Neutral Citation Number: [2009] EWCA Civ 28

Case No: A1/2007/2601 + (A)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Ramsey
[2007] EWHC 2021 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2009

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE RICHARDS
and
LORD JUSTICE HUGHES

- -

Between :

	Dobson and Ors	**Appellants**
	- and -	
	Thames Water Utilities Limited and Anr	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Richard Gordon QC and Robert Weir (instructed by **Messrs Hugh James**) for the **Appellants**
David Hart QC and Michael Daiches (instructed by **Messrs Osborne Clarke)** for the **Respondent**

Hearing date : 13th October 2008

- -

Judgment**Lord Justice Waller :**

1. This is a judgment of the court to which all have contributed.

2. The appellants are claimants in a Group action brought against the respondent (Thames Water). They are divided between claimants who have occupied properties as owners or lessees and those who have occupied without any legal interest in the properties. They all reside in Isleworth and Twickenham in the vicinity of the Mogden Sewage Treatment

Works (Mogden STW) situated in Mogden Lane, Isleworth Middlesex. They all complain that they were affected by odours and mosquitoes caused, they assert, by the negligent operation of Mogden STW.

3. By their Group Statement of Case the claimants pleaded cases in private nuisance caused by negligence and, because Thames Water is a public authority, also pleaded breaches of Article 8(1) of the European Convention on Human Rights and claims for damages under the Human Rights Act 1998 (the HRA).

4. Thames Water by its defence raised various threshold defences, in particular contending that by applying the principle in *Marcic v Thames Water Utilities Ltd* [2004] AC 42 and on the basis (as they asserted) that the complaints were failures to carry out their statutory duties under s.94 (1)(b), enforceable under s.18 of the Water Industry Act 1991, no common law remedy or remedy under the HRA was available. They also raised in the alternative issues which would arise on the basis that such remedies were available.

5. By an order dated 24th January 2007 fourteen issues were directed to be tried as Preliminary Issues. They included both the threshold issues and other issues. The order further identified certain factual assumptions and the legislative provisions on which the trial of the issues was to be based.

6. By a judgment handed down on 24th August 2007 Ramsey J provided answers to all fourteen questions. On the threshold issues he said this:-

> "148. Whilst the principle in Marcic precludes the Claimants from bringing claims which require the court to embark on a process which is inconsistent and conflicts with the statutory process under the WIA, it does not preclude the Claimants from bringing a claim in nuisance involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA."

7. As to the claims under the HRA he stated that the issue should follow the above answer.

8. There is no appeal from those answers. The appeal relates to his answers to issues 9, 10 and 11(b). Those issues were in these terms:-

> "Issue 9: Do, or might, damages for nuisance confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the Human Rights Act 1998?
>
> Issue 10:

Are:

a. the alternative remedies referred to in:

(i) paragraph 9 of the Claimant's Amended Statement of Case on Preliminary Issues (sections 80 and 82 of the Environmental Protection Act 1990) and /or

(ii) paragraph 29 of the Defendant's Defence thereto (the complaint to Ofwat under s. 94 WIA 1991 and the earlier availability of that route for complaint (if these matters do constitute a breach of s. 94 (1)(b) duties)) and/or

b. the current abatement notice as pleaded in paragraphs 21 – 24 of the Claimant's Group Statement of Case

relevant to the issue of whether damages for owners/occupiers and/ or those without a legal interest in their homes are necessary to afford just satisfaction under section 8(3) of HRA 1998?

Issue 11: In the light of the answers to the above and given the terms of section 8(3) of HRA 1998:

. . . .

b If damages for nuisance are lower than those a Claimant with a legal interest in his or her home could obtain under the HRA 1998, can these damages be "topped up" under the 1998 Act?"

9. The judge answered those issues in the context of having considered, under Issue 6, how damages should be assessed in a claim for private nuisance in the light of the House of Lords decision in *Hunter v Canary Wharf* [1997] AC 655. His answers on this issue we should record without, for the present, quoting the passages from the speeches in *Canary Wharf,* which he quotes to support his conclusions. We will have to turn to those passages hereafter.

> "184(1) That damages awarded for nuisance, where there has been personal discomfort, are assessed on the basis of compensation for diminution of the amenity value of the land rather than damages for that personal discomfort.
>
> 184(2) That damages for diminution of amenity value are measured by reference to the size, commodiousness and value of the property not the number of occupiers.
>
> 184(3) That damages for compensation for diminution of amenity value of the land may be reflected either in diminution of capital value or rental value.
>
> 184(4) That damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable

then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity. ”

10. When the judge came to Issue 9 (the most critical of those which we must consider on the appeal) he began in this way:

> “189. The Claimants rely on the fact that, as set out above, damages for nuisance do not take into account the number of people living in the affected property as they are awarded in respect of the damage to the land. The Claimants submit that this does not accord "*just satisfaction*" to victims of an unlawful act under section 8(3) of the HRA 1998 because an award of damages under section 8(3) must be made to the individual victim of the unlawful act so as to be "*just satisfaction to the injured party*."
>
> 190. The Claimants accept that in awarding any damages the court must, under s. 8(3)(a), take into account "any other relief or remedy granted". However they submit that in the case of lodgers or residents of a retirement or children's home, an award of damages in nuisance to the owner could not be just satisfaction for the affected lodgers or residents or be taken into account for the purposes of section 8(3)(a) as any such award would not be bound to be shared.
>
> 191. The Claimants refer to Fadeyeva v. Russia [2005] ECHR 376 where €6000 was awarded as damages for inconvenience and mental distress and a degree of physical suffering over a seven year period.
>
> 192. In the case of non-proprietary partners or children the Claimants accept that an award of damages in nuisance to the partner or parent(s) who have a proprietary interest in the home is a matter to be taken into account for the purposes of section 8(3)(a), although they submit that the position of foster children may be different.”

11. The concession in paragraph 192 should be noted.

12. The judge then identified the issue between the parties by reference to the case of Thomas Bannister, a child in one of the households whose parents (the owners of the house) were also claimants, and recorded the respective positions of the parties. The claimants were arguing that, if the parents received damages in private nuisance as the owners, it was still necessary to make a further award to Thomas Bannister for breach of Article 8; Thames Water were contending that an order in favour of the parents would provide just satisfaction for Thomas. In considering the arguments he again recorded the concession in these terms:-

> “198. Thames Water points out that the Claimants accept that an award of damages to his parents is "*a matter to be taken into*

account for the purposes of s.8(3)(a)" and submits that, on the Bannister facts, the court should say that compensation in nuisance for the parents will mean that the family is properly compensated, and that no further damages should be payable under the HRA.

. . .

203. In this case I cannot consider the position of those living in the same household as those with a proprietary interest other than Thomas Bannister, who is a boy living with his parents. For him, the Claimants accept that an award of damages in nuisance to parents who have a proprietary interest in the home is a matter to be taken into account for the purposes of section 8(3)(a).”

13. His ultimate conclusion on this issue was in the following terms:-

> “209. I consider that when the court award**s** damages for nuisance to those with a legal interest that will usually afford just satisfaction to partners and children but that there might be circumstances where they will not. In the case of Thomas Bannister, he lives in the same household as his parents who will receive damages for the loss of amenity of their property. There is nothing in the claim to show that such damages received by the household would not afford just satisfaction as they did for Mrs Dennis or would have done for Mr Marcic. I conclude that those damages would afford Thomas Bannister just satisfaction.
>
> 210. There may be circumstances where others without a legal right to occupy may have a right to a separate remedy under Article 8 and/or the Human Rights Act 1998 for which there will not be just satisfaction by an award of damages for nuisance.
>
> 211. I therefore consider that the appropriate answer to Issue 9 is that damages for nuisance might confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the Human Rights Act 1998 but whether they do will depend on the facts.”

His formal answer to issue 9 was:

> “Damages for nuisance might confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the HRA. When the court awards damages for nuisance to those with a proprietary interest those damages will usually afford just satisfaction to partners and children but that there might be circumstances where they will not ….”

14. Those representing the claimants on their appeal sought permission to appeal on the basis

that they wished to withdraw the above concessions. Toulson LJ refused permission on paper taking the view that there should be a trial and facts found before the Court of Appeal considered the matter. The application was renewed and, although Sedley and Hughes LJJ were at first inclined to take the same view as Toulson LJ, they were persuaded to grant permission. What was important in reaching that decision was the attitude properly taken by Thames Water, represented by Mr Daiches, on the renewed application. He accepted that there was in Issue 9 an issue of principle and accepted that in managing the litigation it would be helpful for that issue to be resolved. The question whether the claimants should be allowed to withdraw their concessions was also dealt with on that occasion and permission was granted to withdraw the same.

15. Following that hearing, and in the light of the withdrawal of the concessions, Issue 9 was, by agreement, reformulated identifying the main issue between the parties as being

> "Where damages in nuisance are awarded to a property owner, is it necessary, in order to afford just satisfaction to a non-property owning member of the same household such as Thomas Bannister, to award damages under section 8 of the Human Rights Act 1998 for breach of Article 8?".

16. Thames Water's answer, through Mr David Hart QC, is "no, it is not *usually* necessary to award such members damages under the HRA, and in particular the judge was right to rule on the assumed facts of Thomas Bannister's case that it was not necessary to award him damages". Mr Hart argues that, although damages for private nuisance can only be recovered by the owner or a person with a recognised legal right to the land, nevertheless since those damages are assessed on the basis of "compensation for diminution of the amenity value of the land", and since the assessment is by reference to "loss of amenity in respect of the whole property", it follows that to award "loss of amenity" damages to a person without the required legal right but in respect of his presence on the same property would render Thames Water doubly liable for the same loss. If Mr Hart were right that would also provide an answer to Issue 11(b), since clearly if someone without any recognised legal interest in the property could not recover damages under the HRA, there would no room for "topping up" the property owner's claim with further damages under the HRA.

17. Mr Gordon QC submits that the claims of the property owner in private nuisance are different in character from the personal claims under the HRA. The first is a claim assessed by reference to the effect on the value of the land, both market value and amenity value; the other is assessed by reference to the effect on the individual of the odours or mosquitoes. He thus submits that it is actually irrelevant to an award of damages under the HRA whether there has been an award of damages in private nuisance to the property owner. This has led him to suggest that the question should accurately be not as agreed previously but in the following form –

> "Is an award of damages in nuisance to a property owner relevant to the court's determination under the HRA section 8 of whether to award damages to a non-property owning member of the same household such as Thomas Bannister for breach of Article 8?"

He submits that the answer is that an award of damages for private nuisance is irrelevant. On this basis he would argue that under Issue 11(b) he should also succeed and that under that Issue we should rule that a property owner has an entitlement to damages under the HRA, which will be on top of any damages awarded for private nuisance.

18. The starting point for the submissions of both Mr Gordon and Mr Hart is the decision of the House of Lords in *Canary Wharf* but before examining that decision it might be useful to record some areas where we do not understand there to be any dispute. First it is common ground that, although the claims are brought both in nuisance and negligence, as a matter of English law it is only those with a sufficient interest in land who would have a claim in private nuisance for the effects of the escape of odours and such like. Second, and which follows from the first point, no individual would have a claim for damages in negligence in relation to the effect of the escape of odours or mosquitoes causing inconvenience, unless personal injury was caused. If personal injury were caused then any individual might have a claim whether they resided in a house (so as to be within Article 8) or not, whether they had an interest in the property or not, and indeed whether the defendant was a public authority or not. Third, Mr Hart accepts that in the circumstances of this case, because Thomas Bannister (for example) lived in the family house and because Thames Water is a public authority, Thomas Bannister would in principle be able to mount an Article 8 claim in relation to the effects of odours and mosquitoes; indeed he accepts that in principle a person with an interest in the property would also have an Article 8 claim.

19. As we understood this last submission Mr Hart does not contest that it might be appropriate to award monetary compensation as "just satisfaction" for such a claim under Article 8. His argument is that the effect of awarding damages for private nuisance to those with an interest in the property will *usually* be to have provided "just satisfaction" to members of the household and would be "just satisfaction" in the case of the Bannisters' son Thomas who was simply one of two children living in the family home where the home owners the parents had a claim in private nuisance. His argument is that when one examines what was said in *Canary Wharf* it can be seen that damages were being awarded for nuisances "productive of sensible personal discomfort". Though nuisance damages are awarded as damages to land, they are actually assessed by reference to individuals and the effect that the nuisance has upon the individuals in occupation of the land. The damages compensate by reference to the discomfort suffered by individuals for the loss of amenity in relation to the whole property and the occupiers of that property and thus it would not usually be "necessary" under section 8(3) of the HRA to make an individual award to non-proprietary family members.

20. Mr Hart submits that, if there needs to be some formal acknowledgement of the existence of the claims in favour of non-proprietary members of the family for which a further award would be unnecessary, that could be done by either (a) the court declaring that the children would have recovered but for the award to the parents or (b) after assessing the damages in private nuisance in favour of the house owner, declaring a *Hunt v Severs*-type trust in relation to part of the damages in favour of the children [see *Hunt v Severs* [1994] 2 AC 350].

21. Thus the foundation of Mr Hart's argument is that on a proper interpretation of *Canary*

Wharf, despite the award being made only to the person with an interest in the land, the reality is to award damages which include the "loss of amenity" suffered by other persons residing on the property.

22. Mr Gordon's fundamental point is that it is impossible to read the majority in *Hunter v Canary Wharf* in the way Mr Hart would suggest. His submissions are succinctly set out in paragraphs 11 to 14 of his skeleton in the following terms:-

> "11. The award of damages in nuisance is intended to compensate the owner for the diminution in the amenity value of his land. When making that assessment, the court pays no regard to the number of individuals in occupation of the land, let alone to the level of discomfort, inconvenience or mental distress that those other individuals may have suffered (see Hunter v Canary Wharf [1997] AC 655, 706 per Lord Hoffmann, as cited at paragraph 184 (2) of the judgment). Crucially, damages are awarded as a consequence of the legal entitlement to occupy the land as opposed to constituting damages for personal discomfort (see Hunter v Canary Wharf [1997] AC 655, 706 per Lord Hoffmann, as cited at paragraph 184(1) of the judgment). That is why the basis of calculation of such damages is based on loss of amenity value of the land (see judgment including citation of authority at paragraph 184(3)-(4) of the judgment).
>
> 12. By contrast, the child suffers an entirely different loss arising out of the unjustified interference with **his article 8 right**, namely inconvenience, mental distress and physical suffering: (see para 226 of the judgment). As explained by Lord Hoffmann in Hunter v Canary Wharf … this is quite different (and the basis of calculation is quite different) from a discrete claim by an occupier of the land with no legal entitlement to occupy for compensation for his or her discomfort, inconvenience or mental distress.
>
> 13. It follows that damages payable to the owner of the property in nuisance neither reflect the loss suffered by the child nor are for the benefit of the child. Nuisance damages compensate the owner for a loss in which the child has (and can have) no interest.
>
> 14. It follows that damages in nuisance to the owner cannot be taken into account by the court under section 8 HRA when assessing whether to pay damages to the child for breach of his convention right."

Discussion

23. In outline, the issues which we must address seem to us to resolve into the following:

i) What is the proper basis for an award of common law damages for a transitory nuisance where no lasting damage to the claimant's land or loss of capital value has

been occasioned?

ii) Does such an award include damages recovered by the property owner(s) on behalf of any non-property-owner member of the same household?

iii) What is the proper basis for an award of damages for infringement of Article 8 Convention rights in such a case of transitory nuisance? and

iv) What effect, if any, does an award of common law damages under (i) have upon the decision as to what is the proper remedy to be awarded in respect of the same acts to a non-property-owning member of the same household who brings a claim for infringement of Article 8 ?

24. The first two questions depend upon what is the proper interpretation of *Canary Wharf*. Part of the submissions made by Lord Irvine of Lairg QC who, with Philip Havers QC and Daniel Stillitz, represented the appellants who were ultimately successful on the appeal, were in terms which would provide very strong support for Mr Hart if accepted by the majority. His submission is recorded at page 678E to H in these terms:-

> "Where persons with no interest in land suffer personal injury or damage to chattels as a result of a nuisance their appropriate remedy, if any, will be in negligence. No injustice is caused if family members (and others present in the home) without property rights or a right of occupation have no standing to sue. In respect of an occupied property there will always be someone with standing to sue for any private nuisance caused to that property. Moreover, any loss of amenity suffered by family members can be reflected in the quantum of damages recovered by the householder, since his or her loss of amenity will be increased by any detriment caused to other family members in their use and enjoyment of the property: see *Bone v Seale* [1975] 1 WLR 797, 803G-H. It would therefore be not only artificial, but unnecessary, for the class of plaintiffs eligible to sue in private nuisance to be expanded by reference to the specific statutory rights relied on by the plaintiffs in the present actions."

25. It will be noted that Lord Irvine relied on page 803G-H of *Bone v Seale,* a passage in the speech of Stephenson LJ where he said this:-

> "It is difficult to find an analogy to damages for interference with the enjoyment of property. In this case, efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed. The damages awarded by Walton J. were damages simply for loss of amenity from the smells as they affected the plaintiffs living on their property; and of course their enjoyment of their own property was indirectly affected by these smells inasmuch as they affected their visitors and members of their families, such as Lady Goodale. The nearest analogy would seem

> to be the damages which are awarded almost daily for loss of amenity in personal injury cases; it does seem to me that there is perhaps a closer analogy than at first sight appears between losing the enjoyment of your property as a result of some interference by smell or by noise caused by a next door neighbour, and losing an amenity as a result of a personal injury. Is it possible to equate loss of sense of smell as a result of the negligence of a defendant motor driver with having to put up with positive smells as a result of a nuisance created by a negligent neighbour? There is, as it seems to me, some parallel between the loss of amenity which is caused by personal injury and the loss of amenity which is caused by a nuisance of this kind."

26. It seems to us difficult to get from that passage any real support for Lord Irvine's submission but, more importantly when commenting on *Bone v Seale,* it would seem clear that both Lord Lloyd and Lord Hoffmann were rejecting any suggestion that damages for nuisance would be increased by any detriment caused to other family members. When Lord Lloyd referred to *Bone v Seale* he said this:-

> "The only other authority I would mention is *Bone v. Seale* [1975] 1 W.L.R. 797. I refer to it because it illustrates and confirms that the right to sue in private nuisance is linked to the correct measure of damages. The facts of *Bone v. Seale* were that the defendant was a pig farmer. The plaintiffs were the owners and occupiers of two adjoining properties. They claimed damages for nuisance by smell. The judge awarded over £6,000. to each of the plaintiffs. The Court of Appeal reduced the sum to £1,000. The case is interesting because damages were awarded on a lump sum basis for loss of amenity over twelve years, there being no evidence of any diminution in market value of either of the two adjoining properties. Stephenson and Scarman LJJ suggested, very tentatively, that there might be an analogy with loss of amenity in personal injuries cases. But this was only for the purpose of showing that the sum awarded by the judge was much too high. There was no hint that the damages should vary with the number of those occupying the houses as their home. The damages were assessed, so to speak, per stirpes and not per capita."

27. This dictum it should be said follows what seems to us to be the nub of his speech at 696C-D:-

> "If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his *personal* injury, nor for interference with his *personal* enjoyment. It follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right to

exclusive possession."

28. Lord Hoffmann's speech was to like effect. At 705G-707C he said this:

> " *St. Helen's Smelting Co. v. Tipping* was a landmark case. It drew the line beyond which rural and landed England did not have to accept external costs imposed upon it by industrial pollution. But there has been, I think, some inclination to treat it as having divided nuisance into two torts, one of causing "material injury to the property," such as flooding or depositing poisonous substances on crops, and the other of causing "sensible personal discomfort" such as excessive noise or smells. In cases in the first category, there has never been any doubt that the remedy, whether by way of injunction or damages, is for causing damage to the land. It is plain that in such a case only a person with an interest in the land can sue. But there has been a tendency to regard cases in the second category as actions in respect of the discomfort or even personal injury which the plaintiff has suffered or is likely to suffer. On this view, the plaintiff's interest in the land becomes no more than a qualifying condition or springboard which entitles him to sue for injury to himself.
>
> If this were the case, the need for the plaintiff to have an interest in land would indeed be hard to justify. The passage I have quoted from Dillon L.J. is an eloquent statement of the reasons. But the premise is quite mistaken. In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.
>
> I cannot therefore agree with Stephenson L.J. in *Bone v. Seale* [1976] 1 W.L.R. 797 when he said that damages in an action for nuisance caused by smells from a pigsty should be fixed by analogy with damages for loss of amenity in an action for personal injury. In that case it was said that "efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed." I take this to mean that it had not been shown that the property would sell for less. But diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C.

344.

…

But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.

It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort. If more than one person has an interest in the property, the damages will have to be divided among them. If there are joint owners, they will be jointly entitled to the damages. If there is a reversioner and the nuisance has caused damage of a permanent character which affects the reversion, he will be entitled to damages according to his interest. But the damages cannot be increased by the fact that the interests in the land are divided; still less according to the number of persons residing on the premises. As Cotton L.J. said in *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch. D.113, 130:

> ". . . where there are divided interests in land the amount of damages to be paid by the defendants must not be increased in consequence of that subdivision of interests."

Once it is understood that nuisances "productive of sensible personal discomfort" do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable."

29. Lord Hope expressly agreed with the judgment of Lord Hoffmann [see page 726B] having himself said at 724F -725A:-

> "The effect on that interest in land will also provide the measure of his damages, if reimbursement for the effects of the nuisance is what is being claimed, irrespective of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of the land. The cost of repairs or other remedial works is of course recoverable, if the plaintiff has required to incur that expenditure. Diminution in the value of the plaintiffs' interest, whether as owner or occupier, because the capital or letting value of the land has been affected is another relevant head of damages. When the nuisance has resulted only in loss of amenity, the measure of damages must in principle be the same. I do not see how an assessment of the damages appropriate for claims for personal injury at the instance of all those who happened to be on the land can be the right measure. If this were so, the amount recoverable would depend on the number of those affected, not the effect on the amenity of the land. At best it is no more than a guide to the true measure of liability, which is the extent to which the nuisance has impeded the comfortable enjoyment of the plaintiff's

property."

30. Lord Hope also agreed with the judgment of Lord Goff [see page 726B]. Lord Goff's view seems to us to be precisely the same as that of Lord Lloyd and Lord Hoffmann. One passage from his speech will suffice at 692H to 693C:-

> "For private nuisances of this kind, the primary remedy is in most cases an injunction, which is sought to bring the nuisance to an end, and in most cases should swiftly achieve that objective. The right to bring such proceedings is, as the law stands, ordinarily vested in the person who has exclusive possession of the land. He or she is the person who will sue, if it is necessary to do so. Moreover he or she can, if thought appropriate, reach an agreement with the person creating the nuisance, either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation will take place. The former may well occur when an agreement is reached between neighbours about the circumstances in which one of them may carry out major repairs to his house which may affect the other's enjoyment of his property. An agreement of this kind was expressly contemplated by Fletcher Moulton L.J. in his judgment in *Malone v. Laskey* [1907] 2 K.B. 141, 153. But the efficacy of arrangements such as these depends upon the existence of an identifiable person with whom the creator of the nuisance can deal for this purpose. If anybody who lived in the relevant property as a home had the right to sue, sensible arrangements such as these might in some cases no longer be practicable."

31. The speeches of the majority thus clearly establish that damages in nuisance are for injury to the property and not to the sensibilities of the occupier(s). That is so as much for the case of the transitory nuisance interfering with comfort and enjoyment of the land as it is for the case of the nuisance which occasions permanent injury to the land and to its capital value, or other pecuniary loss.

32. That leaves open the question how damages are to be assessed where there is (1) no loss of market value or other pecuniary loss, (2) no physical damage to the property and (3) no loss of income from its use/letting, but is simply (4) loss of amenity. This question did not arise in *Canary Wharf* on the decision of the majority. Lord Hoffmann (706D) contemplated estate agents valuing the difference between the right to occupy a house without the nuisance and the right to occupy one with it, that is to say valuing the loss of (notional) rental value. Lord Lloyd (696C) may have contemplated the same. Lord Hope, however, (724H-725A), said that the assessment is of 'the extent to which the nuisance has impeded on the comfortable enjoyment of the land", and he appeared to regard a notional personal injuries award as 'at best…a guide'.

33. If the house in question was available to be let during the period of the nuisance, it may be that there would be direct market evidence of loss of rental value. Otherwise, it is perhaps inevitable that the assessment of damages for loss of amenity will involve a considerable

degree of imprecision. But if estate agents are to assist in placing a value on the relevant intangibles, whether by calculating the reduction in letting value of the property for the period of the nuisance or in some other way, we would expect them in practice to take into account, for the purposes of their assessment, the actual experience of the persons in occupation of the property during the relevant period. It is difficult if not impossible to see any other way of proceeding. As Lord Hoffman observed, the measure of damages for loss of amenity will be affected by the size and commodiousness of the property. If the nature of the property is that of a family home and the property is occupied in practice by a family of the size for which it is suited, the experience of the members of that family is likely to be the best evidence available of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend.

34. On ordinary principles, it must also be clear that a claimant must show that he has in truth suffered a loss of amenity before substantial damages can be awarded. If the house is unoccupied throughout the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad, or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be any actual loss of amenity. So in this way also, as a matter of practicalities, the assessment of common law damages for loss of amenity to the land is likely to be affected by the actual impact of the nuisance upon the occupier, or the lack of it.

35. It follows that the actual impact upon the occupiers of the land, although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of such damages in many cases, including such as the present where a family home is in question and no physical injury to the property, loss of capital value, loss of rent or other pecuniary damage, arises.

36. In our view not one of the speeches of the majority provides any support for the view that the person who has the right to sue in nuisance is recovering damages on behalf of other occupiers of the property. Insofar as Lord Irvine was submitting otherwise, in our view his submission was rejected. There is therefore no room for a *Hunt v Severs*-type trust; in the *Hunt v Severs* context the central objective of the relevant award is to compensate the carer, whereas it is no part of the purpose of award of damages for nuisance to compensate occupiers with no interest in the land.

37. The third question takes us to s.8 of the HRA. The question is whether Thomas Bannister should recover damages for a breach of Article 8 and what factors are relevant in answering that question. It is clear that where the creator of the nuisance is a public authority and a person's enjoyment of his home is affected, that is capable of infringing Article 8. The several decisions of the European Court of Human Rights cited to us (such as *Fadeyeva v Russia* (2007) 45 EHRR 10) demonstrate both this proposition and that that court may in an appropriate case make an award of compensation. Neither proposition has been in issue before us.

38. It is right to emphasise that this question will arise only in a relatively limited class of nuisance cases. If the case were one where no negligence were being alleged the position would be covered by the House of Lords decision in *Marcic*. In that case it was held that the legislature had struck, in the various remedies it provided, a proper balance between the rights of the community as a whole and those of individuals who might be put to inconvenience; thus in such a case not even the owner of property would have a claim under the HRA. It must follow that a person without a proprietary interest would also be without a separate remedy under the HRA where no negligence was alleged. And unless the potential defendant to a nuisance claim happens to be a public authority, no possibility of a breach of Convention rights will ordinarily arise. What we are being asked to consider is whether just satisfaction demands compensation to someone in the position of Thomas Bannister where fault has been established, where common law damages have been awarded to his parents, the property owners, and where his claim is under Article 8(1) i.e. the allegation is that a public authority has positively interfered with his right to respect for "private and family life" or "his home" without the defence contemplated by the remainder of Article 8(2).

39. In such a case s.8 of the HRA provides as follows:-

> "8 Judicial remedies
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
>
> (5) A public authority against which damages are awarded is to be

> treated—
>
> (a) in Scotland, for the purposes of section 3 of the [1940 c. 42.] Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;
>
> (b) for the purposes of the [1978 c. 47.] Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.
>
> (6) In this section—
>
> "court" includes a tribunal;
>
> "damages" means damages for an unlawful act of a public authority; and
>
> "unlawful" means unlawful under section 6(1)."

40. Article 41 of the Convention provides as follows:-

> "If the Court finds that there has been a violation of the convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

41. It follows that where a public authority has been found to have acted "unlawfully" the court "may grant such relief or remedy …as it considers <u>just and appropriate</u>". No award of <u>damages</u> is to be made unless, taking account of <u>all the circumstances</u> including any other relief or remedy granted <u>in relation to the same act</u>, the court is satisfied that <u>the award is necessary</u> to afford <u>just satisfaction</u>. In determining whether to award damages, or the amount, the court must <u>take into account the principles applied by the European Court under Article 41</u>. We have underlined what seem to us to be important aspects of the exercise that a court must perform.

42. As stated in the judgment of the court, given by Lord Woolf CJ, in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 the role of damages in human rights litigation has significant features which distinguish it from the approach to the award of damages in a private law contract or tort action:

> "The following points need to be noted. (a) The award of damages under the HRA is confined to the class of unlawful acts of public authorities identified by section 6(1): see section 8(1) and (6). (b) The court has a discretion as to whether to make an award (it must be 'just and appropriate' to do so) by contrast to the position in relation to common law claims where there is a right to damages: section 8(1). (c) The award must be necessary to achieve 'just satisfaction'; language that is distinct from the approach at common

> law where the claimant is invariably entitled, so far as money can achieve this, to be restored to the position he would have been in if he had not suffered the injury of which complaint is made. The concept of damages being 'necessary to afford just satisfaction' provides a link with the approach to compensation of the Court of Human Rights under article 41. (d) The court is required to take into account in determining whether damages are payable and the amount of damages payable the different principles applied by the Court of Human Rights in awarding compensation …" (para 55).

In the following paragraph Lord Woolf said that in considering whether to award compensation and, if so, how much, "there is a balance to be drawn between the interests of the victim and those of the public as a whole" and that the court has "a wide discretion in respect of the award of damages for breach of human rights". He described damages as "not an automatic entitlement but…a remedy of last resort." Later, at paragraph 66, in discussing the principles applied by the Strasbourg court, he said that the approach is an equitable one and that "the 'equitable basis' has been cited by the Court of Human Rights both as a reason for awarding damages and as a basis upon which to calculate them". Lord Woolf's analysis was approved by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at paragraph 9. The Convention serves principally public law aims; the principal objective is to declare any infringement and to put a stop to it. Compensation is ancillary and discretionary. The interests of the individual are part of the equation, but so are those of the wider public.

43. This broad discretionary approach to the award of compensation is no doubt the reason for what has been identified by the joint report produced in October 2000 of the Law Commission and the Scottish Law Commission (Law Com No 266) (Scottish Law Com No 180), as the "lack of clear principles [in the Strasbourg case-law] as to when damages should be awarded and how they should be measured". (See paragraph 3.4). All one can say with any certainty is that damages have been awarded for non-pecuniary loss, i.e. for inconvenience and distress, in pollution cases. What is not at all clear is quite how Strasbourg would view claims brought by more than one person in a household and how it would react to the fact that one member of the household had recovered damages for nuisance in the courts of a Member State.

44. The issue which we are now considering was not raised in *Dennis v Ministry of Defence* [2003] EWHC 793, [2003] 2 EGLR 121. The case was a clear instance of pecuniary loss flowing from the nuisance, although damages for non-pecuniary loss of amenity were also awarded. Insofar as Buckley J there indicated (obiter) that any Article 8 award to the non-property-owning wife would call for a pro rata reduction in the common law damages awarded to her property-owning husband, his dictum must be wrong. But his assessment of the common law damages for non-pecuniary loss of amenity on the basis of enjoyment of the estate "which envisages enjoyment by a family as opposed to one individual" was consistent with *Canary Wharf* and clearly demonstrates the point made in paragraphs 32-35 above.

45. We have considerable sympathy for the judge's conclusion as to Issue 9, i.e. that there should be no separate award under Article 8 to Thomas Bannister. However, in the state of

the law which we have set out, we would disagree with the judge that it is possible to give an answer at this stage. If one takes the case of Thomas Bannister as the test case, it seems to us that those representing him can show that he has not, personally, had "reparation" under English law (see Article 41). But we do not think it can be regarded as irrelevant whether his parents recover damages in nuisance or what sums they recover because all the circumstances need to be taken into account in considering whether an award is necessary. Furthermore s.8(3) seems to us expressly to require to be taken into account any remedy granted "in relation to the act in question" and "the consequences of any decision … in respect of that act" without limiting the same to remedies awarded in favour of the person alleging infringement of his rights. The vital question will be whether it is necessary to award damages to another member of the household or whether the remedy of a declaration that Article 8 rights have been infringed suffices, alongside the award to the landowner, especially when no pecuniary loss has been suffered. If, for the reasons explained above in paragraphs 32-34, the effects of the odour and mosquitoes upon Thomas Bannister personally were in practice taken into account in determining the diminution in the amenity value of the property, and therefore in determining the amount of damages awarded to his parents in nuisance, we would regard that as a highly significant consideration when determining whether an award of damages was necessary to afford Thomas just satisfaction under Article 8. In any event the fact of an award to the parents, if made, and its amount, must be a circumstance relevant to whether an award is necessary.

46. For these reasons, we do not think it is possible to say until the case has been tried out whether it is just and appropriate and necessary to award some damages to Thomas Bannister if he is to have just satisfaction. For the reasons given, it may very well be that a declaration is sufficient in his case, but it will depend on the judge's findings in relation to his parents and to any particular consideration affecting Thomas. Even if it is thought that necessity be shown, the fact of any award to his parents, and its amount will be relevant as to quantum. It should be noted that in any event damages if awarded on such issues are not substantial.

47. We would accordingly reverse the judge on Issue 9. We would go no further than to state, by way of formal answer to the issue, that an award of damages in nuisance to a person or persons with a proprietary interest in a property will be relevant to the question whether an award of damages is necessary to afford just satisfaction under Article 8 to a person who lives in the same household but has no proprietary interest in the property.

48. We can, we think, be a little more helpful on Issue 11(b). The answer given by the judge was as follows:

> "Damages would only be awarded under section 8(3) of HRA 1998 if taking account of the measure of damages for nuisance and the availability of alternative remedies, such damages were necessary to afford just satisfaction. An award of damages for nuisance to those with a proprietary interest will usually afford just satisfaction to parents and children. If, despite that, there is a Claimant who still remains a victim because he or she has not received just satisfaction then that person would be entitled to further damages under s.8(3) of the Human Rights Act 1998."

That answer tends to blend Issue 11(b) with Issue 9. Issue 11(b) contemplates a claimant with a proprietary interest and raises the question whether *that person* can recover 'top-up' damages under Article 8 in addition to common law damages.

49. Issue 11(b) was not particularly accurately framed for the judge in that, as phrased, it makes the assumption that a landowner could obtain larger damages for infringement of Article 8 than he would at common law for nuisance. Of course, if that were so, he should recover any shortfall from the defendants. But for the reasons given, this assumption is not only one which cannot be made, but is one which is most unlikely to be true. The real question is whether it can ever be necessary to make an additional award of damages for breach of Convention rights in order to afford just satisfaction to a person with a proprietary interest in the home who has already obtained an award of damages in nuisance in respect of the injury to the amenity value of the home.

50. It follows from what we have said that, despite the fact that damages for private nuisance are awarded as damage to "land", it is highly improbable, if not inconceivable, that Strasbourg would think it appropriate or just or necessary to award a further sum on top for breach of Article 8.

51. In particular, we are not altered in that conclusion by consideration of the case of co-ownership. It is certainly true that at common law there can be but one claim by co-owners for nuisance to their property, and that any damages fall to be divided between them. If two or more co-owners are in occupation, that will achieve proper compensation for all of them, because for the reasons given at paragraphs 31-34 above, the impact upon each of them will in practice inform the assessment of common law damages. If one or more co-owner is out of occupation, then, as it seems to us, he will have suffered no loss, absent any loss of capital or rent, and it would be unconscionable, as between co-owners, for him to retain any share of the damages. If such a case were to arise, the principles of equitable accounting between co-owners ought to be flexible enough to enable the co-owner(s) in occupation to recover from any absentee(s) any share of the damages to which the latter would otherwise be entitled. In that way, the risk which might otherwise arise of an occupying co-owner receiving less than would be his Article 8 entitlement seems to us to be highly improbable in practice.

52. Accordingly we would answer Issue 11(b) as follows:

> "11(b) It is most improbable, if not inconceivable, that damages at common law will be exceeded by any award to the same claimant for infringement of Article 8. Accordingly the award of damages at common law to a property owner will normally constitute just satisfaction for the purposes of section 8(3) Human Rights Act and no additional award of compensation under that Act will normally be necessary."

53. As regards Issue 10 the judge's answer was:-

> "The alternative remedies under sections 80 and 82 of the Environmental Protection Act 1990, the complaint to Ofwat under

> s.94 WIA and the current abatement notice are all relevant to the issue of whether damages for owners/occupiers and/or those without a legal interest in their homes are necessary to afford just satisfaction under section 8(3) of HRA 1998."

Strictly the judge's view must be right that the availability of other remedies must be relevant. That seems to us to flow from s.8(3) and the fact that "all circumstances" must be taken into account. Although s.8(3) contemplates taking account of remedies "granted" in the past, it would be strange if the availability of remedies were not also a circumstance to be considered. But, insofar as claims by property owners under Article 8 are concerned, Issue 10 should not normally arise if our answer to Issue 11(b) is correct.

54. It is thus in relation to claims by non-property owners that the relevance of other remedies are likely to have to be considered. But, that said, if Thomas Bannister were to establish that it was otherwise necessary and just and appropriate that he should be awarded damages for the interference by Thames Water with his Article 8 rights, and remembering that to do so he will also have established negligence, we are very doubtful whether the availability of the remedies referred to in Issue 10 will militate against such an award. Somewhat similar arguments appear to have been raised in *Lopez Ostra v Spain* 20 EHRR 277 and failed. It would surely be held that it was entirely appropriate for Thomas Bannister to join a Group action rather than pursue other procedures such as those identified in Issue 10.

55. With the above observations as to relevance, we would dismiss the appeal of the claimants on Issue 10.

Lord Justice Richards :

56. I agree.

Lord Justice Hughes :

57. I also agree.