Neutral citation number: [2019] EWHC 2272 (Ch)

Ref. E30MA489

IN THE BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre,
1 Bridge Street West
Manchester M60 9DJ

24th July 2019

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Between:

BORWICK DEVELOPMENT SOLUTIONS LTD

Claimant

-v-

CLEAR WATER FISHERIES LTD

Defendant

MR GUY VICKERS (instructed by **Napthens LLP**, Preston) appeared on behalf of **the Claimant**

MR NATHAN WELLS (instructed by **Brown Turner Ross**, Southport) appeared on behalf of **the Defendant**

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment on the trial, on issues of liability only, of a claim in conversion brought by Borwick Development Solutions Limited against Clear Water Fisheries Limited under claim number E30MA489. The claimant is represented by Mr Guy Vickers (of counsel) instructed by Napthens of Preston. The defendant is represented by Mr Nathan Wells (also of counsel) instructed by Brown Turner Ross of Southport.

2. The claimant is the former owner of a commercial fishery developed on freehold land on the west side of Kellet Lane, Borwick, in the county of Lancaster and comprised within title numbers LA814753 and LA825433. The land is close to junction 35 of the M6 motorway. The claimant's sole director and shareholder is Mr Mike Smith.

3. The defendant company purchased the land on 29 June 2016 from the claimant, acting by Law of Property Act receivers appointed by the legal chargee of the land. The defendant company's principal director and shareholder is Mr Alex Mollart.

4. The claim relates to two discrete classes of property which were present on the land at the time it was acquired by the defendant and which the claimant asserts belonged to it. The first is coarse fish which were present in nine man-made lakes and pools formed as a result of the extraction of gravel from the site in connection with the construction of the neighbouring M6 motorway. The second is solar panels, associated controls and a feed-in tariff meter which were attached to the property.

5. Two principal issues fall to be decided by the court. The first is whether title to the fish passed to the defendant with the sale of the land or whether it remained vested in the claimant. This requires the court to determine, apparently for the first time, the legal nature

of property in stocks of fish contained in a commercial fishery. The second issue is whether or not solar panels attached to the land are to be treated by law as fixtures which pass to the purchaser on a sale of the land.

6. I can take the background from paragraphs 2 through to 12 of Mr Vickers's written skeleton argument. The claimant ran a commercial fishery from the site (together with another small piece of land) between 2005 and 2016. The claimant had acquired the site in or around 1997 following the extraction of gravel from the site. That had left a large (33-acre) void on the site which had become a lake. The claimant recognised that the site had development potential and also the British Waterways Board was interested in acquiring the site. The claimant and British Waterways jointly explored the possibility of developing the site into an off-line commercial fishery.

7. In due course, in 2003, the site was leased to British Waterways for this purpose. Meanwhile, in 2002, the claimant and Lancashire County Council had entered into a section 106 Agreement in respect of proposed development of the site. It was being proposed that the site could be used as a commercial fishery, with a lake divided into one large lake and a number of smaller lakes which would be separated and kept isolated from each other by permeable earth bunds.

8. By clause 5.1.9 of a document annexed to the section 106 agreement it was provided that,

> "The angling pools would be isolated from each other and the main lake by permeable earth bunds, to maintain the fish stocks physically separate, for ecological and fishery reasons, whilst allowing water movement across the site."

In effect, fish in any of the water bodies would be isolated in their individual pools for the purposes of species protection and, most importantly, would be unable to escape (or outside fish enter) the closed water system of the fishery.

9. Over the following 13 years, the claimant said that it expended considerable sums in both constructing the fishery and stocking it with fish, both smaller fish and individual larger specimen fish. It also spent considerable sums in maintaining the fishery and the fish within

it. Following legal action, the British Waterways lease came to an end in 2005 from which point the claimant managed the fishery itself, carrying out all fish stocking and fish husbandry. The evidence of the former fisheries manager, Mr Steve Griffiths, dealt with the stocking and husbandry of the fish.

10. The nature of the commercial fishery was that anglers would pay a licence fee to fish but they were required to return any fish that they caught to the water body from which they had been taken. In particular, some anglers aspired to catch specimen fish over a certain size (by weight) and a number of such fish, individually named, were located in the water bodies on the site. It is said that considerable sums of money had been spent stocking the water bodies with fish which had been purchased elsewhere and brought to the site for the specific purpose of being placed in the water bodies for the commercial purposes of the fishery. It is said that they were not being released into the "wild" but into a monitored, self-contained water system of nine isolated pools.

11. In 2012, in an attempt to expand the business, a restaurant and café facility known as "Catch 23" was constructed. In order to do this, the claimant borrowed money from Eastern Counties Finance Limited, with such borrowings being secured on the site by a legal charge dated 12 January 2012.

12. In 2011 to 2012 the claimant placed solar panels, associated equipment and a feed-in tariff meter on the land held under title number LA825433. Those panels were affixed to a metal frame which was then bolted onto a wooden platform which was concreted into the land. This land was part of the land mortgaged to Eastern Counties Finance at around the same time. The solar panels generated electricity during periods of sunlight which would be used, first, by the restaurant premises and then any surplus would be uploaded to the National Grid under a contract between Mr Smith and Eon. When sunlight was insufficient, the restaurant premises would draw electricity from the National Grid. The intention was to cover the capital cost of the solar panels (and eventually to generate a profit) from the surplus electricity uploaded to the National Grid under the contract with Eon for 25 years. The feed-in tariff meter was tied specifically to that contract. The solar panels were acquired (along with other such goods) under an asset lease agreement, also with Eastern Counties Finance. The first period of the lease was 60 months during which a quarterly rental relating to all of

the leased equipment was payable. Thereafter, a payment of 2 per cent of the asset costs would be payable annually.

13. The restaurant did not prove to be a commercially successful venture and by mid to late 2014 the claimant was seeking a buyer for part of the site for a guide price of 1 million pounds. On 12 January 2016, the chargee appointed Law of Property Act receivers over the site but the claimant continued its attempts to sell the site and entered into negotiations with the defendant (through Mr Mollart). A draft contract of sale was produced which showed a purchase price for the land to be sold of £700,000 and, separately, a purchase price of £200,000 for the "Stock" which was defined as "All stock of fish in the lakes." Negotiations continued and at least two further draft contracts of sale were produced between March and April 2016 under each of which the price for the land was £700,000 and the price for the fish was £200,000. The land which was the subject matter of the negotiations did not include the land on which the solar panels were situated although Mr Mollart's understanding was that it did extend to the land on which the solar panels were placed.

14. Negotiations then broke down but they recommenced in the middle of June 2016. At that point the defendant sought, it is said belatedly, a restrictive covenant relating to the use of retained land and also indicated that the revised global offer would be reduced to £850,000. No further draft contract was produced however. On the evidence, it would appear that as a result of those proposed changes, the claimant withdrew from the negotiations.

15. On 29 June 2016 the Law of Property Act receivers sold the site to the defendant for £625,000. On the same day, there was a telex from the Law of Property Act receivers to Mr Smith. That telex said,

> "Further to our telephone conversation I would confirm that when we were in negotiations with Alex it was made clear to him that the bank's charge made no reference to the fish in the lake and therefore we did not consider our appointment to extend over them and that he would be offered no warranties in relation to the transfer of their ownership to him on completion of a sale."

The reference to Alex was, of course, to Mr Mollart.

16. On 1 July 2016, Davis Blank Furniss, the solicitors then acting on behalf of the defendant, wrote a letter contending that the fish were wild animals and therefore could not be owned by the claimant or, alternatively, if they were not wild animals, then the fish were owned by the defendant on the basis that they passed with the land.

17. It is necessary for me to refer to two further letters, both from the claimant's solicitors, Napthens. The first is dated 7 July 2016 and responded to Davis Blank Furniss's letter, expressing surprise and concern by the defendant's stance in relation to the ownership of the fish stocks in the lakes. Napthens commented in detail on the specific issues which had been raised in Davis Blank Furniss's letter. Towards the end of the letter, Napthens said this:

> "… our client demands that your client cease [the defendant's use of the claimant's fish stocks] immediately and provide a signed undertaking in the format enclosed to agree not to operate a business using our client's fish stocks. Our client intends to remove the fish stocks which belong to it and we shall shortly notify your client of our client's removal plan for that process. Our client's fisheries expert has advised that this will be a 4-6 month process which will need to be carried out during the period of October to March. We therefore additionally require an undertaking from your client, that it will not damage or dispose of the fish stocks in the meantime and will fully co-operate with that process."

In the course of his evidence, Mr Steve Griffiths accepted that the reference to the claimant's fisheries expert in that paragraph was a reference to himself.

18. The other letter to which I should refer, again from Napthens to Davis Blank Furniss, is dated 14 September 2016. It included an acceptance:

> "… that the costs involved in our client removing its fish from the waterbodies on your client's land, and the disruption that an appropriate harvesting operation would cause, make this an appropriate case for the payment of damages rather than an injunction. Our client has carried out preliminary (but detailed) calculations of the value of its fish and determined that they are worth approximately £1,161,000. That, clearly, is a value which means your client cannot be allowed to simply acquire

> ownership by stealth and dint of the fact that they are in waterbodies on its land."

That forms the background to the present litigation.

19. The trial took place over two days, on 22 and 23 July 2019. At about 3 o'clock yesterday afternoon I adjourned to consider my judgment overnight. After brief openings from Mr Vickers and Mr Wells I heard from two witnesses from the claimant and one from the defendant. On the morning of Day 1 of the trial I heard from Mr Mike Smith (for a little under two hours). On the afternoon, I heard from Mr Griffiths (for a little over an hour) and from Mr Mollart (for a little under an hour).

20. There was little real challenge to the honesty or reliability of any of those witnesses' evidence. Instead, the cross-examination was directed primarily to elucidating that evidence. The only real challenge was to the penultimate sentence of paragraph 12 of Mr Griffiths's witness statement, where he had said that, prior to development, the site had been very barren and the only fish present were a few wild fish, which had entered the site via the inlet and outlet drain or which had been deposited there by anglers. The challenge to that sentence was founded upon a British Waterways Board Press Release of 23 January 2004 which had said that the main lake would have minimal stocking to enable the current large specimens to remain. Existing stocks were said to be something of a mystery though pike, carp, perch, tench and eels were said definitely to be present. The challenge was also founded upon what appeared on the claimant's own website in 2014 where it had said that, originally, Borwick Fisheries was a single 38-foot gravel pit, holding natural stocks of fish of which the pike and carp grew to well over 30 pounds and the tench to over the magic 10 pounds weight.

21. I do not find it necessary to resolve that challenge to Mr Griffiths's evidence because it is irrelevant to any of the issues I really have to decide. In relation to the website, Mr Griffiths said that the entry had been composed at a time when he had been in hospital being treated for bowel cancer and that the words were not his own. In response to the assertion that the site was not barren, Mr Griffiths accepted that there had been a few natural fish - large specimens - on the site before it had been developed and the lake subdivided into a number of smaller lakes and pools. I find that all three witnesses were truthful witnesses, who were genuinely doing their best to assist the court.

22. From the evidence, it is clear that, eventually, there were some nine lakes and pools on the site, varying from 0.25 acres to 15 acres in area. I find that some of the lakes were up to five metres deep and that the surface of the beds undulated. Mr Mollart set out the areas of the nine lakes and pools at paragraph 8 of his witness statement. At paragraph 9, he described the depth and uneven nature of the beds of the lakes. At paragraph 10, Mr Mollart said that three of the lakes, Fingals, Jimmy's and Griffish (which together made up roughly 80 per cent of the area covered by water), were connected by large water flow pipes through which some fish passed between the lakes. All but one of those pipes remained in place. There were grates within the pipes but the holes in the grates were large enough for smaller fish to swim through. Mr Griffiths, in cross-examination, accepted those two sentences. Mr Mollart added that the pipes were required to stop the lakes from flooding and to allow rainwater from the incoming stream flowing through the surrounding hills and fields to travel through the site and into the River Keer, preventing flooding of the site.

23. In relation to removal of the fish stocks from the commercial fishery, Mr Smith was taken to Napthens' letters of 7 July and 14 September 2016. Mr Smith said that the second of those letters had represented a pragmatic and cost-effective proposal which had been aimed at resolving the dispute. He said that it was not impossible to remove the fish but that it was not going to be straightforward; there was going to be a lot of work involved.

24. The drainage system was described at paragraphs 13 through to 16 of Mr Griffiths's witness statement and also by Mr Smith at paragraph 9(a) of his witness statement. There Mr Smith said that the containment of the site from the natural water course had involved the installation of devices at the north-east and south-west sections of the lake to, essentially, screen the lake from an inlet and outlet drain that fed into, and then out of, the lake. The installation of those devices ensured that fish could not pass into or out of the site at all but at the same time they allowed the natural passage of water into and out of the site.

25. In the course of his cross-examination, Mr Griffiths said that he had never disputed that small fish could swim through the pipes from one of the lakes or pools to another. Earlier he had said that there was a 25-millimetre mesh ,which was appropriate for the size of the fish. The size had been chosen to suit the fish that would be retained within each of the pools. The

size of the mesh would allow fry and elvers to get through although Mr Griffiths noted that eels would travel across grass or stones.

26. In relation to the removal of fish from the fishery, Mr Griffiths acknowledged that with nine lakes or pools on the site, to get the fish to a place of safety would take a considerable period of time although he said that it was not a difficult job. It would take six months because there was a process which had to be followed to ensure that the fish survived their removal from the fishery.

27. In relation to the stocking of the fishery, the evidence was that some £10,760 had been purchased on stocking the fishery in 2005 to 2006. Four specimen fish had been purchased for £3,000 each. There had been some minor re-stocking in 2011, and £10,000 had been spent on stocking in 2013. It was put to Mr Smith that some £32,000 - in fact it seems to me it was probably closer to £33,000 - had been spent on stocking the fishery and Mr Smith said that that sounded about right in terms of the cost of stocking the fishery over the years. It was put to Mr Griffiths that about £30,000 had been spent and he accepted that.

28. In his witness statement (at paragraph 40) Mr Smith had said that the fish stocks were a necessary component of the fishery business and one did not work without the other. In cross-examination, Mr Smith acknowledged that one was dependent upon fish stocks in order to run a fishery business. Mr Smith also accepted in cross-examination that he had never disputed that the fishing rights had passed with the land itself.

29. It was clear from an answer to a question that I asked, at the end of Mr Smith's evidence, that the claimant had made no payment to British Waterways as part of the settlement of their legal dispute; and Mr Smith indicated that the value of the fish had not featured as any part of the overall settlement payment which had been made to the claimant from British Waterways.

30. The solar panels have been described by Mr Smith at paragraph 46 of his witness statement and this was not challenged in cross-examination. The solar panels were said to be affixed to a metal framework which, in turn, was screwed into a wooden frame set in the ground from which they were said to be easily removable. At paragraph 15 of the Reply the

claimant had admitted that the wooden base upon which the solar panels, attached to metal frames, were bolted were set in concrete and that those wooden bases were themselves fixtures although there was said to be no integral connection between the wooden bases and the solar panels or their metal frames bolted there onto.

31. In cross-examination Mr Smith said that he had not been proposing to sell the land on which the solar panels were placed to the defendant company. Each panel was said to be 1 metre by 0.75 metres in size. There were said to be about 40 of those panels in two blocks, each of 20. Mr Mollart expressly accepted Mr Smith's description of the solar panels.

32. As I have said, there was little real challenge to any of the witnesses' evidence; and, in any event, it does not seem to me that this case really turns upon any disputed issues of fact.

33. The cause of action relied upon by the claimant is the tort of conversion. It was common ground before me that conversion is a common law action, tortious in form, which imposes strict liability for a wrongful interference with the right to possession of a chattel. It consists of any act of wilful interference, without lawful justification, with any chattel in any manner inconsistent with the right of another whereby that other is deprived of the use and possession of it.

34. For a claimant to succeed in an action in conversion, he must show that in law he had the requisite possessory title. That may be either actual possession, or the right to immediate possession. The interest upon which the claimant relies must also have been vested in him at the time of the act of alleged conversion. The claimant founds its conversion claims on the asserted basis that: (1) it was at all material times, the owner of the fish in the lakes and pools; and (2) it was at all material times the owner of the solar panels.

35. The defendant says that there has been no conversion of either the fish or the solar panels because the claimant did not, at the relevant time, have any interest (whether a right to immediate possession or otherwise) in either the fish or the solar panels. More particularly, the defendant says, first, that as a matter of law, living fish cannot be "chattels", subject to rights of absolute ownership. They are said to be subject, at most, to rights of qualified property. In the present case, the only right of qualified property in the fish is said to have

been the property ratione soli (the right to fish for and take the fish from the lakes). That right is said to have passed from the claimant to the defendant on the latter's purchase of the property as an ordinary incident of the ownership of the lake beds. Following the sale of the property, the claimant was not left with any rights over, or interest in, the fish.

36. Secondly, the defendant says that the solar panels were fixtures; that they formed part of the property and the title to them therefore passed automatically to the defendant, along with the title to the property, when it purchased it in June 2016. Following the sale of the property to the defendant, the claimant was not left with any rights over, or interest in, the solar panels. The claimant's complaints relate to matters which occurred after the sale of the property to the defendant in June 2016; but the defendant says that by this time it had acquired all available property rights in both the fish and the solar panels. It is therefore denied that the claimant's claims in conversion can succeed.

37. I will deal firstly with the fish and then with the solar panels. The fish are addressed at paragraphs 13 to 17 of Mr Vickers's skeleton argument. Mr Vickers acknowledges that the general rule regarding wild animals is that they are ferae naturae and that there is no absolute property in them whilst living. Therefore, in general, nobody owns fish. However, this general rule must be qualified. He refers to a case in 1593, *Greyes Case* (1593) Owen 20, 74 ER 869. That case confirmed that it was a felony to steal fish out of a trunk or some narrow place, where they are put to be taken at will and pleasure; but it is otherwise where they are put into a pond. Mr Vickers notes that that case is of some antiquity.

38. More recent, but still ancient, is the case of *R v Steer* (1704) 6 Modern 183, 87 ER 939. There a quantity of carp was stolen from a private pond and the court held that the fish were the property of the owner of the pond. The reasoning behind the decision apparently lay in the fact that the fish could not swim away from an enclosed pond and thereby become lost. Mr Vickers submits that the law therefore makes a distinction between rivers or lakes in multiple ownership and still waters, particularly waters in single ownership from which there is no escape and into which wild fish cannot enter. He says that that is made clear in Carty and Payne: *Angling and the Law* (1998) at pages 39 and 40. There it is said to be absurd to try to retain ownership of a fish that may swim up or downstream into a part of the river in another's ownership. However, fish in a lake in one individual's ownership belong to the

owner. It is only when fish are located in rivers or lakes in multiple ownership that they become absolute ferae naturae. The authors sound a word of warning:

> "Ownership of fish in lakes will depend on the circumstances. At one extreme, no one will seek to argue that goldfish in an ornamental pond are not owned by the householder. At the other, a lake may have several feeder streams, several riparian owners and outlets into other rivers and lakes. The fish swimming in such a lake would be ferae naturae. In between these two examples there is a large grey area. There have been no useful decided cases and it remains to be seen where the courts will draw the line."

No authorities are cited in that passage.

39. Mr Vickers submits that whether the fish contained in the nine water bodies on the site on 29 June 2016 belong to the claimant or not must be a matter of fact and degree. He says that the law has long recognised that fish can be reduced into possession, with the ancient cases talking of "trunks" or "tanks" and later cases confirming that fish in ponds had been so reduced. In the present case, there are said to be a number of factual matters, which point towards the claimant having reduced the fish in the water bodies on the site into possession:

(1) The vast majority of them were purchased from elsewhere and introduced into the water bodies for the specific purpose of being made available for coarse angling.

(2) The water bodies were isolated from inlet and outlet streams at locations A and B on the plan at page 1 of the exhibit to Mr Griffiths's witness statement, with "monks" inserted into the culverts, such devices having a mesh screen to prevent the movement of fish into or away from each of the water bodies on the site and from the site as a whole.

(3) The site was divided into nine individual water bodies which were kept isolated from each other, in the main, by permeable bunds and culverts with monks to ensure that the pools (other than the largest, Jimmy's Lake, which was likely stopped for ecological reasons) could be intensively stocked with separate species of fish which needed to be kept physically separate, so far as possible. This indicated an intention to maintain such fish in captivity and in specific locations rather than allowing them to be "wild".

(4) Furthermore, it was a condition of the section 106 Agreement allowing the development of the fishery on the site that the angling pools should be isolated from each other and the main lake by permeable earth bunds which would maintain the fish stocks and keep them

physically separate, for both ecological and fishery reasons, but while still allowing water movement across the site. Considerable amounts of money were put into creating this ecologically safe yet commercially viable water system into which to place acquired fish for the purpose of a commercial fishery. These were the acts of someone asserting ownership over the fish stocks, not releasing them back into their wild state.

(5) At least 14 of the largest fish (primarily specimen carp) were given names by those who regularly caught and photographed them. Although not conclusive, the naming of an animal is an indication of an assertion of ownership over that animal.

(6) Careful measures were taken to expand and maintain the fish stock and its quality on the site, including aeration of the water bodies (to increase oxygen), the avoidance of oxygen sags and the provision of medicinally treated food together with careful monitoring by water bailiffs to ensure that the stock remained in good condition and bred to expand the size of the stock to its maximum volume, without putting undue strain on the water bodies in which each population lived (save that Jimmy's Lake was always kept lightly stocked). Water bailiffs also patrolled to prevent fish being stolen.

(7) There is no reason why, having purchased the fish, the claimant would wish to give up ownership by releasing them into the "wild". Objectively, and in the context in which they were acquired, the claimant could have done no more to assert any intention to continue owning them than to place them, in carefully selected quantities, in separate designated pools isolated from each other and the external water course.

(8) Although the defendant will argue that the fish could not have been quickly and easily removed from the water bodies, this is not a factor relevant to whether they belonged to the claimant or were "wild". If the court concludes that, objectively, the claimant owned and never relinquished ownership of these fish, including any which may have remained from when British Waterways were the tenant (because British Waterways had relinquished ownership of them by vacating the site and making no claim against the claimant, as landlord, for the fish after doing so, with any potential claim long since statute barred), then the number of them, and any subjectively perceived difficulty in catching and removing them from the water bodies cannot, in itself, change the fact of ownership.

40. Mr Vickers also submits that it is clear that when the defendant was negotiating for the purchase of the water bodies, it had been prepared to pay not only £700,000 for the land upon which they were located but also £200,000 for the fish. Whilst it is true that no contract was

ever entered into between the claimant and the defendant other than the one negotiated by the LPA receivers (which was for somewhat different parcels of land, and not for the fish), the draft contracts had not come into existence in a vacuum. The court is invited to note that the defendant, having been prepared to pay a total of £900,000 (and subsequently £850,000) for both the land and the fish (with the land initially being valued under the draft contract at £700,000), ultimately acquired the site (which contained the majority of the land which it had been negotiating with the claimant to buy, but no mention of the fish) for only £625,000. Thereafter, the defendant asserted that the fish did not belong to the claimant or to anyone else because they were "wild" or, alternatively, that they had passed with the land and were subject to the fishing rights of the defendant as riparian owner. Although no issue estoppel arises, the fact remains that the defendant and its advisors clearly considered, when negotiating for a purchase of the majority of the site, that the fish belonged, separately from the land, to the claimant; and they were prepared to pay £200,000 for that which they now say that they acquired for nothing.

41. In the course of his oral submissions, Mr Vickers began by citing pages 1 to 2 of Palmer's *Animal Law* (3rd edn), relating to the ownership of animals. That passage referred to a broad division of "animals" (in the sense of all creatures not belonging to the human race) into two groups: domestic and wild. Mr Vickers submitted that in the modern world it did not help to classify animals as either domestic or wild. He submitted that one must have regard to the intention of man towards the specific animal. Here, the fish had been born in captivity and had been acquired for the purpose of being put into a commercial fishery, to grow there, and then to allow anglers to find, but not to keep, them.

42. Mr Vickers referred to the unchallenged parts of Mr Griffiths's evidence at paragraphs 33, 43, 46 and 47 of his witness statement. He referred to Mr Griffiths's summary at paragraph 52.

> "… my intentions, when I originally stocked the fish on behalf of British Waterways and when I subsequently stocked additional fish on behalf of the claimant (and oversaw their husbandry) were quite clear. My intentions were not to release fish into the wild, but to stock the fish into containment in an enclosed water from which they could not escape so that they remained the property of the person who owned them at the

> time of their introduction, and so, the fish and their progeny could be grown and bred, 'fished' for profit and/or removed or cropped at a time of the owner's choosing."

Those were all said to be incidents of a fish farming operation, involving animals introduced for a specific fish farming purpose. The fish could not therefore be classified as "wild". Mr Vickers drew an analogy with farmed mink. The ownership of the fish was said not to be dependent upon ownership of the land on which they were farmed. There was said to be no authorities specifically relating to the commercial farming of fish. The court had to look to the purpose for which they had been bred, introduced into a closed system, and nurtured there. Even individual lakes or pools on the site had been isolated. Reference was made to the provision of the section 106 Agreement. The claimant had adhered to the restriction in clause 5.1.9. There were not simply a number of open bodies of water in which fish happened to be swimming; the fish had been kept separate from the outside world and from each other. They were being farmed and were therefore to be treated as domestic and not as wild animals.

43. It was said to be difficult to tease out from the authorities relating to other animals or types of water systems precisely what the law was in relation to the intensive farming of fish. The claimant's case was said to be that all of the fish belonged to it. The authorities relied on by the defendant were said not to provide any real assistance to the court. If the court should accept Mr Vickers's submission that these fish were not wild animals, then it was unnecessary to go on to examine the nature of qualified property in wild animals. But Mr Vickers said that it could be argued, in the alternative, that there was a qualified property in the fish per industriam. He emphasised that this was not a game reserve. The principal purpose of the fishery had been to grow, crop, and sell the right to catch (but not to keep) the fish.

44. Mr Vickers speculated that the reason why there was no case law specifically relating to commercial fisheries was because they were a relatively recent form of business venture. The old cases did not deal with a commercial fishery; and there had been no argument in those old cases that fish could be domestic rather than wild animals. The court would have to conclude whether the fish in this commercial fishery were domestic or wild animals. Mr

Vickers submitted that farmed fish must fall within the category of domestic animals. They were not free to roam, but they had been harnessed for the purpose of man's activities.

45. In his reply, Mr Vickers emphasised that the fish had been born, bred and fed in captivity. They had never been wild. Once released into the fishery, they did not breed, they would only grow. They were fish being used for the commercial purposes of man. That must mean that they should be treated as a distinct category of fish. It was no part of the claimant's case that these were ever wild fish. They had been brought into existence as captive fish and so they remained. It had been a specific provision of the section 106 Agreement that each of the lakes should be kept separate from normal water courses, for reasons of environmental protection. These were fish brought into existence as captive fish and they had never been released into the wild. Throughout their natural life cycle, they had been born, bred and kept in captivity; and they would not breed naturally.

46. Mr Vickers submitted that the world had moved on considerably since 1593 and even 1704. These fish had been put in the fishery to be stocked in bulk in a closed system and kept there for angling purposes. He did not dispute that fish in a river were ferae naturae; but this case was not about fish in a river. He submitted that a rabbit might be either wild or domesticated (if kept as a pet). Everything must depend upon the intention of man. One had to go back to the purpose for which the animal had been bred or captivated. Here, the fish were not intended to be the food of man. Mr Vickers indicated that in our modern society, animals served a wider purpose than merely as food. He submitted that the law must develop.

47. The case of a commercial fishery was a novel one. Did it own the fish stocks which it had acquired and husbanded? The case could not be decided in accordance with principles that had governed the right to hunt and kill game in the last century. Here, the fish had always been in the possession of someone. They had never been released into the wild. In the modern world, there were all sorts of situations that could never have been conceived of at the time of the authorities principally relied upon by Mr Wells. There was said to be no case governing the ownership of animals in a zoo, a safari park, or, indeed, a sea world centre.

48. The purpose of the commercial fishery was to give its customers a bloodless sport or recreation. A significant part of the operation of the fishery was said to be the farming of fish. This was not a case about fishing rights in tidal or navigable non-tidal waters. The authorities relied upon by Mr Wells were addressing the natural body of fish that had built up naturally over time. That did not assist when the fish had been put into the water by British Waterways or the claimant. Mr Vickers pointed out that the defendant had been prepared to negotiate a payment of up to £200,000 to acquire the fish. At no stage in his evidence had Mr Mollart indicated that he was not prepared to pay anything for the fish. They had constituted a valuable asset separate from the land.

49. The claimant was said to have had actual power over the fish. It had put them in the water. Mr Vickers noted that one could not fish for recreational purposes within a tank or within nets. The fish had to be able to swim away. There were no authorities addressing organised coarse fishing in artificially created water courses. Mr Vickers submitted that the fish in such water courses remained within the claimant's power. But even if not, they were within its ownership and control.

50. Mr Vickers pointed to paragraph 12(v) of the defence.

> "Following its purchase of the property, the defendant concluded that there were insufficient fish stocks in the lakes to make them viable as a commercial fishery. The defendant was therefore obliged to buy its own fish stocks, which were purchased from reputable dealers and individually microchipped, at a total cost of £150,000, in order to maintain a commercial fishery at the property. This would not have been necessary if the lakes had already contained over £1 million worth of stock as at June 2016."

Mr Vickers accepted that that had not been addressed in the defendant's witness evidence because it went principally to the issue of quantum. However, it had not been challenged by the claimant. It indicated the considerable investment in fish stocks that the defendant said that it had made. The purpose of acquiring such fish stocks had been to grow them and to make them available for bloodless sport. Mr Vickers emphasised that the claim did not relate to tiny fry or elvers; it was simply in respect of the fish which had been in the lakes in

quantity on 29 June 2016 and which had been unable to escape from the self-contained man-made system of water courses. Those were Mr Vickers's submissions for the claimant.

51. For the defendant, Mr Wells first addressed the property rights in the fish. He said that the claimant had started from the basic proposition that at all material times it had been the owner of a substantial number of fish. At paragraph 11 of the reply, the claimant had asserted that the fish in the water bodies or lakes on the property had been chattels belonging to the claimant and that the defendant had not acquired a right to fish for them merely by acquiring the property. Mr Wells said that as a matter of long-established authority that was simply wrong. Fish were animals, wild in their nature or ferae naturae, and whilst they were alive, they could not be chattels and could not be the subject of rights of absolute ownership. They could, at most, be subject only to qualified rights of property.

52. Mr Wells referred to the statement at *Halsbury's Laws of England*, Volume 2 (1) (2017) at paragraph 8 that there was no absolute property in wild animals whilst living and they were not goods or chattels. There might, however be, what is known as a qualified property in them. He, too, made reference to pages 1 to 2 of Palmer's *Animal Law*. Mr Wells made reference to passages in (1) *Blades v Higgs* (1865) 11 HLC 620 at page 636 per Lord Cranworth to the effect that wild animals, whilst living, though they were the property of the owner of the soil on which they were living, were not his personal chattels. (2) *R v Townley* (1871) LR 1 CCR 315, where Bovill CJ made it clear that in animals ferae naturae, there was no absolute property. There was only a special or qualified property. (3) *Cresswell v DPP* [2006] EWHC 3379 (Admin), reported at 171 JPR 233 where, sitting in the Divisional Court, Mr Justice (Paul) Walker had observed (at paragraph 38) that while a wild animal was alive, there was no absolute property in that animal. There might however be, what was known as a qualified property in the animal in three circumstances. (4) *Dawes v Huddleston* (1633) Cro Car 339. (5) *Hamps v Darby* [1948] 2 KB 311 at pages 320 to 321, citing *Blackstones Commentaries* (8th edn), Volume 2 at page 391, both recognising fish as creatures ferae naturae.

53. Mr Wells refers to the evidence of the claimant's witnesses regarding the stocking of the lakes with fish, the naming of a small number of trophy fish, and the steps taken to aerate the lakes and feed the fish. He also makes reference to the concluding summary at the end of

Mr Griffiths's witness statement. However, Mr Wells submits that even if all those matters are established as fact - as in my judgment they have been - they simply have no bearing on the fundamental issue of ownership. The fish were, and are, live creatures ferae naturae and therefore, as a matter of law, they cannot be chattels and so cannot be the subject of absolute property rights. Live fish can, at most, be the subject of qualified property rights, as explained by Mr Justice (Paul) Walker, in *Cresswell v DPP* (previously cited) at paragraph 38.

54. Mr Wells makes the point that the claimant's case has been pleaded on the basis that it had absolute ownership of the fish as chattels. That cannot be correct as a matter of law, and the claimant's pleaded case cannot therefore succeed. The fish can only be subject to qualified property rights, and the relevant qualified property rights, or ratione soli, are said to have been acquired by the defendant. Reference was made to the *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at pages 167 to 168 per Viscount Haldane LC. It is said that where the fishing rights have not been severed from the lake or river bed, they simply pass automatically as part of the land; and there is no need for them to be separately transferred to the purchaser of the land, as explained by Diplock LJ in *Hesketh v Willis Cruisers Ltd* (1968) 19 P&CR 573 at 577 to 578.

55. In the present case, it is said that the defendant purchased the property and, as an ordinary incident of its ownership or as a right inherent in the property purchased, the defendant also acquired the exclusive fishing rights in the waters over the property. Mr Wells acknowledges the reliance sought to be placed on the email from one of the LPA receivers of 29 June 2016. However, Mr Wells makes the point that, as can be seen from the terms of the sale contract, the receivers never purported to withhold from the defendant, any available interest in the fishing rights or in the fish themselves which could otherwise be transferred. There has never been any suggestion that the fishing rights in the lakes had been severed from the property and transformed into a profit a prendre.

56. I have already indicated that in the course of his cross-examination, Mr Smith made it clear that he had never disputed that the fishing rights had gone with the land. It is said that in those circumstances, the defendant acquired both the property and the exclusive fishing rights in all the lakes situated upon it and it thereby acquired the qualified property ratione

soli in the fish within the lakes. That is said to be consistent with the authorities which focus on the rights of the landowner and with those which specifically analyse the rights of the owner of a several or exclusive fishery. Therefore, from 29 June 2016 the claimant lost, and the defendant acquired, the only available property interests in the fish within the lakes on the property.

57. There is said to be no absolute ownership in the live fish but only qualified property rights. Those are the exclusive fishing rights in the lakes which belong to the defendant; and the defendant is the only person which can authorise removal of the fish from the lakes. Any attempt by a third party to interfere with the defendant's fishing rights would be actionable as a trespass and/or nuisance. The defendant is said to be able to rely on its qualified property rights in order to protect and regulate its interests in the fishery. It does not have to try and claim rights of ownership, which cannot exist in live fish, in order to do so.

58. In the course of his oral submissions, Mr Wells emphasised that this is not a fish farm but a commercial fishery. However, the difference between the two did not matter because the law was said to be the same. The law drew a distinction between domestic and wild animals; and the classification between these two was an issue of law. Fish were wild animals and any suggestion to the contrary did not fit in with the established categories. A fish did not cease to be a wild animal just because it was captured. Ordinarily, fish are wild animals and so cannot be subject to absolute property rights. Once an animal was dead one could have absolute property rights in a wild animal, but not until then.

59. Since the claimant's pleaded case expressly disclaimed reliance upon qualified property rights in the fish, that was the end of the claimant's pleaded case. There simply could not be absolute ownership of a wild animal such as fish. The exclusive fishing rights had passed with the land to the defendant. However, Mr Wells went on to explain why, in any event, the claimant did not enjoy any qualified property per industriam, in the fish. That could only arise where the fish had been captured and placed in a confined space, so that the captor could exercise immediate power and control over the fish. Examples given in the authorities were where fish were kept in a tank, in a "trunk" (defined as a perforated floating box for keeping live fish in), in a pond or in a "stew pond" (defined as a pond or tank in which edible fish were kept until needed for the table). The relevant authorities were said to include: (1)

Young v Hichens (1844) 6 QB 606 per Lord Denman CJ at 611. (2) *Hamps v Darby* [1948] 2 KB 311 at page 320 per Evershed LJ. (3) The decision of the majority of the Supreme Court of Canada in *The Ship "Frederick Gering Jnr" v The Queen* (1897) 27 SCR 271 at 298 per King J and at 302 to 303 per Girouard J. (4) *Kearry v Pattinson* [1939] 1 KB 471 at 478 to 479 per Slesser LJ.

60. Mr Wells submits that in the present case the tests for establishing qualified property per industriam were plainly not satisfied in relation to the fish living in the various lakes on the property. The landowner did not have "actual power" or "immediate power" over the fish, such that they could not escape and their natural liberty; rather the fish were swimming freely in large lakes, they were not within sight of the landowner, and the landowner could not easily pursue them. The following aspects of the factual background are said to be of particular relevance to this issue:

(1) The water bodies in the present case bear no resemblance whatsoever to the tanks, trunks or stew ponds that one sees referred to in those authorities where a right of qualified property has been recognised. Rather, they were large open gravel lakes in which the fish swam freely. The smallest lake had an area of 0.25 acres and the largest had an area of over 15.8 acres. These were lakes and were not at all in the nature of fish tanks or trunks.

(2) Certain parts of the lakes were also very deep. In some, the beds were over 20 feet from the surface. In some, the beds were undulating.

(3) Smaller fish would be able to swim through the connecting pipework joining Fingals, Jimmy's and Griffish Lakes (which together made up around 80 per cent of the area covered by water) such that they could move between those lakes.

(4) Around the time of the sale of the property to the defendant, the claimant acknowledged (through its solicitors) that the removal of substantial numbers of fish from the lakes would be a very difficult and time-consuming process. Reference is made to the two letters from Napthens dated 7 July and 14 September 2016 (previously cited).

(5) In paragraph 11 of his witness statement, Mr Mollart made the point that anglers paid to fish in the lakes and to try to catch individual fish. In those circumstances, it would not be a quick or easy task to catch the fish within the lakes. That was supported by Mr Griffiths's observation (at paragraph 40 of his witness statement) that he had not personally seen most of the main specimen fish as they might be caught only once or twice a year and that one of the four specimen carp, which had been introduced by him (Cut-tail) had apparently never been

seen again following its introduction into the lake: see paragraph 38 of Mr Griffiths's witness statement.

61. In the instant case, it is said that the fish in the lakes cannot have been the subject of qualified property per industriam. They were not under the actual or immediate power or dominion of the landowner (as were fish kept in a tank or trunk). Rather, they enjoyed their "natural liberty", swimming freely in large open lakes. They could not be seen by the landowner and plainly they could not be easily pursued. It is said to be worth keeping in mind, when considering any suggestion that some qualified property per industriam might have existed in the fish, that no one was able to say, at any given time, how many fish were in the lakes, which of the fish remaining in the lakes were introduced by British Waterways, the claimant or the defendant, how many had died, when they had died, and so on. Those were all matters that it is said that a claimant should be able to identify if it had sufficient power or control over genuinely confined fish to give rise to rights of qualified property per industriam. Mr Wells referred to observations of Keene LJ in *Cresswell v DPP* (at paragraph 13) to the effect that one had to be able to identify, with some degree of precision, which animal or animals were in the course of being reduced into possession.

62. Even if, contrary to the foregoing, the claimant had enjoyed some sort of qualified property per industriam in the fish whilst it owned the property, it is said that it would have lost that qualified property upon the sale and transfer of the land to the defendant, when it ceased to have such dominion, control or power. If there had been a qualified property per industriam, it could only have been because the fish had been confined within the lakes. The only person who could have been said to have power or control over the fish in those circumstances was the landowner; but as from 29 June 2016 this was the defendant and not the claimant. There could no question of the vendor having a right, after the sale, to go back on to the purchaser's land in order to remove fish from the land. Mr Wells refers to observations in *Kearry v Pattinson* [1939] 1 KB 471 at page 481 per Goddard LJ that there is no case to be found in any books suggesting that anyone has a right to go upon the land of another man to retake an animal ferae naturae and, to similar effect, by Slesser LJ at pages 478 to 479. Consequently, the defendant says that there was simply no qualified property per industriam in the fish within the lakes. But even if (contrary to the defendant's case) there had been, this would have been lost by the claimant upon its sale of the property, including

the lakes, to the defendant in June 2016. The qualified property was now said to lie with the defendant.

63. In the course of his oral submissions, Mr Wells submitted that qualified property per industriam only arises where a fish has been captured and put into a confined space, so that the captor could exercise immediate power and control over the fish. He submitted that nothing less than that would do. The key was said to be actual power over the fish. That was what was said to give rise to property rights. It required there to be confinement within the owner's own immediate power. There had to be a sufficient control and dominion over the fish. It had to remain in the captor's keeping. It was not sufficient, if it was out of sight or could not be pursued without great difficulty. There needed to be such a degree of power or control over a particular animal that it could be identified with some degree of precision. The alleged owner must be able to exercise a close degree of control. Mr Wells emphasised that one was dealing with nine lakes varying in area from 0.25 of an acre to over 15 acres. Some of them were very deep. It would take four to six months to clear the lakes. Smaller fish could pass through the mesh into the natural system. There was unchallenged evidence from Mr Mollart that because of the undulating lake beds, the lakes could not be netted and fish gathered in that way and therefore they would not be easy to catch.

64. At paragraphs 44 to 46 of his written skeleton argument Mr Wells addressed the claimant's apparent argument that the issue of property rights in the fish was somehow affected by the earlier negotiations for the sale of the property in 2016 which had taken place between the claimant, the defendant and Mike Smith. It is unnecessary for me to go through those submissions in any detail because I accept the conclusion (at paragraph 46) that the drafts of the potential agreement or agreements between the claimant, the defendant and Mr Smith are wholly irrelevant to the issues before the court. Those were the submissions.

65. An animal is an organism that has life, sensation and voluntary movement. The name comes from the Latin word 'anima': air, breathe, life or soul. An animal is typically distinguished from a plant. On this basis, a fish is an animal. It is a member of the large group of cold-blooded invertebrates that live in water and breathe through their gills. Loosely termed, it is an exclusively aquatic animal. Given that fish are animals, I must take as my starting point the analysis of Mr Justice (Paul) Walker in the case of *Creswell v DPP*

(previously cited). At paragraph 38, Mr Justice Walker said this with regard to the proprietary rights and interests in animals:

> "In broad terms, (a) it is a question of law whether an animal is wild or domestic… (b) Once a wild animal is killed or dies, absolute property in the dead animal vests in the owner of the land or, in a case where relevant shooting or sporting rights have been granted, in the owner of those rights. (c) While a wild animal is alive there is no absolute property in that animal. There may, however, be what is known as a qualified property in them in three circumstances. The first is described as a qualified property *per industriam*. Wild animals become the property of a person who takes or tames or reclaims them until they regain their natural liberty and have not the intention to return. Examples of that kind of property include animals such as deer, swans and doves. A second qualified property is described as *ratione impotentiae et loci*. The owner of land has a qualified property in the young of animals born on the land, until they can fly or run away. A third type of qualified property is described as *ratione soli* and *ratione privilegii*. An owner of land who has retained the exclusive right to hunt, take and kill wild animals on his land has a qualified property in them for the time being while they are there but if he grants to another the right to hunt, take or kill them then the grantee has a qualified property."

66. In the course of his leading judgment in the recent case of *Egon Zehnder v Tillman* [2019] UKSC 32, [2019] 3 WLR 245 at paragraph 38 Lord Wilson has observed that nowadays few people understand Latin so it is perhaps unfortunate that Latin phraseology permeates that analysis of Mr Justice Walker. I take the Latin phrase "per industriam" to mean, "by industry", in the sense of "diligence or hard work". I reject Mr Vickers's invitation to reclassify the fish in a commercial fishery as domestic rather than wild animals. That, it seems to me, would involve rewriting the whole established basis of the existing law.

67. I accept Mr Wells's point that paragraph 5 of the reply expressly disclaims any qualified property in the fish. That disclaimer is repeated in the second sentence of paragraph 12 of the reply, where it is said that the claimant denies that the only property in the fish was qualified property, passing automatically to the defendant with the freehold title of the property. But the essence of the factual case advanced by the claimant is set out in the following sentence:

> "It is the claimant's case, based on ancient authority, that fish contained in a self-contained water body belong to the person who placed them there on his own land and that therefore title in those fish cannot and did not pass with the sale of the property and those fish remained in the ownership of, and belonging to, the claimant when the property was transferred to the defendant."

In my judgment, it is open to the claimant to contend, that it retained title to the fish because they had been contained in a self-contained water body and that they remained in the ownership of, and belonging to, the claimant when the property was transferred to the defendant. Moreover, that case was expressly addressed by Mr Wells, both in his written and in his oral submissions. In my judgment, if that case is made out it is a mere mischaracterisation to say that the fish were not qualified property but absolutely owned property belonging to the claimant (as is asserted in the final sentence of paragraph 12 of the reply). If by some means any fish were to escape from the self-contained water body within the commercial fishery and were to achieve their freedom, in my judgment they would clearly revert to the status of wild animals and the former owner of the fish would cease to have any property in them. But, in my judgment, it is open to the claimant to contend that whilst within the confines of the commercial fishery, the claimant has a qualified property in the fish. The question before the court is whether that contention is well-founded.

68. In my judgment, it is open to the court, as Mr Vickers submits, to adapt the law on qualified property per industriam to the relatively recent concept of a commercial fishery. The observations in the two antique cases cited by Mr Vickers, where never directed to the then unheard-of concept of a commercial fishery, where anglers cast for fish, not as a potential source of food, but by way of a bloodless recreation or sport. That is also true of the relatively more modern authorities cited by Mr Wells. The case of *Blades v Higgs* was directed to game, described by Lord Westbury LC (at page 631) as animals ferae naturae, which are fit for the food of man. The case of *R v Townley* concerned rabbits. The case of *Dawes v Huddleston* concerned fish, specifically trout, taken from a river. The case of *Hamps v Darby* concerned racing pigeons. The case of *Attorney-General for British Columbia v Attorney-General for Canada* concerned the power to grant fishing rights in tidal and navigable non-tidal waters. The case of *Hesketh v Willis Cruisers Limited* concerned the

grant of a corporeal fishery. The case of *Fitzgerald v Firbank* [1987] 2 Ch 96 concerned the rights of fishing in a defined part of a river; and the case of *Child v Greenhill* was of a similar kind. The case of *Young v Hichens* concerned fishing for pilchards in the sea. The observations of the majority of the Supreme Court of Canada in the case of *The Ship "Frederick Gering Jnr" v The Queen* were uttered in the context of sea fishing. The test formulated in *Kearry v Pattinson* which in turn was derived from *Blackstone's Commentaries* in 1766, was formulated in the context of a swarm of bees.

69. In my judgment, none of these authorities have any real relevance to the case of fish contained in a closed commercial fishery where the whole object of storing the fish there is that they should present a challenge to anglers seeking to catch them. I reject Mr Wells's suggested test of a close degree of control. In my judgment, the appropriate test is that of separation and control. In my judgment, fish reared and/or introduced into a closed commercial fishery are wild animals in which a qualified property exists through industry, diligence and the hard work of the owner or operator of that fishery. In my judgment, the claimant did have a qualified property in the fish which were unable to pass through the meshes separating the various lakes or ponds. I accept that the claimant would not have title to the small fish or fry that could pass through that mesh. But, in my judgment, there was a qualified property in those fish which were introduced into, and were confined within, the nine lakes or pools, and which could not pass out of that closed system. In my judgment, there was a qualified property in those fish and that property did not pass when the land was conveyed to the defendant. In my judgment, the claimant can maintain an action in conversion in relation to those fish.

70. On the issue of liability, therefore, I find, in relation to the fish, for the claimant, adapting the law on a principled basis to the case of a modern commercial fishery. In my judgment, it would not be appropriate for the court to say, in relation to the fish stocks introduced into the commercial fishery by the defendant, as alleged at paragraph 12(5) of the defence, that those fish stocks did not belong to the defendant. Equally, it seems to me that the previously existing fish stocks, which were unable to pass through the meshes, were the property of the claimant.

71. I specifically reject Mr Wells's subsidiary submission that even if the claimant enjoyed some sort of qualified property per industriam in the fis, whilst it still owned the property, it lost that qualified property upon the sale and transfer of the land to the defendant. It seems to me that if the claimant enjoyed a qualified property in the fish up to the time of the conveyance, then it retained that property thereafter since the conveyance did not specifically address, or proport to transfer, title to the fish. It seems to me that the matter can be tested in this way: Suppose there was a domestic rabbit in a hutch on the property. It could not be said that title to the rabbit had passed automatically on a transfer of the land itself. The owner of the rabbit had a qualified title in it whilst it remained within the hutch. And it does not seem to me that that title would have passed to a purchaser of the land without express reference in any transfer of the land itself.

72. I turn then to the solar panels. The law as to the solar panels was addressed at paragraphs 18 to 21 of Mr Vickers's skeleton argument and there was no real dispute between counsel as to the applicable law. Whether or not something is a chattel or a fixture which passes with land depends upon the application of two tests, namely: (1) the method and degree of annexation; and (2) the object and purposes of the annexation. Mr Vickers acknowledges that, as regards the degree of annexation, if an object cannot be removed without serious damage to or destruction of some part of the realty, the case for its having become a fixture is a strong one. However, although the degree of annexation was formerly the primary test, today, so great are the technical skills in the fixing and removing of objects to land or buildings, that it has become subordinate to the test of purpose, which is now of the first importance.

73. Even a building that can be removed as a unit or in sections may remain a chattel so long as it will not be destroyed in the process of removal. The leading case is the decision of the House of Lords in *Elitestone v Morris* [1997] 1 WLR 687. If a building can be a chattel Mr Vickers says, so too, obviously, can solar panels. Certain kinds of chattels are thus held to remain such even after annexation, if the purpose of the annexation was for the better enjoyment of the object as a chattel, rather than the permanent improvement of the land. In this context, the purpose is determined objectively from the evidence. It does not mean the subjective purpose of the person who annexed the chattel. In determining whether an object is to be treated as a chattel or as part of the land, as Lord Clyde observed in *Elitestone v*

Morris at page 698 between letters E and F "… it is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there".

74. The distinction between chattels on the one hand and fixtures on the other was authoritatively stated by Blackburn J in the leading case of *Holland v Hodgson* (1872) LR 7 CP 328 at page 335:

> "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

75. Mr Vickers submits that the solar panels were acquired by the claimant in 2012 for a dual purpose. When the sun was shining they would provide electricity to, in particular, the building housing the restaurant and they would also upload surplus electricity to the National Grid via Eon pursuant to a contract tied to the individual feed-in tariff meter connected to the solar panels. When there was insufficient sunlight, the electricity requirements of the business would be taken from the National Grid in the usual way. It was always intended that the cost of the solar equipment would be amortised by the savings in electricity costs to the claimant from the electricity generated by the solar panels, either used directly or (when there was a surplus) uploaded to the National Grid. Mr Vickers makes the point that when the claimant was negotiating directly with the defendant, the land upon which the solar panels stand was not part of the land to be sold. Therefore, they were not relevant to the negotiations or referred to in the draft contracts. However, since the solar panels were part of the land mortgaged to Eastern Counties Finance Limited, when the Law of Property Act receivers sold pursuant to the mortgage, the land upon which the solar panels, associated equipment and the feed-in tariff meter stood was transferred to the defendant.

76. The solar panels were fixed to a metal framework, which in turn was screwed into a wooden platform set in the ground. The dispute between the claimant and the defendant is

whether the solar panels, associated equipment and feed-in tariff meter, were fixtures such that they passed with the land or whether they were not, in which case they remained the claimant's property notwithstanding the sale of the land to the defendant. The matter is said to be one of fact and decree. Mr Vickers contends that there was no objective intention that the solar panels should be affixed to the property as a fixture because of the personal nature of the contract between Eon and Mr Smith and because there was every possibility that the land upon which they stood would be sold within the 25-year period of the contract. Looked at objectively, it is said that the solar panels were always intended to be an asset to the company for the benefit of its business wherever located rather than forming part of the land because they were specifically and inextricably linked with the feed-in tariff plan contract. When the land in question was mortgaged, the solar panels had not long been located on it and, again, looked at objectively, there was said to be no intention on the part of the claimant, or its mortgagee, to mortgage the benefit of the plan contract served by the solar panels when the claimant mortgaged the land. Without the solar panels and the meter, the Eon contract could not be further performed. Although the contract contained provisions for transferring ownership of the solar panels, such transfer required the carrying out of the deliberate step of the claimant requesting a transfer of ownership agreement form. That form had to be completed to Eon's satisfaction; and Eon required to be informed of the transfer date one month in advance and to be provided with the relevant meter readings on the date of the change of ownership: see clause 12 of the standard form conditions (headed "Change of ownership and assignment of rights"). It is said that all of those provisions indicate that, objectively, the solar panels were placed on the land, not to benefit the land as a fixture, but rather to benefit the claimant personally unless and until it had made a deliberate decision, agreed to by and complying with the requirements of Eon, to transfer that equipment.

77. Mr Vickers submits that it is not any damage to the land caused by the disconnection and removal of the solar panels that is the determining issue but, rather, the purpose of annexation that is of primary importance. The defendant's evidence is that it in fact removed the solar panel units and feed-in tariff meter in 2017, employing a specialist sub-contractor to do the job, which included not only removing the panels and the metal framework but also the larger wooden platform, plus the meters on the side of the frames and the underground cabling. The defendant says it took six men, using a mechanical digger, three days. There was no challenge to that evidence.

78. The claimant contends that the solar panel units themselves, together with the metal frame and the feed-in tariff meter, could have been unbolted from the wooden base and removed relatively easily. It would appear from evidence that was recently provided that the panels have been retained by the defendant, in storage, pending the resolution of the present dispute. In the course of his oral submissions, Mr Vickers emphasised that the defendant now accepts that each solar panel was 1 metre by 0.75 metres in size. They were not huge, monolithic structures; rather, they could be removed quite easily and unclipped from their frame like, Mr Vickers put it, a Meccano set. Although they were acquired on hire purchase, so long as the hire purchase agreement was still subsisting the claimant had the better right to possession; and that gave the claimant an immediate right to possession and an entitlement to sue in the tort of conversion for any interference with the panels. It is clear from the evidence that the panels were ultimately, and finally, paid for out of the surplus sale proceeds received from the defendant on the sale by the LPA receivers.

79. Mr Vickers reiterated that the purpose of having the solar panels on the land was to generate electricity and the money to amortise the cost of purchase of the panels. They did not directly benefit the land, and their purpose was to secure an economic benefit to the electricity generator. It is said that clause 12 of the standard terms and conditions showed that there was always an intention to retain the panels as chattels. Mr Vickers accepted that one purpose was undoubtedly to provide electricity to the restaurant premises; but it was also to upload surplus electricity to Eon, in order to obtain payment for the generator of the electricity or its nominated payee. Mr Vickers submitted that any automatic change in the ownership of the panels with a transfer of the land would undermine the authority of clause 12 of the standard terms and conditions. There was no requirement in the Eon contract, that the solar panels should be placed on any particular piece of land or supply electricity to any particular piece of land. The solar panels could be moved without having to move the wooden supporting platform.

80. In answer to a question from the bench, Mr Vickers suggested that there were a number of differences, between the situation of domestic solar panels on the roof of a house and the solar panels here. I have no evidence before me of the way in which solar panels might be connected to the roof of a house. In his reply, Mr Vickers submitted that it was relevant to

see where the solar panels had been located. The claimant had originally made the decision not to sell the land on which they had been located to the defendant. Their purpose was to take in sunlight and convert it to electricity. However, the solar panels were not tied to the piece of land that they were supplying with electricity. And they were used for the purposes of the owner, and not the land itself. It was said that the solar panels have not needed the wooden platform. They could have been put on something else. And the platform was not necessary for the generation of electricity.

81. The platform was said to benefit the solar panels and not the land itself. If they were not fixtures, then the solar panels were in the claimant's possession; it had the immediate right to possession of them as long as they were not fixtures, and the fact that they may have been held on hire purchase is irrelevant. I accept that latter submission. Even though they were held on hire purchase, I accept that the claimant had the immediate right to possession and that that was sufficient to give the title to sue in the tort of conversion so long as the solar panels had not passed as fixtures to the defendant, as the purchaser of the land. I therefore reject the defendant's submission that the claimant has no title to sue in conversion because the solar panels had not been owned by the claimant.

82. The defendant's case is that the solar panels were fixtures and that they therefore became a part of the property the title to which passed automatically to the defendant when it purchased the land in June 2016.

83. There was, as I say, no dispute between counsel as to the applicable law. In particular, it was common ground that the subjective intention of the parties could not affect the question whether the chattel had in law become part of the freehold. An important consideration was whether the object was designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself.

84. It is the defendant's case that the solar panels, and the units of which they formed an essential and integral part, were fixtures. The defendant relies upon the following:
(1) That the units were deeply embedded in the soil, and the degree of attachment to the property was very significant.

(2) The eventual removal of the units involved very substantial work and significant damage to the surface of the property, which had subsequently to be repaired and re-levelled (as described at paragraph 34 of Mr Mollart's statement).

(3) The object of installing the solar panel units was to generate electricity for use on the property. Paragraph 10 of the particulars of claim acknowledges that the electricity generated through the panels was, amongst other things, for use in the premises on the property. The purpose of the panels was to facilitate the use and enjoyment of the property by supplying it with electrical power. Whether the units provided the principal power source for the restaurant, or merely a supplementary power source, their purpose was not the more complete or convenient use or enjoyment of the solar panels for their own sake.

(4) Paragraph 15 of the reply accepts that "the wooden base upon which the solar panels, attached to metal frames, were bolted were set in concrete and those wooden bases were, themselves, fixtures". Consequently, Mr Wells submits, the claimant is obliged to argue that the status of the solar panels has to be assessed in a vacuum, and without reference to where and how the panels were actually used in practice. That is said to be an incorrect approach as the cases of *The Sheffield and South Yorkshire Permanent Benefit Building Society v Harrison* (1884) 15 QBD 358 and *The Metropolitan Counties Society v Brown* (1859) 26 Beav 454 are said to make clear. Mr Wells submits that it is not possible to assess the status of machinery by breaking it down into numerous component parts. Everything which is a necessary part of the machine is a part of the fixture; and in the instant case, the solar panels are said to have been a necessary part of the solar panel units, the bases of which are admitted to be fixtures.

(5) The claimant has sought to argue (in paragraph 12 of the particulars of claim) that "it was never intended that these items be fixtures because the contract for the supply and sale of electricity to which they are central is a personal one" between [the claimant] and Eon ...". As to that, however, (a) as a matter of law, the claimant's subjective intentions are wholly irrelevant to the status of an item of property as a fixture; and (b) the evidence show, that the Eon contract was made with Mr Smith personally, and not with the claimant.

(6) The claimant has also sought to place weight on the fact that (as pleaded at paragraph 12 of the particular of claim) "the solar panels, associated controls and feed-in tariff meters were not listed as fixtures in the asset schedule to the draft agreement". However (a) the contents of any draft agreement involving the claimant, the defendant and Mr Smith, is simply irrelevant to the identification of the consequences of the subsequent agreement that was

concluded between the claimant, acting by the LPA receivers and the defendant; and (b) the land that the solar panels were located on was never intended to be sold by the claimant to the defendant under the original draft sale contract so that there was no need for any pre-sale discussions between the claimant and the defendant as to those items.

85. For all of those reasons, Mr Wells submits that the solar panels were fixtures. In consequence, title to them passed automatically to the defendant with the title to the property in June 2016, as is conceded (at paragraph 14 of the reply) if the court should conclude that the items were fixtures rather than chattels.

86. In his oral submissions, Mr Wells emphasised that the panels were fixed to the land, not for the better enjoyment of the panels as such but to supply electricity to the restaurant on the property. That was the proper objective purpose of the annexation. The fact that Mr Smith derived an economic benefit from the existence of the panels is said not to affect that. By reference to the two authorities of *Harrison* and *Brown*, Mr Wells submitted that one had to focus on the entire machine, and not pick up on its separate component parts and consider each of them individually. The solar panels formed part of a composite whole. A key part of that whole were the panels themselves. Without them, the whole structure was a complete waste of time.

87. Those were the parties' respective submissions. In my judgment, the solar panels were indeed a fixture on the property and passed automatically with the sale of the land to the defendant. As a result, the claimant has no title to maintain a claim in conversion in relation to the panels. I reach that conclusion for two separate reasons. The first is that, looking at the degree of annexation, I do not consider, as Mr Vickers submits, that one can safely divorce the panels themselves from the wooden structure, concreted into the ground, to which they were attached. I accept Mr Wells's submissions, that one should have regard to the structure as a composite whole. The claimant chose to affix the solar panels to the land through the medium of the supporting wooden frame, concreted into the land. As a result, the degree of attachment to the land was such that the panels formed fixtures and became part of the realty. The second is that even if that were not the case, it seems to me that the real purpose of fixing the solar panels to the land was not for the enjoyment of the solar panels as such, but for the benefit of the land itself. The solar panels were there to receive sunlight

falling on the land and to convert it into electricity. Part of that electricity was to be used, when the sunlight was sufficiently strong and capable of generating sufficient electricity, to power the electrical equipment within the restaurant. Any surplus electricity was to be sold to the grid, to the benefit of the generator's nominee, Mr Smith.

88. It seems to me clear, that the purpose of the solar panels was not for their use independently of the land, but for their use as an integral part of the land itself. They were to receive sunlight falling upon the land and to convert it into electricity. In my judgment, having regard both to the method and degree of annexation, and also to the object and purposes of the annexation, the solar panels became fixtures and ceased to be chattels. As such, they passed with the land to the defendant and the claimant therefore ceased to be able to assert any title thereto.

89. In the result therefore, the claim in conversion, in respect of the fish succeeds; and in respect of the solar panels and associated equipment, including the feed-in tariff meter, the claim fails.

(There followed a discussion on costs)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.