UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Injurious affection – preliminary issues – whether compensation may be claimed for loss of beach and cliff caused by change in tidal flows as a result of construction of Great Yarmouth outer harbour – whether cost of sea defence works recoverable as compensation or claim is restricted to diminution in the value of land – whether claim time barred – claim allowed to proceed – s.4 Great Yarmouth Outer Harbour Act 1986 & s.10 Compulsory Purchase Act 1965

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **BOURNE LEISURE (HOPTON) LIMITED** **Claimant**

and

GREAT YARMOUTH PORT AUTHORITY **Compensating Authority**

Re: Hopton Holiday Village,
Hopton-on-Sea,
Norfolk,
NR31 9BW.

Before: Her Honour Judge Alice Robinson

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
21-23 September 2015

John Howell QC and *Matthew Reed* instructed by Hill Dickinson LLP for the claimant
Gregory Jones QC and *Richard Honey* instructed by Burges Salmon LLP for the compensating authority

The following cases are referred to in this decision:

Moto Hospitality Ltd v Secretary of State for Transport [2008] 1 WLR 2822, CA
Moto Hospitality Ltd v Highways Agency [2006] RVR 280, LC
Marcic v Thames Water [2004] 2 AC 42, HL
Glossop v Heston and Isleworth Local Board (1878) 12 Ch D 102, CA
Kirby School Board for Harrogate [1896] 1 Ch 437, CA
Long Eaton Recreation Grounds Co Ltd v The Midland Railway Company [1902] 2 KB 574, CA
Tabernacle Permanent Building Society v Knight [1892] AC 298, HL
Ferrar v Commissioners of Sewers of the City of London (1869) LR 4 Ex 227
Hunter v Canary Wharf Ltd [1997] AC 655, HL
Transco plc v Stockport Metropolitan Borough Council [2004] 2 AC 1, HL
Midland Bank plc v Bardgrove Property Services Ltd (1993) 65 P&CR 153, CA
Attorney General v Tomline (1880) 14 Ch 58, CA.
Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321, HL
R v Bristol Dock Co (1810) 12 East 429, KB
Chastey v Ackland [1895] 2 Ch 389, CA
Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd [2001] BLR 173, QBD
Earle & Earle v East Riding of Yorkshire Council [1999] RVR 200, LT
New River Co v Johnson (1860) 2 El & El 435
Salvin v North Brancepeth Coal Co (1873-74) LR 9 Ch App 705
Sedleigh-Denfield v O'Callaghan [1940] AC 880, HL
Hurdman v North Eastern Railway Co (1878) 3 CPD 168, CA
Arscott v Coal Authority [2004] EWCA Civ 892, CA
London Borough of Wandsworth v Railtrack plc [2001] 1 WLR 368, QBD and [2002] QB 756, CA
Clift v Welsh Office [1999] 1 WLR 796, CA
Metropolitan Board of Works v McCarthy (1874) 7 App Cas 243, HL
Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1, HL
Eagle v Charing Cross Railway Co (1867) LR 2 CP 638
Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation [1975] AC 99, HL
Ford v Metropolitan Railway (1886) 17 QBD 12, CA
Wilsons Brewery Limited v West Yorkshire Metropolitan Borough Council [1977] 2 EGLR 175, LT
Hewett v Essex County Council [1928] 138 LT 742, KBD
Wrotham Park Settled Estates v Hertsmere Borough Council (1991) 62 P&CR 652, LT and [1993] RVR 56, CA
Moss v Christchurch RDC [1925] 2 KB 750, KBD
Chamberlain v West End of London and Crystal Palace Railway Co (1863) 2 B&S 617, Exch
Wadham North Eastern Railway Co (1884-85) LR 14 QBD 747, QBD
Hillingdon LBC v ARC [1999] Ch 139, CA
Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264, HL
Hammersmith & City Railway v Brand (1869-70) LR 4 HL 171, HL

The following cases were referred to in argument:

Caledonian Railway v Walker's Trustees (1881-82) LR 7 App Cas 259, HL
Ricket v Metropolitan Railway (1867) LR 2 HL 175, HL

Caledonian Railway v Ogilvy (1856) 2 Macq HL 229, HL
Re Penny and South Eastern Railway (1857) 7 El & Bl 660
Hopkins v Great Northern Railway (1877) 2 QBD 224, CA
Northumbrian Water v McAlpine [2014] EWCA Civ 685, CA
Union Railways v Kent County Council [2010] PTSR 90, CA
In re 6, 8, 10 and 12 Elm Avenue [1984] 1 WLR 1398, ChD
British Coal v Gwent County Council (1996) 71 P&CR 482, CA
Maunsell v Olins [1975] AC 373, HL
Esso v Southport Corporation [1956] AC 218, HL
Home Brewery v Davis [1987] 1 QB 339, QBD
Langbrook v Surrey County Council [1970] 1 WLR 161, ChD
Bradford Corporation v Pickles [1895] AC 587, HL
R v Pagham (1828) 8 B&C 355
British Celanese v Hunt [1969] 1 WLR 959, QBD
Leakey v National Trust [1980] 1 QB 485, CA
Holbeck Hall Hotel v Scarborough Borough Council [2000] QB 836, CA
Yorkshire Water v Sun Alliance [1998] Env LR 204, QBD
Backhouse v Bonomi (1861) 9 HLC 503, HL
Weston v Lawrence Weaver Limited [1961] 1 QB 402, QBD
Wagstaff v Department of the Environment, Transport and the Regions [1999] EGLR 108, LT
R (Flight) v the Vestry of St Luke's, Chelsea (1871) LR 6 QB 572, QB and (1871) LR 7 QB 148
Sovmots Investments Limited v Secretary of State for the Environment and others [1979] AC 144, HL
Central Control Board (Liquor Traffic) v Cannon Brewery Company Limited [1919] AC 744, HL
LE Jones Limited v Portsmouth City Council [2003] 1 WLR 427, CA
British Coal v Gwent County Council (1995) P&CR 482, CA
Stone v Yeovil Corporation (1876) LR 2 CP 99, CA

DECISION

Introduction

1. This is a claim for compensation for injurious affection pursuant to s.10 of the Compulsory Purchase Act 1965 ("the 1965 Act"). The claimant is the owner of a holiday village comprising approximately 962 holiday caravans together with recreational and other facilities near the sea known as Hopton Holiday Village, Hopton-on-Sea, Norfolk NR31 9BW ("the reference land"). To the east of the reference land lies a beach known as Hopton Beach.

2. The respondent is the harbour authority for Great Yarmouth. Between 2007 and 2008 an outer harbour was constructed at Great Yarmouth pursuant to the Great Yarmouth Outer Harbour Act 1986 as amended ("the Outer Harbour Act"). The outer harbour lies approximately 3.5km north of Hopton Beach.

3. In 2007 and prior to that time there were sea defences in place along Hopton Beach in the vicinity of the reference land. These comprised a timber revetment with a vertical steel sheet piled toe and to the south of that a concrete sea wall with a vertical sheet piled toe. A series of timber groynes ran at roughly right angles to the revetment and sea wall. During 2013 there was a failure of the timber revetment and part of the cliff collapsed including part of the reference land. As a result the claimant has carried out works to make good the damage and to repair and improve sea defences to provide longer term protection.

4. The claimant alleges that the damage to the reference land was caused by the construction of the outer harbour. Briefly, it is said that completion of the outer harbour changed the tide-flow patterns in the vicinity, increasing erosion and that this caused the failure of part of the sea defences adjacent to the reference land. As a result there has been a loss of beach, loss of access to the beach and damage to and loss of cliff including part of the reference land. The claim for compensation includes the cost of carrying out the works, losses associated with the maintenance and monitoring of the works, operational losses and diminution in the value of the reference land as a result of the loss of beach.

5. The claim is disputed by the respondent who raises a number of preliminary legal points. As a result on 4 March 2015 the Tribunal ordered that 5 questions be determined as preliminary issues:

(1) Whether, for the purposes of section 9 of the Limitation Act 1980, the cause of action accrued when those works were executed which interfered with or blocked shore parallel flows or whether the cause of action accrued when, as a result of the execution of those works, there occurred material physical damage to, or interference with, any interest in land of the Claimant.

(2) Whether the Claimant is entitled to bring a claim under section 10 of the Compulsory Purchase Act 1965 if any interest in land it has has been injuriously affected by the execution of the works under the Great Yarmouth Outer Harbour Act 1986 (as amended).

(3) Whether the types of costs and losses claimed by the Claimant are matters for which compensation can be awarded under section 10 of the Compulsory Purchase Act 1965 or whether compensation can only be awarded under section 10 for the diminution in the open market value of land or interests in land.

(4) Whether the phrase "the execution of the works" in section 10 of the Compulsory Purchase Act 1965 means the construction and completion of those works.

(5) Whether the facts alleged by the Claimant in its statement of case dated 27 June 2014 and its further and better particulars dated 17 September 2014, if correct, would have given rise to a cause of action in nuisance but for the statutory authority conferred by the Great Yarmouth Outer Harbour Act 1986 (as amended).

This is the decision on those preliminary issues.

6. In fact, it is agreed that the logical order of the preliminary issues is different from that set out above. The first question is whether any claim may be made at all under s.10, issue (2). If a claim may be made, the next issue is whether, on the facts asserted by the claimant, a claim arises in principle, issue (5). If it does, what is the measure of compensation, issue (3)? Finally, the two limitation points arise, issues (1) and (4). I propose to deal with the preliminary issues in this order.

7. Although the reference is brought by the claimant, the preliminary issues all arise out of points of law taken by the respondent in its Reply. Accordingly, in dealing with them I propose to summarise the submissions on behalf of the respondent which explain the point before summarising those on behalf of the claimant in reply. However, that should not be taken as detracting from the fact that the burden of proof lies on the claimant to show that it is entitled to claim compensation in this case.

Issue (2): Whether the Claimant is entitled to bring a claim under section 10 of the Compulsory Purchase Act 1965 if any interest in land it has has been injuriously affected by the execution of the works under the Great Yarmouth Outer Harbour Act 1986 (as amended).

Legislative framework

8. Section 1 of the Compulsory Purchase Act 1965 ("the 1965 Act") provides so far as relevant as follows:

(1) This part of this Act shall apply in the relation to any compulsory purchase to which Part II of the Acquisition of Land Act 1981, or Schedule 1 to that Act, applies, and in this part of this Act –

(a) *'the Acquisition of Land Act'* means that Act,

(b) *'compulsory purchase order'* has the same meaning as in that Act.

(2) In construing this Part of this Act the enactment under which the purchase is authorised and the compulsory purchase order shall be deemed to be the special Act.

(3) In this Part of this Act, unless the context otherwise requires, -

"*acquiring authority"* means the person authorised by the compulsory purchase order to purchase the land;

"land" includes anything falling within any definition of that expression in the enactment under which the purchase is authorised;

"subject to compulsory purchase", in relation to land, means land the compulsory purchase of which is authorised by the compulsory purchase order.

(4) In this Part of this Act "*the works"* or "*the undertaking"* means the work or undertaking, of whatever nature, authorised to be executed by the special Act…"

9. Section 10 of the 1965 Act provides so far as relevant as follows:

(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Upper Tribunal.

(2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Land Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds."

10. The application of the 1965 Act to the Outer Harbour Act is dealt with in s.4 of that Act:

"(1) Part I of the Compulsory Purchase Act 1965 (except sections 4 and 27 thereof and paragraph 3(3) of Schedule 3 thereto), in so far as it is applicable for the purposes of this Act and is not inconsistent with the provisions thereof shall apply to the compulsory acquisition of land under this Act as it applies to a compulsory purchase to which the Acquisition of Land Act 1981 applies and as if this Act were a compulsory purchase order under the said Act of 1981."

11. Provision is made for compulsory purchase in s.18 of the Outer Harbour Act:

"(1) Subject to the provisions of this Act, the Commissioners may enter upon, take and use, such of the lands delineated on the deposited plan and described in the deposited book of reference as they may require for the purposes of the works or for any purpose connected with or ancillary to the undertaking.

(2) The powers of the Commissioners for the compulsory acquisition of land under this section shall cease –
(a) in relation to the lands required for Work No.1 on 31st December 1991; and
(b) in relation to the lands required for Works Nos. 2A and 2B on 31st December 1996.

….
(5)(a) The Secretary of State may by order extend the period for the exercise of the powers of the Commissioners for the compulsory purchase of land under this section…"

12. The Outer Harbour Act is amended by the Great Yarmouth Outer Harbour Revision Order 2005 ("the 2005 Order") which also makes further provision relating to construction of the outer harbour. The 2005 Order substitutes a new s.33 into the Outer Harbour Act which makes provision for the respondent to make good, at the instigation of the relevant local authorities, certain damage caused by construction of the outer harbour.

13. Section 33 (as amended) applies to "protected areas" which are defined in s.33(1) as "beaches, sea walls, promenades, groynes, revetments and any other coast protection structures" in the areas of Great Yarmouth District Council and Waveney Borough Council. They are protected from "damage", defined as "any adverse effects to the protected areas." By virtue of s.33(2), if within 10 years of completion of the outer harbour works and wholly or partly in consequence thereof, any alteration of the tidal flow or littoral drift causes damage or a reasonable expectation of damage then, if so required by the local authority, the respondent must make good the damage (failing which the local authority may do so and recover the reasonable costs from the respondent). Section 33(4)(b) goes on to provide: "in the case of erosion or alteration of tidal flow or littoral drift, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be reasonably required by the council".

14. Article 6 of the 2005 Order also makes similar provision relating to the Environment Agency in respect of any erosion of the bed or shore of the sea. In addition, paragraph 6(3) requires the Environment Agency's approval of proposals for construction of the outer harbour which may include conditions requiring the respondent to monitor erosion or alterations in the tidal flow or littoral drift.

15. The full text of s.33 as amended and article 6 of the 2005 Order is set out in an Appendix.

Submissions

16. There is no dispute that the claimant's entitlement to compensation, if any, depends on whether s.10 of the 1965 Act applies to construction of the outer harbour pursuant to the Outer Harbour Act. That in turn depends upon the proper construction of s.4 of the Outer Harbour Act which is said by the claimant to apply s.10 to those works.

17. Mr Jones, counsel for the respondent, highlighted the wording of s.4 and took two points. First (although it was the second point made in submissions), he submitted that s.4 in its express terms only applies Part I of the 1965 Act "to the compulsory acquisition of land under this Act". Thus compulsory purchase of land is a necessary precondition for the application of s.10. However, in this case there was no compulsory acquisition of land. The land required to construct the outer harbour

was acquired by agreement. On 25 May 2007 the respondent entered into a headlease with the Crown Estate Commissioners whereby the premises shown pink on the lease plan comprising the sea bed on which the outer harbour was constructed were demised to the respondent for a term of 99 years and 10 days from 25 May 2007.

18. Although there was no evidence to this effect, Mr Jones informed the Tribunal that this headlease was entered into pursuant to the respondent's general power to acquire land by agreement in s.56 of the Great Yarmouth Port and Haven Act 1866 ("the 1866 Act") "for any of the purposes of" the 1866 Act. He submitted that this power was available because s.42(2) of the Outer Harbour Act extended the limits of the port as defined in the 1866 Act to include the area on which the outer harbour was to be constructed. Thus, the Outer Harbour Act extended the area of the port and the respondent's powers under the 1866 Act applied to the port as so extended. He also submitted that the purposes of the 1866 Act include the improvement of the port although he did not refer to any specific provision to that effect. Thus, not only was no land compulsorily acquired, no land was acquired under the Outer Harbour Act at all.

19. Further, Mr Jones drew attention to the provisions of s.18(2) of the Outer Harbour Act. The powers of compulsory purchase conferred by s.18(1) expired on 13 December 1991 as regards Work No.1 and 31 December 1996 as regards Works No.s 2A and 2B. Thus, no land was even acquired under the shadow of compulsory purchase. No such powers existed, they having expired over a decade before construction of the outer harbour in 2007/2008.

20. He submitted that, even if s.4 had the effect of applying s.10, the right to compensation in s.10 would not cover the circumstances of the present case. He relied upon the decision in *Moto Hospitality Ltd v Secretary of State for Transport* [2008] 1 WLR 2822, CA to the effect that the inclusion of compulsory purchase powers in the package of orders authorising the scheme is enough to trigger the application of s.10, see the judgment of Carnwath LJ as he then was at paragraph 53. Mr Jones submitted that this means the power of compulsory purchase has to exist and be available to the promoter of the scheme, even if it is not exercised.

21. He also relied upon the following passage from The Law of Compulsory Purchase and Compensation by Michael Barnes QC at p.352:

> "[T]here must be a linkage between the injurious affection and compulsory purchase. The necessary linkage is that a claim under section 10 is in principle only sustainable if the execution of the works of the authority has been carried out under a package or compendium of statutory powers which include a power of compulsory purchase."

No such linkage exists here because no powers of compulsory purchase existed at the time of construction of the outer harbour.

22. So far as the authorities relied upon by the claimant are concerned, these relate to the proper construction of s.10 not s.4, the wording of which is different. *Moto* paragraph 38 emphasises the

importance of the precise wording of the special Act and sets out the dividing line as to when s.10 applies and when it does not.

23. The second point relied upon by Mr Jones is that to apply s.10 would be inconsistent with the provisions of the Outer Harbour Act and that therefore the proviso to s.4 applies: "insofar as it… is not inconsistent with the provisions of [the Outer Harbour Act]". This argument is founded upon the provisions of s.33 of the Outer Harbour Act, as amended by paragraph 5 of the 2005 Order, and paragraph 6 of the 2005 Order.

24. Mr Jones drew attention to s.33 of the Outer Harbour Act as amended and paragraph 6 of the 2005 Order. Pursuant to these provisions the respondent entered into an agreement dated 14 August 2003 with the two local authorities and the Environment Agency which obliges the respondent to carry out special monitoring and every year procure a monitoring report from an independent expert. The area subject to the monitoring includes the coast south of the outer harbour including and beyond Hopton beach and the reference land. The report must, pursuant to clause 4.4 of the Monitoring Agreement, identify the extent to which any changes in coastal processes have occurred which are or may be attributable to the works authorised by the Outer Harbour Act. The parties to the Monitoring Agreement can dispute the findings of the monitoring report. If the findings are not disputed then they are conclusive for the purposes of the provisions of the Outer Harbour Act.

25. Thus, Mr Jones submitted there were and remain extensive protective provisions in the Outer Harbour Act which, in short, oblige the Respondent to make good any damage (including to beaches and coast protection structures) which is caused or contributed to by the construction of the outer harbour. This covers erosion and alteration of the tidal flow or littoral drift. These are precisely the matters which underlie this claim. Accordingly, if the Claimant is right in the allegations it makes about causation, the Outer Harbour Act provides a complete remedy and the protection is not restricted to land owned by the authorities. Further, the threshold for intervention under the Outer Harbour Act and 2005 Order (which includes damage partly caused by construction of the outer harbour) is lower than that for a claim in nuisance.

26. Mr Jones submitted that where an elaborate and detailed statutory mechanism is set out in the Outer Harbour Act for dealing with these matters, there is no room (and no need) for a s.10 claim to be available and it would be inconsistent with the provisions of the Outer Harbour Act to allow such a claim as it would cut across the mechanism set out in the Act. He drew an analogy with *Marcic v Thames Water* [2004] 2 AC 42, HL where it was held that a landowner could not maintain a claim in nuisance against a sewerage undertaker because it would be inconsistent with the statutory scheme. In the present case it made sense for coastal protection which may affect many landowners to be dealt with in a comprehensive statutory scheme by those with specialist knowledge rather than by individuals on an ad hoc and piecemeal basis. He also submitted that to permit landowners to recover could result in the respondent having to pay compensation to a landowner under s.10 for diminution in the value of land because of coastal damage as well as paying for the cost of works to remedy the very same damage under the Outer Harbour Act.

27. On the first point Mr Howell, counsel for the claimant, submitted that the function of s.4 of the Outer Harbour Act was that Part I of the 1965 Act should apply to the compulsory acquisition of land under the Outer Harbour Act as it applies to a compulsory purchase to which the 1981 Act applies, subject to the proviso from the parentheses to "…the provisions thereof" which is relevant to Mr Jones's second point (see below). This has the effect of making the Outer Harbour Act part of the "special Act" (s.1(2)), the respondent the "acquiring authority" (s.1(3)) and the construction of the outer harbour the "works" (s.1(4)) for the purposes of the 1965 Act. Thus s.10 applies when any land or an interest in land has been injuriously affected by execution of the works that the respondent was authorised to carry out by the special Act i.e. the Outer Harbour Act.

28. Section 10 has long been recognised as providing a freestanding right to compensation not dependent upon the acquisition of any of a claimant's land:

> " s. 68 [the forerunner of s.10]… has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorized by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament, by authorizing the works, has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law." per Scott LJ in *Horn v Sunderland Corporation* [1941] 2 KB 26, CA at pp.42-43

29. The authorities on s.10 demonstrate that it applies to land acquired by agreement (*Kirby School Board for Harrogate* [1896] 1 Ch 437, CA), land acquired before the Act authorising the works (*Long Eaton Recreation Grounds Co Ltd v The Midland Railway Company* [1902] 2 KB 574, CA) and land acquired pursuant to a different Order to that which gave powers of compulsory purchase (*Moto*). The precise scope of the powers of compulsory acquisition are irrelevant to the availability of compensation under s.10 which depends on injurious affection arising from works authorised by the special Act, see *Moto* at paragraphs 24 and 55.

30. Mr Howell agreed that it is necessary to look at the wording of s.4 but submitted that it is not materially different from that of s.1(1) of the 1965 Act. Both apply Part I of the 1965 Act to a compulsory purchase to which the 1981 Act applies. Despite the reference to compulsory purchase in s.1(1), the authorities are clear that s.10 applies even where there has been no compulsory purchase. There is no warrant for construing s.4 any differently from s.1(1).

31. There is no reason in logic why s.10 should be applied by the Outer Harbour Act to a compulsory purchase but not where land is acquired by agreement. Nor should Parliament be taken to have deprived someone who would otherwise have been entitled to compensation because the works were executed after rather than before expiry of the power of compulsory purchase in s.18 of the Outer Harbour Act where there is no express exclusion of s.10. Further, s.4 states that Part I of the 1965 Act is to apply "as if this Act were a compulsory purchase order" thus making the Outer Harbour Act itself a compulsory purchase order.

32. As to the second point, Mr Howell submitted that the test as to whether a claim for compensation pursuant to s.10 would be inconsistent with the Outer Harbour Act was whether or

not the two could stand together: *Tabernacle Permanent Building Society v Knight* [1892] AC 298, HL. There is no inconsistency between (a) providing arrangements to remedy certain consequences of the construction of the outer harbour for the benefit of two local authorities (in their capacity as coast protection authorities) and (b) providing compensation for any person in respect of any injurious affection to his land, or interest in land, that the execution of the authorised works causes. If the arrangements with the local authorities were effective, they might avert or minimise any injurious affection to land, or interests in land, that the construction of the outer harbour may cause. But that is not inconsistent with providing compensation for any injurious affection that such works may cause, whether or not such arrangements are effective.

33. Mr Howell drew attention to the fact that in this case the reference land itself was damaged and an access way to the beach lost. Neither of these would fall within the "protected areas" as defined in s.33(1) of the Outer Harbour Act and thus such damage could not fall to be remedied pursuant to s.33 (or paragraph 6 of the 2005 Order). He sought to distinguish *Marcic* on several grounds. First, there was an express ouster for breach of any statutory duty. Second, so far as the common law was concerned, the defendant had not created the nuisance and could not prevent the nuisance from occurring because of third party rights to connect to the sewers which resulted in them being overloaded. As to whether there was a duty to construct a new sewer, the relevant Act provided it was for the regulator to decide by balancing benefits and burdens when and how further works should be carried out.

34. By contrast, here s.33 provides no remedy for any damage to land which lies outside the protected areas (nor paragraph 6 for damage beyond the seashore). There is no obligation on the respondent to do anything unless the authorities request it which is entirely a matter for them. As to the argument that the respondent might have to pay twice for the same loss, the reality is that it would be for the respondent to decide what work to undertake and no tribunal would award compensation unless satisfied that the claimant in that case intended to carry out any necessary works, not the respondent.

Discussion

35. I agree that the answer to this preliminary issue depends upon the wording of s.4 which bears close examination. The operative part, omitting the proviso, is that "Part I of the Compulsory Purchase Act 1965… shall apply to the compulsory acquisition of land under this Act as it applies to a compulsory purchase to which the Acquisition of Land Act 1981 applies and as if this Act were a compulsory purchase order under the said Act of 1981." In my judgment the flaw in the respondent's approach is to focus on the phrase "shall apply to the compulsory acquisition of land under this Act" without regard to the important words which follow "as it applies to a compulsory purchase to which the Acquisition of Land Act 1981 applies". Further, the respondent's construction gives no effect to the final words of s.4 "and as if this Act were a compulsory purchase order under the said Act of 1981".

36. If Part I of the 1965 Act applies to a compulsory purchase under the Outer Harbour Act as it applies to a compulsory purchase to which the 1981 Act applies, the starting point is to ask, in what way does Part I of the 1965 Act apply to a compulsory purchase to which the 1981 Act applies? The answer is supplied in s.1(1) of the 1965 Act: "This Part of this Act [i.e. Part I of the 1965 Act] shall apply in relation to any compulsory purchase to which Part II of the [1981 Act] applies". The application of Part II of the 1981 Act is dealt with in s.1(1) of that Act which simply states that "compulsory purchase" (to which Part II of the 1981 Act relates) "means a compulsory purchase of land, being a compulsory purchase to which this Act applies by virtue of any other enactment…"

37. The effect of this rather convoluted set of cross references is that Part I of the 1965 Act applies to any compulsory purchase of land and thus, by virtue of s.4 of the Outer Harbour Act, Part I of the 1965 Act applies to any compulsory purchase of land under the Outer Harbour Act.

38. It is then necessary to understand how Part I of the 1965 Act applies. By virtue of s.1(2) "In construing this Part of this Act the enactment under which the purchase is authorised and the compulsory purchase order shall be deemed to be the special Act". Thus in construing Part I of the 1965 Act, which includes s.10, the Outer Harbour Act is the special Act. This is because compulsory purchase is authorised under s.18 of the Outer Harbour Act *and* because s.4 provides that the Outer Harbour Act is "the compulsory purchase order". The respondent is "the acquiring authority" for the purposes of Part I of the 1965 Act, being "the person authorised by the compulsory purchase order to purchase the land", s.1(3). Finally, "the works" are "the works authorised to be executed by the special Act" i.e. construction of the outer harbour, s.1(4).

39. Turning to s.10, it is well established that this provides a substantive right to compensation and is not merely a procedural provision. The right to compensation arises "in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction…" As is clear from its wording, s.10 does not depend upon the land said to be injuriously affected having been compulsorily acquired. All that is required is that land or an interest in land has been injuriously affected by construction of the outer harbour (the works) and no satisfaction has been made by the respondent (the acquiring authority). The key issue is the extent to which the application of s.10 is dependent upon the existence or use of compulsory purchase powers.

40. The first point to note is that the application of s.10 does not depend upon any compulsory purchase powers having been exercised at all. This is clear from the *Kirby* case where, as here, the relevant land was all acquired by agreement. Second, it is not necessary for any powers of compulsory purchase to be included in the same enactment as the power to execute the works provided they both form part of the same package of enactments that comprise the special Act, see *Moto* paragraph 53. In fact in this case the claimant does not have to rely upon that principle because here the power of compulsory purchase is included in the same enactment as the power to construct the outer harbour.

41. The respondent's case is that s.10 does not apply here because the land on which the works were executed was acquired pursuant to a power in a different Act (the 1866 Act) to that which

authorised the compulsory acquisition of land for and construction of the outer harbour (the Outer Harbour Act). In my judgment that is inconsistent with *Moto*. There the land on which the works were executed that caused the injurious affection was existing highway, presumably acquired at some stage in the past pursuant to the Highways Act 1980 for a different scheme, the construction of the original slip roads to and from the M40. There was no suggestion that this meant s.10 did not apply. Indeed to exclude the right of compensation in s.10 in such circumstances would conflict with the reasoning of the Court of Appeal which focuses on the link between the power of compulsory acquisition and the power to construct the works not when or pursuant to what power the land on which the works were constructed was acquired.

42. The same was true in the *Long Eaton* case where the land on which the works were constructed was acquired before the statutory authority to construct the works was obtained. As Mr Jones submitted, it is correct that the point which arises here was not taken in that case. Nor did it arise directly in *Moto*. Mr Jones's submission may have some force in respect of *Long Eaton* which concerned whether the works amounted to breach of a restrictive covenant, a completely different issue. However, *Moto* was a case where links between the power to acquire land and the power to construct the works were directly in issue and discussed at some length. If the land on which the works were constructed which gave rise to the injurious affection had to have been acquired pursuant to the same package of orders that gave the right to construct the works and compulsorily acquire land for that purpose, one would have expected that point to have been taken.

43. It could be said that in *Moto* it did not matter that the land was already owned by the highway authority because it would have been acquired pursuant to the Highways Act 1980 the whole of which was held to be part of the special Act, see paragraph 55. If it were necessary to do so, I would hold that the power in the 1866 Act to acquire by agreement the land on which the outer harbour was constructed is also part of the special Act.

44. In *Moto* the Court of Appeal endorsed the reasoning of George Bartlett QC, then President of the Tribunal, at first instance as to why all the provisions of the Highways Act 1980 and orders made under it comprised the special Act for the purposes of s.10 of the 1965 Act. That reasoning is contained in paragraphs 18 to 23 of his judgment, see *Moto Hospitality Ltd v Highways Agency* [2006] RVR 280, LC. The then President held that for two reasons a wide rather than a narrow meaning should be given to the word "enactment" in s.1(2) of the 1965 Act so as to embrace the power to compulsorily acquire land as well as the power to execute works on the land. First, the right to compensation under s.10 arises from the execution of "the works" which mean the works authorised to be executed by the special Act whereas the sections of the Highways Act 1980 authorising compulsory acquisition do not authorise execution of the works. In other words, where the two powers are contained in separate statutory provisions, both provisions are to be regarded as the special Act. Second, s.68 of the Lands Clauses Consolidation Act 1845 applied to the whole Act including provisions for the acquisition of land and execution of works. To construe s.10 more narrowly would be contrary to s.10(2) which states that s.10(1) shall be construed as affording the same right to compensation for injurious affection to land as arose under section 68 of the Lands Clauses Consolidation Act 1845.

45. In the present case, on the respondent's submissions, the power in the 1886 Act to acquire land for construction of the outer harbour derives directly from the Outer Harbour Act. The 1866 Act defines the limits of the port of Great Yarmouth in s.4. These were extended by s.42(2) of the Outer Harbour Act to include the area on which the outer harbour was constructed. Thus the power in the 1866 Act to acquire land by agreement "for any of the purposes of" that Act was extended to include acquisition of the land on which the outer harbour was constructed. It follows that without the amendment made by the Outer Harbour Act, the 1866 Act would not have contained a power to acquire the land on which the works authorised by the Outer Harbour Act were executed. Thus, the power of acquisition derives from the Outer Harbour Act and forms part of the package of powers for acquisition and construction of the outer harbour. All therefore form part of the special Act for the purposes of s.1(2) of the 1965 Act.

46. Further, to hold that the power of acquisition did not form part of the special Act would enable the respondent to avoid entirely the obligation to pay compensation under s.10 of the 1965 Act simply by acquiring the land by agreement under the 1866 Act rather than compulsorily under the Outer Harbour Act. That would not only affect this claimant, it would prevent any other landowner whose land was injuriously affected by the construction of the outer harbour from obtaining any compensation. In my judgment that would be contrary to the clear indication in s.4 of the Outer Harbour Act that compensation should be payable under s.10 of the 1965 Act which for over a century has been held to apply to land acquired by agreement.

47. Returning to s.4, the words "shall apply to the compulsory acquisition of land under this Act" do not mean that Part I of the 1965 Act only applies where land is actually compulsorily acquired for two reasons. First, *Moto* makes clear that the inclusion of such words does not have that effect. Section 1(1) of the 1965 Act uses very similar language to that of s.4: "This Part of this Act shall apply in relation to any compulsory purchase…" where s.4 states "Part I of [the 1965 Act] shall apply to the compulsory acquisition of land". Yet s.10 applies where there has been no compulsory purchase so the inclusion of those words cannot be determinative. In paragraph 52 of *Moto* Carnwath LJ, as he then was, specifically addresses the argument that the wording of s.1 of the 1965 Act implies a more specific link with compulsory purchase and for the reasons given concludes that a "broad and purposive approach" should be adopted such that, despite the wording of s.1, no compulsory purchase is required.

48. Indeed, the statutory provision by which Part I of the 1965 Act was applied in *Moto* also stated that the 1981 Act (and thereby Part I of the 1965 Act, see paragraph 36 above) "shall apply to the compulsory acquisition of land", see s.247(2) of the Highways Act 1980 and *Moto* paragraphs 13 and 14. Even this did not mean that it was restricted to the actual use of such powers:

> "There is a slightly stronger argument in respect of the link with compulsory purchase. Section 247 applies the 1981 Act (and through it the 1965 Act) specifically in relation to the compulsory acquisition of land. However, on the view we have taken, the inclusion of *compulsory* purchase powers for part of the land, is enough to apply section 10 to the effects of the whole scheme." paragraph 57

The italics are those of Carnwath LJ indicating he was specifically considering the argument that the reference in the provision which incorporates Part I of the 1965 Act to it applying to a compulsory

purchase restricted s.10 to cases where there is a compulsory purchase. The underlining is mine because it shows that Carnwath LJ rejected that argument and held that it was sufficient if there were compulsory purchase powers, whether used or not.

49. It is to be noted that the language of the special Act in *Ferrar v Commissioners of Sewers of the City of London* (1869) LR 4 Ex 227 (referred to in paragraph 38 of *Moto*) which was held not to incorporate the provision of the Lands Clauses Consolidation Act 1845 was quite different and that decision was not one of the many authorities relied upon by Mr Jones in support of his submissions.

50. The second reason why s.4 is not restricted to cases where land is compulsorily acquired is that s.4 specifically states that Part I of the 1965 Act is to apply "as if this Act were a compulsory purchase order". Thus, even if the words "shall apply to the compulsory acquisition of land under this Act" mean that the application of Part I of the 1965 Act is restricted to cases where there is actually a compulsory purchase order, the Outer Harbour Act is to be treated as if it were a compulsory purchase order, therefore Part I of the 1965 Act, and thereby s.10, applies in principle.

51. As to the respondent's argument that the powers of compulsory purchase had expired before the land was acquired and the works constructed, in my judgment this does not destroy the link between a power of compulsory purchase and the power to construct the works. There is no logical reason why a claimant should only be entitled to compensation if the outer harbour works were constructed before 1991 and 1996 respectively and therefore no reason why that is the intended meaning of s.4. Moreover, such an approach would be inconsistent with the "broad construction and purposive approach" adopted in *Moto* (paragraph 52) to which I have already referred. For the same reason the fact that the consent of the Crown Estate Commissioners would be required to compulsorily acquire part of the sea bed to construct the outer harbour (s.27(1) of the Outer Harbour Act) does not negate the existence of compulsory purchase powers.

52. In any event, as I have already said, s.4 specifically states that Part I of the 1965 Act is to apply "as if this Act were a compulsory purchase order". The Outer Harbour Act itself does not have an expiry date and the power to construct the outer harbour pursuant to that Act was extant at the time it was constructed pursuant to that power. Thus at the time the works were constructed there was in force not just a power of compulsory purchase but a compulsory purchase order itself.

53. For all these reasons, in my judgment s.10 of the 1965 Act applies in principle to the construction by the respondent of the outer harbour in this case. I turn next to consider the second point taken by the respondent, namely that s.10 does not apply to this particular claim because it would be inconsistent with the provisions of the Outer Harbour Act and is therefore disapplied by the proviso to s.4.

54. A claim for compensation could only arise if the claimant would have had a claim in nuisance, but for the statutory authority for construction of the outer harbour. In this case the claim in nuisance would have been put on the basis that the construction of the outer harbour has caused (by altering the coastal drift with consequent erosion to Hopton beach) direct physical injury to the claimant's land and materially interfered with the enjoyment of easements. The Outer Harbour Act and 2005

Order expressly envisage that the construction of the outer harbour may cause erosion and damage to the sea bed, beaches, sea walls etc which I will collectively refer to as coastal protection structures. It is not difficult to imagine that, if such erosion or damage could be caused, the construction of the outer harbour could also cause damage to privately owned land adjoining the coast but lying beyond such structures.

55. Although extensive provision is made by s.33 of the Outer Harbour Act (as amended) and paragraph 6 of the 2005 Order for remedial works where coastal protection structures are adversely affected whether those are in public or private ownership, no provision at all is made for remedying any damage to other land. Thus the statutory regime for protecting and repairing coastal protection structures would not assist a private landowner whose land beyond such structures was damaged. The respondent does not dispute that the claimant has suffered some damage to land which falls outside the definition of "protected areas". For this reason the legislation does not provide a complete remedy.

56. As to the argument that to allow a claim in compensation would be inconsistent with the provisions of the Outer Harbour Act because it would cut across the mechanism set out in the Act, I accept the submissions of Mr Howell. If the arrangements with public authorities were effective, they might avert or minimise any injurious affection to land, or interests in land, that the construction of the outer harbour may cause. However, that is not inconsistent with providing compensation for any injurious affection that such works may cause, whether or not such arrangements are effective.

57. In my judgment, *Marcic* does not assist the respondent for several reasons. In that case the sewerage undertaker had neither created nor continued the flooding the cause of which was outside its control. By contrast, here the respondent has constructed works which, on the basis of the pleaded case, are the direct cause of damage to the claimant's land. To require payment of compensation for loss caused by that positive act is very different from requiring the sewerage undertaker to construct new sewers the need for which arises not out of anything the undertaker has done but rather a statutory duty to provide effectual sewerage for which a specific statutory remedy is provided.

58. The principle applied in *Marcic* is set out by Lord Nicholls in paragraphs 30-31 where he quotes from *Glossop v Heston and Isleworth Local Board* (1878) 12 Ch D 102, CA:

> "It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy…" per Lord Esher at p.621

That is far removed from the present case. The Outer Harbour Act does not impose a statutory duty to prevent increased coastal erosion and only a partial remedy where that does occur. In my judgment the relevant statutory duty is that imposed by s.4 to pay compensation for injurious affection. If the arrangements with the local authorities and the Environment Agency were intended to oust any claim under s.10, it would cut across the express statutory right to compensation for which, in part, no other remedy exists. In contrast with s.18(8) of the Water Industry Act 1991 with

which *Marcic* was concerned, s.33 of the Outer Harbour Act as amended and article 6 of the 2005 Order do not provide that they are the only remedy for coastal erosion caused by the outer harbour.

59. Further, this is not a case where there are competing interests such as there were in *Marcic*. There decisions as to what sewers should be constructed in what location and at what cost involved balancing the competing interests of different customers. Extra sewerage capacity for one customer meant greater charges for another. The legislation provided for decisions as to the fairness of competing priorities to be determined by the Director, a task for which the court is not equipped. Here, there are no alternative interests against which to balance whether or not to protect or repair coastal protection structures. If alterations in the tidal flow caused by construction of the outer harbour cause damage or a reasonable expectation of damage then reconstruction or other protective works must be carried out. Mr Jones was unable to give any example of any potential conflict between the statutory duty to carry out such works and the interests of a landowner claiming compensation for damage to land from the same cause other than the possibility of the respondent having to pay twice for the same thing (as to which see below).

60. In my view the potential for conflict between works needed to coastal protection structures pursuant to the statutory arrangements and any claim for compensation for injurious affection is more illusory than real. The arrangements for comprehensive monitoring and remedial works by the authorities where the impact of the outer harbour works may range over a wide area are no doubt sensible. However, the purpose of the arrangements is to protect the coast and it is difficult to see how this could conflict with the interests of an owner of land adjoining the coast. Any person whose land was injuriously affected would be bound to mitigate his loss and would likely jump at the chance of having remedial works carried out by the authorities at their expense rather than doing the work himself and claiming the cost as compensation or claiming compensation for diminution in the value of land on the basis no works had been carried out.

61. If there were a difference of opinion as to whether particular remedial works were required to protect land, the Tribunal may have to decide such a dispute in a compensation claim, as in this case. But that does not create an inconsistency between the statutory regime designed to protect the coast generally and the right of a particular landowner to compensation if his land suffers damage. As to the argument that the respondent might have to pay twice, it would be a matter for the respondent and other authorities what work was undertaken and any claim for compensation would be determined on that basis.

62. In my judgment there is no inconsistency between a claim for compensation under s.4 of the Outer Harbour Act and s.10 of the 1965 Act on the one hand and the provisions of s.33 of the Outer Harbour Act and article 6 of the 2005 Order on the other.

63. For all these reasons I would answer the second preliminary issue ‘yes’. The claimant is entitled to bring a claim for compensation under s.10 of the 1965 Act in respect of any land or an interest in land which is injuriously affected by execution of the outer harbour works and such a claim is not inconsistent with the provisions of the Outer Harbour Act and 2005 Order.

Issue (5): Whether the facts alleged by the Claimant in its statement of case dated 27 June 2014 and its further and better particulars dated 17 September 2014, if correct, would have given rise to a cause of action in nuisance but for the statutory authority conferred by the Great Yarmouth Outer Harbour Act 1986 (as amended).

Submissions

64. As the respondent accepts, questions of causation and foreseeability would be for the full hearing of this reference. The issue here is whether the claimant's pleaded case would give rise to a claim in nuisance, but for the statutory authority.

65. Mr Jones referred to the three kinds of private nuisance identified by Lord Lloyd in *Hunter v Canary Wharf Ltd* [1997] AC 655, HL at p.695B:

> "Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."

Mr Jones submitted that although the claimant relies upon the second kind of nuisance, there must be more than merely physical damage to justify a claim. The erection of a structure which interferes with the flow of anything across land such as tidal flow patterns is a not a nuisance. He relied upon a number of authorities in support of that submission culminating in *Hunter* which held that there was no liability in nuisance for interference with television reception caused by the erection of a neighbouring building. As Lord Goff put it:

> "the mere fact that a building on the defendant's land gets in the way and so prevents something from reaching the plaintiff's land is generally speaking not enough" p.686C

66. Further, Mr Jones submitted that this was not a case of "direct" physical injury to land for a number of reasons. First, the outer harbour is 3.5km from Hopton beach, too far away to be classified as neighbouring land. Second, the chain of causation relied upon by the claimant, referring as it does to changed tidal patterns affecting the sea bed and the height and energy of waves, cannot amount to direct physical injury and is at the most indirect damage. Third, the changes are so slow and gradual that they could not qualify as an actionable nuisance. Fourth, there has been nothing emanating from the respondent's land and it is a fundamental element of the nuisance that there must be some sort of invasion from the respondent's land to the claimant's land which is not the case here, see *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, HL at paragraph 95. Finally, he submitted that the claimant asserts that the damage has been caused by natural forces, the waves approaching Hopton beach. Subject to narrow exceptions that do not apply, damage caused by the forces of nature is not a nuisance.

67. Separately from these submissions, Mr Jones referred to the fact that the claim for the cost of works carried out is for emergency and long term protective works. He submitted that there can be no action in nuisance where there is only a risk of future damage and works carried out in

anticipation of damage cannot be recovered, even if physical damage has already been suffered, *Midland Bank plc v Bardgrove Property Services Ltd* (1993) 65 P&CR 153, CA.

68. Mr Howell submitted that *Hunter v Canary Wharf* is distinguishable, being concerned with the exercise of a right that every owner of land has to erect a building and interference with the amenity of land by the mere presence of the building. By contrast, absent statutory authority, only the Crown has the right to erect a harbour and, in any event, the consequences of construction here are physical damage to the claimant's land and interference with an easement.

69. He further sought to distinguish the authorities relied upon by Mr Jones on the ground that they were either examples of the common enemy principle, that if works were carried out to protect your own land from damage by water, your neighbour could not complain if the water was thereby diverted onto his land, or of the principle that there is no right or duty to receive water percolating in undefined channels. He submitted that the harbour was not erected to protect Great Yarmouth from the sea but is an artificial erection which caused the changed tidal flows at Hopton. Nor was the sea water that has caused the damage percolating in undefined channels.

70. Further, the removal of a natural barrier or raising of an artificial barrier on the foreshore which has the effect of causing damage to a neighbouring landowner may be an actionable nuisance: *Attorney General v Tomline* (1880) 14 Ch 58, CA.

71. Whether that damage would be "direct" and therefore actionable depends on whether it was foreseeable and was caused by construction of the outer harbour, issues of fact for a substantive hearing not determination of these preliminary issues of law.

72. Mr Howell sought to distinguish *Midland Bank v Bardgrove* on the grounds that it was not a case of continuing nuisance. He submitted that *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, HL demonstrated that where there is a continuing nuisance and physical damage is suffered remedial works may include works to protect against future damage as well. This is the case here as the effects of the outer harbour will continue and it was necessary to carry out the protection works in order to prevent future damage.

Discussion

73. It is clear from a number of the opinions in *Hunter v Canary Wharf* that the House of Lords was drawing a distinction between two types of case: a nuisance interfering with a neighbour's quiet enjoyment of land or causing sensible personal discomfort (Lord Lloyd's third kind of nuisance, see p.695B-C) and a nuisance causing direct physical damage or material injury to property (Lord Lloyd's second kind of nuisance), see also Lord Hoffmann at p.705A-H. *Hunter* was concerned with a nuisance said to interfere with a neighbour's quiet enjoyment of land. The reason why the claim failed was not because interference with a television signal cannot be an actionable interference with quiet enjoyment in an appropriate case, rather that, in the absence of an easement, the right to erect a

building is not restricted by the fact that it may interfere with a neighbour's enjoyment of his land, see Lord Goff at p.685D-H (emphasis added).

74. *Hunter* is distinguishable from the present case on two quite separate grounds. First, the claim here is based on Lord Lloyd's second kind of nuisance, that of causing material injury to property. Second, insofar as the claim is based on interference with use of the beach or access to the beach, the claimant relies upon either ownership of the land or an easement over it, see paragraphs 4 to 8 of the Further and Better Particulars of the Claimant's Statement of Case dated 17 September 2014 ("the Further and Better Particulars"). The quotation from Lord Goff in paragraph 157 of the respondent's Skeleton Argument – "more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance" – omits the words which immediately precede it – "in the absence of an easement", p.685G. Accordingly, insofar as the claimant can establish interference with a legal easement, the decision in *Hunter* is no obstacle to the claim.

75. I should add that the respondent disputes that any relevant easement exists. However, that question has not been ordered to be determined as a preliminary issue. If this claim proceeds that is a matter which will have to be determined at the full hearing.

76. As for the earlier authorities relied upon by the respondent, in my judgment they too are distinguishable. The claim in *R v Bristol Dock Co* (1810) 12 East 429, KB for damages for polluting water drawn from a river for brewing beer failed because the applicant brewer had no legal right to water of any particular quality. By contrast, in this case the claimant relies upon physical damage to its land and interference with a legal easement. In *Chastey v Ackland* [1895] 2 Ch 389, CA the noxious smells were created by the plaintiff who did not have a right to discharge them onto his neighbours land. Here the 'nuisance' does not emanate from the claimant's land and the claimant relies upon physical damage to its land and interference with a legal easement. Again in *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173, QBD the owners who were deprived of a gas supply did not have a property right in the supply of gas.

77. As Mr Howell submitted, many of the authorities are examples of the common enemy rule, including those relating to the erection of sea defences such as *Earle & Earle v East Riding of Yorkshire Council* [1999] RVR 200, LT, something which Mr Jones accepted. He also accepted that the outer harbour was erected for the commercial development of the port and the common enemy rule cannot apply. Further, in *New River Co v Johnson* (1860) 2 El & El 435 and other cases it has been well established that there is no right to water percolating in undefined channels which can be abstracted even if that causes damage. This is quite different from a situation in which the erection of a structure alters the tidal flow removing sand from a beach and causing damage to adjoining land.

78. The authorities cited by Mr Howell establish that the construction of a building on land which has the effect of diverting water onto neighbouring land, other than works constructed for the purpose of protecting that land from water or where the water percolates through undefined channels, will be an actionable nuisance if it causes foreseeable damage. For example, in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, HL a blocked culvert on the respondent's land caused rainwater to flood onto the plaintiff's land. The respondent was liable in nuisance because he

knowingly allowed that to continue. Lord Atkin stated that if the pipe which had caused rainwater to overflow onto the plaintiff's land had been laid by the defendant rather than a trespasser it would have been a nuisance, p. 896.

79. In *Hurdman v North Eastern Railway Co* (1878) 3 CPD 168, CA the defendants raised the level of their land adjacent to a building on the plaintiff's land as a result of which rainwater ran off the defendant's land onto the plaintiff's building causing damage. The Court of Appeal held that the plaintiff had a claim in nuisance. The levels were not raised for the purpose of protecting the defendant's land (p.173), they were an artificial erection (p.173-174) and the water was not percolating underground in undefined channels (p.174-175). It is right that Cotton LJ regarded the raising of levels as something "offensive" as opposed to the something inoffensive which prejudices a neighbour's enjoyment of his property (p.173-174). However, the examples he gave of something inoffensive are of building work which interferes with a prospect or which obstructs lights that are not ancient. A landowner has no legal right to a view or to light in the absence of an easement whereas here the claimant relies on physical damage to land and interference with an easement.

80. *Hurdman* is cited in *Arscott v Coal Authority* [2004] EWCA Civ 892, CA as an example of the principle that the common enemy defence does not permit a landowner to erect works whose effect will be to cause water which has already or will in any event come onto his land to flow from it to that of a neighbour. *Arscott* concerned flooding by a river overtopping its banks, albeit as a result of exceptionally heavy rainfall, suggesting that liability in nuisance for the construction of works which cause water to flow onto a neighbour's land is not confined to the direct action of rainwater.

81. Are these cases distinguishable on the grounds that the works in this case alter the flow of sea water? Both involve the operation of natural forces. It is correct that the claimant cannot be said to have a right to a certain quantity of sand nor any right or duty to receive a certain quantity of sea water and no more. However, in my judgment this misses the point. The claimant's complaint is not the loss of sand per se or the increase in sea water arriving at Hopton beach, rather the consequent physical damage to its land and interference with an easement. If that is the foreseeable consequence of construction of the outer harbour it is difficult to discern a reason in principle why it would not be an actionable nuisance, absent the statutory authority. On the claimant's case the sea water has invaded and eroded the beach as a result of which part of the reference land and access to it has collapsed. The notion of 'invasion' of something onto the claimant's land is not an independent requirement for nuisance to be established and does not arise in cases relating to e.g. loss of support or interference with access to property. The critical issue in such cases is that there should be either physical damage to property or material interference with use and enjoyment of property.

82. It is of note that the nuisance in *London Borough of Wandsworth v Railtrack plc* [2001] 1 WLR (upheld on appeal [2002] QB 756, CA) was created by wild birds roosting on the defendant's structure. Kennedy LJ stated that it was immaterial whether the nuisance was created by natural forces, paragraphs 22 & 24. There the issue was whether the defendant who had not created the nuisance was aware of and had the means and opportunity to abate the nuisance whereas here on the claimant's case the respondent has created the nuisance.

83. Mr Howell also relied upon *AG v Tomline* where the owner of land adjoining the foreshore was held to be entitled to an injunction prohibiting the Crown from removing a shingle bank from the foreshore which would have exposed the owner's land to flooding from the sea. In my view there is potentially a distinction to be drawn between breach of a duty owed by the Crown to protect the realm from incursions by the sea by the removal of a barrier which is protecting land from flooding by the sea and the erection of a structure that has the effect of altering tidal flows and, in consequence, the rate of natural erosion of the coast. However, it is not necessary to decide this issue. For the reasons already given I consider that on the claimant's pleaded case a right of action in nuisance would have arisen, but for the statutory authority granted by the Outer Harbour Act.

84. Turning to the respondent's remaining points, the claimant's pleaded case is that the reference land has suffered direct physical injury and there has been material interference with an interest in land, namely easements. Part of the reference land has collapsed, there has been physical damage to a right of access and there has been a material interference with a right to use Hopton beach, see paragraph 18 of the Further and Better Particulars. If that is correct then in my judgment there is no rule of law which states that the damage must be caused by water entering the claimant's land as opposed to eroding the support for it as a result of which it collapses or that no liability arises if the works bring forward an event which would have occurred in any event years in the future. Arguments that the outer harbour is too far from the reference land to be regarded as a 'neighbour' or that the chain of causation too indirect or slow to found a claim in nuisance are issues which will arise as to foreseeability, remoteness and causation if the claim proceeds to a full hearing. They are issues the resolution of which will require the facts to be established and cannot be determined at this stage as a preliminary point of law.

85. Mr Jones was unable to refer to any authority to the effect that a claim in nuisance may only arise if the claimant's land is adjacent to the land on which the nuisance arises or within a fixed distance from it. Further it is clear from the monitoring study area agreed between the respondent and the local authorities which extends south of Hopton by several kilometres that it was envisaged that the outer harbour may have effects well beyond Hopton beach. Nor was Mr Jones able to refer to any authority which restricts a claim in nuisance to damage caused by forces which operate quickly rather than slowly. *Salvin v North Brancepeth Coal Co* (1873-74) LR 9 Ch App 705 was decided on the basis that the plaintiff was unable to prove causation on the facts, not that slow and gradual changes cannot as a matter of law found a claim in nuisance.

86. Finally, as to whether the claimant may claim the cost of the protection works, in my judgment this is a topic more appropriately dealt with under the third preliminary issue. For the reasons already given, it cannot be said as a matter of law that there could be no claim in nuisance. The claimant's land has suffered direct physical damage. Whether that would be actionable depends on whether the damage was caused by construction of the outer harbour and was foreseeable as such. If it was, then the next issue which arises is as to the proper measure of loss. It cannot be said that the claimant has suffered no loss as, even if the majority of the claim relates to sea protection works, some of the damages claimed relate to making good physical damage to the cliff and access to the beach. The reason why there was no claim for physical damage in *Midland Bank v Bardgrove* was because it was not in issue that such loss was recoverable, see p.155.

Issue (3): Whether the types of costs and losses claimed by the Claimant are matters for which compensation can be awarded under section 10 of the Compulsory Purchase Act 1965 or whether compensation can only be awarded under section 10 for the diminution in the open market value of land or interests in land.

Submissions

87. Mr Jones submitted that under s.10 of the 1965 Act compensation may only be claimed for diminution in the value of the claimant's land and not for any personal or business losses, *Clift v Welsh Office* [1999] 1 WLR 796, CA at p.801C. The present claim is largely for alleged costs and losses of the business: for the construction of new sea defences, re-siting caravans, lost income and the like. These have been suffered by the claimant in a personal capacity and are not recoverable.

88. Although no claim for compensation arises unless a claim for nuisance would have arisen but for the statutory authority, that does not mean the compensation payable under s.10 is the same as the damages which could have been awarded for nuisance. It is well established that the measure of compensation under s.10 is for diminution in the value of land and in no case cited by the claimant has compensation been awarded on any other basis.

89. In any event, the measure of damages for nuisance is also for diminution in the value of land and the losses claimed by the claimant would not be recoverable in nuisance, see Clerk & Lindsell 21st ed. paragraph 20-28 and Halsbury's Laws of England volume 78 (2010) paragraph 227. Further, Mr Jones submitted that, even if the cost of repair may be claimed, the claim is not for repair and reinstatement but for the construction of new sea defences which would not be recoverable in any event. Such works do not abate the nuisance – the alteration in the tidal flows – which continues unabated.

90. Mr Howell submitted that the principle on which compensation is assessed is straightforward. An owner who claims that his land or an interest in land has been damaged has a right to compensation co-extensive with the right of action of which the statute authorising construction of the works has deprived him, *Metropolitan Board of Works v McCarthy* (1874) 7 App Cas 243, HL at p.262. Damages for nuisance are calculated in different ways depending on the nature of the nuisance and the loss. Where damage is done to land the starting point is the cost of repair or reinstatement but this may be displaced in favour of diminution in the value of the land in some circumstances e.g. where the owner does not intend to repair, see Halsbury's Laws of England Volume 29 paragraph 423 and 425. The cost of repair may also include reasonable remedial expenditure to mitigate future damage, *Delaware Mansions*.

91. In the context of s.10, the authorities show that there is no unique measure of compensation. In *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1, HL compensation was not based on diminution in capital value and in *Eagle v Charing Cross Railway Co* (1867) LR 2 CP 638 compensation was again not assessed on loss in value of the land. While Mr Howell accepted that business losses as such are not recoverable, the works the subject of the claim are not purely personal but arise directly out of the damage to the claimant's land and the easements associated with it.

Discussion

92. There is no dispute between the parties that personal losses, business or otherwise, are not recoverable under s.10 of the 1965 Act. However, as, *Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation* [1975] AC 99 HL makes clear, business losses which affect land value are recoverable. Mr Jones relied upon the following passage in the judgment of Buckley LJ in the Court of Appeal at p.114G:

> "In our judgment, no claim to compensation can be brought within section 68 relating to injury to a business."

However, in the very next sentence Buckley LJ continued:

> "To avoid confusion, however, we add that this does not mean that, if injury to a business can be shown to have occasioned a diminution in the value of the land where the business is carried on, compensation cannot be recovered for that injurious affection of the land."

In the House of Lords Lord Wilberforce made a similar point, see p.130H-131A.

93. Further, Lord Wilberforce made clear at p.129G that compensation may also be claimed for damage to land:

> "…by a series of judicial observations of high authority it is well established that the only compensation which can be obtained under this section is "in respect of… lands," i.e., in respect of some loss of value of land, or (what is a branch under this same heading) in respect of some damage to lands, and that compensation cannot be obtained for any loss which is personal to the owner, or which is related to some particular user of land."

94. In *Wildtree Hotels* the claim for compensation for losses caused by temporary obstruction of access to the hotel was allowed by the House of Lords. That element of the claim had been rejected by the Court of Appeal on the grounds that there was no diminution in the capital value of the land at the valuation date when the works were complete. In response to this Lord Hoffmann said:

> "This reasoning assumes that compensation under section 10 of the 1965 Act can only be assessed by considering the capital value of the claimant's land at a given date and deducting that sum from an estimate of what its value would have been if it had not been injuriously affected. But there is nothing in the section which says that compensation for damage to the land must be calculated in this way. The claimant is simply entitled to compensation for the damage to his land." p.16F-H

95. He went on to refer to the decision in *Ford v Metropolitan Railway* (1886) 17 QBD 12, CA. The plaintiff was the lessee of rooms on the first floor of a building access to which was gained by a hall within the building. The defendants removed the front part of the building including the hall which materially affected access to the plaintiff's rooms. The arbitrator's award of compensation was upheld on the grounds that interference with this easement affected the value of the land:

> "I do not consider that any part of the property of which the plaintiffs had a lease was taken away, but some property to which they had a substantial right granted to them by the owners and landlords of the house, namely a right of going through the passage, being a matter connected with the use and enjoyment of those three rooms, was interfered with. The taking away and interfering with the property, if the evidence shows that it was injurious, is a matter which must affect the value of their interest in this land and is not a mere matter of personal annoyance." per Cotton LJ at p.22

It is not clear from the report how the award was calculated nor did the court appear to be concerned as to the precise method of calculation. However, as Lord Hoffmann explained in *Wildtree Hotels* at p.17A-D, the plaintiff only had a 7 year lease which probably had no value and the loss for which he was entitled to compensation was the reduction in rental value of the rooms. This loss of rent was a business loss, but one directly related to the physical interference with access to the plaintiff's premises.

96. Although Lord Hoffmann was considering the temporary effects of construction, the point he makes that "there is nothing in the section which says that compensation for damage to the land must be calculated in this way [i.e. by calculating diminution in capital value]. The claimant is simply entitled to compensation for the damage to his land" is one of general application that derives from the wording of s.10 itself. It grants a claim for compensation for damage to land or any interest in land.

97. In my judgment there is no reason why, in an appropriate case, the compensation payable under s.10 of the 1965 Act should not include the cost of remedial work. The fact that there is no case in which this has been an issue is because it is so self evidently correct that acquiring authorities have never disputed it. For example, in *Clift* which was relied upon by Mr Jones as expressing the principle that compensation may only be claimed for diminution in the value of land, the cost of making good the physical damage to the claimant's land had already been paid for by the Welsh Office, the issue being whether loss caused by dust and mud during temporary construction work was recoverable, see p.803C-D. This was described as "the residual loss in value of the property" (p.803E), clearly indicating that the cost of repairing physical damage to the property was regarded as a loss in value of the land.

98. In *Wilsons Brewery Limited v West Yorkshire Metropolitan Borough Council* [1977] 2 EGLR 175, LT a claim was made under s.10 for the cost of buttressing the wall of a house where the authority had compulsorily acquired and demolished the adjoining building. The case determined the preliminary issue as to whether a right of support existed. However, there was no suggestion that, if there was a right of support, the claimant would be unable to recover the costs of buttressing on the grounds the proper measure of compensation was the diminution in the value of the premises.

99. When I asked Mr Jones if he was able to point to any case which said that the cost of remedial work is not recoverable under s.10 he was unable to do so, saying that there may be pragmatic reasons why authorities pay for repairs. This is undoubtedly correct: acquiring authorities often pay for or carry out what are described as "accommodation works". However, the reason they

do so is not out of charity but because it reduces the claim for compensation which would otherwise be payable.

100. Mr Jones relied upon *Hewett v Essex County Council* [1928] 138 LT 742, KBD as an example of a case where business losses were not allowed. However, as well as there being no physical damage, the losses disallowed related to the acquisition of a new wharf, access to the existing wharf having been obstructed, and loss of trade over and above the diminution in value of the old wharf. Mr Jones sought to draw an analogy between the claim for a new wharf and the claim for construction of sea defences which are not on the reference land. However, in my judgment there is a distinction between claiming the cost of acquiring new premises from which to conduct a business in addition to claiming diminution in the value of the old premises and claiming for the cost of works to protect existing premises from physical damage. Further, the fact that the works to abate the nuisance have to be carried out on another's land (if indeed that be the case here which is a question of evidence) does not matter. In *Wandsworth* it was held that the claim for damages for nuisance for the cost of cleaning pigeon droppings should be reduced because the claimants had not mitigated their loss by entering the defendant's land (a bridge) which they had power to do to abate the nuisance.

101. However, it must always be remembered that the landowner is entitled to no more than fair and reasonable compensation and is under an obligation to mitigate his loss. Where the cost of remedial works exceeds the diminution in value of the land the latter may be the proper measure of compensation. However, this will not necessarily always be the case as other considerations may come into play. For example, it may be reasonable to carry out repairs to a building even though they exceed the diminution in value of the land where the building's heritage value exceeds its financial value.

102. Mr Howell argued that the compensation which may be claimed is coincident with a claim for damages in nuisance. That may not necessarily always be the case and *Wrotham Park Settled Estates v Hertsmere Borough Council* (1991) 62 P&CR 652, LT (upheld on appeal [1993] RVR 56, CA) illustrates one situation in which they may not be. However, damages in nuisance are often calculated by reference to the cost of remedial works. Mr Jones relied upon a statement by Lord Lloyd in *Hunter* that the measure of damages in his second kind of nuisance (by direct physical injury) will be the diminution in the value of land. However, in the next sentence Lord Lloyd states:

> "This will usually (though not always) be equal to the cost of reinstatement." p.695D

Lord Hope also said that "The cost of repairs or other remedial works is of course recoverable." p.724G

103. Mr Jones relied heavily upon *Moss v Christchurch RDC* [1925] 2 KB 750, KBD as demonstrating that the measure of damages in nuisance is diminution in the value of land. It is cited by Clerk & Lindsell and Halsbury's Laws as support for the proposition that the measure of damages for nuisance resulting in damage to land is usually diminution in the value of the land. Salter J stated that "technically" the measure of damage is the diminution in the value of the property, p.751. However, in the case of the first plaintiff's cottage and effects he stated "there is no reason to think that the value to the owner and the cost of replacement were in any way different" and upheld the

award of damages calculated as the cost of replacement, p.751-752. In the case of the second plaintiff he remitted the case because there was no evidence as to the value of the cottage, commenting "There may conceivably be cases where the true measure of damage is less than the cost of replacement, and it is easy to imagine cases where the measure of damage may be far greater." p.752.

104. As I have already said, the claimant's pleaded case is that physical damage has been suffered and there has been material interference with an easement by the physical loss of the land over which the easement may be exercised. Mr Howell informed the Tribunal that some of the costs include remedial works to the reference land as well as the construction of sea defences to protect it from further damage. In carrying out the works claimed for the claimant asserts that it "has acted reasonably to protect its land" from the consequences of the erosion and to prevent further damage to the reference land (paragraphs 21 and 26 of the Statement of Case). Paragraph 22 also refers to works of "mitigation". Whether these claims can be substantiated by the claimant at a full hearing will be a matter of evidence.

105. At one stage Mr Jones submitted that the claimant's case is that it can recover the costs of the works even though they may be out of all proportion to the diminution in the value of the reference land. I did not understand that to be the claimant's case and, if it were, then it goes too far. If the cost of the works exceeds the diminution in the value of the reference land then the cost of the sea defence works may be unreasonable or it was otherwise unreasonable to carry out the works to mitigate the claimant's loss. In that event the claimant may be restricted to claiming compensation for diminution in value or for costs which were reasonably incurred.

106. Mr Jones argued that the cost of sea defence works undertaken by the claimant was not recoverable because their purpose was to protect against future damage and they did not abate the nuisance because the alteration in tidal flows continued unabated. However, as he submitted on preliminary issue (1), a claim for compensation under s.10 can only be made once and has to include "all damages which can reasonably be foreseen", *Chamberlain v West End of London and Crystal Palace Railway Co* (1863) 2 B&S 617, Exch at p.638. If it is reasonably foreseeable that the effects of the outer harbour would continue to cause damage to the claimant's land in the future and that the sea defence works were reasonably necessary to protect against such future loss then in my judgment there is no reason in principle why the cost of those works is not recoverable as compensation, subject to the claimant being able to demonstrate that it acted reasonably to mitigate such future loss.

107. As for the argument that the sea defence works do not abate the nuisance because the change in tidal flows caused by the outer harbour will remain the same, the nuisance relied upon is the damage to the claimant's land and access and substantial interference with an easement over the beach. If the sea defence works prevent those from continuing then they abate the nuisance. The fact that the link between the works (construction of the outer harbour) and the damage has several steps in between does not mean that, as a matter of law, the cost of abatement is not recoverable if the necessary elements of causation and foreseeablity can be proved, a question of fact for a full hearing. In *Delaware Mansions* the immediate cause of the nuisance was the encroachment by tree roots yet the underpinning work the subject of the successful claim for damages did nothing to alter the tree roots, it was directed purely at remedying existing damage and preventing future damage.

108. Similarly, not all of the losses claimed may be allowed. For example paragraph 37 of the Statement of Case claims a number of consequential business losses. Whether these are personal business losses or costs reasonably incurred to mitigate the damage to the claimant's land will be a matter for evidence. Compensation may include losses arising out of the use to which premises are put where these affect its value, see e.g. *Wadham North Eastern Railway Co* (1884-85) LR 14 QBD 747, QBD.

109. The claim also includes "diminution in the value of the Claimant's property interests" arising out of loss of the beach, paragraph 45 of the Statement of Case, further particulars of which are set out in paragraphs 10 to 15 of the Further and Better Particulars. This aspect of the claim is clearly for diminution in the value of land and there was no dispute that it is a proper head of claim.

Issue (1): Whether, for the purposes of Section 9 of the Limitation Act 1980, the cause of action accrued when those works were executed which interfered with or blocked shore parallel flows or whether the cause of action accrued when, as a result of the execution of those works, there occurred material physical damage to, or interference with, any interest in land of the Claimant

Submissions

110. Mr Jones submitted that the cause of action accrued when the relevant works to the outer harbour were executed and not when the claimant's land of any interest in land suffered loss of damage. The relevant works comprised the placement of core materials forming part of the northern breakwater which took place in April 2008 and was certainly complete before June 2008, six years before the reference to the Tribunal was issued. Accordingly the claim is statute barred.

111. The limitation period is that set out in s.9(1) of the Limitation Act 1990, namely six years from the date on which the cause of action to recover any sum recoverable by virtue of any enactment accrued. When a cause of action accrues depends upon the proper construction of the statute, *Hillingdon LBC v ARC* [1999] Ch 139, CA at p.147E. A claim under s.10 of the 1965 Act arises when a reduction in the value of land occurs. Mr Jones submitted that this would be when the relevant works are executed which affect the value of the claimant's land, it is not necessary to wait for physical damage to occur.

112. If the claimant is correct that its loss was caused by the alteration in tidal flows and that this was foreseeable, then the value of the reference land would have been affected when the tidal flow patterns were interfered with which is when the relevant works were executed. If it was foreseeable that the execution of the works would have the effects of which the claimant complains, then the claimant's interests in land would have depreciated when those works were executed. He gave a number of hypothetical examples, such as the detonation of an atomic bomb. The consequences of the nuclear fallout would be foreseeable before they occurred and would affect the value of land. The fact that such diminution in value may be difficult to quantify is not a reason for rejecting this approach, surveyors value land including prospective loss all the time.

113. Mr Jones rejected the analogy with a claim in nuisance. He submitted that all that is necessary to bring a claim under s.10 is that "but for the statute he would have had an action for damages for public or private nuisance", *Wildtree Hotels* per Lord Hoffmann at p.7D. It does not require the claimant to have a 'ripened' cause of action in nuisance before a cause of action under s.10 can accrue. What matters is whether the act complained of would have been actionable but for the statutory authority.

114. If the claimant's submissions are correct, it would force a person affected by the execution of works to wait for actual injury or interference to occur before he could claim under s.10, even if the likelihood of injury or interference is already apparent. This would create a wholly unwarranted restriction on the ability to claim compensation under s.10.

115. Mr Howell submitted that s.10 is concerned with claims for compensation in respect of land or an interest in land "which has been… injuriously affected by the execution of the works". The term "injuriously affected" connotes 'injuria', that is to say, damage which would be *wrongful* but for the protection afforded by statutory powers", per Lord Hoffmann in *Wildtree Hotels* at p.7C. Unless and until any land or an interest in land has been injuriously affected no claim for compensation can arise. The execution of works as such does not entitle anyone to compensation.

116. Further, action would only be wrongful if a claim for damages could have been brought had the works not been authorised by enactment, *McCarthy* per Lord Cairns at p.252. A claim in nuisance is not actionable per se but depends upon damage being caused to the claimant, *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, HL per Lord Goff at p. 295. In that case the spillage of chemicals onto the plaintiff's land could not be an actionable nuisance until such spillage caused damage i.e. when the water in the borehole was rendered unuseable. Thus a claim may only be brought if there is physical damage to land or substantial interference with use and enjoyment of land in consequence of an unreasonable user of land or substantial interference with an easement. Accordingly a cause of action would only arise upon proof of damage to land or substantial interference with an easement.

117. He submitted that s.10 gives a right to compensation for damage to land or an interest in land which had to be distinguished from how you assess that loss. The respondent's approach confuses the measure of compensation with the event which may give rise to compensation.

Discussion

118. It is common ground that the relevant limitation period is set out in s.9(1) of the 1980 Act:

> "An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

The starting point must therefore be s.10 of the 1965 Act by virtue of which a claim to compensation may arise. As Mr Howell submitted, s.10 is concerned with claims for compensation in respect of land or an interest in land "which has been… injuriously affected by the execution of the works"

(emphasis added). As a matter of language therefore, no claim can be brought until loss is actually suffered.

119. Both parties rely upon the principles applicable to claims under s.10 set out in *Wildtree Hotels* by Lord Hoffmann and in particular the second principle:

> "The term "injuriously affected" connotes "injuria", that is to say, damage which would be *wrongful* but for the protection afforded by statutory powers. In *In re Penny and South Eastern Railway Co* (1857) 7 E&B 660, 669 Lord Campbell said "unless the particular injury would have been actionable before the company had acquired the statutory powers, it is not an injury for which compensation can be claimed." In practice this means that a claimant has to show that but for the statute he would have had an action for damages for public or private nuisance…"

120. Applying this well established principle, in my judgment a claim cannot arise under s.10 unless and until a claim would have arisen in nuisance, but for the statutory authority. Mr Jones's submission that a claim may arise under s.10 before a claim would be actionable in nuisance is unsupported by authority or the language of s.10. As I have already said, s.10 specifically refers to land or an interest in land which "has been" injuriously affected. All the authorities Mr Jones's relied upon simply restate the principle that no claim for compensation arises unless the works in question would have given rise to an action at common law. No such claim could arise unless a claim in nuisance could be maintained. Mr Jones's submission to the contrary that the claimant need not have a "ripened" cause of action in nuisance is unsustainable.

121. Reference was made to the statements in *Hillingdon v ARC* that the sum recoverable under the enactment does not have to be quantified, see paragraph 25 and p.157H. However, those statements were made in the context of an argument that time began to run only when the sum due under the statute had been quantified by a court. The Court of Appeal rejected that submission, holding that time began to run when the right to make a claim for compensation arose at the date of entry even though the sum actually payable could not be enforced until it had been determined by the Lands Tribunal. Applying that to the present case, time begins to run when a claim under s.10 may be brought i.e. when a cause of action in nuisance would have arisen, but for the statutory authority.

122. In response to my question as to when a cause of action in nuisance does arise, in his oral submissions Mr Jones conceded that a claim in nuisance does not arise until direct physical damage is suffered or there is substantial interference with enjoyment of an easement. This is consistent with his submissions on the fifth preliminary issue which relied upon the three categories of private nuisance identified by Lord Lloyd in *Hunter v Canary Wharf* namely "encroachment on a neighbour's land", "direct physical injury to a neighbour's land" and "interference with a neighbour's quiet enjoyment of his land". As so expressed none of these claims could be brought following the execution of works until such works caused something to actually affect the claimant's land, be it encroachment, physical injury or interference with quiet enjoyment.

123. As Mr Jones submitted, this may mean that a landowner who anticipates that his land may be damaged must wait until it actually occurs before being able to bring a claim. However, that that is the law is confirmed by *Midland Bank v Bardgrove*, a decision to that effect relied upon by Mr Jones in support of the fifth preliminary issue, that there is no claim in nuisance where there is only a risk of future damage. Neither party suggested that cases relying on a right of support were in a special category so as not to apply.

124. Accordingly, the claimant's right to compensation arose, if at all, upon proof of physical damage to the claimant's land or substantial interference with an easement.

Issue (4): Whether the phrase "the execution of the works" in Section 10 of the Compulsory Purchase Act 1965 means the construction and completion of those works

125. It was far from clear from the parties' Skeleton Arguments whether this preliminary issue in fact raised any separate point. It appears to have arisen from the fact that the Statement of Case asserts that the damage to the claimant's land and interests in land arose out of the "construction and completion" of the outer harbour whereas the respondent asserts that s.10 is limited to loss caused by the "execution" of works.

126. There is no dispute that a claim may arise from temporary loss caused during the construction of the outer harbour: *Ford*. Accordingly the works do not need to be completed before they are "executed" for the purpose of s.10. Further, there is no dispute that no claim may be brought for loss suffered as a result of the use of the works: *Hammersmith & City Railway Co v Brand* (1869-70) LR 4 HL 171. However, no such claim has been made in this case.

127. In the end it appeared that this point was little more than an argument by the respondent, as part of its limitation argument, that any diminution in the value of the claimant's land and therefore any claim for compensation arose when the early works of the outer harbour were constructed, not when the outer harbour as a whole was completed, and Mr Jones did not seek to raise any further point in oral argument. As such it is subsumed in the limitation issue, Issue (1), which I have dealt with and no further point arises on the language of the Statement of Case.

Conclusion

128. To summarise my conclusions on the preliminary issues:

Issue (2) – the claimant is entitled to bring a claim for compensation under s.10 of the 1965 Act in respect of any land or an interest in land which is injuriously affected by execution of the outer harbour works and such a claim is not inconsistent with the provisions of the Outer Harbour Act and 2005 Order;

Issue (5) – the pleaded claim would have given rise to an action in nuisance, but for the statutory authority granted by the Outer Harbour Act;

Issue (3) – compensation may be awarded in principle for the costs of remedial works and is not restricted as a matter of law to diminution in the value of land;

Issue (1) – any cause of action did not accrue until physical damage to the reference land or substantial interference with an easement was caused;

Issue (4) – adds nothing to the other preliminary issues.

Dated 22 February 2016

Her Honour Judge Alice Robinson

APPENDIX

Section 33 of the Outer Harbour Act (as amended) provides:

"33. The following provisions shall, unless otherwise agreed in writing between the Great Yarmouth Borough Council and the Waveney District Council, or either of them, and the Authority have effect:-

(1) In this section –

"accumulation" means any accumulation of silt or other material in the protected areas;

"construction" includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying and removal; and "construct" and "constructed" have corresponding meanings;

"the council" means –

i. in relation to the Borough of Great Yarmouth, and to the protected areas in the Borough, the Great Yarmouth Borough Council;

ii. in relation to the District of Waveney, and to the protected areas in the District, the Waveney District Council;

"damage" means any adverse effects to the protected areas;

"the district" means the Borough of Great Yarmouth or the District of Waveney, as the case may require;

"erosion" means any erosion of the protected areas;

"the protected areas" means the beaches, sea walls, promenades, groynes, revetments and any other coast protection structures in the district;

"specified work" means any permanent or temporary work or operation authorised by this Act (which includes for the avoidance of doubt, any dredging and any exploratory geotechnical investigations that may be undertaken).

(2) If, during the construction of a specified work or within 10 years after the completion of such work and wholly or partly in consequence of its construction there is caused or created an accumulation or erosion or alteration of the tidal flow or littoral drift which causes damage, or reasonable expectation of damage, the Authority, if so required by the council before or within the period of 10 years after such completion shall remedy such accumulation, erosion, alteration of tidal flow or littoral drift, in the manner specified in subsection (4) below and, if it refuses or fails to do so, the council may itself cause work to be done and may recover the reasonable cost thereof from the Authority.

(3) Should any accumulation or erosion or alteration of the tidal flow or littoral drift which causes damage or reasonable expectation of damage, arise in consequence of such construction within the said period of 10 years and be remedied in accordance with subsection (2) above, any recurrence of such accumulation or erosion or alteration of the tidal flow or littoral drift shall from time to time be so remedied by the Authority during the said period of 10 years and at any time thereafter, save that the Authority's obligations under this paragraph shall cease in the event that following the remedying of any accumulation or erosion or alteration of the tidal flow or littoral drift a period of 10 years elapses without any further accumulation or erosion or alteration of the tidal flow or littoral drift being caused or created in consequence of such construction.

(4) For the purposes of subsections (2) and (3) above –

(a) in the case of an accumulation, the remedy shall be its removal; and

(b) in the case of erosion or alteration of tidal flow or littoral drift, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be reasonably required by the council;

Provided that in the event the surveys, inspections, tests or sampling establish that such accumulation or erosion or alteration of tidal flow or littoral drift would have been caused in any event by factors other than the construction of a specified work the Authority shall be liable to remedy such accumulation or erosion or alteration of tidal flow or littoral drift only to the extent that the same is attributable to such construction.

(5) For the purposes of subsection (2) above the date of completion of a work shall be the date on which it is brought into use.

(6) Any difference arising between the Authority and the council under this section (other than a difference as to its meaning or construction) shall be determined by arbitration."

Article 6 of the 2005 Act provides:

"6. – (1) The following provisions shall, unless otherwise agreed in writing between the Environment Agency (in this article referred to as "the Agency") and the Authority, have effect.

(2) In this article –

"accumulation" means any accumulation of silt or other material;

"construction" includes execution and placing, maintenance, extension, enlagement, alteration, replacement, relaying and removal; and "construct" and "constructed" have corresponding meanings;

"drainage work" means any watercourse and any land used for providing flood storage capacity for any watercourse and any bank, wall, embankment, outfall or other structure or appliance constructed or used for land drainage, defence against water (including sea water) or tidal monitoring;

"erosion" means any erosion of the bed or shore of the sea or of the bed or banks of the river Yare;

"the fishery" means fish in, or migrating to or from, any river and the spawn, habitat or food of such fish;

"outfall" means –

(a) any existing land drainage outfall for which the Agency is responsible; or

(b) any sewer, pipe or drain provided for groundwater, surface water or storm overflow sewerage;

"plans" includes sections, descriptions, drawings, specifications and method statements and other such particulars;

"specified work" means any permanent or temporary work or operation authorised by the 1986 Act (which includes for the avoidance of doubt, any dredging and any exploratory geotechnical investigations that may be undertaken); and

"watercourse" has the meaning given in section 22(1) of the Water Resources Act 1991(a).

(3) (a) Before beginning to construct any specified work, the Authority shall submit to the Agency plans of the work and such further particulars available to it as the Agency may reasonably require.

(b) Without prejudice to sub-paragraph (a) above, the Authority shall ensure that its contractor shall provide the Agency with all necessary hydraulic information in order to identify and quantify any effects of accumulation or erosion or alteration of the tidal flow or littoral drift which are likely to be caused by any such specified work and such information shall be accompanied by an appropriate assessment of that information and of any remedial measures which may be reasonably necessary having regard to any such likely effects.

(c) Any such specified work shall not be constructed except in accordance with such plans as may be approved in writing by the Agency or as settled in accordance with paragraph (17) below.

(d) Any approval of the Agency required under this paragraph –

(i) shall not be unreasonably withheld;

(ii) shall be deemed to have been given if it is neither given nor refused in writing and, in the case of a refusal, with a statement of the grounds for refusal within two months of the submission of plans for approval;

(iii) may be given subject to such reasonable requirements as the Agency may impose for the protection of any drainage work or fishery or water resources, for the prevention of flooding and water pollution and in the discharge of its environmental and recreational duties.

(4) Without prejudice to the generality of paragraph (3) above, the requirements which the Agency impose under the paragraph include –

(a) conditions as to the time at which and the manner in which any work is to be carried out;

(b) conditions requiring the Authority as its own expense –

(i) to provide or maintain means of access for the Agency;

(ii) to construct such protective works whether temporary or permanent during the construction of the specified works (including the provision of flood banks, walls or embankments, outfalls and other new works and the strengthening, repair or renewal of existing banks, walls or embankments, outfalls or other works) as are reasonably necessary to safeguard any drainage work against damage or to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased by reason of any specified work;

(iii) to monitor accumulation, erosion or alterations of the tidal flow or littoral drift arising during the construction or following the completion of the specified works;

(iv) to provide, maintain and operate arrangements for dealing with any pollution incidents which may occur during and as a result of the construction of the specified works.

(5) Any specified work, and all protective works required by the Agency under paragraph (4) above, shall be constructed to the reasonable satisfaction of the Agency and the Agency shall be entitled by its officer to watch and inspect the construction of such works.

(6) The Authority shall give to the Agency notice in writing of the commencement of any specified work not less than 14 days prior to its commencement and notice in writing of its completion not later than 7 days after such completion.

(7)(a) If, during the construction of a specified work or within 10 years after the completion of such work and wholly or partly in consequence of its construction

there is caused or created an accumulation or erosion or alteration of the tidal flow or littoral drift which causes damage, or reasonable expectation of damage, the Authority, if so required by the Agency before or within the period of 10 years after such completion, shall remedy such accumulation, erosion, alteration of tidal flow or littoral drift, in the manner specified in sub-paragraph (d) below and, if it refuses or fail so to do, the Agency may itself cause work to be done and may recover the reasonable cost thereof from the Authority.

(b) Should any accumulation or erosion or alteration of the tidal flow or littoral drift which causes damage or reasonable expectation of damage, arise in consequence of such construction within the said period of 10 years and be remedied in accordance with sub-paragraph (a) above, any recurrence of such accumulation or erosion or alteration of the tidal flow or littoral drift shall from time to time be so remedied by the Authority during the said period of 10 years and at any time thereafter, save that the Authority's obligation under this paragraph shall cease in the event that following the remedying of any accumulation or erosion or alteration of the tidal flow or littoral drift a period of 10 years elapses without any further accumulation or erosion or alteration of the tidal flow or littoral drift being caused or created in consequence of such construction.

(c) In sub-paragraphs (a) and (b) above "damage" means any damage to the bed or banks of the river Yare or any adverse effect upon the structure or operation of any outfall, flood or sea defences or any jetty or other structure under the jurisdiction of the Agency for the purposes of the Water Resources Act 1991.

(d) For the purposes of sub-paragraphs (a) and (b) above –

(i) in the case of an accumulation, the remedy shall be its removal or such other protective works or measures as may be reasonably required by the Agency; and

(ii) in the case of erosion or alteration of tidal flow or littoral drift, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be reasonably required by the Agency.

(e) In the event that surveys, inspections, tests or sampling establish that such accumulation or erosion or alteration of tidal flow or littoral drift would have been caused in any event by factors other than the construction of a specified work the Authority shall be liable to remedy such accumulation or erosion or alteration of tidal flow or littoral drift only to the extent that the same is attributable to such construction.

(8) For the purposes of paragraphs (6) and (7)(a) above the date of completion of a work shall be the date on which it is brought into use.

(9) (a) Any specified work which provides a defence against flooding shall be maintained by and at the expense of the Authority to the reasonable satisfaction of the Agency.

(b) If any such work is no longer required by the Authority or is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the Authority at the Authority's own expense to repair and restore the work, or any part thereof, or to remove the work and restore the site (including any sea defences) to its former condition, to such an extent and within such limits as the Agency thinks proper.

(c) If, on the expiration of 30 days from the date on which a notice is served upon the Authority it has failed to comply with the requirements of the notice, the Agency may execute the works specified in the notice, and any expenditure incurred by it in so doing shall be recoverable from the Authority.

(10) If, by reason of the construction of any specified work or by reason of the failure of that work or of the Authority to maintain it, the efficiency of any drainage work or flood defence purposes is impaired or that work is damaged, such impairment or damage shall be made good by the Authority to the reasonable satisfaction of the Agency and, if the Authority fails to do so, the Agency may make good the same and recover from the Authority the expense reasonably incurred by it in so doing.

(11) If any works are constructed by the Agency in relation to a drainage work the Authority shall have no claim against the Agency in respect of any additional costs which may be incurred by the Authority as a result of such works.

(12) The Authority shall indemnify the Agency in respect of all reasonable costs, charges and expenses which the Agency may reasonably incur or have to pay or which it may sustain –

(a) in the examination or approval of plans under this article;

(b) in the inspection of the construction of the specified works or any protective works required by the Agency under this article.

(13)(a)Without prejudice to the other provisions of this article the Authority shall indemnify the Agency from all claims, demands, proceedings, costs, damages or expense or loss which may be made or taken against, or recovered from or incurred by, the Agency by reason of the construction of any of the works or by reason of their maintenance, repair, alteration, renewal, removal, existence or use of any act or omission of the Authority, its contractors, agents, workmen, or servants whilst engaged upon any such work.

(b)The Agency shall give to the Authority reasonable notice of any such claim or demand and no settlement or compromise thereof shall be made without the agreement of the Authority which agreement shall not be unreasonably withheld.

(14) The fact that any work or thing has been executed or done in accordance with a plan approved or deemed to be approved by the Agency, or to its satisfaction, or in accordance with any directions or awards of an arbitrator, shall not (if it was done with neglect or default on behalf of the Agency, or any person in its employ

or of its contractors or agents) relieve the Authority from any liability under the provisions of this article.

(15) Except as otherwise provided by this article, nothing in this Order or the 1986 Act shall prejudice or affect in their application to the Agency the powers, rights, jurisdiction and obligations conferred, arising or imposed under the Land Drainage Act 1991, the Salmon and Freshwater Fisheries Act 1975, the Water Resources Act 1991 or any other enactment, byelaw or regulation relating to the Agency.

(16) For the purposes of section 109 of the Water Resources Act 1991 (as to structure in, over or under watercourses) as applying to the construction of any specified work, any approval given or deemed to be given by the Agency under this article with respect to such construction shall be deemed to constitute a consent under that section.

(17)(a) Unless the parties agree to arbitration any difference arising between the Authority and the Agency under paragraph (3) above shall be settled by the Secretary of State for the Environment, Food and Rural Affairs on a reference to her by either party after notice in writing to the other.

(b) Subject to sub-paragraph (a) above, any difference between the Authority and the Agency under this article (other than a difference as to its meaning or construction) shall be referred to and settled by a single arbitrator appointed by agreement between the parties on references to him by either party, after notice in writing to the other, or, in default of agreement, by the President of the Institute of Civil Engineers."