

**HLPA**  
HOUSING LAW  
PRACTITIONERS  
ASSOCIATION

# Home Truths

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# Editor's Note

Frankly a family camping in a tent, with its entire savings in the bank, is probably in the best position right now. As long as the savings have been distributed between differently owned banks with no more than £50,000 in each one that is!

Homeowners are struggling with a falling property market; the average house is getting £100 cheaper each day, and an absence of affordable mortgage products. The days of remortgaging as soon as a discount period has expired have gone. Families may not have budgeted for repayments at the higher rate and may struggle to service the debt. But don't worry Bradford and Bingley's chief executive recently told a Parliamentary Select Committee that its mortgage book had been stress-tested on the assumption of 25% fall in the market – he should go back and try it again with a 35% fall.

Mortgage repossessions are conservatively set to double with the number of claims issued probably tripling. A lot of claims are being issued by second mortgagees who lent on the back of a healthy 25% equity in a secured property which is now fast disappearing and, because of their vulnerable position in the chargees' pecking order, they want the property sold before the original equity disappears entirely. The good news is that such proceedings are now governed by the Mortgage Arrears Protocol. The bad news is that it reads more like a best practice guide and has no bite, it is a struggle to find any real sanctions imposed against non-compliant lenders. The really, really bad news is that the courts can be avoided by lenders all together. *Horsham Properties Group Ltd v Clark and others* [2008] EWHC 2327 (Ch) 8 October 2008 reaffirmed the approach in *Ropaigealach v Barclays Bank* [2000] QB 263. The mortgage agreement gave the mortgagee a power of sale and a power to appoint a receiver mirroring the rights under the Law of Property Act 1925. The lender used those powers and appointed a receiver who then sold the property at auction (thus bypassing the Administration of Justice Act 1970 protection for the borrower) and thereafter brought trespass proceedings against the borrower. Convention arguments did not protect the borrower. There was engagement but it was, apparently, in the public interest that the property could be sold without a court order!

In the rented sector tenants and occupiers are anxious about what their status and security is likely to be. The Government wants to know how, following housing stock transfers, RSLs have been treating tolerated trespassers to help it decide whether this sub-group should be included in the Housing and Regeneration Act 2008 reforms. The better question would have been to ask RSLs 'How many actually realised they had tolerated trespassers in their housing



Michael Paget

stock?'. Being a public sector landlord is not as simple as some RSLs might think.

Whilst it now seems impossible that the Government will ever reach the targets for building new social and affordable housing set out in the Housing Green Paper (2007) the Chartered Institute of Housing has come up with the clever idea that occupation of the limited social housing there currently is should be time limited by abolishing social tenancies for life. Bizarrely the new Housing Minister was initially attracted to this suggestion. Whatever happened to 'joined-up' government?

Happy Christmas!

**Michael Paget**  
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## HPLA NEWS

### HOUSING LAW CONFERENCE 2008

The annual Housing Conference of the Housing Law Practitioners' Association is the housing conference of the year. The last 12 months has seen a flood of housing cases in the higher courts and the new Housing and Regeneration Act. The conference will take place on **Wednesday 10th December**.

Highlights in this year's programme include:

**Rabinder Singh QC, our keynote speaker.** Rabinder acted for the Equality and Human Rights Commission in *Lewisham LBC v Malcolm*, and for the tenant in *Ghaidon v Godin-Mendoza*.

A panel session on **homelessness law** covering the issues of the day. Our speakers are **Andrew Arden QC and Lan Luba QC. Michael Scorer** to speak from the perspective of the local housing authority and **Professor Caroline Hunter** to provide an academic view. **Carol Storer, the Chair**, will ensure that their contributions – and yours – provide a provocative debate on the recent developments in homelessness law.

The conference offers a number of seminars in the afternoon focusing on the most topical areas of housing law presented by leading practitioners and members of the judiciary, including the Senior President of the Residential Property Tribunal.

The Conference will take place at the Royal Institute of British Architects, 66 Portland Place, London W1B 1AD. The Conference is accredited with Bar Council Accreditation, 6 hours CPD and Law Society Accreditation, 5 Hours 15 minutes CPD.

Please register at: [www.profbriefings.co.uk/hlc2008](http://www.profbriefings.co.uk/hlc2008)

**HPLA Christmas Social**  
**10th December 2008**  
**Royal Institute of British Architects, London**

For more news and events please log onto the HPLA website:

[www.hlpa.org.uk](http://www.hlpa.org.uk)  
[www.hlpa.org.uk/justicecampaign](http://www.hlpa.org.uk/justicecampaign)

# MORE TWISTS AND TURNS – POSSESSION PROCEEDINGS AND OCCUPIERS’ RIGHTS UNDER ARTICLE 8 & ARTICLE 1 OF THE 1ST PROTOCOL – (or how long before a panel of nine law lords)

Stephen Cottle

Garden Court Chambers

- 1. Introduction:-** This saga goes on and on. The space between conflicting European Court and domestic jurisprudence is extremely fertile. Hence the number of articles on the subject, the occasion for which has been recently promoted by the difficulty the House of Lords faced in *Doherty v Birmingham CC* [2008] 3 WLR 363.
2. Until Parliament intervenes, a tweak to CPR 55. 8 to permit a proportionality hearing might do, or until there is a panel of nine Law Lords, the Government will be condemned in its struggle to defend further cases before the European Court.
3. A panel of nine Law Lords is required to make clear [1] that the protection afforded by section 6(2) of the Human Rights Act to public authorities acting in obedience to statutory provisions is limited to those non discretionary circumstances where to find the authority was acting unlawfully under section 6(1) would be to subvert the intention of Parliament; thus *R. (on the application of Hooper) v Secretary of State for Work and Pensions* (2005) UKHL 29; (2005) 1 WLR 1681 (HL) where bereavement allowance payments were permitted to widows, is distinguishable.  
[2] the function of the Court where section 6(2) does not apply includes assessing for itself, in the light of all the circumstances of the case including the impact of eviction on the personal circumstances of the occupiers, the proportionality of an intended eviction; thus achieving an outcome orientated approach more consistent with *Belfast CC v Miss Behavin’ Ltd* [2007] 1 WLR 1420; moreover proportionality can, where convention rights are in issue and distinguishing *R (ABCIFAR) v SOSD* [2003] QB 1397, replace the test of reasonableness traditionally applicable on JR & public law defences  
[3] the cases of *Qazi* (five Law Lords), *Kay* (seven Law Lords) and *Doherty* (five Law Lords) are overruled to the extent they are inconsistent with the above; and  
[4] where section 6(2) protects the authority for the purposes of a Defendant wishing to rely on section 7, then the only option for the Defendant in those circumstances is to challenge the quality of the decision making process on the basis that it was not convention compliant, and if that was not the case, as a final resort seek an adjournment in order to apply for a Declaration of Incompatibility.
4. In summary, the present position is that it is impossible to argue that the Court should be able to decide proportionality for itself. Yet this is precisely what the European Court in *Connors v UK* and in *McCann v UK* has called for. This current state of play is also despite the fact that the Human Rights Act was enacted to incorporate the provisions of the ECHR and so avoid redress only being found by application to Strasbourg.
5. In this difficult environment what should the advisor do? As the case begins there are two things for advisors to do. The first is to get disclosure of the material which was before the decision maker to check if the decision making process was reasonable or whether something has gone seriously wrong. The second is to take a weather eye view on the statutory context, and the overall scheme where relevant in order to distinguish, 6(2)(a) & 6(2)(b) situations and to identify where the Courts might conclude that Parliament has mandated a possession order as against those situations where Parliament has deliberately omitted to confer security so there is a discretion.
6. **To recap:-** We know from section 6 of the Human Rights Act 1998 that it is unlawful for a public authority to act in a way that is incompatible with a Convention Right and furthermore we know from section 7 that a person who claims that a public authority has acted in a way which is made unlawful by section 6, may rely on the convention right or rights concerned in any legal proceedings.
7. Translate this to possession proceedings and we may ask when can an occupier argue that his or her intended eviction is incompatible with a Convention right?
8. Possession proceedings engage Articles 8 and 14 of the ECHR and Article 1 of the 1st Protocol to the ECHR (private & family life, prohibition of discrimination & protection of property).
9. In relation to Article 1 of the 1st Protocol there are two relevant cases. In *Harrow LBC v Qazi* [2004] 1 AC 983 Lord Scott observed:- *“How could the termination of that tenancy in a manner consistent with its contractual and proprietary incidents be held to constitute a lack of respect for the home that had been thus established? The home was always subject to those contractual and proprietary incidents”*.
10. The same sentiments are found in paragraph 107 of the Court of Appeal’s decision in *Kay v Lambeth LBC* [2004] 3 WLR which dismissed the contention that eviction did not respect the Defendant’s rights under Article 1 of the 1st Protocol. The justification seems to be that the Convention rights are not engaged and if they are, there is no disrespect for property rights when exercising a right, the existence of which was agreed to on the face of the contract. But assume for the time being that a

tenancy is property for the purposes of Article 1 of the 1st protocol and that converting the tenant into a trespasser by notice to quit, engages that Convention Right. The burden then shifts to the public authority to justify the notice- i.e. the means (here eviction) that it has chosen to use to achieve its objective.

11. Breach of Art 14 can be found even when there is no breach of a substantive right. What is required is a linkage between the subject matter of the alleged discrimination and, here in the case of possession proceedings the other potentially applicable convention rights. Discrimination may arise where public authorities unjustifiably fail to treat differently persons whose situation is significantly different<sup>1</sup>. The scope for use of Art 14 in conjunction with Article 8 of the ECHR and Article 1 of the 1st Protocol to the ECHR, in defence of possession claims, will add another twist to the unfolding saga.

12. **Context is everything:-** The most essential ingredients to defending possession proceedings in the face of an unqualified right to possession are the information on which the decision was reached and secondly the statutory context. There is also a third ingredient which is the proportionality of the outcome but how far that can be deployed is still to be fought for. In *Huang v SOSHD* [2007] 186 2 AC @ [17] the House of Lords held

“Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise.”

13. In *Doherty* at paragraphs 101 and 102 Lord Walker described the context to the Council’s decision whether or not to obtain possession, in the following terms:-

“The fact is that the city council’s common law right was surrounded on all sides by statutory infrastructure, like a patch of grass in the middle of a motorway junction.”

14. The law will develop on a case by case basis. In *R (on the application of Gilboy) v Liverpool CC & SoSC&LG* [2008] EWCA Civ 751 the Court of Appeal put demoted tenancy orders in with the scheme for obtaining possession against introductory tenants, as dealt with in *McLellan v Bracknell Forest Borough Council* [2001] EWCA Civ 1510 [2002] QB 1129. Neither were incompatible with Article 6.

15. **Doherty v Birmingham CC:-** The Doherty family faced an unqualified right to possession. That is they were trespassers. Their contractual interest was terminated by a Notice to Quit dated 4th March 2004. Point 2 of the head note to the weeklies law report of the Doherty case reports the House as having decided “*the case would be remitted to a High Court Judge to determine the reasonableness of the local authority’s decision to serve the notice to quit*”

16. Housing practitioners know about reasonableness; it is the statutory fetter put on a landlord’s ability to recover possession even where a ground for possession has been established. But reasonableness here could mean that an eviction that would impose a disproportionately onerous burden on the persons being evicted (as compared to the prejudice to the landlord of not obtaining vacant possession) was unreasonable. That is precisely the opposite case scenario to the one Lord Hope had in mind when in *Doherty* at paragraph 42 he stated that a defence based only on the personal circumstances of the occupier, should be struck out.

17. Only Lord Mance in *Doherty* was of the view that when the case was remitted the Court should be able to decide, for itself, if the notice to quit was incompatible with the Defendants rights under Article 8 of the ECHR.

18. In *McCann v UK* the Court held:- “50 . . . *The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.*”

19. In his speech in the *Doherty* case, with whom Lord Rodgers, Lord Scott & Lord Walker agreed, Lord Hope stated at paragraph 19 that his conclusions were as consistent with what the relevant European case law (*Connors v UK & McCann v UK*) required, as domestic law allows.

20. The inability to give expression to the *McCann* judgment was in Lord Hope’s opinion attributable to three reasons. The first two are less substantial than the third. But in relation to the third reason for not applying *McCann v UK*, Lord Hope’s views were only shared by Lord Rodger.

21. [1] A panel of nine Law Lords would be required to depart from the previous decisions of *Qazi* and *Kay*. Furthermore, in Lord Hope’s view a panel of nine was not justified not just because of the facts in *Doherty* but also because there was not the very good reason, as would necessarily be required, for adopting the minority and overruling the majority, in *Kay*. The ability to some extent to develop the reasoning of the majority in *Kay*, with which the European Court in *McCann* disagreed, would allow defendants to question “the fairness and legality” of the authority’s decision making process and allow defendants to put in issue and have resolved by oral evidence any factual issues underlying the reasons for the authority’s stance that eviction was justified – see paragraph 54. An important aspect of the development of the dicta in *Kay* is Lord Scott’s identification of the personal circumstances of the family to be evicted, as material to the decision making process<sup>2</sup>

22. Prior to *McCann & Doherty* there were, and now there still are, two means by which a defendant (trespasser) to an unqualified claim for possession may defend. These

1 An example is the Greek Jehovah’s Witness who was unable to qualify for professional qualification as an accountant because of his conviction and imprisonment for refusing to wear uniform at a time of general mobilisation (2000) 9 BHRC 12. See also Lord Neuberger’s recent analysis of Article 14 in *R (RJM) (FC) v SOSW&P* [2208] UKHL 63 @ [35]- [47].

2 Ten years after the Act was passed, this elementary point finds expression, why has it taken so long?

were identified in para 110 in *Kay v Lambeth LBC*; *Leeds CC v Price* [2006] 2 AC 465 as (A) by arguing that the legislative framework used by the authority for its claim, is incompatible; or (B) by arguing that the decision to pursue eviction was improper.

23. The effect of *McCann* on *Doherty* has been that gateway (B) has been loosened.

24. How loose? Well, the answer should be to afford sufficient procedural safeguards in a given case to prevent the Government again losing the self same case before the European Court on the same basis it did in *McCann* which was that an essentially supervisory jurisdiction of the Court did not permit the Court to disagree with an authority's own assessment of proportionality.

25. Housing Authorities very naturally have difficulty in weighing matters not just from the public interest point of view, from the occupier's point of view and from their own point of view, as the attraction of the latter can (particularly in the day and age of targets) tempt a mind set which destroys the independence of the appraisal.

26. The result so far is that the Court can now decide what is legally capable of being relevant to the decision faced by the authority:- whether or not it is proportionate to evict – and then assess if the authority included the relevant matters or can justify their omission. In particular the Court can also call into question whether the choice of alternative options available to the authority, short of eviction by the notice to quit route, have been properly addressed.

27. But there is an obvious tension in what Lord Hope says when he holds both

(a) it would be unduly formalistic to confine the County Court judge's power to review on *Wednesbury* grounds- hence the Court can decide if the Council's decision was reasonable – see paragraph 55; and

(b) the requisite scrutiny would not involve the judge substituting his own judgement for that of the local authority, the issue was whether the decision to evict was one no reasonable person would consider justifiable – see also paragraph 55.

28. In assessing if the decisions to issue the Notice to Quit and to recover possession was unreasonable, the Court can judge whether the relevant convention right considerations have been properly identified but not take a view of the outcome, unless the outcome is perverse.

29. Apart from the loosening of gateway (B), so overruling *Kay* is not required, we turn to the other matters relied on by Lord Hope for domestic law not being able to give full effect to the European Court's reasoning in *McCann*.

30. [2]: Lord Hope's second reason for not giving effect to the minority view in *Kay*, as approved by the European Court in *McCann* is pragmatic.

31. In *Qazi* at paragraph 38 Lord Hope stated: *The point of automatic possession proceedings is generally to provide a quick and reliable way of evicting tenants whose leases have by the operation of law been terminated. A procedure which gives a discretion to the court by requiring it to consider whether having regard*

*to article 8(2) the making of the order would be proportionate is inimical to that purpose.* This has re-surfaced in a different guise. In *Doherty* at paragraph 20 Lord Hope added a further complaint:-

*Every solicitor who is asked to advise an occupier will have to consider whether it is arguable that the decision to seek his eviction was not proportionate. If he decides to raise this argument the court will have to examine the issue. The whole point of the reasoning of the majority was to reduce the risks to the operation of the domestic system by laying down objective standards on which the courts can rely. I do not think that the decision in *McCann* has answered this problem. Until the Strasbourg court has developed principles on which we can rely on for general application the only safe course is to take the decision in each case as it arises.*

32. It strikes me that for the same reason that the Courts did not have to re-mit back to Parliament the question of reasonableness and what it meant in a given case, when the concept was introduced getting on for a hundred years ago in the early Rent Acts, the Courts ought to be sufficiently mature to develop guidance on the crucial issue, in the words of Lord Bingham in *Kay*, that having regard to the occupier's personal circumstances whether it is disproportionate for the authority to exercise its power to seek a possession order.

3. This second reason explicitly calls for another case to go to the full chamber of the European Court to develop principles “on which we can rely”. It could also be done by a panel of nine Law Lords. But how useful is it to compile a list in a vacuum? All that could be done is to highlight some indicators:-e.g.

- whether the statutory context predicts or mandates an outcome, the alleged necessity for choosing to implement the power to evict as against other available routes for achieving the same objective and the countervailing considerations including :
- the absence or presence of somewhere else to move to,
- the suitability of the offered alternative accommodation and whether the reasonable housing needs of the occupiers will continue to be met.
- the quality and fairness of the decision making process and whether there was an opportunity for the occupiers to have had their case on hardship assessed.
- the reasonableness of the policy which the authority was purporting to follow in taking proceedings and whether the policy was subject to residual discretion and whether that discretion had been addressed.
- if matters had changed between date of notice to quit and trial (in *Doherty* it might be five years).
- the impact of eviction on the members of the household's personal circumstances (including any relevant matters of health or disability)
- Last but not least would be timing – why now as against later – perhaps after school age children complete their term if not their education.

34. The European Court would not in its supervisory jurisdiction be so bold as to try and pronounce generally on what is and what is not proportionate in a given case, instead it would defer to the national authorities being

conversant with its own vital forces and make any conclusion subject to the particular legislative code which applied and the individual circumstances.

35. Thus far the eminent views of Lord Hope in so far as the 1st and 2nd reasons are concerned (for non implementation of McCann) are with respect, not unconquerable.

36. But reason [3], is a real potential show stopper.

37. [3] The third reason in effect is that the Human Rights Act prohibits doing what the European Court in McCann v UK has said is required, namely to allow independent assessment of the proportionality of an intended eviction.

38. This calls for a reminder as to the terms of section 6(2) of the HRA 1998 which provides:-

*Section 6(2)HRA 1998*

*(2) Subsection (1) does not apply to an act if –*

*(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*

*(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

39. Lord Hope concludes that if the decision is made available by statute then the authority can use section 6(2)(b) as a Defence. See paragraphs 39 and 40 in Doherty. In essence Lord Hope's third reason for not bringing McCann home into domestic law is that because of section 6(2)(b), if the authority is acting in exercise of a discretion vested in it by Parliament, then it cannot be held to be unlawful within the meaning of section 6(1). Lord Scott made passing reference to the construction of section 6(2) deferring on the matter to Lord Walker who considered that but for R. (on the application of Hooper) v Secretary of State for Work and Pensions; R (Wilkinson) v Inland Revenue Comrs and Kay, section 6(2) does not apply to a case where a housing authority had a choice about the matter, including whether to start proceedings in such a way as to allow any complaint against the occupier to be adjudicated on by the Court – see paragraph 114. Lord Rodger agreed with both Lord Walker and Lord Hope which is very difficult to assimilate with the differing opinions on the scope for a public authority to avail itself of a section 6(2) defence.

40. Lord Mance expressed reservation about entering into deliberation on the scope of section 6(2) because he did not feel the House had had the benefit of the submissions and argument which the point deserved, he nevertheless expressed the tentative view, in agreement with Lord Walker, that the Hooper case was distinguishable. He thought that using the interpretative tool of section 3 of the Human Rights Act it could not be said that an authority which failed to have regard to the relevant article 8 considerations which fell to be assessed in the proposed eviction of the Doherty family, was acting to enforce statutory provisions.

41. Therefore Lord Hope's (and Lord Rodger's) reason number [3] is subject to the application of the Hooper &

Wilkinson approach to Section 6(2) which Lords Walker (and Lord Rodger) and Mance, do not share. The Government would avoid considerable legal costs by stepping in by legislative change. The hands off approach, let the Supreme Court sort it out might take years.

42. In McCann, the local housing authority was dealing with a secure tenant.

43. It chose to by pass the statutory route for recovering possession provided by Part IV of the Housing Act 1985 based on (an entirely wrong) construction of its policy for dealing with persons it perceived as perpetrators of domestic violence. The Council wrongly chose to construe its own policy – to take action against perpetrators of domestic violence – as including obtaining a notice to quit from a joint tenant (a sort of “McGradying” the remaining tenant to a relationship break-down) as against the plain meaning which was use of Ground 2A of Schedule 2 of the 1985 Act. A choice of construction the County Court Judge HHJ Durman and the European Court thought was unjustified.

44. This McCann scenario does not fit any of the situations for application of section 6(2) identified by Lord Hope. The eviction was not pursuant to a statutory duty or power because the authority was procuring the means of recovering possession against Mr McCann from a third party, his wife, instead of using the statutory route in Part 4 of the Housing Act 1985.

45. So what this all boils down to is that in Lord Hope's opinion because McCann can not overcome the defence provided by section 6(2)(a) and (b), where they occur, Kay should not be overruled.

46. **Conclusion:** Local housing authorities faced with a defence raising arguments relying on convention rights may seek to persuade the court, that what is happening was envisaged by Parliament who chose not to apply any fetter, other than a convention compliant decision making process. It would still be open to the authority to let the Court decide if eviction is justified. Choosing not to do that, because they don't have to, won't always wash.

47. Whether or not section 6(2) can be used by the Claimant will depend on a case by case scenario. Where it does apply the point in the McCann case – that the scheme should permit an independent assessment of proportionality – wont go away. If the section 6(2) statutory defence is available to the Claimant, and there is no defect in the decision making process, then the Defendant's only resort is to argue incompatibility under Gateway [A] and seek a Declaration pursuant to section 4 of the HRA 1998.

48. The decisions of the European Court are not meant to be ignored, the non implementation of the McCann decision is something the Government will expect to hear more about.

49. How the Government goes about securing that personal circumstances can be put before the domestic courts with a view to persuading a Judge to decide that eviction (or more often, its timing without anywhere else or with only temporary accommodation, to go to) would be disproportionate, remains to be seen. It has an opportunity by agreeing the admissibility of the ongoing complaint of Kay v UK.

# Tolerated Trespassers explained for Children

Robert Latham

Doughty Street Chambers

*The boy and the dyke in Holland, how the boy spotted a leak to the dyke and placed his finger there until the hole could be plugged. As a result of his prompt action, a flood was avoided. Or was it?*

The story starts in 1980. For many years the LHA fish had been swimming the LHA canal, cared for by the LHA sheep. The pigs who ran the farm were quite satisfied with this arrangement. The sheep had cared for the fish fairly and they didn't need the protection of a dyke.

In contrast, the fish swimming in the private rented canal had a history of statutory protection, with a strong dyke to shield them from the wolves that prowled around their waters.

In 1980, the pigs who ran the farm had a change of mind. In future the LHA fish could only be evicted from the canal for cause and if it was reasonable to do so. And so the LHA dyke was constructed. In 1985, the dyke was repainted, but there was no change to the basic structure.

In 1987, a little boy found a leak in the dyke. He had examined it after overhearing an argument between Elmbridge Sheep and Thompson Fish. He applied his finger to the hole and shouted out: "We must plug this leak, otherwise the trickle will become a flow, and the flow will become a flood". But no one listened.

In 1988, the pigs turned their attention to the RSL fish who had been swimming in the same pool as the LHA fish for the previous three years. Did they not need a different dyke to protect them from the RSL goats who cared for them? And the pigs agreed that they did. And a new dyke was constructed.

And the little boy said to his sister "will not the RSL dyke also leak?" "No" she replied and explained how the RSL dyke had been constructed to a different design without the use of compound S82-2. The little boy was not convinced.

And so the years went by. The little boy grew impatient sitting by the dyke and removed his finger. So, the trickle became a flow. An increasing number of LHA fish were ejected from the canal and languished in the bog which was developing in the farmland.

In 1996, 5 wise owls determined a dispute between Burrows Fish and Brent Sheep as to the status of the LHA fish which were now languishing in the bog. The wise old owls looked at Burrows fish and said: "You are not totally dead; neither are you totally alive. So we will call you a TT", a phrase which the little boy had never heard before and which seemed extremely refined and artificial. But the wise owls added that it is always open to a TT to apply to be restored to the canal.

In May 1997, there was a change of political control on the farm. The blue pigs were replaced by the red pigs and there was general rejoicing. For many years, the red pigs had been deeply unpopular, but they had changed their political slogan. No longer did it read "all animals are equal". It was amended to add, "but some animals are more equal than others". And this appealed to the animals on the farm, because they all believed in self-advancement.

At about this time, there was a joint approach by two organisations. The little boy was a member of HPLA who believed in promoting the rights of fish; whilst the LGA was

the professional body of the LHA sheep. On 8th August 1997, they wrote to the pigs pointing out that the dyke was leaking. The solution was also identified: remove compound S82-2. But they received no reply.

Now, there were two breeds of pig on the farm: The red pigs who ran the farm and the black pigs, the private bankers, who financed it. Traditionally, there had been a lot of antagonism between the red pigs and the black pigs. But the little boy saw that the pigs had started to scratch each others backs.

I don't how well you know pigs? But there is nothing that a pig likes more than having its back scratched. So there were extremely contented pigs on the farm who sat at the top table and basked in the sun.

Over the years, the little boy, through HPLA, made further approaches to the red pigs who ran the farm. He tried two tactics:

(i) "Is not your slogan 'Bringing Rights Home'? Don't the TT fish also have rights?"

(ii) "Is not another slogan 'Addressing Social Exclusion'? Are not the TT fish excluded from mainstream society?"

But, the little boy received no reply.

The boy looked up at the top table and noticed that the black pigs who financed the farm were gambling ever more recklessly. The little boy said that the red pigs had their snouts in the trough. His sister responded that this was quite unfair. Rather, they had their minds on other matters. Indeed, it was true that there was a succession of 8 different pigs with responsibility for maintaining the dyke over the next 11 years.

One morning, the little boy noted that a change had been made to the political poster. No longer did it just read, "all animals are equal, but some animals are more equal than others". Someone had added: "And what is more, bloated pigs are positively good for the farm".

Animals asked who had done this. Some said it was Mandy, a red pig who had never been popular at the top table. Others said it was a group of red pigs who had been seen with a spray can in a drunken stupor, after celebrating their new responsible drinking laws.

And the little boy couldn't understand what was happening because some of the black pigs had accumulated wealth of such magnitude that they could never spend it during their fleeting existence on the farm.

Over the intervening period of eleven years, there were three developments. First, the red pigs who ran the farm decided that it would be much better if the LHA fish were transferred to the RSL canal. The red pigs insisted on ballots to confirm that the LHA fish supported this. But as you may guess, the LHA fish were given no real choice. They were told that if they transferred, they would be given new hatches funded by the black pigs; whilst if they remained in the LHA canal, their hatches would continue to deteriorate.

There was an immediate problem for the LHA sheep. Whom should they ballot? Just the LHA fish or also the TT fish languishing in the bog? Some LHA sheep balloted the TT fishes; others did not. Some LHA sheep admitted quite frankly that they had no idea which fish were still swimming in the

LHA canal and which were languishing in the bog not totally dead nor totally alive.

The RSL goats turned to the red pigs who ran the farm and asked what they should do. The red pig merely shrugged her shoulders and said “do as you will”.

So the RSL goats turned to the black pigs who financed the farm and asked them what they should do. The Black pigs replied: “We don’t like those TT fish. They don’t pay their hatchery charges. Hang them out to dry.” Quite what that meant, the little boy did not know. Do you?

The little boy was surprised by this approach. The black sheep who financed the farm and who were gambling ever more recklessly had adopted a completely different approach to the fish who were buying their hatches. The greater the financial difficulties of these fish, the larger the sums advanced.

Secondly in February 2006, three wise owls determined a dispute between Harlow Sheep and Hall Fish. It was a very technical dispute about Hall Fish’s bankruptcy. But legal eagles noted that the trickle had now become a flood.

Finally, in May 2007, three wise owls had to determine the dispute between Knowsley Goat and White Fish about the RSL dyke. This was the issue that had been raised by the little boy and his sister in 1988. The legal eagle for White Fish argued that the situation was quite different. Compound S82-2 had not been used in the construction and the dyke was quite robust.

Now wise owls decide disputes by own peculiar rules. On this occasion they decided to determine it by the magnificence of the plumage of the legal eagles. The legal eagle for Knowsley Goat looked at the three wise owls in a most beguiling manner. “I may be a dangerous eagle”, he said “but ain’t my plumage magnificent?” And the legal eagle put his head in the sand and wagged his tail revealing his thinking parts. “Indeed”, the three wise owls agreed, “your plumage is truly magnificent”.

And so it came to be that there were numerous RSL fish languishing outside the RSL canal, namely TTs who were neither totally dead nor totally alive. No one knew how long they had been there or what to do with them. It was now estimated that there were some 750,000 TTs discarded from the LHA and RSL canals, some 10-20% of the fish who had been swimming in the two canals.

I fast forward. Three fish and one sheep took their cases to 5 wise owls, the ultimate appeal court on the farm. By the time that the appeal came to be heard, two of the RSL Goats decided that they could no longer afford the litigation. They put up their hands in surrender and agreed to restore their fish to the canal. Now 5 wise owls take time to deliberate. As this story is written, their opinions are still awaited as to whether the little girl had been correct in 1988.

Meanwhile, the red pigs who run the farm, had finally felt compelled to take action. They had two problems to address. First, How to repair the dykes? The red pigs remembered what had been said in May 1997 and reconstructed the dykes without compound S82-2.

However, whilst the red pigs announced their plans on 22nd July 2008, they added that work could not commence until 6th April 2009. “Why?” asked the little boy. The red pig responded that she couldn’t possibly start work until she had finished her lunch.

The second problem was what to do with the 750,000 TTs who were now languishing in the bog outside the two canals. One solution would have been to put them all back in the canals.

But that would have been too simple. So it was decided that they would be put back in the canals for some purposes, but not for others.

A further problem was what to do with the LHA fish who had been lobbed to the RSL goats and had been left to hang out to dry. “Don’t put them back in the pool” said the RSL goats, because the black pigs won’t like it. These are undesirable fish who don’t pay their hatchery charges. Were they to be restored to the RSL canal they would have preserved rights to buy their hatches. So the red pig merely put her hands in the air and asked “what can I do?”

At that moment there was an almighty thunderbolt. The little boy looked up and saw that the table at which the black pigs had been gambling ever more recklessly had been rent asunder. And the force of the thunderbolt was such as to wake the little boy and he realised that he had been dreaming. Or had he?

Animals on the farm started to ask why the hole in the dyke had not been plugged and the trickle had been permitted to become a flow and the flow to become a flood. But, the little boy knew that it was because the red pigs had been bloating themselves and had closed their eyes to the real problems on the farm. Rather, they had listened too much to the black pigs who financed the farm and had been gambling ever more recklessly.

But over time, all this was forgotten. All that is now remembered is the leak to the dyke and the little boy who stemmed the trickle with his finger. All for the want of a timely plug, the farm had been flooded.

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