

C30MA228.

Neutral citation number: [2017] EWHC 810 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

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

Monday 27th March 2017.

Before:

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

Between:

JASON VICTOR FULLER

Part 20 Claimant

and

(1) DIANA CAROLYN KITZING
(2) MARK EBERHARD KITZING

Part 20 Defendants

MR THOMAS GRANT QC and MR CHRISTOPHER NEWMAN (*instructed by Claremont
Litigation, Leeds LS1 3BE*) appeared for the Part 20 Claimant

MR CHARLES HARPUM (*instructed by Loxley Solicitors Ltd, Wotton-under-Edge, GL12
8RL*) appeared for the Part 20 Defendants

*Digital Tape Transcription by:
John Larking Verbatim Reporters
(Verbatim Reporters and Tape Transcribers)
Suite 305 Temple Chambers, 3-7 Temple Avenue, London EC4Y 0HP.
Tel: 020 7404 7464 DX: 13 Chancery Lane LDE*

JUDGMENT

Monday 27th March 2017

1. This is the trial of the three remaining preliminary issues in litigation between Mr Jason Victor Fuller (as Part 20 Claimant) and Mrs Diana Carolyn Kitzing and her adult son Mr Mark Eberhardt Kitzing (as Part 20 Defendants). The three remaining preliminary issues are said to raise novel and important questions about the nature and incidence of rights of shooting and of way which may have important implications for the practice of shooting in England and Wales. Mr Fuller is the freehold and long leasehold owner of Winsley Hurst Hall and some 30 acres of surrounding land at Burnt Yates, Harrogate in the county of North Yorkshire. Mrs Kitzing is one of the trustees of the surrounding and neighbouring Winsley Hurst Estate and she is also the owner of the sporting rights over Winsley Hurst Hall which used to be within the ownership of the Estate.
2. The litigation started life on 29th February 2016 as a Part 7 claim by Mrs Kitzing against Mr Fuller to restrain him from felling trees and cutting back ground cover on his land, allegedly to the detriment of Mrs Kitzing's sporting rights. There was an application for interim injunctive relief against Mr Fuller which was dismissed by me in an extempore judgment delivered on 31st March 2016 which bears the neutral citation number [2016] EWHC 804 (Ch). Essentially I held that there was just about an arguable case of interference with Mrs Kitzing's sporting rights but that there was no present threat of any activity against which the protection of interim injunctive relief was needed; that the injunctions sought were too broad and lacking in clarity; and that the grant of an interim injunction would have had a stifling effect upon the activities of Mr Fuller which was not justified on the evidence before the Court.
3. Although the focus of the previous hearing was on the clearance of ground cover, which is no longer an issue in this litigation, my earlier judgment contains much useful background material about the nature of the dispute between the parties which I do not propose to repeat in this judgment.
4. Following on from the hearing last March Mr Fuller brought a Part 20 counterclaim against Mrs Kitzing and her adult son, who effectively manages the shoot on her behalf. There was an unsuccessful attempt at alternative dispute resolution after

which, on 29th September 2016, Mrs Kitzing discontinued the whole of her claim against Mr Fuller, leaving only his Part 20 claim outstanding.

5. At a Costs and Case Management Hearing on 7th October 2016 I ordered the trial of six preliminary issues and gave procedural directions in support thereof, including permission for each party to adduce evidence from experts in the field of sporting rights *'as to the effect and practice of shooting in the vicinity of residential properties.'*
6. On 4th January 2017 Mr Fuller conceded three of the original preliminary issues leaving three outstanding, one of which was slightly reformulated by agreement between the parties.
7. The trial of those preliminary issues took place over three Court days between Monday 20th and Wednesday 23rd March 2017. Mr Fuller was represented by Mr Thomas Grant QC leading Mr Christopher Newman, as he had been at the interim injunction hearing in March 2016, whilst Mrs Kitzing and her son were represented by Mr Charles Harpum of counsel, who had not appeared before me last March. Both sets of counsel had submitted detailed written Skeleton Arguments supported, in the case of Mr Grant and Mr Newman, by some 48 case law and textbook authorities, with some 10 additional authorities from Mr Harpum. In closing, some 12 further authorities were placed before me.
8. On the morning of Day 1 Mr Grant opened his case for a little under two hours and Mr Harpum responded for a little over 30 minutes. On the afternoon of Day 1 I heard oral evidence from the only two live witnesses: Mr Fuller for about 20 minutes in cross-examination and 10 minutes in re-examination, and from Mrs Kitzing for about an hour and 20 minutes in cross-examination.
9. On the morning and early afternoon of Day 2 I heard from the two shooting experts Mr Adrian Thornton-Berry, of Farmoor Services (Rural Advisers and Valuers) of North Yorkshire for Mr Fuller, and from Mr Charles Andrew Huntington-Whiteley of Strutt & Parker's Exeter office for Mrs Kitzing. Both joint experts had agreed a joint statement in early March 2017. Mr Thornton-Berry gave evidence before me for a

little over an hour and a quarter and Mr Huntington-Whiteley for about one and a half hours.

10. Mr Harpum then addressed me for about one and a half hours on the afternoon of Day 2 and for a similar time on the morning of Day 3. After a short break Mr Grant addressed me, with the assistance of a written speaking note, for a total of a little under two and a half hours, concluding at about 3.50 on the afternoon of Day 3.

11. At the request of the parties I was asked to defer delivering an oral judgment until 10.30 on the morning of Monday 27th March with consequential matters being deferred to a hearing, to be attended by counsel, which is presently scheduled for Friday 21st April 2017 with the time for applying for permission to appeal being extended until then. In the event I had to defer delivering judgment until two o'clock today (Monday 27th March) because, whilst in the course of preparing my judgment, on the afternoon of Thursday 23rd March I received emails with attached further written submissions from both Mr Grant and Mr Newman for Mr Fuller and from Mr Harpum for Mrs Kitzing. As a result I had to interrupt the preparation of this judgment to deal with those further submissions and attend to the email traffic as a result of which, given other official commitments between last Thursday and today, I needed the morning of today to finish sketching out this judgment.

12. I am attended today by representatives from the parties' solicitors, Mr Blease and Mr Inglis.

13. At the outset of this judgment I should make it clear that I conceive my primary function as a judge of first instance to be to find the relevant facts and to set out my reasons for deciding the crucial legal points in a particular way, doing so in sufficient detail to show the parties – and if need be, the Court of Appeal – the principles on which I have acted and the reasons that have led me to my decision. Those reasons need not be elaborate and there is no duty upon me to deal with every argument advanced by counsel in support of his case provided I sufficiently set out my conclusions and give my supporting reasons. I should also remember - even though ground clearance no longer features in this case - that I should not lose sight of the wood for the trees.

14. Before dealing with the evidence and identifying the issues it is important, in order to place them in to focus, to deal with the historical and conveyancing background to this present unfortunate dispute. This began in 1916 when Mrs Kitzing's maternal grandfather, Mr Thomas Brewster, began acquiring the land which now forms the Winsley Hurst Estate. On his death in the 1950s he left the Estate with its shooting rights to his daughter, Mrs Katharine Dunbar, who was Mrs Kitzing's mother.
15. Having inherited the Estate from her father, on 21st April 1989 Mrs Dunbar granted a lease to Mr and Mrs Brooks for a term of 999 years. That lease was registered with Title No NYK71206 which is now the registered leasehold title of a property adjoining that owned by Mr Fuller and known as Hartwith Hall. By clause 1 of the Lease the grant was subject to certain exceptions and reservations in favour of the lessor as set out in the Third Schedule. Two of these are relevant for present purposes. First, paragraph 1 of the Third Schedule, so far as relevant, was a right of way for the lessor, for the benefit of herself and her successors in title, in common with the lessees and all other persons authorised by them over the road coloured orange 12 feet wide shown on the plan for all purposes. The identifying plan is at bundle 2, divider 12, p. 225. The road coloured orange runs in part along the north-western boundary of Winsley Hurst Hall and forms part of the leasehold title to Hartwith Hall to the east of Winsley Hurst Hall. Secondly, paragraph 7 of the Third Schedule reads as follows:

'There are reserved to the Lessor, her successors in title and her or their servants, agents or invitees all sporting rights including fox hunting over the Estate to include without prejudice to the general reservation of such rights the following rights (a) the right to stand guns on the Estate; (b) the right to take game and game eggs; (c) the right to come on to the Estate for the purpose of exercising the sporting rights and their management but no game shall be reared on the Estate nor fed thereon except on the duck pond.'

The "Estate" was the land demised by the lease: see the recitals in the First Schedule.

16. On 30th May 1990 Mr and Mrs Brooks transferred that part of the leasehold land which now forms the core part of Winsley Hurst Hall and its gardens to Mr Spencer

and connected parties. This transfer is at bundle 2, divider 13, pp. 230-237. The registered leasehold title to Winsley Hurst Hall is Title No NYK90290 and up-to-date office copy entries can be found at bundle 4, divider 15, pp. 547-550 where the registered proprietor is shown as Mr Fuller. It is important to appreciate that this registered leasehold title is extant and has not been closed. The land retained by Mr and Mrs Spencer was the land to the east now known as Hartwith Hall and it included the road coloured orange running in part along the north-western boundary of Winsley Hurst Hall.

17. Mrs Dunbar died in 1997. The executrices and trustees of her Will were Mrs Kitzing and one of her three sisters, Mrs Pamela Holden. The Will is at bundle 2, divider 15, pp. 246-260. Clause 10 of the Will contained the following gift to Mrs Kitzing, who was referred to as Diana:

'10. Sporting rights to Diana.

10.1 In this clause the expression 'sporting rights' shall mean the exclusive right with friends and others of shooting, fishing, grouse, fowling, fox hunting and sporting over and taking all manner of fish, game, woodcock, snipe, quail, hares, rabbits, wildfowl, deer and trapping vermin and the right to preserve and rear game for normal shooting purposes.

10.2 I give and devise all the sporting rights which I now enjoy in and over the whole of my lands and Estates at Winsley Hurst near Burnt Yates aforesaid which I inherited from my late father Thomas Fox Brewster including all such sporting rights owned by me which have been reserved and retained over any Freehold or Leasehold land which I have sold to Diana absolutely free of taxes.

10.3 In the conveyance of the same to Diana and for the proper enjoyment of the sporting rights there shall be granted full rights for Diana, her family, employees, agents, invitees and successors in title to enter upon all the said land and Estates at all times without notice with or without motor vehicles and in particular over and along the two driveways from the main road to Winsley Hurst mansion house and to Winsley Grange and over and along the track between the said properties.

10.4 *I express the sincere hope without creating any legally binding obligation that the sporting rights are retained in the ownership of Diana and her family for at least 60 years from my death and that Diana and her family will give my other grandchildren and their descendants the opportunity to enjoy the sporting rights as much as I have done during my ownership.'*

18. By clause 14 of the Will Mrs Dunbar directed her trustees to hold her residuary estate on trust as to four equal shares for her four daughters for their respective lifetimes with remainders over for their children. The residuary estate comprised most of the Winsley Hurst Estate, Title No NYK235232. By an Assent dated 7th July 1998 the executrices assented to the vesting in Mrs Kitzing of the rights described in Schedule 1 in fee simple *'subject to and where appropriate with the benefit of the matters specified in Schedule 2 so far as they respectively still subsist and are capable of being enforced and relate to the rights.'* The Assent is at bundle 2, divider 16, pp. 262-267. The relevant paragraphs of Schedule 1 read as follows:

'1. The exclusive rights with friends and others of shooting, fishing, grouse, fowling, fox hunting, hunting with hounds and sporting over and taking all manner of fish, game, woodcock, snipe, quail, hares, rabbits, wildfowl, deer and trapping vermin, and the right to preserve and rear game for normal shooting purposes over the whole of the land known as the Winsley Hurst Estate, Burnt Yates near Harrogate, shown edged red on the plan attached to this Assent and described together with other land in an Assent dated 31st December 1965 between (1) Katharine Anne Dunbar as the personal representative of Thomas Fox Brewster and (2) Katharine Anne Dunbar.'

19. I was not shown the Assent dated 31st December 1965, which was not in evidence before me. I was however told that that assent merely described the land comprised within the Winsley Hurst Estate and that it was not otherwise relevant to the matters I have to decide on the trial of these preliminary issues. Paragraph 3 of Schedule 1 reads:

'The right for the beneficiary, her family, employees, agents, invitees and successors in title to enter upon the said land edged red at all times without

notice with or without motor vehicles and in particular over and along the two driveways from the main road to Winsley Hurst mansion house and to Winsley Grange and over and along the track between the said properties.'

The wording of paragraphs 1 and 3 echoes the language of clause 10 of the will. Schedule 2 referred to '*the rights, easements, covenants, agreements and declarations, exceptions, reservations, stipulations and provisions and other matters contained or referred to*' in the following documents. Those documents included the 21st April 1989 Lease of Winsley Hurst Hall and Hartwith Hall to Mr and Mrs Spencer which had by then been severed between these two properties. In my judgment, and contrary (I think) to the submissions of Mr Grant, I hold that the 1998 Assent operated to vest in Mrs Kitzing the sporting rights which had been reserved to Mrs Dunbar by the 1989 Lease. They were sporting rights which she enjoyed and had the power to dispose of at the time of her death. Such disposition was effected by her will and the consequent Assent. They comprise property rights in the nature of a profit a Prendre, which is an incorporeal hereditament lying in grant. The sporting rights are now registered in Mrs Kitzing's name as a freehold profit a prendre in gross under Title No NYK403338 at bundle 4, divider 15, pp. 551-555 (although the file plan is missing): see, in particular, entry No 10 in the property register.

20. On 10th January 2012 the executors of Mr Spencer transferred the leasehold title to Winsley Hurst Hall and its then gardens to Mr Fuller and he became the registered proprietor of leasehold Title No NYK90290 on 23rd February 2012. Mr Fuller proceeded to carry out extensive renovations to the house and he did not move in until the end of May 2013. He was therefore living there during the 2013-2014 and 2014-2015 shooting seasons. In re-examination by Mr Grant, Mr Fuller acknowledged that during the previous six months i.e. during the 2016-2017 shooting season, the shooting had got better; but he added that during the two seasons before that - in other words, the 2014-2015 and 2015-2016 seasons - the shooting had been 'a nightmare', commenting that coming on to the lawn with a gun by those engaging in shooting activities had been 'just ridiculous' – it had been 'too close to the house.' Efforts by Mr Fuller to acquire the freehold to Winsley Hurst Hall during 2012 had come to nothing but he finally succeeded in taking a transfer of the freehold reversion, together with additional land, on 27th February 2015. The transfer is at bundle 2, divider 19,

pp. 334-346. Mr Fuller was registered as the proprietor of the freehold title under Title No NYK422262 on 18th March 2015. The office copy entries are at bundle 3, divider 6, pp. 131-135. They make it clear that the freehold land remains subject to the 21st April 1989 Lease: see entry No 6 on the charges register and the sole entry, numbered 1, of the Schedule of Notices of Leases.

21. The part of the Estate which the trustees retained (Title No NYK235232) was called in the transfer “the Retained Land”. The transfer also referred to ‘the roadways’, which were defined by clause 1.7 by reference to two plans at bundle 2, divider 19, pp. 335-336 where they were coloured yellow. Reference should be made to those plans for the full extent of the roadways. The transfer was made subject to certain exceptions and reservations in clause 3:

‘The following rights are excepted and reserved for the benefit of the Retained Land and each and every part of it: ... 3.7. A right of way on foot and with or without vehicles and machinery over any access ways on the property for the seller and others authorised by them for the purposes of extracting timber; also for all agricultural usages including the passage of herded animals from the Retained Land and for all other reasonable purposes. 3.8 A right of way for the seller, members of the seller’s family, their tenants, agents and all others authorised by them for all purposes over and along the roadways on foot or with or without animals, machinery, vehicles or other equipment.’

22. Clause 4 provided:

‘For the avoidance of doubt all rights of sporting being those contained in an Assent made on 7th July 1998 between Pamela Victor Lorraine Holden and Diana Carolyn Kitzing of the first part and Diana Carolyn Kitzing of the second part (‘the 1998 Assent’) are excluded from this Transfer as these are not included within Title NYK235232 and the property is transferred subject to sporting rights granted by the 1998 Assent which assented the following rights to Diana Carolyn Kitzing. 4.1 The exclusive right with friends and others of shooting, fishing, grouse, fowling, fox hunting and sporting over and taking all manner of fish, game, woodcock, snipe, quail, hares, rabbits, wildfowl, deer

and trapping vermin, and the right to preserve and rear game for normal shooting purposes over the whole of the land known as the Winsley Hurst Estate, Burnt Yates near Harrogate, shown edged red on the plan attached to this Assent and described together with other land in an Assent dated 31st December 1965 between (1) Katharine Anne Dunbar as the Personal Representative of Thomas Fox Brewster and (2) Katharine Anne Dunbar. 4.2 The right for Diana Carolyn Kitzing, her family, employees, agents, invitees and successors in title to enter upon all the said land and estates at all times without notice with or without motor vehicles and in particular over and along the two driveways from the main road to Winsley Hurst mansion house and to Winsley Grange and over and along the track between the said properties.’

Clauses 4.1 and 4.2 replicated paragraphs 1 and 3 of Schedule 1 of the 1998 Assent (previously cited).

23. Mr Harpum submits that the effect of these dealings and documents is as follows:

First, having regard in particular to clause 10.2 of the will, paragraph 1 of the First Schedule to the Assent would have vested in Mrs Kitzing the benefit of the sporting rights that had been excepted and reserved in paragraph 7 of the Third Schedule to the Lease. Secondly, when Mr Fuller took an assignment of part of the land demised by the Lease of the main house in 2012 he necessarily took it subject to those sporting rights, which expressly included the rights (1) to stand guns on the land subject to the Lease, and (2) to come on to the land for the purposes of exercising the sporting rights and their management. Those rights expressly excluded any right to rear game intensively on the demised land and to feed game thereon (except on the duck pond). Thirdly, when Mr Fuller acquired the freehold land under the 2015 Transfer he purchased it expressly subject to the sporting rights that had been vested in Mrs Kitzing by the 1998 Assent. Those sporting rights would have included the rights reserved in the 1989 Lease in relation to that part of Winsley Hurst Hall that remains subject to that Lease; only a part of the freehold land was subject to the 1989 Lease, which remains on foot and has not been merged in the freehold.

24. Accordingly, Mr Harpum submits: (1) that as regards that part of Winsley Hurst Hall that is the subject of the 1989 Lease, Mrs Kitzing has the benefit of, but is subject to,

the restrictions on the rights set out in paragraph 7 of the Third Schedule to the Lease; and (2) as regards the remainder of the land that was conveyed to Mr Fuller in 2015, Mrs Kitzing has the rights set out in paragraphs 1 and 3 of Schedule 1 to the 1998 Assent (subject to any determination to the contrary in these proceedings). These rights include a right to preserve and rear game for normal shooting purposes. There is said to be a difference from the 1989 Lease because the right to rear game is largely excluded as regards the land demised by the Lease.

25. I accept these submissions of Mr Harpum. The first part of his submission reflects paragraph 11(1) of the Reply and Defence to Counterclaim, which asserts that the 1989 Lease is subject to the exceptions and reservations contained in the Third Schedule, that Mr Fuller holds subject to those rights, and that Mrs Kitzing has the benefit of those rights by reason of the grant to her of those rights in the 1998 Assent. Similar averments are made at paragraphs 10 and 12-14 of the original Particulars of Claim. Paragraph 31(3) of the Reply notes that by paragraph 7 of the Third Schedule to the Lease, Mrs Kitzing is specifically entitled to stand guns on the land demised and that that right would be redundant if there was a 300 metre limitation, as asserted by Mr Fuller.

26. Mr Grant submits that Mr Fuller now owns both the 1989 Lease and the reversionary interest from which it is carved out so, to the extent that the Lease reserved rights to the lessor, in 2015 they became vested in Mr Fuller and not in Mrs Kitzing. Even before that, they had vested in the four daughters of Mrs Dunbar jointly as the trustees of her estate and not in Mrs Kitzing alone. Another way of putting the same point is said to be that Mr Fuller is now the successor in title to Mrs Dunbar, to whom the rights were reserved by the Lease.

27. I reject these arguments. They ignore the points: (1) that both the leasehold and freehold estates and titles are extant: there has been no merger; and (2) the sporting rights reserved by the Lease were (a) severed from the freehold reversion and separately transferred to Mrs Dunbar by the 1998 Assent, and (b) by clause 4 of the 2015 Transfer expressly excluded from the transfer of the freehold to Mr Fuller, who took, in terms, subject to the 1998 Assent in favour of Mrs Kitzing. The successor to

the sporting rights reserved in the lease to Mrs Dunbar is, by virtue of the 1998 Assent, Mrs Kitzing.

28. Whilst I was in the course of preparing this judgment in draft, Mr Grant and Mr Newman produced a further Note dated 23rd March 2017 (to which, dropping everything else, Mr Harpum responded later the same afternoon). In their Note counsel for Mr Fuller assert that no reasonable reader of the 1998 Assent would have taken the view that the intention of the Assent had been to sever from the freehold title of the small area of land - said to be five acres - which had originally been let to Mr and Mrs Brooks the rights reserved by the Third Schedule. I reject this further submission. I note that there is no question of the severance of **all** of the rights reserved by the Third Schedule but only of the sporting rights and their ancillary rights of entry and of way. Mr Grant submits that no reasonable reader would conclude that the 1998 Assent was intended to interfere with, and modify, the landlord and tenant relationship as specifically set out in the Lease and as continued for the period 1998 to 2012. I agree, save in respect of the sporting rights reserved to the lessor and their ancillary rights of entry and of way. The reasonable reader would, in my judgment, conclude that the 1998 Assent was intended to give effect to the relevant gift in the testatrix's last Will. This made it clear (by clause 10.2) that it was intended to extend to all of the sporting rights which the testatrix enjoyed in and over the whole of her lands and estates at Winsley Hurst 'including all such sporting rights owned by me which have been reserved and retained over any freehold and leasehold land which I have sold.' This clearly included the sporting rights reserved by Mrs Dunbar when she sold off land to Mr and Mrs Brooks in 1999 for a term of 999 years in return for £390,000. The words 'in fee simple' in clause 1 of the 1998 Assent made it clear that the executrices were also assenting to the vesting in Mrs Kitzing of the reversion to the sporting rights at the end of the 1989 Lease as well as the reservation of the sporting rights during the term of that Lease. As Mr Harpum points out: (1) under the 1989 Lease the lessor had both the freehold reversion and, by virtue of the exception and reservation of sporting rights, a separate profit for a term of years equivalent to the term of the Lease; and (2) after the 1998 Assent it was Mrs Kitzing, and not the Estate, that exercised the sporting rights reserved by the Lease during the period 1998 to 2015 without any objection from Mr Fuller. Of course, in one sense the continued existence of the Lease is of benefit to Mr Fuller since he is able to rely upon the exception at the

end of paragraph 7(c) of the Third Schedule to prevent the intensive rearing or feeding of game on the leasehold land (other than feeding on the duck pond).

29. Against that background I proceed to identify the preliminary issues I have to decide.

The preliminary issues which have now been conceded by Mr Fuller are as follows:

(a) whether the right of way granted in Schedule 1 paragraph 3 of the 1998 Assent was a valid easement that accommodated the sporting rights granted by Schedule 1 paragraph 1 of the Assent – that was the first preliminary issue; (b) whether as a matter of construction the sporting rights granted to Mrs Kitzing by Schedule 1 paragraph 1 of the Assent can only be exercised if she is present – that was the second preliminary issue; and (c) whether the rights granted to Mrs Kitzing by Schedule 1 paragraph 1 of the Assent would terminate on her death – that was the fifth preliminary issue.

30. The Court is therefore asked to determine only the three remaining preliminary issues, namely:

(a) whether the sporting rights granted to Mrs Kitzing by Schedule 1 paragraph 1 of the 1998 Assent authorise her (1) to preserve and rear game or (2) to introduce poults (or young pheasants) on to Mr Fuller's land. This was originally the third preliminary issue and has been described by Mr Grant as "the profit a prendre issue";

(b) whether as a matter of construction the sporting rights granted to Mrs Kitzing by Schedule 1 paragraph 1 of the 1998 Assent can lawfully be exercised within 300 metres of the main house or some other distance from the main house; alternatively can be lawfully exercised on the garden of the main house – the garden is defined by reference to a plan at bundle 2, divider 23, pp. 436-436A, and shows the garden as it is now cross-hatched. This was originally the fifth preliminary issue. The wording of this issue was amended by agreement between the parties. Mr Grant describes this as "the proximity issue"; and

(c) whether the rights of way excepted and reserved in clauses 3.7 and 3.8 of the 2015 Transfer are subject to the limitations pleaded in paragraph 21 of the Defence and Counterclaim, which is at bundle 1, divider 3, p. 23. This was originally the sixth preliminary issue. It has been described by Mr Grant as “the right of way issue”.

31. The only factual evidence was that given by Mr Fuller and Mrs Kitzing. I derived little assistance from this evidence because the issues I have to decide are essentially issues of law. Indeed, in answer to Mr Grant’s repeated questions as to the extent of her ancillary sporting rights, Mrs Kitzing rightly referred to the need to consult her lawyers. There was no challenge to the honesty of either witness’s evidence. I find that despite genuine efforts on the part of Mrs Kitzing to prevent this, during the 2016-2017 shooting season spent shot has fallen on and around Mr Fuller’s house on eight occasions, on five separate shooting days, as set out at paragraph 3 of Mr Fuller’s fourth witness statement dated 6th March 2017. I note that at paragraph 15 of her witness statement Mrs Kitzing states that for the past two years they have reminded all of their guests that if they are shooting in the vicinity of the house they should not shoot towards it. I also note that this is not expressly mentioned in the Winsley Shoot’s written Health and Safety Policy. I note that in cross-examination Mrs Kitzing was adamant that the Shoot would not place guns so as to shoot from Mr Fuller’s terrace.

32. For what it is worth – because I accept Mr Grant’s submissions that such evidence is (a) inadmissible on an issue of construction and (b) cannot in any event affect the construction of a pre-existing document such as (in this case) the 1998 Assent – I also find that Mr Fuller really wanted to acquire the freehold land from the trustees; he appreciated that the sale would not happen without the exclusion of the sporting rights; and he proceeded on the basis of the documentation proffered to him, and in the hope that everything would be fine, even though, on the basis of his own evidence as to the ‘nightmare’ 2014-2015 shooting season, and his own experience of never having shot so close to anyone’s house, he must have appreciated that there would be problems ahead.

33. Turning to the expert evidence, Mr Fuller's solicitors reformulated the questions for Mr Thornton-Berry as follows:

'1. Whether in your experience there is any settled practice as to whether shoots go upon the gardens or terraces of residential property within the area of the shoot?

2. Whether in your experience there is any settled practice as to how shoots set out/up their stands to discharge their weapons in the vicinity of residential property within the area of the shoot?

3. How or whether in your experience shoots seek to accommodate the existence of residential property within the area of the shoot?'

Mr Thornton-Berry's answers are at Section 10 of his report as follows:

'1. No reasonable participant in a shoot would go upon a garden or terrace without prior notification to and agreement of the owner. In the event of an injured bird making its way within close proximity of the house, retrieval should only ever take place after the occupants have been notified.

2. Organised shoots should not put out gun stands where guns can be discharged at or over residential property. I would recommend guns to be placed a minimum of 300 metres from any substantial property like Winsley Hurst Hall to ensure that there is no risk of injury or nuisance caused.

3. It is possible by moving the location of flushing points in drives and the gun stands to avoid the risks of dangerous shots being taken near a domestic residence and to prevent the nuisance of falling shot on such residence. Birds can be moved to better flushing points by moving feeders and/or cutting drives, felling trees to encourage birds to fly. The use of sewing or strips of plastic fastened to a line, or stops (shoot staff members) to prevent birds running through the flushing point, could also be used in continuous woodland such as at Winsley.

In cross-examination Mr Thornton-Berry said that his answers presupposed the land in question was subject to shooting rights.

34. Mr Huntington-Whiteley's conclusions were at paragraphs 5.58 to 5.60 of his expert report:

‘5.58 Had it been intended that the claimant be restricted in the exercise of the sporting rights I would have expected to see such restriction set out in Schedule 1 of the Assent dated 7th July 1998. My understanding of this Schedule is that there is no curtailment of the right to shoot in the manner that shooting currently takes place on the wider Estate or in the proximity of the defendant's house.

5.59 What is clear from my professional and personal experience over the last 40 years is that there is no accepted norm regarding shooting within the proximity of residential properties and that each shoot will operate depending upon a number of factors such as the legally permitted activity set out in a conveyance, lease or similar; the topography and features of the relevant area; the individual shoot operator's aims and aspirations; the financial costs and returns; and where sporting rights are severed from the land the degree of co-operation between relevant parties notwithstanding legal rights and restrictions.

5.60 Taking all the above into account and relating it back to the Winsley Hurst Estate Shoot and the defendant's property and whilst I understand the desire of the defendant to limit or cause to cease the shooting activities in the proximity of his house, the claimant is carrying out the activities associated with shooting in a reasonable manner bearing in mind the documents I have seen.’

The Claimant for these purposes is Mrs Kitzing, the Part 20 Defendant; and the Defendant is Mr Fuller, the Part 20 Claimant.

35. In cross-examination Mr Huntington-Whiteley said that he was not sure that he had seen Mr Fuller's fourth witness statement, which post-dated his expert's report.

36. In the experts' joint statement (at bundle 1, divider 11) Mr Huntington-Whiteley had said that he had been instructed to give his opinion on the single issue set out at paragraph 9 of the Court's Order of 7th October 2016. Mr Thornton-Berry had been instructed to give his opinion on the same issue, which his instructing solicitor had then distilled into three further questions. Since Mr Huntington-Whiteley had no instructions to opine on those three questions he had declined to comment either on Mr Thornton-Berry's opinions or to give his opinions on those matters: see paragraph 3.02 of the joint statement.

37. The experts' agreed opinions so far as material were as follows:

‘4.02. There is no accepted practice regarding shooting within the vicinity of residential properties in the UK other than compliance with statute and each shoot will operate dependent on individual circumstances.

4.03. No reasonable person when shooting would deliberately aim at a dwelling or its immediate garden such as to potentially cause injury or damage to persons or property.

4.05. Due consideration should be given by shoot organisers to take all reasonable steps to prevent causing illegal nuisance to others.

4.06. It would be neighbourly if notice was given to the defendant viz., Mr Fuller, the evening before a day's shooting of the timings of shooting any of the drives in the vicinity of Winsley Hurst Hall.’

38. I accept that both experts were appropriately qualified to opine on matters relating to shooting. However, in the context of the present case, I consider that Mr Thornton-Berry was better qualified to do so than Mr Huntington-Whiteley. The former practises in North Yorkshire rather than the West Country and he has more experience of organising and running shoots - although I acknowledge that many are moorland

grouse shoots rather than pheasant shoots - whereas Mr Huntington-Whiteley is more concerned with advising on the implications of shooting rights for property transactions and consequential valuation issues. I was also unimpressed by Mr Huntington-Whiteley's disinclination to accord an appropriate degree of respect to the body of documentary material generated by respectable countryside associations, and even more by his refusal to acknowledge the inclusion of safety considerations in the enumeration of factors to which express regard should be had when shooting within the proximity of residential properties. Mr Huntington-Whiteley repeatedly refused to accept the introduction of safety as an additional factor at paragraph 5.59 of his report. I therefore prefer the expert views of Mr Thornton-Berry where they differ from those of Mr Huntington-Whiteley.

39. I accept, on the basis of the Health and Safety Executive Guidance on the Safe Use of Guns, supported by the American documentary material appended to Mr Thornton-Berry's report, that spent shotgun pellets can, depending upon the wind, travel up to 300 metres. Mr Huntington-Whiteley's experience of people shooting close to residential property does not mean that it is necessarily safe to do so. I note that Mr Huntington-Whiteley acknowledged that: (1) it was conceivable that shot could fall on Mr Fuller's house from the gun stands as presently positioned, and (2) although he was not a ballistics expert, anecdotally he believed that Mr Thornton-Berry's assessment of the maximum range for falling shot of about 50 metres for active shot and 300 metres for falling spent shot was about right.

40. I shall consider each of the three remaining preliminary issues in turn.

41. First, the profit issue. For Mr Fuller it is submitted that the sporting rights granted to Mrs Kitzing by paragraph 1 of Schedule 1 to the 1998 Assent do not authorise her to preserve and rear game on Mr Fuller's land because they go well beyond any recognised profit or ancillary right, still less do they authorise her to introduce poults (or young pheasants) on to Mr Fuller's land.

42. Mr Grant submits that a grant, or a reservation operating by way of re-grant, of sporting (including shooting) rights must be exercised reasonably and without due interference with the servient owner's enjoyment of his own land. This is the Scottish

law principle of *civiliter* which has been recognised as equally applicable to the law of England and Wales. I do not understand this proposition to be contested by Mr Harpum; and, in any event, I consider that it is well-founded. Mr Grant argues that such a grant cannot be allowed to sterilise and neutralise the rights of the servient landowner and so does not prevent him (or her) from managing his or her own estate in the normal way. Again I consider this argument to be well-founded. It is no doubt because of this (amongst other reasons) that Mrs Kitzing has discontinued her original claim.

43. Mr Grant goes on to contend that a profit a prendre in another's land is the right to take from the servient land some part of the soil or minerals under it or some of its natural produce, such as crops growing naturally upon the land or the wild creatures (such as animals and birds) naturally existing upon it. He says that English law necessarily restricts the subject matter of a profit a prendre to such matters and that this limitation is explicit in the words 'a prendre' which involves 'a taking'. Mr Grant submitted that the position under English law was clear. The subject of the profit must be on the land naturally, viz. not through the agency of man, whether in respect of the initial introduction or the subsequent tending of the subject matter.
44. Mr Grant says that the applicable principles were considered in detail and applied - he submits correctly - most recently in the Australian case of *Clos Farming Estates v Easton* at first instance before Mr Justice Bryson at [2001] NSWSC 525 and on appeal at [2002] NSWCA 389. That Australian case concerned the enforceability of a provision, described in the documents as an 'easement for vineyard', which purported to allow Clos to enter onto land and carry out viticulture works, harvest grapes and sell them. At first instance Mr Justice Bryson had held that the easement for vineyard did not create any interest in land. The New South Wales Court of Appeal unanimously dismissed the appeal. The only reasoned judgment was delivered by Santow JA with the agreement of Mason P and Beazley JA. According to Mr Grant, the Court of Appeal held that an easement of vineyard could not be a valid easement in law because it breached what was said to be fundamental to an easement at law in two respects and because an easement of vineyard was not analogous with the rights conferred by a profit a prendre. At paragraph 55 Santow JA emphasised, first, that the profit must come from the land itself with it not being sufficient that the user of the

land could make a profit out of trading on it. Secondly, the right must be to take something from the land and a right to tend or to grow could not be considered a right to take. Thirdly, the right must only allow the removal of a crop that did not require attention after initial planting. The rules were said to point to the importance of the distinction between *fructus industriales* (or cultivated crops) and *fructus naturales* (or natural crops or plant products). At paragraph 62 Santow JA concluded that Mr Justice Bryson had been correct in concluding that not only was an easement of vineyard not a profit a rendre but that it was not a profit a prendre, being a process of industry rather than a natural process and not one constituting the right to take part of the land or the creatures on it (adopting the words of Mr Justice Megarry in one of the reported cases).

45. Mr Grant points out that in *Clos*, therefore, having analysed the relevant English authorities and applied them in a modern context, all four judges, both at first instance and on appeal, had concluded: (1) that a profit was necessarily 'a right to take something from the land', and (2) that a right to tend or grow, being a process of industry and not a natural process, was not 'a right to take' and so was not a profit a prendre. Applying those principles to the present case, Mr Grant submits: (1) that 'a right to preserve and rear game for normal shooting purposes' is a process of industry and not a natural process, and (2) it is therefore not 'a right to take' that which is naturally there and so is not a profit a prendre.

46. Mr Grant therefore submits:

(1) that there is no legally recognised profit a prendre 'to preserve and rear game' on another person's land as that would be a right relating to the produce or result of continuing human labour. Hence the authorities make clear that the right to cultivate crops cannot be the subject of a profit a prendre: it is not a recognised property right;

(2) *a fortiori*, that there is no legally recognised profit a prendre to import poults (which have been bred elsewhere) on to the land which is the subject of a profit. In any event such activities do not fall within the ordinary meaning of the words 'preserve and rear';

(3) since the interest is not known to English property law, the words ‘preserve and rear game’ were ineffective in the 1998 Assent to pass any interest from the trustees to Mrs Kitzing.

47. Mr Grant submits that pheasants reared in pens do not become *ferae naturae* once released (just as a crop once planted does not become *fructus naturales* simply because it is not tended further and capable of being the subject matter of a profit). They have been brought upon the land: so much is said to be made clear by Mrs Kitzing in her third witness statement at paragraphs 31 and following. In the words of *Megarry and Wade* they are not wild animals found upon the land; they have been bred in captivity and introduced on to the land. However, Mr Grant says that the point does not finally matter because the rights Mrs Kitzing has do not extend to introducing bred poults.

48. In closing, Mr Grant submitted that Mr Harpum’s submission in closing that the distinction between taking that which is naturally on the land and cultivation applies to plants or crops such as mushrooms but not to birds is wrong and is nonsensical. He says, first, that there is no reason to think that different principles apply to different types of profit a prendre. The law on profits a prendre is and should, he says, be uniform; it reflects the essential nature of a profit which (as the name suggests) is a **right to take**. The differentiation between *fructus industriales* and *fructus naturales* is not some judge-made anomaly but is a logical and inevitable exposition of the limits of the right to take. He submitted orally that one looked in vain for any case law authority for the proposition that the law relating to crops was in a hermetically-sealed envelope.

49. Secondly, he says that there is a strong public policy reason to confine profits a prendre to taking that which is naturally there. That policy applies equally to plants and to animals. In both cases it is submitted that the law seeks to place natural limits on property rights over another person’s land so as to ensure that land is not overly encumbered in a way which could infringe the enjoyment of the actual owner.

50. I reject these submissions. As Mr Harpum submits, there are in law three distinct forms of profit; namely, a right to take: (1) some part of the soil or minerals under it; (2) the natural produce of the land, or crops which grow naturally, as distinct from those which are cultivated or produced by labour; and (3) wild animals or birds that exist upon the land. Mr Grant's submissions seek to elide the different principles which apply to crops and to wild animals. In relation to animals, unlike crops, the issue is not whether they are in some sense the produce of human labour but whether the animals are wild animals. There is no absolute property in wild animals and birds. If for example a grouse or a pheasant is on a person's land the landowner who has reared it has a possessory property in it which he loses if the bird flies off his land.

51. I am satisfied that, as Mr Harpum submits, Mr Grant's arguments confuse the distinction between the principles which properly apply to the taking of crops or other fruits of the land, where the applicable dividing line is whether they have grown naturally or as the result of human labour, and the right to take creatures found on the land, where the test is whether they are wild animals or birds.

52. In my judgment Mr Harpum's arguments are supported by the decision of the Court of Appeal in the unreported case of *Pole v Peake* [17th July 1998]. The Court of Appeal consisted of Lord Justice Simon Brown, Lord Justice Schiemann and Lord Justice Buxton. It was Lord Justice Buxton who delivered the leading judgment with which the other two members of the Court agreed. In that case a transfer of property to the appellants had taken the form of the creation of a fee simple subject to a reservation in favour of the respondent sellers of hunting and shooting rights. The hunting and shooting rights expressly included a right to preserve and rear game upon the land in question. It had been agreed that under the admittedly anomalous rule recognised by the Court of Appeal in previous authorities the 'reservations' had operated in law as re-grants by the purchaser of the fee simple, who was, in respect of them, subject to the principles of *contra proferentem* and inability to derogate from his grant. In the order made by the recorder under appeal the respondent owners of the shooting rights had conceded that their rights to come on to the appellants' land for the purpose of preserving and rearing game did not extend to erecting pens or other artificial devices. The recorder had held that the word 'game' in the deed included pheasants reared for the purpose of sport irrespective of whether they had bred naturally on the relevant

estate. The appellants had objected to that part of the Recorder's decision, saying that the word 'game' in the Deed was restricted to 'wild' game that was 'naturally occurring on the property'. The object of that limitation was to prevent the respondents from coming on to the property or otherwise using it for the purpose of rearing birds that had at some stage of their lives been reared in the pens used for that purpose by the respondents on their adjacent property.

53. The appellants' construction was said by Lord Justice Buxton to be impossible on two different scores. First, once the pheasants had left the pens, and thus passed out of the control of the respondents, they had become wild in law as well as in fact. There was said to be no basis for distinguishing between such wild birds according to whether or not they had at some time of their lives been bred in captivity. Secondly, 'game' must mean the same thing in the rearing limb of the relevant reservation as it did in the shooting limb of that reservation. It was said to be impossible to provide, as the appellants' argument required, that those exercising the shooting rights had to perform the impossible task of distinguishing between birds on the wing according to whether or not they had been bred in captivity. Lord Justice Buxton therefore upheld the declaration that 'game' included 'pheasants reared for the purpose of sport irrespective of whether they breed naturally on the Estate'.

54. Lord Justice Schiemann agreed with Lord Justice Buxton's judgment. He recorded that the only matter – but an important one – which had caused him to hesitate was whether the right to enter the appellants' land for the purpose of preserving and rearing game was limited to a right to enter the land for the purpose of preserving and rearing game on the respondents' land or whether it included a right to enter on to the appellants' land for the purpose of preserving and rearing game on the appellants' land. He was persuaded by the reasons set out by Lord Justice Buxton that the latter was the case and so he too would dismiss the appeal.

55. Lord Justice Simon Brown agreed for the reasons given by Lord Justice Buxton.

56. In my judgment the observations of Lord Justice Buxton make good sense. In my judgment, a game bird can be a wild bird, and thus properly the subject of a profit a prendre, even if it has been bred and fed by human agency provided it has been

released back into the wild; and it matters not that it has been bred on, and then flushed out and beaten or driven onto the servient land from, neighbouring land belonging to a third party, whether the holder of the shooting rights or someone else. Even when reared in pens, pheasants (and other game birds) are wild birds once released from the pens into the wild. Once so released, they are capable of being the subject of a valid profit a prendre. I therefore hold that the rights of shooting enjoyed by Mrs Kitzing extend to game birds introduced as poults on to neighbouring land and reared and fed there once they have been released back into the wild. Like Lord Justice Buxton, I consider that it would be impossible to provide, as Mr Grant's argument requires, that those exercising shooting rights have to perform the impossible task of distinguishing between birds on the wing according to whether or not they had once been bred in captivity.

57. However, Mr Grant argues that my decision on this point only addresses the issue of the status of the game once released; it simply does not address the issue whether Mrs Kitzing's profit a prendre entitles her to come on to Mr Fuller's land and engage in activities which constitute 'preserving and rearing' of game (such as placing feeder bins and – as threatened – holding pens on Mr Fuller's land). Mr Grant submits that such activity is contrary to the essential nature of a profit a prendre. English law simply does not recognise such a right as being an interest in land. He submits that a profit can only concern *fructus naturales* and that birds bred elsewhere and reared on the land are analogous to *fructus industriales* just as much as a cultivated crop is because both are the result of human intervention.

58. Moreover he says that Mr Harpum does not begin to explain how a profit a prendre, which is a right to take, can entitle the Kitzings to bring animals or birds from elsewhere and release them onto Mr Fuller's property itself or on to adjoining land in the knowledge and expectation that they will move onto Mr Fuller's land; such activity is said to be contrary to the essential nature of a profit a prendre, viz. the taking of what is naturally present. It is not an interest in land recognised by English law.

59. In response Mr Harpum argues:

(1) that the right to preserve and rear game for normal shooting purposes is now commonly found in grants and reservations of sporting rights and examples are given in standard precedent books such as the *Encyclopaedia of Forms and Precedents*;

(2) the right to *preserve* game is the right to protect the birds from outside threats such as vermin; the right to *rear* game is not limited to nourishing birds already on the servient land – reference is made to the case of *Pole v Peake* (previously cited);

(3) the rights claimed are not a profit a prendre but they are nonetheless valid as ancillary rights necessary to support the principal right of shooting which has been granted to Mrs Kitzing.

60. Mr Harpum says that the Court will imply the grant of such ancillary rights if they are necessary for the enjoyment of an expressly granted right. He refers to a statement in the case of *Pomfret v Ricroft* (1668) 1 Wms Saund 321 at 323 (also reported at 85 ER 454) that when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use. Mr Harpum also cites a more recent statement of the principle by Mr Justice Parker in *Jones v Pritchard* [1908] 1 Ch 630 at 638:

‘The grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment.’

61. Mr Harpum submits that it is obviously open to parties to the grant or reservation of sporting rights to agree more extensive ancillary rights than the law would imply. Mr Harpum submits that the fact that such provisions on rearing and preservation are now widely used suggests that there may be many cases where it may not be possible to rely upon the natural stock of wild birds. Mrs Kitzing addresses this point at paragraphs 30-41 of her third witness statement dated 1st February 2017. Mr Harpum points out that in the instant case express provision has been made for such an ancillary right. The validity of such a grant can be justified as ancillary to the principal profit a prendre of shooting and taking game and there is no reason not to uphold it. He submits that the validity of such rights was not doubted by the Court of

Appeal in *Pole v Peake* and that to strike down such a right would have very serious implications for the shooting industry.

62. Mr Harpum took me to what had been said by Lord Justice Buxton at pp. 7-8 of the transcript of the judgments in *Pole v Peake*. There Lord Justice Buxton was dealing with the meaning or implication of the word ‘rearing’ when used in a grant in relation to game. The appellants had sought to limit that activity to the operations already provided for in ‘preserving’ game together with an ability to remove (‘naturally occurring’) young birds from the appellants’ land for upbringing elsewhere. The appellants submitted that the right did not extend to stocking the appellants’ land or any similar activity. That contention was said to fail on a simple consideration of the natural meaning of the words used. ‘Preserving’ was agreed to be limited to protecting game from outside threats. It most naturally – though perhaps not exclusively – applied to game not brought on to the land by the respondents, who enjoyed the shooting rights. ‘Rearing’ was said necessarily to indicate something different from that, and there was said to be no reason to think that the concept did not have the meaning ascribed to it in the *Shorter Oxford Dictionary* of bringing an animal to maturity or to a certain stage of development by providing it with nourishment or other assistance. Within that meaning it would, in the view of Lord Justice Buxton, be artificial to hold that the respondent holders of the shooting rights might only rear birds that were on the land without any intervention on their part. The concept of entering the property only to deal with birds already there would also in practice seem to be entirely, or at least largely, taken up by the power to ‘preserve’ game on that land. Lord Justice Buxton therefore held that the respondents might perform on the property all the activities comprehended by the normal meaning of ‘rearing’ and might make use of the property by bringing birds on to it for that purpose. As I have already indicated, despite initial hesitation on the point, Lord Justice Schiemann was persuaded by Lord Justice Buxton’s reasoning on the point and so concurred in dismissing the appeal.

63. Mr Grant submits that *Pole v Peake* does not assist Mr Harpum for the simple reason that it was not contended in that case that the right in question could not as a matter of law be a profit a prendre. The appellants had made no objection to the right to preserve and rear as not being a valid profit; hence the case was argued and decided

purely as a matter of construction of the relevant grant. Notably, Mr Grant says, in that case it was conceded on the part of the respondents (acting by Mr Mark Wonnacott) that their rights to come on to the appellants' land for the purpose of preserving and rearing game did not extend to erecting pens or other artificial devices, no doubt, Mr Grant says, recognising that such artificial devices would stretch the concept of a profit a prendre to breaking point. Mr Grant says that *Pole v Peake* is therefore not a relevant precedent as the Court was not asked to adjudicate on the question of what sort of right could constitute a profit a prendre. Not one of the learned authors of the textbooks put before me by Mr Grant is said to suggest that *Pole v Peake* extends the category of profit a prendre to a right to go on to the servient tenement and preserve game, still less actively to rear game.

64. In his closing speaking note, Mr Grant rejects the submission made for the first time in Mr Harpum's skeleton that the discrete right to preserve and rear game for normal shooting purposes over the whole of the Winsley Hurst Estate is ancillary to the valid profit a prendre, which Mr Grant characterises as the right to take game by shooting. Mr Grant submits that the correct approach is: (1) to identify the primary right, and (2) to ask whether the ancillary right is necessary to allow the primary right to be exercised. Applying that analysis to the present case, he submits: (1) that the primary right is to shoot, hunt, etc the game naturally occurring on Mr Fuller's land; (2) that the only ancillary rights concern access – you cannot have a profit that involves anything other than taking and one cannot enlarge the primary right by an impermissible ancillary right; (3) that a right to preserve and rear is not a profit (which is conceded by Mr Harpum) and nor is it ancillary to the profit as it is not necessary to allow Mrs Kitzing to shoot what is naturally there; and (4) that such a right would involve providing by way of ancillary right that which cannot be provided by way of primary right, which Mr Grant says is an odd inversion – he repeats that an ancillary right cannot enlarge the primary right.

65. Mr Grant identifies two useful cross-checks which are said to indicate the correctness of this conclusion. An ancillary right is only that which is necessary to make the primary right effective; it cannot have the effect of expanding the primary right beyond that which is permissible under a profit. The ancillary rights contended for would enlarge a primary right to take what is there into something much more

substantial, viz. a right to tend by human labour, and something which English property law does not recognise. Indeed if Mrs Kitzing's case were correct, she would be legally entitled to place a two-acre holding pen surrounded by chicken wire and electric fence on Mr Fuller's land. That, Mr Grant submits, simply cannot be right.

66. Further, if Mrs Kitzing is right, and she has an ancillary right to preserve and rear game and introduce poults in the nature of a right to stock, then where would that end? How much stocking could take place? Mr Grant points to a statement by Mr Huntington-Whiteley that the shoot could be intensified by increasing the number of pheasants put down to (say) 10,000. That, he acknowledges, would require the enlarging and increasing of the infrastructure. Over their own land there is said to be no problem with this; but over the land which Mr Fuller has paid a large amount of money to buy Mr Grant submits that the self-limiting nature of a profit to take prevents such activities from taking place. That is said to be an entirely sensible and reasonable result.

67. Mr Grant added also the point that Mr Fuller's 30 acres of land could not be said to be necessary to the enjoyment of sporting rights over the whole of the Winsley Hurst Estate, extending to some 1,000 acres. The reality, according to Mr Grant, is that any right of stocking, preserving or rearing game, was anathema to the concept of a profit a prendre, which is the right to take what is naturally there, viz. what is there by some agency other than that of man or woman. Profits a prendre, Mr Grant submits, are recognised by the law as valid property rights encumbering land precisely because they are self-limiting.

68. Mr Grant points out that the 1998 Assent does not mention the introducing of poults. The words of the Assent do not even purport to vest in Mrs Kitzing such a right and the words 'preserving and rearing' do not naturally bear that meaning. That, he submits, is the end of the matter. But even if the Assent had contained the words 'and introducing pheasants', Mr Grant submits that there is no such legally recognised property right; it is not a profit a prendre nor is it now contended to be such. It is certainly not a necessary incident of the right to take what is naturally there. Quite the reverse. It is a right not to take but a right to bring on to the land, the very inverse of the essence of a profit. By analogy there is, as is common ground, no right to plant

crops under a profit a prendre. Again that is said to be not some free-standing rule relating to vegetation but merely the result of a profit a prendre being a right to take.

69. Mr Grant says that it is not clear how the various cases concerning when animals are or are not *ferae naturae* are relevant. None of those cases considered the nature of a profit a prendre but were typically decided in relation to property rights. None are said to support the proposition that a right to take encompasses the converse right to bring on to land.

70. Mr Grant also addresses Mr Harpum's submission, which is said to be without any evidential foundation, that the conclusion for which Mr Grant contends would have serious ramifications for the shooting industry. As to that, Mr Grant submits, first, that the law is the law and Mr Fuller is entitled to an adjudication in accordance with correct legal principles rather than what Mr Harpum asserts, without any actual evidence, is convenient to the shooting industry. Mr Grant submits that Mr Harpum's argument has never been advanced before a court before which suggests that the issue is in fact hardly one of great significance. Secondly, Mr Grant submits that the reality is that most shoots take place over land which is owned by the shoot and so the issue in the instant case does not arise. Furthermore, he points out that parties are always free to enter into contractual licences which are not constrained in the way that the concept of a profit a prendre is constrained; yet further, shooting rights are often said to be the subject of leases.

71. I do not consider that Mr Harpum's concerns can be so lightly dismissed. First, the validity of the right to preserve and rear game has been recognised by the Court of Appeal in *Pole v Peake*. Secondly, there is no evidential foundation for Mr Grant's own assertion that most shoots take place over land owned by the shoot.

72. In the present case Mrs Kitzing explains in her third witness statement (at paragraph 5) that the Estate had originally been acquired by her maternal grandfather in 1916; he had been a keen shot and she knows that her grandfather had bought the Estate and developed it with the aim of creating a pheasant shoot. At the time of his purchase the Estate had been around 400 acres but over time he had acquired quite a lot of adjoining land, taking the total area up to around 1,000 acres. Although various

parcels of land had subsequently been sold off over the years, the sporting rights still extended over the area that Mrs Kitzing's grandfather had owned. At paragraph 10 she says that the area covered by her sporting rights extends to around 1,000 acres, of which around 120 acres is woodland. In her grandfather's day most of this land would have been within the family's ownership but over time various parcels of farmland and residential properties had been sold off, although with the sporting rights retained.

73. I suspect that the reservation of shooting rights on the sales-off of parts of large estates in the manner described by Mrs Kitzing is a not uncommon phenomenon. It would not be realistic to expect the seller to negotiate a fresh contractual licence with the new owner of the servient land every time a further onward sale took place.

74. In my judgment, a right to preserve game by protecting it from outside threats, such as by controlling vermin, is as much a valid incident to a right to take and shoot game as a right of entry on to the servient land. It is reasonably necessary to enable the owner of the shooting rights to shoot all of the game that is naturally on the servient land for the time being. Such a holding is consistent with the approach of the Court of Appeal in *Pole v Peake*.

75. I am further satisfied that a right to rear game already on the servient land is also sufficiently ancillary to a profit of shooting game. It assists to make such game ready for shooting.

76. Conversely, I am entirely satisfied that a right to come on to the servient land for the purpose of preserving and rearing game does not extend to erecting pens or other artificial devices, as was conceded (in my view rightly) by the owner of the shooting rights in *Pole v Peake*. To that extent, the right to rear game does not extend to introducing poults onto the servient land or to stocking it with pheasants. Such a right is not, in my judgment, a right reasonably necessary to the right to shoot and take game on the servient land; rather it involves artificially introducing (captive) birds on to the land which were not already there.

77. However, a right to preserve and rear game does, in my judgment, extend to feeding game birds that are already present on or above the servient land, whether they have

been hatched on the servient land by game birds already naturally there, or they have flown on to the servient land from neighbouring land where they were hatched, or even if they have been introduced on to neighbouring land as poults in pens or some other artificial contraptions and reared there and then later released into the wild. Such a conclusion is in my judgment supported by the decision of the Court of Appeal in *Pole v Peake* which I cannot view as having been decided per incuriam.

78. Indeed, it seems to me that Lord Justice Buxton recognised that, when dealing with the right to rear game, he was not addressing a profit in gross without stint, i.e. unlimited as to numbers of game taken, since (at p. 11) he said that that concept did not seem to apply naturally to the rearing right which was the main bone of contention between the parties. I also consider that such a conclusion is supported by the evidence of Mrs Kitzing as to game keeping activities (previously cited) and of Mr Fuller's own shooting expert, Mr Thornton-Berry, in the section of his report headed 'Driven Pheasant Shooting Practice' at paragraph 3.1 dealing with 'preparation prior to shooting'.

79. However, and having said all that, in the case of the land held by Mr Fuller under the 1989 Lease, and comprised within leasehold Title No NYK90290, I also hold that the express terms of paragraph 7(c) of the Third Schedule to the Lease preclude Mrs Kitzing from intensively rearing game or feeding game except on the duck pond. That is consistent with the submissions of Mr Harpum, although contrary to the submissions of Mr Grant.

80. I will invite counsel to draft appropriate declarations to give effect to this section of my judgment on the profit a prendre issue.

81. Secondly, I turn to the proximity issue. Mr Fuller's position is that as a matter of construction of the 1998 Assent, the sporting rights granted to Mrs Kitzing by Schedule 1 paragraph 1 of the Assent must be subject to some reasonable geographical or territorial limitation, a point which Mr Grant says now appears to be conceded by Mrs Kitzing as a matter of principle. The question is what that geographical or territorial delimitation should be. Mr Fuller's primary position is that as a matter of construction the rights cannot be lawfully exercised within 300 metres of the main

house. Mr Fuller's secondary position is that the rights cannot be lawfully exercised some distance less than 300 metres from the main house, that distance being a matter for judicial determination. Mr Fuller's fallback case is that the sporting rights cannot be lawfully exercised on the garden of the main house, although that fallback case is subsumed within his secondary position.

82. Mr Fuller invites the Court to conclude that: (1) the reasonable reader of the 1998 Assent would not interpret the words 'over the entirety of the Estate' literally; rather they would interpret them as being subject to some reasonable geographical limitation around a residential property; (2) the reasonable reader would conclude that that geographical limit would be such a distance from the property so as to ensure that the shotguns used posed no material threat or nuisance to the users of the property; and (3) on the evidence in this case, and on the facts of the case, that distance is 300 metres.

83. Mr Harpum made a preliminary submission. He says: (1) that the boundaries of Mr Fuller's garden at the main house have been very considerably expanded since the time of the 2015 transfer; (2) that that expansion cannot enhance Mr Fuller's rights as against Mrs Kitzing – the extent of property rights cannot be affected by the unilateral act of one party; and (3) that, accordingly, Mr Fuller's rights were crystallised on the date on which he acquired the Lease in 2012 and, as regards the remainder of the property, the date of the transfer in 2015. I accept that preliminary submission for the reasons advanced by Mr Harpum.

84. Mr Harpum went on to emphasise that there is no express limitation in the 1998 Assent on the area of land over which Mrs Kitzing might exercise her sporting, and specifically her shooting, rights as a matter of construction. However, he acknowledged that profits à prendre are subject to the same general principles of *civiliter* as other servitudes: the dominant owner must exercise the right reasonably and without undue interference with the servient owner's enjoyment of his own land. I accept Mr Harpum's further submission that the *civiliter* principle works both ways and that it is a reciprocal one.

85. Mr Harpum asks the Court to make the following determinations:

(1) that the general principle is the *civiliter* principle;

(2) that the reasonableness of the conduct depends upon all the circumstances, in particular the following matters:

(a) the terms of the grant or reservation of sporting rights;

(b) Mr Fuller's knowledge of the sporting rights at the time of the transfer in 2015;

(c) (which goes together with the immediately-foregoing factor) the circumstances under which Mr Fuller acquired the land at Winsley Hurst under that transfer;

(d) the particular activity that comprises the sporting rights and its potential impact on the servient owner, which must take into account appropriate practice for the exercise of sporting rights; and

(e) the effect on Mrs Kitzing's sporting rights if Mr Fuller is correct;

(3) there is no general principle which prevents the exercise of sporting rights within any specified distance of the servient owner's home or garden – the matter depends in any given case upon the nature of the particular activity, when exercised in accordance with the *civiliter* principle.

86. Mr Harpum developed his submissions at paragraphs 55-66 of his written skeleton and in his closing oral submissions. Mr Grant responded to the evidence at trial and to Mr Harpum's submissions at paragraphs 16-17 of his closing speaking note. He also submitted that the position under the 1989 Lease was entirely irrelevant, although I have already rejected that submission for the reasons previously given. Mr Grant concluded that whether any geographical or territorial limit on the extent of the sporting rights would substantially limit where Mrs Kitzing can exercise those rights should not be relevant to the Court's decision; the very issue in this case is whether or not Mrs Kitzing is entitled to exercise the rights she has as she is presently doing. If the court were to decide that a sensible interpretation of the 1998 Assent would include a reasonable geographical or territorial limit around a residential dwelling house which would bring to an end the danger and intrusion to which Mr Fuller has presently been subjected, but would leave Mrs Kitzing free to shoot on the balance of

the 1,000 acre estate, then Mr Grant submits there would be no injustice in such a result.

87. I can deal with the proximity issue fairly shortly. Although the relevant preliminary issue refers to sporting rights, I am really concerned only with any restriction upon the exercise of Mrs Kitzing's shooting rights, and then only really with the right to shoot game rather than, for example, the targeted shooting of vermin. For the reasons previously given, I consider that Mr Fuller remains bound by the provisions of the 1989 Lease. That Lease expressly entitles Mrs Kitzing to stand guns on the land held by Mr Fuller under the 1989 Lease and comprised within Leasehold Title No NYK90290. Despite Mr Grant's arguments, Mrs Kitzing cannot be restricted from shooting on any of this land. The territorial limitations for which Mr Grant contended would deny Mrs Kitzing the benefit of the rights of shooting expressly conferred on her by the Lease. Just as the Court cannot imply a term into a contract that would contradict any of its express terms, nor in my judgment can the Court import a territorial limitation on the exercise of a profit a prendre that would contradict the express terms of the grant. Thus I cannot accept a blanket ban on the exercise of Mrs Kitzing's shooting rights within 300 metres, or within any other distance, from the main house or on the land originally comprised within Mr Fuller's garden.

88. Since Mrs Kitzing is entitled to shoot on the land originally comprised within Mr Fuller's garden, I cannot see any justification for implying any blanket prohibition against shooting on the further land acquired by Mr Fuller in 2015.

89. Pursuant to the *civilter* principle, and in the light of the expert evidence and the practical restrictions recognised in Mrs Kitzing's solicitor's letter of 7th March 2017 (responding to Mr Fuller's Part 18 request for further information), however, I hold that the exercise by Mrs Kitzing of her shooting rights is subject to the following restrictions:

- (1) shooting should not take place from the house itself, its garages, outbuildings or terrace;

(2) shooting should not deliberately take place in the direction of the house itself, its garages, outbuildings or terrace; and

(3) notice should be given to Mr Fuller the evening before a day's shooting of the timings of any shooting on any of the drives in the vicinity of Mr Fuller's property.

90. Thirdly, and finally, I turn to the right of way issue. There is a real sense of artificiality about this issue given the right of way which has been conferred on Mrs Kitzing in support of her reserved sporting rights by paragraph 3 of Schedule 1 to the 1998 Assent. It is also common ground that, notwithstanding the formulation of the presently third preliminary issue, I am only concerned with the right of way reserved by clause 3.8, and not clause 3.7, of the 2015 Transfer.

91. Mr Grant submits that the court should accept the limitations pleaded at paragraph 21 of the Defence and Counterclaim, which are as follows:

(1) the right of way reserved by clause 3.8 can only be used 'for the benefit of the Retained Land' viz. for travel to and from parts of the Retained Land; it cannot be used to justify other use of the roadways;

(2) the roadways as defined and marked yellow on the plans attached to the 2015 transfer do not include the strip of road behind Mr Fuller's house (as is common ground);

(3) the transfer right of way may only be used reasonably and for the purposes for which it was granted; and

(4) the right of way cannot be used for other purposes such as:

- (a) taking photographs of Mr Fuller or his partner or his employees or contractors or his property,
- (b) travel to and from Mr Fuller's land, and
- (c) going for walks.

92. There are said to be two essential stages in Mr Fuller's argument;

(1) that the right of way can only be used for the purposes of accessing or travelling to and from parts of the dominant tenement; and

(2) necessarily, therefore, and in any event, other uses are prohibited.

93. Mr Fuller's position in summary is that:

(1) rights of way concern access, that is their nature; they do not exist for other purposes such as to allow holders to assess the behaviour of the owner of the servient land or to allow the holder to photograph the servient land or its occupiers, or to go for recreational walks because the right of way happens to pass through a pleasant place;

(2) not only must rights of way only be used for access but, as the rule in *Harris v Flower* makes clear, that access must be solely to the dominant tenement;

(3) the right of way contained in clause 3.8 was expressly excepted and reserved for the benefit of the Retained Land, which accurately reflects the general law and puts the position beyond doubt.

94. The court is invited to note that Mr Fuller entirely accepts that the sporting rights carry with them the necessary rights of access to allow those rights to be exercised. This is acknowledged as implicit in any profit a Prendre; but the third preliminary issue is said not to relate to this point.

95. Mr Fuller accepts that the grant of a way carries with it the ancillary and incidental rights necessary to make the grant of access fully effective but Mr Grant submits that none of the things that the Kitziings do to which objection is taken, such as taking photographs, are necessary to make effective the grant of access. Since a right of way can only be used for the purpose of accessing the dominant tenement, purporting to use it for other purposes, such as taking photographs or going for walks, is said plainly

to go beyond the grant, and therefore to constitute a trespass; in any event, these activities are not in any way ancillary or incidental to the right of way, however that right may be construed.

96. Mr Harpum submits that for there to be a valid easement, such as a right of way, there must be a dominant and servient tenement; in other words, land benefited by the easement and land burdened by it. Where an easement is excepted and reserved for the benefit of specified land, that specification defines the dominant tenement. Accordingly the function of the words of clause 3 of the 2015 Transfer ‘for the benefit of the Retained Land and each and every part of it’ is to identify the dominant tenement. It does not follow from that, however, that the right of way can only be used for travel to and from the dominant tenement. It is said to be a right of way in the widest terms, which can be used for any lawful purpose provided that it accommodates the dominant tenement and is exercised reasonably in accordance with the general principle of *civiliter*. It can therefore be enjoyed in connection with any other right that the owners of the dominant tenement may have.

97. Mr Harpum points out that in addition to the right of way excepted and reserved by clause 3.8 of the Transfer, Mrs Kitzing is also entitled to the wide right of entry and passage in support of her sporting rights contained in paragraph 3 of the Schedule to the 1998 Assent, which were expressly preserved in the 2015 Transfer.

98. In addition, in her capacity as one of the trustees of the Estate, Mrs Kitzing is also entitled to the right of way that the trustees enjoy under the 1989 Lease over the roadway that runs along the north-western side of the main house, and title to which is vested in the adjoining property Hartwith Hall.

99. Mr Harpum submits that the reference in clause 3 of the Transfer to ‘the Retained Land’ identifies the dominant tenement, but that the right of way is not limited to access to and from the dominant tenement; rather the right of way can be used to accommodate the dominant tenement whether or not access to or from the dominant tenement is involved. In other words, the right of way is not limited to travel to or from the Retained Land.

100. In addition, because of the right of way reserved by the 1989 Lease, the Trustees are entitled to use the roadway to the north-west of Winsley Hurst Hall, title to which in any event is not vested in Mr Fuller. In short, Mr Harpum submits that the right of way is not restricted to travel to and from the Retained Land but may be used for any lawful purpose accommodating the dominant tenement. Mr Harpum submits that it is not unlawful per se to take photographs of, for example, birds from a right of way and to do so does not of itself make user of the right of way a trespass. Such conduct can only be unlawful if it is so extreme that it amounts to harassment, for which (if applicable) Mr Fuller can pursue his statutory remedies and his remedies for trespass at the future trial of this Part 20 claim.

101. Mr Harpum also submits that it is lawful to use the right of way to travel from one part of Mr Fuller's land to another and that the right of way can be used for the purpose of going for walks. Mr Harpum posited the example of a person entitled to exercise the right of way choosing to use it to go only part of its length for the purposes of exercise or to visit someone whose property adjoined the right of way. To use the right of way for such purposes, Mr Harpum submits, would clearly fall within the remit of the grant because it confers a benefit on the dominant tenement. He submits that it is clearly a benefit to those who have the right of way that they should be able to use it for the purposes of recreation or exercise.

102. Accordingly, Mr Harpum invites the court to hold that the rights of way excepted and reserved in clause 3.8 are not subject to the restrictions pleaded by Mr Fuller in paragraph 21 of the Defence and Counterclaim.

103. In closing, Mr Grant pointed out that Mr Harpum correctly recognises that a right of way must accommodate the dominant tenement. However, he is said to misstate the meaning and effect of this rule when he asserts that it can therefore be enjoyed in connection with any other right that the owners of the dominant tenement may have. This assertion is said to overlook the point that the right of way is appurtenant to the land and not to the owner of the land.

104. Mr Grant submits that it is beyond sensible argument that a right of way can generally only be used for access to the dominant tenement. It is said to be a right of

access and not a right to do anything else. To suggest that a right of way can be used for other purposes is said to be simply inconsistent with it being identified as a right of way. If the Kitziings are right on this point, and are free to use the right of way for the purposes of any right that the Kitziings have, such a conclusion would, it is submitted, 'reduce to a smoking rubble the entire corpus of settled law on rights of way' in the words of Mr Grant. To give one example, it is said that the rule in *Harris v Flower* would no longer exist. A right of way could be used for any purpose which the owner of the dominant tenement chose such as sunbathing, landscape painting or barbecuing etc.

105. For those reasons, Mr Grant invites the court to declare that the right of way cannot be used lawfully for any purpose other than accessing the Retained Land. Such a declaration would not prevent someone accessing the Retained Land from going there via a particular mode of transport or for a particular purpose; but it would prevent the road from being used for any purpose other than access, such as taking photographs, landscape painting, sunbathing, barbecuing or picnicking; indeed for any purpose which is not connected with getting on to or off the Retained Land. What the purpose of any visit would be would be a question of fact for the trial judge adjudicating on the matter in the future.

106. In summary, Mr Grant submits that a right of way can – he says unsurprisingly – only be used as a right of way; the beginning and end of the debate is to ask what the phrase 'right of way' means. Common sense, the dictionary, the authorities and all the textbooks are said to make it clear beyond any doubt; it is a right of access and egress.

107. As I say, there is a real sense of artificiality about this issue. In my judgment, the true principle is as stated at paragraph 31 of Mr Grant's closing speaking note, citing from paragraph 949 of *Halsbury's Laws* (the title 'Real Property and Registration') Vol 87:

'All private rights of way, no matter how general they may be, can only be used by the owners and occupiers of the dominant tenement and their licensees, and only for some purpose connected with the dominant tenement.'

In my judgment that is the true test: whether the right of way is being exercised for some purpose connected with the dominant tenement.

108. In deciding that question, in my judgment, regard must be had both to the nature and extent of the land over which the right of way is enjoyed and also to the nature and extent of the dominant land. Here we are not concerned with a right of way between two fixed points which affords access to and egress from a particular dwelling house. The roadways are shown coloured yellow on the plans at bundle 2, divider 19, pp. 335-336, and they do not simply go from a public highway to a fixed point. The dominant land is not a single dwelling house but a large Estate. As Mr Harpum submitted orally, a dose of common sense is called for. Why should use of one of the roadways or the track be unlawful simply because a dominant owner has not walked or indeed run the full length of the track but has turned round and returned to his or her starting point halfway along? Why should use of the right of way be unlawful if the user has taken photographs of the dominant land for estate agency or other marketing purposes? Why should it be unlawful if the user of the roadway has taken photographs of local flora or fauna such as the local bird life?

109. In my judgment the true principle is that the right of way can be used for any lawful purpose which is connected with the dominant tenement; and I do not consider that the Court can be more prescriptive than that in general terms. I do not consider that this spells the demise of the rule in *Harris v Flower*. If one is using the right of way substantially to access land beyond the dominant tenement, then the right of way cannot properly be said to be being used for some purpose connected with the dominant tenement. But that does not mean that the roadways in the present case can only be used for access to or egress from some part of the dominant land. I see no reason why the owner of a right of way cannot walk along part of it and then decide to turn back and return to his own property without having reached the public highway at the end of the right of way. I do not see why he cannot use the right of way for the purpose of exercise and recreation provided he is doing so in his capacity as owner of the dominant land. I do not see why, in an appropriate case, he could not use the roadway to access a property adjoining the right of way belonging to a friend of his rather than going on to the public highway at some point beyond that property. As Mr Harpum says, a degree of common sense is required; and it is not possible, in my

judgment, for the Court to be more prescriptive than simply to say that the roadways can only be used for some purpose connected with the dominant land.

110. It will be for counsel, having considered the terms of this judgment, to attempt to craft some response to the third remaining preliminary issue that gives effect to those views; certainly it does not seem to me that I can properly give effect to the full limitations pleaded in paragraph 21 of the Defence and Counterclaim; nor can I be unduly prescriptive as to the purposes connected with the dominant tenement for which the roadways can be used.

111. So that concludes my extemporary judgment and I will adjourn the matter for further argument on the form of my Order when counsel are available to attend. I have already indicated that I will extend the time for appealing accordingly.