HOUSE OF LORDS SESSION 2008–09
[2009] UKHL 4

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OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Trent Strategic Health Authority (Respondents) *v* Jain and another (Appellants)

Appellate Committee

Lord Scott of Foscote
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

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LORD SCOTT OF FOSCOTE

My Lords,

Introduction

1. This is a case in which the appellants, Mr and Mrs Jain, have had their nursing home business destroyed by executive action taken against them by a regulatory authority, The Nottingham Health Authority ("the Authority"). The Authority's statutory successors, Trent Strategic Health Authority are the respondents to this appeal. They inherit any liability incurred by their predecessors.

2. The executive action taken by the Authority consisted of an application made, *ex parte* and without notice, to a magistrate for the cancellation of the registration of Mr and Mrs Jain's nursing home, Ash Lea Court, a requisite under Part II of the Registered Homes Act 1984 for the use of Ash Lea Court as a nursing home. Ash Lea Court had been acquired by Mr and Mrs Jain in 1989 and used as a nursing home to cater for residents who were mentally ill and infirm. Most of them were elderly. Their average age was over 80. Under section 23(1) of the 1984 Act

> "Any person who carries on a nursing home or a mental nursing home without being registered under this Part of this Act in respect of that home shall be guilty of an offence."

3. The cancellation application was made pursuant to section 30 of the 1984 Act. Section 28 gives power to the Secretary of State to cancel the registration of a nursing home but he must give notice of his proposal to do so to the proprietors of the nursing home (see s.31(3)) and they must be given the chance to make representations (s.32). So, if the application is thought to be urgent, section 30 is the route to be followed.

> "30(1) If –
>
> (a) the Secretary of State, applies to a justice of the peace for an order -
>
> (i) cancelling the registration of a person in respect of a nursing home or mental nursing home;
>
> (ii) …….;
>
> (iii) ……; and
>
> (b) it appears to the justice of the peace that there will be a serious risk to the life, health or well being of the patients in the home unless the order is made, he may make the order, and the cancellation …. shall have effect from the date on which the order is made.
>
> (2) An application under subsection (1) may be made *ex parte*, and shall be supported by a written statement of the Secretary of State's reasons for making the application.
>
> (3) An order under subsection (1) above shall be in writing.
>
> (4) Where such an order is made, the Secretary of State shall serve on any person registered in respect of the home, as soon as practicable after the making of the order-
>
> (a) notice of the making of the order and of its terms; and
>
> (b) a copy of the statement of the Secretary of State's reasons which supported his application for the order."

Under section 34 of the Act appeals from orders under section 30 can be made to a Registered Homes Tribunal. The 1984 Act has been repealed and its provisions replaced by the Care Standards Act 2000 but nothing turns on this.

4. The section 30 application was made by the Authority on 30 September 1998 and came before a stipendiary magistrate sitting at Nottingham on 1 October 1998. It may seem an oddity that the application was made by the Authority and not by the Secretary of State. Section 13 of the National Health Service Act 1977 and directions made under that section are referred to in the appellants' Printed Case in support of I have assumed, therefore, that the Authority was entitled to exercise the Part II powers of the Secretary of State.

5. The stipendiary magistrate granted the application on 1 October 1998. He made the order sought. It had the effect of requiring the immediate removal from Ash Lea Court of the thirty three elderly and infirm patients who were living there. Mr and Mrs Jain had been given no prior notice of the application or of the grounds on which it was made. They had no opportunity of contesting the enforced closure of their nursing home.

6. Mr and Mrs Jain's only recourse was to appeal to a Registered Homes Tribunal. This they did. But there was no procedure available for an expedited appeal and no procedure enabling a stay of the magistrate's order pending an appeal to be obtained. We were told that the procedures under which appeals to a Registered Homes Tribunal can be made lead to a minimum delay of six weeks before an appeal can be heard. In the event, Mr and Mrs Jain's appeal was not heard until February 1999, over four months after the order had been made, and, not surprisingly, by the time the appeal was heard irrevocable damage had already been done to their nursing home business, with an adverse knock-on effect on other assets that they owned.

7. The appeal, heard by the Tribunal on 8 and 9 February 1999, was a resounding success. But the success came too late to afford them more than the satisfaction of vindication. The Tribunal, having heard evidence from the Authority in purported justification for the action they had taken, did not call for any evidence from the Jains in response and were scathing in their criticism of the Authority. In the Tribunal's nineteen page Reasons For Decision one reads of the inclusion of irrelevant and prejudicial information in the statutory statement that had been placed by the Authority before the magistrate, of insinuations by the Authority of abuse of residents notwithstanding the absence of evidence sufficient to justify any charges of abuse, and of untrue suggestions by the Authority of failure by the Jains to comply with various statutory regulations. Some of the complaints made in the statutory statement about the running of the nursing home did, in the

view of the Tribunal, have some substance but, commented the Tribunal, "none warranted the immediate closure of the home". They said that "there was no reason for supposing that the residents could not properly have been protected by proper monitoring by the inspectors and the provision of advice where necessary". The statutory statement had complained that building works of improvement being carried out at Ash Lea Court had produced an unsatisfactory physical environment for the residents, but the Tribunal noted that there was no evidence that the dust from the building works "posed any risk to the life or health of the residents" and concluded that the conditions at Ash Lea Court had not justified an application for an order under section 30 :

> "… the respondents have wholly failed to persuade us that an application for an order cancelling registration under section 30 was an appropriate way of meeting [the Authority's concerns about the running of the nursing home]"

8. The Tribunal was particularly scathing about the Authority's decision to make their application *ex parte* and without notice to the Jains. While accepting that there had been "no bad faith" on the part of the officials who, on behalf of the Authority, had been responsible for making the application, the Tribunal said that they could see

> "… no justification whatever for the failure to warn [the Jains] that the application was to be made"

So the Tribunal allowed the appeal, set aside the magistrate's order of 1 October 1998 and expressed, as a coda, their regret that they had no power to order the Authority to pay Mr and Mrs Jain's costs: cold comfort, no doubt, for the Jains.

9. The upshot of this sad story is that Mr and Mrs Jain's nursing home business had been ruined and serious economic harm had been inflicted on them by an *ex parte* without notice application that ought never to have been made.

The litigation

10. Being unwilling to accept their undeserved fate, Mr and Mrs Jain have sought a remedy in tort for the economic damage caused to them by the Authority's unjustified application. It was, of course, the magistrate's order that directly caused the damage and a causation point was taken, unsuccessfully, by the respondent health authority both at first instance before Sir Douglas Brown, sitting as an additional judge of the Queen's Bench Division, and before the Court of Appeal. The causation point has not been revived before us. The remaining question on liability, answered in favour of Mr and Mrs Jain by Sir Douglas Brown but adversely to them by the Court of Appeal (Arden and Wilson LLJ, Jacob LJ dissenting), is whether the Authority, in making the application for cancellation in the manner in which they did, were in breach of any tortious duty that they owed Mr and Mrs Jain under domestic law. Since no allegation of bad faith or of misfeasance in public office is made against any of the officers of the Authority, the domestic law cause of action on which the Jains must, and do, rely is the tort of negligence. The difficulty for the Jains is that reliance on the tort of negligence requires them to establish that, in preparing and making their section 30 application, the Authority owed them a duty of care. Sir Douglas Brown and Jacob LJ thought the Authority did owe a duty of care. Arden LJ and Wilson LJ thought they did not. Yours Lordships' opinions on this appeal must resolve the issue.

The Human Rights Act 1998

11. Before, however, turning to that determinative issue I want to consider the implications of the 1998 Act. The Act, although it received the Royal Assent on 9 November 1998, did not come into effect until 2 October 2000. The Authority's section 30 application and the magistrate's order had been made some two years earlier. The Jains cannot, therefore, pray in aid in the domestic courts their Convention rights incorporated into domestic law by the 1998 Act. If, however, those events had happened after 2 October 2000, it seems to me, as at present advised, that Mr and Mrs Jain would have had a sound case for contending for a remedy under that Act. If that is right, it is, to my mind a consideration which bears upon the question whether this House should now, after the enactment of the 1998 Act, develop the duty of care so as to provide a common law tort remedy in cases such as this. The point that such a development should be left to Parliament would have particular force, as it seems to me, where Parliament had already legislated and had provided a domestic law remedy. With some

trepidation, therefore, for this is not a matter that has been addressed by counsel, it seems to me worth considering how this case would look if the 1998 Act had been applicable.

12. Two Convention rights would, I think, have been in play. Article 1 of the First Protocol to the Convention provides that -

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

The benefit of registration of Ash Lea Court under Part II of the 1984 Act, enabling Mr and Mrs Jain to use the property as a nursing home, would, in my opinion, qualify as a possession for Article 1 purposes (see *Van Marle v Netherlands* (1986) 8 EHRR 483 where the goodwill of a business qualified as an Article 1 possession). The Article 1 right to enjoy possessions is, of course, not an unqualified right. It is subject to the State's entitlement to impose limitations where other important interests are at stake. The State is plainly entitled in the public interest to impose limitations for the purpose of safeguarding vulnerable people, such as elderly and infirm residents in nursing homes.

13. Limitations imposed in the public interest on rights to the enjoyment of possessions must, however, be reasonable and proportionate to the purpose sought to be achieved. As the Strasbourg court observed in *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35, paragraph 69 :

> "… the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights…."

And in striking the "fair balance" the requirements of Article 6 of the Convention must, in cases where the interference with possessions requires a judicial or quasi-judicial ruling, surely be borne in mind :

> "6.1 In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing …"

The right under Article 6 to a "fair and public hearing" becomes very relevant when a judicial or quasi-judicial order has deprived an individual of his possessions, has been made at a hearing of which he was given no notice, is an order that he has had no opportunity of resisting until it is too late, and has been made in response to an application by the State or agents of the State that ought not to have been made.

14. It is easy to accept that the statutory requirement for registration of a nursing home as a condition of the use of premises for that purpose is an unexceptionable limitation on Article 1 of the First Protocol rights, that statutory provision enabling an application to be made to a court or tribunal for cancellation, on sufficient cause being shown, of the registration of a registered nursing home, too, is a necessary limitation, that in cases of urgency, where delay in making the application may leave the lives or health of residents in a nursing home at risk for an unacceptable period, an immediate application without the period of notice normally required may be necessary, and that in really extreme cases it may be necessary to make the application without any prior notice being given to the proprietors of the target nursing home. But an application to a court or a tribunal without prior notice to a respondent whose economic interests will be prejudiced, perhaps severely, by the order that is sought has an inherent potential for injustice and can be acceptable, and compatible with the Convention rights guaranteed under Article 6 and Article 1 of the First Protocol, only if hedged around with precautions and procedures designed to limit the injustice so far as practicable.

15. The vice and potential injustice of *ex parte* applications made without notice to the respondent and of orders that are made on such applications and executed immediately with consequent damage, sometimes irreversible, to the respondent's business, became apparent in the early years of Mareva injunctions and Anton Piller orders. It became apparent to me when hearing an application in the Chancery Division consequent upon the grant *ex parte* of a Mareva injunction and Anton Piller order against a copyright pirate. The case was *Columbia Pictures Industries Inc v Robinson* [1987] Ch 38 and the facts of the present case brought the respondent's complaints in that case vividly to my mind. I noted in that case that

> "It is a fundamental principle of civil jurisprudence in this country that citizens are not to be deprived of their property by judicial or quasi-judicial order without a fair hearing" (p.73).

and asked

> "what is to be said of the *Anton Piller* procedure which, on a regular and institutionalised basis, is depriving citizens of their property and closing down their businesses by orders made *ex parte*, on applications of which they know nothing and at which they cannot be heard, by orders which they are forced …. to obey, even if wrongly made?" (p.74).

All of this could be said of the procedure employed by the Authority in their section 30 application in the present case, save, I hope, that the *ex parte* without notice procedure is not used on a "regular and institutionalised basis" (but see *Lyons v East Sussex County Council* (1987) 86 LGR 369).

16. Orders in response to *ex parte* without notice applications made in the High Court, of whatever variety, are accompanied by procedural safeguards for the protection of absent respondents that are apparently not available where such applications are made to a magistrate under section 30 of the 1984 Act, or, for that matter, under section 11 (see *Lyons v East Sussex County Council*). First, the High Court judge can, and usually does, require a cross-undertaking in damages to be given by the applicant for the order, undertaking that, if it turns out that the order ought not to have been granted and has caused loss to the respondent, the applicant will compensate the respondent in such sum as the court may think right. Such undertakings are not required by magistrates as a condition of making section 30, or section 11, orders on *ex parte* applications and there appears to be good reason to doubt whether a magistrate would have power to exact such an undertaking and whether, or how, the undertaking, if exacted, would be enforceable. Second, an order made by a court on an *ex parte* application can be the object of an immediate application by the respondent for the order to be set aside or stayed until his response to the application for the order can be heard. This procedure is not available under the 1984 Act; all that can be done by the respondent against whom and in whose absence the *ex parte*

order has been made is to appeal the order and wait for a minimum of six weeks for the appeal to be heard – by which time the damage done to the nursing home business that has been closed down may, as here, be irreversible. Third, it is accepted that on an *ex parte* application to the High Court the applicant, and the lawyers acting for the applicant, owe duties to the court to make full and fair disclosure of all facts and matters known to them relevant to the application and to the order being sought. A breach of this duty can be dealt with by the immediate discharge of the order, and by an indemnity costs order against the applicant for the order. I am not clear whether a similar duty should be regarded as resting on those who apply for *ex parte* orders under section 30, or section 11, of the 1984 Act, but even if it should be so regarded, the tools available to a magistrate to enforce the duty and impose a sanction for any breach appear to be non-existent.

17. My Lords the safeguards to which I have referred, which, in my opinion, render, in principle, the procedures attending *ex parte* without notice applications in the High Court and orders made in response thereto Convention compliant, appear to be wholly absent when *ex parte* applications for orders under the 1984 Act are made. I find it very difficult to see how the 1984 Act procedures for these applications can be regarded as compliant with Article 6, or how the making of an order under the Act in response to such an application can be regarded as having been made in the public interest for Article 1 of the First Protocol purposes where, as here, it is established, albeit late in the day, that the application ought never to have been made.

18. My Lords, the considerations to which I have referred lead me to suppose that, if the application and order of which Mr and Mrs Jain complain had post-dated 2 October 2000, they would have been entitled to compensation under domestic law. How could it be compatible with their Convention rights to deprive them by judicial order of the benefit of registration of their Ash Lea Court nursing home without according them the opportunity of showing the application to be insubstantial and based on insufficient grounds and without there being any circumstances of urgency arguably sufficient to justify depriving them of that opportunity?

The duty of care

19. As it is, however, the 1998 Act is not available to provide a domestic law remedy to Mr and Mrs Jain. A remedy for breach of their

pre 2 October 2000 Convention rights can only be obtained from Strasbourg. But before they can apply to Strasbourg they must exhaust their domestic remedies, hence the litigation commenced by Mr and Mrs Jain that is now before the House and the success of which requires them to persuade your Lordships that, in the circumstances of this case, a duty of care was owed to them by the Authority.

20. My Lords, I am of the opinion, in agreement with the majority in the Court of Appeal, and substantially for the reasons they have given, that an authority making an application to a magistrate under section 30 for the cancellation of the registration of a nursing home, or, for that matter, under section 11 for the cancellation of the registration of a residential care home, does not owe a common law duty of care to the proprietors of the home. In making the application the authority is exercising a statutory power. The purpose of the power is the protection of the residents in the home in question. It might be fair and reasonable to conclude that the authority did owe a common law duty of care to the residents of a nursing home or a care home if conditions at the home warranting the exercise of the authority's statutory powers had come to the authority's attention but nothing had been done. But to conclude that an authority exercising, or deciding whether to exercise, its statutory powers owed a duty of care also to the proprietors of the home seems to me much more difficult.

21. There are two lines of authority which bear upon this issue. One line of authority consists of cases where the exercise of statutory powers conferred for the protection of a certain class of persons will or may impinge on the interests of others. The other line of authority consists of cases where the bringing of unsuccessful judicial or quasi-judicial proceedings has resulted in economic loss to the eventually successful respondent.

22. Cases in the first mentioned line of authority include *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151; [2004] QB 558, in which the judgment of the Court of Appeal, handed down by Lord Phillips of Worth Matravers M.R. (as he then was), contains a valuable review of cases in this line of authority. The Court of Appeal was hearing three appeals each of which involved accusations of abuse of a child made against a parent of the child by the professionals concerned for the welfare of the child. In each case, the accusations having proved unfounded, the parent claimed damages in negligence for psychiatric harm alleged to have been caused by the false accusations. In each case, therefore, the question arose whether the professionals,

who had a statutory duty, and perhaps a common law duty too, towards the child, owed a common law duty of care to the parent.

23. The Court of Appeal concluded that while a common law duty of care might on the individual facts of a particular case be owed to the child, no common law duty of care was owed to the parent. In paragraph 86 the Court explained why.

> "… Where the issue is whether a child should be removed from the parents, the best interests of the child may lead to the answer yes or no. The Strasbourg cases demonstrate that failure to remove a child from the parents can as readily give rise to a valid claim by the child as a decision to remove the child. The same is not true of the parents' position. It will always be in the parents' interests that the child should not be removed. Thus the child's interests are in potential conflict with the interests of the parents. In view of this, we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents."

An appeal by the parent to this House was dismissed: [2005] UKHL 23; [2005] 2 AC 373. Lord Nicholls of Birkenhead, in paragraph 85, expressed the same "conflict of interest" reason that had been given by the Court of Appeal. So, too, did Lord Rodger of Earlsferry (para.110) and Lord Brown of Eaton-under-Heywood (para.129). Lord Steyn expressed his agreement with the opinions they had given.

24. *B v Attorney General of New Zealand* [2003] UKPC 61; [2003] 4 All ER 833 was a case that arose out of the belief by a social worker that a child was the victim of sexual abuse by a parent. A statutory duty to investigate was cast by the Children and Young Persons Act (New Zealand) 1974 on the Director General of Social Welfare if he had reason to suspect that a child was suffering or was likely to suffer from ill treatment. Both the parent and the child subsequently claimed damages in respect of the allegedly negligent way in which the investigation had been conducted. The issue for the New Zealand courts and, on appeal, for the Privy Council was whether a tortious duty of care was owed and, if so, to whom. The New Zealand courts held that no duty of care was owed. The judgment of the Board, delivered by Lord

Nicholls of Birkenhead, allowed the appeal by the child but dismissed that of the parent. The Board said, in paragraph 30 (p.841) that

> "… to impose a common law duty of care on the department and the individual professionals in favour of the alleged victims or potential victims and, at one and the same time, in favour of the alleged perpetrator would not be satisfactory."

25. *M v Newham London Borough Council* [1995] 2 AC 633 was one of the appeals heard by the House of Lords at the same time as, and reported with, *X v Bedfordshire County Council* and three other appeals. In the *Newham* case the Council, in reliance on a social worker's suspicions that a child was suffering sexual abuse, removed the child from her mother's care. The suspicions were mistaken and both the mother and the child sued in negligence for damages for psychiatric harm brought about by their separation. This House held that no duty of care was owed either to the child or to the mother. Subsequent cases, fully reviewed by the Court of Appeal in the *D v East Berkshire* case, have placed a question mark against the conclusion that no duty of care was owed to the child, but the authority of the *Newham* case for the proposition that no duty of care was owed to the mother remains unshaken. The social worker's, and the Council's, statutory duty had been owed to the child. That duty provided no basis for the imposition on the authority of a duty of care owed to the mother.

26. The cases to which I have referred are cases in which the damage complained of was personal damage. The cases where the damage complained of was economic show similar conclusions for similar reasons. *Harris v Evans* [1998] 1 WLR 1285 was a case in which the Court of Appeal held that the Health and Safety Executive and their inspectors, when requiring steps to be taken by the proprietor of bungee jumping facilities in order to improve the safety of members of the public using those facilities, did not owe a tortious duty of care to the proprietor of the facilities who had suffered economic damage on account of their requirements, some of which turned out to have been misconceived. Their duty, a statutory one, was owed to the members of the public using the facilities.

27. Similarly, it was held in *Reeman v Department of Transport* [1997] 2 Lloyds Rep 648 that the Department did not owe a duty of care to the purchaser of a fishing boat who had relied on an incorrect

safety certificate in respect of the vessel. The object of the statutory scheme pursuant to which the certificate had been issued was to promote safety at sea and not to safeguard the economic interests of purchasers of the vessels. This decision appears to me to be on all fours with the great case of *Caparo Industries plc v Dickman* [1990] 2 AC 605, where this House held that the auditors of a company's accounts did not owe a duty of care to potential purchasers of shares in the company. Their duty of care was owed to the company and its current shareholders.

28. This line of authority demonstrates, in my opinion, that where action is taken by a State authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the State authority to others whose interests may be adversely affected by an exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose.

29. The second line of authority relates, as I have said, to the conduct of, or to steps taken in preparation for, litigation and includes both civil and criminal cases. In *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 the Court of Appeal held that the Crown Prosecution Service owed no general duty of care to a particular defendant in their conduct of a prosecution of him : per Steyn LJ at 348

> "In the absence of a specific assumption of responsibility lawyers engaged in hostile civil litigation are not liable in negligence to the opposing party"

and, at 349

> "… there is no duty of care owed by the CPS to those it prosecutes."

In *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495 Lord Rodger of Earlsferry (at 1511, para 38) referred with approval to *Elguzouli-Daf* which showed, he said, that

> "… the Crown Prosecution Service and the police owe no duty of care to a defendant against whom they institute and maintain proceedings. The reasons are general, but nonetheless persuasive."

30. In *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229 I struck out a claim for damages in negligence brought by a company which had been made the object of a winding-up order on a petition that had never been served on the company. The petition had been served at the address stated in the petition to be the company's registered address. But it was the wrong address. The company did not know the petition had been issued, did not appear at the hearing of the petition and, the petition appearing to the judge to be regular, the winding-up order had been made. The company succeeded in getting the winding-up order set aside but it sued the petitioner in negligence for the damage it claimed it had suffered. The petitioner's application to have the negligence action against it struck out succeeded on the ground that it had not owed the company a tortious duty of care. I held, at 239, that it was not "just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process" and said that "the safeguards against ineffective service of process ought to be … found in the rules and procedures that govern litigation", and, at 241, that -

> "… there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort."

31. In *Customs & Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181 the issue was whether a bank, which had been given notice of a court order freezing an account held by one of the bank's customers, owed the party who had obtained the order a duty of care to comply with its terms. The first instance judge, Colman J, had held that the duty of care was not owed by the bank, the Court of Appeal had disagreed, and the issue came before the House. The House, like Colman J, held that no duty of care was owed. The judgments of their Lordships repay careful reading but it will suffice for present purposes, I think, to refer to a few short passages. Lord Bingham of Cornhill at 195 (para.18) said that

> "… it cannot be suggested that the customer [the party against which the freezing injunction had been obtained] owes a duty to the party which obtains an order, since they are opposing parties in litigation and no duty is owed by a litigating party to its opponent …"

Lord Rodger of Earlsferry at 202 (para.47) said that

> "When parties embark on contested court proceedings, even under the rules of procedure in force today, they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care."

Both their Lordships cited with approval the *Business Computers* case.

32. Finally I should refer to *Martine v South East Kent Health Authority* (1993) 20 BMLR 51, a decision of the Court of Appeal on the very question in issue in the present case, namely, whether a common law duty of care is owed to the proprietors of a registered nursing home by a health authority that makes a section 30 application for the cancellation of the registration. The Court of Appeal held that a duty of care was not owed and the question whether *Martine* was rightly decided is identified in the Statement of Facts and Issues signed by the respective counsel for the parties to this appeal as one of the issues to be decided by the House.

33. As in the present case, the section 30 application made in *Martine* was made *ex parte*. It was supported by a written statement of the reasons for making the order made by the health authority's chief nursing officer. The order cancelling the registration was made by the magistrate and the nursing home was perforce closed with financial loss to its proprietor. As in the present case, the proprietor appealed to a registered homes tribunal which, having heard the appeal, found that the facts relied on in support of the application did not provide grounds for seeking or granting the order. So the section 30 order was set aside and, again as in the present case, the proprietor brought an action in negligence (combined with an action for malicious prosecution) against the health authority. The first instance judge struck out the negligence claim, the plaintiff appealed and, as here, the issue for the Court of

Appeal was whether the health authority had owed the plaintiff the requisite duty of care.

34. Dillon LJ, who gave the leading judgment, referred to the *Business Computers* case and approved the conclusion that

> "… it was not just or reasonable … that there should be a duty of care because the adversarial system of litigation has its own rules and requirements, which operate as checks and balances"

and that if in any circumstances the checks and balances should fail

> "… negligence as a tort could not be, and should not be, invoked as the remedy."

"So it is", said Dillon LJ, "with the statutory procedure under section 30 of the 1984 Act". The statutory check on an unjustified section 30 application was, he pointed out, that the order had to be made by a magistrate, so that if the health authority failed to put forward an adequate case

> "… it would be the duty of the justice of the peace to ask for more information or reject the case until it has been more fully made out."

He concluded that

> "… there is no warrant … for extending the duty of care in these circumstances."

Leggatt LJ expressed himself to the same effect.

> "The prescribed procedure is fast, and interposes only a sole justice of the peace between a health authority in pursuit of an order under the Act and the owner of a

> nursing home. But the fact that the safeguard is slight does not entitle a litigant to make good a supposed deficiency in the statutory procedure by recourse to the tort of negligence."

35. My Lords, the cases in this second line of authority, including *Martine*, which I regard as having been rightly decided, establish, in my opinion, that where the preparation for, or the commencement or conduct of, judicial proceedings before a court, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, has the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care. The protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation must depend upon the control of the litigation by the court or tribunal in charge of it and the rules and procedures under which the litigation is conducted.

Conclusion

36. Each of these lines of authority leads to the conclusion that this appeal must be dismissed. The 1984 Act conferred statutory powers on registration authorities. These powers enable registration authorities to entertain applications for registration of nursing homes (s.23), to refuse such applications (s.25), to cancel registrations (s.28 but subject to the procedures required under ss 31 to 33) and to apply *ex parte* to a magistrate for an order cancelling registrations with immediate effect (s.30). The exercise of the powers under sections 25, 28 and 30 may often, perhaps usually, cause economic damage to the proprietors of the nursing homes, or, in the case of section 25, the intended nursing homes. The purpose of these powers, however, is to protect the interests of the residents in nursing homes. The interests of the proprietors of nursing homes that the homes should remain open for that use "are in potential conflict with the interests of …" the residents (see *D v East Berkshire Community NHS Trust* para.86, cited in para.23 above).

37. As to the second line of authority, there is, in my opinion, as I hope I have made clear, a lamentable lack in the statutory procedures prescribed for section 30 applications of reasonable safeguards for the absent respondents against whom these applications, *ex parte* and without notice, can be made. The only safeguard, as Dillon LJ observed

in the *Martine* case, is that the cancellation order must be made by a magistrate. The clear inadequacy of that as a sufficient safeguard does not, in my opinion, justify the creation of a duty of care. The remedy lies, surely, in the amendment of the procedures so as to incorporate safeguards on the lines of those that attend applications in the High Court for *ex parte* orders. My opinion that the role of the magistrate is, by itself, an inadequate safeguard against injustice to absent respondents is not based on any adverse opinion of the quality of magistrates but rather on the inability of any judge hearing an *ex parte* application in the absence of the respondent to guard against potential injustice. A judge, or magistrate, may often be sceptical as to whether assertions of imminent risk of disaster made by an applicant for an *ex parte* order are well founded but, lacking any means of testing them and faced with the possibility that they may be well founded, has often no real alternative but to accept them at their face value and to make the order sought.

38. The remedy for this does not, in my opinion, lie in the creation and imposition on the registered authority of an inappropriate duty of care owed to the proprietors of the nursing homes in question. It lies in the formulation and application of procedural safeguards comparable to those attendant upon *ex parte* applications in the High Court. The Secretary of State has power, under section 9(2) of the Protection of Children Act 1999, by regulations to "make provision about the proceedings of the Tribunal" before which now, under the Care Standards Act 2000, appeals against orders made by magistrates under section 20 of that Act, replacing section 30 of the 1984 Act, must be brought. It is doubtful whether this power would permit the Secretary of State to make a regulation enabling the Tribunal to grant a stay of a magistrate's order pending the hearing of an appeal. But procedure for an expedited appeal could surely be provided. As to the proceedings in the magistrates court, a discretionary power for magistrates to require cross-undertakings in damages to be given by applicants for *ex parte* orders, coupled with means of enforcement, would be an obvious and important procedural safeguard. Another would be the requirement that, unless impracticable, short notice of the intention to make the *ex parte* application be given to the proprietor, or manager, of the nursing home. And, also, power for a magistrate, on sufficient cause being shown, to entertain an application for, and to grant, an immediate stay of an order made *ex parte* might prevent the sort of injustice that occurred in the present case. Sections 144 and 145 of the Magistrates' Courts Act 1980 appear to me to provide the necessary statutory authority for rules of this sort to be made. A further safeguard would be an explicit statement that the applicant's duty to the magistrate to whom the application was to be made was a duty of full and fair disclosure, again, with sanctions available to be employed by the magistrate in the event of any breach.

If procedural improvements on these lines are not introduced, the 2000 Act section 20 procedure will continue to appear, as the 1984 Act section 30 procedure appears to me now, to be incompatible with the Convention rights of those against whom these *ex parte* applications are made.

39. It is, moreover, the case that, post-2 October 2000, article 6 and article 1 of the First Protocol have become part of our domestic law and that breaches of these articles can be met by damages remedies under domestic law. As Lord Brown of Eaton-under-Heywood observed in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2008] 3 WLR 593 at 633/4 (para.136)

> "… it is quite simply unnecessary now to develop the common law to provide a parallel cause of action"

40. Accordingly, with regret and with very great sympathy for the endeavours of Sir Douglas Brown and Jacob LJ to fashion a domestic law remedy for Mr and Mrs Jain, I would dismiss this appeal

LORD RODGER OF EARLSFERRY

My Lords,

41. I have had the advantage of considering the speech of my noble and learned friend, Lord Scott of Foscote, in draft. Since counsel did not make submissions on the point, I prefer not to speculate on the position if the Human Rights Act 1998 had been in force when the relevant events took place. Leaving that matter on one side, I am in full agreement with Lord Scott's reasons for dismissing the appeal, as well as with the further observations of my noble and learned friend, Lord Carswell.

BARONESS HALE OF RICHMOND

My Lords,

42. When refusing leave to appeal to this House, Jacobs LJ expressed the hope that we would give leave: "In my view, the injustice sanctioned by the majority of this court, if a true consequence of the law, should be sanctioned at the highest level". We did give leave, because we shared his view that there was indeed a serious injustice here which deserved a remedy. It is with the greatest of regret that we have all reached the conclusion that the common law of negligence does not supply one. I have nothing to add to the reasons given by my noble and learned friend Lord Scott of Foscote for reaching that conclusion.

43. However, the Human Rights Act 1998 is expressly designed to offer individuals a remedy, if need be in damages, against public authorities which act incompatibly with their Convention rights. That is one of the great benefits brought by the Act to people who have been wronged by an abuse of executive power. It is, to say the least, arguable that this public authority did indeed act incompatibly with two of the Convention rights. Under article 6(1) of the Convention, "In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Mr and Mrs Jain did eventually achieve such a hearing before the Registered Homes Tribunal and as a general rule, article 6(1) does not apply to interim measures such as the Magistrate's order. However, article 6(1) can apply to interim measures if their practical effect is to determine the rights in question, as was the case here. The home was instantly closed down, the residents dispersed, and Mr and Mrs Jain were ruined. This is the sort of irreparable damage which can mean that even interim measures must comply with article 6(1): see, for example, *Markass Car Hire Ltd v Cyprus*, application no 51591/99, 23 October 2001; *Zlínslat, Spol. S.R.O. v Bulgaria*, application no 57785/00, 15 June 2006. Each of those cases concerned actions which interfered with the running of a business; in the latter case, the prosecuting authorities prohibiting the privatisation of a hotel and thus effectively prevented the applicants from running it. Hence it also seems likely that closing this home down would be regarded as the determination of a "civil right" for the purpose of article 6(1).

44. Also relevant may be the rights protected under article 1 of the First Protocol: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Controls on the use of property are, however, allowed "in accordance with the general interest". This is a broader test than the more familiar qualifications in articles 8 to 11, which require that the interference be necessary and proportionate for the purpose of one of the legitimate aims listed in each article. Controlling the use of premises as a home for vulnerable adults is fairly obviously in the general interest. But that does not mean that it is in the general interest to close down a home and ruin someone's business when, as the tribunal found, there was no good reason to do so; still less does it mean that it is in the general interest to descend upon a home with a number of ambulances and nurses and remove 33 elderly mentally infirm residents to other hospitals and nursing homes without any notice or opportunity to prepare for such a distressing and potentially damaging disruption to their lives.

45. We cannot, of course, express any concluded opinion on these issues because they are not before us. Perhaps they will one day come before the European Court of Human Rights. They are not before us for two reasons. First, the remedy given to individuals under sections 6 and 7 of the 1998 Act does not apply to the acts of public authorities taking place before the 1998 Act came into force, as this did: see *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807. Furthermore, the interpretative duty in section 3(1) of the 1998 Act only arises in respect of acts of public authorities which would otherwise be unlawful under section 6. Once again, therefore, it does not arise if those acts took place before the 1998 Act came into force: see *R (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189.

46. Secondly, the interpretative duty in section 3 is designed to march hand in hand with the power to make a declaration of incompatibility in section 4. Only if the problem cannot be cured by interpretation should a declaration be made: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. Hence if section 3 is not available as an interpretative tool, the power to make a declaration of incompatibility under section 4 does not arise: see *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816. In any event, such a declaration does not affect the validity, continuing operation or enforcement of the provision in which it is given and is not binding on the parties to the case in which it is made: see section 4(6). Accordingly, Mr Ullstein QC, who appears for Mr and Mrs Jain, very properly took

the view that it would be disproportionate to pursue an earlier claim for a declaration of incompatibility.

47. Such a claim would in any event present some difficulties because it may be possible to operate section 30 in a compatible way. Authorities can and should refrain from making section 30 applications in cases which do not warrant them. Magistrates can and should refrain from making *ex parte* orders unless there is no alternative. As my noble and learned friend Lord Carswell has pointed out, it is likely to be a very rare case where an order has to be made without giving the owners an opportunity to state their case. I agree with everything which he has said upon that subject.

48. With regret, therefore, I too would dismiss this appeal.

LORD CARSWELL

My Lords,

49. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Scott of Foscote. I agree entirely with what he has said and for the reasons which he has given I too would dismiss the appeal. I wish to add only a few observations.

50. The decision in *Martine v South East Kent Health Authority* (1993) 20 BMLR 51, which Lord Scott has discussed in paras 32-4 of his opinion, is predicated upon the assumption that magistrates will carry out their safeguarding function in a satisfactory manner. In the present case that function was not carried out in a manner sufficient to prevent a serious miscarriage of justice. The House did not have any details of the hearing before the magistrate, and is not in a position to say whether he should have probed more carefully into the issues involved in granting such a draconian remedy as an *ex parte* cancellation of the appellants' registration, or whether he was misled into his decision by unfounded representations made on behalf of the respondent health authority.

51. What is very clear is that the case should sound as a strong warning to magistrates faced with similar *ex parte* applications to make orders cancelling the registration of persons operating nursing homes. It is likely to be a very rare case where an order has to be made without giving the owners an opportunity to state their case. Magistrates should devote care to probing the case made by health authorities, to satisfy themselves whether there is such a risk that no course other than that of making an immediate cancellation order can safely be followed. Certainly on the facts which came out before the tribunal in the present case, there was no need whatever to make an immediate order. No harm would have been done to the interests of the patients if the magistrate had adjourned the matter for such time as was required to allow the appellants to advance any explanations they might wish to put before him and make representations why it was not necessary to make an order to protect the patients against serious risk to their life, health or well-being. If this simple step had been taken, there might have been a wholly different result. I must express the hope that magistrates will understand and accept the imperative need to devote the necessary time and care to ascertaining whether such orders need to be made at all and, in particular, whether they should accept the case made *ex parte* for cancellation of registration. They should bear in mind that their function is to exercise an emergency function for the protection of patients. If there is evidence that a nursing home is being run in an unsatisfactory manner, but they are not satisfied that there is a serious risk of immediate harm, they can refuse to make any order under section 20 of the Care Standards Act 2000, the successor to section 30 of the Registered Homes Act 1984, leaving the issue to be determined by the registration authority under section 14 of the 2000 Act.

52. Unhappily, improvements in procedure adopted in the future and changes in the law will not help the appellants. They will understandably feel aggrieved by the extent of the power entrusted to officials and the extent of its misuse in their case, and I can only join in the expressions of sympathy which have been made. I am impelled, however, to the conclusion reached by Lord Scott, and for the same reasons, that the common law cannot give them a remedy. I therefore have to agree with regret that the appeal must be dismissed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

53. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. In common with all your Lordships, I agree with his reasoning as to why this claim must fail and share his considerable regret at the result.

54. Like Lord Scott, and indeed like my noble and learned friend Baroness Hale of Richmond, whose opinion I have also had the benefit of seeing in draft, there appears to me to be considerable force in the notion that the appellants' rights under article 6 of the Convention and article 1 of the First Protocol to the Convention have been infringed. While it would be quite inappropriate to express any concluded view on the point, I think it is only right to add that it would seem to give rise to a serious injustice if the appellants were unable to recover proper compensation for the loss they have suffered as a result of what, to put it mildly, was an inappropriate and high-handed implementation of the procedure contained in section 30, and in particular section 30(2), of the 1984 Act.

55. I also agree with what my noble and learned friend Lord Carswell, whose opinion I have had the privilege of seeing in draft, has said about what should be learnt from this sorry case. It provides an object lesson for any District Judge to whom an application under section 30 is made, indeed for any Judge to whom any application is made, where no prior notice of the application has been given to the respondent against whom an order is being sought. In any such case, before entertaining the application, the Judge should, really as a matter of course, ensure that it is simply not possible or that it is inappropriate to give the respondent any notice. Impossibility would arise where there was extreme urgency or where the respondent cannot be contacted within the requisite time-scale; the classic case where it might be inappropriate would be in the case of some freezing injunctions, where there is a real risk of dissipation or concealment being effected very quickly by the respondent.

56. However, even in many cases where it is impossible or inappropriate to give written notice as required by the rules relating to applications on notice, it may well be possible and not inappropriate to

give informal notice, even by telephone or e-mail, to inform the respondent of the application, before the applicant seeks such an order – or even after the application has been made and before the order is pronounced. If such a course is possible and not inappropriate, then the Judge should normally require it to be taken. And the more draconian the effect of the order applied for or to be made, the more necessary it is for the Judge to be satisfied that it is simply impossible or inappropriate to give the respondent any notice that the application is being sought before he or she makes the. Furthermore, it is wholly unsatisfactory for an applicant to contend before the Judge that an application must be heard at once without any, or even very limited, notice to the respondent, in circumstances where the applicant has been preparing the application for some time, and could therefore have given notice, possibly only of an informal nature, to the respondent to warn that the application was being, or even might be, made.

57. Had the District Judge in this case been aware of the need to approach the without notice application of 30 September 1998 in this way (or had he been made aware of the need for this approach by the representative of the Authority, as he should have been), it seems very unlikely that the appellants would have suffered the very serious financial loss, or the justifiable sense of outrage, which they must have suffered. As it is, however, despite the regret I feel at the decision, I too would dismiss this appeal.