as in the *NWAA* case therefore the matters of which complaint was made

were attributable not to the exercise of a statutory power but to the performance of a statutory duty.

(4) s. 10(1) of the 1975 Act was analogous to s. 18(2) of the 1950 Act: there was no relevant distinction between a non-exoneration provision such as s. 18(2) and a provision saying that you cannot do something if it causes injury.

(5) It followed that the Environment Agency was not liable in the absence of negligence, and s. 10(1) of the 1975 Act did not make it liable, any more than s. 18(2) of the 1950 Act made NWAA liable.

62. Mr Turney advanced this argument with skill and tenacity but I am unable to accept it. First, I do not consider that s. 10 of the 1975 Act can be regarded as analogous to a non-exoneration provision such as s. 18(2) of the 1950 Act. On its face the requirement that there be no injury to the milling power of the river does not just preserve a right of action to a person injured, but, as submitted by Mr Nigel Thomas who appeared for Sir George, creates a pre-condition or limitation on the exercise of the power: if the condition that there be no injury to the milling power cannot be satisfied, the right to construct the fish pass is not available.

63. Mr Turney indeed in answer to questions from the Court expressly accepted that if the Environment Agency proposed to construct a fish pass which would constitute an immediate injury to the then milling power, then it could not construct it (or at any rate not under the power in s. 10(1) of the 1975 Act – it would have to find, he said, some other power). He was to my mind right to accept this as that is no more than the natural meaning of s. 10(1). But that illustrates a second point, which is that one cannot draw a neat distinction between the construction of the fish pass and its operation. It is not the building of the pass by itself that injures the milling power of the river; what injures the milling power is opening the pass and allowing water to run down it. When therefore s. 10 provides that the Environment Agency may construct and maintain a fish pass "so long as no injury is done by such a fish pass to the milling power", this must mean "so long as no injury is done by [the construction and operation of] such a fish pass to the milling power."

64. But once this point has been reached, the analogy with the *NWAA* case to my mind breaks down. There it made sense to draw a clear distinction between the initial laying of the main some time before 1927, and the bursting of the main in 1978, which were two quite distinct events, and to analyse the latter as attributable to the performance by NWAA of its statutory duties, not to the exercise by its predecessor of the power to lay a pipe many years before. But in the case of a fish pass, if it is such as to injure the milling power of the river on day 1, one cannot sensibly say that that is a question of operation that can be divorced from its construction. It is the construction, opening and operation of the fish pass which together will injure the milling power and prevent the power in s. 10(1) from being available.

65. Third, Mr Turney's argument to my mind proves too much and, taken to its logical conclusion, would end in absurdity. The argument presupposes that if no complaint is made of the initial construction of the fish pass but only of its operation many years later, s. 10(1) does not apply because the Environment Agency is not operating the fish pass pursuant to s. 10(1) but under its statutory duty to maintain and improve salmon fisheries etc. But suppose Sir George's Archimedes turbine had been in situ

in 1999, that he had not objected to the construction of the fish pass because he did not appreciate what effect it would have at low water, and that for one reason or other he did not raise a complaint for many years, say until 2015. On Mr Turney's argument, he would not be able to complain at all despite the fact that on this hypothesis from its inception the fish pass injured the milling power of the river available to the Archimedes turbine. But if this is right, then why should not the same apply if Sir George, instead of delaying his complaint for 16 years, delayed it for only 4 or 2 or 1? (It is to be noted that it is no part of Mr Turney's argument that Sir George's rights have been barred by limitation – nuisance is a continuing tort that accrues from day to day and it has never been suggested that his rights have been affected by either limitation or prescription). And if the argument applies where Sir George first complains after a year, what if he first complains after a month, or on day 2? But it cannot sensibly be suggested that if he complained after a month or on day 2 he was only complaining about the operation of the fish pass and not about its construction.

66. Mr Turney's argument would therefore end up as being that if Sir George did not object to the initial construction, he could not complain about its subsequent operation, however substantial the interference with his turbine. But this is not what s. 10(1) says. What it says is that the Environment Agency can "construct *and maintain*" a fish pass so long as no injury is done to the milling power. Before the Judge it was common ground (the Judge adding "rightly in my view") that "maintain" here did not simply mean "carry out works of maintenance" but "keep in place and operational" (Jmt at [18]). I agree that this is the better view. But the natural meaning of that is that the Environment Agency has no power to keep the fish pass in place and operational if its original construction had been unauthorised by s. 10(1).

67. If this is right, then what is left of the defence of statutory authority? If (as Mr Turney accepts) it cannot be used to justify the initial construction of a fish pass which as constructed injures the milling power; and if, which I think necessarily follows, it cannot be used to justify the subsequent operation of a fish pass which as initially constructed was unauthorised because it injured the milling power, then it seems to me that there is no room left for the operation of the defence save possibly in the case where although it is not suggested that the initial construction was unauthorised by s. 10, it is said that its continued operation is now in breach of s. 10. That raises a question whether in such a case the milling power is limited to the milling power at the time of original construction or the milling power from time to time. But that is the very question raised by Ground 2. In my view therefore Ground 1 in truth does not raise any separate issue, and if the Environment Agency does not succeed on Ground 2 it cannot succeed on Ground 1.

68. I would therefore reject Ground 1 as a separate reason for allowing the appeal. In my judgment the owner of a mill or turbine who establishes that as initially constructed a fish pass injured the then milling power is entitled to complain that the person constructing the fish pass had no power under s. 10(1) of the 1975 Act to construct it or operate it thereafter and the Environment Agency cannot rely on its statutory duties under s. 6 of the 1995 Act to provide it with a defence of statutory authority to a nuisance caused by operating the fish pass. I accept the submission by Mr Thomas that the Judge was right to say (Jmt at [105]) that the Agency does not have a duty under s. 6 of the 1995 Act to keep a fish pass open if it has no power to do so.

69. Before leaving Ground 1 I should make it clear that we have not heard any argument on whether the Environment Agency might have a defence to nuisance if the owner of a mill or turbine had consented to, or acquiesced in, a fish pass being constructed. One can see that questions might arise if the owner of the mill had expressly consented to a fish pass being constructed, which the Agency had then done at considerable expense; or indeed if the owner had stood by and allowed the Agency to spend large sums of money on constructing a pass without objection. But such questions would have nothing to do with the defence of statutory authority which is the only question that has been argued under Ground 1, and I say nothing about them.

Ground 2

70. Ground 2 is that the Environment Agency is entitled to a defence of statutory authority for any claim in nuisance which arises as a result of the installation of a turbine after the date of the construction of the fish pass pursuant to s. 10 of the 1975 Act.

71. This raises a short but not entirely easy question of construction of s. 10. The question is whether "so long as no injury is done by such a fish pass to the milling power" refers to injury to the milling power from time to time (as the Judge held) or injury to the milling power at the time of the construction of the fish pass.

72. The Judge's view sufficiently appears from Jmt at [92]-[93] where in response to the argument that it would be absurd if the Environment Agency could be required to close a fish pass because a new turbine had been installed, he said:

> "92. Again, I cannot agree with the premise of this argument. One feature of the law of nuisance is that a use of land which has continued for a long time may become a nuisance if it starts to cause adverse effects on neighbouring land due to a change in the use of that land: see *Bliss v Hall* (1838) 4 Bing NC 183, *Sturges v Bridgman* (1879) 11 Ch D 852, *London, Brighton and South Coast Railway Company v Truman* (1885) 11 App Cas 45 at 52 and *Fleming v Hislop* (1886) 11 App Cas 686 at 697.
>
> 93. That being so, there is nothing surprising in the fact that s.10 and its predecessors impose a continuing requirement that the fish pass should not cause an injury. A fish pass may be maintained in a dam only "so long as no injury is done by such a fish pass to the milling power…". If a fish pass causes no injury when it is installed, but it begins to cause an injury later due to a change in circumstances, the statutory authority to maintain it in place ceases."

This has the merit of being a simple and straightforward reading of the statute.

73. Mr Turney acknowledged that his argument required a less straightforward (or as he described it "inelegant") reading of the statute. He put forward two possibilities. One was that "maintain" in s. 10(1) did not in fact mean "keep in place and operational" (as had been common ground below) but meant "carry out works of maintenance to". Mr Turney himself accepted that this was a "difficult" reading and I have already said that in common with the Judge I think the parties were right when they agreed below that it meant "keep in place and operational". The full phrase is "construct and maintain in any dam or in connection with any dam a fish pass …". Although in the present case the Environment Agency in fact had a lease of the island where the fish

pass was constructed, there is nothing in the 1975 Act which limits the Agency to constructing a fish pass on its own property, and in some, possibly many, cases the Agency will no doubt construct the fish pass "in" the dam. If, as one would have thought likely, the dam belonged to someone else, statutory authority would be needed not only to construct the fish pass in the first place but to keep it there and operate it thereafter. In such a case, as the Judge said (Jmt at [81]) s. 10 operates in effect to confer a sort of limited power of compulsory acquisition (and the owner can claim compensation for any loss sustained by injury to the dam under s. 18(3)). I do not therefore accept Mr Turney's first submission.

74. His second submission was that "milling power" was to be read as a reference to the milling power at the time of construction. The argument in support of this submission has two steps. The first step is to identify what "milling power" refers to. Mr Turney said that it did not refer to the *potential* for a flow of water to be exploited for the purposes of generating power, but to the flow that was *actually* being exploited.

75. One point Mr Turney relied on in support of this was the statutory definition of "mill" in s. 41(1) of the 1975 Act as including any erection for the purpose of developing water power, and "milling" as having a corresponding meaning (paragraph 18 above). That, he said, pointed to "milling power" being understood as a reference to the power being actually exploited by an existing mill or turbine, not to the power that might be exploited by any potential future mill or turbine. The Judge did not find this argument persuasive (Jmt at [94]) and purely as a matter of language I tend to agree that the definitions do not compel this interpretation.

76. Mr Turney also relied on a variant of the absurdity argument deployed before the Judge (paragraph 48 above). If "milling power" included the potential for the water flow to be exploited in the future it would never be possible to construct a fish pass, as any pass would be bound to diminish the flow of water available for other purposes, and hence would affect the potential for that flow to be exploited by some future mill or turbine.

77. The Judge's answer to the absurdity argument, as we have seen, was to confine an injury to a tangible injury actually caused to someone seeking to take advantage of the milling power of the river, that is that:

> "there will only be "injury" done by a fish pass to the milling power of a watercourse if there is a mill or turbine making use of the flow of the river, the operation of which will be adversely affected by the construction or operation of the fish pass, *or that is likely to be the case in the future*."

Mr Turney said that the Judge was right to focus on actual injury to someone seeking to take advantage of the milling power, but wrong to include the words I have italicised which extended it to injury to likely future uses.

78. Mr Thomas supported the Judge's conclusions on this point. He submitted that at common law a riparian owner was entitled to upgrade his mill or milling machinery, and that there were good economic reasons why this should be the case (cf *Saunders v Newman* (1818) 1 B&A 258 at 261 per Abbott J); in the present case the Francis turbine dated from the 1930s and was probably obsolete and it could be reasonably contemplated that it would need upgrading.

79. On this point however I prefer the submissions of Mr Turney. The difficulty I have with extending the meaning of milling power from the power being exploited by an existing mill or turbine to include the power required by one that (in the Judge's formulation) is "likely" to be there, or (in Mr Thomas's formulation) is in "reasonable contemplation" is that it changes the nature of the inquiry, and makes it much more difficult for the Environment Agency to know if it can lawfully construct a fish pass or not. The Agency ought to be able to form a view, when considering constructing a fish pass, as to whether it will be lawful to do so. On Mr Turney's argument that would require them to ascertain what mill or turbine was presently in place and then assess whether the construction of the proposed fish pass would substantially interfere with the operation of that mill or turbine. That seems to me to be likely to involve a relatively limited inquiry. If however they also had to form a view how obsolete the existing mill was, or how likely it was to be replaced, and if so what it might be replaced with, the scope of the inquiry would become considerably wider and much more open to argument. Moreover in its original form s. 10(1) required a fish pass to be approved by the relevant Minister, and, as Mr Turney pointed out, it is one thing to expect the Minister to have formed a view on the basis of injury to an existing mill, and quite another thing to have expected the Minister to form a view as to whether it might injure a future mill or turbine that was likely or might reasonably be contemplated.

80. For these reasons I accept that "milling power" refers to the power actually being exploited (or capable of being exploited) by an existing mill or turbine at the relevant time. (I add "capable of being exploited" to allow for the case where the mill is not in fact being operated although it could be, as on one view of the facts might have been the case here with the Francis turbine). That means that if the construction of the fish pass at Padworth in 1999 did not cause any tangible injury to the milling power required for the operation of the Francis turbine (as the Judge found), then the initial construction was permitted by s. 10(1) and was not unlawful.

81. In submissions made to us after circulation of our draft judgments, Mr Thomas suggested that it was wrong to say that the Judge had found that the initial construction had not affected the Francis turbine. I am unable to accept this. The Judge said (Jmt at [9]):

> "The fish pass did not affect the operation of the turbine in the turbine house at the time."

The natural meaning of that is that the Francis turbine was still able to operate in the same way despite the construction of the fish pass. This was a finding relied on by the Environment Agency in its skeleton argument in support of the appeal where it was said that the turbine in place at the time of the construction was "not adversely affected". There was no suggestion by way of Respondent's Notice, or in the Respondent's skeleton argument, or in oral submissions to us, that this was either not what the Judge meant or a finding the Judge was not entitled to make. Indeed Mr Turney made it clear both in writing and orally that if the Environment Agency succeeded on Ground 2, then on the facts of this case that would be a complete defence precisely because the initial construction of the fish pass did not affect the operation of the Francis turbine. In those circumstances I proceed on the basis that the initial construction of the fish pass was not contrary to s.10 of the 1975 Act and was not unlawful.

82. That leaves the second step in the argument which is that the milling power referred to is that required when the fish pass is first constructed, not the milling power required from time to time. I have already said that Mr Turney accepted that this was an inelegant reading of the statute, and he did not seek to support it as the natural meaning of the words, but he essentially said that it was the only way to make practical sense of the provision. It made no sense, he submitted, for the Environment Agency (or before that water authorities, with the consent of the Minister) to spend time and money devising, constructing and putting into operation a fish pass that was entirely lawful on the day it was opened, only to find that the owner of the dam, by altering his own turbine, could subsequently render the fish pass unlawful, something which the Environment Agency would be powerless to prevent.

83. There is I think considerable force in this submission. In effect it requires reading s. 10(1) as if it provided that the Environment Agency can construct a fish pass provided that no injury is thereby done to the (then) milling power of the river, and can thereafter maintain it. That is not the most natural reading of the words but it is to my mind certainly a reasonably available meaning.

84. In those circumstances we have to construe the section in such a way as most likely to give effect to Parliament's intention. For those purposes it is necessary to try and make sense not only of s. 10, but of the statutory scheme as a whole. That includes in particular s. 9(1), under which if a new dam is constructed or an existing dam is raised or altered so as to create increased obstruction to the passage of salmon or migratory trout, or any other obstruction is created, increased or caused, the Environment Agency can require the owner or occupier of the dam to make a fish pass, and thereafter maintain it. By s. 9(4)(a) this does not authorise the doing of anything that may injuriously affect any navigable river or canal and the like; but there is no proviso that it should not affect the milling power.

85. The practical consequence is that if a riparian owner wants to install a new dam so as to install a new turbine, the Environment Agency can insist on a fish pass being provided even if affects the operation of the proposed new turbine. So if Sir George had not had a dam and turbine at all in 1999, he could not have constructed a new dam and installed a new turbine without having to give priority to the Environment Agency's requirement for a fish pass. The same would be true if he had an existing dam but he needed to alter it to install his new turbine, and the alteration caused increased obstruction to salmon. But if Sir George is right, then the fact that he had an existing dam in 1999, and was able to install his new turbine without altering the dam, means that he is able to insist on priority for his new turbine and force the closure of the fish pass which was lawfully constructed in 1999.

86. That does not seem to me to produce a coherent scheme. As I see it, the legislation as a whole represents a balance between the interests of riparian owners and the interests of those concerned with the free migration of fish, and it does so not by giving priority to one or the other but by seeking to minimise any adverse effect on existing interests. Thus if there is an existing mill, the Environment Agency cannot install a fish pass if the milling power is adversely affected (s. 10(1)). Nor can they alter an existing fish pass if that will injure the milling power (s. 10(2)). Nor can they do so if it will adversely affect the supply of water to navigable waters (ibid). Conversely, a riparian owner who does not have an existing dam cannot build one so as to obstruct the existing migration of salmon or migratory trout, and must make a fish pass if

required to do so (s. 9(1)); and again this does not permit any interference with the supply of water to navigable waters (s. 9(4)).

87. Moreover I agree with Mr Turney that Sir George's construction might have serious practical consequences. The Environment Agency might well find that it had spent large sums of public money on constructing a fish pass, which it could not then lawfully use as intended. The effect of closing any particular fish pass would depend on how many days it was closed for: it may be that the closure at Padworth for the number of days which Sir George sought would not in practice prevent salmon from migrating upstream in due course – there were no findings in relation to this – but it is easy to see that at other places if the owner of a turbine were able to insist on the closure of a fish pass, the effect might be to act as a very significant obstacle to migration or even prevent it altogether. That would not only be a waste of the money spent in constructing that particular fish pass, but might also render an entire chain of fish passes useless. That seems to me quite a strong pointer that that cannot be what Parliament intended.

88. Mr Thomas suggested that if there were practical problems, the solution might lie in the Environment Agency using its powers when licensing impoundments to impose suitable conditions. While this might be capable of mitigating the problem in some cases, I accept Mr Turney's submission that this is not a complete answer. First, the replacement of a turbine with a new one will not necessarily always require a licence: that depends on whether there will be any "impounding works" within the meaning of s. 25 of the 1991 Act. Second, the licensing regime arises under different legislation. It cannot sensibly be supposed therefore that Parliament intended it to be used to solve the problems arising out of Sir George's construction.

89. In those circumstances I conclude that Mr Turney's construction is to be preferred. In my judgment the effect of s. 10(1) of the 1975 Act is that the Environment Agency can lawfully construct a fish pass provided that it does not materially or substantially injure the milling power of the river that is then being exploited (or capable of being exploited) by an existing mill or turbine, and having done so, can thereafter keep it in place and operational even if the turbine is subsequently replaced by a turbine which is adversely affected by keeping the fish pass open.

90. I would therefore allow the appeal on Ground 2, and replace the declarations made by the Judge by suitable declarations.

Lord Justice David Richards:

91. I agree.

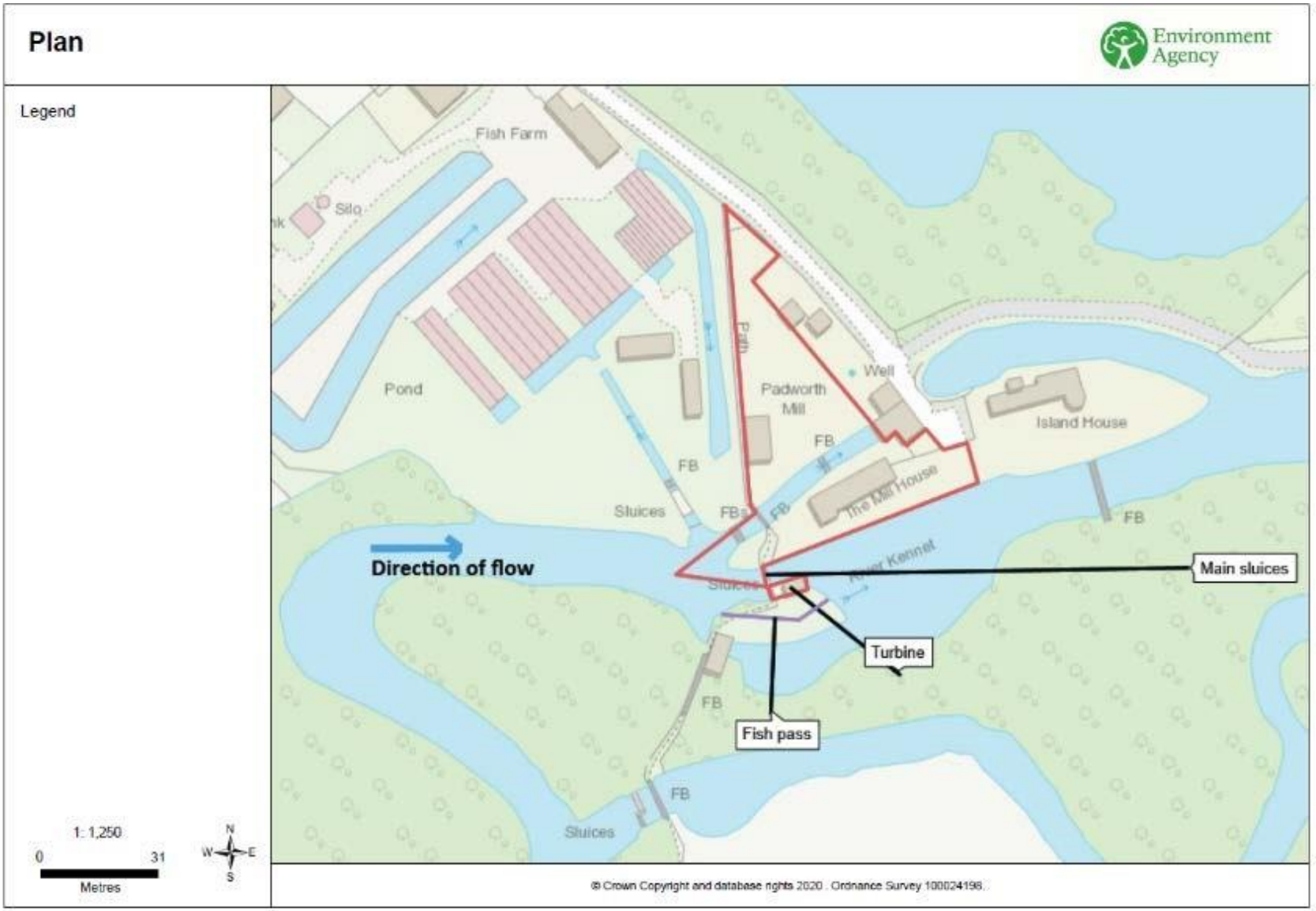
Lord Justice Davis:

92. I also agree with the judgment of Nugee LJ.

93. On the first ground, I saw some force in Mr Turney's arguments. Clearly, however, the Environment Agency could only act for this purpose as empowered to do under s. 10. The limitation ("so long as no injury is done by such a fish pass to the milling power" etc.) in that section qualifies the power to "construct and maintain". I had wondered if those words "construct and maintain" connoted the physical acts of

construction and thereafter of maintenance (in the landlord and tenant sense): which also would be consistent with the use of the word "maintain" in s. 9 (2). If that were the right reading, then the subsequent *operation* of the fish pass by the Environment Agency would not necessarily seem to be within the ambit of the proviso contained in s. 10. On that basis, the argument based on the Environment Agency acting in discharge of its statutory duties, in line with the position arising in the *NWAA* case, would then potentially hold good. But on reflection I think that that is too narrow a reading of those words. Nor was it a reading adopted in the court below.

94. Overall, therefore, I consider that the first ground fails, for all the reasons given by Nugee LJ. I agree that the appeal should be allowed on the second ground.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