Neutral Citation Number: [2017] EWHC 107 (Ch)

Case No: HC-2016-000782

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Royal Courts of Justice
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 27/01/2017

Before :

MR JUSTICE NEWEY

- -

Between :

RICHARD EATON PEARSON	**Claimant**
- and -	
LILLIE EILEEN JULIA FOSTER	**Defendant**

- -
- -

Mr Stephen Jones (instructed by **Scott Rowe, Axminster**) for the **Claimant**
Mr Nathan Wells (instructed by **Beviss & Beckingsale, Honiton**) for the **Defendant**

Hearing dates: 1-4, 7 & 8 November 2016 (Winchester Law Courts)
& 11 November 2016 (Rolls Building)

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Newey :

1. The claimant, Dr Richard Pearson, and the defendant, Mrs Lillie Foster, own adjacent properties in Maiden Newton, Dorset, which stands on the River Frome. A channel carrying water from the river passes through Dr Pearson's property, Maiden Newton House, and on to Mrs Foster's, Maiden Newton Mill ("the Mill"). This case concerns the relationship between Mrs Foster's rights as the owner of the Mill and fishing rights that Dr Pearson enjoys.

Some geography

2. As it approaches Maiden Newton from the north, the River Frome passes under an embankment carrying a railway line. On the southern side of the embankment are to be found some sluice gates. A little way further to the south, the river bifurcates. One channel turns sharply to the west before swinging back to the south and meandering southwards through meadows. This channel ("the Western Channel") is fed by various springs as well as by water from the main river. The other channel ("the Eastern Channel") continues to the south past an open area between it and the town called "The Quarr" and then (also to its east) the church and, beyond that, Maiden Newton House before arriving at the Mill. For most of its length, the Western Channel is broadly parallel to the Eastern Channel, but the latter is a good deal straighter.

3. As the Eastern Channel nears the Mill, it divides into two parts, referred to in these proceedings as the "East Leat" and the "West Leat". The East Leat leads to a set of three vertical-lift sluice gates immediately to the north of the Mill building. These are operated by winding gear from a wooden bridge on their southern side. When the gates are open, water flows under them and then through a pair of brick-lined bypass tunnels beneath the Mill building.

4. The West Leat leads to a large breast-shot water wheel at the western end of the Mill building. Adjacent to the wheel, there is a mill wheel control gate which is operated from within the Mill building. Northwards of the wheel and control gate, the West Leat is separated from the East Leat by a narrowing area of grass and then, to the point at which the Eastern Channel splits into the two branches, a spillway. When the water level in the West and East Leats rises above the top of the spillway, water overflows into a narrow channel that meets water from the sluice gates just north of the bypass tunnels. There is a bridge from the grassed area to the eastern side of the spillway, from which can be reached the bridge with the winding gear for the sluice gates.

5. Three further features of the West Leat should be noted. First, there is a small sluice gate between the spillway and the northern end of the grass. Water entering this would continue into the channel within the spillway and thence through the bypass tunnels under the Mill building. Secondly, on the western side of the West Leat is to be found the inlet to a hydraulic "Ram" which, I gather, has served to supply water to a farm some distance away. Thirdly, there was formerly something described as a "weir" running diagonally across the West Leat. 1887 and 1902 Ordnance Survey maps of Maiden Newton both show a "Weir" in this position, and it also appears in plans included in sales particulars in 1931 and 1936. The feature in question is marked on each of the maps with a single line, and Oliver, "Ordnance Survey Maps",

3rd ed., explains (at page 130) as regards the treatment of weirs on Ordnance Survey maps:

> "On single streams a single line is used if less than 1 metre in length vertical or horizontal at 1:1250, or 2 metres at 1:2500: for a greater horizontal distance two lines are used."

That there was a "Weir" where shown in the maps is borne out by the fact that, when clearing the West Leat, Mr Ken Hughes, who has worked extensively on the Mill and Leats since the property was purchased by Mrs Foster, found the remains of 10-15 "crystallised" wooden posts in a straight line and at an angle across the bed of the Leat in the position in which a "Weir" can be seen in the Ordnance Survey maps. These, it is fair to infer, will relate to the "Weir".

6. If allowed to do so, water from the West Leat would flow southwards under the mill wheel to the mill race before rejoining water from the bypass tunnels a little to the south of the Mill building. Water then proceeds under the A356 road to meet the River Hooke, which reaches Maiden Newton from the west. Water from the Western Channel has already joined the River Hooke after passing under another road bridge slightly to the west. The combined river continues to the south-east as the River Frome.

Some history and description

Maiden Newton House

7. Maiden Newton House is next door to Maiden Newton Church and was formerly a Rectory. It was at least largely built in the nineteenth century in a Victorian Gothic style, replacing an earlier house.

8. In 1938, Maiden Newton House, which was then still known as "The Rectory", was sold "pursuant to the Parsonages Measure 1930". It was re-sold in 1947 to a Major Otho Bullivant, who gave it to his wife Penelope in 1960. In turn, Mrs Bullivant gave the property to her son Andrew in 1968 and Mr Andrew Bullivant passed it on to his wife Penelope in 1970. Maiden Newton House was then sold to a Mr and Mrs Bryan Ferriss (in 1985) and on to Parafic Corporation (in 1994). In 2003, Parafic Corporation sold the property to Dr Pearson, who was registered at the Land Registry as its proprietor with effect from 12 March 2003.

9. The property of which Dr Pearson is the owner is substantial. It extends as far north as the point where the River Frome bifurcates south of the railway embankment and westwards to Chilfrome Lane, thus encompassing much of the Western Channel. From the point the river bifurcates to the southern edge of the church, Dr Pearson's land is bounded to its east by the Eastern Channel. On the river side of Maiden Newton House itself, there is a lawn running down to the Eastern Channel and, at the southern end of this, a footbridge across the Eastern Channel. The property continues southwards beside the East Leat until it meets the Mill.

The Mill

10. The Mill and Eastern Channel have clearly existed for centuries. An arbitration award dated 27 October 1608 records a dispute between a "tenant to the Mill in Maydon Newton" and the parson and farmer of the "parsonage of Maydon Newton" concerning "the repair of the bank of the watercourse running by one close of meadow parcel of the glebe of the said parsonage, to the said Mill". The present Mill building appears to date back to the late eighteenth century. An 1825 issue of the Dorset County Chronicle advertises the sale by auction of "All those capital FLOUR MILLS, called *Maiden Newton Mills*, with the dwelling-house, yard, garden, mill-house, stable for ten horses, bakehouse, Brewhouse, and other buildings thereto belonging, with an excellent meadow adjoining" and states that the "mills, dwelling-house, and buildings were erected about 30 years since"; a "very extensive trade" was said to have been carried on there for the last 23 years. 22 years on, in 1847, the Sherborne and Yeovil Mercury carried an advertisement relating to the Mill. Headed "A FLOUR MILL TO LET", it referred to "A LARGE and Commodious BUILDING, late a Spinning Factory, and well adapted in every respect for a Flour Mill". At much the same time, the Parliamentary Gazeteer of England and Wales noted a flax mill, which "in 1838 employed 55 persons".

11. In 1918, the Mill was leased to a Mr Victor Mearns by the tenant for life of the Frampton Court Estate for a term of 14 years. Exceptions and reservations provided for the landlord to have, among others, shooting rights and rights to use water from the river to irrigate meadows. Nothing was said about fishing.

12. In 1931, the Mill was marketed for sale as part of the Frampton Court Estate, which was explained in particulars to comprise "nearly the whole of the Parish of Frampton, together with portions of the Parishes of Bradford Peverell, Sydling St. Nicholas, Maiden Newton and Frome Vauchurch". Lot 71 comprised the Mill with "such water rights as at present exist". The sales particulars recorded the lease to Mr Mearns and that the "Mill Pond supplies a good head of water and affords exceptional driving power", that the "Mill Plant consists of an undershot water-wheel and connections" and that a "separate water-wheel and gear for electric plant is claimed to be the property of the tenant".

13. In the event, the Mill was sold to Mr Mearns. The conveyance, which was dated 29 June 1932, provided for there to be excepted and reserved "unto the said Edgar Creyke Fairweather and his successors in title", among other things, the Ram and the following rights:

> "(1) All rights of fishing in that part of the river and Backwaters included in the hereditaments hereby conveyed (hereinafter called 'the said river').
>
> (2) A right for the said Edgar Creyke Fairweather and his successors in title and his and their licensees and keepers:-
>
> (a) to gain access over such part of the hereditaments hereby conveyed to the said river and backwater and to traverse the banks thereof for the purpose of fishing and all other proper purposes in connection with the

> enjoyment of the fishing rights so reserved as aforesaid.
>
> (b) to cut weeds and clean and clear the bed of the said river.
>
> (c) to maintain the weirs (if any) and execute all proper works thereto for the purpose of maintaining the said river and backwaters in the best condition for the enjoyment of the said Fishing Rights.
>
> (d) to cut or lop trees or bushes which overhang the rivers or backwaters or which interfere with the full enjoyment of the said fishing rights."

14. Sales particulars were prepared for the Mill in 1936, although it was not in the event sold at that stage. The particulars stated that the "Mill Plant consists of an undershot water wheel and connections with complete gear, bins and pulleys" and that the electricity supply was "obtained by means of a dynamo driven by a water wheel".

15. In 1941, Mr Mearns sold the Mill to a Mrs Evelyn Higginbottom. There were exceptions and reservations mirroring those set out in paragraph 13 above.

16. In 1945, Mrs Higginbottom sold the Mill on to a Mrs Barbara Brocklesby (subject to the same exceptions and reservations), and in 1968 it was re-sold (on the same basis) to a Mr Norman Greenaway. Mr John Walmsley, who has been married to Mr Greenaway's daughter since 1979 and visited the Mill regularly between 1974 and 1977, explained that Mr Greenaway had leased the Mill for some years before buying it and that he established a carpet factory there. As Mr Walmsley understood it, Mr Mearns had previously used the Mill as a corn mill. Mr Walmsley also said that the water wheel at the Mill was used to run a generator between 1974 and 1977.

17. In 1977, there was a further sale, by Mr Greenaway to a Mr Sidney Hollier and his wife Christine (with the same exceptions and reservations). Mr Walmsley's understanding from Mr Greenaway was that the purchasers intended to use the Mill to make silk screen printing machines. Mr John Wright, a close friend of the Holliers who stayed at the Mill for about a year in 1984-1985, said that he was aware of the sluice gates there having been opened only once during this period: the Mill, he observed, was suddenly silent.

18. Finally, Mrs Foster (as "Lillie Eileen Julia Worden", which was her name at the time) bought the Mill in 2009. She was registered as its proprietor at the Land Registry with effect from 14 August 2009.

The fishing rights

19. It appears from a 1941 abstract of title that the fishing rights that Dr Pearson now enjoys can be traced back to a conveyance dated 31 December 1931. By then, it seems, there had been an agreement to sell fishing rights to Mr Edgar Fairweather, who had himself agreed to sell such rights to a Mr John Sheridan. At the request, therefore, of Mr Fairweather, Mr Sheridan was granted "sole and exclusive fishery

and fishing rights and the fishery and fishing profits a prendre" in parts of the River Frome and its backwaters together with these additional rights (as they are stated in the abstract of title):

> "(I) Right to gain access over such property adjoining sd River Frome and its backwater as is coloured yellow mauve blue and green on sd plan and to traverse the banks throf for the pppse of fishing and all other proper ppses in connection with enjoyment of the fishing rights.
>
> (II) The right to cut weeds and clear and clean the river bed.
>
> (III) The right to maintain the weirs and execute all proper works thrto for the ppses of maintaining rivers and backwaters in best condition for enjoyment of sd fishing rights.
>
> (1V) To cut or lop trees or bushes which overhang the rivers or backwaters or which interfere with full enjoyment of sd fishing rights."

20. It is not wholly clear why fishing rights were reserved to Mr Fairweather when the Mill was sold to Mr Mearns in 1932 (see paragraph 13 above) if the rights had by then already been granted to Mr Sheridan by a 1931 conveyance. It has, however, been suggested that the rights were reserved to Mr Fairweather as a trustee for the eventual purchaser of them, viz. Mr Sheridan.

21. By a conveyance dated 8 April 1941, a Mr Wilfrid Fryer acquired "exclusive and several fishery and fishing rights and fishing profits a prendre" in the "parts of the River Frome and its backwaters" coloured on an attached plan together with the rights specified in a schedule. The stretches of water in question included the southern end of the Western Channel, some of the eastern side of the Eastern Channel north of the church and the western bank of the River Frome from a long way northwards from the point of bifurcation (substantially past the railway embankment) and to slightly south of that point. The colouring includes, too, both sides of the West Leat, the western side of the East Leat (essentially, part of the spillway) and the eastern side of the East Leat from the Mill building north to Dr Pearson's land.

22. The relevant schedule to the conveyance specifies these rights:

> "The right to gain access over such property adjoining such part of the River Frome and its backwaters as adjoin the banks which are delineated on the said Plan and thereon coloured Pink and Green and to preserve the banks thereof for the purpose of fishing and all other proper purposes in connection with the enjoyment of the fishing rights.
>
> The right to cut weeds and clear and clean the river bed.

> The right to maintain the weirs and execute all proper works thereto for the purpose of maintaining the rivers and backwaters in the best condition for the enjoyment of the said fishing rights.
>
> The right to cut or lop trees or bushes which overhang the rivers or backwaters or which interfere with the full enjoyment of the said fishing rights."

23. One difference from both the rights described in paragraph 13 above and those set out in paragraph 19 above is noteworthy: "traverse" has become "preserve" in the first paragraph. It can also be observed that "(if any)" is to be found after "weirs" in paragraph 13 above, but not in either the abstract of title (paragraph 19 above) or the statement of the rights given in the 1941 conveyance.

24. In 1965, Mr Fryer sold the fishing rights to Major Bullivant, who gave them to his son Andrew in 1968. Since then, the rights have been transferred with Maiden Newton House, most recently by Parafic Corporation to Dr Pearson in 2003.

25. Dr Pearson has with effect from 2010 been registered at the Land Registry as the proprietor of a profit a prendre in gross relating to fishing rights "affecting the land shown edged red" on the title plan. The register records that the profit a prendre was included in the 1941 conveyance to Mr Fryer and quotes the details of the profit a prendre and ancillary rights given in that conveyance. The colouring on the title plan extends to that part of the eastern bank of the East Leat as lies between the Mill building and the southern boundary of Maiden Newton House. Immediately north of that, along the spillway, the plan has the *western half* of the East Leat, up to a pecked line in the middle of the Leat, edged in red. There is no red edging on the eastern side of that part of the East Leat (the eastern bank of which lies within Dr Pearson's property).

Events leading to the trial

26. After buying the Mill in 2009, Mrs Foster embarked on its restoration. Mr Ken Hughes said this in his witness statement about the position at the time of Mrs Foster's acquisition:

> "the site was in a state of total dereliction and decay. Clearly, nobody had touched it in years. The millwheel and the sluice gates were in an advanced state of decomposition, with paddle blades hanging off or missing and cast iron fittings cracked and broken."

27. Photographs taken in 2009 show that there was then considerable siltation in both the East and West Leats. A photograph of the East Leat includes a great deal of vegetation growing in the water. With the West Leat, I think it unlikely that there was even a pool of water. Mrs Foster said in her witness statement that it was "effectively just a boggy overgrown area of land to the north of the mill wheel", and her description is borne out by the photographic evidence.

28. Mrs Foster had large quantities of silt and vegetation removed from the Leats. She also arranged for the mill wheel to be restored to working order, for bridges at the property to be rebuilt, for the spillway to be restored and for sluice gates to be either replaced or repaired. In addition, she has restored much of the residential accommodation at the Mill and undertaken work to clear the grounds.

29. The work in the grounds has been one of a number of sources of dispute between Mrs Foster and Dr Pearson. Dr Pearson complained that Mrs Foster was damaging the environment by chopping down trees. Arguments also arose over where the boundary between the Mill and Maiden Newton House lay.

30. What matters for present purposes is that the operation of the sluice gates in the East Leat became a source of controversy. Dr Pearson's position (as he explained in his witness statement) is that:

> "Shortly after [Mrs Foster] took ownership of the Mill, people who … were instructed by her started working in the Mill leat and leaving the Mill sluice gates open. This had a dramatic effect on the water levels in the Mill leat and consequently on the river Frome itself."

31. Correspondence with solicitors acting for Dr Pearson soon ensued. Scott Rowe wrote on behalf of Dr Pearson in November 2009 to complain about, among other things, tree-felling and trespass. In her reply of 11 December, Mrs Foster alleged that there had been interference with her sluice gates on several occasions without her consent. Scott Rowe responded that Dr Pearson "does have the right to access the sluice gates and there are no grounds for action for trespass against him for this".

32. In August 2010, Dr Pearson applied to the Land Registry for his fishing rights to be registered. After Mrs Foster had raised an objection, the matter was referred to the Adjudicator to the Land Registry. In April 2012, however, Mrs Foster withdrew her objection, with the result that an order was made requiring the Chief Land Registrar to give effect to Dr Pearson's application for registration. Soon afterwards, Mrs Foster sought to put forward a new objection to registration of the fishing rights, but on 17 May 2013 the Adjudicator ordered the Chief Land Registrar to cancel that objection, taking the view that "the May 2012 Order gave rise to an estoppel by record" and that the matter had therefore "been judicially determined in a final manner and … could not be re-litigated except on appeal" or, alternatively, that it was an abuse of process for Mrs Foster to re-litigate the issues having regard to the rule in *Henderson v Henderson* (1843) 3 Hare 100. Mrs Foster tried to appeal against the Adjudicator's decision, but permission was refused first by the Adjudicator (on 18 June 2013) and subsequently by Arnold J (on, it seems, 4 November 2013).

33. A few months before this, an incident had occurred about which a considerable amount of evidence was given. Dr Pearson said that, when he returned to Maiden Newton House late on Friday 30 August 2013, he found that the water in the East Leat had "disappeared". Investigating the matter the next morning, he discovered that one of the sluice gates had been locked open, draining the Leat. He considered that the "action could have no other purpose than to prevent [him] from exercising [his] right to close the sluice gate to restore the water levels to the river". Mr Wright, who visited Maiden Newton House on 31 August, explained in evidence that he was

shocked by what he saw. As, however, I mention later (in paragraphs 100 and 101), Mrs Foster and Mr Hughes maintain that the sluice gate was left open for reasons quite different to those suggested by Dr Pearson.

34. On 2 September 2013, Scott Rowe wrote to Mrs Foster and her husband on Dr Pearson's behalf demanding the removal of any locks on the sluices and that all gates and sluices be closed "to maintain water levels". Mr Foster replied on 11 September that, although the sluice gates had been closed for 90% of the time, it was his wife's "prerogative to adjust or lock the sluice gates in any position she so wishes". By then, Dr Pearson had instructed Scott Rowe to apply for injunctive relief.

35. The application for an injunction came before District Judge Williams in the Weymouth County Court on 13 November 2013. He acceded to the application and made an interim order which required Mrs Foster fully to restore the water level in the Leat if she had not already done so and which went on to restrain her from the following:

> "2.1 Interfering with the Claimant exercising his fishing rights over the waters of the Leat.
>
> 2.2 Altering the restored water level of the Leat by adjusting any of the sluice gates at the Mill save in the following circumstances:
>
> (a) On those days that the Environment Agency issues a 'high risk' of flooding alert for the river Frome at Maiden Newton, Any such alteration to be limited to the period of such alert.
>
> (b) To carry out reasonable and necessary repairs or maintenance to the weirs, banks and sluices at the Mill Leat on the following conditions:
>
> (i) Not less than 14 days prior to the proposed commencement of the repairs or maintenance the Defendant shall serve upon the Claimant a notice (the 'Defendant's Notice') in writing describing in sufficient detail the nature of the said works, the estimated length of time required to carry out any such works and the date upon which the Defendant proposes to commence the said works.
>
> (ii) Upon completion of the said maintenance or repairs the Defendant shall restore the water level of the Leat forthwith.
>
> (iii) In the event the Claimant objects to the proposed maintenance or repairs he shall have liberty to apply to the Court on notice for the purpose of determining whether or not the proposed maintenance or repairs should proceed."

36. Following disputes between the parties over whether the sluice gates were being opened otherwise than when permitted under the order of 13 November 2013, Dr Pearson applied for a penal notice to be endorsed on the order. On 26 March 2014, District Judge Williams granted injunctive relief in slightly revised terms with a penal notice endorsed. As well as restraining Mrs Foster from "interfering with [Dr Pearson] exercising his fishing rights over the waters of the Leat", the order prevented her from opening any of the sluice gates at the Mill save in the following circumstances:

> "(a) At those times and on those days when the Environment Agency issues a river flood alert for the Frome River at Maiden Newton. Any such opening to be limited to a period of 24 hours from the time the flood alert is said to be no longer in force on the Environment Agency website.
>
> (b) At those times and on those days when a representative of the Environment Agency shall request the Defendant (or any person acting for her or on her behalf) to open any of the sluice gates to prevent flooding provided that:
>
> (i) If such request is made in person the Defendant shall send confirmation in writing from the Environment Agency that such a request was made to the Claimant's solicitors within 2 days of receiving the said request.
>
> (ii) In any case where the Defendant is requested by a representative of the Environment Agency to open any of the sluice gates to prevent flooding by telephone the Defendant shall send confirmation in writing to the Claimant's solicitors of the time and date the request was made, what was requested and the name of the person making the request within 2 days of receiving the said request.
>
> (iii) In either of the instances set out in paragraph 3.1.2(b) above the Defendant may only open any of the sluice gates for the period requested by the representative of the Environment Agency or if no period is requested and no flood alert is subsequently issued by the Environment Agency for the period of 24 hours from the time of the request by the Environment Agency. If however a flood alert is subsequently issued within either such period then the Defendant may keep open the sluices until 24 hours after the time the alert is said to be no longer in force on the Environment Agency website.
>
> (c) To carry out reasonable and necessary repairs or maintenance to the weirs, banks and sluices at the Mill Leat on the following conditions:

> (i) Not less than 14 days prior to the proposed commencement of the repairs or maintenance the Defendant do serve the Claimant with notice in writing describing in full and sufficient detail the nature of the said works, the estimated length of time required to carry out any such works and the date upon which the Defendant proposes to commence the said works.
>
> (ii) Upon completion of the said maintenance or repairs the Defendant shall restore the water level of the Leat forthwith.
>
> (iii) In the event the Claimant objects to the proposed maintenance or repairs he shall have liberty to apply to the Court on notice for the purpose of determining whether or not the proposed maintenance or works should proceed."

37. Dr Pearson's position is that an injunction along these lines is necessary and that the focus should be on how the relief should be fine-tuned (in particular, to allow Mrs Foster to open the sluice gates periodically for the purpose of flushing away silt). In contrast, Mrs Foster regards the injunction as a gross intrusion. She believes that the fact that the injunction has limited her ability to open the sluice gates has resulted in siltation, stagnant water, methane gas, pond weed and flooding.

38. On 19 February 2016, Judge Iain Hughes QC concluded that the proceedings should be tried by a Chancery Judge in view of the specialist nature and complexity of the matters in dispute. He therefore transferred the case to the High Court.

Fishing matters

39. I had the benefit of expert evidence on matters relating to fish and fishing from Mr Ian Wellby, who was called by Dr Pearson, and Dr Bruno Broughton, whom Mrs Foster called.

40. Points emerging from the evidence of Mr Wellby and Dr Broughton (who were agreed on a good deal) include these:

    i) The River Frome is a chalk stream. Its upper reaches are characterised by riffle (i.e. shallow water running across gravel or other coarse material) and pools (i.e. deeper and calmer areas where the bed is made up of finer material such as silt), interspersed with glides, which expose the underlying gravels;

    ii) Atlantic salmon and sea trout are unlikely to come as far up the River Frome as the Mill. The relevant fish for fishing purposes are native brown trout;

    iii) Fish like the cover that deep water can offer, but it does not, in itself, provide a complete habitat for brown trout, which may feed and would almost certainly spawn elsewhere. Brown trout, Dr Broughton explained, "require clear substrate (usually gravels) in which to lay their eggs, which they then cover with the substrate". Further, in their young stages (as fry and fingerlings), the

primary habitat requirements of brown trout would not be restricted to or necessarily present in deep water. Pool habitats, Mr Wellby commented, tend to be good for *fishing*, but fish need more. The best habitat, Dr Broughton said, is normally a mosaic that *includes* deep water;

iv) Any substantial reduction in water depths between the Mill and the point of bifurcation upstream could cause a temporary devaluation of the habitat for brown trout;

v) On the other hand, the sluices at the Mill need to be opened from time to time to maintain the channels close to the Mill and prevent excessive accumulation of silt. Undershot sluice gates, Dr Broughton explained, "encourage strong water flows at or just above bed level, and the scour this creates helps to remove silt and prevent further silt accumulation up stream". Mr Wellby suggested that sluice operation should be "occasional" (perhaps four times a year) whereas Dr Broughton felt that it should happen more frequently. They agreed, however, that the topic was really outside their areas of competence;

vi) Sustained closure of the sluice gates at the Mill is damaging to fishing in the East and West Leats;

vii) At present, the Leats do not provide good conditions for a trout fishery. In the words of the experts' joint statement, the closure of the sluice gates is:

> "exerting a progressively negative impact of the habitat for brown trout and other fish because of siltation and its knock-on consequences";

viii) Dr Broughton said that, when he last visited the Mill (which was in the summer of 2015), he found that, where the bed of the East Leat was visible, it comprised silt-like material. Near the sluices, he explained, "large accumulations of filamentous, green-brown algae had amalgamated into substantial clumps" and the water "was almost stagnant with numerous gas bubbles rising to the surface" and had "small clumps of yellow-green algae floating on the surface". As regards the West Leat, "[l]arge clumps of filamentous algae were present, and in places they almost completely smothered the Starwort …, Canadian Pondweed … and Curly Pondweed … growing up from the bed", while elsewhere "the algae reached the water surface, forming floating, yellow-green and dark-green mats". Dr Broughton considered, and I accept, that trout would have actively avoided the habitat. The position will, I think, be similar today.

41. It is apparent from a hydraulic modelling report produced by Mott MacDonald for the Environment Agency in 2014 that the impact of opening the sluice gates at the Mill "does not extend to the point where the mill channel splits from the Natural Frome [i.e. the point where the River Frome bifurcates], and therefore levels in the Natural Frome are not affected by the amount of gate opening". During his oral evidence, Mr Wellby suggested that there would be an impact for perhaps 70 metres or up to somewhere towards the church.

42. Mr Wellby considered that, while the sluice gates need to be opened periodically to address siltation, fluctuations in the river conditions would not appeal to fish, which hate change. As I understood his evidence, he acknowledged that, if the sluice gates at the Mill were left open permanently, the areas of river affected would in time become a good habitat for fish, but took the view that fish would be less happy during the changeover period.

The issues

43. The parties' submissions give rise to the following main issues:

    i) Is Dr Pearson entitled to operate or control the various sluice gates at the Mill for the purpose of achieving the best condition of the stretches of watercourse over which he has fishing rights for the enjoyment of those rights?

    ii) What, if any, riparian and milling rights does Mrs Foster enjoy?

    iii) Have the fishing rights been extinguished as regards the West Leat?

    iv) Do the fishing rights extend to the waters adjoining the south-eastern corner of the East Leat?

    v) Who owns the eastern half of the bed of the East Leat?

    vi) Has Mrs Foster actionably interfered with Dr Pearson's rights?

    vii) What, if any, relief should Dr Pearson be granted by way of an injunction and damages?

    viii) What, if any, injunctive relief should Mrs Foster be granted?

44. I shall take these topics in turn.

Operation of the sluice gates

Construction

45. The single most important question I have to decide in this case relates to the construction of the rights granted to Mr Sheridan in 1931 and reserved to Mr Fairweather in 1932. As expressed in the 1941 conveyance to Mr Fryer and recorded at the Land Registry, they include:

> "The right to maintain the weirs and execute all proper works thereto for the purpose of maintaining the rivers and backwaters in the best condition for the enjoyment of the said fishing rights."

46. According to Dr Pearson, this provision gives him a right to close and otherwise control the various sluice gates at the Mill (i.e. the three sluice gates in the East Leat, the mill wheel control gate and the small sluice gate next to the spillway). He does not assert that he has an unfettered right. He maintains, however, that he is entitled to shut the sluice gates so as to retain water in the East and West Leats where that promotes

the best condition for fishing (e.g. if the gates have been left open for no good reason).

47. In contrast, Mrs Foster's position is that, properly construed, the relevant provision gives Dr Pearson no entitlement to operate or control the sluice gates. She contends that the word "weirs" does not apply to the sluice gates and that, even if it did, closing the gates would not fall within the words "maintain … and execute proper works".

48. In my view, the rights granted and reserved in 1931-1932 do not entitle Dr Pearson to operate or control the sluice gates at the Mill. My reasons include these:

    i) The word "weirs" would not ordinarily refer to the sluices or sluice gates. Mr Dan Alsop and Mr Malcolm Cooper, who were called by Dr Pearson and Mrs Foster respectively to give expert evidence on water management issues, agreed that a "weir" is a different thing from a "sluice", and Mr Stephen Jones, who appeared for Dr Pearson, accepted that a sluice gate is not of itself a "weir";

    ii) The word "weirs" can be given its ordinary meaning without rendering it redundant. It is capable of applying to both the spillway and the "weir" running diagonally across the West Leat which was shown in the 1887 and 1902 Ordnance Survey maps and the 1931 and 1936 sales particulars (see paragraph 5 above). In any case, the 1932 conveyance to Mr Mearns referred to "the weirs (if any)" (see paragraph 13 above), suggesting that the right was not carefully tailored to the specific circumstances of the particular grant/reservation;

    iii) Even supposing that the sluice gates were to be considered "weirs", operating them would not naturally, in my view, be described as "maintaining" them or executing "proper works" to them. A right to "maintain" and "execute all proper works" could, as it seems to me, be expected to refer to keeping the relevant structures in repair rather than to their operation. There is no reference to "control" or "operation" of anything; and

    iv) Looking at the context, it is inherently improbable that the relevant right was intended to extend to control of the sluice gates. At the time the right was granted/reserved (1931-1932), the Mill was still a functioning mill and the sluice gates will have played a key role in its efficient operation. It is hardly to be supposed that the grant/reservation of the right to maintain weirs and execute works to them was meant to pass control over the gates to someone other than the miller, the more so since (a) the mill wheel control gate was operated from within the Mill building so the grant/reservation of a right to operate it would have been very intrusive and (b) the Mill had been leased to Mr Mearns without any right to operate the sluice gates having been reserved.

49. Mr Jones argued that the sluice gates are component parts of a single system on the basis that a weir will not perform its function of retaining a level of water if sluice gates are left open and that, in the context, "maintain" must encompass keeping the sluice gates in a state (i.e. shut) which maintains the retentive function of the weir system. As attractively, though, as Mr Jones developed this argument, I am not persuaded by it. The better view, to my mind, is that the relevant right does not apply

to the sluice gates (since they are not "weirs") and would not anyway allow the holder of the right to operate the sluice gates (because that is neither to "maintain" the structures nor to "execute … proper works thereto" and it is inherently improbable that the right was intended to include control of the sluice gates).

Implied grant

50. Mr Jones argued that, even if the express terms of the grant/reservation do not entitle Dr Pearson to operate or control the sluice gates, he has such a right as a matter of implication. Mr Jones cited in support of this submission the decision of the House of Lords in *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634. Lord Parker of Waddington there said (at 646):

> "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used…. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

In the present case, Mr Jones said, it can be seen from the grant/reservation that there was a common intention that the relevant waters should be maintained in the best condition for fishing so it is to be inferred that the grantee was to be entitled to control the sluice gates to achieve that objective.

51. For his part, Mr Nathan Wells, who appeared for Mrs Foster, submitted that the mere grant of a profit of fishing will not carry with it, by implication, a right to interfere with the ordinary use of the retained land. The implied right contended for is, Mr Wells said, wholly unreasonable and, since Dr Pearson cannot hope to establish that the original parties envisaged the fishery being exercised only by the maintenance of a deep pool near the Mill, there can be no question of a right to manipulate the waters to create such a habitat being implied.

52. Mr Wells sought support for his contentions in *Jeffryes v Evans* (1865) 19 CB (NS) 246 and *Gearns v Baker* (1875) LR 10 Ch App 355. In the former case, Willes J said (at 266):

> "the grant is of the exclusive right of fishing and sporting over and taking the game, rabbits, and wild-fowl on the land demised and on that under lease to Rees. I apprehend that such a grant as that does not prevent the land-owner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game."

In a similar vein, *Gearns v Baker* decided that (in the words of the headnote):

> "A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting."

James LJ said (at 357):

> "The agreement is an ordinary agreement for letting shooting, and I must say that it would be an immense surprise to many persons who let shooting in this way to learn that they are to be interfered with by this Court or by any other Court in their mode of managing their own property. It is preposterous to suppose that a man who grants a shooting lease for twenty-one years is to be dictated to by this Court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed and not implied in the ordinary grant of shooting, and that this Court has no right to interfere in the way suggested. As this case stands, it is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this Court to interfere with him in so dealing."

Mellish LJ, the other member of the Court, observed (at 358):

> "In my opinion, the right of shooting is a right to shoot over the lands as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting."

53. To my mind, various matters show that Dr Pearson does not have any implied right to operate or control the sluice gates:

i) It was obviously the common intention of the parties in 1931-1932 that the grantee of the fishing rights should be able to fish, but it is not necessary to give effect to that intention to imply any right to control the sluice gates. A person can fish in the East and West Leats (and elsewhere in the parts of the River Frome and its backwaters in respect of which fishing rights exist) without being able to operate the sluice gates: exercise of the fishing rights does not depend on having an entitlement to open and close the sluice gates in any circumstances, let alone so as to achieve "the best condition for the enjoyment of the fishing rights" or, more specifically, a deep pool immediately upstream of the Mill. As it happens, the evidence indicates that keeping the sluice gates shut in accordance with the 2014 injunction has produced a habitat that is not congenial to fish and that leaving the sluice gates open permanently would in time result in an environment that suited fish;

ii) It is true that the grant/reservation of the ancillary right to maintain the weirs and execute works to them refers to "the best condition for the enjoyment of the fishing rights", but the provisions in question themselves specify what the grantee is to be able to do to produce that condition;

iii) The matters mentioned in paragraph 48(iv) above make it the more unlikely that there was a common intention that the grantee of the fishing rights should be able to operate or control the sluice gates;

iv) *Jeffryes v Evans* and *Gearns v Baker* tend to confirm that the grant/reservation of fishing and ancillary rights should not be taken to have carried a right for the grantee to interfere in the ordinary operation of the sluice gates by the owner of the Mill. In *Gearns v Baker*, James LJ said that it would be an "immense surprise" to many persons letting shooting "to learn that they are to be interfered with by this Court or by any other Court in their mode of managing their own property". Mr Mearns would, as it seems to me, have been similarly surprised at any suggestion that he was to be restricted in his use of sluice gates that were integral to his milling business; and

v) In all the circumstances, the implication advanced by Dr Pearson is neither necessary nor reasonable.

54. That is not to say that Mrs Foster can act maliciously. Mr Wells said that it is accepted that Mrs Foster is not permitted to interfere with Dr Pearson's fishery wilfully or maliciously. That concession is consistent with the passages from *Jeffryes v Evans* and *Gearns v Baker* quoted above. Willes J said in *Jeffryes v Evans* that a landowner and his tenants can use land in the ordinary and accustomed way, "provided they do not resort to any expedients for destroying or driving away the game", and in *Gearns v Baker* Mellish LJ spoke of a landlord "not doing anything for the express purpose of injuring the right of shooting".

Conclusion

55. Dr Pearson has no right to operate or control any of the sluice gates at the Mill.

Riparian and milling rights

56. It is Mrs Foster's case that she enjoys riparian and milling rights. More specifically, she contends that, as the owner of a riparian property, she is entitled "to access to the water in contact with [her] frontage, and to have the water flow to [her] in its natural state in flow, quality and quantity so that [she] may take water for ordinary purposes in connection with [her] riparian tenement including the use of water power" (adopting words of Lord Templeman in *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, at 531) and that, as regards that part of the Eastern Channel which lies to the north of her land, she has the benefit of a right to impound and release waters as and when required for the purposes of working a water mill, maintaining the bed of the watercourse and preventing flood damage to the Mill.

57. Dr Pearson disputes Mrs Foster's claims principally on the basis that (a) riparian rights arise in relation to natural watercourses but the Eastern Channel (including the East and West Leats) is an artificial one, (b) the watercourse will not, moreover, have

been created for a permanent purpose so no prescriptive rights can have been acquired and (c) any prescriptive rights that may have existed have been abandoned.

58. I shall therefore consider in turn:

i) Whether the Eastern Channel is a natural or artificial watercourse;

ii) Whether Mrs Foster is entitled to riparian rights even if the Eastern Channel is an artificial watercourse;

iii) Whether Mrs Foster is unable to rely on prescriptive rights because the Eastern Channel was created for a temporary purpose; and

iv) Whether any prescriptive rights have been abandoned.

Is the Eastern Channel a natural or artificial watercourse?

59. The suggestion that the Eastern Channel (including the East and West Leats) is an artificial watercourse is founded on evidence given by Mr Alsop. He is firmly of the view that the Eastern Channel is not a natural watercourse. As he explained in a witness statement dated 8 October 2015, his reasons for arriving at this conclusion include the fact that the Eastern Channel is elevated above the valley bottom, which "would be the normal location for a natural river channel"; the fact that, unlike natural reaches of the River Frome elsewhere (which are "markedly sinuous in form"), the Eastern Channel is relatively straight; the fact that there are two roughly parallel watercourses (viz. the Eastern and Western Channels) when "[d]uplicate channels of this type would not be expected to be present as a natural morphological feature in the River Frome or in other rivers of similar character"; the fact that the Eastern Channel has "a negligible bed slope compared with the longitudinal slope of the main river valley", suggesting that it was "formed specifically for the purpose of feeding water to the mill"; and the fact that "a considerable difference exists between the water levels upstream and downstream of Maiden Newton Mill" when it would be "impractical to provide this difference in water levels without diverting the flow of the River Frome from its natural channel into an artificial channel". During his oral evidence, he said that he was quite convinced that, if there had not been human interference, the River Frome would have taken the Western Channel, although that might not have followed quite the line it currently does.

60. Mr Wells, with support from Mr Cooper and Mr Foster, took issue with Mr Alsop's view. Among other things, he pointed out that it can be seen from, for example, the 1608 arbitration award that the Eastern Channel has existed for some centuries; that neither Mr Alsop nor anyone else has been able to identify when or by whom the Eastern Channel would have been constructed; that an 1811 Ordnance Survey map shows a single watercourse running to the Mill and on to meet the River Hooke; that the evidence indicates that the bed of the Eastern Channel has a non-negligible slope and may not be far above the valley bottom; that the Eastern Channel is not all that straight; that civil works (so as to create a head of water) can be installed in a natural river; and that various maps and plans from the nineteenth and twentieth centuries appear to have treated the Eastern Channel as the main River Frome.

61. With a degree of hesitation, however, I accept that Mr Alsop is likely to be correct. The reasons he advanced for his conclusion had cogency, while neither Mr Cooper nor Mr Foster is qualified to give expert evidence on this aspect of the case; as he himself accepted, Mr Cooper's expertise lies in the operation of water mills rather than hydrology. I doubt, moreover, whether any real weight can be attached to the maps and plans to which Mr Wells referred. They may indicate that those preparing them took the Eastern Channel to be the main river, but it does not follow that they were correct. As regards, more specifically, the 1811 Ordnance Survey map, it is striking that it depicts only one watercourse even though both Eastern and Western Channels will presumably have been in existence by then.

62. In all the circumstances, I find that the Eastern Channel is an artificial channel, albeit one that has been in existence since at least the beginning of the seventeenth century (and probably much longer than that).

Is Mrs Foster entitled to riparian rights even if the Eastern Channel is an artificial watercourse?

63. The basic principle is that "[t]here is no natural right to water in an artificial watercourse" (Halsbury's Laws of England, volume 87, at paragraph 999). Thus, in *Kensit v Great Eastern Railway Co* (1884) 27 Ch D 122, Cotton LJ said (at 133-134):

> "It seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut."

64. There are, however, various cases in which riparian rights have been held to exist in respect of an artificial channel. The earliest such case to which I was referred was *Sutcliffe v Booth* (1863) 32 LJ (QB) 136. The effect of that decision is summarised in the headnote as follows:

> "A watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action."

Wightman J said:

> "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had had it been a natural stream".

65. In *Nuttall v Bracewell* (1866-67) LR 2 Ex 1, Pollock CB and Channell B considered the plaintiff to have the rights of a riparian proprietor because the watercourse in question was "a natural stream or flow of water, though flowing in an artificial channel". They said in a joint judgment:

> "Now, in the present case, Coates Mill is on an estate abutting on the river. Prior to 1804, the water came to the mill from the stream through a goit and a reservoir, all on the mill-owner's estate. Since then there has been either an additional supply of water or a substituted one, I am not sure which, through a goit leaving the river higher up on the estate of another proprietor. Now it seems to me that the goit is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz. to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe v. Booth*."

66. Riparian rights were also held to exist in *Holker v Poritt* (1872-73) LR 8 Ex 107 (affirmed on other grounds by the Court of Exchequer Chamber: see (1874-75) LR 10 Ex 59), where a natural stream divided into two branches at a point referred to as "E" and a Mr Walker, who was a predecessor in title of the plaintiff, had collected the water from one of the branches, which had hitherto overflowed from a trough and then diffused over the ground before finding its way to the River Irwell, into a reservoir and "conducted it by a culvert to a mill situated on the banks of the Irwell" (to quote the headnote). The plaintiff was held by the Court of Exchequer to be entitled to maintain an action against a riparian owner on the stream above E for obstructing the flow of water. Pigott B said this in his judgment (at 117-118):

> "Here … there is a branch of the stream at E., where the main stream divides into two currents. There is no evidence as to the precise period when the plaintiff's branch was first made; but it was done beyond the time of memory. There is, then, no ground for saying that this is a diversion of the stream, it was the stream itself which passed on from E. to the trough. Then, Walker, being the proprietor of the land lying on this branch, finding the water dissipating itself beyond the trough, collected it into a reservoir, and conducted it in pipes to the land which is now owned by the plaintiff, where it was carried on to the Irwell. In that state of things the water continued to pass along the new course till the land was sold to the plaintiff. Thus the plaintiff became possessed of this land with what is equivalent to a natural stream of water running through it. What had been a stream which could scarcely be traced had become a defined stream. Why, then, is not the plaintiff entitled to maintain this action for the obstruction by the defendants of the water which would naturally run along that channel? *Nuttall v. Bracewell* shews that by turning a natural stream into a cut, you do not change the character of the right. The proprietor does not claim his right in a different way, but he claims the use of the water

> as the proprietor of land in, over, and through which there passes a natural stream, which has, by the expenditure of labour, been turned into an artificial channel. By taking away this water the defendants take away from the plaintiff what is perhaps as valuable and useful as any part of his estate. The defendants could not have abstracted the water as against Walker; and if so, why is the plaintiff not entitled to sue, who claims through Walker? He claims the water not as an easement, but as owner of the land through which it passes."

Another of the judges, Kelly CB, said (at 114-115):

> "What in the contemplation of law is the nature of this artificial stream or tunnel? Suppose that instead of a tunnel conveying the water into what are now the plaintiff's premises Walker had cut an open drain, and so made a stream visible on the surface passing through his land, and on into the Irwell. If he had done so, I am of opinion that he, or any one claiming under him through whose property this open stream passed, would have been as much entitled to the water running along it as if he had been the owner of land on the bank of the stream between E. and the trough. It would have been a mere continuance of the stream. But the cases upon this subject establish the proposition that there is no difference in the contemplation of law between a stream visible to the eye, and a stream conducted through a tunnel, nor any difference in the rights which may be acquired in them respectively. If this is so, on what ground is there any difference between the rights of the plaintiff in the stream which now flows to him through a tunnel, and the rights which he would have had in an open stream passing into and through his land? I think there is none."

67. *Sutcliffe v Booth* was followed in *Roberts v Richards* (1881) 44 LT 271. Hall V-C there said (at 274):

> "It appears to me a reasonable and the sound conclusion in this case, that if the watercourse was in part, or I should say even wholly artificial, it was made so as to give all the rights of riparian proprietors to all the riparian proprietors, or at all events to the defendant's predecessors in title who allowed it to be made through their land."

68. *Sutcliffe v Booth* was followed, too, in *Baily & Co v Clark, Son & Morland* [1902] 1 Ch 649. In that case, the plaintiffs owned a mill which was situated on an artificial cut or channel from a natural river which ran for about a mile and a half before rejoining the river. As Stirling LJ commented (at 668), nothing was known as to the circumstances in which the watercourse was created:

> "It has existed for hundreds of years, but we do not know who at the time of its construction were the owners of the properties which now belong to the plaintiffs and the defendants

> respectively, or indeed anything about the ownership at that time of any part of the land along the watercourse."

The Court of Appeal concluded that the plaintiffs and other owners of property abutting on the watercourse were all entitled to use the water for reasonable purposes. Having noted that other adjoining owners had used water from the watercourse, Stirling LJ said (at 669):

> "What ought the conclusion to be with regard to these acts of the riparian owners? It seems to me that they ought to be taken primâ facie to have been done in the exercise of a legal right rather than as having been done without any legal title. It ought therefore, I think, to be inferred that the owners of the lands abutting on this watercourse reserved to themselves at the time when the watercourse was constructed the right to a reasonable use of the water as it passed their lands, and that the plaintiffs are in like manner entitled to a similar right - a right to the use of the water for all reasonable purposes, and not merely for the purposes of their mill. In substance, over and above the special use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners are entitled to those rights to which the owners of lands adjoining a natural stream would be entitled inter se."

In a similar vein, Cozens Hardy LJ said (at 673):

> "In my judgment the true inference from all the facts is, that the rights of the riparian owners and occupiers must be taken to be the same as they would have been had this been a natural watercourse. I think the evidence shews that the riparian owners and occupiers are entitled to a reasonable use of the water, whether for domestic or for manufacturing purposes."

69. Subject to the point addressed in paragraphs 70 and 71 below, it seems to me that I should draw a similar conclusion in the present case. Here, as in *Baily & Co v Clark, Son & Morland*, nothing is known as to the circumstances in which the relevant watercourse (viz. the Eastern Channel) was constructed or the ownership at the time of its banks, but the evidence indicates that it has been in existence for hundreds of years and that mill-owners will have been using the water in it to supply power over those centuries. In those circumstances, it is, I think, to be inferred that the Eastern Channel was originally constructed on the basis that the owner of the Mill should have the same rights as he would have had if the watercourse had been natural.

Is Mrs Foster unable to rely on prescriptive rights because the Eastern Channel was created for a temporary purpose?

70. It is apparent from the decision of the Court of Exchequer in *Arkwright v Cell* (1839) 5 M&W 203 that rights cannot be acquired by prescription in relation to a flow of water through an artificial watercourse having a "temporary character". In *Burrows v Lang* [1901] 2 Ch 508, Farwell J concluded (at 508) that "temporary" in this context is "not confined to a purpose that happens to last in fact for a few years only, but

includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end". He continued:

> "For example, if a man pumps water from his mines for the purpose of draining them, that is a temporary purpose, as it is limited by the duration of the workings. If a man makes a watercourse leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill. In both cases, in my judgment, it is a temporary purpose within the meaning of the authorities. It is not meant to be a permanent alteration of the face of nature, but a temporary alteration for the purpose of and co-extensive with the carrying on of a particular business— in this case the business of a miller, and that is a temporary purpose within the authorities."

71. Mr Jones floated the idea that this principle applies in the present case. I do not consider, however, that it does. The Eastern Channel has existed and served a mill for centuries. It represents, not a "temporary alteration for the purpose of and co-extensive with the carrying on of a particular business", but a "permanent alteration of the face of nature".

Have any prescriptive rights been abandoned?

72. Mr Wells argued that Mrs Foster has the benefit, not merely of riparian rights, but of prescriptive milling rights. In this connection, he cited *Borough of Portsmouth Waterworks Co v London Brighton and South Coast Railway Co* (1909) 26 TLR 173, where Parker J said (at 174):

> "[T]he inference which I draw from the facts proved at the trial is that the mill pond was originally formed by placing a dam at the Upper Bedhampton Mill across the bed of a natural stream; the effect of such a dam would, of course, be to back the water up the channel of the natural stream and its tributaries to overflow their original banks, and thus constituting a mill pond. If the person responsible for erecting the mill dam owned all the land affected by the backing of the water, such mill dam could not give any cause of complaint to upper riparian owners; and even if he did not own all the land affected, a right in the nature of an easement might be acquired against such riparian owners by actual or presumed grant, or by prescription."

73. Aside from the point considered in paragraphs 70 and 71 above, I did not understand Mr Jones seriously to dispute that prescriptive miller's rights to impound and release water would have subsisted in the hands of, say, Mr Mearns. He argued, however, that any such rights have been abandoned.

74. On this aspect of the case, I was taken to the decision of the Court of Appeal in *Gotobed v Pridmore* (1971) 217 EG 759. Buckley LJ is there recorded (at 760) as having said the following when giving the judgment of the Court:

> "The benefit of an easement might of course be formally released by deed. There was ample authority to show that it might also be impliedly released where the conduct of the dominant owner was such as to manifest an intention to abandon the benefit of the easement. Mere abstinence from the use of an easement such as a right-of-way was, however, insufficient to establish such an intention …. To establish abandonment of an easement the conduct of the dominant owner must, in their Lordships' judgment, have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement. The circumstances might, of course, be such that he was estopped from denying such an intention …. But abandonment was not to be lightly inferred. Owners of property did not normally wish to divest themselves of it unless it was to their advantage to do so, notwithstanding that they might have no present use for it."

75. In the present case, Mr Jones said that the Mill has not functioned as a working mill for the grinding of grain for some decades and that it will never do so in the future. On the latter point, he relied on a revision to a planning application made by Mrs Foster under which the ground floor of the Mill would be designated for Class B1 use so as to be compatible with the creation of a dwelling unit on upper floors. Mr Jones submitted that the surrounding circumstances clearly indicate an intention on the part of Mrs Foster not to resume use of the Mill as a working mill.

76. In my view, however, none of the relevant rights has been abandoned. It is true that the Mill has not been used for corn-milling since Mr Mearns left, but the mill wheel ran a generator in the 1970s and Mrs Foster aspires to operate a hydro-electric generator and, potentially, corn-milling equipment that she has bought. In any case, as *Gotobed v Pridmore* shows, mere non-user of rights does not suffice to establish abandonment, and there is, as I see it, no question of Mrs Foster or any of her predecessors in title having made it clear that she or he had a "firm intention that neither [she or] he nor any successor in title of [hers or] his should thereafter make use of the easement".

Conclusion

77. In my judgment, Mrs Foster has the benefit of riparian and milling rights.

Extinguishment and the West Leat

78. It is Mrs Foster's case that the profit of fishery that Dr Pearson enjoys has been extinguished as regards the West Leat. Mr Wells argued that, by the time Mrs Foster bought the Mill and for at least several years before that, the West Leat had ceased to exist as such and there was no possibility of anyone fishing there. That means, Mr Wells submitted, that the profit of fishery must have ceased to exist.

79. More than one authority tends to suggest that a profit of fishery can be extinguished if the relevant watercourse disappears. Woolrych, "A Treatise on the Law of Waters" (1851), states (at 290):

> "So, again, if an island rise up in a river, the right of fishing is, of course, extinguished on that spot; for a fishing being a privilege inseparably connected with water, it must terminate when the subject to which it owes its origin is destroyed. And so, again, it would be if a river should become dry; the right would be extinguished by a natural cause."

Earlier, in *R v Montague* (1825) 4 B&C 598, the Court of King's Bench had accepted that a public right of navigation in a watercourse could be extinguished by natural causes. Bayley J there said (at 602-603):

> "But even supposing this to have been at some time a public navigation, I think that, from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most probably the rights of the public (if they ever had any) arose from the flux and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes also put an end to them?"

In a similar vein, Holroyd J observed (at 604) that a public right of navigation "may be extinguished by natural causes" and went on:

> "It seems, therefore, that the right of way which existed on account of the navigation of the river, ceased in the original channel when the river changed its course, but followed the river to its new course. If then the water of the sea recedes so that a stream formerly navigable ceases to be so, why should not the rights of the public be extinguished, particularly where other rights have been superinduced, as the right of way in the present case?"

Littledale J, too, thought that any right of navigation had come to an end, explaining (at 605):

> "In the present case, it appears to me a more reasonable presumption, that the passage, if it ever existed, was stopped up by natural causes, by the recess of the sea, or by an accumulation of silt and mud, which we know by experience is constantly going on in many of the harbours of this country, and by which they would eventually be choked up, unless artificial means of cleansing them were adopted."

80. The cases cited by Mr Wells also included *Scrutton v Stone* (1893) 9 TLR 478, where Charles J held that rights of common had been lost. He said (at 479):

> "There has been for a great number of years practically no user of any rights of common over this land, and also such an

> alteration in the character of the land itself and in the actual user of it as to render the resumption of the commoners' privileges impossible, or in the highest degree improbable. Now I am aware that the question whether rights of common or easements are lost from mere non-user is a difficult one, but it seems clear from the authorities that they may be so lost …. In the present case the non-user has been so long that I think I am bound to infer an intention to renounce the right. The product, which is the subject matter of the right, has practically disappeared. The entire extinction of the product brings to an end the commoners' rights, although, of course, as long as the product exists it need not be actually used …."

Mr Wells said that Charles J's remarks involved a degree of conflation between extinguishment and abandonment, but stressed the last sentence of the passage I have quoted from the report.

81. Mr Jones countered with the decision of the Court of Appeal in *Huckvale v Aegean Hotels Ltd* (1989) 58 P&CR 163, where it was argued that rights of way had been extinguished. The judgments refer to *National Guaranteed Manure Co v Donald* (1859) 4 H&N 8, where a canal had been converted into a railway and Martin B said (at 18-19):

> "This easement was to take water for the canal, and when the canal ceased to exist the easement ceased with it."

In *Huckvale* itself, Slade J said (at 173-174):

> "… I think that no authority has been cited to us which establishes that a once valid easement can be extinguished in a case where dominant and servient tenements both still exist.
>
> For all that, I would for my part be prepared to accept in principle that, even in a case of that nature, circumstances might have changed so drastically since the date of the original grant of an easement (for example by supervening illegality) that it would offend common sense and reality for the court to hold that an easement still subsisted. Nevertheless, I think the court could properly so hold only in a very clear case. The authorities cited by Nourse L.J. illustrate how slow is the court to infer the *abandonment* of an easement. *A fortiori*, in my judgment, in the absence of evidence or proof of abandonment, the court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change in circumstances since the date of the original grant there is no practical possibility of its ever again benefiting the dominant tenement in the manner contemplated by that grant. If there has been abandonment, and that abandonment is proved, of course a quite different situation in law will arise."

82. Mr Jones submitted that, in the light of *Huckvale*, a profit of fishery could not be taken to have been extinguished unless it is clear that a change of circumstances means that there is "no practical possibility of its ever again benefiting" its holder. Here, he said, the fact that Mrs Foster has been able to restore the West Leat itself means that she cannot show that there was no practical possibility of the profit of fishery benefiting the person with the benefit of it.

83. I agree. While I accept both that there was no possibility of fishing in the West Leat by 2009 and that a right of fishing could be extinguished if the relevant watercourse were irrevocably destroyed by natural causes, it seems to me that extinguishment will not occur unless and until there is "no practical possibility of [the profit] ever again benefiting" the person entitled to it and that that condition has never been satisfied in the present case. It is true that *Huckvale* concerned easements rather than a profit, but I cannot see why that should matter in this context.

The south-eastern corner of the East Leat

84. As mentioned in paragraph 25 above, Dr Pearson's profit of fishery is shown on the title plan at the Land Registry as including that part of the eastern bank of the East Leat as lies between the Mill building and the southern boundary of Maiden Newton House. Mrs Foster, however, contends that the Land Registry has made a mistake in this respect and that the register should be altered to correct it.

85. Mrs Foster's case is that, while, say, the fishing rights conveyed to Mr Fryer in 1941 may have extended to the relevant portion of the eastern bank of the East Leat, the 1965 sale to Major Bullivant, from which Dr Pearson derives his title, did not encompass the waters adjoining the south-eastern corner of the East Leat. In this connection, Mr Wells pointed out that the parcels clause in the 1965 conveyance speaks of rights in respect of "such parts of the river Frome and its back waters … as adjoin the bank thereof which are delineated on the plan annexed to this Deed and are thereon coloured red" and that the colouring on that plan does not cover the section of the eastern bank of the East Leat between the Mill building and the southern boundary of Maiden Newton House.

86. Mr Wells argued that, in the circumstances, alteration of the register should be ordered pursuant to paragraph 2(1)(a) of schedule 4 to the Land Registration Act 2002, which empowers the Court to make an order for alteration for the purpose of "correcting a mistake". "What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake": Megarry & Wade, "The Law of Real Property", 8th ed., at paragraph 7-133. In *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594, Jacob LJ (with whom Mummery and Tomlinson LJJ agreed) said (at paragraph 25) that he could "see no reason for limiting 'correction of a mistake' to a mistake through some official error in the course of examination of the application". At paragraph 24, Jacob LJ had commented:

> "A registration obtained by a person not entitled to apply for it would be mistaken. So, putting the register back in the condition it was prior to the application would be *correction of a mistake* within the meaning of paragraphs 1 and 5(a) of Schedule 4."

Ruoff and Roper, "Registered Conveyancing", suggests (at paragraph 46.009) that:

> "there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that would not have been made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion."

87. So far as the present case is concerned, the Land Registry remarked in a letter dated 29 September 2010 that "if possible [it] prefers to show the origin of such rights on the Register, ie the Conveyance where they were first severed from the land by either a grant or reservation". Although the fishing rights will have been severed before 1941 (in 1931-1932), the Registry presumably identified the rights by reference to the 1941 conveyance when registering them because that was the earliest relevant conveyance available. It appears, moreover, from a letter dated 27 October 2010 that the Registry was proceeding on the basis that:

> "Until the Conveyance dated 12 April 1994 [i.e. that from Mr and Mrs Ferriss to Parafic Corporation] the fishing rights together with ancillary rights of access had been conveyed unchanged as stated in the earliest conveyance dated 8 April 1941."

The Registry does not seem to have noticed that the colouring on the 1965 plan differed slightly from that on the 1941 plan.

88. Mr Jones submitted that Mrs Foster was trying to go behind the outcome of the proceedings before the Adjudicator to the Land Registry (as to which, see paragraph 32 above). I have not, however, been persuaded that is so. Dr Pearson's original application for registration identified the land to be registered by reference to the 1965 conveyance, the order made by the Adjudicator following the withdrawal of Mrs Foster's objection required the Chief Land Registrar "to give effect to the original application" and the subsequent order of 17 May 2013 similarly provided for effect to be given to Dr Pearson's original application. The question whether Dr Pearson's rights should be defined by reference to the 1965 conveyance or that of 1941 was not at issue.

89. In all the circumstances, it seems to me that (a) no right to fish from the eastern bank of the East Leat between the Mill building and the southern boundary of Maiden Newton House or in the adjacent waters was transferred in 1965, (b) Dr Pearson cannot therefore have had such a right when he applied for registration, (c) the Land Registry made a "mistake" within the meaning of paragraph 2(1)(a) of schedule 4 to the Land Registration Act 2002 when it coloured the relevant part of the eastern bank of the East Leat on the title plan for the fishing rights and (d) the proceedings before the Adjudicator do not preclude Mrs Foster from taking the point. I shall, accordingly, order the register to be altered. The alteration will involve amendment to the title plan for the fishing rights.

Ownership of the eastern half of the bed of the East Leat

90. The earliest available conveyances of the Mill and Maiden Newton House are that of 1932 in favour of Mr Mearns (in the case of the Mill) and that of 1938 "pursuant to the Parsonages Measure 1930" (as regards Maiden Newton House). Each conveyance had a plan drawn on it. On neither plan was any of the bed of the East Leat or the West Leat coloured.

91. Mr Jones submitted that, in the circumstances, ownership of the bed of the East Leat falls to be determined by reference to the "general presumption of law that the owner of land abutting on a non-tidal river is entitled to the soil of the river so far as the middle thread of the water" (to quote from Halsbury's Laws of England, volume 51, at paragraph 397). He pointed out, moreover, that *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427 indicates that the presumption can apply to an artificial channel. In the *Whitmores* case, Eve J said (at 434-435):

> "With regard to the title to the bed of the stream, I should have been prepared to hold that in cases where an artificial channel or cut passes by or through the lands of several proprietors, and water flows therein to serve the purposes of a lower proprietor, the proper grant to presume, in the absence of all evidence as to the terms and conditions upon which the channel was originally made, is the grant of a watercourse—that is, of the easement or right to the running of water—and that, under such circumstances, prima facie every proprietor of land on the banks of such a channel or cut is entitled to that moiety of the bed of the channel which adjoins to his land."

92. Mr Wells, however, contended that, on its true construction, the property comprised in the 1932 conveyance to Mr Mearns was to include the beds of the East and West Leats. The parcels clause in that conveyance, he observed, refers to "ALL THOSE freehold premises situate at Maiden Newton and Frome Vauchurch in the County of Dorset and forming part of the Frampton Estate more particularly specified in the First Schedule hereto and delineated on the plan drawn hereon". The property conveyed was thus to be not only delineated on the plan, but "more particularly specified in the First Schedule". That schedule includes "Bed of Pond and River" with an acreage of ".364" and a reference number of "Part 95". The land in question, Mr Wells argued, must be the beds of the East and West Leats. The beds of the Leats can be seen to have represented "Part 95" from several other plans: that included in the 1936 sales particulars for the Mill, that to be found in an abstract of Mr Mearns' title dating from 1941, that drawn on the 1941 conveyance to Mrs Higginbottom and that attached to a 1944 statutory declaration. Further, no other piece of land with a 0.364 acreage or reference of "Part 95" can be seen on the plan in the 1932 conveyance.

93. Mr Wells also relied on what he described as the "careful" way in which colouring was applied to the plan in the 1938 conveyance of Maiden Newton House. The colouring extends to parts of the beds of the Eastern and Western Channels and is limited as regards the northern part of the Eastern Channel to the western half of the bed. That makes it the more striking, Mr Wells suggested, that none of the beds of the Leats was coloured.

94. It appears, therefore, that in the 1930s, when the earliest available conveyances of the Mill and Maiden Newton were prepared and executed, it must have been understood by those involved that the Frampton Estate owned, and so could convey to Mr Mearns, the beds of the Leats and that Maiden Newton House carried with it title to parts of beds of the Western and Eastern Channels, but *not* the beds of the Leats. I agree with Mr Wells that, in the circumstances, the presumption of ownership "so far as the middle thread of the water" is inapplicable. The correct inference from the evidence is that the beds of the Leats passed to Mr Mearns under the 1932 conveyance (despite the deficient colouring on its plan) and are now owned by Mrs Foster.

95. There remains the question whether, although not its owner, Dr Pearson is entitled to fish in the eastern half of the East Leat (as he can certainly do in its western half).

96. In 1931-1932, the Frampton Estate granted and reserved all rights of fishing in the East and West Leats. Come 1941, however, Mr Fryer was sold only the rights in "such parts of the River Frome and its backwaters … as adjoin the banks thereof which are delineated on the Plan annexed … and thereon coloured Pink", and in 1965 Mr Fryer similarly conveyed to Major Bullivant the rights in "such parts of the river Frome and its back waters … as adjoin the banks thereof which are delineated on the plan annexed … and are thereon coloured red". On balance, it seems to me that each of these conveyances is to be construed as passing the fishing rights in the half of the East Leat next to the relevant colouring. In practice, that means that Dr Pearson is entitled to fish in the western half of the East Leat (in particular, from the spillway coloured on the 1965 plan), but not in the waters beyond the centre line. As Mr Wells pointed out, it is by no means unknown for someone with fishing rights to be able to fish in just one half of the river (compare e.g. *Elliot v Earl of Morley* (1907) 51 SJ 625 and *Lovett v Fairclough* (1990) 61 P&CR 385).

97. In short, Dr Pearson, in my view, neither owns the eastern side of the bed of the East Leat nor is entitled to fish there. It is to be noted that, except as regards the south-eastern corner of the East Leat (in respect of which I have indicated in paragraph 89 above that I am ordering alteration), this conclusion is consistent with the Land Registry plans for Maiden Newton House, the Mill and the fishing rights.

Has Mrs Foster actionably interfered with Dr Pearson's rights?

98. In the light of the conclusions I have arrived at thus far, Dr Pearson cannot succeed in any claim for interference with his rights unless he can prove that Mrs Foster acted wilfully or maliciously. As I noted in paragraph 54 above, Mr Wells accepted that Mrs Foster is not permitted to interfere with Dr Pearson's fishery wilfully or maliciously.

99. Mr Jones submitted that it is to be inferred that, at Mrs Foster's instigation, a sluice gate was opened otherwise than in good faith on 30 August 2013. The reasons that Mrs Foster and Mr Hughes gave for the opening of the sluice gate should, Mr Jones said, be rejected. Further, there was, Mr Jones suggested, no good reason for sluice gates being opened over some 29 days in the period between October 2013 and February 2014. The flood management justifications advanced by Mr Foster and Mr Ben Pettitt, a son of Mrs Foster who lived on site, are, Mr Jones argued, no more than pretexts.

100. It is fair to say that the accounts that Mrs Foster and Mr Hughes gave of how a sluice gate came to be locked open on 30 August 2013 were not fully consistent. Both denied acting maliciously, but, whereas Mrs Foster spoke of concern over trapped fish, Mr Hughes said that he had opened all three main sluice gates to work on the mill wheel and that, when he came to shut them, the middle gate jammed. He explained that, on the spur of the moment, he fitted a lock to the gate to ensure that no one was hurt over the weekend and then repaired the gate first thing on Monday morning.

101. Having seen both Mrs Foster and Mr Hughes in the witness box, I accept that neither of them acted wilfully or maliciously. The likelihood, I think, is that Mr Hughes' recollection is substantially correct.

102. I have not been persuaded, either, that sluice gates were opened wilfully or maliciously in the period up to February 2014. Mr Pettitt said that he did not remember ever having opened the sluice gates without a flood alert or warning once an injunction had been granted. Whilst there may be room for debate as to whether there was invariably such an alert or warning, I see no reason to conclude that Mr Pettitt was wilful or malicious. In fact, I am not sure that it was explicitly put to either him or Mrs Foster in cross-examination that they had acted wilfully or maliciously.

103. I hold, accordingly, that Dr Pearson has not proved any actionable interference with his rights.

What, if any, relief should Dr Pearson be granted by way of an injunction and damages?

104. The conclusions I have reached above mean that it is not appropriate to grant Dr Pearson any relief by way of either injunction or damages.

What, if any, injunctive relief should Mrs Foster be granted?

105. Mrs Foster's counterclaim includes claims for injunctions restraining Dr Pearson from interfering with the sluice gates at the Mill and the natural and ordinary flow of water to it. Mr Wells suggested that such relief should be granted because Dr Pearson has operated the sluice gates more than once without having any legal right to do so. While, however, I have concluded that Dr Pearson is not entitled to operate the sluice gates, I do not think that I should accede to the application for injunctions. When Dr Pearson operated the sluice gates, it had not yet been determined that he had no right to do so. I see no reason to think that he will interfere with the sluice gates in the future.

Conclusion

106. I can summarise my conclusions as follows:

i) Dr Pearson is not entitled to operate or control any of the sluice gates at the Mill (including the mill wheel control gate);

ii) Mrs Foster has the benefit of riparian and milling rights;

iii) Dr Pearson continues to enjoy fishing rights in respect of the West Leat;

iv) The register should be altered to reflect the fact that Dr Pearson has no right to fish from the eastern bank of the East Leat between the Mill building and the southern boundary of Maiden Newton House or in adjacent waters;

v) Dr Pearson neither owns the eastern side of the East Leat nor is entitled to fish there;

vi) Dr Pearson has not proved any actionable interference with his rights; and

vii) It is not appropriate to grant any injunctive relief against Dr Pearson.

107. I should like, finally, to thank both counsel for their well-researched and presented submissions, which I have found of very considerable assistance.