

IN THE COUNTY COURT AT CARDIFF

Case No. F29YJ188

2 Park Street
Cardiff
CF10 1ET

Wednesday, 7th October 2020

Before:
HIS HONOUR JUDGE JARMAN QC

B E T W E E N:

PUGH & REES ON BEHALF OF RHYMNEY & DISTRICT ANGLING SOCIETY

and

CAERPHILLY COUNTY BOROUGH COUNCIL

MS L PHILLIPS appeared on behalf of the Applicant
MR H LEITHEAD appeared on behalf of the Respondent

JUDGMENT
(Approved)

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HHJ JARMAN:

1. In these proceedings, the defendant, the council, owns and manages a county park called Park Cwm Darran, comprising about 800-900 acres, and set in the Darran valley. In June 2010, the council granted to the claimant club, a 25-year lease to fish any lake within the park on the River Rhymney, including Deri Lake (the lake). This was after the council had engaged contractors to carry out a major silt clearance work in the lake. Therefore the lake had to be restocked with fish and this the club did in 2010 with 15,000 fish, mainly carp and roach, and again in 2012, adding about another 2,500 carp. The following year, the council engaged contractors again Alun Griffiths Contractors Limited (the contractors) to remove silt from a silt-trap where the river enters the lake to the north, and to add an additional course of block stones to a block work wall or buffer in the northern section of the lake, so as to form a wetland area. I shall call these works “the works”.
2. To do so, it was necessary to reduce the water levels in the lake by opening a valve in an outlet pipe (the pipe) to the south. The council’s specification, agreed with the contractors, provided that the level of the water in the lake should not be reduced to less than 0.5 metres above the level of the bed. The contractors started work on 8 April 2013 when they opened the valve.
3. The club alleges that over the next couple of days, the level of the water in the lake was reduced to substantially less than 0.5 metres, so that in many parts, there was no water at all, leading to a significant loss of the fish stock. It is not in dispute that during this time, there was no mesh over the entrance to the pipe, contrary to the belief of the council’s engineers at the commencement of the works. The club claims damages against the council for negligence, interference with its fishing rights, breach of covenants contained in the lease for quiet enjoyment, and derogation from grant. The council denies their claim, and there are issues of fact and breach of duty, causation, and quantum.
4. The critical events took place over four days, from Monday 8 April when the contractors first attended the lake. For the club, I have written and oral evidence from its chairman, Brian Rees, its secretary, Jesse Pugh, his daughter, Ellen Hook and members Lloyd Davies, Thomas Parfitt, and Adrian Reed. Most of these members are in their seventies or eighties with many years of fishing experience. I also heard from two dogwalkers, Jason O’Keefe and Wayne Evans. For the council, I have written and oral evidence from four of its employees: Kevin Kinsey, who was its principal engineer, in overall charge of the works and contractual documentation. However, he did not attend the lake over those four days. His assistant, Jonathan Pitman was responsible for the day-to-day management of the works, as he accepts in his witness statement. He compiled daily supervision records of the works. Two other employees were called, the park manager, Peter Lewis and a park warden, Michael Chapman.
5. I also heard two experts on the alleged fish losses: Ian Wellby for the club, who is a fellow of the Institute of Fisheries Management, gave written and oral evidence. Mr Mulder, who is a member of the Chartered Institute of Ecology and Environmental Management, also filed reports and gave evidence. They signed a joint statement of agreement and disagreement. Before I deal with the issues, I shall set out in more detail some of the uncontroversial background.
6. The lake is about 450 metres in length, and covers some three acres, running roughly north to south, as does the river. It is centrally located within the park and is one of its central attractions. It has a footway around its perimeter and is popular with walkers as well as anglers. There was a plan included in the bundle, showing an aerial picture of the lake and its surroundings. It shows the visitor centre about 200 metres to the north of the lake, and the river coming into the lake under a footbridge. Where it does, there is a wetland area with bulrush reeds and

willow. Then, about a third of the way along the lake, there is the blockwork stone wall. The middle section of the lake has an island towards the south, and there are five fishing platforms on either shore of the lake. The lower section of the lake also has four fishing platforms on either side. This leads to the outflow into the river under a footbridge.

7. In the lower section and in the lower parts of the middle section, there is shown in the plan indicative growths of vegetation called frogbit. The river then runs on into a much smaller lower lake. The water depth in the lake is shallow, and it is affected by silt levels on the lakebed throughout its length. In 2012, Mr Pitman undertook a silt survey of the lake. That is shown in 17 cross sections and an overall plan. The cross sections give the water level, the bed level, and the top of the silt levels. The silt is shown coloured brown. There is a similar pattern throughout the lake. At the water's edge, the lakebed slopes downwards at varying degrees. At the bottom of the slope, the water depth is usually in the region of about two meters. However, the silt builds up towards the middle of the lake in each section. In the upper section above the block work wall, there is a metre or more of silt towards the middle, so that at points, the silt is just a few centimetres below water level. Unsurprisingly, below the block work wall, the silt levels are less so that the water depth in the middle of the lake is in the order of 1.25 metres' depth and a similar pattern in the lower section.
8. The agreement with the contractors is dated 6 March 2013. It includes a number of documents, including the contractor's tender, the conditions of contract and the specifications. The conditions deal specifically with conservation of fisheries and refer to the relevant legislation, including the Wildlife and Countryside Act 1981. It is provided that the contractor will take all precautions to ensure that no work in any watercourse corridor is done in such a manner as to cause damage to flora and fauna. In particular, although not derogating from the generality, a number of requirements are therein set out, some of which are to be approved or otherwise agreed with the council's engineer. In the specification, the work is set out as to the construction of an addition layer of block stones added to the two existing walls within the Park Cwm Darran Lake, and the desilting with a silt trap upstream of the first line of block stones.
9. The scheme includes, as ancillary works, reduction of the water levels within the main lake to a depth of 0.5 metres above bed level, using the sluice valve located adjacent to the outfall weir, and provisional supplementary pumping to ensure water levels are maintained at the reduced level during the course of the works. The method of working also refers to working within the confines of the existing lake, and the maintenance of water levels of 0.5 metres at all times. It also includes protection of flora and fauna, requiring the contractor to take all precautions to protect flora and fauna from his operations, and not to deal with vegetation without specific instructions from the engineer. Mr Kinsey, when he was asked about this, accepted that the 0.5 metre water depth would be taken from above the top of the silt level.
10. The first main issue I have to deal with is the water level over the crucial four days, and a subsidiary point about how long the valve in the pipe was open for. On behalf of the club, it is said that this was open for significant periods on the 8th, 9th and 10th April. On behalf of the council, it is said that the valve was only open for three hours on the 8th, shut on the 9th, and open again on the 10th. There was no direct evidence of this, and I heard no evidence from an employee of the contractors. This is based upon what Mr Kinsey says he was told by the contractors. In my judgement, it is inevitable that there will be some differences of recollection of events which occurred over three or four days more than seven years ago. Many of these were explored in evidence. Most, in my judgement were no more than to be expected by witnesses, some of them in their seventies and eighties, trying to remember these events. I shall only deal in this judgment with those that have a probative value on the issues.

11. Mr Lewis said that he had a request from the contractors to open the valve at about 9.30am on the 8th. He rang Mr Kinsey who gave approval and also indicated that there was a mesh over the entrance to the pipe. Mr Rees says that he went down to the lake at about 1pm and stayed for about three and a half hours. By then, he said, the water level had dropped by about two foot. He could see this from the levels on the concrete surround of the pipe, and also by looking at the watermarks on the wooden legs of the fishing platforms. He could also see that there was no mesh covering the opening of the pipe. He saw a van of the contractors and tapped on the window and informed the workmen of this. He does not know their names. His concern at the time was about fish being drawn through the pipe and injured or lost. He had another conversation with the workmen about an hour later to ask what was happening. Mr Chapman was there for some of the time. Mr Rees said that when he got home, he phoned Mr Pugh to tell him what was happening. Mr Chapman said that he spoke to the contractors when they opened the valve at about 10am that morning. He saw the water levels dropping. He waited with Mr Rees until the water levels had dropped sufficiently so that the entrance of the pipe could be seen. He also noticed that there was no mesh at the entrance of the pipe. He confirmed that Mr Rees was, in his words, “angry about this”. Mr Chapman said that he was not concerned about the water levels, and that it was not his job to monitor them.
12. In my judgement, the preponderance of the evidence about water levels on the 8th broadly ties in with one another, and I accept it. I accept that Mr Rees on that day had a particular concern about fish going through the pipe and is likely to have taken particular notice of the levels of water at this point. I accept that when he left that day, the water levels, at least in the middle of the lower sections, were down by some two foot, or just over 0.6 metres. That would leave the water level above the silt near the 0.5 metre limit over significant areas of the lake.
13. The evidence about water levels on the following day is more controversial, although by the end of the oral evidence was not quite as controversial as it appeared at the outset of the hearing. Mr Pugh says that he rang Natural Resources Wales (NRW) which is responsible for regulating watercourses and fisheries, that morning. He and Mr Rees say they went to the lake that afternoon. They both say there was hardly any water left in the lake. They say they went to get wellington boots and waders and phoned around other members of the club before going back to the lake, and Messrs Davis, Parfitt and Reed all say they went down to the lake late afternoon and early evening. The preponderance of their evidence was that there was some water near to the pipe, the southern end, and what was described as, “puddles here and there” in other sections or, “a film of water over the silt”.
14. There was some corroboration of this description from Messrs O’Keefe and Evans. Mr O’Keefe said that he walked past the lake daily, and “the drain was going”, to use his phrase, “for two full days”. Messrs Lewis and Chapman say they passed by the lake on each of the four days in the course of carrying out their duties in respect of the whole of the park but did not notice anything concerning water levels at this time. However, both were at pains to say that it was not their responsibility to monitor water levels during the works. Although Mr Kinsey did not attend the lake at this time, to his credit in cross-examination, when the silt survey photographs and other contemporaneous documentation was put to him, he accepted that the water levels are likely to have dropped by just over a meter at this time, which would have exposed the silt beds over 16 or 17 different areas in the lake.
15. Mr Pitman, who did have the day-to-day responsibility of managing the works, said that he attended the lake on the 9th and 10th of April, but not on the 11th. He produced his personal diary to corroborate that. However, he accepted in cross-examination that his focus was upon measuring the moved silt from the northern section of the lake above the block work wall and for purposes of preparing a bill of quantities. He said he parked his car at the carpark near the south end of the lake, and walked its length to the north, but did not notice any concerns about

water levels. In his daily supervision record for the 9th, in describing the operation for that day, it says this, “Dewatering of main lake to bring water levels down to enable access to the downstream block stones”. In comments, he says that he met with representatives of the contractors on site, including the foreman and that he instructed them to place a mesh panel on top of outgoing pipe to stop ingress of fish. The note continues, “but also instructed Simon to place hay bales in outgoing channel”. He notes that no other works were being undertaken on the site at the moment, and that the client had confirmed that he is happy for, “us to start lowering the water level in the main lake with a minimum water depth of 0.5 metres to be maintained”.

16. During cross-examination, he said that the reference to dewatering taking place that day was a mistake. At the time, he thought that the valve was open that day when he compiled the record, but it was shut. When asked what made him think it was a mistake, he replied that he had been told, “recently” by Mr Kinsey that the valve was shut that day. When I pressed him as to what he meant by “recently”, at first he said he was not sure, but then he said it was after the end of the first day’s hearing, namely the previous before. When asked why he gave the instruction to put hay bales in the outgoing channel, he said he could not remember. He agreed that he did not check if this had been done. In my judgement, the evidence of Mr Pitman on his supervision record on 9 April was singularly unimpressive. It is likely that the record made that day is accurate. The only basis for saying otherwise is that he was told by Mr Kinsey after the first day’s evidence, and that was in turn based on what Mr Kinsey says he had been told by the contractors, although he cannot remember the identity of the person concerned.
17. It is further likely, in my judgement, that the instruction to put a mesh over the pipe and hay bales in the outflow that day was to prevent fish being drawn through the pipe, and to slow down the outflow. It is likely that the valve was opened on 9 April and that the water levels were further reduced to the levels described by the club’s witnesses, and accepted to some extent by Mr Kinsey.
18. On 10 April, Messrs Rees and Pugh say they and other member of the club went back to the lake and water levels had not increased. It is accepted that on that day the valve was open. Mr Pitman says he took a photograph of the lake around this time but could not remember precisely when. His camera’s metadata shows it was taken on 9 April at about 9.15 and is referred to in a contemporaneous email. In my judgement, it is likely to have been taken at that time. The photograph is not clear. It shows sections of the lake around the block work wall. The block stones which are about a cubic metre in size are usually just below the water surface. These stones, or part of them, can be seen above water level. Parts of the photograph appear to show water surface on the lake, but what is not clear is how deep the water is above silt level.
19. Ms Hook says that she was asked by her father to take photographs of the lake, which she did on her lunch hour on 10th, the only time she could get away from work. Her pictures are much clearer. The first photograph shows Mr Rees standing at the bottom of the sloping bank of the lake, adjacent to one of the three fishing platforms shown in the photograph. He is standing on a level part of the bed where there is no water. There is water just to his left, although it is not clear how deep that was. It is clear from the photograph and from the discolouration of vegetation where the water levels have been up to that point. The vegetation is shown in dark colours, then above that and they correspond with the levels on the wooden legs of the fishing platforms, the vegetation has its natural colour. The top of the fishing platform nearest to the Mr Rees is about shoulder height or above. The second photograph shows Mr Pugh in waders. In the foreground there is water up to his knees. In evidence, he described that much of that would be silt, and of course walking on the silt, his waders would sink into that to some extent. In the background again, there is shown the fishing platforms and the demarcation between

the discoloured vegetation and the natural vegetation showing again a distinct drop in the water levels.

20. There are further photographs. One shows Mr Rees, with the island of the lake on the right-hand side, and three or four of the fishing platforms on the far side of the lake. A great deal of silt and vegetation is evident in the foreground. In the middle ground there is surface water. It is not clear in parts how deep, but in other parts it is clear that the vegetation is showing above the surface of the water.
21. Another photograph, three, looking towards the island, shows four of the fishing platforms on the right-hand side and silt with vegetation in the foreground. The fourth photograph shows the entrance to the pipe encased as it is by concrete. By then, some sort of mesh had been put over the entrance to the pipe, although this was put at an angle and not flush with the wall of the concrete. In my judgement, those photographs give support to the evidence of Mr Rees and Mr Pugh about water levels on the 10th. These were put to Mr Kinsey and Mr Pitman in cross-examination. Each of them said they would not be concerned about those levels of water. In conclusion, on this point of water levels, in my judgement, is it likely that on 9th and 10th April, there were large sections of the middle and lower section of the lake which had no water or just a film of water above the silt.
22. The most controversial aspect of the case was what effect if any this had on the fish stock. Messrs Rees and Pugh say that they attended the lake on the afternoon of 9th, and saw substantial numbers of fish either dead, or floundering in the silt. Their concern was to pick up the floundering fish out of the silt and to put them in water which was deeper around the pipe. That is why they went to get their boots and waders. This went on for about three hours or so, until dark. Mr Pugh says that he got 20kg plastic feed bags from his brother who owns a smallholding nearby. They proceeded to put dead fish in these bags. This evidence had support from Messrs Rees, Davies, Parfitt and Reed. Mr Pugh says he then drove these bags in his vehicle to an infill site nearby, where he knew the watchman. Although the site was not officially open by this time, the watchman allowed him to deposit the fish in plastic bins. The next morning, he and Mr Rees say they returned to the lake; they found more dead fish and collected about another six bags of dead fish, again with help from some members. The operation with respect of their disposal was repeated. That operation was completed by the time his daughter arrived to take the photographs at lunchtime.
23. There is some corroboration in relation to dead fish from Mr O'Keefe who is not a member of the club. He says he walks his dog early in the morning, and he saw about 25 dead fish over two days. The council witnesses say that they did not see any dead fish. Mr Leithead, on behalf of the council, put to the first of the club's witnesses that this collection of dead fish simply did not happen. This is not the sort of event that someone is likely to mis-remember, either individually or collectively, so I gave him a chance to take instructions on whether it was being put that this story was invented. After taking instructions, he put to each of the witnesses who said they were involved in this operation, that he was making up the evidence about dead fish. This is a serious allegation to put to witnesses whose reputation was not otherwise impugned. The starting point, in my judgement, is that it is unlikely that five or so such witnesses who are experienced fishermen would perjure themselves in this way. There is also some corroboration as I have said from Mr O'Keefe.
24. Moreover, the demeanour of the witnesses in dealing with these allegations lends some support to that unlikelihood. I am careful not to attach too much weight to demeanour, which can be misleading at times, but in my judgement, these witnesses gave vivid accounts. Mr Parfitt for example described the experience as "very, very upsetting". When it was put to each that he was making this part of his evidence up, each firmly but clearly denied that allegation with appropriate indignation.

25. Mr Leithead submitted that the evidence is improbable, full of inconsistencies and unsupported by independent evidence. It is unlikely, he submitted, that in two days the lake would be down to a puddle, but I have already made my findings on water levels. He submitted that it was surprising that no one noticed the operation. On the 9th, this was carried out late afternoon to dark, where Mr Pugh and Mr Rees said they did not see any staff or contractors. That, in my judgement, is unsurprising. On 10th, they carried out further operations for a couple of hours but the operations of the contractor, and the focus of Mr Pitman were on the northern section of the lake. The manager and warden, as they accepted, had other duties. It was also submitted that it is improbable that older men would carry 20kg weight of sacks with fish in, and that the story of smuggling these into the disposal site was surprising. I accept that to some extent, and it causes me to treat their evidence with care.
26. I accept also, as did the witnesses, that there was no reporting of the dead fish at the time, although there was afterwards. Both Mr Rees and Mr Pugh said that they were concerned to save fish at the time, and there was no one there at the time. Mr Pugh said it was generally difficult to get assistance from the council in matters concerning the lake or contact staff in the office. Given their other duties, that evidence is not surprising and I accept it. I do not accept that it was surprising that they went home to get their boots and waders rather than to go looking for staff or contractors. Mr Rees did report the matter to a councillor, Councillor Cuss, who wrote an email about the complaint on 11 April, referring to 20-30 dead fish. Mr Rees in his evidence said that he did not say that but referred to what had happened and referred to sacks. There are other emails referring to 50 dead fish at the time; again, in my judgement, this means that the account of the club's witnesses in this regard should be examined closely. On the other hand, it is easy for there to be a misunderstanding. There are also no photographs or notes of the dead fish. Mr Pugh, for example, said that he had had no camera at the time, which is why he asked his daughter to come. He had a phone but it was an old one and he hardly ever used it.
27. It was put to Ms Hook that she only took photographs and knowing that they were as evidence for a possible complaint or claim, of certain parts of the lake, and it is clear that the photographs focus on the middle and lower sections of the lake where the fishing platforms are. In my judgement, that is not surprising.
28. Finally, relying on the evidence of Mr Mulder who has experience of these sorts of events, and who says he has never come across this sort of event without either photographs of dead fish, or a carcass count. Again, I accept that this is surprising and proceed with care.
29. In relation to the expert evidence, there was a great deal of agreement between the experts. Mr Wellby carried out a fish survey in 2017 by netting methodology. It is agreed that that was appropriate for the conditions and that that survey led to a reasonable estimate of the fish population in the lake at that time. It recorded a total of six different species, with a total of 113 fish caught and only three large carp seen but not caught. That appeared to be a lower stock of fish in 2017 compared to initial stock in numbers. The initial stock in numbers, it is agreed between the experts, constituted a high density of fish for the size and depth of the water volume. There would have been a natural reduction in stock fish numbers over time, from the initial stocking, irrespective of any drainage works, particularly for carp which do not usually recruit naturally in British waters. When they were questioned about this, Mr Wellby said that as stocking takes place in the winter, he would expect this reduction to take place perhaps over the next season, over a year. Mr Mulder agreed in principle but was less ready to put a figure on it.
30. There was also catch data from the lake during angling matches since 2013. Both experts agreed that that data had significant limitations. Its use is not advocated by NRW, which

recommends quantifying the loss through a carcass count, and / or a pre and post fish population survey. The experts also made clear that the different accounts between the parties of the draining and depth of the water had not been included in the analysis.

31. In terms of disagreement, this is set out as follows:

“Mr Wellby believes the available direct evidence (Netting survey showing more than 90% reduction in stocked fish, substantial CPUE reduction, 2013 gap in roach recruitment) is mutually corroborative and supports the possible cause being the maintenance drainage works carried out at Park Cwm Darran between 8th and 11th April 2013, the size and timing of which matches the evidence and which was likely to have the predictable consequences of a significant stock loss. This is in contrast to normal, mainly natural possible causes: (predation, disease, over stocking impacts on fish stock) of which there is little direct evidence, and no evidence of the abnormally high levels required to have produced the demonstrated impact”.

In terms of the 2013 gap in roach recruitment, again there was agreement between the experts that in the 2017 survey, and because of the fish size growing with age, it was apparent that there were no roach, or no significant roach recorded from 2013. Mr Mulder disagreed and his part of the joint statement says this:

“Mr Mulder believes that the reduction over time could have been caused by other more natural causes. Although the exact number of fish present each year was unknown, the following factors are considered relevant. a) the very high initial fish stock levels mean that numbers are likely to have reduced relatively quickly over the time, due to competition for space, food, and oxygen, especially in the shallowing lake. b) the presence of a predatory otter means that predation pressures would have been higher than normal, again, in the context of a shallowing lake. c) reductions were also attributed to disease and fish stock. d) the alleged fish loss was not evidenced or quantified. Photos provided for the lake showed no dead fish. There was no other further evidence, e.g. waste transfer notes that a large number of fish were recovered and disposed. e) there is no 2013 pre-event or 2014 post-event population level data with the only actually population data collected in 2017, that is three years after the works”.

In cross-examination, both experts maintained their position. Mr Wellby said that a one-metre reduction in water levels would have had a significant effect on the fish stocks and would take them down to silt level or turbid water on top which would damage the gills. He accepted that the stocking level in 2013 was higher than he would have recommended, but not that abnormal and the vast majority of fisheries have more than that. He indicated that the NRW had agreed to these levels. He said that there was no evidence of mortality or poor condition after stocking and this was a very public space. There was no report of mortality at the time, one going back from 20 years ago, and two fish were found after his survey a few days afterwards, or the carcass of fish, which was said to be diseased, by NRW. He agreed with Mr Mulder about the effects of overstocking. It could increase disease but there is no evidence that it happened. He accepts that there would be some predation, but not the reduction of 90%. He said that he identified otters on the lakes, they have not been identified before, but the lake was reedy and the fish could escape. It was a good habitat for fish, with good hiding places. There was no evidence

- of any bird predators. He accepts that theft of fish is a nationwide problem, but the only evidence is some anecdotal evidence of some night lines being reported.
32. I accept that it would not be expected to have evidence of every incident of natural factors. However, in my judgement, if one or more of these factors did substantially cause the fish loss identified by Mr Wellby, it is reasonable to expect more evidence than the very scant evidence available. On the other hand, on the facts found, there was a significant reduction of the water levels on the 9th and 10th April, below 0.5m, and again, it is reasonable to expect a significant impact on the fish. Accordingly, although I accept Mr Mulder's evidence that these natural factors could have had an impact, I also accept Mr Wellby's evidence that on the facts of this particular case, and the lack of other evidence, the event described by the club and their witnesses is more likely to be the causative event. That also gives support to the club's witnesses. Taking all these factors into account, in my judgement their evidence is likely to be a true account. I reject the suggestion that they were making it up.
 33. I now turn to the legal principles, which were not in dispute. The claimants put their case in negligence, on the basis of breach of covenant and on derogation from grant, and interference with fishing rights. The relevant parts of the lease are that the council covenanted to use its best endeavours to prevent the ponds, including the lake, from being drawn off, raised, lowered, or polluted, so as to materially affect the proper exercise of the fishing rights, and also covenanted to permit the club and its member a peaceable enjoyment of the fishing rights. It is accepted on behalf of the council that it did have a duty of care in respect of the fishing rights in the lake. The council relied on the fact that they instructed independent contractors to carry out the works, and I accept that they did.
 34. However, the operation of the valve was ancillary to these works, and in respect of conservation of fauna, in contractual terms and in practice, this was subject to the engineer's supervision; that is clear from the supervision records and also that the contractors sought approval from the council to open the valve. Accordingly, in these respects, in my judgement, the primary duty of supervision and monitoring in respect of water levels and protection of fish, lay with the council. Alternatively, even if it did not, then the law is such that they cannot in some circumstances escape liability for nuisance for the act of an independent contractor. The main authority quoted for this proposition is *Matania v National Provincial Bank Ltd* [1936] 2 All ER 633. In that case, the claimant occupied the second and third floors of a building, and the defendants who occupied the first floor, employed independent contractors to carry out certain alterations. In the course of their work, the contractors caused a nuisance to the claimant by reason of the noise and dust produced by their operations. It was held that the defendants were liable but Slessor LJ at paragraph 646 said this, "If the act done is one which in its very nature involves a special danger of nuisance being complained of, then the employer of the contractor will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise". In the current edition of Clarke and Lindsell on Torts 23rd edition, at paragraph 6.71, the editors submit that that was the correct approach.
 35. In this case, in my judgement, there was no monitoring on behalf of the council of how long the valve was open for, of water levels or whether the water levels reduced to less than the required 0.5 metres limitation. It was not suggested that that was an unreasonable limitation, and Mr Mulder said in cross-examination that that was a reasonable amount of water for fish to be comfortable in. However, the council, through Mr Pitman, and Mr Kinsey has accepted, knew that the water levels as apparent from the surface were not all that they seemed because of the built up of silt. They did not share the silt survey. Most telling of all, that survey showed that the depth of water around the perimeter and a film over the silt which varied throughout the lake, did not give the contractors any real indication of silt levels. These were within the knowledge of the council's engineers but not within the knowledge of the contractors. In my

judgement, the council should have monitored the operation of the valve, they should have checked whether there was a grill in place, or a mesh at the entrance before the works carried out. They should have checked if hay bales were put in as instructed, and they should have monitored and checked whether the water levels did reduce below the specified level.

36. Accordingly, in my judgement, the council were in breach, alternatively, applying the *Matania* case and perhaps the case is more appropriately seen as a nuisance case, there was a clear risk of nuisance, of interference with the fishing rights, and it was not open to the council to delegate those matters. In the further alternative, in my judgement, these matters also constitute a breach of the covenants in the lease which I have identified. Other particulars were pleaded and canvassed in evidence, such as failure to notify the club of the precise dates of the work, or to notify NRW, or to assist with the stranded fish. In my judgement, none of these on the facts are made out, or causative of any loss.
37. I then turn to issues of quantum. Again, these were in issue. The schedule of loss pleads the cost of restocking, past loss of fishing amenity from 2013 to 2017, loss of income from individual day tickets during the same period, loss of income from ticket sales to other fishing clubs during the same period, and a further loss amenity from 2018 to 2019. These calculations were done by Mr Pugh with the assistance of his solicitor. It follows the approach adopted in two County Court cases in assessing damages for loss of fishing amenity, *Broderick v Gale & Ansley* in Swindon County Court on 21 March 1993, and *Bruton v Clarke* in Cambridge County Court in July the same year. In the former, the defendant polluted the club's fishery, resulting in the death of fish, and a claim for nuisance and negligence. The judge approached the matter in this way:

“I have to decide, it seems to me, what is a proper figure to represent the loss of amenity suffered by the association members from, in a nutshell, not getting the fish they had paid for, or on occasions, getting less enjoyable fishing than they had paid for, or perhaps worst of all, unless they like sitting on the banks going fishing and getting no fish at all.”

38. The judge in that case awarded loss of amenity damages as general damages, and by reference to the formula applied in this case, the judge in *Broderick* adopted a similar approach. Dealing with the heads in turn, the cost of restocking the lake is said to be £10,660. On behalf of the council, it was said that this cost was carried out some four years later; there was a failure to mitigate by restocking earlier and the club had funds and they could have instructed an expert earlier. Both experts in this case agreed that there was natural diminishing and some allowance should be made for that. No one worked out any figures before me as to what allowance should be made, and it was suggested I should adopt a broad-brush approach. I will say something more about mitigation of loss in a moment, but in terms of cost of restocking, it does not seem to me that figures largely. I do accept however, that there would have been some natural degeneration in any event, based on the experts' report in this case. Taking a broad-brush approach, I would allow £9,000 under that head.
39. In relation to past loss of fishing amenity, I accept that the club did have funds to restock earlier. It would have taken some time to restock in the winter months, and Mr Pugh in his evidence said that for some time, they did not know precisely what had happened, they had no expert evidence, and the council were not accepting what had happened. I accept that some of those matters would affect the figures. Again, there is no precise formula for me to apply. Furthermore, in respect of this head, it does appear that some reference was made to fishing during 2010/2011/2012 when the stocks would have been at a high level, and overstocked, and

some allowance has to be made for that. In my judgement, on the broad-brush approach, the appropriate figure for loss of fishing amenity for that period is £12,000.

40. Then there is the partial loss of income for individual day tickets. It was accepted by Mr Pugh that some errors of calculation have been made in respect of that. Again, the point in relation to the previous years being bumper years need to be taken into account, and I would allow £4,000 under that head. Similarly, in respect of ticket sales to other clubs for that period, I would allow £4,500 under that head.
41. In respect of further loss of amenity from 2018 to 2019, in my judgement, by then it is reasonable to have expected the club to have restocked. Accordingly I would not allow any figure under that head. Accordingly, the total award I make is £30,000, and I will hear counsel now on any consequential matters.

End of Judgment.

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This transcript has been approved by the judge.