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Court of Appeal

Thomas and others *v* Bridgend County Borough Council

[2011] EWCA Civ 862

2011 June 21; July 26 — Mummery, Carnwath LJJ, Hedley J

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Local government — Compensation — Depreciation caused by public works — Substantial loss in value of homes caused by noise and fumes from adjoining highway — Highway not becoming maintainable at public expense until more than three years after opening to public traffic — Statute precluding home owners' claims for compensation — Whether home owners' Convention right to peaceful enjoyment of possessions engaged and breached — Whether statutory time limit for bringing compensation claim proportionate — Land Compensation Act 1973 (c 26), s 19(3) (as amended by Local Government, Planning and Land Act 1980 (c 65), ss 112(1)(8), 194, Sch 34, Pt XII) — Human Rights Act 1998 (c 42), s 3, Sch 1, Pt II, art 1

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The claimants sought compensation from the defendant highway authority, under Part I of the Land Compensation Act 1973[1], as amended, for depreciation in the value of their homes caused by noise and fumes from the use of a nearby road, which had been built by developers as a condition of the grant of planning permission for a housing development and pursuant, inter alia, to an agreement with the authority under the Highways Act 1980. The authority disputed the claims on the basis that, since the road had not been adopted as a highway maintainable at public expense until more than three years after it had opened for public use (by reason of the developers' delay in completing many minor works), section 19(3) of the 1973 Act operated to bar the claims. The claims were referred to the Upper Tribunal (Lands Chamber) which heard the preliminary issue whether section 19(3) of the 1973 Act was incompatible with, inter alia, the claimants' rights to the peaceful enjoyment of their possessions under article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms[2] and, if so, whether it could be interpreted compatibly with such rights under section 3 of the Human Rights Act 1998. It was assumed for the purpose of the preliminary issue that the claimants could show depreciation in value sufficient in principle to give rise to a claim for compensation and it was accepted that the construction of the road was in the general interest and lawful. The tribunal determined that section 19(3) of the 1973 Act was not incompatible with the claimants' Convention rights.

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On the claimants' appeal—

Held, allowing the appeal, that in order for article 1 of the First Protocol to be engaged there was no need to show, in the absence of unlawfulness, that the interference was direct and serious; that although loss of a quiet and pleasant environment, without evidence of loss of value, was not sufficient, the assumed facts showed interference with the claimants' peaceful enjoyment of their properties sufficient to engage article 1; that in determining whether, as well as being lawful and in the general interest, the interference was proportionate the relevant question was whether it struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the claimants' fundamental rights, or whether it imposed a disproportionate and excessive burden on them; that the presence or absence of compensation was not a separate issue but

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[1] Land Compensation Act 1973, s 19(3), as amended: see post, para 2.
[2] Human Rights Act 1998, s 3: see post, para 63.
Sch 1, Pt II, art 1: see post, para 27.

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A an important element in deciding whether in authorising the interference in the general interest the balance struck by the state was fair; that where a class of potential claimants was excluded from the compensation rights created by the 1973 Act the court was entitled to inquire into the reasons for the exclusion and ask whether it served any legitimate purpose or led to results so anomalous as to render the legislation unacceptable; that the operation of the three-year time limit in section 19(3) in circumstances such as the present, where the right to compensation B would be lost because of unjustified delay by the developer, was so absurd that it undermined the fairness of the balance intended by Parliament and necessary to satisfy article 1; that, therefore, a breach of article 1 of the First Protocol had been established; but that under section 3 of the Human Rights Act 1998 section 19(3) of the 1973 Act could, and was to, be read, compatibly with article 1, so as to permit the claim; and that, so read and on the assumed facts, the claimants were entitled to compensation under the 1973 Act (post, paras 38, 39, 41, 45, 48, 49, 50, 53, 56, 59, C 60, 63, 67–69, 70, 71).

Per curiam. A general review of the operation of section 19(3) of the 1973 Act is clearly desirable (post, para 68).

Decision of the Upper Tribunal (Lands Chamber) [2010] UKUT 268 (LC); [2011] RVR 76 reversed.

The following cases are referred to in the judgment of Carnwath LJ:

D *Antonetto v Italy* (2000) 36 EHRR 120
Ashworth v United Kingdom (Application No 39561/98) (unreported) given 20 January 2004, ECtHR
Bugajny v Poland (Application No 22531/05) (unreported) given 6 November 2007, ECtHR
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
E *Hatton v United Kingdom* (2003) 37 EHRR 611, GC
Krickl v Austria (1997) 89-A DR 5
Lough v First Secretary of State [2004] EWCA Civ 905; [2004] 1 WLR 2557, CA
Marcic v Thames Water Utilities Ltd [2003] UKHL 66; [2004] 2 AC 42; [2003] 3 WLR 1603; [2004] 1 All ER 135, HL(E)
Matthews v Ministry of Defence [2003] UKHL 4; [2003] 1 AC 1163; [2003] 2 WLR 435; [2003] ICR 247; [2003] 1 All ER 689, HL(E)
F *O'Connor v Wiltshire County Council* [2006] 2 EGLR 81; [2007] EWCA Civ 426; [2007] LGR 865, CA
Powell and Rayner v United Kingdom (1990) 12 EHRR 355
Pye (JA) (Oxford) Ltd v United Kingdom (2007) 46 EHRR 1083, GC
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1; [2001] 2 Cr App R 351, HL(E)
Rayner v United Kingdom (1986) 9 EHRR SE 375
G *S (Minors) (Care Order: Implementation of Care Plan), In re* [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192; [2002] LGR 251, HL(E)
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wildtree Hotels Ltd v Harrow London Borough Council [2001] 2 AC 1; [2000] 3 WLR 165; [2000] 3 All ER 289; [2000] LGR 547, HL(E)

The following additional cases were cited argument:

H *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
Capital Bank AD v Bulgaria (2005) 44 EHRR 952
Lithgow v United Kingdom (1986) 8 EHRR 329
Price v Caerphilly County Borough Council [2005] RVR 103

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R (Kehoe) v Secretary of State for Work and Pensions [2005] UKHL 48; [2006] 1 AC 42; [2005] 3 WLR 252; [2005] 4 All ER 905, HL(E)
Van Der Mussele v Belgium (1983) 6 EHRR 163
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)

APPEAL from the Upper Tribunal (Lands Chamber) sitting in Cardiff

By separate claims dated 8 August 2003 the claimants, Mrs E J Thomas, Mr and Mrs D C Moore, Miss C A Loveland, Mr and Mrs D H Jones, Mr and Mrs A Howells, Mr and Mrs V G Dyer and Mrs A L Austin, sought from the defendant highway authority, Bridgend County Borough Council, compensation under Part I of the Land Compensation Act 1973, as amended, for depreciation in the value of their houses caused by noise and fumes from an adjacent highway known as the Hendre Relief Road, Pencoed in Bridgend, which had opened to public traffic on 9 July 2002 but was not adopted by the authority as a highway maintainable at public expense until 29 June 2006. On 14 August 2009 the claims were referred to the Upper Tribunal (Lands Chamber) for decision. On 26 March 2010 the President of the Lands Chamber of the Upper Tribunal ordered that the claims be consolidated and that the following preliminary issues be determined: (i) whether section 19(3) of the 1973 Act was incompatible with the claimants' Convention rights under, inter alia, article 1 of the First Protocol to, and/or article 6 of, the Convention for the Protection of Human Rights and Fundamental Freedoms; and if so (ii) whether section 19(3) of the 1973 Act, as amended, could be interpreted compatibly with such rights under section 3 of the Human Rights Act 1998 so as to read: "and no claim shall be made if the relevant date falls at a time when the highway was not maintainable, unless it is agreed that it will become so maintainable, and the highway does not become so maintainable within three years of that date." By a decision dated 29 July 2010 and order dated 1 October 2010 the Upper Tribunal (Lands Chamber) (Judge Jarman QC) [2010] UKUT 268 (LC), sitting in Cardiff, determined that section 19(3) of the 1973 Act was not incompatible with the claimants' rights under article 1 of the First Protocol. By further order dated 16 November 2010 the judge refused the claimants permission to appeal.

By an appellant's notice filed on 7 December 2010, and pursuant to permission given by the Court of Appeal (Arden LJ) on 26 January 2011, the claimants appealed on the grounds that the judge had wrongly concluded that (i) their rights under article 1 of the First Protocol to the Convention were not engaged by the operation of the 1973 Act; and (ii) their rights under article 6 of the Convention were not engaged.

The facts are stated in the judgment of Carnwath LJ.

Robert Weir QC and *Chris Stone* (instructed by *Hugh James Solicitors, Cardiff*) for the claimants.

Primarily the right to compensation for depreciation of the value of interests in land caused by the use of highways arises through section 1(1) of the Land Compensation Act 1973: see section 1(4). No claim for compensation can be made before the expiration of 12 months from the date when the highway was first opened to public traffic, whether or not it was maintainable at public expense. A claim is barred if the highway is then not

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A adopted until more than three years after it was first opened to public traffic: see sections 3(2) and 19(1)(3).

The compensation sought by the claimants is for diminution in value of their properties. This diminution in value plainly qualifies as an interference within the terms of article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1"). It was the defendant highway authority which, as the highway authority which B caused the Hendfre Relief Road to be constructed, caused the diminution in value of the claimants' properties, albeit indirectly. It follows that A1P1 is engaged between claimants and defendant: compare *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 and *Antonetto v Italy* (2003) 36 EHRR 120.

In relation to A1P1 what matters is whether the effect is to give the executive a power to make decisions about people's rights which under the C rule of law should be made by the judicial branch of government. The right to the independence and impartiality of the judicial branch of government would not be worth much if the executive could stop a person from getting to the court in the first place: see *Matthews v Ministry of Defence* [2003] 1 AC 1163; *Wilson v First County Trust (No 2)* [2004] 1 AC 816 and *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42. In the context of article 6, the effect of section 19(3) is to vest in the highway D authority the power to make a decision as to whether a given homeowner can recover compensation by determining the date at which it adopts the new road. Parliament has addressed the issue of compensation through the Land Compensation Act 1973 and has recognised that it is appropriate to provide compensation to homeowners adversely affected by a new road built in the public interest. The court should address, through the obligation E imposed on it under section 3 of the Human Rights Act 1998, whether it is compatible with the claimants' Convention rights. Section 19(3) is literally concerned with cases where the highway authority does not adopt a road at the time it is first opened to the public. [Reference was made to *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1083; *Lithgow v United Kingdom* (1986) 8 EHRR 329; *Capital Bank AD v Bulgaria* (2005) 44 EHRR 952 and *A v Secretary of State for the Home Department* [2005] F 2 AC 68.] It is invidious that a public authority should be in a position where it can delay signing off the works and so adopting the road until over three years after the date when the road was first opened to the public so as to advance its financial position to the detriment of deserving homeowners. The interpretative obligation under section 3 of the Human Rights Act 1998 is a strong one: see *R v A (No 2)* [2002] 1 AC 45; *In re S (Minors) (Care* G *Order: Implementation of Care Plan)* [2002] 2 AC 291 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Therefore, the court is invited to interpret the relevant part of section 19(3) to read as: "and no claim shall be made if the relevant date falls at a time when the highway was not so maintainable and the highway does not become so maintainable within three years of that date *unless the highway authority agreed by the relevant date that the highway would become so maintainable*."

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Paul Stinchcombe QC (instructed by *Head of the Legal Services, Bridgend County Borough Council, Bridgend*) for the defendant highway authority.

Section 19(3) of the Land Compensation Act 1973 has the effect of barring claims for compensation where a highway is not adopted by the

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highway authority within three years of it first being open to public traffic: see *Price v Caerphilly County Borough Council* [2005] RVR 103 and *O'Connor v Wiltshire County Council* [2006] 2 EGLR 81.

A right to compensation in respect of depreciation in value caused by the use of a highway only arises where a claimant has acquired an interest in land before the relevant date: section 2(1). The relevant date is the date on which it was first opened to public traffic.

The interpretation which the claimants propose of section 19(3) amounts to the impermissible amendment of the Act of Parliament, so it is beyond the reach of the interpretive powers afforded by section 3(1) of the Human Rights Act 1998. There could be no entitlement to compensation simply on the basis that there has been an interference with the claimants' property rights; section 19(3) has the legitimate aim of not imposing liability on the part of a highway authority to pay compensation to owners whose property values have been affected by the building of a road which the authority did not intend to adopt.

Article 1 of the First Protocol does not guarantee the right to the peaceful enjoyment of possessions in a pleasant environment: see *Van Der Mussele v Belgium* (1983) 6 EHRR 163 and *Rayner v United Kingdom* (1986) 6 EHRR SE 375. The interference with the peaceful enjoyment of property has to be a direct and serious interference: see *Hatton v United Kingdom* (2003) 37 EHRR 28; *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42; *Rayner v United Kingdom* and *Clayton & Tomlinson, The Law of Human Rights*, 2nd ed (2009).

There is no rule under article 1 of the First Protocol that interference with the substance of ownership, or hindering the enjoyment of property, requires the automatic payment of compensation. In enacting section 19(3) of the Land Compensation Act 1973 the state has simply limited the scope of those who are entitled to claim compensation by reference to the persons qualified to claim and the time within which they can do so. There is nothing remotely illegitimate in so doing. The state is clearly entitled to impose a limitation period for reasons of certainty: see *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 45; *Lithgow v United Kingdom* (1986) 8 EHRR 329; *Capital Bank AD v Bulgaria* (2005) 44 EHRR 952 and *Price v Caerphilly County Borough Council* [2005] RVR 103.

Even though the right to property was already protected in English domestic law prior to the enactment of the Land Compensation Act in 1973, property owners whose land was depreciated in value by the reasonable and lawful use of a road near their home did not have available to them any right to claim compensation, whether in nuisance or under statute: see *Matthews v Ministry of Defence* [2003] 1 AC 1163. In introducing compensation under the 1973 Act the state exercised its democratic power to determine the scope of those new rights to which they would otherwise not have been entitled at all; the democratic power of the state has determined, and restricted, the scope of the Act through enacting section 19(3), thereby qualifying both the people who could claim and the time within which they could do so. Article 6 is designed only to prevent contracting states from imposing restrictions on a right to bring one's dispute before the judicial branch of government in a way which threatens the rule of law and, therefore, the separation of powers concepts should not to be used as a tool for prising open the question as to whether any particular scheme enacted by

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A Parliament is fair or not. Section 19(3) does not remotely concern the rule of law or the separation of powers. Neither its purpose nor its effect is to give the Secretary of State or the highway authority a discretionary power to swoop down and prevent people with claims from bringing them before the courts: see *Matthews's* case. Although the court has very wide powers under section 3(1) of the Human Rights Act 1998, the proposition suggested by the claimants with regard to section 19(3), to make it compatible with B Convention rights, is impermissible since it involves rewriting the Act passed by Parliament: see *R v A (No 2)* [2002] 1 AC 45; *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The Land Compensation Act 1973 was aimed to provide a defined class of persons with a right to compensation which was limited in time, and that is entirely compatible with the C claimants' Convention rights.

Weir QC replied.

The court took time for consideration.

26 July 2011. The following judgments were handed down.

D **CARNWATH LJ**

The issue in the appeal

1 The appellant claimants all own houses close to the new Hendre Relief Road ("the relief road") in Pencoed, Bridgend. They claim compensation under Part I of the Land Compensation Act 1973 (as E amended, inter alia, by sections 112 and 194 of and Part XII of Schedule 34 to the Local Government, Planning and Land Act 1980 ("the LGPLA 1980") and section 343(2) of and paragraph 23(a) of Schedule 24 to the Highways Act 1980) for alleged depreciation in the value of their houses attributable to noise and other nuisance from the road. It is to be assumed for the purpose of this appeal that the use of the road has caused such depreciation in value, sufficient in principle to support a claim under the Act.

F 2 The 1973 Act created a new right of compensation for owners of properties affected by the use of public works but from whom no land was acquired. Section 1 provides such a right where the value of an interest in land is "depreciated by physical factors" caused by the use of public works, such as a new highway. Section 1(9) defines a "relevant date", which in the case of a highway is "the date on which it was first open to public traffic". G Section 19(3) (as amended by sections 112(1)(8) and 194 of and Part XII of Schedule 34 to the LGPLA 1980) provides:

"In the application of this Part of this Act to a highway which has not always since 17 October 1969 been a highway maintainable at the public expense as defined above— (a) references to its being open to public traffic shall be construed as references to its being so open whether or not H as a highway so maintainable; (b) for references to the highway authority who constructed it there shall be substituted references to the highway authority for the highway; and no claim shall be made if the relevant date falls at a time when the highway was not so maintainable *and the highway does not become so maintainable within three years of that date*." (Emphasis added.)

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3 The relief road was opened for public use on 9 July 2002, but not adopted by the council until 29 June 2006, that is more than three years later. On an ordinary reading of the 1973 Act the claim is excluded by section 19(3). The question for us is whether that result is compatible with the claimants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms and, if not, whether we can provide a remedy.

4 I note that the same issue has been before this court on a previous occasion. In *O'Connor v Wiltshire County Council* [2006] 2 EGLR 81 the Lands Tribunal (Judge Michael Rich QC) had held that the provisions for compensation in the 1973 Act were not part of the rights safeguarded by article 1 of the First Protocol to the Convention ("article 1"). On appeal to this court [2007] LGR 865 it was held that on the facts the highway authority had adopted the road at the date it was first open to the public, so that the issue of the effects of delay beyond the three years did not arise. The court declined to express any view on the point.

Contractual background

5 To put the arguments in context it is necessary to say a little more about the contractual arrangements under which the road was provided.

6 The bypass was built by Redrow Homes South Wales Ltd ("the developer") in connection with a housing development for which planning permission was granted in 1999. We have been shown three relevant agreements governing its construction. (1) A planning agreement dated 16 June 2000, under section 106 of the Town and Country Planning Act 1990, provided that the residential development should not begin until construction had begun on the relief road; that the developers should construct the relief road at their own expense in accordance with a "highways agreement"; and that no more than 50 dwellings should be occupied until it was open for use by the public. (2) A "highways agreement", of the same date, defined the developer's obligations in detail, specified the works to be completed to the satisfaction of the council by a date "no later than four months prior to the opening of the relief road for use by the public" (clause 3.7) and required the developer to enter into agreements under the Highways Act 1980 before commencing work: clause 3.8. (3) Finally, a Highways Act agreement dated 5 April 2002, under sections 38 and 278 of the Highways Act 1980, set out the process which was expected to lead in due course to the road being adopted by the council as one maintainable at public expense.

7 The Highways Act agreement included the following steps. (1) Having commenced construction of the relief road, the developer was required "diligently and expeditiously [to] proceed with and substantially complete the works within 14 weeks": clause 3(c). (2) The developer would enter into a bond with the National House Building Council as surety in the sum of £554,270 to reimburse the costs of the council carrying out works on default by the developer: clause 3(m). (3) The developer indemnified the council against claims arising out of the works including claims for compensation under the Land Compensation Act 1973: clause 3(r). (4) A "letter of substantial completion" would be issued by the council's inspector when the works had been substantially completed to his reasonable satisfaction, following which the bond would be reduced by 90%:

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A schedule 2, para 11. (5) On the issue of the letter of substantial completion any additional land required to be brought within the highway boundary as a consequence of the works would become "dedicated as part of the public highway" and conveyed to the council at no cost: clause 3(l). (6) During a 12-month maintenance period following the letter of substantial completion, the developer would make good any defects identified by the inspector as due to defective materials or workmanship: schedule 2, para 12.
B (7) A "letter of acceptance" would be issued by the inspector at the end of the maintenance period, after any defects had been made good to his reasonable satisfaction, upon which the bond would be released in full and the works would become maintainable at public expense: schedule 2, para 13; clause 4(c).

8 As has been seen, the road was opened for public use on 9 July 2002.
C It seems clear—and is not as I understand in dispute—that if the developer had performed his obligations under the agreements as intended, it would have been accepted by the council for adoption long before the end of the three-year period. In the event the letter of acceptance was not issued until 29 June 2006.

9 As to the reasons for the delay, the claimants' witness, Mr Stockdale,
D simply refers us to a bundle of correspondence and memoranda between April 2002 and August 2006—running to some 120 pages. In his skeleton argument Mr Weir summarises the position:

> "The delay in the adoption of the road was a result of wholesale delay by the developer in completing many minor works, audits and so forth. The developer was regularly chased by the council and pressed to carry
> E out the necessary remedial work so that the letter of substantial completion could be produced by the council."

10 Although it would have been more usual and more helpful to have had the witness's own summary of the material in his exhibit, I do not understand this assessment to be materially challenged by Mr Stinchcombe.

11 I note for example a letter of 18 August 2005 (picked at random) from the council to the developer complaining of "unacceptable" delay since
F a meeting in early June in the production of a programme of work, and referring to "numerous complaints from different sources regarding this road". The council threatened action under the section 278 agreement. In spite of that threat, and further exchanges, it was not until 17 May 2006 that the council was able to report that the road works inspector was now satisfied with the completion of the works.

G 12 It is fair to record that we have not been referred to any direct evidence, and it is not in terms alleged, that the delay was motivated by a deliberate intention to avoid compensation claims. Mr Stockdale does, however, give evidence of a number of other road schemes, in Wales and elsewhere in the country, in relation to which delays in adoption have resulted in the barring of claims for compensation for depreciation for which the developer would otherwise have been liable.

H 13 On any view, the practical effect of these arrangements, in their statutory context, is remarkable. On the one hand, under the highways agreement, the opening of the road to traffic could not take place before completion of works as there specified; and, under the planning agreement, there was a limit on the number of houses which could be occupied before

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that date. However, neither the opening of the road nor the sale and occupation of houses was dependent on completion of the steps required (under the Highways Act agreement) before adoption by the council as a road maintainable at public expense. Thus, once the road was opened, there was little commercial incentive for the developers to hasten progress towards adoption, but rather, on the face of it, good reason to delay it until the expiry of the three-year period for claims under section 19(3) of the 1973 Act.

14 As I understand it, there is nothing unusual about these particular agreements. The judge observed [2011] RVR 76, para 21 that there might have been scope for providing in the agreement that the developer should pay on completion an amount equivalent to the decrease in value. That suggestion has not been pursued before us. I comment only that I find it difficult to see how a different form of contractual arrangement between the council and the developer could be an adequate substitute for a statutory right enjoyed by the claimants themselves. In any event, I did not understand it to be part of Mr Stinchcombe's case that a variation in the contractual provisions as between the council and the developer would be an answer to the claimants' case under the Convention, if otherwise well founded.

The 1973 Act: background and development

15 Before considering the arguments under the Convention, it is necessary to look at the relevant provisions of the 1973 Act in more detail, and in their historical context.

16 The background to the 1973 Act is described in the Law Commission's consultative report *Towards a Compulsory Purchase Code: (1) Compensation* (2002) Consultation Paper No 165, p 154 and following. Previously, compensation for those whose properties were injuriously affected by public works was limited to depreciation caused by construction: see *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 for the most authoritative, modern exposition of the principles. A 1972 White Paper, *Development and Compensation: Putting People First* (Cmnd 5124) (5 October 1972), proposed the introduction of a new right to compensation for depreciation caused by use. The White Paper spoke, at para 1, of the need for a "balance" to be struck between the duty of the state to promote essential developments in the public interest and "the no less compelling need to protect the interests of those whose personal rights or private property may be injured in the process".

17 The White Paper noted the lack of redress for those whose properties were injuriously affected by public works, where no land was taken. The proposed right was intended to fill this gap. Depreciation caused by use of new roads was given as one example, at para 23: "Where for example a dwelling is depreciated significantly and permanently in value because a noisy road now runs by . . . the owner can claim for that loss of value." There would be a threshold of £50 in loss of value to ensure that compensation would be paid "for any significant drop in value while it will exclude frivolous claims": para 23-4. (I note in passing that, in spite of the significant increases in property values since 1972, the threshold has not changed.)

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A 18 Claims would be assessed by reference to prices current at the valuation date, which would be set at 12 months after the start of the use of the works "so as to allow values to stabilise": para 24. The period within which claims could be made would be two years from the valuation date, "i e between one and three years after the start of the use of the works": para 26. The cost would be met by "the authority responsible for the works the use of which causes the injurious affection": para 27.

B 19 The White Paper proposals were generally reproduced in the 1973 Act, and for the most part are reflected in the modern law. One significant change, made by Part XIII of the LGPLA 1980, concerned time limits for claims. In line with the White Paper, the 1973 Act had originally provided that no claim could be made outside the "claim period", defined as a two-year period starting one year from the relevant date: section 3(2) as C unamended. In 1980 this was amended by removing the two-year claim period, and substituting simply a "first claim day", one year after the relevant date (section 112(1)(2) of the LGPLA 1980), combined with the ordinary six-year time limit for claims under the Limitation Act 1980, time being deemed to run from the first claim day: section 19(2A), as inserted by section 112(1)(6) of the LGPLA 1980. These amendments were designed to D address criticisms made in a report of the Parliamentary Commissioner for Administration, to the effect that the short time limit in the 1973 Act, combined with lack of publicity, had led to many complaints being made out of time or not at all: see the notes to Part XIII of the LGPLA 1980 in *Current Law Statutes Annotated 1980*, vol 2, chapter 65.

20 The main features of Part I of the 1973 Act in its current form are as follows. Compensation is payable for depreciation attributable to public E works, including "any highway". The Act defines a "relevant date", which in the case of a road is the date when it is first open to traffic: section 1(9). The relevant date must fall on or after the 17 October 1969—three years before the publication of the White Paper. No claim may be made before the "first claim day", that is the day following the expiration of 12 months from the relevant date: section 3(2), as amended. Compensation is assessed by reference to values current on the first claim day: section 4(1), as amended. F The claim is met by the "appropriate highway authority", defined as "the highway authority who constructed the highway to which the claim relates": section 1(4) and section 19(1), as amended.

21 It is to be noted that "highway" for these purposes is defined as "a highway . . . maintainable at public expense": defined by reference to section 329(1) of the Highways Act 1980 and section 19(1) of the 1973 Act. G It follows that, unless and until a highway is accepted by a highway authority as so maintainable, no question of compensation under the 1973 Act can arise. One of the ways in which a highway can become maintainable under the Highways Act 1980 is pursuant to an agreement under section 38, as in this case.

22 Turning to section 19(3) of the 1973 Act, I note that it had no precursor in the White Paper. Nor have we been referred to any other H contemporary records showing how or why it came to be included. However, it is easy to see why provision was thought necessary for roads which were built and opened by private developers rather than the highway authority, and were then adopted under arrangements such as in the present case. The practical impact of the use of such a new road, from the point of

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view of neighbouring properties, would be exactly the same as if it had been built by the highway authority. There would be no unfairness to the authority in making it responsible for compensation, since it would have had the opportunity to insist on indemnification as part of the arrangements for adoption.

23 The provision appears in the interpretation section. It creates an extension of the scope of the rights created by the 1973 Act, and a consequent qualification of the definition of "appropriate highway authority". The thinking behind the three-year time limit is not obvious.

24 What is clear is that this three-year limit is not to be seen as analogous to the time limit originally set for all claims under the 1973 Act, and represented by the "claim period": para 19 above. In its original form section 19(3) expressly provided for that claim period to be notionally extended:

> "and no claim shall be made if the relevant date falls at a time when the highway was not so maintainable and the highway does not become so maintainable within three years of that date *but, if it does, the claim period shall be treated as continuing until the end of one year from the date on which it becomes so maintainable, if, apart from this provision, that period would end earlier*."

25 The italicised words were repealed in 1980 (by section 112(1)(8) of and Part XII of Schedule 34 to the LGPLA 1980). Claims under section 19(3) are now subject to the ordinary Limitation Act 1980 period, running from the "first claim day", in the same way as claims in respect of highways constructed by the authority: section 19(2A) of the 1973 Act. The first claim day is linked to the opening of the road, not the time when it is adopted as maintainable by the public, and compensation is assessed by reference to that date. Thus, once a year from the opening of the road has elapsed, the basis of compensation will be settled and time will begin to run, even though no right to compensation can crystallise until the highway has become publicly maintainable.

The case under the Convention

26 Mr Weir for the claimants relies in the alternative on article 1 of the First Protocol and article 6 of the Convention. I agree with the judge for the reasons he gave that article 6, which is concerned with procedural rights, is of no assistance—and in particular that the argument is not strengthened by reference to comments of Lord Hoffmann in *Matthews v Ministry of Defence* [2003] 1 AC 1163, para 29. The issue here is whether the claimants have a substantive right, not the fairness of the procedure by which it is determined. In the remainder of this judgment I will address the more difficult issues under article 1.

27 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law.
> "The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

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A 28 Mr Weir's case in short is that the use of the road has interfered with the peaceful enjoyment of his clients' houses; and that the provisions designed by Parliament for their protection, and necessary to achieve the fair balance which article 1 requires, fail to do so because they can be defeated by the unilateral action (or inaction) of those responsible for payment. He submits that the court has power to remedy that defect, under section 3 of the Human Rights Act 1998, by reinterpreting section 19(3) of the 1973 Act; B or, failing that, to make a declaration of incompatibility.

The interpretation of article 1

29 The leading authority of the European Court of Human Rights ("the Strasbourg court") on article 1 of the First Protocol is *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35. The case concerned an C expropriation permit issued by the Government, which was not implemented, but cancelled after a long period without compensation. The court held by a narrow majority that article 1 had been violated.

30 The court interpreted article 1 as involving "three distinct rules", at para 61:

> "The first rule, which is of a general nature, enounces the principle of D peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the E purpose; it is contained in the second paragraph."

On the facts of *Sporrong and Lönnroth v Sweden* itself, the court held, at para 73, no deprivation of possession under the second rule, and no "control" under the third; but that there was a breach of the first rule, because the measures created a situation which

> "upset the fair balance which should be struck between the protection F of the right of property and the requirements of the general interest"—and (for the claimants)—"an individual and excessive burden which could have been rendered legitimate only if they had had the possibility to seek a reduction in the time limits or of claiming compensation."

31 Later cases (see e g *Bugajny v Poland* (Application No 22531/05) (unreported) given 6 November 2007, para 56 and following) have given G further guidance on the practical application of article 1 to individual cases. First, the three rules are not "distinct in the sense of being unconnected"; the second and third rules are to be "construed in the light of the general principle enunciated in the first rule". Secondly, although not spelt out in the wording of the article, claims under any of the three rules need to be examined under four heads: (i) whether there was an interference with the H peaceful enjoyment of "possessions"; (ii) whether the interference was "in the general interest"; (iii) whether the interference was "provided for by law"; and (iv) proportionality of the interference.

32 There have been relatively few cases under the first rule, nor is it easy to find a common theme. *Clayton & Tomlinson, The Law of Human Rights*, 2nd ed (2009), para 18.100 comment:

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> "the court has recognised a type of interference with the peaceful enjoyment of possessions which is neither a deprivation nor a control of use. It has been described as a kind of catch-all category for any kind of interference which is hard to pin down. The court is increasingly using the concept of interference with the substance of property when it has difficulty classifying interferences."

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This suggests that searching for an all-embracing test of the situations engaged by the first rule may be unproductive.

33 In the present case there is no issue as to (ii) and (iii); the construction of the road was in the general interest and lawful. The debate has therefore turned on (i) (interference) and (iv) (proportionality).

Interference with peaceful enjoyment

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34 In spite of the wording of the first rule, it is clear that it is not enough to show mere interference with the enjoyment of property. *Clayton & Tomlinson* state, at para 18.81, that article 1 "does not afford . . . a right to peaceful enjoyment of possessions in a pleasant environment". To similar effect is *Harris*, *O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2nd ed (2004), p 662:

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> "The state will be responsible under article 1 of the First Protocol for interferences which affect the economic value of property. Accordingly claims about interferences with the aesthetic or environmental qualities of possessions are protected, if they be protected at all, elsewhere in the Convention."

35 The former proposition is supported by *Rayner v United Kingdom* (1986) 9 EHRR SE 375, one of a line of cases concerning disturbance by aircraft noise from Heathrow Airport. In rejecting the claim under article 1 the European Commission of Human Rights said, at para 6:

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> "The applicant has further invoked [article 1 of the First Protocol] which guarantees the right to the peaceful enjoyment of possessions. This provision is mainly concerned with the arbitrary confiscation of property and *does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment*. It is true that aircraft noise nuisance of considerable importance both as to level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. However, the applicant *has not submitted any evidence showing that the value of his property was substantially diminished* on the ground of aircraft noise so as to constitute a disproportionate burden amounting to a partial taking of property necessitating payment of compensation." (Emphasis added.)

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36 Similarly, the cases cited by *Harris, O'Boyle & Warbrick* turned on the lack of evidence of diminution in value. Thus, for example, in *Krickl v Austria* (1997) 89-A DR 5 it was held that there was no arguable violation of article 1 where a building had been erected unlawfully close to the claimant's boundary, but he had not shown that "this fact led to a loss of value of his land or that he could not be compensated for such loss if any": p 16. In *Ashworth v United Kingdom* (Application No 39561/98) (unreported) given 20 January 2004 it was noted that the applicants had not submitted any evidence that house prices in general or the value of their properties had been

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A adversely affected by flights at Denham, and that accordingly the claim under article 1 had not been substantiated.

37 Subsequent cases against the United Kingdom concerning the effects of aircraft noise proceeded under article 8 of the Convention rather than article 1 of the First Protocol. Thus, although in *Rayner v United Kingdom* 9 EHRR SE 375 itself the article 1 claim failed at the first stage, the case proceeded in the court under article 8, as well as articles 6 and 13: see *Powell* B *and Rayner v United Kingdom* (1990) 12 EHRR 1083. More recently, similar issues came before the Grand Chamber in *Hatton v United Kingdom* (2003) 37 EHHR 611, which again proceeded by reference to article 8 rather than article 1. The court said, at para 96:

> "There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by C noise or other pollution, an issue may arise under article 8 . . ."

38 To summarise, loss of a quiet and pleasant environment, without evidence of loss of value, is not enough to engage article 1 of the First Protocol; nor article 8 of the Convention unless the effects are "direct and serious". Neither point provides an answer to this case. Article 8 is not relied on. Under article 1, it is assumed, for the purpose of the preliminary D issue, that the claimants can show depreciation in value sufficient in principle to give rise to a claim to compensation.

39 It is at this point that the respective submissions diverge: (1) Mr Weir submits that, for the first rule of article 1 to be engaged, it is enough to show interference with peaceful enjoyment combined with evidence of loss of value. The debate then shifts to the other preconditions of liability: legality, E general interest, and proportionality. Apart from the citations already given, he relies for direct authority on *Antonetto v Italy* (2000) 36 EHRR 120 and the absence of Strasbourg authority to the contrary. (2) Mr Stinchcombe submits that, in the absence of an unlawful interference (as in *Antonetto v Italy*), it is not enough to show diminution in value caused by the interference. For article 1 to be engaged, no less than article 8, the interference must be "direct and serious". Apart from the analogy with F *Hatton v United Kingdom* 37 EHRR 611 (para 37 above), he relies on the passage already cited in *Rayner v United Kingdom* 9 EHRR SE 375, and on statements by the House of Lords in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.

40 I look first at *Antonetto v Italy* 36 EHRR 120. The claimant's property had been affected by the erection of a tall building on adjoining G land, thus resulting in loss of light and view, and diminution in value. It had been held in the domestic courts that the building had been erected illegally and that it should be demolished, but the administrative authorities had failed to implement that requirement over a very long period. The court held a violation of article 1 had occurred, and made a financial award including L100m (over £30,000) for loss of value. Mr Stinchcombe argues that central to the court's reasoning was the unlawful conduct of the Italian authorities H over a very long period, which is sufficient to distinguish it from the present case.

41 I can accept that the prolonged and inexcusable failure of the administrative authorities was important to the court's overall assessment. However, I find no indication in their reasoning that this was a necessary

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part of the finding of an interference at the first stage. The court, at para 34, observed simply that the consequence of the failure of the authorities was that the unauthorised building remained

> "even though it partially blocked the light and view from the applicant's house, thus reducing its value. In these circumstances the Italian authorities are responsible for interference in the applicant's right of property; the interference in question constitutes neither deprivation of nor control over the use of property but rather is covered by the first sentence of the first paragraph of article 1."

Although it may be inferred from the amount of the award that the court accepted that the effect on the property was serious, there is no indication that such a finding was a necessary precondition to the engagement of the rule.

42 The issue of unlawfulness was addressed only at the next stage. The court referred to the "first and most important requirement" of article 1 that any interference must be lawful. Accordingly, once it had been established that the interference did not satisfy that requirement, the question of proportionality did not arise: para 35.

43 Turning next to the two authorities on which Mr Stinchcombe relies, he emphasises the following words in *Rayner v United Kingdom* 9 EHRR SE 375, para 6 (in the passage already cited at para 35 above):

> "aircraft noise nuisance of considerable importance both as to level and frequency *may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property*".

Implicit in this, argues Mr Stinchcombe, is the proposition that article 1 of the First Protocol is not engaged by anything short of interference sufficiently serious to amount to "partial taking" of the property in the sense there explained. It cannot be argued that noise from the ordinary use of a nearby public highway, accepted by millions of people as part of "the give and take of everyday life", comes near this threshold.

44 His other authority, *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, was concerned with flooding of the claimant's garden by overloading of a section of the sewerage system, for which the respondent was responsible. It was common ground that article 1 was engaged, as Lord Nicholls of Birkenhead explained, at para 37:

> "The flooding of Mr Marcic's property falls within the first paragraph of article 8 and also within article 1 of the First Protocol. That was common ground between the parties. *Direct and serious interference* of this nature with a person's home is prima facie a violation of a person's right to respect for his private and family life under article 8 and of his entitlement to the peaceful enjoyment of his possessions under article 1 of the First Protocol . . ." (Emphasis added.)

45 I agree with Mr Weir that neither of these is of material assistance in distinguishing *Antonetto v Italy* 36 EHRR 120. *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 is of course of high authority on the issues decided, but on this point it rested on a concession, readily understandable on the facts of the case. As to *Rayner v United Kingdom* 9 EHRR SE 375, the comments relied on by Mr Stinchcombe did not purport to be an

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A exhaustive explanation of the scope of the first rule. As has been seen, the actual decision in *Rayner's* case turned not on this point but on the lack of "any evidence" showing that the value of the property was substantially diminished. In so far as their words imply that the first part of article 1 is confined to "partial taking" in the sense explained, they are not borne out by the analysis in the textbooks, and are inconsistent with *Antonetto v Italy* 36 EHRR 120. The loss of value in that case was no doubt substantial in B monetary terms, but there was no suggestion that the claimant was deprived in any sense of the use of her property nor that it was unsaleable.

46 For completeness I should also mention an authority in this court: *Lough v First Secretary of State* [2004] 1 WLR 2557. This concerned the grant of permission to appeal in respect of a 20-storey building affecting an adjoining residential area. The judgment of Pill LJ was directed principally C to the applicability of article 8. However, he noted briefly at the end of his judgment that, in his reply, Mr Clayton for the claimants had "sought to create diminution of value as a separate and distinct breach of article 8 and article 1 of the First Protocol". Pill LJ commented, at para 51:

> "Having regard to the background and purpose of each article, I do not accept that submission. A loss of value in itself does not involve a loss of D privacy or amenity and it does not affect the peaceful enjoyment of possessions. Diminution of value in itself is not a loss contemplated by the articles in this context."

47 It is clear that article 1 of the First Protocol was not the subject of any detailed discussion, nor was *Antonetto v Italy* 36 EHRR 120 cited. Realistically, Mr Stinchcombe does not rely on this as binding authority in E relation to the application of article 1 in the present context.

48 In conclusion, on this aspect of the case, I agree with Mr Weir that, on the assumed facts, there is established an interference with his clients' peaceful enjoyment of their properties, sufficient to engage article 1 of the First Protocol. I turn therefore to the issue of proportionality.

Proportionality

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49 The cases show that the issue of proportionality can be expanded into the following question:

> "whether the interference with the applicants' right to peaceful enjoyment of their possessions struck the requisite fair balance between the demands of the general interest of the public and the requirements of G the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on them." (*Bugajny v Poland* 6 November 2007.)

50 Mr Weir argues that the balance drawn by the statute is not fair, because it leaves a gap, apparently unintended, in the protection which Parliament intended. The 1972 White Paper makes clear that the new H compensation rights then proposed were seen by the Government, and in due course Parliament, as necessary to achieve the "fair balance", now safeguarded by article 1. It is manifestly anomalous and unreasonable that the right to such compensation, following the opening of a new road, should be lost merely because of unjustified delay by the developer, whose interests were in direct conflict with those of potential claimants.

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51 He referred us by way of analogy to *Bugajny v Poland* a case which does not seem to have been referred to below. Within a development area certain plots had been designated as "internal roads", which were in due course built and opened to the public. The developers sought to transfer ownership to the council in return for compensation, under a statute by which "public roads" were required to be expropriated subject to compensation. This request was rejected on the grounds that, not having been provided for in the local land development plan, they did not belong to the category of "public roads". This contention was upheld by the domestic courts. An application to the Strasbourg court for breach of article 1 of the First Protocol succeeded, and a substantial payment was ordered by way of pecuniary damage. It was held that the requirement to accept the public use of the roads significantly reduced the effective exercise of their ownership, and thus involved an interference with the peaceful enjoyment of their possessions within article 1. The interference was in the general interest and lawful, but it was not proportionate. The land could only be used as public roads, for which the developers were left responsible for an unlimited time. The consequence of the approach adopted by the authorities was that they could, at para 72: "effectively evade the obligation to build and maintain roads other than major thoroughfares provided for in the plans and shift this obligation onto individual owners." In the same way, Mr Weir argues, the form in which the time limit is expressed enables those responsible for compensation to evade their responsibility for the compensation which Parliament intended by the simple expedient of delay in completion.

52 Mr Stinchcombe argues that section 19(3) represents a legitimate limitation on the scope of the right granted by the 1973 Act, well within the margin of discretion allowed to a member state under the Convention. It was entitled to make highway authorities liable only in respect of highways for which they were responsible. A time limitation was justified in the interests of certainty and it was reasonable "to make the period relatively tight in order to address the initial dip in a property's value upon a road opening and before people get used to it". The fact that there are some anomalies in the operation of the limits set by Parliament is not sufficient to show that those limits are without reasonable foundation, or to take the legislation outside the permissible margin of discretion.

53 The general purpose of these provisions is, as the 1972 White Paper made clear, to strike a balance between public and private interests. It is right of course that member states have a significant margin of discretion in deciding how to give effect to the rights safeguarded by article 1 of the First Protocol, and in setting the boundaries of any mitigation measures. However, that works both ways. In deciding whether the proportionality test is satisfied, the court is entitled to treat the compensation rights created by the 1973 Act as part of the "fair balance" thought necessary by Parliament. Where a class of potential claimants is excluded from those rights, the court is entitled to inquire into the reasons for the exclusion, and ask whether it serves any legitimate purpose, or leads to results "so anomalous as to render the legislation unacceptable": *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1083, para 83.

54 Although there is no contemporary material to explain the inclusion of section 19(3), it is unsurprising. Agreements such as those in the present case are a familiar feature of the planning of major developments, and no

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A doubt would have been so in 1973. The fact that this relief road was built by a developer before being adopted by the highway authority, rather than built by the authority itself, makes no material difference to its effect on the houses nearby. Although there is no reference to this topic in the 1972 White Paper, nor in any of the other contemporary materials before us, it is not surprising that a decision was made at some stage to include specific provision.

B **55** The purpose of the three-year limit is less easy to ascertain. I am not persuaded by Mr Stinchcombe's suggestion that it was designed to address the "initial dip in a property's value". That is addressed by the one-year gap between the opening of the road and the first claim day, by reference to which values are fixed. The three-year limit in section 19(3) does not affect valuation. It seems more likely that it was designed to ensure that there is a C sufficiently close link between the construction and opening of the road, and its adoption by the authority. Such a link is necessary to make it appropriate to categorise the construction of the road as a "public work", analogous to a road constructed by the highway authority itself, and so to justify a liability for compensation falling on the authority. The three-year time limit can be seen as providing a certain, if somewhat arbitrary, criterion to fix that connection.

D **56** Whatever its purpose, the operation of the provision in circumstances such as the present is truly bizarre. The diligent road-builder who completes his project in time is penalised by liability for compensation; the inefficient road-builder is rewarded by evading liability altogether. For the householders there is a double disadvantage. Not only do they suffer the inconvenience and disturbance of a protracted maintenance period, but they E lose their right to any compensation for the effects of the use which they are already experiencing. This result is in my view so absurd that it undermines the fairness of the "balance" intended by Parliament, and necessary to satisfy article 1.

57 In this respect it is my view a stronger case than *Bugajny v Poland* 6 November 2007. The nature of the interference was very different. But at the heart of the court's reasoning on proportionality, as I read the decision, F was the arbitrary distinction drawn by the domestic law between "public roads" as designated in the development plan, and "internal roads" which were no less public in practice, and no less appropriate for adoption by the authorities. The "fairness" of the balance between public and private interests was destroyed by the opportunity so given to the authorities to evade the responsibility otherwise imposed on them. At least there the state G was able to raise an arguable case for distinguishing between the two categories of road. Here, instead, the section produces a result which is directly contrary to that which common sense would dictate.

58 In the Upper Tribunal (Lands Chamber) Judge Jarman QC proceeded on the assumption that in principle noise and nuisance from the use of the road might amount to an interference with the first rule of article 1 and that the claimants would be able to show significant diminution in the H value of their properties. However, at para 30, he drew a distinction between the effect of the road, which was potentially within article 1, and the absence of compensation, which in his view was not:

> "The scheme under the [1973] Act aims to mitigate one effect, a decrease in value of homes, by the giving of compensation. Mr Weir

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emphasised that it is that effect which is at the heart of his case of interference within the meaning of article 1. However, such a decrease, in my judgment, has been suffered whether compensation under the Act is paid or not. The compensation provided for by the Act to mitigate that decrease is not in my judgment a possession within the meaning of article 1."

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59 I am unable with respect to accept that distinction. Once an interference with article 1 rights is accepted, it is clear from the Strasbourg authorities (see e g *Sporrong's* case 5 EHRR 35 itself) that the presence or absence of compensation is not a separate issue, but is an important element in deciding whether, in authorising the interference in the general interest, the balance struck by the state is fair.

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60 Accordingly, I agree with Mr Weir that a breach of article 1 of the First Protocol has been established.

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Remedy

61 Mr Weir submits that the powers of the court under section 3 of the Human Rights Act 1998 are sufficiently wide to enable us in effect to rewrite section 19(3) of the 1973 Act to remedy the defect. He asks us to read it as though amended by the addition of the italicised words:

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"no claim shall be made if the relevant date falls at a time when the highway was not so maintainable and the highway does not become so maintainable within three years of that date *unless the highway authority agreed by the relevant date that the highway would become so maintainable*."

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62 Mr Stinchcombe accepts that the interpretative power given by section 3 of the 1998 Act is very wide, but the interpretation must be one which is consistent with the fundamental features, and "goes with the grain" of the legislative scheme: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 572, per Lord Nicholls. However, Mr Stinchcombe argues that the suggested interpretation goes against the grain of the legislation by changing the category of persons who are able to claim compensation, changing the time set for claims, and adding to the burden on public funds. Furthermore it is unworkable because the council could not properly agree by the relevant date that the highway would definitively become maintainable, since they could not be certain that it would meet the necessary standards.

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63 Section 3 requires the court to read legislation in a way which is compatible with Convention rights "so far as it is possible to do so". A number of cases at the highest level have emphasised the width of the power. For example, in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, para 38 Lord Nicholls described it as "a powerful tool whose use is obligatory." He acknowledged, however, the difficulty of "identifying the limits of interpretation in a particular case", adding, at para 40:

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"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate."

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A In that case it was held that the proposed reinterpretation (favoured by a majority of the Court of Appeal) would have departed fundamentally from the legislative scheme. Where Parliament had entrusted to local authorities, not the courts, the responsibility for looking after children subject to care orders, the proposed interpretation (involving a so-called "starring system") would have enabled the court to exercise a "newly created supervisory function": para 42.

B **64** As a strong example going the other way, Mr Weir referred us to *R v A (No 2)* [2002] 1 AC 45. This concerned the provisions of the Youth Justice and Criminal Evidence Act 1999 concerning protection of complainants in proceedings for sexual offences. Section 41 placed strict limits on the scope for evidence or cross-examination of complainants about their own sexual behaviour. As Lord Steyn said, at para 30, the practically "blanket C exclusion" of prior sexual history between the complainant and the accused posed "an acute problem of proportionality". Notwithstanding the apparently clear language of the section, it was held that it could be reinterpreted under section 3 of the 1998 Act to the extent that justice required the admission of such evidence or cross-examination. Lord Steyn said, at para 45:

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> "In my view section 3 requires the court to subordinate the niceties of language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstance. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full E and complete defence by advancing truly probative material."

The section should be read as subject to an implied provision that "evidence or questioning required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible."

65 Although the context of the present case is very different, similar considerations arise in my view. The proposed interpretation does not F depart from any fundamental feature of the 1973 Act, but rather gives effect to the intention that those adversely affected by noise from new roads should be compensated. "[Logic] and common sense" suggest that had Parliament been alerted to the problem it would not have left open a loophole such as revealed by the present case.

66 I am not impressed by Mr Stinchcombe's argument as to G practicalities. On its face Mr Weir's suggested wording leaves open the possibility that a highway authority might become liable in respect of a road which, because of defective construction, is never taken over as maintainable by the public. However, as has been seen a highway which is not maintainable by the public is not a "highway" within the meaning of the 1973 Act. So the issue would never rise. It is certainly not a practical problem in this case, since the road was in due course completed and did H become publicly maintainable.

67 My only concern is that Mr Weir's proposed wording disregards the three-year limit altogether. That is not necessary for his case, since he can say that, not only was the road built under an agreement made before the relevant date, but it should and would have been adopted within the three-

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year period if the agreement had been performed in accordance with its terms. His proposed qualification to section 19(3) could be further refined:

> "no claim shall be made if the relevant date falls at a time when the highway was not so maintainable and the highway does not become so maintainable within three years of that date unless, under an agreement made by the highway authority before the relevant date, the highway should reasonably have become so maintainable within that period."

This would have the advantage of respecting the spirit of the three-year time limit, but in a way which avoids the absurd effects of unreasonable delay by the developer.

68 However, I do not think it is necessary for us to make a formal declaration as to the words to be read in to the section. The precise form of wording required to give effect to the claimants' rights is not critical: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 35, per Lord Nicholls. The court is not required to redraft the statute with the precision of a parliamentary draftsman, nor to solve all the problems which it may create in other factual situations. It is enough to determine that on a proper reading, and on the facts disclosed in the case, the claimants are entitled to compensation under the 1973 Act. That is sufficient to meet the needs of this case. However, quite apart from the present case, a general review of the operation of the section is clearly desirable.

69 I would therefore allow the appeal and decide the preliminary issue in favour of the claimants.

HEDLEY J

70 I agree that this appeal should be allowed for the reasons given by Carnwath LJ in his judgment with which I am in full agreement. I only add that I am glad that such a result can properly be achieved for not only does it redress what otherwise seemed to be an arbitrary injustice but also in my judgment it succeeds (on the basis of the policy behind the Land Compensation Act 1973) in reflecting what would have been the intention of Parliament had its mind been addressed to the particular issues raised in this case.

MUMMERY LJ

71 I agree.

Appeal allowed with costs.

KEN MYDEEN, Barrister

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