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England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2003] EWCA Civ 183
Case Nos: B1/2001/2088A & B1/ 2002/1607

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WESTON-SUPER-MARE COUNTY COURT
Judge O'Malley
District Judge Exton

Royal Courts of Justice
Strand,
London, WC2A 2LL
19th February 2003

B e f o r e :

LORD JUSTICE BROOKE
LORD JUSTICE SEDLEY
and
LORD JUSTICE CARNWATH

Between:

RITA FLEURETTE GREGORY and JOYCE RITA GREGORY	**Claimants/ Appellants**

- and -

SIMON TURNER and
KAREN TURNER

and **Defendants/ Respondent**

Between
THE QUEEN ON THE APPLICATION OF

JOHN MORRIS (as attorney for Joyce Rita Gregory) **Applicant/ Appellant**

- and -

NORTH SOMERSET COUNCIL **Defendants/ Respondents**

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

SARAH LEE (INSTRUCTED BY THE TREASURY SOLICITOR) APPEARED AS AN ADVOCATE TO THE COURT
MR MORRIS APPEARED AS A LAY ADVOCATE FOR THE APPELLANTS IN EACH CASE
THE RESPONDENTS IN EACH CASE WERE NOT PRESENT OR REPRESENTED

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Lord Justice Brooke :

1. Introduction

1. This is the judgment of the court, to which all three members of the court have made significant contributions.

2. These applications are concerned with different stages of a prolonged dispute between neighbours in Dial Hill Road, Clevedon. They were listed for hearing before a three-judge court because they raise issues of general importance. This judgment is therefore released from the general restrictions on the citation of judgments of this type.

3. We understand that there are now before us three applications on behalf of Mrs and Miss Gregory, the claimants ("the Gregorys"). They are made by Mr John Morris, as holder of an enduring power of attorney on behalf of Mrs Gregory. They are:

> (i) An application for permission to appeal against an order made by Burton J in the Administrative Court on 19th July 2002 whereby he was refused permission to apply for judicial review of a decision by the North Somerset Council on 7th February 2002 not to serve an enforcement notice on the Turners in relation to matters arising out of the same dispute.
>
> (ii) An application for permission to seek an order setting aside an order by Sedley LJ dated 7th December 2001 so as to enable them to reopen their application for permission to appeal against the costs order made against them summarily by Judge O'Malley in the Bristol County Court on 20th February 2001;
>
> (iii) An application for permission to challenge (in this Court or elsewhere) the order made by that judge on the same occasion, whereby he refused them

permission to appeal against an order made by District Judge Exton in the Weston-super-Mare County Court on 4th October 2000, following a trial in the small claims track, whereby they were awarded only £100 as damages for trespass against the defendants Mr and Mrs Turner ("the Turners");

The last two represent the intended effect, as we interpret it, of a letter to this Court from Mr Morris dated 6th August 2002. Notwithstanding the procedural informality, the general importance of the issues raised has made it convenient to treat them as applications properly before the court.

4. Because of the difficulty of some of the matters we had to decide we sought the assistance of an advocate to the court, and Miss Lee appeared in that capacity. The Gregorys had the benefit of advice given to them by counsel instructed by the Bar's Pro Bono Unit (although he did not appear at the hearing), and Messrs Freshfields prepared the court's bundles on a pro bono basis. We are grateful to all of them for their help.

5. We permitted Mr Morris to make submissions to us on behalf of the Gregorys after we had heard Miss Lee's submissions. The council did not appear on the third application, but we had the benefit of their written submissions in the court below. We ensured that notice of this hearing should be given to the Turners' solicitors, and we will refer in paragraph 38 below to the short written submissions we received from them.

2. Factual and procedural background

6. To set the scene for the discussion of the legal issues, it is necessary to summarise the factual background, and (in rather more detail) the course of the proceedings before the district judge. However, it is important to emphasise that it is not our task to try the case, and further that we have only heard one side of the story.

7. It has not been easy to identify the documents that were before the district judge and those that were not (but might have been if she had handled the case differently). In the circumstances, it seems best to tell the story from the documents before us, confident in the knowledge that a large majority of the material documents were before the district judge, at any rate by the time of the trial she conducted on 18th September 2000. In order to avoid giving undue prominence to the detail at the expense of the principles involved, in Appendix I to this judgment we have set out, as far as we have been able to ascertain from the papers (in Part I) the factual background; (in Part II) a summary of the respective cases of the parties; (in Part III) a description of the course of the pre-trial proceedings before the district judge; (in Part IV) a summary of the witness statements and other evidential material before the district judge; and (in Part V) a description of the trial and the district judge's judgment. (The original text of this Appendix was more than twice as long, but we have shortened it in the interests of brevity without, we hope, creating any impression that we have not fully understood all the details of the case).

3. The proceedings before the District Judge

8. The account in Parts III-V of Appendix I reveals, on the face of it, serious cause for concern about certain aspects of the proceedings before the district judge. In saying this, we make clear that we are doing so on the basis of the material before us, and without having heard the defendants' (or the judge's) version of the events. Our comments are to that extent provisional.

9. In summary, the claimants had complained that the Turners and their builders repeatedly trespassed on their land and treated them in a high-handed manner during the course of the building works; they also complained that a new garage, and a long brick wall which the Turners erected (without any prior consultation) between their gardens, encroached on their land, and that the amenities of their property were seriously impaired. They set out their complaints in detail in their particulars of claim, in which they claimed, among other things, injunctive relief and damages for trespass, including aggravated damages, limited to £5,000. The Turners for their part denied most of the allegations, claimed that they had acted entirely within the law and their own boundary, and that it had been the Gregorys who had fomented the dispute.

10. In spite of this fundamental clash of evidence, the district judge (apparently of her own motion) allocated the claim to the small claims track in March 2001, and refused to re-allocate it in June 2001. (The small claims track is intended for "most straightforward claims with a financial value of not more than £5,000": CPR PD 26 para 8.1(1)) She appears to have regarded it as a simple boundary dispute, and one which could be resolved by the instruction, on a joint basis, of a surveyor (to state whether there was an encroachment) and a valuer (to state whether the value of the claimants' land had diminished as a result of the encroachment). During the week before the trial took place she adhered to the view (apparently, and if so surprisingly, confirmed by the defendant's solicitor) that there were "few, if any factual disputes".

11. Given this position, she made clear her view that oral evidence by the parties was unlikely to assist matters. The same thinking led her to refuse to adjourn the trial, notwithstanding the fact that the valuer had only recently reported, witness statements had not yet been served, and Mrs Gregory, aged 82, had very recently undergone two heart operations, and her daughter had to stay at home to care for her. She proceeded to try the case with no oral evidence on any of the disputed issues of fact on which the claim for aggravated damages turned, and refused to permit cross-examination of Mrs Turner, whose witness statement had been served less than three working days before the hearing. Nor did she permit an adjournment to allow Mrs Gregory to respond to any of the contentious matters to which Mrs Turner had so very recently deposed.

12. Underlying this approach (as far as one can ascertain from her judgment) appears to have been a view that, as a matter of law, damages should be limited to the diminution in value caused by the very small encroachment which the surveyor identified. She rejected an approach based on *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (that is, an assessment of damages in lieu of an injunction based on a negotiated price for the incursion), apparently on the grounds that it was confined to cases involving developers. The legal basis on which she made that distinction is not clear (see e.g. *Jaggard v Sawyer* [1995] 1 WLR 269, and cases there cited).

13. Further, she made no reference to the claim for aggravated damages, clearly raised by the pleadings, based on "fear and distress" allegedly caused to the claimants by trespasses over a period of more than a year and a half. She may have intended to cover this aspect by her comment that it was not a case for "exemplary damages to punish any wrong done by the defendants as opposed to compensating the claimants". If so, she misunderstood the distinct purpose of aggravated damages. The law is conveniently reviewed in the Law Commission's report on *Aggravated, Exemplary and Restitutionary Damages* Law Com No 247 (1997), which refers to the "best view" (in accordance with Lord Devlin's analysis in *Rookes v Barnard* [1964] AC 1129) as being:

> "…that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional *compensatory* sum…" (para 2.1)

(although the Commission also refers to "continuing confusion" in the case law about whether they serve "a different function, which is punitive in nature"). The same passage (para 2.10) confirms that such damages are available on a claim for trespass to land (para 2.10). In *Cassell v Broome* [1972] AC 1027, 1124, Lord Diplock explained "aggravated damages" (as distinct from "punitive damages") as reflecting the clamaint's heightened sense of injury resulting from "the manner in which or motive for which" the defendant acted. Thus, this was a valid and important aspect of the claimants' case, which, because of the district judge's view of the law, was wholly overlooked.

14. We have some sympathy with the district judge's wish to cut through what must have seemed a very messy dispute. We also bear in mind the fact that, although the claimants pressed on two occasions for this action to be allocated to the fast track or the multi-track, they did not appeal against the district judge's orders reserving jurisdiction to herself in the small claims track, however unsuited that track was for the trial of an action in which the facts were so bitterly disputed and the applicable law so

potentially complex. The district judge was nevertheless obliged to conduct a fair trial in the track she had chosen for the case, and to deal correctly with the issues raised by the pleadings.

4. The appeal to the Circuit Judge

15. The Gregorys sought permission to appeal to a circuit judge. This application was listed for hearing before Judge O'Malley at Bristol on 20th February 2001. Although this was a "without notice" hearing, the Turners' solicitors became aware of it. A skeleton argument, settled by counsel, was filed and served a few days beforehand, and counsel appeared on their behalf at the hearing itself, which lasted for two and a half hours.

16. In his reserved written judgment Judge O'Malley held that the Gregorys had no real prospect of succeeding on any of the grounds of appeal they wished to raise. He dealt in some detail with the legal issues, including a party walls issue, and held that there was no realistic prospect of showing that the district judge's approach was wrong on any of them. He rejected Mr Morris's criticism that the level of damages should have taken account of the unattractive appearance of the wall, on the grounds that "there is no such thing as a visual nuisance in law". As to a right to light point, he observed that no evidence had been called before the district judge as to the amount of light enjoyed in the past before the Gregorys occupied the property, and that the district judge had not been persuaded that the building of the wall had reduced that amount of light. He said that these were findings of fact which the district judge "having heard the evidence, was entitled to make".

17. He rejected all Mr Morris's complaints about the district judge's procedural handling of the case – the allocation to the small claims track, the refusal of an adjournment to allow Mrs Gregory to be called, and the refusal to permit Mr Morris to challenge the "expert's report". He said that these were matters relating to case management or to the conduct of the hearing itself, in respect of which the district judge had a wide discretion. Accordingly, he held that the appellants had no reasonable prospects of success, and he refused permission to appeal.

18. Reviewing the judgment, in the light of the material available to the judge, we can only conclude that unhappily what should have been the main thrust of the Gregorys' complaints about the procedure in the lower court seems to have been lost in a mass of paper. Judge O'Malley had before him the Gregorys' original grounds of appeal, a 42-page document headed "Claimants' Arguments in support of Grounds of Appeal", the skeleton argument submitted by counsel for the Turners, an eight-page document riposte by Mr Morris entitled "Appellants' Preliminary Comments on Respondents' Skeleton Argument", and a document containing substituted grounds of appeal.

19. This wealth of material obscured what should have been the two key points in the appeal - the failure of the district judge to hear *any* oral evidence on the disputed factual issues, and the limited view she took of the measure of damages for trespass. In fairness to the judge, Mr Morris's written submissions gave neither issue the emphasis which it would have received from a more experienced advocate. The former point seems to have been missed entirely by the Judge; otherwise it is difficult to explain his references to the judge below having "heard the evidence". On the latter point, he may have been led to believe that there was common ground. The respondents' skeleton (para 5.2) noted in relation to "damages (trespass)":

> "Diminution in land is the appropriate measure; this does not seem to be in issue. There is no claim for exemplary damages and the evidence would not have supported the same…"

This statement of the position in respect of the trespass claim does not seem to have been challenged in Mr Morris's written response, although in relation to the issue of rights to light he referred to cases cited in Gale on Easements (*Carr Securities v Dick Maitland Associates* [1986] 1 WLR 922; *Deakins v Hookings* [1994] 1 EGLR 190) as showing that, in that context, the court could take account of loss of amenity generally, and the defendant's expected profit. There is, however, a hint of the point in paragraph (6) of the substituted grounds of appeal.

20. Judge O'Malley said at the end of the hearing on 20th February 2001 that he was refusing permission to appeal from the district judge's order. He summarily assessed the costs at £2,000 and directed that the Gregorys should pay them. Mr Morris's account of what happened and his reaction appears in his letter to the court dated 21st February:

> "I had received two schedules of costs from the solicitors, one just over £10,000 and one just under. They in fact were not pressed to the judge for consideration, counsel for the defendants having suddenly realized he could only request costs for that day. This was confusing to me and I could not absorb his precise figures or consider what figure His Honour Judge O'Malley rounded down to £2,000. All in all I cannot be very happy about a summary assessment until I have the detail of what was finally requested."

We have seen one of these schedules, which wrongly included all the costs allegedly incurred in the proceedings before the district judge. It is obvious to us that the procedure in fact adopted on 20th February did not comply with paragraphs 13.5 and 13.7 of the Costs Practice Direction.

5. The appeal on costs

21. There was no right of appeal against the judge's refusal of permission to appeal (Access to Justice Act 1999, s 54(4)). However, there was the possibility of an appeal (with permission) against his order for costs (see *Riniker v University College London* [2001] 1 WLR 13). On 7th December 2001 Sedley LJ, sitting in court, refused permission to appeal ([2001] EWCA Civ 1952).

22. He described what had happened before the judge, basing himself on Mr Morris's account of what happened, in these terms:

> "Reading Judge O'Malley's reserved judgment, it is plain from it that he was both assisted and influenced by the submissions made by the intended respondents' counsel, and he awarded them their costs of the application before him. Presented with a bill hovering around the £10,000 mark, Judge O'Malley took it with a very large pinch of salt and made a summary assessment of £2,000."

He held that this was within the judge's discretion:

> "[T]he respondent having elected to attend, it is plain from Judge O'Malley's judgment that he derived not only assistance but conclusive assistance from the submissions which the respondents' counsel made.
>
> Even in that situation it is by no means obligatory for the permission judge to give successful respondents their costs. He may still say that their attendance was a luxury for which they themselves have to pay. But equally, where it appears to the judge that by attending the respondents' lawyers have clarified the issues and have shown the judge that it is inappropriate to make a grant of permission to appeal which the judge might otherwise have been persuaded to make but which, as he can now see, would only have resulted in a full opposed hearing with the same outcome, then the judge's discretion undoubtedly extends to giving the intended respondents their reasonable costs of, in effect, turning up and heading off an appeal which was eventually going to fail."

As to the figure of £2,000, he said that "it was of course an estimate" but -

> "… it (was) not perceptibly an arbitrary or unreasonable figure. Indeed, experience suggests that it was quite realistic".

(Incidentally, he accepted, when Mr Morris pointed the matter out to him, that this application should have gone to a High Court judge and not to the Court of Appeal, but he recorded that Mr Morris consented to his having jurisdiction to hear the matter.)

6. Issues in this Court

23. There are, in summary, four issues before us:

(i) Can Sedley LJ's decision on the costs appeal be reopened? ("the costs issue")

(ii) Is there any remedy in this court (or elsewhere) in respect of the circuit judge's decision refusal of permission to appeal on the merits? ("the merits issue")

(iii) Did the grant to Mr Morris of an enduring power of attorney confer rights to conduct litigation or render advocacy services on Mrs Gregory's behalf? ("the power of attorney issue")

(iv) Are there arguable grounds for judicial review of the planning authority's decision not to take enforcement action? ("the enforcement issue")

24. The last issue, in our view, raises no points of principle. For convenience of reporting, we have set out our conclusions in Appendix II to this judgment. For the reasons given there, permission to appeal against the judgment of Burton J is refused.

7. Reopening previous decisions

25. Before considering issues (ii) and (iii), it is necessary to refer to three recent decisions of this Court, which provide the foundation for the attempt by Mr Morris to reopen the decisions of Judge O'Malley and Sedley LJ. They are *Jolly v Jay* [2002] EWCA Civ 277; *Taylor v Lawrence* [2002] EWCA Civ 90; [2002] 3 WLR 640; and *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738. See also *Matlaszek v Bloom Camillin* [2003] EWCA Civ 154.

8. Jolly v Jay

26. It is no secret that after Sedley LJ's direction upholding this respondents' costs order for £2,000 on a permission to appeal application against litigants in person had come to the attention of the authorities in the Civil Appeals Office, arrangements were made for a three-judge division of the court to review the status of respondents at the early stages of an appeal. The Court's judgment in *Jolly v Jay* [2002] EWCA Civ 277 highlighted the need for a more consistent approach to the award of costs at that stage. Revisions have now been made to the relevant practice direction to deal with this issue (see the new paras 4.22 to 4.24 of the Practice Direction to CPR Part 52). Paragraph 4.23 provides:

"Where the court does not request submissions from or attendance by the respondent, costs will not normally be allowed to a respondent who volunteers submissions or attendance."

(NB The second "not" is erroneously omitted from the Winter 2002 Supplement to the White Book)

9. Taylor v Lawrence

27. In this case, it was established that notwithstanding the express provisions of the Civil Procedure Rules, this court possesses a residual jurisdiction, inherent in its function as a court of justice, "to avoid real injustice in exceptional circumstances", so that proceedings, once closed, may be reopened "where there is a real requirement for this to happen" (*Taylor v Lawrence* at para 54). The injustice alleged in that case (though not established) was of bias on the part of the judge. In such a case, it was said, "the need to maintain confidence in the administration of justice makes it imperative that there should be a

remedy"; this might justify the court "taking the exceptional course" of reopening proceedings which it had already heard and determined (para 55).

28. It has also been held that the High Court possesses a similar jurisdiction (*Seray-Wurie v Hackney LBC* [2002] EWCA Civ 909, [2002] 3 All ER 408). In the latter case this court expressly declined to consider whether a similar jurisdiction existed at county court level (where until December 2002 there did exist a jurisdiction to reopen civil cases in certain very limited circumstances: see *Taylor v Lawrence* at paras 31-32). It is at once obvious, given the tendency of a significant number of unsuccessful litigants in person to refuse to take "no" for an answer, that the work of circuit judges in the county courts would be very badly disrupted if any such jurisdiction existed. In *Matlaszek v Bloom Camillion* Brooke LJ observed that the court has been told that even in the Court of Appeal, where litigants in person are far less common, over 200 applications by litigants seeking to invoke the exceptional *Taylor v Lawrence* jurisdiction have been made in the last 12 months. None of these applications have yet been granted.

10. Sivasubramaniam

29. In recent months a new practice developed. Litigants in person were now seeking orders from the Administrative Court for permission to apply for judicial review to quash a decision of a circuit judge, sitting as an appeal court, to refuse permission to appeal to him. A good example of the problems being created by this development can be seen in *R (Messer) v Cambridge County Court* [2002] EWCA Civ 1355. The viability of this new route of challenge was authoritatively considered by this court in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738.

30. Lord Phillips MR, giving the judgment of the court, rejected a submission advanced by counsel for the Lord Chancellor's Department to the effect that section 54(4) of the Access to Justice Act 1999 ousted the jurisdiction of the High Court, by judicial review, over decisions made by circuit judges in the county court to grant or refuse permission to themselves. He had earlier referred to a passage, in *Re Racal Communications Ltd* [1981] AC 374, 383, where Lord Diplock had described the effect of the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, as destroying, as respects administrative tribunals and authorities, "the old distinction between errors of law that went to jurisdiction and errors of law that did not"; but had distinguished the position of inferior courts:

> "In the case of inferior courts where the decision of the court is made final and conclusive by the statute, this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic* …"

31. Lord Phillips made clear (at para 54) that the new statutory scheme provided a litigant with fair, adequate and proportionate protection against the risk that a district judge may have acted without jurisdiction or fallen into error. In those circumstances judges of the Administrative Court should ordinarily exercise their discretion to dismiss such applications for judicial review in a summary manner. He ended his judgment, however, (in para 56) in these terms:

> "The possibility remains that there may be very rare cases where a litigant challenges the jurisdiction of a circuit judge giving or refusing permission to appeal on the ground of jurisdictional error in the narrow, pre-*Anisminic* sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing. If such grounds are made out we consider that a proper case for judicial review will have been established."

11. Issue (i): The costs issue

32. Mr Morris wishes to invoke the exceptional jurisdiction confirmed by *Taylor v Lawrence*, in order to challenge Sedley LJ's refusal of permission on the judge's costs order. The grounds on which he seeks to do so are not very clear from his letter. In *Clark v Perks* [2001] 1 WLR 17, it was made clear (at

para 17) that permission to appeal against a costs order made by an appeal court refusing permission to appeal would only be granted in a very clear case.

33. Mr Morris points to the more favourable practice established since *Jolly v Jay*. In that case, as has been seen, the court sought to reduce the lottery which had been developing in relation to the costs of opposed without-notice applications. The principles have now been codified in the recent changes to the Practice Direction to CPR Part 52, referred to above. However, neither such considerations, nor the more detailed review of the history of the case that we have now conducted, can be regarded as undermining Sedley LJ's decision, still less as an "exceptional circumstance", such as would justify reopening it in accordance with *Taylor v Lawrence*. The permission application had led to the respondents incurring substantial costs in the pre-*Jolly v Jay* climate, and although strict attention was not paid to the letter of the Practice Direction, we can see no merit at all in reopening the costs issue now.

34. The test in the event adopted by Sedley LJ did not differ significantly from that in the new Practice Direction. Our views are also affected by our uncertainty as to whether the district judge had any power to order the Turners to pay more than £200 in respect of an expert's fee in the small claims track (see CPR 27 PD para 7.3(2)), and by the fact that the much larger sum they were in fact ordered to pay has been set off against the sum ordered by Judge O'Malley.

35. We have also taken into account the view expressed by the solicitors for the Turners, in a letter to the court, following notification of the present hearing. They said:

> "As we see it, this matter has dragged on and been pursued with such zeal and obsession that it has cost our clients in excess of £15,000. The token award of £2,000 has been only a nominal sum, we think that it was too low and as the appeal failed, and was effectively damned as having little or no merit and the subsequent (appeal) has failed, we do not think the costs order should be challenged."

36. In any event there appears to be no power, on an appeal in the small claims track, to order a "detailed" assessment, as Mr Morris appears to have wished (see CPR 43.3, defining "summary assessment"). An award of costs in the small claims track is governed by CPR27.14(2). This sub-rule provides that the court "may not" make an award of costs, except as allowed by the following paragraphs. Paragraph (c) refers to "costs assessed by the summary procedure in relation to an appeal".

12. Issue (ii): the merits issue

37. As has been seen, the Access to Justice Act 1999 s 54(4) precludes any further right of appeal against Judge O'Malley's refusal of permission to appeal. That is sufficient to dispose of Mr Morris's attempt to reopen the merits of the case in this court. *Taylor v Lawrence* provides no assistance on this point.

38. The only possible alternative route to challenge that decision is that left marginally open by *Sivasubramaniam* (see para 29 above), that is judicial review. There is presently no application for judicial review of that decision. Nor could one be made, in respect of a decision in February 2001, without a very substantial extension of the normal three months time limit (see CPR54.5), which no doubt would be strongly resisted by the Turners. However, conscious of Mr Morris' persistence, we think it would be wrong for us to leave the case, without at least expressing some view on that possibility, in order to avoid yet further expense and effort being needlessly incurred. We do so, with due caution, not having had the benefit of argument on the difficult legal issues which may arise.

39. In *Sivasubramaniam*, this court was at pains to emphasise the narrowness of the gap left open by its decision. A mere error of law by the circuit judge in the county court would not be sufficient. The possibility was confined to "very rare cases", on the ground of an excess of jurisdiction in "the narrow, pre- *Anisminic* sense", or the denial of the right to a fair hearing.

40. Unfortunately, as the court recognised, the cases before *Anisminic* do not provide clear guidance. A useful summary of the classes of jurisdictional error, recognised by public law before *Anisminic* was decided, is included in the argument of Mr Sydney Templeman QC and Mr Gordon Slynn for the

Foreign Compensation Commission ([1969] 2 AC 147, 161). Their fourth category is a heterogeneous group of cases which counsel characterised in this way:

> "These are difficult cases in that it is sometimes hard to see what the precise point was but it may be possible to build up from them a proposition of general validity that a tribunal has no jurisdiction to make a determination if it has acted in complete disregard of its duties."

Given that *Ridge v Baldwin* [1964] AC 40 was among the cases in this group, one sees why this court in *Sivasubramaniam* specifically added the denial of a fair hearing as a class of jurisdictional error; but Mr Templeman's characterisation of the group of pre-*Anisminic* decisions to which *Ridge v Baldwin* was assigned goes somewhat wider than the failure to hear which was the vice in that particular case.

41. We agree, in any event, with the emphasis implied by the words "complete disregard of its duties". What is required, at least, is some fundamental departure from the correct procedures. A useful – more modern – analogy may be found in the decision of the House of Lords in *Re McC* [1985] AC 528, discussing the circumstances in which an action for false imprisonment may lie against justices, as having acted "without jurisdiction or in excess of jurisdiction" (within section 15 of the Magistrates Court (Northern Ireland) Act 1964). In that context, as in this, it was made clear that the "novel test of excess of jurisdiction" derived from *Anisminic* was of no relevance (p 546G, per Lord Bridge). The approach in that case has also been endorsed by the European Court of Human Rights, in the application of Article 5(5) (the right to compensation for unlawful arrest or detention). A detailed analysis of the cases, both here and in Strasbourg, can be found in Appendix A of the Law Commission's report *Damages under the Human Rights Act 1998* (Law Com No 266 (2000)).

42. For present purposes, it is sufficient to refer to Lord Bridge's comments on the position where justices "have duly entered upon the… trial of a matter within their jurisdiction". In such a case, he said:

> "… only something quite exceptional occurring in the course of their proceeding to a determination can oust their jurisdiction so as to deprive them of protection from civil liability for a subsequent trespass..[An] error (whether of law or fact) in deciding a collateral issue on which jurisdiction depends will not do so. Nor will the absence of any evidence to support a conviction… It is clear, in my opinion, that no error of law committed in reaching a finding of guilt would suffice, even if it arose from a misconstruction of the particular legislative provision to be applied, so that it could be said that the justices had asked themselves the wrong question….
>
> Justices would, of course, be acting 'without jurisdiction or in excess of jurisdiction' within the meaning of section 15 if, in the course of hearing a case within their jurisdiction, they were guilty of some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, or of the rules of natural justice, as for example if the justices refused to allow the defendant to give evidence. But I would leave for determination if and when they arise other more subtle cases one might imagine in which it could successfully be contended in judicial review proceedings that a conviction was vitiated on some narrow technical ground involving a procedural irregularity or even a breach of the rules of natural justice. Such convictions, if followed by a potential trespass to person or goods, would not, in my opinion, necessarily expose the justices to liability in damages." (p 546D-547B)

43. The Law Commission also saw a parallel in the Privy Council decision in *Maharaj v A-G for Trinidad and Tobago* [1979] AC 385, where in a similar context Lord Diplock said that "a mere irregularity of procedure" was not enough:

> "… [T]he error must amount to a failure to observe one of the fundamental rules of natural justice."

44. In the present case, we are concerned with a potential challenge to the jurisdiction of Judge O'Malley in dealing with the application for permission to appeal. He undoubtedly had jurisdiction to "enter on" the hearing of that matter. The question is whether there was something exceptional in the course of the hearing or in his decision, sufficient to oust that jurisdiction. In our view, there was not.

45. We have already made clear our concerns about the course of the proceedings before the district judge. Her case-management decisions, including her allocation to the small claims track, did in practice have the effect that there was no proper hearing of much of the claimants' evidence, nor cross-examination of that of their opponents. However, those decisions were apparently based on her erroneous view that the evidence was irrelevant in law to the issues she had to decide. That error might have been corrected at an early stage, if the Gregorys had exercised their right to appeal against the allocation. Even on the submissions to Judge O'Malley, the crucial errors were not clearly identified. His approach to the application, and the grounds of his determination, reflected the way in which the case was presented to him. Whatever criticisms may be made of his reasoning, it cannot be categorised as amounting to a "complete disregard of his duties" or fundamental departure from the rules of natural justice.

46. The Gregorys may well be concerned to learn that we consider that this is the end of the road, despite our serious concern that something may have gone wrong in connection with the district judge's handling of the case, and we are sorry if it did. This, however, is the effect of Judge O'Malley's decision, and of Parliament's decision not to permit an appeal against that decision. In paragraphs 5 and 6 of Section 2 of his *Interim Report on Access to Justice* (1995) Lord Woolf highlighted the tensions that exist between a desire to achieve perfection and a desire to achieve a system of justice which is not inaccessible to most people on grounds of the time and cost involved. He quoted tellingly from a 1970 broadcast by Lord Devlin:

> "[I]s it right to cling to a system that offers perfection for the few and nothing at all for the many? Perhaps: if we could really be sure that our existing system was perfect. But of course it is not. We delude ourselves if we think that it always produces the right judgment. Every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt."

Section 54 of the Access to Justice Act 1999 encapsulates part of Parliament's response to Lord Devlin's question.

13. Issue (iii) - The power of attorney: (a) Background

47. Judge O'Malley's order was drawn up on 5th March 2001. On 8th March Mrs Gregory executed in favour of her daughter and Mr Morris the enduring power of attorney which is described below. The notice of appeal against Judge O'Malley's decision was expressed to be made by Mrs Gregory "by advocate R.J.Morris…represented by power of attorney." The power of attorney was expressed to be given under the Enduring Powers of Attorney Act 1985. It was in the form prescribed under that Act. It gave him authority, first, to deal with "all planning development and environmental matters" affecting their ownership of their house at 96 Dial Hill Road (para 1) and, second, to

> "(2) represent me and act in my place if the need arises in any legal matters or proceedings arising out to the matters at (1) above and any other legal processes necessary to safeguard and protect my personal proprietary interests including authority to sign and execute on my behalf any legal documents required for the causes set out above…".

48. Before considering the legal effect of that document for the purposes of the Courts and Legal Services Act 1990, it is necessary to say something about Mr Morris' background. He is now aged 82. After war service he served in the General Post Office for 33 years before retiring to Clevedon in 1977. He then

became a sub-postmaster, and he also played a prominent part in local civic activities, serving on local councils for six years. He would often give advice to his customers if they were encountering difficulties with the authorities, and after his second retirement he extended the scope of these voluntary services by establishing a family advisory service which he called "Oracle West Lynkage". He described this as a "family group dedicated to giving help by conducting correspondence on matters in which people fall into difficulties". He has said that his service will always refer people to tried and tested specialists if specialist legal or planning advice is needed, and that they do not regard themselves as legal advisers. On the other hand they had enough knowledge of the Civil Procedure Rules to draft a claim if necessary. He has no legal or other relevant qualifications which would entitle him to act on behalf of the claimants in legal proceedings.

49. The question raised by this appeal is whether the power of attorney given by the claimants enables him in effect to stand in their shoes, and so to exercise their undoubted rights under the 1990 Act, as individuals, to conduct litigation and appear in court in their own behalf.

14. (b) The Courts and Legal Services Act 1990

50. The starting point for consideration of rights of audience and the right to conduct litigation is now the Courts and Legal Services Act 1990. This was intended to establish a comprehensive modern code to replace the diverse statutory and common law rules which previously governed these matters. (See the White Paper: "Legal Services: a Framework for the future" Cm 740 July 1989 for a useful summary of the different rules which previously governed rights of audience in the various courts.)

51. Section 17 of the Act sets out "the statutory objective and the general principle". The "general principle" is that rights of audience and rights to conduct litigation should be determined by reference "only" to certain specified factors; they include the relevant qualifications, membership of professional bodies and the interests of "the proper and efficient administration of justice" (s17(3)). More specific provision is made for rights of audience, and rights to conduct litigation, respectively, in sections 27 and 28 respectively. By section 119, the "right of audience" is

> "the right to appear before and address a court including the right to call and examine witnesses";

the "right to conduct litigation" is

> "the right (a) to issue proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions).".

52. Section 27, dealing with rights of audience, provides:-

> "The question whether a person has a right of audience before a court or in relation to any proceedings shall be determined solely in accordance with the provisions of this Part" (see s 27(1)).

Sub-section (2) provides that a person shall have a right of audience before a court in relation to any proceedings "only in the following cases". The categories can be summarised as follows:-

> (a) Appropriately qualified members of the legal professions.
>
> (b) Rights of audience granted by a particular enactment.
>
> (c) "A right of audience granted by that court in relation to those proceedings."
>
> (d) "Where he is a party to those proceedings and would have had a right of audience, in his capacity as such a party, if this Act had not been passed."

> (e) In certain forms of proceedings where the person is employed to assist in and is under instructions given by a qualified litigator.

Sub-section (4) provides:

> "Nothing in this section affects the power of any court in any proceedings to refuse to hear a person (for reasons which apply to him as an individual) who would otherwise have a right of audience before the court in relation to those proceedings."

(Sub-section (7) makes clear that where, before the commencement of the Act appearance in any particular court or proceedings was unrestricted, that position is preserved. That needs to be read in the light of the definition of "court" which includes tribunals and statutory inquiries, in many of which there was and is no restriction on appearances. It has no relevance to the present case.)

53. There is authority that the discretion to allow appearance in particular proceedings (under category (c)) is not intended to override generally the restrictions in the Act. In *Paragon Finance v Noueiri* [2001] EWCA Civ 1402; [2001] 1 WLR 2357 at [67], this Court repeated the guidance given by Lord Woolf MR in *D-v-S* [1997] 1 FLR 724, 728:-

> "[The 1990] Act does give a court discretion [to grant advocacy rights]. In my view, it is quite clear from the terms in which the Act as a whole is written that it is giving a discretion which is to be exercised only in exceptional circumstances … [The grant of advocacy in specific cases] is the responsibility of the courts who have been given the rights by Parliament. Those who have rights of audience are subject to very stringent requirements … The law must be administered fairly. If the position was otherwise than I have indicated, others can do exactly the same as [X]; and that would be monstrously inappropriate having regard to the requirements that are placed upon those who have normal rights of audience."

At the same time, emphasis has been rightly laid on the need for common sense, in allowing exceptions to the general rule where this will be of genuine assistance to the court and to the course of justice (see *Izzo v Philip Ross & Co* [2002] BPIR 310, 313 per Neuberger J)..

54. Section 28 makes similar provision in relation to rights to conduct litigation. They are to be determined "solely" in accordance with the Act. Categories (a) to (d) correspond to those in section 27. In particular category (d) reads:-

> "Where he is a party to those proceedings and would have had a right to conduct the litigation, in his capacity as such a party, if this Act had not been passed."

There is no equivalent of section 27 (4), which gives the court power to nullify the right of audience in a particular case. However, where a right to conduct litigation is granted in a particular case (under s 28(2)(c)), the court also impliedly has power to take it away (see *Paragon Finance* (above) at para 58).

55. Rights of audience and rights to conduct litigation conferred by or under the Act may be exercised, notwithstanding the restrictions in the Solicitors Act 1974 on unqualified persons acting as solicitors or carrying on proceedings as such (1990 Act s27 (10), 28 (6), disapplying Solicitors Act 1974, ss 20, 22 and 25).

56. Reference in the present context should also be made to section 11 of the 1990 Act, headed "Representation in certain County Court cases". This gives the Lord Chancellor power to provide by order that there shall be "no restriction on the persons who may exercise rights of audience or rights to conduct litigation", in relation to particular categories of proceedings in the County Court, including

"small claim" proceedings. The Lay Representatives (Rights of Audience) Order 1999, made under this section, provides that "any person" may exercise rights of audience in small claim proceedings, but subject to the following:-

> "A lay representative may not exercise any right of audience
>
> (a) where his client does not attend the hearing;
>
> (b) at any stage after judgment; or
>
> (c) on any appeal brought against any decision made by the District Judge in the proceedings."

57. Read literally, this would appear to exclude any discretion to allow appearance by a lay representative where those conditions are not met. However, it seems clear that section 11 is intended to widen the rights which would otherwise be available, and therefore does not detract from the general discretion conferred by sections 27(2)(c) and 28(2)(c) to grant rights in particular proceedings. This understanding is confirmed by the Practice Direction relating to small claims (CPR PD27 para 3.2) which, having set out the terms of the order adds:

> "However the Court, exercising its general discretion to hear anybody, may hear a lay representative even in circumstances excluded by the order."

It may be envisaged that in the small claims court the discretion under category (c) will be exercised more flexibly than is implied by Lord Woolf's comments in *D-v-S*, which were directed to courts at a higher level of the hierarchy.

58. It is thus not in doubt that Mr Morris was able to attend the small claims hearing as a lay representative on behalf of the claimants, although insofar as his clients did not personally attend he would do so only by discretion of the district judge.

15. (c) Special cases

59. Before turning to the effect of power of attorney granted in this case, it is convenient to mention two other categories of case, which might be seen as departures from the basic regime of the 1990 Act: first, representation of corporations, and secondly, "litigation friends". Although neither is directly relevant to this case, they may be of assistance in deciding whether a power of attorney should be seen as a further departure from that regime.

60. CPR Part 39.6 provides that a company or corporation may be "represented at trial" by an employee who has been authorised to appear on behalf of the company, if the court gives permission. The Practice Direction para 5.3 says:

> "Rule 39.6 is intended to enable a company or other corporation to represent itself as a litigant in person. Permission under rule 39.6(b) should therefore be given unless there is some particular and sufficient reason why it should be withheld. In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative."

Since this right of representation requires the permission of the court, it is consistent with category (c) in the 1990 Act; the only difference is that the presumption is in favour of the grant of permission rather than the reverse. (For a recent application of this provision, see *Watson v Bluemoor Properties Ltd* [2002] EWCA Civ 1875).

61. The provisions for "litigation friends" are contained in CPR Part 21. They are described as "special provisions which apply in proceedings involving children and patients". "Child" is defined as a person under 18; "patient" is defined as "a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his own affairs." It is provided

that a patient "must have a litigation friend to conduct proceedings on his behalf". A child is subject to the same requirements, unless the court has made an order permitting the child to conduct proceedings without a litigation friend (Rule 21.2). The notes in Volume I of Autumn 2002 White Book (para 21.2.1) observe that the meaning of "conduct proceedings on his behalf" is not elaborated in the rules but

> "…doubtless would include doing anything which in the ordinary conduct of any proceedings is required or authorised by a provision of the CPR to be done by a party to the proceedings."

It is also noted that there is no requirement that a litigation friend must act by a solicitor in High Court proceedings. This contrasts with the predecessor provision, RSC 80 r2(3), which provided that a "next friend or *guardian ad litem* of a person under a disability must act by a solicitor."

62. Rules 21.4-5 provide for the appointment of litigation friends, in cases where none has been appointed by the court and there is no person authorised under Part 7 of the Mental Health Act 1983 to conduct legal proceedings in the name of a patient. (Section 96(1) of that Act enables the Court of Protection to give directions in relation to a patient for various matters including "the conduct of legal proceedings in the name of the patient or on his behalf".) Apart from any such order the rules provide that a person may act as a litigation friend if he "can fairly and competently conduct proceedings" on behalf of the child or patient, has no interest adverse to that of the child or patient and, in the case of a claimant, undertakes to pay any costs ordered. Rule 21.5 sets out the procedure to be followed by the person who wishes to act as a litigation friend, including filing the relevant authorisation and other documents.

63. It is not entirely clear how this provision is intended to fit into the regime of the 1990 Act. The removal of the specific requirement for the litigation friend to act by a solicitor appears to imply that there is nothing to prevent the litigation friend carrying out procedural steps on behalf of the patient. Although there is no definition of the expression "conducting legal proceedings" in Part 21 (or in the Civil Procedure Act 1997, under which the new rules were made) it is difficult to see how it can differ significantly in scope from the expression "conducting litigation" as defined in the 1990 Act. On this basis this may be seen as a case within category (b) under the 1990 Act, where the right to conduct litigation in relation to the proceedings is "granted by or under any enactment".

64. Such an interpretation, however, would leave open the question whether the litigation friend has a right of audience under section 27. In the absence of any specific provision in Part 21 expressly giving him such a right, it is difficult to bring this within category (b). It is unnecessary to resolve that issue in this case. However, it is to be noted that the court would in any event have a discretion to allow the litigation friend to be heard, under category (c).

16. (d) Powers of Attorney

65. Against that background we turn to the significance of the grant of the power of attorney in this case.

66. *Bowstead and Reynolds on Agency* (17th Ed 2001) adopts the following definition of power of attorney as:-

> "A formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes" (para 2- 039, quoting *Jowitt's Dictionary of English Law*).

In a later passage the authors comment:-

> "The term 'power of attorney' is usually applied to a formal grant of power to act made by deed or contained in a deed relating also to other matters. There was in fact no rule that agency must be created by deed, except where the agent himself is empowered to execute a deed, and it seems that such a power could at common law be granted by simple writing. However, the Powers of Attorney Act 1971 s1 requires that powers of attorney be executed under seal.

> The term 'power of attorney' is not defined, but presumably means a formal grant of agency powers, often of a general nature."

67. As this passage makes clear, the grant of a power of attorney is in principle no more than the grant of a form of agency. The Powers of Attorney Act 1971 followed recommendations of the Law Commission (*Powers of Attorney* Law Com No 30 (1970)). The main purpose was to simplify and rationalise the existing provisions for the grant of powers of attorney in various statutes. The report noted, but did not pursue, suggestions for enabling such a power to continue notwithstanding incapacity of the donor (para 25). Accordingly the 1971 Act simply provided a general mechanism for the grant of powers of attorney. Section 10 of the Act provided that subject to certain exceptions, a general power of attorney should operate to confer "authority to do on behalf of the donor anything which he can lawfully do by an attorney".

68. The problems of incapacity were considered by the Law Commission in 1983 (*The Incapacitated Principal* Law Com No 122 (1983)). The recommendations in this report led to the Enduring Powers of Attorney Act 1985, under which the power was granted in this case. The main purpose of the Act was to allow the grant of a power which would survive subsequent mental incapacity. Section 3 provided that an enduring power of attorney could confer either "general authority" on the attorney to act in relation to "all or a specified part of the property and affairs of the donor"; or authority to do specified things on the donor's behalf. Where the instrument was expressed to confer general authority, it gave power "to do on behalf of the donor anything which the donor can lawfully do by an attorney".

69. More recently the subject was referred to in the context of the Commission's report on mental incapacity (*Mental Incapacity* Law Com No 231 (1995)), which included a draft Bill. One of the recommendations was to integrate the provisions for enduring powers of attorney into a "unified scheme" for "substitute decision–making procedures" (para 7.5), including a "continuing power of attorney" ("CPA"). This would extend to "personal welfare decisions", as well as the questions of "property and affairs" which were the subject matter of enduring powers under the 1985 Act. Clause 16(1) of the draft Bill provided that a CPA could

> "extend to all or to any specified matters relating to the donor's personal welfare, health care, property or affairs, *including the conduct of legal proceedings*…". (emphasis added)

> The reference to "conduct of proceedings" was not discussed in the text, but it seems likely that it was intended to mirror the powers which could be granted by the court under section 96 of the Mental Health Act 1983 (see above). This Bill has not yet been enacted

70. Apart from that reference, the possibility of an attorney having power to conduct litigation, or to appear in court on behalf of the donor of the power, was not addressed in any of the Law Commission working papers or reports to which we have referred. Nor have we been referred to any reported case which mentions that possibility. On the other hand, it has always been clear that there were some limitations on the scope of the attorney's authority, under even a general power. In his work on *Powers of Attorney* (9th Ed 2000), Trevor Aldridge, who as a law commissioner would have been involved in the discussions which led to the recommendations in Law Com No 231, has a section describing "Limits on powers of attorney". As he says, these are not apparent from either the 1971 Act or the 1985 Act:

> "Some restrictions on delegation stem from the donor's position, others from the nature of the action to be performed. There may also be practical limitations …" (1-13).

71. He describes the limitations on the powers that can be granted by power of attorney. One well-established example is the power to make a will, which cannot be delegated by power of attorney. He also refers to some reported cases, illustrating the limitations. The most recent is *Clauss –v- Pir* [1988] Ch 267, in which it was held that a requirement under the court rules to verify a list of documents by affidavit, could not be performed by the defendant's solicitors under a power of attorney. The judge

(Francis Ferris QC, as he then was) referred to *Halsbury's Laws of England* 4th Ed Vol 1 para 703, for the general proposition that –

> "whatever a person has a power to do himself he may do by means of an agent,"

but noted the qualifications, one of which was –

> "where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power authority or duty of a personal nature in requiring skill and discretion for its exercise…".

Trevor Aldridge ends this section with the following observation :-

> "A question which does not seem to have been conclusively settled is whether a litigant can appoint an attorney to represent him in court, exercising the donor's right to appear in person. To allow this would be to drive a coach and horses through the traditional monopoly of the legal profession to appear on behalf of litigants. It seems unlikely that a court would accept this."

17. (e) Rights under the 1990 Act

72. We now return to the present case, viewed in the context of the 1990 Act. So far as rights of audience are concerned, the only categories which could possibly be relevant are (b) and (d). (b) would only assist Mr Morris if it could be said that the rights had been conferred "by or under" the Enduring Powers of Attorney Act 1985. However, there is nothing in that Act which relates specifically to rights of audience or conduct of litigation.

73. The simple question is therefore, one of construction of sections 27 (2) (d) and 28 (2) (d). They confer a right of audience and a right to conduct litigation on "a party" to the proceedings if he would have had that right "in his capacity as such a party" if the Act had not been passed. The question is whether "a party" in this context includes a person with a power of attorney on behalf of such a party.

74. It is important to note that this question is not confined to a power granted under the Enduring Powers of Attorney Act 1985. As has been seen, that Act extends the circumstances in which a power of attorney may be granted, but it does not change the nature of the powers so conferred. Indeed there is nothing in either that Act or the 1971 Act which distinguishes the powers of an attorney in relation to litigation, from those which could be enjoyed by an ordinary agent. As we have noted, the ordinary rule is that an agent stands in the shoes of his principal to the extent of his authority, whether conferred by a power of attorney or not.

75. Accordingly, category (d) would only assist if the reference to a "party" can be interpreted as including the agent of a party. In relation to rights of audience, in our view such a construction would, as Mr Aldridge says, drive a coach and horses through the purpose of the statute, which is to impose effective controls on rights of audience and conduct of litigation in accordance with the "general principle". The exception for the individual party is, as the paragraph makes clear, a recognition of the established position before the 1990 Act, which allowed an individual to appear in his own case in any court, regardless of his qualifications. There is nothing to suggest that, before the 1990 Act, that right could be exercised by an agent, other than one properly qualified for the purpose. In our view, this was and is a personal right, which cannot be delegated. Were it otherwise, there would be no purpose in the careful restrictions imposed in the public interest on those who can appear as advocates in proceedings.

76. In relation to rights to conduct litigation under section 28, the position before the 1990 Act may not have been quite so clear. We were referred to one nineteenth century case (*Re Wallace* (1884) 14 QBD 22), which may suggest a more flexible approach. It was held that a person, authorised by a power of attorney "to commence and carry on or to defend at law or in equity all actions suits or other proceedings…" in relation to the ships of the donor, was able to sign on behalf of his principal a bankruptcy petition against a debtor of the principal. This seems to have been seen as merely an

extension of established bankruptcy practice. It is not clear whether this approach would have been applied to other areas of litigation, or extended beyond the initiation of the proceedings.

77. More generally, there seems to have been some uncertainty as to the extent to which the conduct of the proceedings before trial was within the power of an unqualified agent. In *Re Incorporated Law Society's Application* [1884] 1 TLR 354, it was held that the then Solicitors Act was not contravened by a person who issued proceedings and arranged for a statement of claim to be drawn up, where he had made it clear to the client (a Mr Hale) that he was not acting as a solicitor. According to the short report, the court was

> "satisfied … that Hale knew who the man was and that he was not a solicitor, and that what he did for Hale was simply done for him in his place, and as though Hale did it".

78. However, whatever uncertainties there were in the past the position is now clearly regulated by section 28 of the 1990 Act. In relation to rights to conduct litigation, paragraph (d) in that section follows the same form as its equivalent in section 27 (rights of audience), and must be construed in the same way. It authorises conduct of litigation by the party, but not by an agent other than one who is properly authorised under one of the other categories.

79. It follows that Mr Morris has no right to conduct litigation or to appear in court on behalf of the claimants. He may do so only (as he has done before us) in the exercise of the court's discretion.

18. Conclusion

80. Accordingly we dismiss all the applications. We also hold that Mr Morris had no right to conduct litigation or to appear in court, here or below, save with the permission of the court.

81. We cannot leave this case without expressing sympathy for District Judge Exton and Judge O'Malley, in spite of the criticisms we have made. The history of these proceedings illustrates vividly why Parliament considers that those who conduct litigation, and those who perform advocacy services, in litigation of any complexity should be appropriately qualified to perform these duties. Mr Morris has many sterling qualities, and he has an encyclopaedic knowledge of some of the points of law and practice which featured in this case. But he lacks the insight, which professional training and experience should give, to separate his good points from his bad points, and his good points get lost under a sea of paper. He also lacked the procedural knowhow to spot when the claimants would have to appeal against a case management order if they were dissatisfied with it.

82. The Woolf reforms, with the encouragement they have given to procedural informality, have placed very heavy burdens on the judges in our county courts. The documents in this case were in a mess when they reached this court, and it has taken very many hours of time – a commodity not readily available to a judge in a busy county court – to sort out the mess. It can be said with some force that the district judge took too many short cuts in her efforts to do justice in this bitter dispute, and the circuit judge on appeal failed to appreciate just how many short cuts she had taken when he refused permission to appeal. However, that is not sufficient to open yet another path for the Gregorys to pursue the matter. In our judgment they have reached the end of the road.

Appendix I

Part I – The factual background

83. The story began in February 1997, when the Turners bought 94 Dial Hill Road, Clevedon, which was one of a row of four houses, developed in the mid-1920s. Until the events at the centre of this dispute, they had all been occupied by elderly people for many years. The Gregorys, mother and daughter, jointly own the neighbouring house, 96 Dial Hill Road, where they have lived since May 1978. Mrs Gregory is now 83 years old.

84. The Turners wished to create a modern dwellinghouse and garage on their small site. Their project involved gutting the existing pre-war bungalow and creating a modern house within its walls. It also involved the demolition of an elderly lean-to garage and the erection of a modern brick-built garage right up to the boundary of the Gregorys' property.

85. From the Gregorys' perspective, the Turners' arrival in the road shattered "the serene and peaceful relationships that existed for many years until the change of ownership at No 94". The Turners started work in early February 1997 without first obtaining planning permission but there was such an uproar that they decided to stop work and await the outcome of the planning process.

86. Their first application for planning permission was rejected both by the local planning authority ("LPA") and on appeal. They submitted an application for a smaller scheme after the LPA's decision. A garage no longer appeared in their new proposal. By reducing its volume below 70 cubic metres, they were able to contend that it would qualify as permitted development pursuant to Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995. This view was accepted by the LPA. (The correctness or otherwise of that view is not an issue before us. We note, however, that the planning officer's letter of 16th June 1997, confirming that view, included a request "to site the garage further back, thereby alleviating the potential impact on the neighbouring property". It appears that the Turners were not willing to do this, in the absence of a legal requirement to do so.)

87. Trouble blew up again in the week before Christmas. Mrs Gregory's perception was summarised in a letter from her solicitors on 31st December 1997 to the Turners' solicitors. In the absence of any response they followed this up a week later with a letter to the Turners themselves. They made five main complaints:

> (i) The Turners' builders had knocked down the fence which the Gregorys had recently erected within their boundary at their own expense;
>
> (ii) They had even drilled concrete from the bases of the Gregorys' fence posts;
>
> (iii) Every attempt to persuade the builders to reinstate the Gregorys' fence had met with laughter and abuse;
>
> (iv) Their workmen had trespassed onto the Gregorys' property, uprooted shrubs, removed rockery stones and trampled down plants. Complaints and requests that the builders should moderate their behaviour had met with no response.
>
> (v) None of the notices required by the party walls legislation had been served.

They said that their clients had consulted them in despair after their own complaints had met with no response. Their letters ended with the threat of court proceedings for an injunction and damages.

88. There was no substantive response to these letters until 30th January 1998, when the Turners' solicitors wrote contending that their clients had built their garage entirely on their own land. They complained that a fence put up by the Gregorys the previous autumn had involved a small trespass onto their land. They also asserted that the Gregorys had knocked down their own fence. The Gregorys' solicitors replied saying that their clients said it was nonsense to suggest that they had destroyed their own fence. They took issue with virtually everything the Turners said, and stated that the Turners' builders had mocked and taunted their clients beyond belief. Legal aid forms were being completed with a view to proceedings being taken.

89. In the meantime, work to the garage was proceeding. On 9th January 1998 Mrs Gregory noted in her diary: "The wall is now 14 feet high and 16 feet long. We cannot see any sky. Our kitchen is very cold." The garage, which had a pitched roof, appears to have been completed by the end of January.

Measurements recorded later by the LPA show that it was set back 7.5 metres from the front building line. This meant that its southern end was close to the Gregorys' kitchen, and the garage then ran northwards for six metres. Its flank wall was three metres high on the Gregorys' side, and rather higher on the Turners' side. The Gregorys' kitchen window was only 1.85 metres from its front corner.

90. Although solicitors' letters were exchanged sporadically until early April, the threat of court proceedings was not pursued. The chronology before the district judge shows that representations continued to be made to the LPA, the building inspectorate, and other people in positions of authority. In the meantime the Turners, who now had the benefit of planning permission, were proceeding with the rest of the development. There was further trouble in October 1998 when the new garden wall was being built.

91. In June 1998, a mutual friend suggested to the Gregorys that they should seek help from Mr John Morris, who offered assistance to people experiencing difficulties with authorities and others (for a description of Mr Morris see para 48 above). During the remainder of 1998 he conducted correspondence with the LPA on their behalf, but without any immediate success.

92. During 1999 he made an attempt, retrospectively, to have recourse to the statutory procedure relating to party wall awards. He seems to have been influenced by a passage in a standard text-book which suggested that some courts had tacitly approved a retrospective procedure being adopted as a means of "dealing with a real bad hat who refuses to serve notices". However this may be, the Turners and their advisers refused to co-operate with this process, and the district judge was undoubtedly right to rule that this procedure, which culminated in an award in August 1999 holding that there had in fact been a small encroachment, had no legal effect.

Part II - The respective cases

93. The proceedings were begun by the Gregorys in December 1999. They complained that the Turners and their builders repeatedly trespassed on their land and treated them in a high-handed manner during the course of the building works. They also complained that the new garage, and a long brick wall which the Turners erected between their gardens, encroached on their land, and that the amenities of their property were seriously impaired. They set out their complaints in detail in their particulars of claim, served on 31st December, in which they claimed injunctive relief and the enforcement of the party wall award together with damages for trespass, including aggravated damages, limited to £5,000. The particulars of claim, running to 10 pages, and supported by statements of truth and 37 pages of appendices, were served on 31st December 1999. Details were given of all the acts of trespass complained of, "on divers occasions" between February 1997 and October 1998, and of the "fear and distress" caused by the "belligerent attitude" of the defendants and their agents. The particulars of special damage contained details of all the expense to which the Gregorys had been put as a result of the Turners' activities.

94. On the other side, the Turners' re-amended defence, served on 24th January 2000, disputed most of the Gregorys' allegations against them, but without descending to detail. In particular they denied that they had committed any trespass, denied that they had smashed the Gregorys' fence, and denied that they had caused the Gregorys fear and distress. They said that they had meticulously observed the planning permission and that they had built within the curtilage of their property.

Part III – The proceedings before the District Judge

95. The first substantive case management hearing took place on 6th March 2000 when District Judge Exton allocated the action to the small claims track, rejecting Mr Morris's application (which was not opposed by the Turners' solicitor) that it should be heard in the fast track or the multi-track because of its complexity. She directed that the parties should jointly instruct an expert in order to ascertain whether there was in fact any encroachment onto the Gregorys' land. In due course she nominated Mr Davey for this role.

96. By the time of the next case management hearing on 9th June, Mr Davey had furnished his report as the single joint expert. He concluded that the Turners' new garage and their new brick wall had reduced the

width of the Gregorys' rear garden by a maximum of 4.75 inches, reducing to zero at a point approximately midway along the garage wall.

97. On 9th June Mr Morris made a renewed application for the case to be allocated to the multi-track. The district judge rejected this, but directed that a valuer should be jointly instructed to provide a report as to the diminution in value, if any, of the Gregorys' property by reason of the Turners' encroachment. Witness statements were to be exchanged two weeks after his report. 18th September was fixed as the date for the trial. On 30th June she refused to extend the valuer's instructions so that he would also report on the extent to which the Turners' property had appreciated in value as a result of the trespass.

98. With the trial date now approaching, Mrs Gregory's health took a distinct turn for the worse. Her doctor had told the court at the end of February that she had been suffering from severe anxiety and depression for a year or more. He attributed her condition to the stress caused by this dispute. On 25th July she underwent urgent operative treatment, and she had to be readmitted to hospital for another operation a fortnight later. Her daughter now spent most of her time caring for her, and in these circumstances neither mother nor daughter were in any state to cope with the burdens of a trial which was now only a month away. What was more, Mr Dunscombe's report had not yet surfaced, so that witness statements had not yet been exchanged.

99. In these circumstances both parties sought an adjournment of the trial date. In their letter consenting to the application, the Turners' solicitors said that if the Gregorys could not attend at court through illness they would have thought that it was in everybody's interests to delay the matter for, say, a further two months.

100. On 24th August District Judge Daniel refused this application. He said that Mr Dunscombe's report could be available by 29th August and that witness statements could be exchanged by 12th September. He added that if either party was unhappy with his directions, they could make a formal application to the court. In the event Mr Morris did make such an application, which was not listed for hearing until 13th September.

101. In the meantime Mr Dunscombe had submitted his report. He limited himself to the issues that were identified for him in his letter of instructions. He said that a prospective purchaser of 96 Dial Hill Road would not notice the miniscule reduction in the size of that property which was created by the encroachment noted by Mr Davey. On the other hand he considered that the increased height of the garage wall in such close proximity to the Gregorys' kitchen window had the effect of making the wall visually intrusive and that it excluded a significant fraction of the natural light to the room. He also referred unfavourably to the overbearing appearance of the new wall between the two gardens (which replaced a mature hedge). He considered that each of these features of the Turners' work would lead to a diminution by £3,000 in the price a purchaser would be willing to pay for the Gregorys' property. He said that bare breeze block was infrequently used for creating boundaries between properties of this calibre, and that its appearance was most unattractive to prospective purchasers.

102. Mr Morris again appeared on the Gregorys' behalf on 13th September. By now the Turners' solicitors were content that the trial should proceed on 18th September. They said that they could see no reason why Miss Gregory should not attend court that day, even if her mother was too ill to do so. District Judge Exton refused to adjourn the trial. She accepted that Mrs Gregory had recently undergone two major operations, and that when she was discharged from hospital at the end of the current week, she would need 24-hour care, in practice from her daughter. She did not wish to belittle or underestimate the personal difficulties the Gregorys had experienced in recent weeks, but she had to apply the overriding objective and be fair to both parties. She also could not ignore the fact that if she granted the application a whole day of court time would be wasted. She considered it to be a straightforward boundary dispute with valuation implications. She regarded Mr Dunscombe's evidence as helpful to the claimants, saying that without in any way prejudging the decision she would make at the final, hearing, it seemed to her that the claimants were in a relatively strong position.. As to other witnesses she said:

> "There is also some suggestion that witnesses will attend the hearing, and of course their statements have not yet been exchanged. But I have already expressed the view during this hearing that the witnesses are unlikely to add to anything which the expert reports had not already dealt with. The defendants' solicitor confirms my understanding that there are few, if any factual disputes… In my view the stage has been reached whereby verbal witness evidence will be unnecessary, and the matter will almost certainly proceed on the basis of expert evidence and legal argument, and therefore it is not necessary for either of the claimants to attend."

103. Mr Morris has told us that the Gregorys abandoned their claims for injunctive relief at this stage. He has also told us that the district judge told the parties that her award could exceed the financial limits of a small claim if the occasion demanded.

104. After the hearing on 13th September the Turners' solicitors served on Mr Morris a five-page witness statement by Mrs Turner, with a very brief confirmatory statement from her husband. Between 13th and 15th September Mr Morris sent some witness statements to the Turners' solicitors. They reciprocated by sending him a documentary exhibit to Mrs Turner's statement. He seems to have produced a chronology, incorporating the diary entries, at the hearing itself.

Part IV The witness statements and other evidential material

105. The claimants' witness statements included statements from:-

> (i) Mr Harrington, a local builder, who had been employed first by the Gregorys in April 1997 to erect some temporary fencing along the boundary, to replace a side fence allegedly damaged by the Turners. In September, he had supplied and erected a more permanent fence (at a cost of nearly £850), which he placed (as he said) five centimetres inside the line of the old metal posts marking the boundary line. He revisited the site at the end of December 1997, when he found that three of his panels and posts had been removed and also saw cracks in the Gregorys' pathway; and again in April 1998, when he found that he could not re-erect the Gregorys' broken fences because there was now no room to do so between their concrete path and the wall of the Turners' new garage.
>
> (ii) PC Cornish, who had visited the site with another officer on the evening of 23rd December 1997, in response to the Gregorys' complaint that their neighbours' foundation work was damaging their fence. He could see that two fence panels had cracked at the edges, and that a third panel had fallen over because their concrete bases had been undermined. In his note-book a sergeant, now dead, had recorded that he received a promise from the Turners that they would reinstate the fence as soon as possible after the footings had been completed (a promise which was not apparently fulfilled).
>
> (iii) Mrs Powell, of No 92, (a widow then in her early 90s, who died in November 2000), gave evidence of having witnessed the knocking down of the Gregorys' woven fence in December 1997 and the subsequent work in laying concrete foundations along their boundary for a wall.
>
> (iv) Mr Snook of No 98, a retired civil engineer who had acted as an expert witness in boundary disputes in the past, gave factual evidence as to the extent of the encroachment. Mr Snook also deposed to an unhappy incident in which Mr Turner had sounded his van's horn loudly and continuously at Miss Gregory, called her a stupid old cow, and threatened to knock Mr Snook's block off when he remonstrated with him.

106. The claimants' evidential material at the trial also included the contents of their particulars of claim, supported as they were by statements of truth, and the diary entries included in the chronology produced by Mr Morris. There were also photographs before the district judge.

107. The main points in Mrs Turner's statement were that:

> (i) There was a line of trees and overgrown shrubs on the boundary line to the north of the old shed behind their bungalow. One tree in particular was very tall and took away all the light Miss Gregory might otherwise have enjoyed through her back window. In July 1997 a Mr Beard had measured exactly where the boundary was, and the Turners had decided to build an inch or two within that boundary line, because they did not wish to trespass.
>
> (ii) The Gregorys had erected their interwoven panel fence in 1997 when the Turners were away on holiday. Although the Turners thought its foundations trespassed on their property, they did not object because relationships were now so bad that they were glad to see a boundary go up. They decided to build the garage, as advised, in December 1997, with no foundations underspilling the Gregorys' property, and with the new garage wall completely within land in their ownership. Their garage was completed in January 1998. Everything they did accorded with approvals given by the planning authority and the building inspectorate, where necessary;
>
> (iii) It was simply not true that they had damaged the Gregorys' fence. All the abuse had come from the Gregorys' side, and the police had eventually warned the Gregorys for wasting their time. The Gregorys had no right to light, and in any event they now enjoyed a greater amount of light than before, as a result of the work done by the Turners in clearing the trees, the old shed, and the bushes. They had been unable to engage in any meaningful dialogue with the Gregorys. They would have been happy to accommodate any suggestions they might have made about the facing of the garage wall or the composition of the new wall separating their gardens, "be it larch fencing or the like".

Mrs Turner also included some of the correspondence as an exhibit to her statement, whose accuracy was confirmed by her husband.

Part V The hearing on 18th September

108. By reason of the district judge's comments on 13th September (see para 103 above) none of the Gregorys' witnesses attended to give their evidence orally on 18th September or to submit themselves to cross-examination. Miss Gregory herself had been able to travel to Weston-super-Mare with Mr Morris for the short hearing on 13th September. The district judge's remarks persuaded them that there would be no purpose in her going to court again on 18th September (she would also have needed to find somebody to care for her mother). Although the Turners were present at the trial, the district judge did not allow Mr Morris to cross-examine them. She had already ruled that she would not permit cross-examination of the two joint experts, who were not required to attend.

109. The hearing on 18th September lasted for four and a half hours. No oral evidence was heard. When it was suggested (in the documentary exhibit faxed to Mr Morris one working day before the hearing) that the Gregorys had knocked down their own fence, the district judge refused to allow an adjournment so that Mrs Gregory could give her own account of what had happened. Her short reserved judgment was signed on 4th October and sent to the parties on 27th October. The main points were:

> (i) The Turners had accepted the conclusion of Mr Davy's report as to the extent of the encroachment. The question for her was what, if any, damages

should be awarded to the Gregorys to compensate them for any diminution in the value of their property caused by the encroachment. She added:

> "I reject any other approach to the measure of damages. As I have said previously, this is not a *Wrotham Park* type of case. That was a case involving developers, quite unlike the situation here. So, in my view, this is not a case where exemplary damages are appropriate to punish any wrong done by the defendants as to compensating the Claimants."

On this basis, and in the light of Mr Dunscombe's report, there was no diminution in value, and therefore no award of damages for encroachment;

(ii) Despite Mr Dunscombe's report, she was not satisfied that the Gregorys had acquired an easement of light, so that there could be no entitlement to damages for the loss of light. Further, the wall would have looked the same even if there had been no encroachment. The Gregorys would have had no cause of action in such a case, and there could be no award of damages based on the unattractive appearance of the encroaching wall, when the encroachment itself had not led to any diminution in value.

(iii) Trespass was actionable of itself, and the Gregorys should be entitled to recover £100 nominal damages;

(iv) There was a technical defect in the procedure adopted by Mr Morris under the party walls legislation, which had vitiated the whole of that procedure in any event;

(v) The Gregorys had not satisfied the burden of proof that lay upon them to prove that the Turners had been responsible for the damage to their fencing;

(vi) The council appeared to have no present intention of taking any enforcement action, and she could only deal with the case on the basis that there had been no planning breach.

110. She therefore awarded the Gregorys £100 damages and directed the Turners to reimburse them for the other half of the cost of Mr Davey's report. She refused to make an order for costs against the Gregorys based on the unreasonable conduct of their case.

111. We need only expand on two of her findings. On item (ii) she said that there was no evidence before her as to the situation in relation to the kitchen window of the Gregorys' house before 1978. She said of the window "Did it even exist?" The offending garage had been put up in 1997, and the Gregorys had not proved uninterrupted enjoyment of access of light for 20 years. She added that it seemed far from clear that the building of the garage had reduced the amount of light to the kitchen. It had a small window "that had previously faced a rickety green lean-to". There had also been some mention of a tree coming down. This would give more light, and it sounded to her that there was possibly little light coming into the window anyway. It will be remembered that she had not permitted any cross-examination on this point, notwithstanding the provisions of CPR 27 PD para 4.3 which allows a judge to limit but not to forbid cross-examination.

112. On item (v) she said that although Mrs Powell had said that she witnessed the knocking down of the Gregory's woven fence, she did not say who was knocking it down. There was therefore no evidence that it was done by the Turners or by anyone on their behalf. She referred to the letter from the person who had suggested that it was the Gregorys' own fault that the fence had collapsed, but because this person was not at court to be cross-examined, she "must, therefore, attach little or no weight to what he says." (She made no reference at all, however, to most of the evidence produced on behalf of the Gregorys, summarised in Parts I and IV of this appendix).

113. By her order (dated 4th October at the bottom and 27th October at the top) the Turners were directed to pay the Gregorys £1,763.21 by 28th October. All but £100 of this sum represented Mr Davey's fees. We do not know the basis on which she decided not to observe the limitations on experts' fees prescribed by CPR 27.14(3) and CPR 27 PD para 7.3(2). Indeed, the directions she made, against the Gregorys' wishes, for single joint experts in a small track claim were scarcely compatible with this restrictive costs regime.

Appendix II

Issue (iv) The enforcement issue

114. This issue arises from events following Judge O'Malley's order. The history can be quite briefly stated, because the relevant facts are fully set out in the judgment of Burton J in the Administrative Court ([2002] EWHC 1712 (Admin)). Now that it had been established judicially that the Turners had encroached by a few inches onto the Gregory's land when they built their garage, Mr Morris persuaded the local planning authority to consider serving an enforcement notice on them, on the basis that permitted development could not possibly extend beyond the boundary of the building owners' own land.

115. In due course, however, at a meeting on 7th February 2002, the relevant committee decided by seven votes to six that they would not authorise the service of an enforcement notice. They were clearly influenced by the terms of paragraph of Planning Policy Guidance note 18 ("PPG 18"), and by the history of matters as recorded by the district judge in her judgment. The essence of Burton J's decision, which Mr Morris now seeks to challenge, is contained in the following passage at the end of his judgment:

> "It appears quite clear to me that the crucial question before the committee was whether the fact that this garage was four inches on the wrong side of the line, and that in breach of planning permission, should give rise to an enforcement notice requiring the Turners to pull down the whole structure. The contents of PPG 18, paragraph 5, have already been drawn to my attention and I have already recited them in this judgment. They were plainly in the minds of the officers, and put before the committee in their report. It is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site and, as they cited in their report:
>
> > 'Planning authorities should not normally take enforcement action solely to remedy a slight variation in excess of what would have been permitted by virtue of the General Permitted Development Order provisions.'
>
> It seems to me that the question the committee was asking itself was: what difference did the four inches make, apart from rendering the building in breach of planning? It seems to me, as indeed Mr Morris accepted in argument, that the fact that this three-metre structure was four inches nearer the kitchen window than it would otherwise have been made no material difference to the Gregorys, whose real complaint was that the wall had been built at all opposite their window, and that even four inches back it would have been just as distressing to them. In those circumstances, it seems to me that the question that there had previously been a structure there is much less material than the fact that if a structure had been built in accordance with the General Permitted Development Order, it would still have had exactly the same ill effects, so far as the Gregorys are concerned. That, in my judgment, renders the error, if error there was, in relation to the old garage immaterial so far as the considerations of the committee are concerned.

> In those circumstances, therefore, argued well though it has been by Mr Morris, I am not satisfied that it is arguable that the decision not to issue an enforcement notice is unlawful, and I consequently dismiss the application for permission."

116. In our judgment, Burton J was clearly right, and an appeal against his judgment would stand no prospect of success. We have taken into account all the very detailed points Mr Morris made to us, but we see no merit in repeating them in this judgment. As Sullivan J, with his great experience of planning law, said when he refused permission on paper, this was essentially a dispute between two landowners, and the councillors were fully justified to conclude that enforcement action was not expedient in the public interest. In any event, it appears that the garage was completed in early 1998, and any enforcement proceedings would now be time-barred.

117. We therefore refuse permission to appeal against Burton J's judgment.

ORDER: Applications dismissed

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