Neutral Citation Number: [2024] EWHC 913 (Admin)
Case No: AC-2023-BHM-000141

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil and Family Justice Centre
33 Bull Street,
Birmingham, B4 6DS

Date: 23/04/2024

Before :

MR JUSTICE EYRE

- -

Between :

WORCESTERSHIRE COUNTY COUNCIL	**Appellant**
- and -	
(1) ALAN ROY PAIN **(2) PENCROFT LIMITED** **(3) OLIVER RICHARD ROGERS**	**Respondents**

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- -

John Hunter and **Elana Kaymer** (instructed by **Clarke Willmott**) for the **Appellant**
Richard Kimblin KC (instructed by **Lodders Solicitors**) for **Alan Roy Pain**
Scott Stemp (instructed by **Irwin Mitchell)** for **Pencroft Limited** and **Oliver Richard Rogers**
Hearing dates: 19th March 2024

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Approved Judgment

This judgment was handed down remotely at 10.00 am on 23rd April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr. Justice Eyre:

Introduction.

1. This is a prosecution appeal by way of case stated against the decision of HH Judge Cole sitting with two magistrates in the Crown Court at Worcester on 27th July 2022. By that decision the Crown Court allowed the Respondents' appeal against their conviction pursuant to section 24 of the Land Drainage Act 1991 ("the LDA") of an offence of failing to comply with notices served under that section.

2. The case arises out of the construction, beginning in 2013, of three irrigation pools on land at Witley Park Farm, Great Witley, Worcestershire. The pools were constructed along the line of a watercourse flowing across that farm and forming part of a tributary of the Shrawley Brook. The pools were created by the importation on to the farm and the depositing thereon of tens of thousands of tonnes of waste. The Appellant ("the Council") is the Local Lead Flood Authority for Worcestershire and as such is the relevant drainage board for the purposes of the LDA. It is not disputed that the Respondents are persons by whom those works were done and/or persons having power to remove the pools.

3. On 29th December 2015 the Council served on the Respondents notices ("the Notices") in the terms I will consider below. The Notices purported to be served pursuant to powers under section 24 of the LDA and to require sundry actions to be taken.

4. The Respondents were prosecuted pursuant to informations laid on 14th June 2019 for alleged failures to comply with the Notices. There followed a six-day trial in the Magistrates' Court where the main issue was whether the watercourse was a watercourse within the meaning of the LDA. The Respondents were convicted on 7th September 2020 and sentenced in November 2020.

5. The Respondents appealed successfully to the Crown Court. There was a hearing in the Crown Court to consider various preliminary issues, one of which was the lawfulness of the Notices. The outcome in the Crown Court turned on the interpretation of the final requirement in the Notices that the Respondents "reinstate land to former condition"; on the lawfulness of that requirement; and on the question of whether that requirement, if unlawful, was severable from the other parts of the Notices. The Crown Court held that the requirement was unlawful and that it was not severable with the consequence that the Notices were entirely invalid.

6. The Council applied for the statement of a case in August 2022 and this resulted in the Case Stated dated 21st June 2023 (and amended on 28th February 2024). The Case Stated posed two questions:

    (1) "Were we right to find that the final requirement in the notices, "to reinstate the land to former condition," was outside the powers conferred by section 24?

    (2) If so, were we right to find that the requirement could not be severed and that, as a result, the notices were entirely invalid?"

7. Addressing the first question involves consideration of two issues: the proper interpretation of the requirement and the lawfulness of the requirement as so interpreted. The question of severability will fall to be considered after the determination of those matters.

8. The appeal was filed in the District Registry of the King's Bench Division on 30th June 2023 (and so within the required 10 day period from the date of the Case Stated). It was returned to the Council on 11th July 2023 on the basis that it should have been filed with the Administrative Court and was filed there on 17th July 2023. The parties were agreed that even if the filing was out of time (which the Council says it was not) an extension of time should be granted. That is clearly the appropriate course and to the extent that it is necessary I grant an extension of time.

The Legislative Framework.

9. Section 72(1) of the LDA defined "culvert" and "watercourse" as:

> "*culvert'* means a covered channel or pipe which prevents the obstruction of a watercourse or drainage path by an artificial construction;"
>
> "*watercourse*" includes all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the Water Industry Act 1991) and passages, through which water flows"

10. By section 23(1) the LDA prohibited the obstruction of watercourses in the following terms:

> "No person shall—
>
> (a) erect any mill dam, weir or other like obstruction to the flow of any ordinary watercourse or raise or otherwise alter any such obstruction; or
>
> (b) erect a culvert in an ordinary watercourse, or
>
> (c) alter a culvert in a manner that would be likely to affect the flow of an ordinary watercourse, without the consent in writing of the drainage board concerned."

11. Section 24 addressed the consequences of an unauthorised obstruction thus:

> "(1) If any obstruction is erected or raised or otherwise altered, or any culvert is erected or altered, in contravention of section above, it shall constitute a nuisance in respect of which the drainage board concerned may serve upon such person as is specified in subsection (2) below a notice requiring him to abate the nuisance within a period to be specified in the notice."
>
> (2) The person upon whom a notice may be served under subsection (1) above is—
>
> (a) in a case where the person by whom the obstruction has been erected or raised or otherwise altered has, at the time when the notice is served, power to remove the obstruction, that person; and
>
> (b) in any other case, any person having power to remove the obstruction.
>
> (3) If any person acts in contravention of, or fails to comply with, any notice served under subsection (1) above he shall be guilty of an offence and liable, on summary conviction—
>
> (a) to a fine not exceeding level 5 on the standard scale; and
>
> (b) if the contravention or failure is continued after conviction, to a further fine not exceeding £40 for every day on which the contravention or failure is so continued.
>
> (4) If any person acts in contravention of, or fails to comply with, any notice served under subsection (1) above, the drainage board concerned may, without prejudice to any proceedings under subsection (3) above—

> (a) take such action as may be necessary to remedy the effect of the contravention or failure; and
>
> (b) recover the expenses reasonably incurred by them in doing so from the person in default."

12. Section 25 of the LDA gave the drainage board power to serve a notice where the proper flow of water in an ordinary watercourse was impeded but, by way of contrast to the position in respect of section 24 notices, section 27 gave the recipient of such a notice a right of appeal to the magistrates' court.

The Notices.

13. The Notices served on 29th December 2015 were in identical terms. Before I turn to the terms of the Notices it is to be noted that there is no prescribed form for a notice under section 24(1) of the LDA. In addition, the parties were agreed that it would have been open to the Council to serve notices simply identifying the matters said to constitute a nuisance for the purpose of section 24(1) and requiring the recipients to abate that nuisance. However, as the Crown Court correctly put it in the Case Stated, if the Council chose to specify on a notice the steps which were to be taken then those steps had to be "clear and lawful".

14. The Notices consisted of a "Preamble to Notification", a "Notice to Abate/Remove Obstruction" which was followed by notes, a schedule of "Steps required to abate the Nuisance" ("the Schedule"), a copy of the terms of section 24; and a plan entitled "Witley Park Farm Pool Map" ("the Plan"). It is common ground that all are to be read together. A copy of the Plan appears at Annex 1 below.

15. The Preamble provided in part as follows:

> "Works to create three irrigation lakes over an Ordinary Watercourse at Witley Park Farm have been carried out without consent under *s.23; Land Drainage Act 1991*. Un-consented structures have been erected in on and over the watercourse that flows from the Washing Pool, through a Local Wildlife Site and discharges into the Shrawley Brook system downstream of the site ...
>
> The works carried out consist of un-consented lengths of culvert in the watercourse to enable waste/fill material to be imported, deposited and profiled over the existing and new culvert structures in the watercourse to form the three irrigation lakes.
>
> …
>
> The LLFA is issuing this notice to require you to restore the watercourse to its condition prior to the works such as to abate the nuisance.
>
> …"

16. The "Notice to Abate/Remove Obstruction" invoked section 24 and then said:

> "The LLFA considers that:
>
> • an obstruction has been raised in an ordinary watercourse, namely an un-named tributary of Shrawley Brook at Witley Park Farm, Great Witley, Worcestershire
>
> AND
>
> • a new culvert has been erected and existing culverts altered in a manner likely to affect the flow of an ordinary watercourse, namely, an un-named tributary of Shrawley Brook at Witley Park Farm, Great Witley, Worcestershire.

> Without the consent, in writing, of the LLFA in contravention of Section 23 *Land Drainage Act 1991*
>
> In accordance with Section 24 of the *Land Drainage Act 1991*, Worcestershire County Council, as the Lead Local Flood Authority, requires you to lake the actions set out in Schedule 1 of this notice by the date(s) specified."

17. The Schedule of "Steps required to abate the Nuisance" began by saying:

> "Positions of Pond 1, Pond 2 and Pond 3 and of original culvert and origins' open watercourse are as shown on the attached plan"

18. There then followed a table consisting of two columns in the first of which a step was identified while the second contained the date by when the step was to have been taken.

19. The first step was:

> "Remove imported waste material from Pool 1 (upstream end), off-site to expose original culvert/open watercourse"

20. That step was to have been taken by 4 months from the date of service of the notice. The second and third steps were in the same terms but referred respectively to "Pool 2 (middle pond)" and "Pool 3 (downstream end)" and were to have been taken 8 and 12 months from the date of service.

21. The fourth step was:

> "Removal of un-consented lengths of culvert and remediation to watercourse open channel and brick culverts to reinstate land to former condition"

22. That step was to have been taken "within 1 month from the end of each step above".

23. The Schedule, therefore, provided for works to be done in respect of each of the three pools and for the steps set out in the fourth box to be undertaken in relation to each pool after the earlier works in respect of that pool had been completed.

24. The dispute between the parties turns on the interpretation and lawfulness of the last six words of the fourth step namely "and reinstate land to former condition".

<u>The Decision in the Crown Court.</u>

25. The decision to uphold the Respondents' appeal was made at the conclusion of a preliminary hearing which was to determine whether the Notices were *ultra vires* and so invalid and whether the prosecution amounted to an abuse of process.

26. The Respondents had argued that the use of the expression "the site" in the Notices was a reference to the land holding as a whole with the consequence that the requirement in the first three steps for material to be removed "off-site" was to be read as requiring the waste to be removed from the holding. The Crown Court rejected that argument. It held that account was to be taken of the areas marked on the Plan with the consequence that the requirement that waste material be removed "off-site" was to be read as requiring removal from the particular area which the step was addressing (namely Pool 1, Pool 2, or Pool 3).

27. The Crown Court held that the words "and reinstate land to former condition" were to be interpreted as requiring the removal of all of the waste from each of the three pools as

identified on the Plan and that this was an unlawful requirement which went beyond the Council's powers under section 24. The reasoning was set out thus at paragraph 4.2(d) of the Case Stated:

> "However, we held that the requirement in step [4] to 'reinstate land to former condition' was applicable to a much wider area when considering that the watercourse itself was modest and not more than a meter or so wide. We found that although some reasonable degree of 'curtilage' may be covered by a notice under s24 of the Land Drainage Act 1990, the wholesale removal of tens of thousands of tonnes of waste fell outside of the powers available under s24 LDA. We found that a notice concerned with obstructed or altered watercourses could not, as a matter of law, attach to an area of land outside what could reasonably be considered as the watercourse. The prosecution conceded that the requirement to 'reinstate the land' could mean either the requirement to remove all of the waste on the site (because this would be required to reinstate the land) or that it could be read as meaning only some of the waste. We found that the phrase 'reinstate the land' meant restoring the condition of the land, using the same soils, the same type of vegetation (grass) and the same land levels and topography. Our view was that this would require removal of all of the imported waste material. We considered whether this should be limited just to land affected by unconsented lengths but the clear words of the notice were 'remediation to watercourse open channel and brick culverts' and this reinstatement requirement was required to take effect within a month of completion of the other steps. Accordingly, we were satisfied that this final provision required reinstatement of the land to its former condition in respect of each of the pool areas marked on the Plans. In simple terms it required removal of all of the waste material imported to form the ponds because only that allowed reinstatement to its former condition."

28. The Crown Court then moved to consider whether the unlawful requirement could be severed from the other requirements in the Notices. It approached that question by applying the test of whether the requirement was "inextricably interconnected" to the valid requirements and did so on the basis that this was the test laid down by the Court of Appeal in *Dunkley v Evans* [1981] 1 WLR 1522. The Crown Court held that severance was not possible. It expressed its reasoning thus at paragraph 4.7:

> "We concluded that, whilst it might on an initial reading appear that the requirement to reinstate the land could be severed by striking out the last six words of the notices, it was in fact inextricably linked to each of the first three steps and so could not be excised. This is because the final provision required reinstatement of the land in relation to all other areas (affected by requirements [1] to [3]) and required removal of all of the waste from within all of the areas and that this fell outside of the powers available to the Council under the Act."

29. In those circumstances the Crown Court did not need to come to a conclusion on the abuse of process argument. The court expressly said that it was not making a finding as to whether there should be a stay on that basis. However, a tentative conclusion was expressed thus at paragraph 4.9:

> "...We found that if we were wrong on the law as to validity of the notice and/or as to severance, then the recipients of the notice had no way of knowing what they were required to do lawfully and that this had the appearance to us of a sufficient degree of unfairness as would warrant staying the case as an abuse of process..."

30. The Respondents had not sought amendment of the Case Stated to provide for an additional question in relation to the alleged abuse of process. That was, therefore, not an issue before me save that the Respondents left open the possibility of arguing, in the event that the Council's appeal succeeded, that the potential abuse of process was relevant in considering

how the court's powers under section 28A(3) of the Senior Courts Act 1981 should be exercised. At this stage I note only that the Crown Court's provisional view as to unfairness was based on the conclusion that the Respondents, as recipients of the Notices, were unable to know what they were being required to do. The question was, therefore, one of the clarity and/or comprehensibility of the Notices. Subject to further submissions, that appears to me to be a matter going to lawfulness rather than to fairness or abuse of process. If the Notices sought to impose requirements but did not specify the same with sufficient clarity for the recipients to know what was required then the Notices would be unlawful even if the requirements in question could have been imposed by a sufficiently clear notice. Conversely, if the requirements were set out with sufficient clarity so as to be comprehensible by the recipients and were within the scope of the powers under section 24 then the Notices would be lawful. In the latter circumstances there would appear to be little scope for a conclusion that prosecution for a failure to comply with the lawful notices was unfair such as to be an abuse of process.

The Grounds of Appeal.

31. The Council advanced four grounds of appeal. The fourth was that the Crown Court had erred in law in the respects set out in the three preceding grounds which were:

> "(1) The requirement to `reinstate the land to former condition' only applies to land within the site affected by compliance with the other steps/requirements of the notices;
>
> (2) Such a requirement is within the powers conferred by section 24 LDA 1991;
>
> (3) Further or alternatively, even if the requirement is outside the powers conferred by section 24, it is clearly severable;"

The Interpretation of the Notices.

32. There was substantial agreement on the approach to be taken to the interpretation of the Notices but disagreement as to the outcome of applying that approach. The Notices are to be read objectively and as a whole. There cannot be regard to extraneous material but account is to be taken of the factual context. The Crown Court said that "a person served with such a notice is entitled to look only to the words of the notice and find out from within the four corners of the notice what they are required to do". I agree with that proposition subject only to the qualification that a notice under section 24 can only be validly served on a person with power to remove the obstruction. Accordingly, the person served with the notice is to be taken to have the knowledge of matters such as the nature and location of the site which such a person could be expected to have. However, the Council's intention was to be derived from the Notices and could only be effected through the Notices with the consequence that its internal undisclosed expressions of intention were not relevant to the interpretation exercise.

33. For the Council Mr Hunter submitted that account was to be taken of the fact that non-compliance with a notice was an offence. He said that this meant that where there was a choice between a narrower and a wider reading the former should be adopted. Such an approach may very well be appropriate when interpreting legislation and determining whether particular conduct is or is not lawful. However, I do not accept that it has any part to play in the interpretation of the Notices. Those need to be read objectively with a view to establishing the meaning of the requirements contained in them. If there are two or more equally tenable interpretations such that there is genuine ambiguity and it truly cannot be said (having proper regard to the language of the Notices seen as a whole) which is the correct reading then it is not permissible to say that the potential criminal consequences can

tip the balance in favour of the narrower reading. Instead in such a situation the fact that non-compliance was an offence would be likely to lead to the conclusion that the Notices were invalid. That would be because, in order to be effective, a notice giving rise to such a consequence has to be clear so that a recipient had no scope for genuine doubt as to what was to be done.

34. The Respondents submitted that, as the Crown Court had found, the requirement to "reinstate land to former condition" was a reference to the entirety of Pools 1, 2, and 3 and required each of those to be restored to its former condition with the removal of the entirety of the waste. The Council submitted that the scope of the closing words of the final requirement was much narrower and that it only applied to such land as had been affected by compliance with the preceding requirements.

35. There are a number of considerations which operate in favour of the Respondents' interpretation.

    a. Pools 1, 2, and 3 were identified on the Plan attached to the Notices. The reference to "land" in a requirement relating to the pools could be seen as a reference to the areas of land so identified.

    b. If the intention had been to require the Respondents simply to reinstate the area from which waste or the unconsented lengths of culvert had been removed or where the watercourse had been remediated in accordance with the earlier requirements then this could have been stated without the use of the word "land". In particular, the requirement could simply have referred to the remediation of the watercourse and its reinstatement to its former condition.

    c. Following on from the preceding point it is said that it is necessary to give meaning to the final requirement and to all the words used. It is said that the Council's interpretation fails to give effect to the word "land" and that the requirement, on that interpretation, adds nothing to the preceding ones and in particular adds nothing to the requirement of remediation.

    d. The Crown Court was influenced by the view that reinstatement of the land meant the restoration of its previous condition including vegetation, land levels, and topography. It concluded that this would "require removal of all of the imported waste material". The first proposition as to the meaning of reinstatement to the former condition is clearly correct. However, in my judgement this does not assist with the key question as to the extent of the area which is to be reinstated. The waste material has to be removed from the area to be reinstated but what is that area? If the area in question is that on which the work to meet the earlier requirements has been done the reinstatement of that area will require removal of the waste from there but it will not necessarily require waste to be removed from a wider area. The Case Stated said that the Crown Court "considered whether this should be limited just to land affected by unconsented lengths" and then gave the following as the reason for rejecting that view and for concluding that the requirement was to reinstate the entire area of each identified pool "the clear words of the notice were 'remediation to watercourse open channel and brick culverts' and this reinstatement requirement was required to take effect within a month of completion of the other steps". I am unable to see how those matters assist in determining the extent of the area identified by the word "land".

e. However, there is some force in the argument that a requirement to reinstate land must relate to a wider area than that addressed by the remediation of the watercourse because reinstatement of the narrow strip (identified in the Crown Court as being only 1m or so wide) while leaving the surrounding land unaffected would be an unrealistic exercise.

f. If the Council's interpretation is correct then the Notices are unduly complicated. The effect which the Council says is achieved by the requirements could equally have been achieved by a simple requirement to restore and reinstate the watercourse. It is suggested that the fact that the requirement was not expressed in that way indicates that more was intended.

g. The Respondents sought to revive before me the argument that had failed in the Crown Court that the direction in the first three steps for removal "off-site" required the waste to be removed from the entire holding. They sought to argue that this was an indication that "land" should be read as referring to the area of each of the pools as shown on the Plan. That course was not open to the Respondents in circumstances where they had not sought any additional question in the Case Stated relating to the interpretation of "off-site". In any event I am satisfied that the Crown Court's interpretation of that provision was correct. In each of the first three steps the removal is required to be from the identified pool in question and the identification of the pool is immediately followed by the words "off-site". The Crown Court was right to identify in each instance the site being referred to as the pool as shown on the Plan. However, the Crown Court's interpretation of "site" and "off-site" in the first three steps does provide some very limited support for conclusion it reached on the fourth step. The contention is that "land" in that step should be regarded as a reference to the same area as the sites in the earlier ones. The weight is limited because "site" and "land" are different terms and can refer to different areas. Indeed, the fact that the reinstatement is to be of "land" rather than of "site" notwithstanding the use of the latter term in the first three required steps suggests a different area is envisaged (otherwise the reference could have been to "site" throughout).

h. Mr Kimblin KC submitted that the reference in the Preamble to the "works" as including the deposition of the waste material was an indication that the Council was addressing the deposition as a whole. He said that this, in turn, indicated that it was appropriate to read the Notices as requiring reinstatement of the entirety of the area of the pools. It is correct that the Preamble does make reference to the totality of the works which had been undertaken. However, the force of the argument based on that is greatly reduced by the fact that the purpose of the Notices is said to be to require the restoration of the watercourse. That is a factor which supports the Council's interpretation and indicative that the Steps Required were confined to the watercourse.

i. Similarly, I found unpersuasive Mr Kimblin's argument based on the references in the Notices to other regulatory regimes. The Notices explained that the works required to comply with them might be "a notifiable project under the CDM Regulations" and that other consents relating to the use of engineering fill "such as planning permission or waste disposal" might be required. Mr Kimblin said that this was to be seen as indicative of the scale of works being contemplated by the Notices which, in turn, indicates that a wholescale removal of the waste material was being required. I do not accept this. It is not suggested that on the Council's interpretation

of the final requirement the works required by the Notices would be *de minimis*. In those circumstances it would be necessary for the Respondents to consider the need for compliance with the various regimes to which the Notices referred whichever interpretation were correct.

36. The following considerations (in addition to those identified in the treatment of the points above) point the other way and support the Council's interpretation.

    a. The requirement is to be read realistically and in the context of the Notices as a whole; of the works being required; and of the preceding steps. It is said that when this is done the requirements are to be seen as being for a sequence of actions following on from each other and directed to the strip of land occupied by the watercourse.

    b. If the intention had been for the final requirement to refer to the area of the pools as a whole then they could have been identified as they had been in the earlier steps. The requirement could have been to reinstate "the pool" and that would have been read as a reference to the pools successively. The fact that this was not done indicates that something different was intended.

    c. The interpretation of the final requirement which was adopted by the Crown Court makes the earlier requirements redundant. That is because all the works set out there would be elements in reinstatement of the pools as a whole. Such reinstatement of the pools to their former condition would necessarily have involved everything covered by the earlier steps. It follows that if the intention had been for the Notices to require the removal of all the waste and the reinstatement of the full area of all three pools and if the final requirement was meant to have that effect then the Notices could have achieved that objective by much simpler drafting. Instead of four steps setting out four processes (removal of waste to expose the watercourse; removal of unconsented lengths of culvert; remediation to watercourse; and reinstatement of land) all that would have been required would have been a notice requiring the reinstatement of the identified pools to their former condition.

    d. Following on from the preceding point there is force in the Council's contention that it would be illogical and artificial for the final part of the last required step to be interpreted as requiring more works to be done than in the earlier steps or as referring to works which would include those already done. Rather the more natural reading is to see required step 4 and then the requirements in that step as building on the preceding steps and requirements with the required reinstatement being reinstatement of the land affected by those steps or requirements.

    e. The fact that various actions were spelt out does not mean that the Notices are to be interpreted as doing more than requiring the restoration of the watercourse. The steps and requirements are to be seen as the measures needed to achieve that outcome.

    f. The conclusion correctly reached by the Crown Court as to the proper interpretation of steps 1 – 3 is relevant to the interpretation of the final requirement. The first three steps required the removal of sufficient waste in respect of each pool to expose the original culvert or watercourse at that location. That is a clear and natural reading of those steps. It would have been possible for those steps to be followed by a further

requirement to remove the rest of the waste. However, neither the fourth step nor the final requirement in that step are read naturally as being such a requirement. Instead they are read more naturally as being the continuation of works focused on the watercourse itself. The watercourse having been exposed through the first step in the sequence the further works are aimed at restoring that watercourse to its original condition. The works of removing unconsented lengths of culvert and of remediating the watercourse clearly relate just to the watercourse and the reinstatement requirement included with those works in the same step (and the same sentence) is most naturally seen as part of the same watercourse-focused exercise.

37. No one factor is conclusive. However, I am satisfied that the proper interpretation is clear. When the words "reinstate land to former condition" are read realistically and in context then the requirement is for reinstatement of the area of land which has been the subject matter of the preceding requirements of the Notices namely the watercourse itself. That is the land which is to be reinstated. The Notices set out a staged series of works each part of which relates to the watercourse and none of which extend beyond that. They are: the exposure of the watercourse by the removal of sufficient waste to achieve exposure; the removal of unconsented lengths of culvert; the remediation of the watercourse; and the reinstatement of the land on which those works have been undertaken. The reinstatement of the watercourse is to be to the condition before the waste was deposited and it may be that this will require work going beyond the watercourse itself but that work is only required, on the proper interpretation, to the extent that it is necessary to achieve reinstatement of the watercourse.

The Lawfulness of the Final Requirement when properly interpreted.

38. There was no dispute that interpreted in the way I just have as requiring only reinstatement of the watercourse and such of the adjoining land as had been the subject of the earlier requirements then the requirement was one which the Council had power to impose.

39. That was clearly correct. As it was put in the Case Stated "some reasonable degree of `curtilage' may be covered by a notice under section 24". The effect of section 24 is that it is the erection of the obstruction or the erection or alteration of a culvert which constitutes the nuisance. The power to require abatement of that nuisance necessarily includes the power to require reinstatement of the relevant watercourse or culvert to its previous condition. Such a power in so far as it is not comprised in the power to require abatement of the nuisance is either "incidental to or consequential upon" that power (to use the language of Lord Selborne In *Att Gen v Great Eastern Railway Company* (1880) 5 App Cas 473 at 478) or "conducive to incidental to" the discharge of the section 24 power (in the language of section 111 of the Local Government Act 1972).

40. In the Crown Court it was contended that the Notices were insufficiently clear for the recipients to know what was required of them. This was the basis of the abuse of process argument and found favour with the Crown Court albeit no definitive finding was made in that regard. As explained above it seems to me that the point is best seen as relevant to the validity and lawfulness of the Notices. However, the first question in the Case Stated is directed to the issue of whether the requirement was outside the Council's powers in the narrow sense of whether there was a power to impose such a requirement. That is seen as distinct from the question of whether the formulation used in the Notices was sufficiently clear so as lawfully to impose that requirement. Although the questions are logically

distinct that approach is artificial here where the ultimate question is whether the Notices were lawful and so had the consequence that non-compliance was an offence.

41. Both sides proceeded before me on the footing that the clarity or otherwise of the Notices and the consequent unfairness or otherwise of the prosecution of the Respondents would be relevant to the order to be made if the requirement was found to be within the Council's powers and/or severable. I will invite further submissions on that point on the handing down of this judgment. However, my provisional view is that my conclusion that the correct interpretation is clear when the Notices are read realistically and in context precludes a finding that they are unlawful on the basis of a lack of clarity. Where there is a natural reading which can be adopted and where the works to be performed are clear on that reading then there is no lack of clarity. The fact that there is an alternative reading which is less natural, albeit one in support of which cogent arguments can be advanced does not make a notice unclear. The recipient of a notice cannot strive to create ambiguity by pointing to an artificial reading where a natural interpretation is available.

42. It follows that the first question is to be answered in the negative and the Crown Court was wrong to find that the final requirement was outside the powers given by section 24.

The Council's Argument as to Lawfulness on the alternative Interpretation.

43. For the Council Mr Hunter argued that even if the Notices were to be interpreted as requiring the removal of all the waste from the entire areas of each of the pools and the reinstatement of all those areas the requirement remained lawful and was one which the Council was entitled to impose. The point is academic in light of the conclusion I have reached on the interpretation of the Notices. In deference to Mr Hunter's argument I will set out my reasons for rejecting this contention. I will do so briefly though, I regret, at greater length than the Crown Court where the Case Stated put the point correctly and concisely by saying that "a notice concerned with obstructed or altered watercourses could not, as a matter of law, attach to an area of land outside what could reasonably be considered as the watercourse".

44. Mr Hunter's principal point was that section 23(1)(a) identified obstructions as "any mill, dam, weir or other like obstruction". The obstruction is the structure such as the mill or dam. It is the erection of such a structure which, by virtue of section 24, constitutes a nuisance. The power under section 24 is to require the abatement of that nuisance. As the erection of the structure constitutes the nuisance so abatement of that nuisance requires the removal of the structure as a whole. Mr Hunter drew support from the fact that section 24(2) provides that it is those with power to remove the obstruction who are to be served with notice. Mr Hunter said that the position was analogous to cases of the obstruction of the highway. Where a structure is obstructing the highway (for example an overhanging building) the relevant highway authority can require removal of the whole structure and not just the overhanging or obstructing part. Mr Hunter said that in so far as authority was needed for this proposition in respect of highways it was inherent in the decision in *R(Ashbrook) v East Sussex CC* [2002] EWCA Civ 1701, [2003] 1 P & C.R 13. He said that the relevant structures in the current case were the pools; that they were to be seen as single structures; and that the Council was entitled to require their removal.

45. Before addressing that principal argument I can deal shortly with a subsidiary argument advanced by Mr Hunter. He prayed in aid section 61A of the LDA. He said that, when considering the extent of the Council's powers under the LDA, it was relevant to take

account of the purposes for which they were to be used and that section 61A set out a wide range of purposes. I do not accept that section 61A supports the Council's case on this point. It is correct that the purpose for which a statutory power is granted can be relevant to the interpretation of the power both as to express interpretation and as to the extent to which particular powers can be said to exist as a consequence of necessary implication (see my summary of my understanding of the authorities in *R (Ball) v Hinckley & Bosworth BC* [2023] EWHC 1922 (Admin), [2024] PTSR 19 at [44] – [48]). Section 61A does not, however, throw any light on the ambit of section 24. On a proper reading section 61A is clearly identifying factors which are to be taken into account in the exercise of the powers provided in the LDA rather than as addressing or influencing the scope of those powers. It is of note that section 61A only took effect on 21st September 1994 having been introduced into the LDA by the Land Drainage Act 1994. It was not suggested that the introduction of section 61A increased the scope of the powers under section 24 from those which had existed before September 1994.

46. Returning to the Council's principal argument on this point I am satisfied that when read properly sections 23 and 24 point against the Council's contention. Section 23 is directed at actions which obstruct or affect the flow of a watercourse while section 24 empowers a drainage board to compel the removal of the interference with the flow so as to maintain the flow of water. The focus is on interference with the flow of water. This is also shown by the reserve power in section 24(4) for the drainage board to take action "to remedy the effect of the contravention" (my emphasis). Similarly, in section 25 the emphasis is on maintaining the "proper flow of water". So the power in section 24 is to require the removal of structures which obstruct the watercourse. It then becomes necessary to analyse the nature of the structure which is the obstruction of the watercourse and to do so in light of the purpose of the provisions. It can readily be understood that if the obstruction is a mill, dam, or weir then the power will extend to removal of the structure as a whole. That is because save in exceptional circumstances it will be artificial to see the parts of those structures which happen not to be in the watercourse as distinct from those parts which are. However, where the obstruction is an "other like obstruction" then it is necessary to take care to identify what in fact constitutes the obstruction. That will be a matter of fact but in most cases only that part of a structure which obstructs the flow of a watercourse will be an "other like obstruction" for these purposes.

47. Here the pools were created by the importation and depositing of waste over an extensive area. The parts of those works which covered the watercourse were clearly an obstruction. However, it is artificial to see waste deposited some distance away from the watercourse as being an obstruction of it. The Crown Court explained that the watercourse was about 1 metre wide whereas the pools covered an area 100 metres or more wide. In the absence of clear evidence it cannot realistically be said that waste deposited any significant distance away from the 1 metre wide strip of the watercourse operated as an obstruction of that watercourse. I do not understand it to be asserted by the Council that remediation of the watercourse can only be effected by removal of all the waste from the full area of the pools. Mr Hunter said that each of the pools were treated by all as being a single structure but that is artificial and the depositing of waste over an area 100 metres wide is not (at least in the context of this watercourse) akin to a structure like a dam or a weir.

48. Mr Hunter said that the Crown Court erred in seeking to limit the section 24 power to a particular geographical area. He said that the limitation is only as to the removal of the nuisance. The latter proposition is correct but the former is a mischaracterisation of the

Crown Court's approach. It was not saying that there was a particular arbitrary geographical restriction on the section 24 power. Rather it was saying that there was no power to require the removal of waste at a significant distance from the watercourse in the circumstances here because such waste was not capable of obstructing the flow of the watercourse and so not capable of being a nuisance for the purposes of section 24.

49. It follows that unless it were to be established that removal of all the waste was necessary to end the obstruction of the flow of water in the watercourse the Council had no power under section 24 to require the removal of all the waste from the whole area of the pools. If contrary to the conclusion I have reached above the Notices were to be interpreted as having that effect they would have been unlawful.

Severability.

50. The issue of the severability or otherwise of the final requirement in the Notices is academic in light of my conclusions as to the correct interpretation and the lawfulness of the requirement. However, again as the point was fully argued I will set out my conclusions shortly.

51. The starting point is the decision of the Divisional Court in *DPP v Jones* [2002] EWHC 110 (Admin). The substantive judgment was given by Gage J (as he then was) with whom Auld LJ agreed. In that case an order had been made under section 14 of the Public Order Act 1986. This had imposed restrictions on assembly; had defined the places at which an assembly could take place; and had imposed conditions governing activity at particular locations and on related matters. The defendant had been prosecuted for breach of the restrictions imposed by the notice. The notice had imposed five conditions and three of these were found to have been *ultra vires*. The magistrates had found that this rendered the entire notice *ultra vires* and ineffective. The prosecution appealed by case stated contending that the magistrates should have severed the valid conditions from those which were unlawful and should have addressed whether there had been compliance with the lawful conditions.

52. At [31] Gage J rejected the argument that there was any unfairness because the severance would "necessarily take place in retrospect as a judicial exercise" saying:

> "If a person taking part in an assembly breaches a condition which is clear and properly severable from conditions which are not valid, for my part I can see nothing unfair in him or her being prosecuted for their breach."

53. Gage J then considered the test to be applied. In that case it was common ground that the applicable test was that which had been laid down by the House of Lords in *DPP v Hutchinson* [1990] 2 AC 783 which I will consider below. Although the applicability of that test was common ground Gage J nonetheless addressed the point. He noted that the *Hutchinson* test was formulated by reference to the severability of parts of a legislative instrument. He found that the test was applicable saying that the test for the severance of the parts of a notice under the 1986 Act should not be more restrictive than that applicable to secondary legislation. Applying that test Gage J found that the provisions of the notice were severable and that the defendant was liable to be prosecuted for a failure to comply with the lawful conditions.

54. It follows that *DPP v Jones* is authority for the proposition that there can be severance of the elements of a statutory notice where a failure to comply with the notice can be a criminal offence and that the test for severance is that laid down in *Hutchinson*.

55. In *DPP v Jones* the notice prohibited certain conduct and the potential criminal liability arose from a positive act in breach of the restrictions imposed by the notice. Does it make any difference that the section 24 notice here imposed a positive obligation and that the potential criminal liability arose from the Respondents' failure to act?

56. In saying that the *Jones* approach was not applicable Mr Kimblin drew attention to the difference between the approaches taken to negative and to mandatory injunctions (and in particular interim injunctions). He said that this demonstrated that the approach to be taken when a negative restriction was being considered was not necessarily that to be taken when a positive obligation was being imposed. I find that the analogy to injunctions is helpful but not in the way suggested by Mr Kimblin. The approach to both negative and mandatory interim injunctions is governed by the same underlying principle. In respect of each when considering the grant of an interim injunction the court is concerned to take the step which runs the least risk of causing irremediable harm if a different view is ultimately taken at trial. Similarly, when considering final injunctions the court is concerned, in respect of both restrictive and mandatory injunctions, to identify the minimum order necessary to vindicate or to protect the successful party's rights or interests. To the extent that the tests for restrictive and for mandatory injunctions are expressed in different language that is not because of any difference in the underlying approach. Rather it is because as a matter of practicality greater certainty can be needed for the court to be satisfied that a mandatory injunction is the course least likely to cause irremediable harm (at the interim stage) or the minimum step necessary to vindicate or protect the applicable rights (at the final stage).

57. I am satisfied that the rationale of the approach set out by Gage J in *Jones* at [31] applies to notices requiring action as well as to those prohibiting action. There is no unfairness in a criminal prosecution for a failure to perform works where the obligation to perform those works flows from a lawful requirement which was "clearly and properly severable" from any unlawful requirements purportedly imposed by the same notice. However, the fact that the obligation is a positive one to undertake certain actions will come into play in deciding whether severance is in fact possible. It may well be harder as a matter of fact in the circumstances of particular cases to satisfy the test for severability derived from *Hutchinson* where the obligations to be severed are ones requiring positive actions than where they are restrictions of activity. This is because as a matter of fact the parts of a series of positive actions may well be regarded as being interdependent on each other in circumstances where the separate elements of a series of prohibitions may not be.

58. I turn to the test laid down in *Hutchinson*. The House of Lords was concerned with the severability of byelaws. At 804 F – G Lord Bridge (with whom Lords Griffiths, Oliver, and Goff agreed) explained that it was necessary to consider both textual and substantial severability. He defined them thus:

> "A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

59. At 811 F – G and at 813 D – F Lord Bridge explained what was required for substantial severability in cases where textual severance was and when it was not possible. As to the former circumstance he said:

> "...It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision..."

60. In the Crown Court in this case the issue of severability was approached by reference to the approach set out by the Divisional Court in *Dunkley v Evans* [1981] 1 WLR 1522. It was said that this was a test of whether the requirement to be severed was "inextricably interconnected" or "inextricably linked" to the other parts of the Notices. The Respondents maintained before me that this was the correct approach. I disagree for the following two reasons.

61. First, as a matter of authority *Dunkley v Evans* was a decision of the Divisional Court while *Hutchinson* was a subsequent House of Lords decision and so is to be followed in preference to the earlier decision. In that regard it is significant that the House of Lords in *Hutchinson* did not simply approve *Dunkley v Evans*. Instead, at 809 C Lord Bridge said that he doubted whether the English authorities including *Dunkley v Evans* threw much light on the problem of severance in legislative instruments. Moreover, the House of Lords reformulated the test in the way I have already described and it is the reformulated test which is to be applied.

62. Second, it is an unduly narrow reading of *Dunkley v Evans* to interpret it as simply articulating a test of inextricable connexion. It is right that at 1524 H Ormrod LJ *per curiam* said:

> "The general principle is stated in *Halsbury's Laws of England*, 4th ed., vol. 1 (1973), para. 26:
>
>> 'Unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part, leaving the rest intact'."

63. However, immediately after those words Ormrod LJ said:

> "The principle is more fully formulated in the judgment of Cussen J. sitting in the Supreme Court of Victoria in *Olsen v. City of Camberwell* [1926] V.L.R. 58, 68, where he said:
>
>> 'If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail.'
>
> We respectfully agree with and adopt this statement of the law."

64. The formulation derived from *Olsen v City of Camberwell* is expressly said to be the fuller formulation and it is that which is adopted by the Divisional Court. It follows that even applying *Dunkley v Evans* the test cannot properly be characterised simply as one of inextricable connexion.

65. In the circumstances of this case the question of severance of the final requirement only arises if that requirement is interpreted as requiring the removal of all the waste from all of each of the three pool areas. In those circumstances textual severance would be possible because the deletion of the words “and reinstate land to former condition” would leave the remaining text grammatically sound and coherent. However, the requirement of substantial severability would not be met. That is because on this hypothesis the notice with the final requirement included would have required removal of all the waste from all of the three pools. Severance to remove the final requirement would leave a notice with a very different effect. It would change the nature of what was being required and severance would turn the notice into something very different from what was intended. The preceding text could not, on this hypothesis, be seen as unaffected by and independent of the final requirement.

66. It follows that if, contrary to the conclusion reached above, the final requirement is properly to be interpreted as requiring the removal of all the waste from all of the pools then that requirement could not be severed from the balance of the Notices.

Conclusion.

67. The first of the questions posed in the Case Stated is to be answered in the negative. As a consequence the second question does not arise and the appeal is to be allowed.

ANNEX 1