

# GLS Legitimate Expectation Webinar

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## CASE REFERENCE

### **Rowland v Environment Agency**

Court of Appeal (Civil Division)

19 December 2003

Westlaw Case Analysis ..... 14 pages

Official Transcript ..... 54 pages

Status:  Positive or Neutral Judicial Treatment

## Rowland v Environment Agency

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### Case Analysis

#### Where Reported

[2003] EWCA Civ 1885; [\[2005\] Ch. 1](#); [\[2004\] 3 W.L.R. 249](#); [2004] 2 Lloyd's Rep. 55; (2004) 101(8) L.S.G. 30; [2003] N.P.C. 165; Times, January 20, 2004; [Official Transcript](#)

#### Case Digest

**Subject:** Real property **Other related subjects:** Administrative law; Environment; Human rights

**Keywords:** Extinguishment; Legitimate expectation; Navigation; Obstruction; Private rights; Protection of property; Riparian rights; Rivers

**Summary:** The common assumption of the claimant and defendant before November 2000 that part of the River Thames known as Hedsor Water was private gave rise to a legitimate expectation, but public rights of navigation on the Thames could not be extinguished except by statute so that the court could not give effect to the legitimate expectation at common law, and although the expectation was a possession protected by the Human Rights Act 1998 Sch.1 Part II Art.1, it gave way to an overriding public interest.

**Abstract:** R appealed against a decision ([2002] EWHC 2785, [2003] Ch. 581) that public rights of navigation, PRN, existed over a stretch of the River Thames. R owned a house and land on the bank of a stretch of the non tidal part of the natural mainstream of the River Thames known as Hedsor Water. From time immemorial PRN had existed over the Thames and they had been continued under the Thames Conservancy Act 1932. Hedsor Water was difficult to navigate and it had been bypassed by a "cut" made in 1830. For many years the relevant navigation authorities had treated Hedsor Water as private, having erected weirs at both ends and having erected, or permitted the erection of, signs indicating that Hedsor Water was private and that there was no thoroughfare. In 2000 the Agency, as the relevant navigation authority, reconsidered the position and asserted that PRN continued to exist over Hedsor Water. R sought a declaration that Hedsor Water had become a permanently private water by virtue of the Thames Preservation Act 1885, and, alternatively, that she had a legitimate expectation at common law or by virtue of the [Human Rights Act 1998](#) of enjoying Hedsor Water as a private water. The judge decided both issues against R, holding that Hedsor Water was subject to PRN and that the Agency was entitled to perform its statutory functions with respect to Hedsor Water.

Held, dismissing the appeal, that (1) PRN over the Thames could only be lost by legislation and there was no provision giving the navigation authorities express or implied power to extinguish PRN on the Thames. PRN were not lost merely by disuse. There was no agreement between R's predecessor in title and the navigation authorities that Hedsor Water was a private channel. Section 2 of the 1885 Act did not avail R because it protected riparian owners in respect of the extension of PRN to channels over which no PRN had

existed previously, whereas Hedsor Water was subject to existing PRN. Hedsor Water had not been enjoyed as a private channel by any "lawful title" for 20 years before the passing of the 1885 Act. Section 5 of the 1885 Act legitimised obstructions which had been maintained for 20 years before the commencement of the Act, but only applied to obstructions placed by riparian owners and not to obstructions such as the weirs which had been erected by the navigation authorities under their statutory powers, and (2) at least since 1920, and arguably since 1897, the navigation authorities had believed that Hedsor Water was private. There was the necessary representation that there were no PRN over Hedsor Water to found a legitimate expectation. The fact that Hedsor Water, if private, would constitute a unique exception to the public navigation of the Thames should have led the navigation authorities to investigate the position long before 2000. R could not reasonably have believed that Hedsor Water was private. A legitimate expectation at common law could only be founded on a lawful representation or practice and the claim was bound to fail because the navigation authorities had no power to extinguish PRN over Hedsor Water. Even if there had been a legitimate expectation, there was a sufficient overriding public interest to justify the Agency's departure from its previous practice, and its decision to resile from its previous position was not so unfair as to be an abuse of power. A legitimate expectation, even if arising from ultra vires acts by a public authority, could constitute a possession for the purposes of Sch.1 Part II Art.1 of the 1998 Act; R's expectation as to the privacy of Hedsor Water was a possession entitled to protection unless the Agency's interference with it was justified and proportionate. Such interference was lawful, pursued a legitimate aim and was proportionate. However, in exercising its public functions in respect of Hedsor Water, the Agency had to take into account the common assumption prior to November 2000 that it was private.

**Judge:** Peter Gibson, L.J.; May, L.J.; Mance, L.J.

**Counsel:** For R: Lord Lester Q.C. and Robert Howe. . For the Agency: Peter Village Q.C. and Lisa Busch.

**Solicitor:** For R: CMS Cameron McKenna. . For the Agency: Clarks (Reading).

## Appellate History & Status

### Chancery Division

#### Rowland v Environment Agency

[\[2002\] EWHC 2785 \(Ch\)](#); [\[2003\] Ch. 581](#); [\[2003\] 2 W.L.R. 1233](#); [\[2003\] 1 All E.R. 625](#); [\[2003\] 1 Lloyd's Rep. 427](#); [\(2003\) 100\(9\) L.S.G. 28](#); [Times, December 28, 2002](#); [Official Transcript](#)

**Affirmed**

### Court of Appeal (Civil Division)

#### Rowland v Environment Agency

[\[2003\] EWCA Civ 1885](#); [\[2005\] Ch. 1](#); [\[2004\] 3 W.L.R. 249](#); [\[2004\] 2 Lloyd's Rep. 55](#); [\(2004\) 101\(8\) L.S.G. 30](#); [\[2003\] N.P.C. 165](#); [Times, January 20, 2004](#); [Official Transcript](#)

## Related Cases

### Rowland v Environment Agency (Costs)

[\[2004\] EWCA Civ 37](#); [Official Transcript](#); CA (Civ Div)

**All Cases Cited****ST Dupont v El du Pont de Nemours & Co**

[\[2003\] EWCA Civ 1368](#); [\[2006\] 1 W.L.R. 2793](#); [\[2006\] C.P. Rep. 25](#); [\[2004\] F.S.R. 15](#); [\(2004\) 27\(2\) I.P.D. 27009](#); [\(2003\) 147 S.J.L.B. 1207](#); [Official Transcript](#); CA (Civ Div); 2003-10-10

**Qazi v Harrow LBC**

[\[2003\] UKHL 43](#); [\[2004\] 1 A.C. 983](#); [\[2003\] 3 W.L.R. 792](#); [\[2003\] 4 All E.R. 461](#); [\[2003\] 2 F.L.R. 973](#); [\[2003\] 3 F.C.R. 43](#); [\[2003\] H.R.L.R. 40](#); [\[2003\] U.K.H.R.R. 974](#); [\[2003\] H.L.R. 75](#); [\[2004\] 1 P. & C.R. 19](#); [\[2004\] L. & T.R. 9](#); [\[2003\] 3 E.G.L.R. 109](#); [\[2003\] Fam. Law 875](#); [\(2003\) 100\(38\) L.S.G. 34](#); [\(2003\) 147 S.J.L.B. 937](#); [\[2003\] N.P.C. 101](#); [Times, August 1, 2003](#); [Independent, October 3, 2003](#); [Official Transcript](#); HL; 2003-07-31

**Hatton v United Kingdom (36022/97)**

[\(2003\) 37 E.H.R.R. 28](#); [15 B.H.R.C. 259](#); [Times, July 10, 2003](#); ECHR (Grand Chamber); 2003-07-08

**Stretch v United Kingdom (44277/98)**

[\(2004\) 38 E.H.R.R. 12](#); [\[2004\] B.L.G.R. 401](#); [\[2004\] 1 E.G.L.R. 11](#); [\[2004\] 03 E.G. 100](#); [\[2003\] 29 E.G. 118 \(C.S.\)](#); [\[2003\] N.P.C. 125](#); [Times, July 3, 2003](#); ECHR; 2003-06-24

**R. (on the application of Hooper) v Secretary of State for Work and Pensions**

[\[2003\] EWCA Civ 813](#); [\[2003\] 1 W.L.R. 2623](#); [\[2003\] 3 All E.R. 673](#); [\[2003\] 2 F.C.R. 504](#); [\[2003\] U.K.H.R.R. 1268](#); [14 B.H.R.C. 626](#); [\(2003\) 100\(29\) L.S.G. 35](#); [Times, June 28, 2003](#); [Independent, June 25, 2003](#); [Official Transcript](#); CA (Civ Div); 2003-06-18

**Henry Boot Homes Ltd v Bassetlaw DC**

[\[2002\] EWCA Civ 983](#); [\[2003\] 1 P. & C.R. 23](#); [\[2002\] 4 P.L.R. 108](#); [\[2003\] J.P.L. 1030](#); [\[2002\] 50 E.G. 112 \(C.S.\)](#); [\(2002\) 99\(49\) L.S.G. 20](#); [\(2002\) 146 S.J.L.B. 277](#); [\[2002\] N.P.C. 156](#); [Times, December 16, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-11-28

**Assicurazioni Generali SpA v Arab Insurance Group (BSC)**

[\[2002\] EWCA Civ 1642](#); [\[2003\] 1 W.L.R. 577](#); [\[2003\] 1 All E.R. \(Comm\) 140](#); [\[2003\] 2 C.L.C. 242](#); [\[2003\] Lloyd's Rep. I.R. 131](#); [\(2003\) 100\(3\) L.S.G. 34](#); [Times, November 29, 2002](#); [Official Transcript](#); CA (Civ Div); 2002-11-13

**R. (on the application of Westminster City Council) v National Asylum Support Service**

[\[2002\] UKHL 38](#); [\[2002\] 1 W.L.R. 2956](#); [\[2002\] 4 All E.R. 654](#); [\[2002\] H.L.R. 58](#); [\[2003\] B.L.G.R. 23](#); [\(2002\) 5 C.C.L. Rep. 511](#); [\(2002\) 146 S.J.L.B. 241](#); [Times, October 18, 2002](#); [Official Transcript](#); HL; 2002-10-17

**South Buckinghamshire DC v Flanagan**

[\[2002\] EWCA Civ 690](#); [\[2002\] 1 W.L.R. 2601](#); [\[2002\] 3 P.L.R. 47](#); [\[2002\] J.P.L. 1465](#); [\(2002\) 99\(25\) L.S.G. 35](#); [\(2002\) 146 S.J.L.B. 136](#); [\[2002\] N.P.C. 71](#); [Official Transcript](#); CA (Civ Div); 2002-05-16

**Todd v Adams (t/a Trelawney Fishing Co) (The Maragetha Maria)**

[\[2002\] EWCA Civ 509](#); [\[2002\] 2 All E.R. \(Comm\) 97](#); [\[2002\] 2 Lloyd's Rep. 293](#); [\[2002\] C.L.C. 1050](#); [\(2002\) 99\(21\) L.S.G. 32](#); [\(2002\) 146](#)

[S.J.L.B. 118; Times, May 3, 2002; Official Transcript](#); CA (Civ Div); 2002-04-18

**R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC**

[\[2002\] UKHL 8; \[2003\] 1 W.L.R. 348; \[2002\] 4 All E.R. 58; \[2003\] 1 P. & C.R. 5; \[2002\] 2 P.L.R. 60; \[2002\] J.P.L. 821; \[2002\] 10 E.G. 158 \(C.S.\); \[2002\] N.P.C. 32; Times, March 5, 2002; Official Transcript](#); HL; 2002-02-28

**R. (on the application of Daly) v Secretary of State for the Home Department**

[\[2001\] UKHL 26; \[2001\] 2 A.C. 532; \[2001\] 2 W.L.R. 1622; \[2001\] 3 All E.R. 433; \[2001\] H.R.L.R. 49; \[2001\] U.K.H.R.R. 887; \[2001\] Prison L.R. 322; \[2001\] A.C.D. 79; \(2001\) 98\(26\) L.S.G. 43; \(2001\) 145 S.J.L.B. 156; Times, May 25, 2001; Daily Telegraph, May 29, 2001; Official Transcript](#); HL; 2001-05-23

**R. v A (Complainant's Sexual History)**

[\[2001\] UKHL 25; \[2002\] 1 A.C. 45; \[2001\] 2 W.L.R. 1546; \[2001\] 3 All E.R. 1; \[2001\] 2 Cr. App. R. 21; \(2001\) 165 J.P. 609; \[2001\] H.R.L.R. 48; \[2001\] U.K.H.R.R. 825; 11 B.H.R.C. 225; \[2001\] Crim. L.R. 908; \(2001\) 165 J.P.N. 750; Times, May 24, 2001; Independent, May 22, 2001; Daily Telegraph, May 29, 2001; Official Transcript](#); HL; 2001-05-17

**R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions**

[\[2001\] UKHL 23; \[2003\] 2 A.C. 295; \[2001\] 2 W.L.R. 1389; \[2001\] 2 All E.R. 929; \[2002\] Env. L.R. 12; \[2001\] H.R.L.R. 45; \[2001\] U.K.H.R.R. 728; \(2001\) 3 L.G.L.R. 38; \(2001\) 82 P. & C.R. 40; \[2001\] 2 P.L.R. 76; \[2001\] J.P.L. 920; \[2001\] 20 E.G. 228 \(C.S.\); \(2001\) 98\(24\) L.S.G. 45; \(2001\) 151 N.L.J. 727; \(2001\) 145 S.J.L.B. 140; \[2001\] N.P.C. 90; Times, May 10, 2001; Independent, June 25, 2001; Daily Telegraph, May 15, 2001; Official Transcript](#); HL; 2001-05-09

**R. (on the application of Bibi) v Newham LBC (No.1)**

[\[2001\] EWCA Civ 607; \[2002\] 1 W.L.R. 237; \(2001\) 33 H.L.R. 84; \(2001\) 98\(23\) L.S.G. 38; \[2001\] N.P.C. 83; Times, May 10, 2001; Official Transcript](#); CA (Civ Div); 2001-04-26

**Douglas v Hello! Ltd (No.1)**

[\[2001\] Q.B. 967; \[2001\] 2 W.L.R. 992; \[2001\] 2 All E.R. 289; \[2001\] E.M.L.R. 9; \[2001\] 1 F.L.R. 982; \[2002\] 1 F.C.R. 289; \[2001\] H.R.L.R. 26; \[2001\] U.K.H.R.R. 223; 9 B.H.R.C. 543; \[2001\] F.S.R. 40; Times, January 16, 2001; Daily Telegraph, January 9, 2001; Official Transcript](#); CA (Civ Div); 2000-12-21

**Tanfern Ltd v Cameron-MacDonald**

[\[2000\] 1 W.L.R. 1311; \[2000\] 2 All E.R. 801; \[2001\] C.P. Rep. 8; \[2000\] 2 Costs L.R. 260; \(2000\) 97\(24\) L.S.G. 41; Times, May 17, 2000; Independent, May 16, 2000; Official Transcript](#); CA (Civ Div); 2000-05-12

**Beyeler v Italy (33202/96) (No.1)**

[\(2001\) 33 E.H.R.R. 52](#); ECHR; 2000-01-05

**R. v Secretary of State for Education and Employment Ex p. Begbie**

[\[2000\] 1 W.L.R. 1115](#); [\[2000\] Ed. C.R. 140](#); [\[2000\] E.L.R. 445](#); [\(1999\) 96\(35\) L.S.G. 39](#); [Times, September 14, 1999](#); [Official Transcript](#); CA (Civ Div); 1999-08-20

#### **R. v North and East Devon HA Ex p. Coughlan**

[\[2001\] Q.B. 213](#); [\[2000\] 2 W.L.R. 622](#); [\[2000\] 3 All E.R. 850](#); [\(2000\) 2 L.G.L.R. 1](#); [\[1999\] B.L.G.R. 703](#); [\(1999\) 2 C.C.L. Rep. 285](#); [\[1999\] Lloyd's Rep. Med. 306](#); [\(2000\) 51 B.M.L.R. 1](#); [\[1999\] C.O.D. 340](#); [\(1999\) 96\(31\) L.S.G. 39](#); [\(1999\) 143 S.J.L.B. 213](#); [Times, July 20, 1999](#); [Independent, July 20, 1999](#); CA (Civ Div); 1999-07-16

#### **R. v Oxfordshire CC Ex p. Sunningwell Parish Council**

[\[2000\] 1 A.C. 335](#); [\[1999\] 3 W.L.R. 160](#); [\[1999\] 3 All E.R. 385](#); [\[1999\] B.L.G.R. 651](#); [\(2000\) 79 P. & C.R. 199](#); [\[1999\] 2 E.G.L.R. 94](#); [\[1999\] 31 E.G. 85](#); [\[2000\] J.P.L. 384](#); [\[1999\] E.G. 91 \(C.S.\)](#); [\(1999\) 96\(29\) L.S.G. 29](#); [\(1999\) 149 N.L.J. 1038](#); [\(1999\) 143 S.J.L.B. 205](#); [\[1999\] N.P.C. 74](#); [Times, June 25, 1999](#); [Independent, June 29, 1999](#); [Official Transcript](#); HL; 1999-06-24

#### **Stretch v West Dorset DC (No.1)**

[\(2000\) 2 L.G.L.R. 140](#); [\(1998\) 10 Admin. L.R. 129](#); [\(1999\) 77 P. & C.R. 342](#); [\[1998\] 3 E.G.L.R. 62](#); [\[1998\] 48 E.G. 183](#); [\(1998\) 162 J.P.N. 202](#); [\(1997\) 94\(46\) L.S.G. 30](#); [\(1998\) 75 P. & C.R. D26](#); [Times, November 27, 1997](#); CA (Civ Div); 1997-11-11

#### **Credit Suisse v Allerdale BC**

[\[1997\] Q.B. 306](#); [\[1996\] 3 W.L.R. 894](#); [\[1996\] 4 All E.R. 129](#); [\[1996\] 2 Lloyd's Rep. 241](#); [\[1996\] 5 Bank. L.R. 249](#); [\(1997\) 161 J.P. Rep. 88](#); [Times, May 20, 1996](#); [Independent, June 7, 1996](#); CA (Civ Div); 1996-05-08

#### **R. v Inland Revenue Commissioners Ex p. Unilever Plc**

[\[1996\] S.T.C. 681](#); [68 T.C. 205](#); [\[1996\] C.O.D. 421](#); [Official Transcript](#); CA (Civ Div); 1996-02-13

#### **R. v Cambridge DHA Ex p. B (No.1)**

[\[1995\] 1 W.L.R. 898](#); [\[1995\] 2 All E.R. 129](#); [\[1995\] 1 F.L.R. 1056](#); [\[1995\] 2 F.C.R. 485](#); [\[1995\] 6 Med. L.R. 250](#); [\[1995\] C.O.D. 407](#); [\[1995\] Fam. Law 480](#); [\(1995\) 145 N.L.J. 415](#); [Times, March 15, 1995](#); [Independent, March 14, 1995](#); CA (Civ Div); 1995-03-10

#### **Pine Valley Developments v Ireland (A/246-B)**

[\(1993\) 16 E.H.R.R. 379](#); ECHR; 1993-02-09

#### **Pepper (Inspector of Taxes) v Hart**

[\[1993\] A.C. 593](#); [\[1992\] 3 W.L.R. 1032](#); [\[1993\] 1 All E.R. 42](#); [\[1992\] S.T.C. 898](#); [\[1993\] I.C.R. 291](#); [\[1993\] I.R.L.R. 33](#); [\[1993\] R.V.R. 127](#); [\(1993\) 143 N.L.J. 17](#); [\[1992\] N.P.C. 154](#); [Times, November 30, 1992](#); [Independent, November 26, 1992](#); HL; 1992-11-26

#### **Attorney General Ex rel Yorkshire Derwent Trust Ltd v Brotherton**

[\[1992\] 1 A.C. 425](#); [\[1991\] 3 W.L.R. 1126](#); [\[1992\] 1 All E.R. 230](#); [\[1993\] Env. L.R. 79](#); [90 L.G.R. 15](#); [\(1992\) 63 P. & C.R. 411](#); [\(1992\) 156 L.G. Rev. 406](#); [\[1991\] E.G. 129 \(C.S.\)](#); [\(1992\) 89\(2\) L.S.G. 31](#); [\(1992\) 136 S.J.L.B. 11](#); [\[1991\] N.P.C. 130](#); [Times, December 10, 1991](#); [Independent, January 16, 1992](#); [Financial Times, December 10, 1991](#); HL; 1991-12-05

#### **Pine Valley Developments v Ireland (A/222)**

[\(1992\) 14 E.H.R.R. 319](#); [Times, December 11, 1991](#); ECHR; 1991-11-29

#### **Hazell v Hammersmith and Fulham LBC**

[\[1992\] 2 A.C. 1](#); [\[1991\] 2 W.L.R. 372](#); [\[1991\] 1 All E.R. 545](#); [89 L.G.R. 271](#); [\(1991\) 3 Admin. L.R. 549](#); [\[1991\] R.V.R. 28](#); [\(1991\) 155 J.P.N. 527](#); [\(1991\) 155 L.G. Rev. 527](#); [\(1991\) 88\(8\) L.S.G. 36](#); [\(1991\) 141 N.L.J. 127](#); [Times, January 25, 1991](#); [Independent, January 25, 1991](#); [Financial Times, January 29, 1991](#); [Guardian, January 25, 1991](#); [Daily Telegraph, February 4, 1991](#); HL; 1991-01-24

#### **Calder Gravel Ltd v Kirklees MBC**

[\(1990\) 60 P. & C.R. 322](#); [\[1990\] 2 P.L.R. 26](#); [\[1989\] E.G. 137 \(C.S.\)](#); [Times, October 16, 1989](#); [Independent, October 30, 1989](#); Ch D; 1989-10-13

#### **R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd**

[\[1990\] 1 W.L.R. 1545](#); [\[1990\] 1 All E.R. 91](#); [\[1990\] S.T.C. 873](#); [62 T.C. 607](#); [\[1990\] C.O.D. 143](#); [\(1989\) 139 N.L.J. 1343](#); [Times, July 17, 1989](#); [Independent, August 4, 1989](#); [Independent, August 7, 1989](#); [Financial Times, July 19, 1989](#); [Guardian, July 20, 1989](#); QBD; 1989-07-07

#### **Council of Civil Service Unions v Minister for the Civil Service**

[\[1985\] A.C. 374](#); [\[1984\] 3 W.L.R. 1174](#); [\[1984\] 3 All E.R. 935](#); [\[1985\] I.C.R. 14](#); [\[1985\] I.R.L.R. 28](#); [\(1985\) 82 L.S.G. 437](#); [\(1984\) 128 S.J. 837](#); HL; 1984-11-22

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[\(1983\) 5 E.H.R.R. 35](#); ECHR; 1982-09-23

#### **Western Fish Products Ltd v Penwith DC**

[\[1981\] 2 All E.R. 204](#); [77 L.G.R. 185](#); [\(1979\) 38 P. & C.R. 7](#); [\[1978\] J.P.L. 627](#); [\(1978\) 122 S.J. 471](#); CA (Civ Div); 1978-05-22

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[1976 S.C. \(H.L.\) 30](#); [1976 S.L.T. 162](#); [Times, March 4, 1976](#); HL; 1976-03-03

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[\[1971\] 2 Lloyd's Rep. 183](#); [70 L.G.R. 1](#); CA (Civ Div); 1971-04-29

#### **Minister of Agriculture and Fisheries v Matthews**

[\[1950\] 1 K.B. 148](#); [\[1949\] 2 All E.R. 724](#); [65 T.L.R. 655](#); KBD; 1949-10-14

#### **Associated Provincial Picture Houses Ltd v Wednesbury Corp**

[\[1948\] 1 K.B. 223](#); [\[1947\] 2 All E.R. 680](#); [\(1947\) 63 T.L.R. 623](#); [\(1948\) 112 J.P. 55](#); [45 L.G.R. 635](#); [\[1948\] L.J.R. 190](#); [\(1947\) 177 L.T. 641](#); [\(1948\) 92 S.J. 26](#); CA; 1947-11-10

#### **Attorney General v Smethwick Corp**

[\[1932\] 1 Ch. 562](#); CA; 1932-02-04

#### **Simpson v Attorney General**

[\[1904\] A.C. 476](#); HL; 1904-08-05



**Thames Conservators v Smeed Dean & Co**

[\[1897\] 2 Q.B. 334](#); CA; 1897-07-16

**Conservators of the River Thames v Port Sanitary Authority of the Port of London**

[\[1894\] 1 Q.B. 647](#); QBD; 1893-12-13

**Bourke v Davis**

[\(1890\) L.R. 44 Ch. D. 110](#); Ch D; 1889-12-03

**Micklethwait v Newlay Bridge Co**

[\(1886\) L.R. 33 Ch. D. 133](#); CA; 1886-07-22

**Attorney General v Great Eastern Railway Co**

[\(1879-80\) L.R. 5 App. Cas. 473](#); HL; 1880-05-27

**Orr-Ewing v Colquhoun**

[\(1876-77\) L.R. 2 App. Cas. 839](#); HL; 1877-07-30

**Cory v Bristow**

[\(1876-77\) L.R. 2 App. Cas. 262](#); HL; 1877-02-22

**Attorney General v Earl of Lonsdale**

[\(1868-69\) L.R. 7 Eq. 377](#); Ct of Chancery; 1868-12-22

**R. v Betts**

[117 E.R. 1172](#); [\(1850\) 16 Q.B. 1022](#); QB; 1850-05-22

**Williams v Wilcox**

[112 E.R. 857](#); [\(1838\) 8 Ad. & El. 314](#); KB; 1838-01-01

**R. v Montague**

[107 E.R. 1183](#); [\(1825\) 4 B. & C. 598](#); KB; 1825-01-01

**Vooght v Winch**

[106 E.R. 507](#); [\(1819\) 2 B. & Ald. 662](#); KB; 1819-01-01

**Key Cases Citing**

**Distinguished**

Elveden Farms Ltd v Secretary of State for Environment, Food and Rural Affairs

[Unreported, January 25, 2012](#); QBD (Admin); 2012-01-25

**Applied**

R. (on the application of Fivepounds.co.uk Ltd) v Transport for London

[\[2005\] EWHC 3002 \(Admin\)](#); [\[2006\] R.T.R. 12](#); [Official Transcript](#); QBD (Admin); 2005-12-21

**Considered**

R. (on the application of Parents for Legal Action Ltd) v Northumberland CC

[\[2006\] EWHC 1081 \(Admin\)](#); [\[2006\] B.L.G.R. 646](#); [\[2006\] E.L.R. 397](#); [\[2006\] A.C.D. 87](#); [Official Transcript](#); QBD (Admin); 2006-05-18



**All Cases Citing****Mentioned by**

R. (on the application of Save Our Parkland Appeal Ltd) v East Devon DC

[\[2013\] EWHC 22 \(Admin\)](#); QBD (Admin); 2013-01-18

**Mentioned by**

Charles Terence Estates Ltd v Cornwall CC

[\[2012\] EWCA Civ 1439](#); [\[2013\] 1 W.L.R. 466](#); [\[2013\] P.T.S.R. 175](#); [\[2013\] H.L.R. 12](#); [\[2013\] B.L.G.R. 97](#); [Official Transcript](#); CA (Civ Div); 2012-11-13

**Mentioned by**

McCauley's Application for Judicial Review, Re

[\[2012\] NIQB 74](#); [Official Transcript](#); QBD (NI); 2012-10-12

**Mentioned by**

R. (on the application of Davis) v West Sussex CC

[\[2012\] EWHC 2152 \(Admin\)](#); [\[2013\] P.T.S.R. 494](#); [\(2012\) 156\(34\) S.J.L.B. 27](#); QBD (Admin); 2012-08-22

**Mentioned by**

R. (on the application of TW Logistics Ltd) v Tendring DC

[\[2012\] EWHC 1209 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2012-05-09

**Distinguished**

Elveden Farms Ltd v Secretary of State for Environment, Food and Rural Affairs

[Unreported, January 25, 2012](#); QBD (Admin); 2012-01-25

**Mentioned by**

Loreto Grammar School's Application, Re

[\[2012\] NICA 1](#); [Official Transcript](#); CA (NI); 2012-01-10

**Mentioned by**

Charles Terence Estates Ltd v Cornwall CC

[\[2011\] EWHC 2542 \(QB\)](#); [\[2012\] P.T.S.R. 790](#); [\[2011\] B.L.G.R. 813](#); [\[2012\] 1 P. & C.R. 2](#); [\[2011\] N.P.C. 99](#); [Official Transcript](#); QBD; 2011-10-07

**Mentioned by**

Wilmington Trust Co v Rolls Royce Plc

[\[2011\] CSOH 151](#); [Official Transcript](#); OH; 2011-09-09

**Mentioned by**

Simpson & Marwick v Revenue and Customs Commissioners

[\[2010\] UKFTT 380 \(TC\)](#); [\[2011\] S.F.T.D. 1](#); [Official Transcript](#); FTT (Tax); 2010-08-16

**Mentioned by**

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Legitimate expectation; Maladministration; Public authorities; Remedies; Ultra vires acts.

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**Insight**

[Legitimate expectation](#)

[Judicial review: grounds](#)



Case No: A3/2003/0187

Neutral citation no: [2003] EWCA Civ 1885  
IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE HIGH COURT OF JUSTICE  
Lightman J.

Royal Courts of Justice  
Strand,  
London, WC2A 2LL

Friday 19 December 2003

Before :

LORD JUSTICE PETER GIBSON  
LORD JUSTICE MAY  
and  
LORD JUSTICE MANCE

Between :

JOSIE ROWLAND  
– and –  
THE ENVIRONMENT AGENCY

Appellant

Respondent

-----  
(Transcript of the Handed Down Judgment of  
Smith Bernal Wordwave Limited, 190 Fleet Street  
London EC4A 2AG  
Tel No: 020 7421 4040, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)  
-----

Lord Lester QC and Mr Robert Howe (instructed by CMS Cameron McKenna. Mitre House, 160  
Aldersgate Street, London EC1A 4DD) for the Claimant  
Mr Peter Village QC and Ms Lisa Busch (instructed by Clarks, Great Western House, Station Road,  
Reading RG1 1JX) for the Defendant

-----  
Judgment  
As Approved by the Court

Peter Gibson L.J.:

Introduction

1. This appeal concerns a stretch of the River Thames just below Cookham in Berkshire known as Hedsor Water, which is a Y mile bend in the non-tidal part of the natural mainstream. On the northern bank are the house and grounds known as Hedsor Wharf. The house is situated about 50 yards from the river, with the main rooms facing the river and open lawns leading down to the river bank. It has been the country home of the Claimant, Josie Rowland, since 1968 when it was purchased by a Lonhro Ltd. subsidiary for the occupation of her late husband, "Tiny" Rowland, and herself. On his death in 1998 she, as his executrix and sole beneficiary under his Will, took Hedsor Wharf, becoming the registered owner on 22 November 2001. Included in Hedsor Wharf are one bank of Hedsor Water, parts of the other bank and the whole of the river bed of Hedsor Water.
2. The parts of the other bank of Hedsor Water which are not part of Hedsor Wharf are parts of Sashes Island. The southern edge of the island is a cut ("the Cut") made in 1830 by the Commissioners for the River Thames ("the Commissioners") to bypass Hedsor Water which, for various physical reasons, was difficult to navigate. Sashes Island vested in the successors to the Commissioners, the Conservators for the River Thames ("the Conservators"), in 1926 and is now vested in the Defendant, the Environment Agency. The Defendant is the successor to the National Rivers Authority which was the successor to the Conservators. The Defendant is a public authority created under the Environment Act 1995 ("the 1995 Act"). Sashes Island is let on an agricultural tenancy.
3. From time immemorial public rights of navigation ("PRN") have existed at common law over the Thames, both in its tidal parts and its non-tidal parts. As was stated in the preamble to one of the earliest Acts of Parliament relating to the navigation of the Thames and Isis, the Thames and Isis Navigation Act 1751 ("the 1751 Act"), "the Rivers of Thames and Isis have, Time out of Mind, been navigable from the City of London to × beyond Lechlade ×." By s. 1 of the Thames Preservation Act 1885 ("the 1885 Act") public rights of navigation ("PRN") both for pleasure and profit were declared over every part of the Thames through which Thames water flowed from Teddington Lock to Cricklade. A provision in substantially the same form is now to be found re-enacted in s. 79 (1) of the Thames Conservancy Act 1932 ("the 1932 Act") which continues in force.
4. However, the various navigation authorities with respect to the Thames ("the NA") have for many years treated Hedsor Water as a private water, having erected a weir at the south western end ("the Upper Weir") and another at the north eastern end ("the Lower Weir"), and erected, or permitted to be erected, signs that there was no thoroughfare through Hedsor Water and that it was private. Thus by a notice displayed by the Defendant at Cookham Lock a plan of the Thames in that area shows Hedsor Water as private and the text accompanying the plan states:

Once the main route for river traffic, this stretch of river remains private with no public right of navigation, a unique situation on the Thames."

5. The Defendant reconsidered the position in late 2000 and the following year asserted that PRN continue to exist over Hedsor Water. Mrs. Rowland disputes this. She relies on certain provisions of the 1885 Act in support of a contention that Hedsor Water has become a permanently private water. She also contends that through the doctrine of legitimate expectation, either alone or taken with the European Convention on Human Rights ("the Convention") incorporated into English law by the Human Rights Act 1998 ("the 1998 Act"), she has rights to privacy in respect of Hedsor Water which the Defendant has failed to recognise.
6. There are therefore two main issues between the parties:
  - (1) Is there a statutory basis upon which it can be said that Hedsor Water has become a permanently private water?
  - (2) If not, has Mrs. Rowland a legitimate expectation of enjoying Hedsor Water as a private water at common law or taken with the Convention and, if so, has there been an abuse of power by the Defendant in resiling from its acceptance that Hedsor Water was private and failing to take proper account of that legitimate expectation?
7. These were the issues which came before the trial judge, Lightman J. On 19 December 2002 in a reserved judgment he decided both issues against Mrs. Rowland. He dismissed her claim and granted declarations pursuant to the Defendant's CPR Part 20 counterclaim that (1) Hedsor Water is and remains subject to PRN, and (2) the Defendant is entitled to perform its statutory functions, including under the 1932 Act and the 1995 Act, with respect to Hedsor Water. Permission to appeal to this court was refused by the judge but allowed by Chadwick L.J., considering the matter on paper.

#### The background

8. By the 1751 Act the Commissioners were given jurisdiction over the Thames and Isis from Middlesex to Wiltshire. That Act was followed by several others for improving and completing the navigation of the Thames and Isis from London to Cricklade. S. 7 of the Thames and Isis Navigation Act 1771 gave the Commissioners power to make such wharfs, locks and weirs for completing and carrying on navigation on the two rivers as they thought necessary and convenient for those purposes.
9. The Thames and Isis Navigation Act 1795 ("the 1795 Act") was passed to enlarge the Commissioners' powers so far as they related to improving and completing the navigation of the Thames and Isis. S. 22 (the sidenote to which was "Method of recovering Damages") provided that if any person considered himself aggrieved, damaged or injured by any works made by the Commissioners he might complain to them and they should hear such complaint and make such order, determination and judgment as seemed just to them and give such satisfaction to the complainant as they should think reasonable. The complainant had a right, if dissatisfied, of appeal to the Quarter Sessions.

10. The Thames and Isis Navigation Act 1812 ("the 1812 Act") was also passed for the improvement and completion of navigation and new powers were conferred on the Commissioners. They included by s. 8 the power to make such cuts as they deemed necessary for navigation, but without diverting or stopping up the present or usual channel of the river or altering the course of the stream or water passing through the same.
11. The Commissioners received many complaints about the inconvenience to commercial traffic passing through Hedsor Water which was shallow and fast flowing, the natural gradient of the river bed making navigation difficult for larger vessels such as barges. The Commissioners responded by making the Cut in 1830 (with a lock at Cookham at the north eastern end of the Cut), the PRN becoming exercisable through the Cut. No obstruction was placed at either end of Hedsor Water. In 1833 Lord Boston, the then owner of Hedsor Wharf, complained to the Commissioners about the deposit of a gravel bank by the Commissioners in Hedsor Water and the loss of income caused by the construction of the Cut. For many years there had been a wharf at Hedsor Wharf, and he had derived a sizeable income from commercial traffic passing through Hedsor Water, including in particular rent payable by his tenant whose horses were used for towing barges along Hedsor Water, and from the lease of and tolls payable with respect to his wharf. He claimed the removal of the gravel bank, and the bank was removed. He also claimed compensation for the loss of income and, when the Commissioners declined to allow the claim, on appeal he was awarded by the Buckinghamshire Quarter Sessions what were then substantial sums by way of compensation and costs. When the Commissioners did not pay, he obtained an order of mandamus from the Court of King's Bench (see R v Commissioners of the Thames and Isis (1837) 15 LJ Rep. 17).
12. In 1837 the Commissioners built the Upper Weir as an open or movable weir to improve the water level in and through the Cut. The weir would probably have been a paddle and rymer weir which consisted of timber paddles slotted between vertical posts (rymers), both of which were suspended from a horizontal beams. This retained the water level upstream at a higher level, but the removal of paddles would allow the passage of higher flows. In a movable weir, the beam could be swung to enable vessels to pass through when the paddles and rymers had been removed.
13. In 1838 Lord Boston's tenant gave up his tenancy because of the adverse effect of the Upper Weir on the flow of water through, and on the traffic to, Hedsor Water, and this occasioned a complaint by Lord Boston to the Commissioners and a further claim for compensation. The litigation was resolved by arbitration, culminating in an agreement between the parties on 10 November 1843 ("the 1843 Agreement"). Its terms included (1) the payment to Lord Boston of an agreed sum of compensation, (2) the erection by the Commissioners of closable gates for facilitating the passage of barges and other craft through the Upper Weir, (3) the erection by them at the lower end of Hedsor Water of a movable weir with sliding gates, which was to be similar in construction to the previously existing Upper Weir, to pen back the water to the height of one foot above the ordinary level of the stream, such new weir to be removed and put up again by the Commissioners at the usual seasons, (4) that no footway would be allowed to be made or used over the Upper or Lower Weir and that fan palisading be erected to prevent such access, (5) that the channel of the Thames between the weirs be and kept ballasted to allow a 60-ton barge to be navigated through it, and (6) that the Commissioners would do and execute everything necessary to keep the channel so navigable.

14. In 1844 the Commissioners built the Lower Weir as a movable weir and installed double gates in the Upper Weir. The effect of the gates was to trap a short length of water the level of which was adjustable by a system of sluices in the gates, thereby enabling a vessel to pass from the higher to the lower level or vice versa. But the growth of the railways rendered the commercial use of Hedsor Water uneconomic.
15. The ownership of Hedsor Wharf carried with it the ownership of the fishing rights in Hedsor Water. Lord Boston in 1846, according to a private four-volume History of Hedsor Water ("the History") written in 1899 by the then Lord Boston, complained to the Commissioners that a Captain Hall had entered through the Upper Weir and attempted to fish. He asked the Commissioners to assist him in checking such trespasses by locking the weir, giving him a key as well as retaining a key for themselves, and putting up a notice board on the weirs that all persons were forbidden to trespass on the weirs and that there was no thoroughfare between the weirs. The Commissioners' minutes of 19 May 1846 record that they resolved that Lord Boston's request be complied with. The Commissioners caused signs to be erected on the weirs stating:

Thames Navigation. No Thoroughfare. All persons forbidden to trespass upon these weirs."

At the same time the Commissioners wrote a letter to Lord Boston ("the Side-letter"), saying:

notwithstanding the Public trade and traffic may have been diverted from this part of the river, it cannot be converted into private property, but remains open to the Public as heretofore."

There is a dispute between Mrs. Rowland and the Defendant as to whether the Commissioners locked the gates of the weirs, preventing navigation through the weirs, or gates providing access from the banks to the weirs, thereby preventing access to the weirs, but it is agreed that they gave a key to Lord Boston in respect of the Upper Weir, themselves retaining keys in respect of both weirs. Although there is no evidence that there were access gates, the judge was to hold that the Commissioners locked access gates, as contended for by the Defendant, because of the terms, referred to above, of what they wrote to Lord Boston to the effect that Hedsor Water remained open to the public.

16. The Conservators were constituted by the Thames Conservancy Act 1857. They took over the functions previously performed by the Commissioners with respect to the Thames between London and Wiltshire and the property in any weirs on the Thames was vested in the Conservators by s. 43 Thames Navigation Act 1866.
17. By 1868 both the Upper and the Lower Weirs had fallen into disrepair. Lord Boston wrote to the Conservators to remind them of their obligations under the 1843 Agreement. The Conservators inspected the weirs and then built a new Upper Weir. This was a closed weir with no gates. Lord Boston complained that it lacked a lock and so had been built in contravention of the 1843 Agreement. The Conservators responded that the lock in the original Upper Weir had never been used, that therefore the building of a lock or gates in the weir was not of paramount importance and that in the present state of their funds they could not expend the large amount which would be required to put it in a sufficient state.

They undertook to erect fan palisades at the end of each weir to prevent trespass upon it and to put up notice boards with the same object.

18. Lord Boston's solicitors on 13 December 1869 denied that the lock in the original Upper Weir had never been in use and stated that "the temporary closing of the passage" must not be regarded as prejudicing his right to require the 1843 Agreement to be fully carried out.
19. In 1870 Lord Boston made a further complaint to the Conservators about the state of the Lower Weir. He wanted it conveyed to him on his undertaking to keep it in repair, but the Conservators refused. They agreed instead that he could rebuild it at his own expense, and that that weir should thereafter be kept in a state of repair by them, but that Lord Boston's execution of the work should not prejudice any of the rights of the public or of the owners or occupiers of the adjoining property. Lord Boston replied that he did not recognise any right of the public or of such owners or occupiers in the Lower Weir. In 1871 he re-erected the Lower Weir. This had a fixed gangway on it which would not have allowed barges or other large craft through. However, the History records that a sluice could be opened by a person standing on the weir to enable a pleasure boat to pass through, but it adds that that was under the control of Lord Boston's waterman.
20. A Select Committee of the House of Commons was convened in 1884 to discuss the question of PRN on the Thames and it received evidence from riparian owners, river users and others. The Select Committee's report presented on 4 August 1884 referred to the evidence put before them by Lord Boston through his agent. Among the points made for Lord Boston was that the question whether the public had a right to enter Hedsor Water was for the Conservators but that the principal reason why he would deny that the public had a right to enter Hedsor Water was that they could not get there; Lord Boston claimed no more than what the 1843 Agreement gave him which, he said, was the exclusive possession of Hedsor Water but only by reason of the weirs. In the Committee's view:

in the event of any further litigation, the rights of the public to move in boats over any and every part of the river through which Thames water flows, as in an ancient and free highway, wherever they are not of necessity and, for the time, excluded by the requirements of the navigation, should be clearly declared: it being left open to any person claiming to exclude the public from a cut or channel made at any time on his property for drainage or other purposes, to prove his right to do so in a court of law."
21. There were further proceedings before a Select Committee in 1885. The Bill which was to be enacted as the 1885 Act was a hybrid Bill and evidence was received by the Committee from interested parties. It was for the promoters to satisfy the Committee that the Bill merited enactment.
22. The long title of the 1885 Act was "An Act for the preservation of the River Thames above Teddington Lock for purposes of public recreation and for regulating the pleasure traffic thereon". Ss. 1 - 5 were in this form:

1. It shall be lawful for all persons, whether for pleasure or

Public right  
of  
navigation

profit, to go and be, pass and repass, in boats or vessels over or upon any and every part of the River Thames, through which Thames water flows, between the Town of Cricklade and Teddington Lock, including such backwaters creeks sidechannels bays and inlets connected therewith as form parts of the said river within the limits aforesaid.

Private  
artificial  
cuts not to  
be deemed  
parts of the  
river

2. All private artificial cuts for purposes of drainage or irrigation, and all artificial inlets for moats boathouses ponds or other like private purposes, already made or hereafter to be made, and all channels which by virtue of any conveyance from or agreement with the Conservators, or the Commissioners acting under any of the Acts mentioned in the First Schedule to this Act or by any lawful title have been enjoyed as private channels for the period of twenty years before the passing of this Act shall be deemed not to be parts of the said river for the purposes of the last preceding section or any provisions consequent thereon.

Conservators  
may exclude  
the public

3. Notwithstanding anything in the first section contained, it shall be lawful for the Conservators from time to time to exclude the public for a limited period from specified portions of the said river for purposes connected with the navigation or with any public work or uses, or for the preservation of public order.

Right of  
navigation  
to include  
anchoring  
and mooring

4. The right of navigation herein-before described shall be deemed to include a right to anchor, moor or remain stationary for a reasonable time in the ordinary course of



pleasure navigation, subject to such restrictions as the Conservators shall from time to time by byelaws determine; and it shall be the duty of the Conservators to make special regulations for the prevention of annoyance to any occupier of a riparian residence by reason of the loitering or delay of any house-boat or steam launch, and for the prevention of the pollution of the river by the sewage of any house-boat or steam launch. Provided that nothing in this Act, or in any byelaw made thereunder, shall be construed to deprive any riparian owner of any legal rights in the soil or bed of the river which he may now possess, or of any legal remedies which he may now possess for prevention of anchoring, mooring, loitering, or delay of any boat or other vessel, or to give any riparian owner any right as against the public which he did not possess before the passing of this Act to exclude any person from entering upon or navigating any back-water, creek, channel, bay, inlet, or other water, whether deemed to be part of the River Thames as in this Act defined or not.

Provided also, that the powers given by this clause shall be in addition to and not to be deemed to be in substitution for any powers already possessed by the Conservators.

Riparian  
owner to  
remove  
obstructions  
unless  
maintained  
for 20 years

5. Any person obstructing the navigation herein-before described by means of any weir, bridge, piles, dam, chain, barrier, or other impediment, shall be liable to be called upon by the Conservators to remove the same, and his refusal to do so shall be deemed to be a continuing offence within the

meaning of this Act, and the obstruction itself shall be deemed to be a nuisance to the navigation unless the same or substantially the same has been maintained for the period of twenty years before the commencement of this Act."

23. In the History Lord Boston said of the words in s. 2 commencing "and all channels" that they referred to Hedsor Water and that it "would have gone far" to securing the claims of the owner of Hedsor Water. But he continued that the first proviso to s. 4, which was introduced as a late amendment, tended to diminish the protection given by s. 2 and to leave matters in "statu quo" so far as concerned Hedsor Water. The clause which was to become s. 5 of the 1885 Act contained a provision allowing a person who had obstructed the navigation of the Thames to retain the obstruction if maintained for 20 years before the Act's commencement. That provision was described by the Select Committee Chairman as "a very great concession to the riparian owners".
24. In 1894 there was, according to Lord Boston, "a determined attempt" by the Conservators to open Hedsor Water to the public by indirect means through the inclusion of two clauses in the Bill which became the Thames Conservancy Act 1894 ("the 1894 Act"). He presented a petition against the Bill and a Select Committee was appointed to consider the Bill. The two clauses were not enacted. Lord Boston gave evidence to the Select Committee. It was contended by him that, because of the 1843 Agreement, Hedsor Water was private. Other witnesses supported the view that Hedsor Water had been a private water for over 50 years. The Conservators disputed that contention. The Select Committee did not attempt to resolve the dispute, and instead a saving provision was included in the 1894 Act. That provided in s. 232:

Nothing in this Act shall take away prejudice or affect or authorise anything to be done which may take away prejudice or affect any estate right title or privilege of [Lord] Boston or other owner for the time being of the Hedsor Estate in respect of or in relation to the channel known as Hedsor Water~~x~~. or in respect of or in relation to the Upper Weir or Lower Weir at Hedsor."

Lord Boston in the History said that while express title to Hedsor Water was not given him, the 1894 Act "undoubtedly strengthened" his position, his claim being recognised, and protection being given him for the first time in an Act of Parliament. S. 72 of the 1894 Act re-enacted ss. 1 - 5 of the 1885 Act save for the omission of the words in s. 5 deeming the obstruction to be a nuisance to navigation.

25. The Upper Weir burst in 1897. In the History Lord Boston records calling on the Conservators to prevent any persons from entering Hedsor Water through the opening and informing the Conservators that they would be held responsible for any undue strain placed on the Lower Weir by weight of water. He said that he was told on 6 August 1897 by his agent that the agent had seen the engineer to the Conservators who told him that their men

had "the strictest orders to prevent anyone passing." On 10 August 1897 it was reported to Lord Boston that an effectual temporary barrier had been made with a barge and two boats with chains between. On 25 August 1897 the Conservators' engineer thanked Lord Boston for "consenting to the Conservators' men taking out and replacing the tackle at Lord Boston's weir". In 1898 the Upper Weir was rebuilt without any locks or openings for boats.

26. In the History Lord Boston noted a number of points in conclusion. They included that Hedsor Water was originally enclosed by the Commissioners and not by Lord Boston, that the original Upper Weir had no lock for the passage of boats but a lock had been inserted in 1843 at Lord Boston's request for his accommodation and not that of the public, that the Lower Weir when erected in 1843 was without a lock and that all public navigation, whether for pleasure or profit, along or upon Hedsor Water ceased after 1843. That was said to be the position in 1899.
27. In 1920 there was published what Tom Christie, the Navigation Secretary of the Defendant since 1986, an employee of the NA since 1969, and a keen reader of Thames Navigation history, calls "the standard reference work on the history of the freshwater River Thames": The Thames Highway by Fred S. Thacker. This narrates the disputes between Lord Boston and the Commissioners and the building of the Upper and Lower Weirs as part of the account of the manner in which Hedsor Water, "the ancient navigable highway became entirely closed to the public: the unique example, I think, of the complete alienation of the main Thames to private uses and enjoyment" (p. 313). The author said: "The Hedsor Water privilege was reserved to Lord Boston in [the 1894 Act]" (p. 315).
28. By the 1932 Act the enactments relating to the powers and duties of the Conservators were consolidated and amended. The saving provision in s. 232 of the 1894 Act was re-enacted in s. 259 of the 1932 Act.
29. In 1957 the Conservators undertook a dredging and tree-planting scheme in Hedsor Water. There is no evidence as to the purpose for which this was done. In 1964 they rebuilt the Upper Weir. This is a substantial edifice without any locks or opening for boats, and blocks navigation through the weir.
30. The judge found that between 1894 and 1948 the NA's responsible officers on the ground appeared to have inferred from the absence of exercise of PRN over Hedsor Water and from s. 232 of the 1894 Act that Hedsor Water was private and that they thereafter acted on that basis. The judge also found that Mr. Christie formed the same belief and acted in the same way and that in that belief -
  - (1) the NA's lockkeepers sought permission from the owners for the time being of Hedsor Wharf before launching boats on Hedsor Water on a number of occasions;
  - (2) if boats came in Hedsor Water, those owners would call the NA's lockkeepers who would warn the boats that Hedsor Water was private;

(3) the NA's officials permitted access to Hedsor Water to be obstructed by the remains of the Lower Weir (including the gangway on it);

(4) the NA's officials permitted signs to be erected and to remain at the Lower Weir stating that Hedsor Water was private and in 1990 they permitted the erection of a sign to the like effect at the Upper Weir;

(5) the NA's officials erected public information signs off the Cut, stating that Hedsor Water was private.

31. On 30 December 1924 Hedsor Wharf was conveyed on sale for £9,500 by the then Lord Boston to a Mrs. Moore. The parcels clause in the conveyance included "All such estate, interest and rights as [the Vendor] has power lawfully to convey to the Purchaser in and over the bed of the River Thames" between two points shown on a plan. In four subsequent conveyances on sale of Hedsor Wharf, on 13 September 1948 by Mrs. Moore to a Mr. Scott for £16,850, on 17 December 1948 by Mr. Scott to a Mr. Badcock for £18,300, on 18 April 1968 by Mr. Badcock to the Sugar Corporation of Malawi Ltd. ("SCML") for £73,500 and on 19 April 1974 by SCML to Mr. Rowland for £351,997, the same formula was used.
32. The purchase by SCML was effected with the object that Hedsor Wharf should be the residence of Mr. and Mrs. Rowland. In 1967 Mr. Rowland had placed an advertisement in a Sunday newspaper seeking a "Mill House or Period House" to purchase. On 20 August 1967, Mrs. Badcock wrote in response, saying of Hedsor Wharf: "Without fear of contradiction it is a unique spot – three quarters of a mile private Old River Thames - no public access by River." Mr. and Mrs. Rowland visited Hedsor Wharf several times before the purchase from Mr. Badcock. They could see the sign (erected by the Badcocks) at the Lower Weir saying "Strictly private No Mooring or Navigation beyond this Point". They were shown a copy of the History and a copy of either s. 232 of the 1894 Act or s. 259 of the 1932 Act, which impressed Mrs. Rowland and seemed to her to be "a striking confirmation of the special nature of Hedsor Water". The Badcocks informed Mrs. Rowland that no boat had the right to enter Hedsor Water and anyone so doing should be challenged and asked to turn back and that if he failed to do so, she was to take the name of the boat and telephone the lockkeeper at Cookham Lock. I must return later to the question whether Mr. and Mrs. Rowland acted reasonably in reliance on representations by the NA that Hedsor Water was private.
33. On 3 August 1961 Mr. Badcock had written to the Conservators referring to "my private water". On 21 May 1968 the architects instructed by Mr. Rowland to design a new footbridge over Hedsor Water wrote to the Secretary of the Conservators about this and the possibility of removing the Lower Weir and "your obtaining permission to deepen Hedsor Water". They said:

I would like to stress, at this point, that our client whilst willing in some circumstances to allow the Thames Conservancy Engineers to work in the river, does not wish to jeopardize the control he maintains over Hedsor Water, which is set out in [s. 259 of the 1932 Act]. "

Neither letter appears to have led the Conservators to challenge or question what was being asserted in respect of Hedsor Water.

34. From 1968 to late 2000 the NA continued to treat Hedsor Water in the same manner as the NA had previously. Thus on 13 December 1990 Mr. Christie confirmed to Mr. Rowland's architects that the placing by Mr. Rowland of a pile in the bed of Hedsor Water did not require the NA's licence as the pile, being in Hedsor Water, would be exempt from the licensing provisions of the 1932 Act. At the same time no objection was taken by the NA to a sign erected by Mr. and Mrs. Rowland by the Upper Weir and containing wording, a draft of which had been supplied to the NA, saying "HEDSOR WATER No navigation or mooring x. PRIVATE." As the judge found, Mr. Rowland enjoyed the privacy and security of absence of PRN until the end of his life.
35. The Lower Weir has now virtually disappeared from sight through disrepair with only remains of it appearing in the water. It would appear to be a hazard but not an insuperable obstacle to those wishing to enter Hedsor Water with boats of a shallow draught, at least when the water is high.
36. On 23 October 2000 Mrs. Rowland wrote to the Defendant complaining of the multiple mooring of boats at Cookham Lock with associated high speed trespassing into Hedsor Water. Mr. Christie responded on 24 November 2000. In his letter he said this:

The Thames has been a public waterway since time immemorial and it is not immediately clear to us how your predecessors have managed to claim part of the ancient mainstream of the Thames to be private water."

He said that they had recently had cause to examine the 1843 Agreement and that he had been advised by the Defendant's solicitor that neither that agreement nor s. 259 of the 1932 Act was to be understood as extinguishing or disclaiming the PRN in Hedsor Water. He asked Mrs. Rowland to clarify what was the legal basis for her signs seeking to exclude the navigating public from Hedsor Water.

37. Mrs. Rowland consulted her solicitor who took the advice of counsel. On 20 February 2001 Mr. Christie wrote to Mrs. Rowland's solicitor, saying:

The Agency is very mindful of Mrs. Rowland's wish to enjoy ongoing privacy on the Hedsor Water and it is appreciated that the property will have been purchased on the understanding that the Hedsor Water is private. However it appears to the Environment Agency that the ancient navigable status of the Thames at Hedsor has never been extinguished by statute or by any other competent authority. Accordingly in the absence of any evidence being produced to the contrary, the Agency will be needing to remove all signage prohibiting, or appearing to prohibit, public navigation in the Thames at Hedsor.

At the same time I have no doubt that the Environment Agency would wish to avoid causing the present owner, Mrs. Rowland, any

greater discomfort than is inescapably necessary for the removal of the prohibitory signage and for the upholding of public rights. Certainly we have no intention of promoting public use of Hedsor Water and, as I say, we would wish to minimise for Mrs. Rowland, as far as we properly can, the effect of any abatement of prohibition. The Agency would be less concerned for any incoming occupier, in succession to Mrs. Rowland.

When you have had an opportunity of looking into the evidence I would be glad to hear from you as to any basis in law on which you feel that Hedsor Water can be treated as no longer part of the ancient navigable river."

### The proceedings

38. After a further exchange of correspondence Mrs. Rowland commenced proceedings on 4 June 2001, as a claim under CPR Part 8. Subsequently pleadings were ordered. At the judge's request an Advocate to the Court was appointed and participated in the hearing before the judge, but it has not been considered necessary for such assistance to be provided in this court. No oral evidence was heard by the judge. He reached his conclusions on the basis of the documentary evidence, including the witness statements of the witnesses on either side whose evidence was not challenged. That documentary evidence was by no means complete. Mrs. Rowland has not been able to obtain the conveyancing files of the solicitors acting for SCML and Mr. Rowland in 1968 and 1974 because, with the passage of time, they appear to have been destroyed. The Defendant's disclosure was even less satisfactory. It was not able to give complete disclosure of all relevant documentation as that was not practicable. As its solicitors explained, documents had been placed in files, some of which had been destroyed, there being no uniform policy in the Defendant with regard to the destruction of files. Many files were also held on microfiche, but none of the hundreds of microfiche tapes is indexed. They likened the search for relevant documents to looking for a needle in a haystack.
39. The judge's conclusions on the first issue were in summary:
- (1) PRN over Hedsor Water could only be extinguished by legislation (para. 53 of the judgment)
  - (2) None of the relevant legislation confers express power on the NA to extinguish the PRN (para. 53).
  - (3) No power to extinguish the PRN was impliedly conferred on the NA by s. 22 of the 1795 Act or s. 8 of the 1812 Act (paras. 54 and 55).
  - (4) Neither the 1885 Act nor either of the 1894 Act and the 1932 Act expressly or impliedly conferred power on the NA to extinguish the PRN with respect to a stretch of the Thames, nor did anything in any of those Acts have the effect of turning Hedsor Water into a private water (paras. 59 - 66).
  - (5) In particular -

- (i) ss. 2 and 5 of the 1885 Act did not apply to Hedsor Water because, as the first proviso to s. 4 makes clear, those provisions did not apply to existing PRN (para. 60);
- (ii) even if ss. 2 and 5 were applicable to Hedsor Water, s. 2 could not assist Mrs. Rowland as none of her predecessors in title had enjoyed Hedsor Water as a private channel for the relevant 20-year period (paras. 61 - 3);
- (iii) there had been no relevant legally binding agreement between Lord Boston and the NA whereby he might enjoy Hedsor Water as a private channel (para. 64);
- (iv) Lord Boston did not have "lawful title" to enjoy Hedsor Water as a private channel for the 20-year period (para. 65);
- (v) s. 5 did not avail Mrs. Rowland either as its provisions did not confer a licence to replace any obstruction to PRN removed by the NA, but merely afforded a defence to the original criminal offence created by the same section, and could not preclude recourse to other remedies for the removal of obstructions or confer immunity from civil suit or exercise of the right of abatement where any such obstruction to PRN is created (para. 66).

40. The judge's conclusions on the second issue were in summary:

- (1) The NA had no power either to make or give effect to a representation that Hedsor Water was private, and a legitimate expectation cannot be derived from an unlawful act or statement (para. 69).
- (2) Mrs. Rowland failed to make out the necessary representation by the Defendant that PRN were permanently extinguished, the words and actions of the officials of the NA being equivocal and the officials lacking the necessary authority (para. 72).
- (3) It was not objectively reasonable for Mr. and Mrs. Rowland to rely on the representations made to them without having made enquiries of the Defendant and without having instructed their solicitors to make investigation of the question (para. 72).
- (4) The Defendant acted fairly in resiling from any expectation that was induced (para. 73).
- (5) As Mrs. Rowland did not have a legitimate expectation that Hedsor Water was private, her expectation was not a possession protected by Article 1 of the First Protocol to the Convention, nor did it otherwise give rise to a claim for relief under the Convention (para. 81).
- (6) If the expectation did constitute a possession, no violation of Mrs. Rowland's rights occurred because the interference with her



possession was plainly lawful, pursued the legitimate aim of safeguarding the rights of the public over Hedsor Water and were proportionate to the aim (para. 82).

### The appeal

41. Lord Lester Q.C. and Mr. Robert Howe for Mrs. Rowland attack the judge's conclusions on a number of grounds. They submit that the judge made a number of important erroneous findings of fact which materially affected his reasoning and conclusions on the legal issues. They say that he erred in the answers which he gave to the legal issues. They put their case before this court, as they did below, on five different bases, which I summarise in my own words:

(1) Hedsor Water is for the purposes of s. 2 of the 1885 Act a channel which by virtue of an agreement with the Conservators acting under the 1795 and 1812 Acts (mentioned in the First Schedule to the 1885 Act) had been enjoyed as a private channel for the period of 20 years before the passing of the 1885 Act and as such was deemed not to be part of the Thames for the purposes of s. 1 of the 1885 Act.

(2) Hedsor Water is for the purposes of s. 2 a channel which by a lawful title had been enjoyed as a private channel for that period with the like deemed consequence.

(3) If any obstruction, maintained for that period, to PRN is removed by the Defendant, s. 5 confers on Mrs. Rowland a licence to replace it and any such replacement obstruction could not be removed by the Defendant.

(4) Mrs. Rowland has a legitimate expectation at common law that she and her successors in title to Hedsor Water would continue to be entitled to enjoy Hedsor Wharf as a private water and it is an abuse of power for the Defendant to change its position and deny that entitlement.

(5) Mrs. Rowland by her legitimate expectation has a possession entitled to protection under Article 8 of the Convention ("Art. 8") and Article 1 of the First Protocol to the Convention ("Art. 1"), with the like consequences on a change of position by the Defendant.

42. Mrs. Rowland seeks declarations, if she succeeds on both or either of bases (1) and (2), that no PRN exist over Hedsor Water and that it would be unlawful for the Defendant to remove, alter or otherwise interfere with any signs erected by her or her successors in title to Hedsor Wharf, alternatively erected by her for so long as she chooses to live at Hedsor Wharf, prohibiting entry to and navigation over or through Hedsor Water. If she succeeds on basis (3) she seeks a declaration that, if the Defendant removes or alters the Upper or Lower Weir, she is entitled to erect substantially the same impediments to navigation over Hedsor Water and that the Defendant has no power to remove them.

43. If Mrs. Rowland fails on bases (1) - (3), but succeeds on either or both of bases (4) and (5), she seeks the following declarations:

(1) A declaration that she has a legitimate expectation, constituting a fundamental right protected by Art. 1, that she (and any successor to her as owner of Hedsor Wharf) was and is entitled to continue to enjoy Hedsor Water as a private channel.

(2) A declaration that it was unfair and an abuse of power for the Defendant to change its position as regards Hedsor Water in November 2000, and thereafter seek and obtain a declaration that it had unfettered rights to exercise its statutory functions in relation to Hedsor Water, including its functions under the 1932 Act and the 1995 Act, without regard to her Convention rights, and without securing and maintaining a fair balance between:

(a) her Convention rights; and

(b) the general interest of the community (including the PRN at Hedsor Water).

44. Mr. Peter Village Q.C. and Miss Lisa Busch for the Defendant submit that the judge's judgment is unimpeachable. They say that the challenged findings of fact were based on evidence before the judge and that this court cannot interfere with them. They contend that the judge was fully entitled to hold, as he did, that ss. 2 and 5 of the 1885 Act are inapplicable and that the judge's findings with respect to the submissions on legitimate expectation were correct in law and based on factual findings which it was open to the judge to make. They further say that where Parliament has enacted a detailed legislative scheme which is specifically aimed at striking a fair balance between the interests of riparian owners on the one hand and the public on the other, it is not for the court to interfere in that scheme, whether pursuant to the Human Rights Act 1998 or otherwise, to confer a new right which she does not possess under the legislative scheme. They rely on the recent decision of the House of Lords in Harrow London Borough Council v Qazi [2003] 3 WLR 792 as establishing the principle that human rights legislation cannot be relied upon either to create new property rights not already recognised under English law or to divest other persons of property to which they are entitled under English law. They argue that she does not have the right to privacy with respect to Hedsor Water under the 1885 Act and she cannot be allowed to divest the public of its possession, the right to exercise PRN. They say that none of the grounds of appeal is sustainable.

45. Before I consider the rival submissions, it is convenient to deal with one preliminary matter. The skeleton arguments of the parties appeared to disclose a material difference in approach. It was being contended for Mrs. Rowland that because this was not a case in which the trial judge had the advantage of assessing the demeanour of the witnesses when making factual findings and because this court had the same evidence as was before the judge, this court was in as good a position as the judge to arrive at the true facts. The Defendant on the other hand said that the relevant question was whether the judge's findings with respect to the facts were wholly unreasonable or perverse. However, in the course of the hearing substantial unanimity in approach, centred on the judgment of Clarke L.J. in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577, emerged.

46. In that case Clarke L.J., in a section of his judgment headed "Approach of the Court of Appeal" (paras. 6 - 23), referred to CPR 52.11 (1), providing as it does that every appeal will be limited to review of the decision of the lower court with two exceptions, of which the second is where the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing. Clarke L.J. also referred to r. 52.11(3)(a) which provides that the appeal court will allow an appeal where the decision of the lower court was wrong, and to r. 52.11(4), allowing the court to draw any inference of fact which it considers justified on the evidence. He said:

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the RSC and should be its approach on a "review" under the CPR.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

47. Clarke L.J. then referred with approval to what Mance L.J. said in Todd v Adams & Chope [2002] 2 Lloyd's Rep 293 at para. 129:

With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of 'review' may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment - such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in r 52 11 (3) and (4) to the power of an appellate court to allow an appeal where the decision below was 'wrong' and to 'draw any inference of fact which it considers justified on the evidence' indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellate court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or

otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence."

A similar approach was indicated by May L.J. in El Du Pont De Nemours & Co. v S T Dupont [2003] EWCA 1368 at para. 97.

48. I take it therefore that where there is a challenge to a material finding of fact in a case such as the present, where the judge has no advantage over this court of having seen and heard witnesses, this court must make up its own mind about the correctness of the finding, giving appropriate respect to the decision of the lower court.

#### S. 2: Agreement

49. Lord Lester and Mr. Howe rightly do not dispute that PRN cannot be lost by disuse: see Wills Trustees v Cairngorm Canoeing and Sailing School [1976] SC (HL) 30. They did not concede that PRN could not be lost by some way other than by statute, but advanced no argument in favour of some such other way applying to the present case. They accepted that there was no provision giving the NA express power to extinguish PRN on the Thames, but submitted that such power was impliedly conferred by s. 22 of the 1795 Act and/or s. 8 of the 1812 Act. Like the judge, I would reject that submission. It is, to my mind, inconceivable that either provision should be construed as authorising the extinction of PRN in a stretch of the Thames in the absence of a clear indication that that is what Parliament was intending in Acts to improve and complete the navigation of the Thames. It is impossible to read such a power into s. 22, a section enabling the Commissioners to give satisfaction to a complainant injured by the Commissioners' works. It is no less impossible to read such power into s. 8, enabling the Commissioners to make cuts, given the proviso preventing diversion or stopping up of the present or usual channel or altering the course of the stream. The suggested implied power cannot fairly be regarded as incidental to or consequential upon what the legislature has expressly authorised, as it would deprive the public of rights which had long been enjoyed.
50. In attacking the judge's conclusion on s. 2 of the 1885 Act and in relying on an agreement in 1846, Lord Lester and Mr. Howe challenge several findings of fact by the judge.
51. The first is the finding that Lord Boston's complaint in 1846 was not a complaint under s. 22 (para. 21 of the judgment). I do not see that the judge was wrong on that. Lord Boston was hardly complaining of injury caused by the Commissioners' works, viz. the weirs with gates to the Upper Weir in accordance with the 1843 Agreement and the movable Lower Weir. He had wanted Hedsor Water to be capable of navigation. What he was complaining about was that trespassers were letting themselves through the weirs and, as the Commissioners'

minutes of 19 May 1846 show, he asked the Commissioners to assist him in checking those trespassers. The Commissioners agreed to help him.

52. The second is that the judge described the Commissioners' decision as a unilateral decision, and a revocable arrangement for the benefit of Lord Boston and not an agreement, and that it was a conciliatory gesture or favour (paras. 21 and 63). The essential question is whether there was an agreement with the Commissioners whereby Hedsor Water was enjoyed as a private channel. It is said for Mrs. Rowland that that was a true agreement, with all the elements present which are required to make an agreement: offer, acceptance, consideration and an intention to create legal relations. I do not agree. On the known facts it is fanciful to suggest that there was a legal agreement. Lord Boston did not make an offer. He asked for help and the Commissioners gave it to him by consenting to give him the help which he sought. There was no consideration. It is quite unlike the 1843 Agreement or the agreement reached in 1870. In any event it cannot be said that the "agreement" was one whereby Hedsor Water was enjoyed as a private channel. The Commissioners made clear by the Side-letter, to which I have referred in para. 15 above, that Hedsor Water could not be converted into private property but remained open to the public.
53. The third finding which is challenged is that the access gates to the weir were locked but not the weirs themselves. I respectfully disagree with the judge on this. There was no evidence that gates providing access to the weirs had been erected, whereas there was reference to gates in the weirs enabling navigation through the weirs. The complaint about Capt. Hall was that he had "passed through" a weir and that the trespassers were "letting themselves through the Weir". The signs agreed to be put up commenced "Thames navigation. No thoroughfare". To construe the signs as merely forbidding trespassers on the weirs, as Mr. Village argues, renders the further prohibition against trespass upon the weirs mere repetition of what was in the first part of the signs, if he is right. I do not think that the terms of the Side-letter are conclusive on this point. However in my judgment this error by the judge does not invalidate his conclusion on this part of s. 2 for the reasons already given.
54. The fourth finding is that in the 20 year period before the 1885 Act the Conservators continued to have and fulfilled statutory functions in respect of Hedsor Water (para. 63). That was one of the reasons given by the judge for finding that Lord Boston did not enjoy Hedsor Water as a private channel within the meaning of s. 2. The judge, in paras. 22 - 24, had set out the material events within the 20 year period and they primarily relate to the weirs, viz. the rebuilding of the Upper Weir in 1868 and the rebuilding of the Lower Weir by Lord Boston in 1871 with the agreement of the Conservators who retained responsibility for its repair. But the fulfilling of statutory functions in relation to the weirs is not the same as fulfilling statutory functions in relation to Hedsor Water. With the rebuilding of the Upper Weir as a closed weir in 1868 and with the Lower Weir being rebuilt without a lock, public navigation over Hedsor Water practically ceased, as the judge found (see para. 24). I doubt if the fourth finding constitutes a sound reason for the judge's conclusion that s. 2 was not satisfied. However, in my judgment this too does not invalidate the judge's conclusion on s. 2.
55. Finally, I should refer to the primary ground on which the judge decided that s. 2 did not apply. The judge had regard to the scheme of the 1885 Act. He had noted (in para. 49 of his judgment) that whereas in the case of a tidal river PRN extended over the whole watercourse, in the case of a non-tidal river PRN are confined to the channel of the river. He noted that by s. 1 PRN are made exercisable over and upon any and every part of the

Thames through which Thames Water flows and so PRN was extended to channels over which no PRN had existed previously. But he said that ss. 2 and 5 were protective provisions in favour of riparian owners in respect, and in respect only, of those extended rights of the public. He described s. 4 as making clear that ss. 2 and 5 were not to be construed as restricting pre-existing PRN. Ss. 2 and 5, he said, could have no application to existing PRN and could confer no new right on a riparian owner to exclude any person from exercise of such PRN. Accordingly, he held that s. 2 did not avail Mrs. Rowland because Hedsor Water was subject to existing PRN.

56. Lord Lester argued that to read the first proviso to s. 4 literally would render the substance of the rights protected by s. 2 illusory. He submitted that s. 2 recognised that there were situations in which riparian owners had acquired the right to exclude the public from entering upon or navigating a channel whether by conveyance, agreement or lawful title and actual enjoyment of the channel as a private channel. He argued that Parliament prescribed a period of 20 years prior to the 1885 Act during which such situations would be recognised as having been excluded from the scope of s. 2.
57. I am not persuaded that Lord Lester's submission provides an answer to the judge's reasoning on the scheme of the 1885 Act and I regret that I do not understand how Lord Lester's argument gives any real scope to the first proviso to s. 4. That provides, it will be recalled, so far as material: "Provided that nothing in this Act ×. shall be construed ×. to give any riparian owner any right as against the public which he did not possess before the passing of this Act to exclude any person from ×. navigating ×. any ×. water, whether deemed to be part of the River Thames as in this Act defined or not". In my judgment prior to the 1885 Act Lord Boston had no right as against the public to exclude any member of the public from exercising PRN over Hedsor Water, even though as a practical matter entry into Hedsor Water was not possible because of the closed Upper and Lower Weirs. I repeat that PRN are not lost by mere disuse. Although Lord Lester sought some assistance from the law relating to the acquisition of prescriptive rights over land in relation to the construction of the 1885 Act, I have to say that it did not seem to me to be of any help even by analogy, so very different are the applicable principles.
58. For all those reasons I would reject the first basis of Mrs. Rowland's appeal.

#### S. 2: lawful title

59. Lord Lester frankly acknowledged the difficulty in succeeding on the basis of "lawful title" in s. 2 if his argument on "agreement" was rejected. He nevertheless submitted that in its context in the 1885 Act, what was meant was the situation where a riparian owner has been in physical control of the enjoyment and use of the water, in a known and defined channel of which bank and bed he is the owner, openly and in the manner that a person rightfully entitled would have used the channel, to the deliberate exclusion for the time being of the public using the ordinary and usual mode of access, with the agreement of the NA as guardians of the PRN, exercising its discretionary powers to improve and complete public navigation elsewhere in that part of the Thames.
60. The judge described that argument as hopeless, and I agree with him. As the judge said, "lawful title" requires an entitlement to enjoyment of the channel as a private water, and s. 2

does not provide that enjoyment for the 20 year period is a substitute for lawful title: it is what the judge called "a superadded requirement". No such lawful title was established. Further in 1846 the Side-letter made plain to Lord Boston that PRN continued, and again in 1870 the Conservators expressly reserved the rights of the public when they agreed to let Lord Boston rebuild the Lower Weir.

61. I would therefore reject the second basis of this appeal.

S. 5

62. It was the submission of Lord Lester that s. 5 of the 1885 Act applied to an obstruction to navigation placed by any person including the Conservators so that if it had been maintained for the period of 20 years before the commencement of that Act, it was not deemed to be a nuisance to the navigation but was lawful. He further submitted that if the Defendant removed the obstruction, Mrs. Rowland would be entitled to replace the obstruction, and, provided that it was in substantially the same form, she could not be called upon by the Conservators to remove the same, even though she was a person obstructing the navigation, because the obstruction, or substantially the same obstruction, had been maintained for the requisite 20 year period.
63. I have no hesitation in rejecting those submissions. The section was plainly intended to apply to obstructions placed by persons such as riparian owners (see the sidenote to the section) and not by the Conservators. The Conservators had statutory authority to erect such things as weirs, and Parliament could not have intended that they should be liable to be called on by themselves to remove the same with a criminal sanction if they did not remove them. It would be absurd if, upon the removal by the Conservators in the performance of their statutory functions of a weir which they had erected earlier, a riparian owner was enabled by the section to rebuild the weir, immune from any attempt to have it removed as a nuisance. The section makes good sense if it is construed as applying to an obstruction erected by persons other than the Conservators, and as allowing it to remain if maintained for the 20 year period. That is the natural reading of the section. It makes no sense to construe the section as applying to weirs erected by or with the consent of the Conservators to aid navigation, still less to read words into the section to authorise someone other than the Conservators to rebuild weirs with impunity. That is a wholly unnatural construction of this section.
64. The judge founded his rejection of the argument for Mrs. Rowland on his view of the concluding part of s. 5 as merely affording a defence to the criminal offence created by the section. I see it as going a little further than that and as legitimising the obstruction so that the person causing the obstruction could not be called on to remove it. But I agree with the judge when he said (in para. 66) that s. 5 was not to be construed as conferring a licence to replace any obstruction to PRN removed by the Defendant, and that when read in the context of the legislation as a whole and the range of remedies afforded by the common law and the legislation for removal of obstructions created by a riparian owner, the section could not preclude recourse to other remedies for their removal or confer immunity from civil suit or exercise of the right of abatement in case she creates any, or any such, obstruction of PRN.



65. The appeal on the third basis therefore also fails.

Legitimate expectation

66. Under this head I will consider the English domestic law of legitimate expectation apart from the effect of the Human Rights Act 1998, this being how the judge approached it. It is not in dispute that the Defendant is a public authority and is under a common law duty to act fairly and reasonably in exercising its powers and performing its duties. For the most part the statutory functions conferred on the Defendant are powers, in particular for the improvement and regulation of navigation on the Thames (see Part III of the 1932 Act), though it also has duties. Thus by s. 6(1) of the 1995 Act (so far as material):

It shall be the duty of the [Defendant], to such extent as it considers desirable, generally to promote -

- (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters;
- (b) the conservation of flora and fauna which are dependent on an aquatic environment; and
- (c) the use of such waters and land for recreational purposes  
×."

Lord Cairns L.C. in Cory v Bristow (1877) 2 App. Cas. 262 at p. 273 described the Conservators as "the guardians ×. of the navigation of the Thames".

67. The public law concept on which Mrs. Rowland relies is that of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. Lord Lester accepted the judge's summary of the general principles of English law on this subject as correct:

68. By a representation (a term which embraces a regular practice and a course of dealing) a public body does not give rise to an estoppel but may create an expectation in another ("the citizen") from which it would be an abuse of power to resile: R v. East Sussex County Council ex parte Reprotech Pebsham Ltd [2002] 4 All ER 58. The principle of good administration prima facie requires adherence by public authorities to their promises. Whether it does so require must be determined in the light of all the circumstances. The public body can only be bound by acts and statements of its employees and agents if and to the extent that they had actual or ostensible authority to bind the public body by their acts and statements: South Bucks District Council v. Flanagan [2002] 1 WLR 2601 at 2607 para 18 per Keene LJ. The relevant representation must be unequivocal and lack any relevant qualification: see R v. Inland Revenue ex parte MFK Underwriting [1990] 1 WLR 1545. The citizen must place all his cards on the table, making full disclosure and his expectation must be objectively reasonable: R v. Secretary of

State for Education ex parte Begbie [2000] 1 WLR 1118 ("Begbie") per Peter Gibson LJ at p.1124 and Laws LJ at p.1130. Where the expectation relates to matters of substantive law as to which both parties are ignorant or in error, it is relevant both to reasonableness and fairness that the citizen had access to legal advice had he wished to take it: see Henry Boot Homes Ltd v. Bassetlaw DC 28.11.02 CA per Keene LJ at para 58 ("Boot"). The expectation may be substantive or procedural and the categories of legitimate expectation are not closed: Begbie. Once the claimant has established the legitimate expectation, he must show that it would be unfair of the public body to resile from giving effect to the legitimate expectation. Lord Woolf in R v. North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraphs 57–8 identified three kinds of unfairness, namely: (1) unfairness consisting in an irrational (in a *Wednesbury* sense) failure by a public body to take its representations into account (together with the legitimate expectation to which it may have given rise before resiling from the representation); (2) unfairness consisting in a procedurally unfair failure by a public body to afford the citizen affected by its decision to resile from its expectation an opportunity for consultation; and (3) unfairness consisting in a failure by a public body to give effect to a substantive benefit which is the subject matter of a legitimate expectation in circumstances where there is no overriding interest which would justify the public body in resiling from its representation that such a benefit would be forthcoming. Where the court is satisfied that the public body made the representation by mistake, the court should be slow to fix the public body permanently with the consequences of that mistake: see Begbie per Peter Gibson LJ at p.1127 and Sedley LJ at p.1133. In such a situation the court must be alive to the possibility of such unfairness to the individual as to amount to an abuse of power. The court must also consider whether and how far (going beyond the immediate parties) the wider interests of the public may be affected by giving effect to the expectation, for the wider interests may require that the public body resiles in order properly to protect those wider interests. In such a case the issue of fairness requires the public body to act fairly in accordance with the first of the three categories in Coughlan balancing in the public interest the irreconcilable interests and conflicting desiderata: see Begbie at pages 1130–1 and Laws LJ Bibi at paras 34–9 and Boot [2002] EWHC (Admin) 546 (Sullivan J) and the Court of Appeal. At the end of the day the court must decide whether having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public and considerations of proportionality for the public body to resile would in all the circumstances and applying the criteria referred to be so unfair as to constitute an abuse of power.

69. English domestic law imposes a constraint upon the applicability of the doctrine of legitimate expectation. For an expectation to be legitimate the party seeking to invoke it must show (amongst other things) "that it lay within the powers of the ... authority both to make the representation and to fulfil it": per Schiemann LJ in R (Bibi) v. Newham LBC [2002] 1 WLR 237. A legitimate expectation can only

arise on the basis of a lawful promise or practice: per Gibson LJ in Begbie at 1125. If the expectation relates to the exercise of a lawful discretion e.g. to admit late claims, such an expectation may bind the public body to exercise its discretion in accordance with that expectation: see R v. IRC, ex parte Unilever [1996] STC 681. But under English domestic law there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so. This rule of law has been the subject of sustained academic criticism as conducive to injustice: see e.g. Professor Craig (1999) *Administrative Law* 4th ed at 642 and *Administrative Law in Ireland*, 3rd ed at p.863. But it remains the law."

68. I add to that summary of the law in the following respects.

(1) A legitimate expectation may arise from "the existence of a regular practice which the claimant can reasonably expect to continue": see Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374 at p. 401 per Lord Fraser, quoted by me in Begbie [2000] 1 WLR 1118 at p. 1125.

(2) It is not always a condition for a legitimate expectation to arise that there should be a clear, unambiguous and unqualified representation by the public authority (R v IRC, ex p. Unilever plc [1996] STC 681 at pp. 693–5 per Simon Brown L.J.): the test is whether the public authority has acted so unfairly that its conduct amounts to an abuse of power.

(3) Similarly, without in any way wishing to belittle the "cards on the table" requirement laid down in the MFK case (a tax case), the answer to the question whether there has been such a failure of disclosure by a party as to disentitle him from having a legitimate expectation must depend on the particular circumstances of the case.

69. The main criticisms made by Lord Lester and Mr. Howe of the judge relate to his factual conclusions which led him to decide the issue of legitimate expectation against Mrs. Rowland.

70. The first of those conclusions (in para. 72) is that there was no unequivocal representation by the NA that Hedsor Water was a private water. For my part I accept that prior to 1894 the attitude displayed by the NA was ambivalent. On the one hand it agreed in 1846 to putting up the "No thoroughfare" sign, and in 1868 built the Upper Weir as a closed weir and in 1870 agreed to the rebuilding by Lord Boston of the Lower Weir without a lock. On the other hand the NA by the Side-letter in 1846 and by the reservation in 1870 of the rights of the public appeared anxious to bring home to Lord Boston that PRN continued to exist over Hedsor Water even though in practice they were not exercised. Lord Boston in 1894 mistakenly relied on the 1843 Agreement as making Hedsor Water private. However, the 1894 Act did not resolve the validity of Lord Boston's claim, s. 232 merely preserving whatever rights Lord Boston had over Hedsor Water. Nevertheless it is readily understandable that the unusual inclusion in a statute of that express provision was misunderstood as a recognition by Parliament of Lord Boston's rights. We know from Thacker's book, the authority of which was recognised by the knowledgeable Mr. Christie,

that that was the view of the author. Moreover, Mr. Christie said in his first Witness Statement after quoting the author's statement of the effect of s. 232:

Generations of readers including myself and other navigation officers have been given to understand that the privilege of maintaining an exclusion of the public from the Hedsor Water by means of the upper and lower weirs was reserved to Lord Boston by the Thames Conservancy Act 1894 and was carried forward into the Thames Conservancy Act 1932. At first sight, section 259 of the 1932 Act appears to place Hedsor Water and its weirs outside the operation of the Thames Conservancy Act and the Claimant has disclosed in these proceedings a letter which I wrote some years ago expressing that view. It now appears that I was wrong."

Mr. Christie in the penultimate sentence refers to the letter of 13 December 1990 to which I referred in para. 34 above.

71. What is striking is that there is no evidence whatever that anyone in the NA after 1894 held or expressed a different view. On the contrary the judge found, and I have recorded in para. 30 above, the various actions taken by staff of the NA in the belief that Hedsor Water was private water. That culminated in the notice at Cookham Lock to which I refer in para. 4 above. The judge found both that the NA had continued to perform its statutory functions with respect to Hedsor Water and also that the owners of Hedsor Wharf at all times acknowledged that. But the evidence in support of that first finding is this. It consists of evidence of two pieces of work carried out by the NA. In 1957 a dredging and tree-planting scheme was carried out. But that was hardly likely to have been for the purpose of PRN in Hedsor Water given that there is no evidence of the exercise of such rights. It is possible that it was to improve the flow elsewhere. The other piece of work was the rebuilding of the Upper Weir in 1964. Again that appears to have little to do with improving PRN in Hedsor Water. It is not apparent that there is any evidence in support of the second finding.
72. The judge said (also in para. 72) that the officials on the ground, and in particular the lock keepers, could not have had the authority to make the representation that Hedsor Water was private. But there is nothing in the evidence to suggest that what the officials on the ground said was in any way inconsistent with the belief held and expressed by everyone in the NA. Mr. Christie's evidence, which I have cited, supports that. So does the evidence of Mrs. Rowland on what the Badcocks told her, viz. that if those who entered Hedsor Water, when challenged and asked to turn back, failed to do so, she could telephone the lock keeper at Cookham Lock who would speak to them when they passed through the lock or call another lock keeper downstream and if that had no effect, "the Lock Keeper could refer it upwards, leading to loss of the boat's licence" (see para. 5 of Mrs. Rowland's first witness statement). How could so substantial a stretch of the Thames (unlike any other part of it) be treated for so many years as private by lock keepers and navigation officers and the Secretary to the NA alike without the authority of the NA itself?
73. The evidence to my mind plainly indicates that arguably since 1897 and at least since 1920 the NA believed that Hedsor Water was private and that the regular and consistent practice of the NA for at least 80 years was to act on that footing. To any objective observer the NA was by its conduct representing that there were no PRN in Hedsor Water. In my judgment

there was the necessary representation or practice to found a legitimate expectation and the judge was, with respect, wrong on that point.

74. Mrs. Rowland next challenged the judge's conclusion (again in para. 72) that it was not objectively reasonable on the occasion of the purchase of Hedsor Wharf, with solicitors instructed to act on the purchase to investigate title, for Mr. and Mrs. Rowland to rely on the representations which they did without making direct enquiries on the issue of the Defendant and without instructing their solicitors to investigate the question as part of the investigation of title. The judge expressed similar views in para. 29 of his judgment. There he referred to the Enquiries before Contract, which document has survived. This shows that to an enquiry as to what estate and rights in and over the bed of the Thames did the vendor claim the answer was given that the vendor claimed full rights to the river bed. We do not know whether any, and, if so, what further enquiries were made in consequence of that unsatisfactory answer. The incomplete nature of the documentary evidence is demonstrated by an enquiry with regard to clause 12 of the draft contract as to whether the vendor was aware of any particular rights and powers of the Conservators concerning the property, to which the answer was "Except as stated in clause 12 the Vendor knows of none". There is nothing to indicate what were the terms of clause 12. Mrs. Rowland was never cross-examined although at one stage the Defendant indicated that it wished to cross-examine her and although she was offered for cross-examination.
75. In the unsatisfactory state of the documentary evidence and given the death of Mr. Rowland, who would have been the prime mover in the purchase by SCML in 1968 and in the sale on to him in 1974, I do not think that the judge could properly reach any conclusion as to what enquiries were made or not made at the relevant times, and as to what instructions were given to the solicitors acting for SCML and Mr. Rowland. We do not know whether an enquiry was or was not made of the NA - I refer again to the inadequacy of its disclosure - and still less what the result would have been if such enquiry had been made, given the apparent uniformity of belief in the NA that Hedsor Water was private.
76. The judge took the view that the History was never shown to the solicitors acting for SCML and Mr. Rowland nor was its existence revealed to the NA, but that had it been so shown and revealed, it would have made a dramatic difference. As I understand the judge's thinking, this was because "The History made plain that the issue of PRN over Hedsor Water (to say the least) was highly contentious," and if the History had been disclosed to the NA, it would have undertaken immediately the investigation which Mr. Christie was given the occasion to undertake in 2000 with the same result. The judge even expressed the opinion that the beliefs and actions of Mr. Christie and other employees of the NA would not have been the same if they had realised the existence of the History and had recourse to it.
77. In my judgment the judge has, with respect, considerably overstated the significance of the History. It represented Lord Boston's personal view in 1899 of the history of Hedsor Water, and in particular his account of the disputes between the owner of Hedsor Wharf and the NA. But much of the material was available elsewhere, for example in Thacker's book, in the minutes of the Commissioners, and in public documents relating to the passage of the 1885 Act and the 1894 Act respectively. That the question of PRN over Hedsor Water was contentious in the 19<sup>th</sup> Century was obvious from those sources. The most significant fact ascertainable from the History but not available from elsewhere (in the absence of full disclosure by the Defendant) is the Side-letter. But in any event what occurred in the 20<sup>th</sup>

Century was to my mind much more significant than what occurred in the period covered by the History, and I have already referred to the widespread belief that by reason of the 1894 Act Hedsor Water was private and to the actions of the NA consistent with that belief. We know from Mr. Christie the significance to him and generations of navigation officers of the NA of Thacker's statement published in his book. There were other opportunities prior to 2000 for the NA to undertake the investigation which Mr. Christie chose to make in 2000 when he consulted the Defendant's solicitor; that investigation was in no way prompted by the subsequent disclosure of the History, nor was the result of the investigation dependent on the History. The NA, with its statutory functions, should surely have kept in mind at all times not only what navigation was physically possible through Hedsor Water but whether PRN continued to exist, and the very fact that Hedsor Water, if private, would constitute a unique exception to the navigating by the public of the Thames should have led the NA to investigate the position long before 2000. It might seem surprising (though I accept that we do not know) if none of the several purchasers of Hedsor Wharf in the last century had made any enquiry of the NA given the wording of the parcels clause in each Conveyance, which should have alerted every purchaser to the fact that there was some uncertainty as to the precise interest conveyed in respect of Hedsor Water. In 1961, 1968 and 1990 there was correspondence with the NA which could reasonably have caused it to look into the true status of Hedsor Water, but it did not do so. Mr. Christie recalls a letter from a local MP to the NA some time in the 1990s asking how it could be lawful for the public to be excluded from Hedsor Water, and again it would be remarkable if that was the only such query in the last Century; but again that letter did not provoke an investigation. In the circumstances it is not apparent that there is any valid basis for the judge's view that the disclosure of the History would have triggered an investigation leading to the adoption of the stance now taken by the Defendant.

78. I accept that the wording of the parcels clause of the conveyances to SCML and Mr. Rowland respectively would have attracted the attention of any conveyancer, and thereby of his purchaser client, to the fact that the interest in Hedsor Water being conveyed was subject to some uncertainty. But in my judgment the judge's conclusion that Mr. and Mrs. Rowland could not reasonably believe that Hedsor Water was private goes much too far. That belief had been shared by Mr. Christie and, so far as one can tell, everyone else in the Defendant. Mr. and Mrs. Rowland reasonably relied on what they were told by Mr. and Mrs. Badcock, who had lived at Hedsor Wharf for nearly 20 years. They told Mr. and Mrs. Rowland of their dealings with the NA which supported the belief that Hedsor Water was private, as the signs in the river indicated. Moreover all that occurred in Mr. and Mrs. Rowland's dealings with the Defendant subsequent to 1968 is consistent with that belief. In my view, subject to the effect of the rule under English law that a legitimate expectation can only arise on the basis of a lawful promise or practice, I would accept that Mrs. Rowland has a legitimate expectation that she would continue to be entitled to enjoy Hedsor Water as private. However, I share Mance L.J.'s reservations about the scope and strength of that expectation in the particular circumstances (see paras. 157 and 158 of his judgment).
79. The judge's finding (in para. 73) that, even if he was wrong and the expectation was legitimate, the Defendant acted fairly in deciding to resile from any expectation induced by the NA is challenged by Mrs. Rowland. Lord Lester says that there was no evidence from the Defendant to support the judge's view that full consideration was given to her interest and the impact of the decision on her. He submits that the Defendant, as a public authority, is bound to comply with the legitimate expectation created by its previous conduct of a benefit which is substantive rather than merely procedural, viz that Mrs. Rowland is entitled to continue to enjoy Hedsor Water as a private water, where not to further that expectation

would be so unfair that it would amount to an abuse of power. He argues that following the guidance given by this court in Coughlan the court has to determine whether there is a sufficient overriding public interest to justify a departure from what had previously been the Defendant's practice, asking itself whether the application of a new policy to an individual who had been led to expect something different is a just exercise of power. I accept that argument.

80. Nevertheless I do not think that it is right to say that there was no evidence in support of the judge's view that the Defendant's balancing exercise was fair and free from objection. The letter dated 20 February 2001 from Mr. Christie expressed the views of the Defendant. It expressly acknowledged that Mrs. Rowland wanted to enjoy ongoing privacy on Hedsor Water and that Hedsor Wharf would have been purchased on the understanding that Hedsor Water was private. As against that the Defendant set the fact that PRN over Hedsor Water had never been extinguished. It indicated that it intended to remove signs suggesting that there were no PRN, but it further indicated that it did not intend to promote public use over Hedsor Water and would minimise for Mrs. Rowland, as far as it properly could, the effect of its new policy. Whilst I do not doubt that Mrs. Rowland could justifiably seek further particulars of the Defendant's intentions and more concrete details of its proposal, I am unable to conclude that the balancing exercise which evidently has been carried out by the Defendant and the result thereby produced were so unfair as to amount to an abuse of power.
81. As it is accepted by Mrs. Rowland there can only be a legitimate expectation founded on a lawful representation or practice, her claim to a legitimate expectation that she would continue to be entitled to enjoy Hedsor Water as private was bound to fail under English domestic law if taken alone without the Convention in the absence of any statutory basis for the extinction of PRN over Hedsor Water. I therefore turn next to the question whether the Convention has altered the position.

### The Convention

82. Mrs. Rowland relies on Art. 8, the right to respect for private and family life, and on Art. 1, providing for the protection of property in this form:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

83. Lord Lester concentrated on Art. 1, accepting that if he did not succeed on Art. 1 he would not succeed on Art. 8, which is merely an adjunct to the Art. 1 claims. He argued that what would be a legitimate expectation under English law, but for being ultra vires the public authority concerned, relating to specific rights connected with a specific property is a possession within the meaning of Art. 1 and so cannot be taken away or interfered with

except in accordance with the requirements of Art. 1 as regards the principles of legal certainty and proportionality.

84. By s. 6 of the 1998 Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right unless constrained by legislation. S. 8 enables the court to grant such relief or remedy or make such order within its powers as it considers just and appropriate. S. 2 provides that the courts must have regard to decisions of the European Commission and the European Court of Human Rights ("the ECHR"); but they are not bound to follow those decisions.
85. The judge correctly analysed Art. 1 as comprising three distinct rules: the first (in the first sentence of the first paragraph) enunciating the principle of peaceful enjoyment of property, the second (in the second sentence of the first paragraph) prohibiting deprivation of possessions unless certain conditions are satisfied, and the third (in the second paragraph) recognising that a state has the right to control the use of property (so far as relevant) in accordance with the general interest. He referred to two decisions of the ECHR. The first was Beyeler v Italy [2001] 33 EHRR 52 in which it was held that the concept of "possessions" in Art. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law, and requires the examination of the question whether the circumstances of the case, considered as a whole, conferred title to a substantive interest protected by Article 1 (see para. 100). The judge said that the Strasbourg jurisprudence afforded the concept a wide meaning. The second case was Pine Valley Developments v Ireland [1991] 14 EHRR 319. The judge accurately summarised the facts of that case and the reasoning and summarised the principles derived from that case, saying (in para. 80):

The principles to be derived from the decision of the Court and Commission, as it appears to me, are as follows: (1) a legitimate expectation relating to property may constitute a possession protected by Article 1 at any rate if it can be regarded as a component of property protected by Article 1. I can see no reason why in principle an expectation that public rights over private property will be extinguished (in this case PRN over the bed of Hedsor Water) should not likewise be capable of protection; (2) a legitimate expectation for this purpose may arise notwithstanding the fact that it was beyond the powers of the public body which fostered the expectation to realise the expectation. (It may be noted that the Irish member of the Commission dissented from the view of the majority on this issue); (3) the legitimate expectation cannot entitle a party to realisation by the public body of the expectation which it is beyond the powers of the public body to realise, but may entitle him to other relief which it is within the powers of the public body to afford, e.g. the benevolent exercise of a discretion available to alleviate the injustice or payment of compensation; (4) but the fact that the expectation was founded on an ultra vires act or that the public body had no power to realise the expectation raised and the reason why in law it had no such power (e.g. the potential adverse effect on third parties) may be a reason, and indeed a strong reason, going to the justification for the interference and its proportionality."



86. The judge then applied those principles, saying that the fact that it was ultra vires for the NA to extinguish PRN over Hedsor Water should not debar an expectation of Mr. and Mrs. Rowland relating to the subsistence of PRN over Hedsor Water from constituting a possession entitled to protection under Art. 1, though the relief that might be available might be restricted in the manner he indicated.
87. However, the judge went on to say in para. 81 that for the same reasons he had given in para. 72 of his judgment that the expectation of Mr. and Mrs. Rowland, even if not illegitimised by the doctrine of ultra vires, would not entitle Mrs. Rowland to relief under English domestic law, he did not think that the expectation constituted a possession entitled to protection and giving rise to any claim to relief under the 1998 Act and the Convention. He distinguished the Pine Valley case on its facts. That case related to a legitimate expectation arising from an ultra vires grant of planning permission (but recorded in a public register) on which an applicant company (and its applicant owner) relied when purchasing land. The court's decision invalidating the permission constituted an interference with the permission of those applicants for the purposes of Art. 1, but the interference was justified and proportionate.
88. There is no appeal by the Defendant from the judge's acceptance that in principle, following the 1998 Act, a legitimate expectation, even if arising from ultra vires acts by a public authority, can constitute a possession for the purposes of Art. 1. Lord Lester submits that the correctness of that proposition has been confirmed by the ECHR in Stretch v U.K. on 24 June 2003, in which that Court held that the concept of "possessions" in Art. 1 includes a legitimate expectation of obtaining effective enjoyment of a property right resulting from the ultra vires act of a public authority. In that case a council had relied on its own invalidity in granting an option to renew a lease when it had no power to do so. It was held by the ECHR that the lessee had a legitimate expectation and that was a possession with which the council had interfered and that such interference was not justified. Mr. Village argued that Stretch was in reality a case of unjust enrichment. No doubt the element of unjust enrichment added to the unfairness, but the relevance of the case relates to the ECHR's acceptance that the lessee had a possession in his legitimate expectation notwithstanding the ultra vires nature of the council's act.
89. I am not able to agree with the judge's reasons for holding that the expectation of Mrs. Rowland as to the privacy of Hedsor Water was not a possession entitled to protection. I have already set out in paras. 70 – 80 above why I disagree with what the judge said in para. 72 of his judgment. The fact that the expectation was held by Mrs. Rowland as the owner of Hedsor Wharf and was associated with her property would lead to the conclusion that the expectation was a possession protected by Art. 1 unless that conclusion was precluded by the decision of the House of Lords in Qazi, as Mr. Village argued it was.
90. In Qazi the tenant's tenancy of a council house was terminated by the Council which obtained a possession order against him. The tenant's defence under Art. 8 was rejected by the County Court on the basis that the house was no longer the tenant's home after the termination of the tenancy. This court allowed the Council's appeal on the basis that Art. 8 was engaged, and remitted the case to the County Court to determine whether the interference with the tenant's Art. 8 rights was justified under Art. 8(2). The Council appealed to the House of Lords which unanimously held that the house was a home for the purposes of Art. 8. However the majority (Lord Hope, Lord Millett and Lord Scott, Lord Bingham and Lord Steyn dissenting) held that Art. 8 could not be relied on to defeat

proprietary or contractual rights to possession and no question arose for determination under Art. 8(2). Mr. Village submits that this case lays down the fundamental principle that the 1998 Act and the Convention cannot be relied on either to create new property rights not already recognised under English law or to divest other persons of property to which they are entitled under English law. Whilst the decision directly relates to Art. 8, there is only one mention of Art. 1. Lord Scott at para. 124 referred to the case of an occupier acquiring title by adverse possession of property for 12 years and said:

Article 8 would not be relevant. The disentitled owner might make a complaint under article 1 of the First Protocol but would fail. The divesting operation of the statutes of limitation would be justifiable as being in the public interest etc. ×."

Mr. Village said that that indicated that the same reasoning applied with respect to Art. 1 as well as to Art. 8, the aim of Art. 1 being to protect individuals from arbitrary interference by the state with their property to which they were entitled under domestic law and that article should not be regarded as conferring new property rights.

91. Ingenious though that argument based on Qazi is, I am not able to accept it as it seems to me to fly in the face of the Pine Valley and Stretch decisions that an expectation may amount to a possession for the purposes of Art. 1 even though it arises from an act unlawful under the domestic law. I repeat the comments in para. 85 above on the Beyeler decision. I do not read Lord Scott's obiter, but, if I may say so respectfully, plainly correct, observations on Art. 1 as extending beyond the illustration which he gave.
92. I would therefore hold that Mrs. Rowland's expectation was a possession entitled to protection under Art. 1 unless the interference by the Defendant with that possession was justified and proportionate.
93. The judge's view was that the interference was plainly lawful, being in accordance with English law, pursued the legitimate aim of safeguarding the legal rights of the public over Hedsor Water and was proportionate in that it achieved a fair balance between the interests of the public and the interests of Mrs. Rowland.
94. Lord Lester took issue with that conclusion. He said (by reference to R (Daly) v Home Secretary [2001] 2 AC 531 at 547) that the correct test now requires consideration by the court of the question whether the means proposed to be used by the Defendant (which he suggested involved not only the removal of the signs that Hedsor Water was private but also the weirs themselves as impediments to public navigation, without compensation to Mrs. Rowland) are no more than necessary to achieve the objective of enabling the public to have opportunities for boating on Hedsor Water. He argued that there was no evidence to support the existence of any overriding public interest to assert PRN over Hedsor Water or any pressing social need, and he referred to the extraordinary delay on the part of the NA in asserting that PRN continued over Hedsor Water. He pointed to the evidence of Mrs. Rowland that, if there were such PRN, that would be extremely damaging to the amenity of Hedsor Wharf and would totally remove its privacy and security, and that it would have a very severe financial effect on the property, a valuer's estimate being of a reduction in value of approximately 10 to 25%. He submitted that the action of the Defendant in resiling from

its previous acceptance of the private status of Hedsor Wharf was disproportionate and unjustified.

95. Mr. Village submitted that the judge was right to conclude as he did on this issue. He argued that the consequence of the Defendant not resiling from its previous stance would be to deprive the public of a right of inestimable value forever, and the Defendant had no power to give effect to Mrs. Rowland's expectation. PRN, he said, are not property belonging to the NA but belong to the public and the NA had no power to stop the public from exercising PRN wherever they exist. He submitted that it was well-established that where property rights are concerned, the courts should give primary decision-makers a broad margin of discretion with respect to their decisions concerning such rights, and he pointed to the judgment of the ECHR in Hatton v U.K., 8 July 2003, in this context in which it was said that what must be considered is whether the public authority has struck a fair balance between the public interest and the conflicting interest of the person affected (para. 122).
96. In my judgment the judge was right on this issue for the reasons which he gave. It was inevitable that once the Defendant was aware that it had made a mistake in allowing Hedsor Water to be treated as a private water, it, as the guardian of navigation in the Thames, should resile from its previous stance. Courts should be slow to fix a public authority permanently with the consequences of a mistake (see Begbie at p. 1127), particularly when it would deprive the public of their rights. The Defendant had no power to fulfil the expectation of Mrs. Rowland, and it was bound to conclude that it should remove the misleading signs that Hedsor Water was private, as they were inconsistent with the continued existence of PRN over that stretch of the Thames. The rights of the public, expressly recognised by s. 1 of the 1885 Act, now s. 79(1) of the 1932 Act, required nothing less. The Defendant rightly took account of the expectation of Mrs. Rowland that Hedsor Water was and would continue to be private, of the fact that Hedsor Wharf was purchased on the understanding that it was private, and of Mrs. Rowland's wish to continue to enjoy privacy. In consequence in the letter of 20 February 2001 it gave the assurances not to promote public use of Hedsor Water and to minimise for her the effect of removing the prohibition on the public using Hedsor Water. True it is that the details of such minimisation were not spelt out in that letter, but to respond as the Defendant did by that letter was in my judgment neither disproportionate nor unjustified. It is to be noted that there is no suggestion in that letter of any intention to remove both or either of the weirs. There is no offer of a payment of compensation to Mrs. Rowland, but even in the Amended Particulars of Claim Mrs. Rowland has not sought compensation, and Lord Lester accepts that compensation could not be recovered under these proceedings as they now stand. It is therefore unnecessary for this court to decide whether the judge was right to indicate that he would not award compensation or to say anything further about compensation. Neither of the declarations sought by Mrs. Rowland on this appeal seems to me to be appropriate.
97. Lord Lester criticised the form of the unqualified declarations granted by the judge to the Defendant. The second declaration granted by the judge that the Defendant is entitled to perform its statutory functions with respect to Hedsor Water contains no reference to the obligations which the Defendant undertook by its letter of 20 February 2001. I agree with Mance L.J. that it would be appropriate in the circumstances to grant a further declaration that the Defendant must take into account, in exercising its statutory functions, the common assumption prior to November 2000 that Hedsor Water was private as indicated by that letter.

98. However, subject to that, for the reasons which I have given I would dismiss this appeal.

Lord Justice May:

99. I agree that this appeal should be dismissed for the reasons given by Peter Gibson LJ, whose account of the facts and circumstances of the appeal I gratefully adopt. I also agree with Mance LJ that it would be appropriate to grant a further declaration in the terms which he suggests. I agree with the structure of Mance LJ's reasoning which reaches his conclusion. But I would put a rather different emphasis, more favourable to Mrs Rowland, on the strength of the legitimate expectation to which in my judgment the facts give rise. I agree with Mance LJ that it would be quite inappropriate to introduce a form of ongoing court supervision in relation to future events.
100. I reach the conclusion that this appeal should be dismissed, for the reasons given by Peter Gibson and Mance LJJ, with undisguised reluctance. I say this because I regard the outcome as unjust. It is, in my view, the unjust product of a developing, but at times over complicated, body of related jurisprudence, elements of which need reconsideration. Binding authority prevents constructive reconsideration in this court. The most unusual facts and circumstances of this appeal seem to me to illustrate related problems of real importance.
101. It is now commonplace to acknowledge that the introduction of the Human Rights Act 1998 was a fundamental watershed in the development of both substantive and procedural law. Resort to the Human Rights Convention and to decisions of the European Court of Human Rights has served to identify aspects of domestic law and procedure where it has been right to question whether domestic arrangements, untempered by human rights considerations, provided proper protection for individuals against the actions of public authorities; whether the product of the application of domestic rules was just and proportionate; and whether remedies need to be found which domestic rules alone would not provide. In a large majority of cases in which human rights arguments have been deployed, the domestic structure has been found entirely sufficient without a human rights overload, which would only provide additional (and unnecessary) grounds for reaching the same conclusion. In cases where human rights considerations are persuasive and make a difference, something is wrong with the relevant domestic law or procedure taken alone. It is right to temper the domestic rules in this way, but it may not be the best means of reaching a just result. Better, perhaps, to adjust the underlying domestic rules.
102. The present case is an illustration of this. English law recognises that there may be circumstances where fairness and proportionality require that a public body should not be able to resile from a representation which has resulted in a legitimate expectation in an individual or group of individuals. Unfairness may arise of the third kind identified by Lord Woolf in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at paragraphs 57 to 58. This kind of unfairness arises where there is no overriding interest which would justify the public body in resiling from its representation. But orthodox English domestic law does not allow the individual to retain the benefit which is the subject of the legitimate expectation, however strong, if creating or maintaining that benefit is beyond the power of the public body.

103. Such is the present case. Hedsor Water was part of the original main stream of the River Thames. From time immemorial, a public right of navigation has existed over the river. The public right of navigation now exists by statute going back to the Thames Preservation Act 1885. Successive Navigation Authorities had no power to extinguish that right. A public right of navigation cannot be extinguished by prescription, even over a period exceeding 100 hundred years. The respondents and their predecessors have acted for a period in excess of 100 years so as to give rise to the legitimate expectation on which Mrs Rowland relies. But, because the Navigation Authorities had no power to extinguish the public right of navigation over Hedsor Water, English domestic law cannot give effect to Mrs Rowland's legitimate expectation. This is unjust and illustrates a defect in the law. In my view, the just outcome of these proceedings is that Hedsor Water should remain private. English law cannot at present achieve this.
104. So resort is had to the Human Rights Convention and jurisprudence under it. This should not be necessary. I agree that Mrs Rowland's legitimate expectation should be seen as a possession within Article 1 of the first Protocol. An intricate process of reasoning is required to reach this conclusion. But, as Peter Gibson LJ has explained in paragraph 96 of his judgment, this conclusion does not take Mrs Rowland very far. The Human Rights Convention does not enable Mrs Rowland to retain Hedsor Water as private, when to achieve this is beyond the statutory power of the respondents. They must not act so as to abuse their power, but I agree that they have not done so. Their letter of 20<sup>th</sup> February 2001 was not only considerate, but a genuine statement of the respondents' intention to moderate, so far as they were able, the effect on Mrs Rowland of their discovery that Hedsor Water is not private and cannot continue to be so. I doubt the practical ability of the respondents to alleviate Mrs Rowland's position, but I would certainly not prejudge what might in the future be done.
105. I have indicated that, in my view, Mrs Rowland's legitimate expectation is in general stronger than the limited expectation which Mance LJ has identified. I accept that a modification in Mrs Rowland's favour of the strength of her legitimate expectation does not achieve for her a more favourable outcome to this appeal under the law which we are obliged to apply. However strong the legitimate expectation, it comes against the buffers that it is beyond the power of the respondents to extinguish public rights of navigation over Hedsor Water. I shall, however, briefly explain why I consider her legitimate expectation to be a strong one.
106. Hedsor Water became a backwater of the River Thames soon after the cut and lock were constructed at Cookham in 1830. The effectiveness of that lock necessarily required a weir at some point in Hedsor Water to maintain the water level upstream of the lock at a suitable level. Otherwise, at least in modern times, the water level on either side of the lock would be much the same and there would be little point in having the lock. The upper weir constructed under the terms of the 1843 Agreement was built so that barges and other craft could pass through it, because Lord Boston wanted what had hitherto been profitable traffic to continue to use Hedsor Wharf. The lower weir was likewise constructed with gates to enable barges to pass, but its purpose must have included maintaining a higher water level within Hedsor Water. The reason for this could variously have been to retain a sufficient water depth at Hedsor Wharf; to promote Lord Boston's fishery; to promote his eel bucks; or to improve the general appearance of the river bank along Lord Boston's property. However that may be, Lord Boston was positively promoting a public right of navigation in Hedsor Water in 1843.

107. This had all changed by 1846 with the arrival nearby of the railway. Since 1846, Hedsor Water has been effectively (although not in law) a private water. Peter Gibson LJ has given the details of what happened in 1846 in paragraph 15 of his judgment. Both weirs had been built by then. The Commissioners caused signs to be erected telling the public that there was "No Thoroughfare" and forbidding persons from trespassing on the weirs. At the same time, they wrote to Lord Boston saying that, notwithstanding that public trade and traffic were being diverted from Hedsor Water, it could not be converted into private property, but remained open to the public as before. This letter is significant for a number of reasons and should not be overlooked. The fact, however, is that the public had not used Hedsor Water since 1846 - a period of 154 years before the present respondents rediscovered that a public right of navigation over Hedsor Water had not been extinguished, and that they and their predecessors had no power to treat it as private, as they had done for over 100 years. The relevance of this, to my mind, is that it inevitably diminishes the "public interest" in maintaining a public right of navigation over Hedsor Water. The public, or most of it, has been quite content for over 150 years that Hedsor Water should be private.
108. The upper weir was rebuilt in 1868 as a closed weir with no gates. It was rebuilt in 1898 and again in 1964, on each occasion without locks or openings for boats. Its main necessary function has been to maintain the water level above Cookham Lock. Since 1868, Hedsor Water has been a true backwater. It is not even in theory part of the navigable Thames, in the sense that boats travelling both upstream and downstream at Cookham have to travel through the lock cut and the lock (unless perhaps they are carried along the towing path).
109. The lower weir was rebuilt by Lord Boston, with the agreement of the Conservators, in 1871. For practical purposes it prevented boats from entering the Hedsor Water backwater. It has since decayed, but remains as a (no doubt dangerous) largely underwater obstruction.
110. I agree with Peter Gibson LJ in his analysis of the construction of section 5 of the 1885 Act and its application to the facts. The Act maintained public rights of navigation in Hedsor Water - but not, for practical reasons, through it. Nevertheless, by 1885 the public had already been excluded from Hedsor Water for nearly 40 years. Nine years later there was what Lord Boston described as "a determined attempt" by the Conservators in Parliament to open Hedsor Water to the public. The attempt was successfully resisted by Lord Boston in the sense that two proposed clauses in the Bill which became the Thames Conservancy Act 1894 were not enacted. As Peter Gibson LJ has explained in paragraph 24 of his judgment, the Select Committee did not attempt to resolve the dispute, but a saving clause specific to the owner for the time being of the Hedsor Estate was included as section 232 of the Act. This was re-enacted as section 259 of the Thames Conservancy Act 1932.
111. In my view, it is a reasonable inference that the Navigation Authority gave up trying to establish public access to Hedsor Water upon the passing of the 1894 Act. The events of 1897, which Peter Gibson LJ describes in paragraph 25 of his judgment, are clear indications of the Conservators overtly accepting Lord Boston's entitlement to private enjoyment of Hedsor Water. Thus in my view the legitimate expectation relied on by Mrs Rowland dates back to the last years of the 19<sup>th</sup> century and has extended for a period in excess of 100 years. I do not consider that justice should accede to the proposition that Mrs Rowland's legitimate expectation cannot antedate 1968 or thereabouts when her husband's company acquired the property. Successive owners of the Hedsor Estate had enjoyed Hedsor Water as private for upwards of 70 years before them.

112. The publication by Mr Thacker in 1920 of *The Thames Highway*, whose contents Peter Gibson LJ summarises in paragraph 27 of his judgment, serves to support the inference to which I have referred. Mr Christie, the Navigation Secretary of the defendant since 1986, and who has been employed by the Navigation Authority since 1969, calls it the standard reference work on its subject. No doubt it was, or soon became, the standard reference work when it was published. It shows that the privacy of Hedsor Water was established by 1920. This kind of understanding does not arise overnight. With this minor gloss, I agree with Peter Gibson LJ's conclusion in paragraph 73 of his judgment, that there was the necessary representation or practice to found a legitimate expectation, and that the judge was wrong on that point. I also agree with his conclusion in paragraph 78, that the judge's conclusion that Mr and Mrs Rowland could not reasonably believe that Hedsor Water was private went much too far.
113. I accept that an intellectual case can be constructed criticising the investigations which Mr and Mrs Rowland might have made and inquiries which their conveyancing solicitors might have undertaken on their behalf. I do not, however, consider that the evidence fairly supports any inference which materially diminishes the strength of the legitimate expectation which Mrs Rowland is now entitled to rely on. The criticism is an imputation that the solicitors were, or may have been, negligent. I do not consider that the state of the evidence justifies such an imputation. These events happened 35 years ago. No doubt the climate in which conveyancing work was done in 1968 is different from today's climate. No doubt also there are people still in practice or recently retired who were experienced conveyancers in 1968. But on the state of the evidence in the present case, I would largely discount the possibility that Mr and Mrs Rowland were incautious or that their solicitors were negligent. Very few of the relevant documents are available, and documents of possible relevance in the hands of the defendants are stored in an unobtainable form. In short, I consider that it was objectively reasonable for a purchaser in 1968 (or 1974), knowing among other things that there was a large Private sign in the river (which the Navigation Authority must have countenanced), to have purchased in the faith that Hedsor Water was indeed private. The court should not ignore the fact (as I think) that it had been accepted as private for some 70 years before Mr Rowland's company purchased the estate, and that the public had been excluded with the positive acquiescence of the Navigation Authority for a further 50 years before that. I have no difficulty in inferring that this was reflected in the 1968 and 1974 purchase prices.
114. I have already indicated my view that the law is defective and that in consequence this court is obliged to uphold an unjust outcome. A sustained and powerful academic analysis to this end is to be found in Professor Paul Craig's *Administrative Law* 4<sup>th</sup> Edition pages 635 to 650, with an appendix dealing with the decision in *Coughlan* at page 907. I briefly summarise his thesis, which nevertheless merits reading in full.
115. Professor Craig addresses and disapproves of, as I do, an unmitigated state of the law to the effect that a representation by a public authority, which the public authority has no power to make, is not binding and cannot sustain a legitimate expectation or an estoppel. The logic of the jurisdictional principle is followed through to its inexorable end. But a moment's reflection makes evident the hardship to the individual. The extraordinary facts of the present case, in my view, illustrate this with greater clarity than all or most of the authorities to which Professor Craig refers, many of which have concerned planning, housing, or social security matters.

116. On page 641, Professor Craig says this:

The most oft-repeated rationale for the rule, both here and in the United States, is that stated by Lord Greene MR in *Minister of Agriculture and Fisheries v Hulkin* (unreported but cited in *Minister of Agriculture and Fisheries v Mathews* [1950] 1 KB 148); if estoppel were to be allowed to run against the Government the donee of a statutory power could make an *ultra vires* representation and then be bound by it through the medium of estoppel. This would lead to the collapse of the *ultra vires* doctrine, with public officers being enabled to extend their powers at will. The jurisdictional principle is said to protect the public or that section of it to which the duty relates.

Two other themes recur in the case law. There is the argument that estoppel cannot be applied to a public body so as to prevent it from exercising its statutory powers or duty. There is also the argument that to allow an *ultra vires* representation to bind the public body would be to prejudice third parties who might be affected, and who would have no opportunity of putting forward their views."

117. Professor Craig contrasts the intentional and inadvertent over-extension of its powers by a public body. In a typical case, where the extension is inadvertent, the rigid maintenance of the principle will not deter the official of a public body, who acts in the belief that what he does is legitimate. It is not clear why the loss should be borne by the person who relies on the representation. The reason appears to be that there is still an extension of statutory powers and that this outweighs any harm to the individual. But a rule of such generality cannot be presumed, without more, to be correct. It does not seem at all self-evident that the detriment to the public interest would outweigh the harm to the individual. It is certainly not clear that the harm to the public will be greater than that to the individual in all areas.

118. Professor Craig then examines three possible approaches to the problem. That which he prefers is a modification of the *ultra vires* principle. The principle is the embodiment of the principle of legality. It may however clash with the principle of legal certainty, and does so when an individual has detrimentally relied on an *ultra vires* representation. "If, however, the harm to the public would be minimal compared to that of the individual, there would seem to be good reason to consider allowing the representation to bind."

The existence of a legitimate expectation is not, however, a *sufficient* condition for binding the public body, precisely because the representation may have been *ultra vires*. The existence of a legitimate expectation does, however, serve as a signal that issues of legal certainty are involved in a case. The existence of such an expectation should, therefore, operate as a trigger to alert a court that a balance between the principles of legality and legal certainty may be required."

I would add that the principles proportionality, and indeed basic fairness, should come into play.



119. Professor Craig refers to such authority as might arguably support a balancing approach. He then says at page 646:

The balancing approach has the advantage of allowing the court the very flexibility which the jurisdictional principle treats as a foregone conclusion. It manifests a willingness to inquire whether the disadvantages to the public interest really do outweigh the injustice to the individual. In many of the areas where the representation relates to a purely financial matter, such as a claim by the Government for tax or a citizen seeking social security benefits, the hardship to the individual who has detrimentally relied will outweigh any public disadvantage. There are, of course, many other areas where the balance would be different.

There are two disadvantages with the balancing approach. The *practical objection* is uncertainty, particularly in the initial period when the application of the doctrine is being tested in different areas. Any such uncertainty must be weighed against the hardship which the judicial balancing approach alleviates. The *conceptual objection* is more central. It might be felt that a balancing test would not fit into the constitutional structure which exists in this country. Our judiciary act against the background of parliamentary sovereignty. If Parliament has laid down certain limits to the powers of a body, it might be felt that the courts should not balance the public versus individual interest in the manner suggested above."

Professor Craig examines these problems. He concludes by considering the argument that it would be much simpler to give compensation than to allow an *ultra vires* representation to bind. Any system of compensation would derive its funds from a certain section of society, directly or indirectly. It might, for example, be through general taxation or from the local rates. It is a trite, though important, proposition that funds for compensation are scarce. "If, by balancing the public and private interest, it can be shown that the detriment to the former is outweighed by that of the latter, it is not clear why we should give compensation rather than allow the representation to bind."

120. I regret that it is not, in my view, open to this court to implement Professor Craig's balancing approach. At this level, it would amount to legislation. I say nothing about whether the House of Lords could or would consider implementing it.
121. The appeal has not been argued with a correction of the law of this kind in view. It would not, therefore, be right to conclude that Mrs Rowland would succeed in retaining Hedsor Water as private, if the correction were made. She would, however, in my view have a strong case to that effect. She does not at present claim compensation, and I say nothing as to whether a claim to compensation under the present law might succeed, nor against whom, or in what jurisdiction. But my inclination is that, if the law were corrected, it would be a fairer and more proportionate outcome for her to retain Hedsor Water as private, than for the public purse to compensate her for the real loss which she would suffer if Hedsor Water ceases to be private.

122. My inclination also is that a balance between her legitimate expectation and the public interest, if it were permissible, might well fall on her side. I have given my views as to the strength of her legitimate expectation. The strength of the public interest has not really been investigated. Indeed, it has largely been assumed to be absolute without investigation.
123. There are, I believe, numerous backwaters on the River Thames, where locks have been cut, impassable to navigation but leading to both the upstream and downstream sides of weirs, which maintain water levels above locks. Generally speaking, the upstream channels are dangerous if you get too close to the weir, since boats are in danger of being carried onto or over the weir. The downstream channels may also be dangerous at the foot of the weir from cascading or turbulent water, especially if the river is in flood or the stream strong. I imagine that danger of this kind does not apply to the main stretch of Hedsor Water away from the upper weir. On the other hand, there is some evidence to indicate that at some states of the water level, Hedsor Water may become shallow, and perhaps too shallow for safe navigation. The lower weir was constructed in part to maintain the water level and it may still do so.
124. I have not investigated the question of public mooring rights in Hedsor Water, but it was assumed during the hearing of this appeal that there may well be none. If there were public mooring rights and on the assumption that Hedsor Water was effectively available for public navigation, the loss to Mrs Rowland would be that much greater. On an assumption that there are no public mooring rights, the practical public interest in a public right of navigation in Hedsor Water may be no more than an ability to travel by boat up the backwater towards the upper weir, in order to turn round and travel out again. For anything other than very small and shallow craft, even this assumes the removal of the remains of the lower weir. Given that the public has managed to get on without this modest privilege for 157 years, a court might well conclude that Mrs Rowland's interest was so clearly the stronger that Hedsor Water ought to remain private.
125. If it were possible so to decide, that would admittedly constitute a minor judicial modification to the effect of section 5 of the 1885 Act as subsequently re-enacted. But it would really amount to no more than a clarification of what is now section 259 of the 1932 Act with, so far as I can see, no other consequential detriment to anyone. The same result could be achieved by a simple Act of Parliament containing one section.

Lord Justice Mance:

*Preliminary*

126. I have had the benefit of reading in draft the judgment of Peter Gibson LJ. I agree with his reasoning and conclusions on the issues of statutory construction, and address only the issue of legitimate expectation, which is critical in this appeal. I approach this issue on the basis that, for the reasons given by Peter Gibson LJ, Hedsor Water was and is, as a matter of law, subject to a public right of navigation and that The Environment Agency had no power and was wrong to treat it as private to the owners of the Hedsor Estate, who owned the river bed. On this basis, Lord Lester QC for Mrs Rowland submits that the Agency created a legitimate expectation on the part of Mrs Rowland that Hedsor Water was and would be regarded as private; and that the Agency is bound to exercise its wide discretionary powers under the legislation governing the River Thames in such a way as to strike a fair balance between her expectation and any other competing rights.
127. Lord Lester objects in this context to the unqualified declaration that the judge granted to the Agency, to the effect that "Hedsor Water was and remains subject to the public right of navigation". He asks the Court to declare in substitution that:
- (A) Mrs Rowland "has a legitimate expectation, constituting a fundamental right protected by Article 1 of the First Protocol to the European Convention on Human Rights and by Article 8 of the said Convention that she (and any successor to the Hedsor Wharf Estate) was and is entitled to continue to enjoy Hedsor Water as [a] private channel;
  - (B) "×. it was unfair and an abuse of power for the Respondent to change its position as regards Hedsor Water in November 2000, and thereafter seek and obtain an injunction [sic] that it had unfettered rights to exercise its statutory functions in relation to Hedsor Water ×.without regard to [Mrs Rowland's] aforesaid Convention rights, and without securing and maintaining a fair balance between
- (1) [Mrs Rowland's] said Convention rights; and
  - (2) The general interest of the community including the public right of navigation ["the PRN"] along at Hedsor Wharf".

Lord Lester conceded, as Peter Gibson LJ records, that, if Mrs Rowland could not succeed under Article 1 of the First Protocol, then the claim under Article 8 of the Convention added nothing. The concession may reflect the emphasis in Mrs Rowland's case upon the original purchase of Hedsor Wharf for herself and her husband, and the financial loss that she fears if Hedsor Water ceases to be treated as private.

128. In *R (Bibi) v. Newham LBC* [2002] 1 WLR 237, 252e, this Court (in the light of specific promises made to the applicants of legally secure housing within 18 months) granted a declaration

that the local authority is under a duty to consider the applicants' applications for suitable housing on the basis that they have a legitimate expectation that they will be provided by the authority with suitable accommodation on a secure tenancy".

But the declarations suggested by Lord Lester have implications calling for particular consideration in the more complex circumstances of the present case. They refer to successors in title; and they seek to categorise as both unfair and "an abuse of process" not just the Agency's change of position in November 2000, but also its successful claim to an injunction (no doubt a mistake for declaration) in the form granted by Lightman J, on the basis that the Agency was thereby failing to secure and maintain a fair balance between Mrs Rowland's "rights" and the community's general interest, including the PRN. The reference to successors in title here too probably reflects Mrs Rowland's case, to which I will return, that she and her husband were entitled to and did buy Hedsor Wharf on the basis of a legitimate expectation created by the Agency. I did not understand Lord Lester to address particular submissions to suggest that it could be regarded as "unfair and abuse of process" for the Agency to seek and obtain a declaration from Lightman J that the Agency had "unfettered rights to exercise its statutory functions in relation to Hedsor Water". If and so far as Lightman J was wrong, the remedy is by appeal, with an appropriate costs order in the event of success; it has not been suggested that Mrs Rowland will have suffered any loss in the meanwhile, since the Agency is currently staying its hand.

#### *Legitimate expectation - the principles*

129. The public law doctrine of legitimate expectation exists as a common law control on the exercise of powers by a public body. If a public body, by words and conduct, creates or encourages a legitimate expectation, the expectation may, according to the circumstances, be viewed as procedural or substantive: see *R v. North and East Devon HA, ex p. Coughlan* [2001] QB 213, (decided July 1999) para. 57. Lord Woolf CJ there identified as the relevant question: "But what was their legitimate expectation?". His answer was that it might merely be (1) to oblige the public authority to "bear in mind the previous policy or other representation, giving it the weight it thinks right, before deciding whether to change course" (in which case he suggested that the court would be confined to reviewing the decision on *Wednesbury* grounds); or it might be (2) to give persons affected by the potential change to be consulted before any decision was taken; or it might be (3) to entitle persons affected to a substantive benefit and, in a proper case, to entitle them to object that any change would be so unfair that it would be an abuse of process for the authority to change course.
130. In *R v. Secretary of State for Education and Employment, ex p. Begbie* [2000] 1 WLR 1115, Laws LJ commented (at p.1129f) that "abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law" and that "it informs all three categories of legitimate expectation case as they have been expounded by this court" in *Coughlan*. Later (at para. 78) he identified as the correct test whether an authority's change of attitude

would be so unfair as to amount to an abuse of power".

He went on (at pp.1130f–1131c):

As it seems to me the first and third categories in the *Coughlan* case ×. are not hermetically sealed. The facts of the case, viewed always in their proper statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear. ×. In other cases the act or omission complained of may take place on a smaller stage, with far fewer players. Here ×. lies the importance of the fact in the *Coughlan* case ×.. that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of person. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies within what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. ×."

131. The judgments in *Begbie* also considered the role of reliance. Peter Gibson LJ was (at p.1124b–d) prepared to accept that the principle of good administration requires adherence by public authorities to their promises, so that change of position as a result of a representation is not always a pre-requisite to relief. But he thought that the significance of reliance in this area should not be understated, and cited *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5<sup>th</sup> Ed. (1995) p.574, para. 13–030, to the effect that it might (a) provide evidence of legitimate expectation and (b) be relevant to the decision of the authority whether to revoke a representation. Sedley LJ (at p.1133d–e) distinguished (a) governmental statements of intention regarding the exercise of powers affecting the public at large (where the government might be held to its word irrespective of whether the particular applicant had relied specifically on it) from (b) cases where the basis of claim was, as in *Begbie*, that a pupil-specific discretion should be exercised in certain pupils' favour" (in which case he found it difficult to see how a person who had not clearly understood and accepted a representation could be said to have such an expectation at all). In cases within (a), consistency of treatment and equality are at stake (see *Bibi*, above, at para. 30); and, since the Human Rights Act 1998, article 14 of the Convention is also directly in point.
132. *Bibi* was a case where the local authority, acting under a misunderstanding as to its obligations, had regularly promised permanent housing to unintentionally homeless people like the two families before the Court. The Court (at para. 19) identified three practical

stages as arising in any legitimate expectation case – in summary: (a) the extent to which the public authority may, by practice or promise, have committed itself, (b) whether it is proposing to act unlawfully in relation to its commitment and (c) what the court should do (i.e. relief). Following *Begbie*, the Court endorsed the view that "the significance of reliance and of consequent detriment is factual, not legal" (para. 31). As to (c), relief, it said at paras. 41–43:

"41. The court, even where it finds that the applicant has a legitimate expectation of some benefit, will not order the authority to honour its promise where to do so would be to assume the powers of the executive. Once the court has established such an abuse it may ask the decision taker to take the legitimate expectation properly into account in the decision making process.

42. Only part of the relevant material upon consideration of which any decision must be made is before the court. Because of the need to bear in mind more than the interests of the individual before the court, relevant facts are always changing. As Sir Thomas Bingham MR said in *R v Cambridge Health Authority, Ex p B* [1995] 1 WLR 898, 906:

it would be totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient C who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration."

43. While in some cases there can be only one lawful ultimate answer to the question whether the authority should honour its promise, at any rate in cases involving a legitimate expectation of a substantive benefit, this will not invariably be the case."

133. Recently, in *R (Reprotech (Pebsham) Ltd) v. East Sussex CC* [2002] UKHL 8; [2003] 1 WLR 348 (February 2002), the House of Lords has "held it to be unhelpful to introduce private law concepts of estoppel into planning law". It said in Lord Hoffmann's words (at para. 34):

There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see [*Coughlan*]. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law rights can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see *Coughlan's* case, at pp.254–255) while ordinary property rights are in general far more limited by considerations of public interest: see *R (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389."

134. The same theme was picked up in *Henry Boot Homes Ltd. v. Bassetlaw DC* [2002] EWCA Civ 983 (28<sup>th</sup> November 2002); the issue was whether a developer had a legitimate expectation that works carried out in breach of the conditions of a planning permission would be treated as commencement of the works within five years (so preserving the permission) in circumstances where the authority had at the time of the works indicated (incorrectly as a matter of law) that they would so be treated. The Court identified (in para. 55) the reduced potential for a legitimate expectation to arise in circumstances where third parties and the public had interests in establishing that the planning permission had lapsed (and where two other interested parties had in fact started judicial review proceedings to protect such interests). It endorsed Sullivan J's statement that planning was a public matter, not a matter for private agreement between developers and local planning authorities. Further (in para. 58) it said:

58. The issue whether the works carried out in breach of condition amounted to a start to "the development to which the permission relates" within the meaning of section 92(2) of the Act was and is essentially a legal one, to be determined in the last resort by the courts. It is not simply a matter for the local planning authority, and it means that any view expressed on it by the local planning authority is in a very different category from the normal case of a legitimate expectation that a public body will exercise its powers in a particular way. Moreover, insofar as the doctrine of legitimate expectation is to be seen as "rooted in fairness", as it was put by Bingham L.J. in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited* [1990] WLR 1545, 1570, it is relevant that the appellant itself, as a substantial house-building company, had access to legal advice, had it wished to take it. It was as capable as was the local planning authority of informing itself as to the legal consequences of commencing development in breach of condition and of the problems in establishing that this amounted to a start of development under the outline permission."

135. The common law principle of legitimate expectation is thus flexible and fact-responsive. Regard must be had to all the circumstances. There may be circumstances which are potentially relevant at each of the three practical stages identified in *Bibi*. Examples might include both the conduct of the parties (e.g. the nature and closeness of their relationship, and the extent to which a practice or promise may have been directed at and detrimentally relied on by a complainant) and the interests of third parties and the public. A potential inter-relationship between the three stages is also reflected in Lord Woolf's question ("But what was the legitimate expectation?") and in the three possible answers that he gave in *Coughlan* (see paragraph above). But there can also be cases where, although an expectation has been created by a public body and is held legitimately as far as the member of the public is concerned, the Court cannot give positive relief in one of the ways indicated in *Coughlan*, and the only relief possible may be by way of a claim for compensation.
136. Thus far, there is nothing in the common law which falls short of or appears to require adaptation in the light of principles to be derived from the European Convention on Human Rights. But in *Bibi* (at paras. 21 and 46) this Court suggested as likely that the "legitimacy" of any expectation depended upon whether the relevant representation was within the authority's lawful power. In *Stretch v. West Dorset CC* (11<sup>th</sup> November 1997) this Court, with no enthusiasm, applied the principle that a local authority can rely on the invalidity of

its own actions (cf. *Hazell v. Hammersmith and Fulham LBC* [1992] 2 AC 1 and *Credit Suisse v. Allerdale BC* [1997] QB 306), holding invalid an option for a further 21 year term granted to the tenant under a lease for an initial 21 year term. The local authority's only relevant power was to let, and thus did not extend to granting an option. So, in the present case, Lord Lester recognises that at common law, prior the incorporation of the Convention on Human Rights, the Agency's lack of any power to abrogate or qualify the public's PRN, or therefore to represent that such PRN did not exist, would pose an apparently insuperable obstacle to success in an argument that the Agency by words or conduct had led Mrs Rowland to have a legitimate expectation that a PRN did exist.

137. Since the incorporation of the Convention, Lord Lester submits, this lacuna has been closed in the context of Article 1 of the First Protocol by decisions in the European Court of Human Rights, which we should now take into account. Peter Gibson LJ has set out Article 1 in paragraph 82. A starting point is the Court's general statement in *Beyeler v. Italy* (Application no. 33202/96, 5 January 2000) that

the concept of 'possessions' in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision ×..".

138. The main authorities on which Lord Lester relies are *Pine Valley Developments Ltd. v. Ireland* 14 EHRR 319, and the *Stretch* case itself: *Stretch v. UK* (Application no. 44277/98; 24 June 2003). In *Pine Valley* developers had, in purchasing a plot, relied on an existing ministerial grant of outline planning permission. This was recorded in the official planning register, but was later, after the purchase, declared by the Irish Supreme Court to be *ultra vires* and a nullity (as being contrary to the relevant development plan). The European Court held that, until the Supreme Court's decision, the developers

had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol No. 1, A component part of the property in question".

However, the "control" over the use of such property which was introduced by the Supreme Court's decision was regarded "as a proper way - if not the only way - of achieving [the] aim" of preventing development in green belt land, and also as proportionate – even though no compensation was afforded. The reasoning for holding that there was no breach of Article 1 of the First Protocol was that:

The applicants were engaged on a commercial venture which, by its very nature, involved an element of risk and they were aware not only of the zoning plan but also of the opposition of the local authority × to any departure from it."

Nevertheless, since other developers in a similar position had been granted retrospective legislative relief, there was a violation of article 14, for which substantial compensation was later awarded against the Irish state: [1993] 16 EHRR 379.



139. In *Stretch* neither party had been aware of any impediment to the local authority granting a lease, and the applicant had entered the lease (under which he had to erect buildings on the land) on the basis that he would have an option to renew it. The European Court held (para. 35) that

the applicant must be regarded as having at least a legitimate expectation of exercising the option to renew and this may be regarded, for the purposes of Article 1 of Protocol No. 1, as attached to the property rights granted to him by [the local authority] under the lease."

The authority's inability to afford the renewal constituted either an interference with or a deprivation of the applicant's possessions within Article 1 of the First Protocol (para. 36). It involved a failure to "strike a 'fair balance' between the general interests of the community and the requirements of the individual's fundamental rights" and was not proportionate (para. 38). The transaction was essentially of a private law nature, and not against any public interest or prejudicial to "any third party interests or the performance of any other statutory function" (para.39). The United Kingdom's submissions that the applicant should have been aware of the consequences of any incapacity, and had the opportunity to take legal advice or could sue his legal advisers for negligence in giving any such advice were all rejected (para. 40); the court said that:

Since however the local authority itself considered that it had the power to grant an option, it does not appear unreasonable that the applicant and his legal advisers entertained the same belief."

Accordingly, there was a violation of Article 1 of the First Protocol.

140. The judge's summary of the effect of these European Court decisions (excluding the decision in *Stretch*, which post-dated his judgment) appears in paragraph 80 of his judgment, set out by Peter Gibson LJ in paragraph 85 above. No challenge was made before us to the first three principles, including therefore the proposition that the Agency could not, even bearing in mind any contrary legitimate expectation, be expected to perform acts exceeding its actual powers, although it would be entitled to alleviate any injustice by benevolent exercise of its powers. Lord Lester questioned only the fourth principle, or at least its relevance in this case. In his submission, the Agency is under no absolute duty to promote any PRN through Hedsor Water, and could, acting within its powers, continue to act as it has always acted, leaving Hedsor Water to be enjoyed as a private channel, or allowing public recreational use on limited terms (Summary of Argument, para. 148). Lord Lester also left open the possibility of a future claim under s.8 of the Human Rights Act 1998, for any breach by the Agency of s.6 of that Act. No compensation has been claimed in these proceedings, although the judge expressed views adverse to any such award.

### *Application of the principles*

141. I turn to apply these principles to this case. The judge held that Mrs Rowland had no legitimate expectation, and that, if she had, the Agency acted fairly in resiling from it. The factual basis for these conclusions is contained in paragraphs 72–73 of his judgment. Since the judge heard no oral evidence, the correctness or otherwise of his findings as to primary fact and as to inferences from primary fact is a matter which we are able to consider for ourselves. While such findings and inferences stand, this court will, on the other hand, be circumspect in any review of the judge's evaluation of their significance: see the passages cited by Peter Gibson LJ in paragraphs 46–47 above from *Assicurazioni Generali SpA v. Arab Bank Group* [2003] 1 WLR 577 and *Todd v. Adams* [2002] 2 L.R. 293.
142. Here the judge's reasoning regarding legitimate expectation includes reference to the whole history of Hedsor Water, in both the 19<sup>th</sup> and 20<sup>th</sup> centuries, as well as, more specifically, to the circumstances of the purchase of Hedsor Estate for Mr and Mrs Rowland by Mr Rowland's company, SCML, in 1968 and by Mr and Mrs Rowland from SCML in 1974. The judge, in finding that the Agency would have acted fairly in resiling, refers to all parties' common mistake, to the grave prejudice to the public if effect were given to any expectation and to the absence of evidence that more had been paid for Hedsor Water than the value of Hedsor Water subject to PRN.
143. I start with the time(s) or period(s) at which it is relevant to look. The issue is whether Mrs Rowland has a legitimate expectation as owner and/or of Hedsor Wharf in relation to the Agency. Her case is founded upon (i) what was understood by herself and her husband, first when SCML purchased the property for their occupation in 1968, and then when they bought it from SCML in 1974 and (ii) their communications with the Agency (or its predecessors) and the Agency's conduct from the dates of such purchases until November 2000. I would regard the past history of Hedsor Wharf or past representations and conduct of the Agency's predecessors prior to 1968 as material as relevant only in so far as (a) they led to a situation that was apparent to the Rowlands on looking at Hedsor Water prior to their purchase or (b) they were foreseeably communicated or known to Mr and Mrs Rowland in some other way or, possibly, (c) it could be assumed in one way or another that they would be so communicated or known.
144. Prior to SCML's purchase in 1968, the Rowlands visited Hedsor Wharf several times. They had Mrs Badcock's letter, referring to three quarters of a mile of "private Thames - no public access by River"; they could see the Badcocks' sign at the lower weir saying "Strictly private No mooring or Navigation beyond this point"; and they were told by Mrs Badcock that others' boats had no right to enter Hedsor Water, and that any which did should be challenged and the Agency's predecessors' lock-keepers telephoned with the name if it persisted. All these matters were strong indications that the Agency's predecessors accepted that Hedsor Water was not subject to any PRN. I do not think that the judge was right to disassociate the Agency or its predecessors from the conduct of their lock-keepers (or from knowledge of the Badcocks' sign). The Rowlands were, I think, entitled to expect that the Agency and its predecessors would have sufficient information about the affairs of the river to know that their lock-keepers were acting in this way and that the sign was there. Further, the fact that Hedsor Water was treated by all concerned as private seems to me to be a matter that could be expected to be communicated to the Rowlands, as it in fact was, by the Badcocks. Mr and Mrs Rowland were also shown by the Badcocks a copy of s. 232 of the 1894 Act or s.259 of the 1932 Act, which seemed "a striking confirmation of the special

nature of Hedsor Water". By itself the section could not, I think, have been significant, because it does no more than preserve any rights that existed. But it was capable of providing considerable comfort in the light of the actual facts brought to Mr and Mrs Rowland's notice by the Badcocks and by viewing of the estate.

145. The judge also found that Mr and Mrs Rowland were shown the written History. This was capable, at least on any thorough reading, of leading to questions whether Lord Boston had had any rights which could be preserved by s.232 or s.259. The judge said that it "made plain that the issue of PRN over Hedsor Water (to say the least) was highly contentious"; and he use this to support his finding (in para. 72) that:

×. it was not objectively reasonable on the occasion of the purchase of Hedsor Wharf, with solicitors instructed to act on the purchase to investigate title, for Mr and Mrs Rowland to rely on the representations which they did without making direct inquiries on the issue of the Defendant and without instructing their solicitors to investigate the question as part of the investigation of title".

146. I see no basis for disagreeing with the judge's conclusion that Mr and Mrs Rowland were given the History to read before the purchase in 1968. It appears to me to follow from Mrs Rowland's pleaded case (amended particulars of claim, paras. 17.4 and 28) and from her first statement (para. 3) and second statement (para. 8). I note that neither the appellant's notice, nor the skeleton lodged on Mrs Rowland's behalf (para. 26), took any issue with this finding. I see equally little basis for disagreeing with the judge's statement that the Agency "first learnt of the existence of the History shortly before the commencement of this action". The History is a one-off four volume account, "too rare and faded to leave Hedsor Wharf" in Mrs Rowland's own words in a draft letter of December 2000. There is no evidence that any copy was ever made, or that it or its contents have ever received any publication.
147. In these circumstances, it does not seem to me that the History can have relevance on the question whether the Agency and its predecessors, by words or conduct, made any representation to Mr and Mrs Rowland, which might now give rise to an expectation that the Agency would continue to treat Hedsor Water as private. The Agency cannot rely on the History to counteract any impression it may otherwise have conveyed, because it did not know that the Rowlands had it. Nor do I think that the Agency could make any assumption regarding the existence or level of the Rowlands' knowledge of the actual history of Hedsor Water in the 19<sup>th</sup> century, although Mrs Rowland pleads very detailed knowledge of such history (Amended Particulars of Claim paras. 12–23 and 28(1)). But the History, and such information about the actual history as Mrs Rowland may have derived from it or otherwise, may bear on the reasonableness of the Rowlands' reliance on any such representation, as well on the nature and extent of any relief which a court might consider appropriate. Judging by Mrs Rowland's statements, neither she nor her husband saw anything in the History to disturb them. They may not therefore have concentrated on its detail. There is no suggestion, and the evidence makes it unlikely, that they took legal advice on the privacy of Hedsor Water. While the conveyancing documentation is now incomplete, it is clear that the Badcocks did not in the conveyance give any undertaking along the lines of the representations that were made in Mrs Badcock's letter dated 20<sup>th</sup> August 1967 and orally. The conveyance to SCML in 1968, like the conveyance to the Badcocks in 1948 and to the Rowlands in 1974, simply passed

all such estate interest and rights as the Vendor has power lawfully to convey to the Purchaser in and over the bed of the river Thames between the said points marked A and B on the ×. plan ×."

Mrs Rowland's account regarding reliance is that she

felt confident in taking the advice of Mr and Mrs Badcock and acting on it in everything concerning Hedsor Water" (first statement para. 4).

148. Subsequent to the purchase of Hedsor Wharf, the Agency and its predecessors treated Hedsor Wharf as private in further communications and conduct. In particular, there was no challenge to Mr Rowland's architects' letter dated 21<sup>st</sup> May 1968 to their Secretary, referring to "the control" which Mr Rowland exercised over Hedsor Water; and on 13<sup>th</sup> December 1990 Mr Christie, by now the Navigation Secretary, acknowledged that Hedsor Water was outside the licensing provisions of the Thames Conservancy Act 1932, and took no objection to the erection of a sign saying "HEDSOR WATER No navigation or mooring ×. PRIVATE". Hedsor Water remained in practice private until November 2000. The Agency's lock-keepers from time to time assisted to keep it so and the Agency asked for permission to inspect the downstream side of the upper weir from a small boat from time to time.
149. If this were a case where the Rowlands had purchased Hedsor Wharf without concerning themselves with the private nature of Hedsor Water, but had found, while resident there during the last three or so decades, that Hedsor Water was treated by the Agency as private, Mrs Rowland could still assert that the Agency's representations and conduct over those decades gave rise to a legitimate expectation on her part. But this would, evidently, be a weaker form of expectation than she now puts in the forefront of her case. The property would not have been bought under a misconception. She would on the face of it have received no more than an uncovenanted benefit in the form of complete privacy. Her expectation of continuing enjoyment of that privacy would be dashed by any change of attitude by the Agency, but that expectation could only merit limited, transitional consideration.
150. The force of Mrs Rowland's present case therefore lies in her evidence that "We would not have looked at Hedsor Wharf had the property not enjoyed the sole right to use the stretch of river known as Hedsor Water" (second statement, para. 5). The reasons that the judge gave for rejecting this case included, first, his conclusion (cf paragraph above) that it was "not objectively reasonable" for the Rowlands to rely on the Agency's predecessors' representations on the occasion of the purchase of Hedsor Wharf, and, second, the fact that there was, in his view, no evidence that more was paid (in 1968 or 1974) for Hedsor Wharf than the value of Hedsor Wharf subject to PRN over Hedsor Water (para. 73). However that may be, Mrs Rowland's uncontradicted evidence is that, if the public could navigate along the river, it would totally remove the privacy and security of Hedsor Wharf, and (supported by Chestertons' letter of 27<sup>th</sup> May 2002) that there would be a severe financial effect on the *current* value of the property, certainly of 10% and perhaps of as much as 25% of its value. In these circumstances, Mrs Rowland might, possibly, have advanced a case that the Agency's representations since 1974 have led to her (and her husband while alive) remaining at Hedsor Wharf in the belief in its privacy, so depriving her or them of the opportunity of acquiring an alternative property which would have had the value which privacy on any view currently enjoys. No such case has been advanced. But the realistic view is, I consider, that the evidence justifies an inference that the value of Hedsor Wharf

would have been affected, even in 1968 and 1974, had it been known *then* that Hedsor Water was not private. Common-sense and the terms in which Mrs Badcock described the property to the Rowlands in 1967, lead to that inference, whether or not the differential would have been proportionately as great in 1967–1968 as in 2002.

151. Viewing the circumstances identified in paragraphs to above, it is necessary to consider the position at each of the three (potentially inter-related) stages mentioned in *Bibi* (cf paragraphs and above). In general terms, it is clear that the Agency conducted itself in a way which would tend to encourage in any owner of Hedsor Wharf (and did on the evidence, indirectly prior to the 1968 purchase and thereafter directly, encourage in Mr and Mrs Rowland) a belief that Hedsor Wharf was private. The Rowlands were also entitled to think that the Agency, as guardian of any PRN on the Thames, would know what the true position was. But there was no direct contact between the Agency and the Rowlands before 1968, and no formal contact between them in the context of either the 1968 or the 1974 purchase. Further analysis is therefore necessary as to the nature, scope and legitimacy of any expectation created by the Agency's conduct.
152. Whatever the previous position, I consider, in the light of the European Court decisions in *Pine Valley* and *Stretch*, that it can no longer be an automatic answer under English law to a case of legitimate expectation, that the Agency had no power to extinguish the PRN over Hedsor Water or to treat it as private. However, the present case differs significantly from those two cases. In *Pine Valley* and *Stretch*, the European Court was considering claims for relief against states. Those states undoubtedly had the power to pay compensation for any inability of the part of the public authority whose conduct was in issue to fulfil any legitimate expectation which it had created. Here there is before us no claim against the state, and indeed no claim for compensation against anyone. We are concerned simply and solely with a claim for declaratory relief regarding the conduct of the Agency, which can only act in accordance with its statutory mandate. That mandate involves preserving the PRN, and it is not suggested (nor could it be in the light of the public interest) that the alchemy of s.3(1) of the Human Rights Act 1998 can affect that mandate. The Agency was therefore bound in law to adjust its attitude, as it did in December 2000, once it became apparent that the PRN had never in law been extinguished. The Court cannot grant relief which would have the effect of obliging the Agency to continue to treat Hedsor Water as private. Lord Lester's submissions recognise this. The argument is that the Agency's mandate confers on it sufficient powers and discretion for it to be able to give effect to Mrs Rowland's legitimate expectation without any need to neglect or affect that mandate. If the Agency created in Mrs Rowland an expectation which should in European Convention terms be regarded as legitimate, but which goes beyond the Agency's discretionary powers to fulfil under domestic law, that might lead to some different claim for compensation against the state. But I understood Lord Lester to accept that this would not lie against the Agency (cf s. 6(2) of the Human Rights Act).
153. The present case thus resolves itself into issues regarding the nature (including the strength) of any expectation created by the Agency and the extent to which the Court both can and should grant relief requiring the Agency to take that expectation into account in the course of exercising its discretionary powers. For my part, I accept that the Agency's conduct conferred on Mrs Rowland a legitimate expectation to the effect, at least, that, should it transpire that Hedsor Water was not private, the Agency would, in reacting to any such discovery, take into account the previous common assumption of the Rowlands and of the Agency to the contrary and the fact that Hedsor Water has been effectively private (so far as

can be judged without any serious public discontent) over many years; and would smooth the position (as far as possible consistently with its duties to preserve the PRN) for Mrs Rowland while she owns and resides at Hedsor Wharf. Considerations which can and should properly be taken into account by the Agency in that regard include the long period of Mrs Rowland's previous residence at Hedsor Wharf with her husband, during which she has foregone any opportunity of moving elsewhere, together with her wish to continue to reside there and to make it into her main English home for the rest of her life. It seems to me very likely that the expectation encouraged in Mrs Rowland would also require the Agency, at least during an initial period, to consult Mrs Rowland, particularly with regard to any steps that might be proposed following the realisation that there was still in law a PRN over Hedsor Water. Since both the Agency (which could have been expected to have a good grasp of the true position) and the Rowlands were under the like misapprehension until December 2000, I cannot regard the Rowlands' failure to investigate or appreciate the true legal position prior to that date as undermining an expectation along these lines.

154. In my view the Agency has indicated that it both understands and intends to satisfy in any appropriate manner the expectation which I have identified in the previous paragraph. Once it concluded (correctly) that Hedsor Water was still subject to a PRN, the Agency could no longer display, or permit the display by Mrs Rowland, of incorrect signs to the contrary. That was in fact the only positive step, towards removing the physical privacy of Hedsor Water, that the Agency announced by its letter dated 20<sup>th</sup> February 2001. In the same letter it wrote:

The Agency is very mindful of Mrs Rowland's wish to enjoy ongoing privacy on the Hedsor Water and it is appreciated that the property will have been purchased on the understanding that the Hedsor Water is private. ×..

. I have no doubt that the Environment Agency would wish to avoid causing the present occupier, Mrs Rowland, any greater discomfort than is inescapably necessary for the removal of prohibited signage and for the upholding of public rights. Certainly we have no intention of promoting public use of the Hedsor Water and, as I say, we would wish to minimise for Mrs Rowland, as far as we properly can, the effect of any abatement of prohibition. The Agency would be less concerned for any incoming occupier, in succession to Mrs Rowland."

The letter went on to ask for a reply within two months, and to say that the Agency would 'of course' take no further action for the time being. No doubt, when deciding what if any further action to take, the Agency would bear in mind the absence, so far as appears, of any grave prejudice to date arising from the lack of public access to Hedsor Water. The judge spoke of grave prejudice to public interests if any effect were given to any expectation, but he must I think have had in mind permanent barring of all public access, despite the PRN. In reality, practical obstacles anyway appear to stand in the way of extensive navigation in the foreseeable future, namely the upper weir and the remnants of the lower weir which, even if it was otherwise appropriate to think of removing them, could presumably only be removed with difficulty and considerable expense.

155. The Agency's letter in my opinion well reflects the reduced potential, recognised in the *Reprotech* and *Henry Boot* cases, for giving effect to any expectation in circumstances where the public has an interest, in the form of the PRN which could not be overridden in

law and which it was and is the duty of the Agency, as guardian of the PRN, to preserve. I consider that an expectation, along the lines identified in paragraph sing its discretionary powers. For my part, I accept that the Agency's conduct conferred on Mrs Rowland a legitimate expectation to the effect, at least, that, should it transpire that Hedsor Water was not private, the Agency would, in reacting to any such discovery, take into account the previous common assumption of the Rowlands and of the Agency to the contrary and the fact that Hedsor Water has been effectively private (so far as can be judged without any serious public discontent) over many above, can still survive and require recognition, even in such a case. However, I agree with the judge and with Peter Gibson LJ that the letter satisfied in a sensitive way any such expectation. I add that I would reject Lord Lester's submission that this Court should in some way reserve jurisdiction over the performance by the Agency of its assurances. The most that can be done at this stage is to require the Agency in general terms to take any such legitimate expectation into account. How the Agency as an executive agency exercises its statutory powers in the future is for it to determine; it would be quite inappropriate, not to say impractical, to introduce a form of ongoing supervision in relation to future events (cf *Bibi* , especially para. 42, cited in paragraph 6 above). If in the future, Mrs Rowland considers that the Agency has acted in a manner which fails to respect the assurances contained in its letter, she may be able to raise that by subsequent separate claim.

156. The declarations sought on behalf of Mrs Rowland in this court appear to go further than the assurances contained in the Agency's letter dated 20<sup>th</sup> February 2001. As pointed out in paragraph above, they refer to any successor in title to Mrs Rowland. Many of the submissions advanced on Mrs Rowland's behalf before us proceeded on the basis that the Agency created a legitimate expectation which can be regarded as having led directly to the Rowlands purchasing Hedsor Wharf, when otherwise they would not have done so; and, furthermore, that it led them to purchase at a price greater than would have been obtainable had Hedsor Water not been viewed by all concerned as private. The submission is, I understand, that, since the matter should be viewed on the basis that the Agency effectively (though not of course deliberately) misled the Rowlands into purchasing Hedsor Water, the Agency is now bound to exercise its statutory powers, possibly even indefinitely, taking into account this past injustice, and/or the potential future loss which would result to Mrs Rowland on any re-sale if the expectation of privacy were to be undermined even in relation to a successor in title. Lord Lester, as I have said, also reserves Mrs Rowland's right to seek damages, or "just satisfaction" in monetary form, in some future proceedings, if and in so far as the Agency's powers cannot be exercised so as to give effect to that expectation.
157. It is at this point that I have reservations about the scope and strength of the suggested expectation. Although the principles applicable are those of public, not private law, it is in my view very relevant that (a) the Rowlands were here acquiring a property for their own use; (b) that they alone knew the factors which were important for them in deciding whether or not to buy it; (c) that, although they received and relied on representations from the Badcocks, the conveyance from the Badcocks did not, of course, either convey or describe Hedsor Water as private; (d) that they did not approach the Agency's predecessors to obtain any assurance as to the private nature of Hedsor Wharf – if they needed or wanted assurances from the Agency as to the basis of which they could purchase Hedsor Wharf and to which they could later hold the Agency, this would have been, in my view, an obvious course to take; (e) that the existence or otherwise of a PRN is not a matter on which the Agency could, in any event, give any absolute assurance – as with public footpaths, bridleways and other highways (which a local authority responsible for keeping them open may in fact neglect to keep open, so that they lie unused for years), so a PRN may lie

unused without the public's legal right being in any way affected; and (f) the Rowlands had full access to their own legal advisers on the issue whether a PRN existed – yet, so far as appears, they took no legal advice to assure themselves that there was no PRN; and, if (improbably) they did take such advice, it must follow from the rest of their case that the advice received was erroneous, in which case they would, on the face of it, have a potential claim to compensation against the lawyers who advised.

158. In relation to (d), I add that I do not accept as in any way likely that, if the Rowlands had gone to the Agency's predecessors and asked, in the context of an impending decision to purchase, for confirmation that Hedsor Water was private, they would have received any response which could have thrown onto the Agency responsibility for any loss resulting, if it later turned out that Hedsor Water was not private. The Agency would have had to be unwise indeed to commit itself, gratuitously, to any such response. I do not think that the Agency's conduct or communications accepting that Hedsor Water was private, in contexts where no significant financial risk attached to the answer, is any guide as to the Agency's likely response, if the Rowlands or their lawyers had asked for assurance in the context of an impending decision to purchase. The likelihood is that any approach to the Agency would have received a non-committal reply. But if the Agency was prepared to go into the matter any further, I agree with the inference that its investigations would probably soon have led to it realising that the existence of a PRN could not be excluded.
159. These circumstances outlined in the previous paragraphs to my mind tend to limit the level and strength of any expectation in favour of Mrs Rowland to which the Agency's past conduct and communications may be said to have given rise. I would not analyse this conclusion in terms of objective reasonableness or unreasonableness, as the judge did. This puts the matter too high, particularly when (as in *Stretch* : paragraph above), both parties shared the same misconception, and the Agency, as guardian of the PRN, was well-placed to know, and should have known, the actual legal position. I prefer to approach the matter on the basis that it was open to the Rowlands to take any course and any risk they liked when purchasing Hedsor Wharf: cf the quotations from the *Henry Boot* and *Stretch* cases in paragraphs and above.
160. In summary, if and so far as the Rowlands relied, when purchasing Hedsor Wharf, on conduct by the Agency, communicated indirectly in circumstances where the Agency were unaware of the basis on which Hedsor Wharf was being purchased, that was first and foremost a matter for the Rowlands. I consider that it would be wrong to assess the nature and strength of any expectation created by the Agency as if the Agency was effectively answerable for the Rowlands' purchase of Hedsor Wharf under a misapprehension as to the privacy of Hedsor Water. It is true that the Agency in its letter dated 20<sup>th</sup> February 2001 accepted, as a matter of fact, that the Rowlands would have purchased Hedsor Wharf on the understanding that it was private. But the Agency was in my opinion justified in going on to say that its concern, following its realisation that the PRN still existed over Hedsor Water, would relate primarily to Mrs Rowland's position, and that it would be less concerned for any incoming occupier.
161. In this respect too, both *Pine Valley* and *Stretch* were in my judgment very different cases to the present; and the distinction is not purely formalistic as Lord Lester suggests. In *Pine Valley* the minister's grant of outline planning permission was an official decision creating legal rights, formally recorded for public use; even in that situation, it was held that purchasers bore the risk that the right might be nullified. In *Stretch* the borough council was



the other contracting party in an apparently straight-forward commercial transaction, whereby the council granted an option for an additional term, a grant which must clearly and fundamentally have shaped the consideration obtained by the council from the other party. The council's inability in law to grant such an option pursuant to its own direct contractual undertaking led, not surprisingly, to the grant of relief to the other party to the contract.

162. In the present case, the Agency was never asked to, and did not, issue any formal statement or enter into any direct commercial relationship with the Rowlands. Still less did it purport to convey to the Rowlands any right for which the Rowlands paid anything. The Agency and the Rowlands were never in direct contact before the purchase in 1968. After 1968, there were occasional communications, some expressly accepting the private status of Hedsor Water. But in none of them was the private status of Hedsor Water in issue in any direct commercial sense coming close to that attaching to the ability to grant an option in *Stretch* or the validity of the planning permission in *Pine Valley*. What the Agency in reality did was continue to treat Hedsor Water as private - something on the face of it to the benefit of the owners of Hedsor Wharf - in circumstances where this has now proved wrong. Neither *Pine Valley* nor *Stretch* in my view therefore lends support to an argument that the legitimate expectation created by the Agency in the present case should be regarded as having a scope beyond that identified in paragraph 159. For my part, I accept that the Agency's conduct conferred on Mrs Rowland a legitimate expectation to the effect, at least, that, should it transpire that Hedsor Water was not private, the Agency would, in reacting to any such discovery, take into account the previous common assumption of the Rowlands and of the Agency to the contrary and the fact that Hedsor Water has been effectively private (so far as can be judged without any serious public discontent) over many years; and it follows that that expectation would be satisfied by performance of the assurances given in the Agency's letter dated 20<sup>th</sup> February 2001.

### *Conclusion*

163. I would supplement the declarations granted to the Agency by a further declaration to the effect that the Agency was obliged to take into account in the exercise of its statutory functions the common assumption prior to November 2000 of the Rowlands and of the Agency to the effect that Hedsor Water was private, as indicated in its letter dated 20<sup>th</sup> February 2001. But I would go no further in allowing this appeal.

Order: Appeal dismissed. Order as per minute of order.

(Order does not form part of the approved judgment)