Neutral Citation Number: [2019] EWHC 1562 (Ch)

Case No: 30BM240

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 21/06/2019

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

CLOCHFAEN ESTATE LIMITED	**Claimant**
- and -	
(1) BRYN BLAEN WIND FARM LIMITED	**Defendants**
(2) EDWARD DAVID HOWELLS	
(3) GARETH WYN HOWELLS	
(4) JONES BROS.RUTHIN (CIVIL ENGINEERING) COMPANY LIMITED	

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Mr Edward Denehan (instructed by **Harrison Clark Rickerbys**) for the **claimant**
Mr Nigel Thomas (instructed by **Aaron & Partners LLP**) for the **first to third defendants**
Mr Wilson Horne (instructed by **Hill Dickinson LLP**) for the **fourth defendant**

Hearing dates: 10 to 13 June 2019

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Approved Judgment

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

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. By a lease dated 12 April 2011 made between Kevin Hughes and James Richard Stirk as lessors and the claimant (Clochfaen) as lessee, Clochfaen was granted the sole and exclusive right and liberty (the rights) of shooting sporting and fishing together with ancillary sole and exclusive right and liberty of fowling on and over some 4,000 acres of land, including 92 acres (the servient land) of agricultural land at Maesgwyn, Llangurig, Powys owned in part and farmed by the second and third defendants, Messrs Howells. In August 2016 the first defendant (Bryn Blaen) obtained planning permission to construct and operate 6 wind turbines to the north of the servient land, and for access roads, temporary compound and associated works (the works) on the servient land. Bryn Blaen contracted with the fourth defendant (Jones Bros) to construct the works, and with Messrs Howells for permission to do so. The works commenced in May 2017 and were finally completed in April 2018. Thereafter, Messrs Howells carried out works of fencing drainage ploughing and reseeding on the servient land to restore the temporary compound to agricultural use. By a lease dated 14 February 2018 (the 2018 lease) Messrs Howells demised to Bryn Blaen the access road. Clochfaen claims that the temporary and permanent development of the servient land has and will constitute substantial interference with its rights over it, and seeks a declaration, injunctions and damages. The defendants, whilst now accepting that the claimant is entitled to its rights, deny that any interference was substantial.

2. It is common ground that Clochfaen has not exercised or attempted to exercise its rights over the servient land for over 60 years. On its behalf, therefore, Mr Denehan submits that such substantial interference amounts to trespass and that it is not necessary to show actual loss to succeed in a trespass claim. Moreover, as the works in question could not have been carried out without offending the rights, this is a case where damages should be awarded on the basis of what the claimant might have negotiated with the defendant to allow the works. There was a meeting between Clochfaen and Bryn Blaen during the planning permission process but that led nowhere. Such damages are now known as negotiating damages.

3. After closing submissions, it was clear that there are no substantial issues of fact or law in the case before me. Rather it is a matter of applying clear and well-established principles to the facts.

4. Before dealing with the question of interference, it is necessary to say something more about the nature and condition of the servient land before, during and after the works. I attended an accompanied site view on the first morning of the listed hearing. Its southern boundary is close to and for a short length runs along the A470, which is a busy road. The fields there are low lying and poorly drained and sometimes waterlogged in winter months. Rushes, ferns and mosses grow there and this is natural habitat for game such as snipe, mallard, teal and hare.

5. From the A470 runs a track north to the dwelling known as Maesgwyn and to improved uplands of the servient land. This has now become known as the spur road which is what I shall call it. The dwelling is occupied by third parties and lies just outside the servient land. The second defendant in cross examination said that from the spur road there was also an agricultural track (although he referred to it as a path in his witness statement) along the line of what became the access road across two or three fields to the western boundary of the servient land and on to the farmhouse and

main buildings. He said this was used by him, his brother and other farmworkers driving landrovers tractors and quadbikes. They would travel along it daily to care for the livestock. It was also used to access a barn within the servient land just off the spur road, which was used for hay and fertiliser storage and lambing, and to gain access to the A470 if going further east. There are now substantial modern agricultural sheds on the barn site. I accept that evidence, although such use is unlikely to have been heavy historically as there were no clearly defined tracks in the photographic evidence. He also makes the point in his witness statement that over the years farm machinery has greatly increased in size complexity and weight so that farmers have had to develop hard tracks to maintain access for modern farming methods. That piece of evidence was not challenged, and I accept it.

6. There are five small parcels of coniferous woodland on the servient land, which do not have substantial ground cover. However, the improved grassland provides habitat for pheasant and partridge and the woodland provides roosting areas for pheasant and pigeons. There are various gullies on the servient land which are ideal for snipe.

7. The Howells family have traditionally used the servient land for grazing sheep, and in the summer months, cattle, as part of a much larger farming enterprise. The upland pasture has on occasion been used for root crops and kale for sheep, which also provides food and cover for pheasants. There are large commercial shoots within 15 miles which breed and release partridge pheasant and duck, and some of those find their way to the servient land.

8. The nature of the servient land and the rights over it is such as to allow rough shooting or walked up shooting. The former involves a small number of guns working with dogs along hedgerows, small woods and rough uncultivated parcels of land in pursuit of birds and ground game. The latter will often involve beaters but also the hunters walking through woodland and planted root crops shooting birds as they are flushed out.

9. It is common ground that there are constraints on the servient land as to where guns may be discharged. They may not be discharged towards the A470, towards livestock, towards people on foot or in vehicles, towards two electricity lines which cross the servient land, one east to west and the other north to south, or towards Maesgwyn house. Mr Stirk in cross-examination accepted to his credit that the claimant has not and would not grant a licence to use the rights on fields where there are livestock.

10. Reports were filed from surveyors and each gave oral evidence. Thomas Wyn Jones for the claimant visited the servient land in December 2018 in the shooting season when hare, pheasant, mallard and partridge were seen. He visited again in March 2019 in the close shooting season when pigeon and snipe were seen. Mark Osborne, for the first second and third defendants, visited in November 2018. Both are highly experienced in shoots and shooting rights, commercial and otherwise. It is not in dispute that the servient land provides poor quality shooting and that the rights are of low value. It provides little food and little cover for birds, as cultivated grassland is not good cover.

11. Both experts accept that there is a market for the types of shooting for which the servient land is suitable. The number of resident birds is small. Mr Osborne made the point that only a few woodcock and snipe are resident, but once these are shot then it

is uncertain when more will come onto the land. In the case of woodcock this is dependent upon moon activity and in case of snipe the ground has to be right.

12. Both experts accept that some reared birds from large commercial shoots a few miles away, which are predominantly pheasant and partridge, find their way on to the servient land, but again numbers are small. Mr Osborne explained in cross examination that a five mile radius from such shoots would cover thousands of acres, and birds reared on these shoots will stop where there is good food and good cover. Pheasants, in particular, are not strong fliers and prefer to keep to the ground. There are hundreds of parcels of land of similar size to the servient land within such a radius with better food and cover than the servient land. He also explained that the servient land is not near a centre of high population and that there is better shooting land near such centres. Accordingly, he said, it is not surprising that the rights have not been exercised over the servient land for decades.

13. Mr Wyn Jones is of the view that the servient land is marketable for shooters with guns and dogs who will pay £10 per hour per person. He accepted that the servient land alone is not good enough or near enough to populated centres to be attractive, but mentioned a number of shoots in the area which have benefited from birds coming on from nearby commercial shoots. He called this the secondary market and said that those not wishing to pay top rates will travel for a day's shooting over several small shoots for about one and half hours at a time, and the servient land could be one of these.

14. It was evident in my judgment that both experts are very knowledgeable and experienced in these matters and each gave his evidence in a clear and balanced way. I was greatly assisted by the evidence of each of them. In their joint memorandum, and by the end of oral evidence, in my judgment there was hardly any difference between them, as far as the servient land is concerned. In so far as there was, I accept the detailed explanation of Mr Osborne as to why it is not surprising that the rights have not been exercised over the servient land for so long, as that fits neatly with its history nature and location.

15. I turn now to the works. The details of these are set out in the witness statement of the site agent of Jones Bros, Rhydian Hafal, and are agreed. Construction work started on 2 May 2017 and the initial phases, relative to the servient land, consisted of forming a compound and batching plant area on part of a field just to the west of the spur road and fencing off that area. The spur road was upgraded, initially by filling potholes. The existing agricultural track to the west, which became the access road, was stripped of topsoil, the underlying material stabilised, and a surface layer of aggregate applied. The topsoil was retained in temporary bunds alongside for use in reinstating the access road embankments. Watercourses were culverted under it and trackside drainage ditches with outlet pipes installed.

16. For the batching compound, the top corner of the field was levelled over 60m x 50m and fenced. Topsoil was stripped and stored, and a surface of aggregate applied to that and to the spur road. The batching plant was then installed. Four site cabins were placed there until these were relocated on the windfarm itself. All of these works were completed by the end of May 2017. Cattle continued to graze the rest of the field.

17. Sand, cement and aggregate was then delivered to the compound and stored until use. The first concrete pour was carried out on 6 July 2017 and the last on 25 August 2017 by mixer trucks driving along the spur road and the access road and on up to the windfarm site.

18. The demobilisation of the batching plant and site cabins, and reinstatement of the compound and spur road, commenced on 29 August 2017 and concluded on 11 September 2017. The compound's aggregate surface was stripped, the levels restored, and the top soil replaced.

19. Bryn Blaen employed a contractor known as Enercon to install the wind turbines. Components were delivered along the access road on weekends between 3 September and 17 November 2017, and daily on the final two weeks of that period. Installation took place between 29 September and 20 November 2017. Whilst this was being done, the embankments of the access road were reinstated.

20. The turbines were commissioned between November 2017 and April 2018, during which the access road was redressed with aggregate and snagging works completed. All plant was removed from site by 27 April 2018.

21. The access road and splay onto the A470 remain, as does the upgraded spur road. The access road was demised to Bryn Blaen by the 2018 lease for an initial term of 28 years at an initial rent of £70,000 per annum, with provisions for a further term and rent increases. The permitted use includes access to the windfarm along the access road and construction and use of adjacent equipment compounds and hardstanding areas. Mr Howells in his oral evidence says that the roads will continue to be used for agricultural purposes, and the right to do so is reserved in the lease, as will the splay as a hardstanding on which to place calf feeders. I accept that evidence.

22. I deal next with the law. It is not in dispute that the claimant must show that there has been an interference with the reasonable exercise of its rights, or in other words that there has been a fundamental change in the character of the servient land.

23. *Peech v Best* [1931] KB 1 concerned a claim of interference with shooting rights over 700 acres by the building of stables and related dwellings for the training of racehorses over 12 of the acres. The Court of Appeal held that that amounted to an infringement of the rights and upheld the grant of a declaration to that effect and an award of £100 damages. Scrutton LJ said this at page 14:

> "It appears to me that fundamentally changing the character of the land over which sporting rights are granted, though it is not with the deliberate intention of injuring the sporting rights, and though it is a thing which a landowner would have power to do if he does not injure the rights of others, if it has the necessary effect of substantially injuring the rights of others is a derogation from the grant, and is a substantial interference with the profit à prendre granted. If this is true of building affecting the whole land, or cutting down all the timber on the land for same: see per Eve J in Dick v Norton, it appears to me to be true of partial changes in the land, provided they substantially injure the rights granted. "

24. At pages 18 and 19 Greer LJ said:

> "..I regard the lease of sporting rights in this case as a lease of rights over farm lands. Though such a grant would not operate to restrain the landlord from interfering with any reasonable and normal operations which might be deemed advisable for the purposes of dealing with the land to the best advantage as farming land, he would have no right to put the land to uses which have nothing to do with farming requirements, so as to oust entirely the sporting tenant from exercising his rights over a substantial part of the land included in the grant…In my judgment, what the defendants were threatening to do by their conduct, if not restrained by injunction, was to entirely prevent the plaintiff from exercising any shooting rights over 12 acres and, I think, also to damage to some extent his shooting rights beyond that area by frightening the birds away."

25. At page 21 Slesser LJ referred to the fact that the 12 acres, although not of much value from a shooting point of view were of some value, and went on to say:

> "From the authorities it would appear that injury to shooting rights from the ordinary management of land is not an injury of which the shooting tenant can complain."

26. The *Peech* case was described as the leading case by the Court of Appeal in *Well Barn (Shoot) Ltd v Shackleton* [2003] EWCA Civ 2, which involved a proposal to convert redundant farm buildings to two dwellings over an area of two acres, with changes to access. This area was part of a much bigger area over which there were shooting rights. The judge at first instance applied the principle in *Peech* and found that the disruptive and noisy construction works and the potential for obstruction by fences amounted to substantial interference. This was upheld by the Court of Appeal.

27. It is not essential to show actual loss to succeed in obtaining an award of damages or an injunction. *Nicholls v Ely Beet Sugar Factory Ltd (No 2)* [1936] Ch 343 involved an allegation that effluent had been discharged on two occasions from a sugar factory into a nearby river, thus prejudicing fisheries. The judge dismissed the claim on the basis that no pecuniary loss and no causation had been established. On appeal Lord Wright MR at page 349 observed that no actual damage need be shown in order to obtain an injunction.

28. However, at page 354, the Master of the Rolls continued thus:

> "In a case like this, the first thing that occurs to the mind is that the only matters involved are of very small importance in money or, indeed, in substance. The plaintiff has his fishery; his title is not attacked; in two years he has suffered for a very brief period an injury for which I think, not ungenerously, I have estimated, treating the damages as being at large, 50*l*. as the sum which I think a jury would fairly have given. There is no threat on the part of the defendants to repeat what they have

> done. The circumstances were such that if these transitory damages were inflicted in these two brief periods when the factory started working it was very improbable that the same thing would happen again. I have not considered the matter finally, but in my judgment it seems to me very improbable that under circumstances like these the Court would have granted an injunction against the defendants, even if the plaintiff had established his case. The issues, I daresay, are much more important from the point of view of the defendants, because an injunction, if it were granted, might have radically affected their whole method of working and might have entirely destroyed the chance of making a profitable use of their factory and their appliances; but from the point of view of the plaintiff the matter involved seemed to me almost nugatory. The trouble, however, is this, that when a case of this type comes before the Court, unless the Court is able to apply the doctrine that it is too small for the Court to take cognizance of it, the Court is bound to try it with the same care as would be required in a case in which questions of the greatest importance, either in value or in principle, or in regard to reputation are involved

29. Applying those principles to the facts of this case, in my judgment the works carried out on the servient land from May 2017 to April 2018 taken as a whole constituted a substantial interference with the rights. The nature of them was industrial and had nothing to do with agriculture and accordingly they amounted to a fundamental change in the character of the land, albeit only a small part of the servient land. They had the effect of excluding the compound, the splay, the spur road and the access road from the exercise of the rights. I take into account that the field in which the compound was placed is likely to have been grazed during this period if the works had not been carried out, so as to preclude shooting towards the field. However, it is not just the effect of exclusion which must be taken into account, but also, as in the *Well Barn* case, the effect of noise and dust on the surrounding areas. Dust reduction measures were put in place during the works, but it is likely that in the summer months particularly significant amounts of dust were generated and it was not suggested otherwise. I have also taken into account that reinstatement work was completed in September 2017, before or shortly afterwards the start of the shooting season in respect of some species of game bird. However, the rights are not restricted to these birds, and heavy plant continued to use the access road frequently until November 2017, and commissioning work, trackside drainage and re-dressing of the access road continued until April 2018.

30. Thereafter, however, in my judgment the substantial interference ceased. I accept that some windfarm related traffic is likely to use the access road, although that traffic is likely to be less frequent and less heavy. There is another and more convenient access to the windfarm off a public highway which runs from Llangurig. However, the access road and spur road are also likely to be used frequently by farm vehicles under the reservation to do so in the 2018 lease. I accept that the splay area will also be used for agricultural purposes.

31. The access road was formerly a grass track which would provide little or no food or cover for game. The 2018 lease demises this and extensive associated rights to Bryn Blaen, but there is no basis to support a finding that this is likely to lead to substantial interference in the foreseeable future. Its director, Steven Radford, was cross-examined about such use. In his witness statement, he referred to the fact that planning permission for the windfarm imposed detailed conditions, including site decommissioning and restoration, which have been complied with. He says the works have been completed. When referred to the extensive rights demised in the 2018 lease, he said these contained standard provisions, but that Bryn Blaen did not need to exercise all of these. For example, rights are granted in respect of the construction of an electricity sub-station, but Mr Radford said there was no need for such a station for the windfarm in question. I accept his evidence.

32. Finally, I deal with relief. The defendants now accept that the claimant is entitled to the declaration sought and I shall grant that. The claimant is also entitled to damages for the substantial interference to its rights between May 2017 and April 2018. I am satisfied that it is unlikely that the claimant has suffered any pecuniary loss during this period. I award nominal damages in its favour against the defendants jointly and severally in the sum of £100. Because the award is nominal in nature, I make no distinction in respect of the parts played by each defendant.

33. In my judgment it is not appropriate to make an award on the basis of negotiating damages. In *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, the Supreme Court, or at least the majority, concluded that there are circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. Imaginary negotiation is a tool for arriving at that value, but the real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.

34. This was one of the few differences between the surveyors. Mr Wyn Jones gave examples of cases where a release fee was negotiated for the release of shooting rights. In the more recent of those cases the release was needed to allow residential development. Mr Osborne made the point that potential lenders would want to be satisfied that any development was not in breach of the rights. He was of the view that negotiating damages are not appropriate in this case, on the basis the claimant had a weak bargaining position in respect of its rights over the servient land as agricultural land where such rights had not been exercised for years.

35. The claimant contemplated applying for an interim injunction to prevent the works, but as Mr Stirk frankly accepted, was put off by the risk of having to pay damages under the usual undertaking. In my judgment, that is not surprising having regard to the disparity between the potential prejudice to the claimant in not granting such an injunction on the one hand, and that to the defendants in granting such an injunction on the other. The principle that such an interim injunction will usually be granted to restrain continuing trespass, as set out in *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853, does not in my judgment suggest otherwise, where the trespass is of a temporary nature and where, as I have found here, a declaration and nominal damages is sufficient affirmation of the claimant's rights. In my judgment the claimant was in a very weak bargaining position, and the economic value of the right breached on a temporary basis in circumstances where the right had not been exercised for decades is such that nominal damages are sufficient remedy.

36. Thereafter, as there is no continuing interference, there is no further award of damages.

37. As for injunctive relief, it is accepted that such is now not appropriate in respect of the works which have already taken place. As there is no substantial interference continuing, or likely in the foreseeable future, the grant of an injunction now is inappropriate.

38. It was agreed with counsel at the end of closing submissions that they would consider this judgment before deciding how best to deal with consequential matters. If these can be agreed or dealt with on the basis of written submissions I invite such submissions within 14 days of hand down. If not, then a request for a further hearing should be made within that timescale, together with a time estimate.

39. I end by repeating my thanks to each counsel for the thorough yet focused way in which each presented his case.