Neutral Citation Number: [2025] EWHC 752 (Ch)

Case No: PT-2024-BRS-000024

IN THE HIGH COURT OF JUSTICE
BRISTOL BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS & PROBATE LIST (Ch D)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 08/04/2025

Before :

HHJ RUSSEN KC
(Sitting as a Judge of the High Court)

- -

Between :

(1) MARTIN CRAIG NICHOLAS **(2) SCOTT NICHOLAS** **(3) RAPTORS OF PENWITH LIMITED**	**Claimants**
- and -	
(1) BARNES DAVISON THOMAS **(2) UPPER COT ESTATE LIMITED**	**Defendants**

- -

David Mitchell (instructed by **Arch Law**) for the **Claimants**
Charles Auld (instructed by **Nalders Solicitors**) for the **Defendants**

Hearing dates: 23rd, 24th, 27th, 28th, 29th, 30th and 31st January and 3rd and 5th February 2025
(Site Visit: 17th January 2025)
Draft judgment circulated to the parties on 27th March 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 8 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Russen KC:

INTRODUCTION

1. This is my judgment following a trial which is the result of a bitter dispute between neighbours in Cornwall, all of them living and, so far as the parties to the proceedings are concerned, respectively operating (through a company which is also party to the proceedings) their businesses next to one another. The location is the hamlet of Bosavern, St Just, in Cornwall, only a few miles short of Land's End.

2. The dispute has led to a claim by two brothers based upon 35 allegations of harassment by their neighbour, the first defendant.

3. Their company, which carries on the business of breeding falcons, also sues him and his company (the owner and operator of a small farm neighbouring the properties of the claimants and their parents) for the torts of nuisance and negligence and it seeks damages for losses caused to that business. Those losses are said to be the result of some birds dying and others not breeding as they should (including but not only through smashed and infertile eggs in the relevant year) because of the defendants' actions.

4. There are 8 allegations of nuisance. The damages claim is put at £1,209,000 (to include the loss of chicks over a 10 year period) plus ongoing losses of £344,250 per annum in respect of the loss of 14 breeding pens within the aviary. The claimants also seek injunctive relief against the defendants, the granting of which they recognise would avoid such ongoing losses to the company. They say the nuisance, which they also frame as negligence, has involved malice on the part of the defendants.

5. The defendants deny those claims. The first defendant has his own counterclaim, including a claim for injunctive relief, based upon his own 5 distinct allegations of harassment (pleaded as a non-exhaustive list of "*frequent acts of harassment*" against him by the claimants).

6. This is not the only litigation between some of the parties arising out of their adjoining ownership. In recent proceedings in Truro County Court commenced on 24 November 2022 ("**the Septic Tank Claim**") the present first defendant sued the two brothers, their parents and another neighbour over what was either a cesspit (per the claimant in those proceedings) or a septic tank (per the defendants). Those proceedings were compromised before trial by a Tomlin Order dated 10 May 2024. As I touch on below, by any standards the Septic Tank Claim appears to have been a highly questionable piece of litigation so far as the basis and timing of it (at least in terms of service of the proceedings after the tank in issue had in fact been removed) are concerned.

7. Factual evidence about forty-eight distinct alleged causes of action (all of which, at least at their high point on the nuisance allegations, involve an allegation of consciously deliberate wrongdoing), some widely diverging submissions about actionability under the law of nuisance (despite further recent Supreme Court clarification of the principles), some sweeping and largely unchallenged submissions from each side about the approach to awards of damages for nuisance and harassment (of the type relevant to

this case) including the potential liability of a director for the torts of his company, a relatively rudimentary approach to ROP's claim for ongoing losses (including after the claimants' production of a very detailed and potentially discombobulating document on the eve of trial about breeding numbers) and, finally by way of this summary of the bigger points requiring considerable thought for this judgment, the need to analyse detailed veterinary scientific evidence about the nature and cause of illness and death in gyr falcons, all make for a very long judgment.

8. The structure of it is as follows:

A. BACKGROUND

9. In this judgment I refer to the First Claimant as **Martin**, the Second Claimant as **Scott** and the Third Claimant company as **ROP**. I will refer to the First Defendant as **Mr Thomas** and the Second Defendant as **UCE**.

10. Martin and Scott are brothers and co-owners and directors of ROP, a business specialising in the breeding of falcons from a large and modern aviary next to their homes. ROP focuses upon breeding gyr falcons, peregrine falcons (and gyr/peregrine crosses) though barbary falcons (which are also sometimes used in the cross breeding), Peale's falcons and merlins are also raised in its aviaries. ROP raises chicks both through birds breeding naturally and by "imprinting" which is a process of artificial insemination with sperm collected from male falcons which is ejaculated into a hat worn by the breeder. This is a delicate operation which obviously first requires the breeder to gain some familiarity with the male donor.

11. The gyr falcon (*Falco Rusticolus*) is native to a region from the edge of the Arctic coast south to around the northern tree lines of Canada, Russia and Europe. The peregrine falcon (*Falco Peregrinus*) is native to area from around the southern limit of the Gyr falcon's natural habitat and extending south to across the equator as far as southern South America, South Africa and Australia.

12. Martin and Scott are also co-owners and directors of a company with a scaffolding business whose offices, like ROP's, are next to their homes at Higher Bosavern, St. Just. The two companies share members of staff.

13. Martin and Scott live with their respective families in two houses in the immediate vicinity of the aviary. Their parents, Mr Roger Nicholas and Mrs Susan Nicholas also live immediately next door to Martin and his family.

14. Mr Thomas is the claimants' neighbour. UCE, his company, owns neighbouring agricultural land (which includes the field that borders the aviaries on the other side of the path) which is separated from the claimants' land by a public footpath, including the land over which that footpath runs and the yard between ROP's offices and Martin's and Scott's respective homes.

15. The proximity of these neighbours, and the position of the aviaries, is shown by the shading on the aerial photo at Annex 1 to this judgment. I visited their properties on a site visit on 17 January 2025, shortly before the trial.

16. The Nicholas family moved to Bosavern in 1995. The lower of the yellow shading at Annex 1 covers both Nos. 1 and 2 Bosavern Cottage. Martin and his wife, Karen, and children live in No. 1 and Roger and Susan live in No. 2. The plan at Annex 2 shows the division of that building. Scott and his family live in No. 1 Bosavern Manor Farm (highlighted in green at Annex 1 and also shown on the plan at Annex 2). Their adjoining neighbours – Mr and Mrs Bragg – use No. 2 Bosavern Manor Farm as a second home.

17. Mr Thomas lives in Pengelly which is shaded blue at Annex 1. This is a new, substantial house, built of stone, which he has built in place of a bungalow (also known as Pengelly) which he inherited from his grandmother Barbara Thomas. His grandmother bought the former Pengelly in 1988.

18. Mr Thomas moved in with his grandmother in 2018. In October 2020 UCE bought the land shaded purple at Annex 1 from Mrs Deborah Trembath. While the land was in her ownership it had been farmed by a tenant farmer. This arrangement probably meant that the Nicholas family was effectively able to use the land between their homes, which provides access to them, as if it was their own. Indeed, the evidence of Karen Nicholas and Roger Nicholas indicated that they and other members of the public used to walk quite freely over the fields (certainly to the local attraction of Tom Thumb Rock in one of them) and Karen Nicholas said that, before matters turned hostile, Mr Thomas said the Nicholases could walk there.

19. As I explain below, UCE's acquisition of the land has resulted in much clearer and demonstrative assertions (including by action) as to ownership of that land and the rights over it.

20. ROP's aviaries are located in a modern building on the land highlighted in red at Annex 1, being land jointly owned by Martin and Scott and leased to ROP. Even though much of the evidence refers to the aviaries (plural) I will refer to it below as "**the Aviary**" in distinction from the number of pens within it. The layout of the Aviary (and the number and location of its pens) is shown in Annex 3 to this judgment. The Aviary houses a significant number of birds owned by Hussain Lootah ("**Mr Lootah**").

21. Martin explained that ROP has a business partnership with Mr Lootah who is based in Dubai and breeds falcons there. Mr Lootah sends ROP falcons for breeding and young birds are sent back to him in Dubai for training, racing and onward sale. ROP receives 50% of their sale proceeds. Mr Lootah receives 30% of the sale proceeds from the sale by ROP of offspring of two birds respectively owned by him and ROP and 20% of any offspring from a pair of ROP's birds.

22. Another near neighbour of the present litigants is Mr Benjamin Joint. His ownership is marked in orange at Annex 1. Mr Joint owns the land on which the septic tank (which was the subject matter of the Septic Tank Claim) was located and on which, in November 2022, a replacement waste disposal system was placed by him and the Nicholases. The plan at Annex 2 is taken from the Land Registry title for that particular parcel of land and the location is outlined in red.

23. The road running north-south to the east of these neighbours' properties is the B3306. The plan at Annex 2 shows Mr Thomas's preferred vehicular access to the westward-facing front of Pengelly is now via what has been referred to as the farmyard between ROP's offices and Bosavern Cottage and down the lane into UCE's field fronting Mr Joint's land. I will refer to this as "**the Lane**". The public footpath runs over the lane before continuing at a right angle between the Aviary and UCE's field.

24. Construction of the Aviary began in October 2018 and was completed by July 2022. Martin explained in evidence that the southern section of it was ready for use in 2019 and that all breeding pens in the Aviary save Nos. 34, 35 and 37 were ready for use at the start of the breeding season in 2022. He said that at that time what remained to be

completed was an upper walkway, a tie-down room, and the roof netting of one of the two hack pens. The hack pens are used for exercising birds. ROP's claim for harm allegedly suffered in 2022 relates to birds in the western side of the Aviary (though not then pens 34, 35 and 37 which were completed later that year) and shaded in pink at Annex 3. I will refer to these as "**the Western Pens**". As at 2022, and with the exception of pens i1 and i2 (the "i" denotes imprint) the Western Pens had been designed to house naturally breeding pairs.

25. Martin explained in his evidence, which I accept on this point, that the Western Pens were all completed by the end of 2021. Martin said that, because some of them were newly built and not used to house birds in 2021, they could be used in 2022 to quarantine birds imported early that year from Dubai. Now that the Aviary has been operating for some years, imported birds are now quarantined in a shipping container to the north of the Aviary before being put into pens. The Western Pens had been designed for pairs of birds. On the site visit I could see the modification of the Western Pens that ROP has been undertaking in the light of what it says was the harm caused to birds in 2022 as a result of activity on UCE's land. The modification will see the west-facing windows in the Western Pens being closed off so that falcons in those pens will not be susceptible to visual interferences from UCE's land. ROP proposes to use those pens as breeding pens for imprint birds rather than breeding pairs.

26. This is a dispute between neighbours which has acquired real momentum and escalated through unwelcome behaviour over a relatively short space of time. When the court's focus should be upon the pleaded events, determining whether or not actionable wrongdoing forms any part them and, if so, what the legal consequences of that should be, any inquiry into its underlying cause(s) might be thought to be of questionable relevance and reliability. That said, it is alleged that Mr Thomas has acted maliciously in causing harm to ROP's business and, with the inevitable caveat that no judicial decision some years later can hope to determine objectively, with complete accuracy, why neighbours who initially got along have since fallen out spectacularly, it is necessary to consider whether the actions of either side were motivated by a sense of grievance and malice.

27. Having listened to 8 days of evidence, given by reference to lengthy witness statements, I have been left with the clear impression that the wider dispute which gives rise to the issues to be determined in this judgment springs largely from Mr Thomas's interest in having a more convenient vehicular access route to his new home at Pengelly via the Lane than that provided by the driveway affording the more direct access to Pengelly between Wesley's Barn and Keigwin: see Annex 2.

28. That access takes Mr Thomas and visitors to Pengelly through a gateway off the Lane and in front of the land (edged in red on Annex 2) where the new waste treatment system serving Mr Joint's home and Bosavern Manor Cottages is now installed.

29. Mr Thomas and his partner Daniel Ambler referred to the difficulty in turning cars at the Pengelly end of the alternative access via the straight driveway off the B3306 which runs past Keigwin. Mr Charles Neave-Hill, who used that driveway when visiting Mr Thomas's grandmother, gave evidence to the same effect and assumed, from his subsequent visits to Mr Thomas, that it was no longer used. For that reason, very soon after UCE bought the land from Mrs Trembath, in October 2020, Mr Thomas approached Mr Joint with a proposal to buy a small part of his land (next to the land

with the septic tank) which would have made turning easier. Nothing came of that proposal.

30. The straight driveway was the means of access always used by Mr Thomas when he stayed with his grandmother in her bungalow at Pengelly which his newly built home has replaced. It is not possible to gain access to the front of Pengelly (where I saw cars parked on the site visit) by that driveway because of a field boundary at the end of it.

31. Mr Thomas also said he has plans to develop a glamping business on UCE's land. If planning permission can be obtained for that business then the access to UCE's land via the Lane (which is also a public footpath) would be an obvious route for customers of that business to use. If the Nicholases and Mr Joint had not in November 2022 addressed issues with leakage from the old septic tank, by replacing it with a new waste treatment system now confined to Mr Joint's land, then that leakage might have impacted negatively upon such use (and use by Mr Thomas and visitors). Part of the Nicholases' harassment claim is based upon Mr Thomas putting up a sign on the public footpath on 22 June 2021 which stated "*Regrettably due to mounting legal costs regarding a neighbour dispute over pollution…*" there would be no camping (of a less formal kind not requiring planning permission) in the field that year.

32. The Septic Tank Claim was issued on 24 November 2022. It was a claim based on Mr Thomas's contention the sewage system on Mr Joint's land was a cesspit (as it was described in a relevant conveyance) rather than a septic tank with soakaways into Field No. 8440; and the particulars of claim put the Nicholases and Mr Joint to strict proof that a soakaway existed and was part of the system in respect of which they enjoyed rights of drainage. That contention was to some extent pursued by and on behalf of Mr Thomas at the trial before me. Yet it is at odds with the express recognition by his former solicitors in a letter dated 8 July 2021 (to which those particulars of claim referred) which stated the "*septic tank drains into a soakaway system situated on CL184450*" before noting that the precise location of the soakaway system appeared to be a matter of disagreement between the parties.

33. In any event, it seems very clear from the photographs in evidence before me – both of the old sewage chamber on Mr Joint's land before it was removed and of leakage in Field No. 8440 a little distance from that chamber - that the system did not involve a sealed (or what should have been sealed) cesspit but, instead, a septic tank with soakaways. The septic tank was emptied regularly by a tanker but the system evidently had soakaways running into the field. Part of Martin's and Scott's case in these proceedings is that Mr Thomas caused one of his contractors to damage the soakaway pipes.

34. Within two days of the Septic Tank Claim being issued, the Nicholases and Mr Joint had replaced the septic tank (with its need for soakaways) with the new self-contained waste disposal system. At the time of its replacement the Nicholases did not know the claim had been issued and only became aware of it through the not very seasonal act of service by the court on 23 December 2022. Before UCE bought the land in 2020 they had been in discussions with Mrs Trembath about installing a new septic tank and soakaways (drawings had been prepared) and the Environment Agency had been approached for the relevant permit. There had been a leak in the field which the Nicholases had tried to address by depositing rubble and soil while the EA's approval to a replacement system was sought. Martin explained in evidence that Mrs Trembath

put the plans for a replacement on hold. It seems to me to be quite likely that this was because of her plans to sell the land.

35. I have already mentioned that the Septic Tank Claim was compromised in May 2024. It is therefore not for me to address the merits of a claim for injunctive relief on a claim which, as I have explained, lost its substratum two days after it was issued and before proceedings were served. However, I was shown some recent inter-solicitor correspondence (from October 2024) which recorded the Nicholases' suggestion that a right of way over the Lane to access the new sewage system, for the purposes of future maintenance, needed to be recorded in a deed to reflect two provisions of the Tomlin Order. In his evidence, Mr Thomas explained why he had not engaged further with that suggestion.

36. Part of the present dispute also concerns a rainwater drain on the Lane ("**the Drain**") situated just outside the front wall of No. 2 Bosavern Cottage and whether it was being used to receive grey water (i.e. household waste water) from one or both of Bosavern Cottages. The Drain was constructed some 8 years ago, and therefore some time before UCE purchased its land from Mrs Trembath, when extensions to the front of Nos 1 and 2 Bosavern Cottages were built. The Drain, and some kerbing stones which had been installed by the Nicholases to divert rainwater into it, were on the Lane. Following UCE's acquisition of the land, the Drain positioned on the Lane became another bone of contention between the parties. The removal of the kerbing stones on Mr Thomas's instructions is part of the claimants' harassment claim.

B. THE PROCEEDINGS

37. The letter before claim in these proceedings was dated 12 December 2022. Martin's solicitors had previously written to Mr Thomas's solicitors on 31 October 2022, saying they were instructed "*in relation to all private nuisance issues*" and setting out what they said had been Mr Thomas's unreasonable actions in relation to the Drain between May 2021 and July 2022 (and which now form part of the harassment claim).

38. ROP alleges that the defendants' activities caused the death of three of its gyr falcons in April and May 2022, each identified by the number on its A10 Certificate. As Martin explained, an A10 Certificate contains a number which identifies the bird. ROP has relied upon the number on the A10 Certificate in this case, rather than its ring number, out of a concern that the latter can be used to trace a bird's breeding lineage. That can be commercially sensitive information, from which blood lines can be traced, when race-winning birds command high values.

39. The first bird to die, on 3 April 2022, was a male gyr which was a race-winning bird: No. 614959/03 ("**Gyr 03**"). The second was another male gyr which died on 14 April 2022: No. 616630/05 ("**Gyr 05**"). The third was a female gyr (the mate of 03) which died on 10 May 2022: No. 614959/06 ("**Gyr 06**"). Gyr 03 and Gyr 06 were both 4 years and Gyr 05 was 3 years old at the time of death.

40. ROP also alleges that the defendants' activities caused other birds to damage their eggs and become infertile in the 2022 breeding season. It claims those activities have a continuing adverse impact on breeding success within the Aviary.

(1) Allegations of Nuisance (ROP's case)

41. Martin, Scott and ROP allege that Mr Thomas and UCE (either by themselves or by their servants or agents) were guilty of the following acts of nuisance in close proximity to the Aviary:

    (1) From January to April 2022 operating a scaffolding business which generated excessive noise in the Aviary and included the operation of a truck-mounted crane of approximately 10 metres in height which broke the sight-line of the falcons constituting a visual threat. The Particulars of Claim aver that "excessive noise is 70 decibels or more within the aviaries".

    (2) From early January 2022 depositing large stones and soil piles which generated excessive noise in the Aviary and caused a visual threat to the falcons.

    (3) On 25 March 2022 lifting scaffolding poles by the Crane which generated excessive noise in the Aviary and caused a visual threat to the falcons.

    (4) On 31 March 2022 operating diggers and dumper trucks and loading and offloading lorries which generated excessive noise in the Aviary.

    (5) On 7 April 2022 positioning a digger with its bucket raised in the air constituting a visual threat to the falcons.

    (6)) On 18 April 2022 Bank holiday, Ed McFadden operated diggers which generated excessive noise in the Aviary.

    (7) On 29 April 2022 performing works using two JCB Excavators, one for digging and another for pecking out granite, which generated excessive noise in the Aviary and caused it to vibrate.

    (8) On the 2 May 2022 Bank holiday, Ed McFadden generated excessive noise in the Aviary by loading and unloading granite from a steel trailer.

42. All three claimants allege that Mr Thomas (acting personally and on behalf of UCE) acted maliciously in causing those things to be done and so as to deliberately cause a nuisance, harm the falcons and damage their business interests.

43. As those interests are ROP's, and no personal loss to Martin or Scott is alleged, the nuisance claim is exclusive to ROP.

(2) Alleged Negligence (ROP's Case)

44. ROP alleges that those same acts of nuisance were acts of negligence which breached a duty of care "*not to cause or permit the falcons to suffer excessive noise or visual threats, in particular during the Breeding Season*."

(3) Alleged Acts of Harassment (Martin's and Scott's case)

45. The acts of harassment alleged by Martin and Scott against Mr Thomas are as follows:

(1) In January 2021 Nigel Semmens, Mr Thomas's contractor, destroyed the soakaway to the septic tank jointly owned by Martin, his parents Roger and Susan Nicholas, as well as their neighbour Benjamin Joint.

(2) In or around March 2022 blocked Martin's access to the septic tank with granite stones and boulders.

(3) On 8 April 2021 refused Martin access to the septic tank.

(4) From April 2021 intimidated Martin's and Scott's families by driving past their respective properties at high speed whilst staring and gesturing at them.

(5) On 26 April 2021, Daniel Ambler and Ed McFadden, Mr Thomas's contractors, trespassed onto land owned by Mr Joint and removed the lids and drain covers of the septic tank, photos of which were then emailed to Martin and Scott in order to taunt them.

(6) On 4 May 2021 situated a peacock house and pen outside Scott's property in order to cause a noise disturbance and padlocked the pen blocking access to his septic tank.

(7) On 7 and 10 May 2021 removed a concrete drain cover over the Drain creating a flooding risk.

(8) On 11 May 2021 interfered with Martin's refuse, emptying bird guts out and then maliciously reporting Martin to Trading Standards for not correctly depositing the waste.

(9) On 11 May 2021 emailed Martin with a false and malicious complaint of homophobia against him.

(10) On 18 May 2021 maliciously contacted the Council's Community Protection Department to serve a notice on Martin having previously told Martin and Scott that the issue of the septic tank was only to be dealt with through solicitors.

(11) On 27 May 2021 falsely and maliciously alleged homophobia against Martin and Scott on Instagram.

(12) In May 2021, along with a male partner and group of females, congregated outside Martin's property, stared in through the bedroom window at his family, mimicking and intimidating them.

(13) On 22 June 2021 erected a sign for a campsite on the public footpath which stated "*Regrettably due to mounting legal costs regarding a neighbour dispute over pollution…*" The dispute between the parties did not involve pollution and the statement was false.

(14) On 25 June 2021 Adrian Thomas (Mr Thomas's father) made false and malicious allegations of homophobia against the Martin and Scott at a meeting with Derek Thomas MP, which was convened to discuss Mr Thomas's harassment.

(15) On 25 June 2021 stacked silage bales outside Scott's property, blocking his family's sea view. As at the date of the Particulars of Claim (13 April 2023) the bales were said to have remained in situ.

(16) On or around 14 July 2021 Mr Thomas and Adrian Thomas falsely and maliciously accused Martin and Scott of slashing silage bales belonging to the defendants in order to fabricate a complaint to the Police.

(17) On 16 July 2021 at 5.00am woke up Scott, his family and visiting friends, by moving and re-stacking the silage bales outside Scott's property.

(18) On 17 July 2021 at midnight repeatedly drove past Martin's property and Scott's property.

(19) In July 2021 made false and malicious complaints against Martin and Scott to the Animal and Plant Health Agency, Planning Enforcement and Trading Standards. Each organisation duly investigated and found no wrongdoing.

(20) On 4 August 2021 situated four male peacocks in the pen outside Scott's property causing them to fight and create a noise disturbance. Further to the nuisance allegations, this is another example of Mr Thomas's cruelty towards animals in the pursuit of his vendetta against Martin and Scott.

(21) On 6 August 2021 the peacocks were killed by a fox. Their severed remains were left in situ for two days in full view of Scott's family. This is a further example of Mr Thomas' cruelty towards animals in the pursuit of his vendetta against Martin and Scott.

(22) On 6 November 2021, without any advance notice, set off fireworks in the field next to the Aviary causing excessive noise and a visual disturbance to the falcons.

(23) For the period January to May 2022 caused or permitted the acts of alleged nuisance and did so maliciously.

(24) From the end of April 2022 onwards, dumped silage bales, large stones and piles of earth in front of Scott's Property in order to create a mess, ruining its visual aspect and interfering with his family's quiet enjoyment of their home. In addition, the silage bales created a risk of aspergillosis to the breeding falcons by affecting air quality potentially causing respiratory infections.

(25) On 3 May 2022 attempted to remove the storm drain covers from the access road.

(26) On 3 May 2022 Adrian Thomas falsely and maliciously accused Martin and Scott of homophobia, switching off Mr Thomas's water supply and poisoning his apple trees.

(27) On 11 May 2022 removed the curb stones diverting rainwater across the Lane to the Drain. Consequently, on 17th May 2022 Martin's property and Scott's property flooded.

(28) On 16 June 2022 installed a cattle grid next to the entrance to Scott's property in order to generate a noise disturbance. The grid was useless as a cattle grid, not extending across the road so livestock could walk around it. The grid also caused a serious injury to Martin's dog.

(29) On 4 July 2022 stacked more silage bales to block the sea view from Scott's property and create a risk of aspergillosis to the falcons.

(30) On or about 6 July 2022 excavated in the location of the septic tank in order to fabricate a complaint against Martin. On or around 21 July 2022 Martin duly received a report from the Council which stated that, "*We have received a report via the local Councillor that your septic tank is currently discharging/has discharged onto your neighbours land*".

(31) On 17 October 2022 Adrian Thomas falsely accused Roger Nicholas of filling the cattle grid with rubble. He proceeded to threaten to dump the rubble onto Scott's property.

(32) On 18 October 2022 trespassed onto Scotts'property and dumped rubble from the cattle grid. Upon Scott threatening to call the police Mr Thomas's contractor moved the rubble to opposite Scott's driveway to prevent him parking his vehicles.

(33) On or around 7 November 2022 erected a fence around the septic tank to prevent Martin and Scott installing a new soakaway.

(34) On 26 November 2022 made further false and malicious complaints to the Environment Agency ("EA") and Council prompting investigators to visit the claimants. Mr Thomas informed (i) the EA that Martin's septic tank had discharged following heavy rain (ii) the Council that the septic tank was overflowing onto a public footpath. Representatives from the EA and the Council visited the site and once again, no evidence of any wrongdoing was found.

(35) On 26 November 2022 Adrian Thomas used his van to block access for works being carried out by Martin and Scott to install a new septic tank. He then threatened violence against Scott and his family, warning "*if you don't stop I will hurt you and your family*".

(4) Alleged Acts of Harassment (Mr Thomas's Case)

46. Mr Thomas alleges that Martin and Scott have engaged in "*frequent acts of harassment*" against him which include the following:

(1) On 25 June 2021 Scott came on to the UCE's property and destroyed signs which Mr Thomas had erected.

(2) On 6 November 2021 Scott came on to Field No: 8440 (which forms part of UCE's land and is outside Pengelly) and shouted threateningly and abusively at Mr Thomas.

(3) On 5 May 2022 Mr Thomas was in his vehicle again in Field No: 8440 on UCE's land. John Brady, an employee of ROP who acts in accordance with instructions given by the first and/or second claimant, then trespassed on to UCE's land where he confronted Mr Thomas and threatened him, saying words to the effect that Mr Thomas had been causing "*lots of problems*" and that he, Mr Brady, was there to sort them out. Feeling threatened and fearing for his safety, Mr Thomas then drove off and Mr Brady proceeded to chase him, using a white van, for some 3 miles.

(4) On 27 July 2022 John Brady blocked the exit gates from UCE's land and came up to Mr Thomas (who was sitting in a vehicle) and insisted on speaking to him. Mr Thomas reminded him that correspondence should be through solicitors, but Mr Brady said that he does not deal with solicitors. Again, Mr Thomas felt extremely threatened by Mr Brady.

(5) On 28 July 2022 John Brady trespassed on UCE's and obstructed the entrance so as to prevent builders acting for Mr Thomas and UCE from gaining access. Mr Brady then demanded that Mr Thomas should come to see him. At the same time, Mr Brady gave instructions to a third party to drive Mr Thomas's cattle on to the public highway.

C. LEGAL PRINCIPLES

47. As appears from my analysis below, some all-embracing submissions on the law have been advanced, and Mr Mitchell and Mr Auld asked me to reach materially different conclusions in relation to the principles of the law of nuisance and negligence applicable (or, as Mr Auld contended, not applicable) to this case.

48. It is therefore necessary to address those principles at some length.

(1) NUISANCE

(A) Core Principles

49. In *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2024] AC 1, at [8]-[47], Lord Leggatt, drawing heavily upon the decision of Bramwell B in *Bamford v Turnley* (1862) 3 B&S 66, 83, set out the core principles of the common law of private nuisance applicable to the facts of that case. *Fearn* concerned a claim in nuisance based upon the intrusion to the claimants' privacy (in their own homes) created by the public's use of the external viewing gallery situated on the top floor of the neighbouring Tate Gallery. Lord Leggatt gave the majority decision which found that the Tate's use of the viewing gallery did give rise to liability to the claimants under the common law of nuisance and which remitted the case to the High Court to determine the appropriate remedy for that nuisance.

50. *Fearn* was a case based upon interference by "looking in", visual intrusion impacting upon the claimant's enjoyment of his property, rather than one concerned with the sights offered up to the claimant by the use of the defendant's land.

51. It is necessary to set out my understanding of principles clarified or established by *Fearn* because of the parties' radically different interpretations of the decision. For example, in the application notice by which the defendants had hoped to secure the dismissal of ROP's claim before trial (but which was a summary judgment I declined to entertain on its merits at the pre-trial review) they said of the nuisance allegation based on visual disturbances:

> "There is no allegation that crane jibs over-sailed the aviaries or otherwise trespassed. The sight of such cranes alone cannot constitute a nuisance in law. If 3C's falcons were likely to suffer stress from seeing such cranes operating, the duty was on the Claimants to obscure the view."

52. My reading of *Fearn* before the PTR led me to conclude that there was much to be argued about here and that argument and a decision on those points alone (there were others extending to the suggested effect of the veterinary evidence) would have exceeded the unfeasibly ambitious one hour time estimate given by the defendants for the summary disposal of ROP's claim.

53. For the purposes of this judgment, I distil the following propositions from Lord Leggatt's comprehensive analysis of the relevant principles (references are to paragraphs in his judgment in *Fearn*).

(1) The law of nuisance is concerned with the wrongful interference with the claimant's enjoyment of rights over his land. This extends to any buildings upon it and to rights appurtenant to his ownership interest. The focus is upon the diminution in the utility and amenity value of the land as opposed to harm to the person. Nuisance is therefore a property-based tort. The claimant must have a legal interest in the land in order to have standing to sue. ([9]-[11]).

(2) There is in principle no limit upon the types of activity which may constitute an actionable nuisance. Nuisance can be caused by any means, distinct from acts of trespass, which materially interfere with the claimant's enjoyment of such rights. The cause of the interference may be something physical and/or tangible (such as invasive plants spreading from the defendant's property) or intangible (such as noise, fumes, vibration or excessive light emanating from it). In principle, the sight offered to the claimant by the use to which the defendant's property is put may be so offensive as to constitute a nuisance. ([12]-[17]).

(3) Not all causes of significant annoyance to the claimant in his enjoyment of his land will be actionable as a nuisance. The need to balance the (sometimes) conflicting rights of neighbouring landowners, or the principle of reciprocity often described in terms of "give and take", means that the court must have grounds for concluding that the defendant's activity is unlawful. Only if it is unlawful will it then be appropriate to label it, in what otherwise would be question-begging and legally

vague terms, as an "undue" or "unreasonable" interference with the claimant's enjoyment. ([18]-[20]).

(4) Any decision that the defendant's activity is unlawful (and, therefore, constitutes an undue or unreasonable interference with the claimant's enjoyment of his land) must at the first stage rest upon the twin-limbed conclusion that there has been a s*ubstantial* interference with the *ordinary* use of the claimant's land. The test of whether or not the interference is *substantial* is an objective one and is applied by reference to the standards of an ordinary or average person in the claimant's position. It is aimed at eliminating small or trifling inconveniences to leave those which may sensibly be categorised as actionable interferences. That the defendant's activities must interfere with the ordinary use of the land is aimed at eliminating unjustified claims which are instead founded upon interferences with land use that is out of the ordinary. Lord Leggatt endorsed the observation in a decision of the Privy Council in 1902: "*A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure*." This limb of the test therefore requires the court to consider the type of property in question within its surrounding neighbourhood: 'the locality principle'. It is contrary to the notion of "give and take" that a claimant should, by using his land for purposes beyond the ordinary and which carry with them particular sensitivity to neighbouring activity, increase the potential liability of his neighbour under the law of nuisance. ([21]-[26]; [35]-[36] and [38]).

(5) The same notion of the common and ordinary use of land applies to the next stage of any determination of liability which is to consider the nature of the defendant's activities upon his land. In the absence of malicious behaviour (see below), if they constitute no more than the common and ordinary use of his own land *and* are done with proper consideration for his neighbours – i.e. "*conveniently done*" in the words of Bramwell B - then he will not be liable. ([27]-[28]).

(6) Save perhaps in a case where the design or construction of a building is "*so far from anything that could actually be expected*", that will be so even if the design attributes of the claimant's property means that the claimant is abnormally sensitive to such activities. However, if the defendant's activities fall outside the common and ordinary use of his land then it is no defence to say that the design of the building occupied by the claimant means the claimant is particularly sensitive to their consequences. Neither is it a defence to say that the claimant's building might have been differently constructed or designed so as to avoid the nuisance. It is the utility of the actual land, including the buildings actually constructed on it, for which the law of private nuisance provides protection, not for some hypothetical building of "average" or "ordinary" construction and design. ([62]-[75] and [83]). It is possible that there could be an "extreme case" where the design or construction of a building is so unusual and far from anything that could actually be foreseen that its physical attributes might give rise either to a claim or to a defence to a claim in nuisance. ([76]-[79]).

(7) The application of the second limb of the test of lawfulness – extended to consideration of the ordinary use of the defendant's land - will therefore enable the court to reach a decision by reference to what, again, would otherwise be an insufficiently principled observation about the defendant's "reasonable" or

"unreasonable" use of his land. ([29]-[33]). It follows that the locality principle comes into play again when considering the nature of the defendant's activities on his land.

(8) Subject to any agreement not to do so or impermissible interference with a neighbour's property right, there is a fundamental right to build (and demolish) structures on one's own land. It follows from this (and the fifth proposition above) that interference with neighbouring land which results from construction or demolition work will "*not be actionable provided it is, in Bramwell B's phrase, "conveniently done", that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours*." ([36]-[37]).

(9) There is a qualification to this potentially exculpatory second limb of the test, based on the defendant's ordinary use and occupation of his land, where he is shown to have acted maliciously. Lord Leggatt cited the judgment of Bramwell B in *Bamford v Turnley*, in explaining that activities to be categorised as the ordinary use of the defendant's land will not be treated as nuisances "*unless done maliciously and without cause*". ([27]. Lord Sales, at [162], cited another passage in the same judgment, at 82, where Bramwell B observed "*The defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the [claimant's] habitation by causing a sensible diminution of the comfortable enjoyment of it.*"

54. In addressing the point summarised in the fourth sub-paragraph above Lord Leggatt referred (at [25]) to two cases in saying the law of nuisance will not protect against injury to particularly delicate or sensitive operations: *Robinson v Kilvert* (1889) 41 Ch D 88 and *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Ltd* [1902] AC 381. Mr Auld placed particular reliance upon that passage in Lord Leggatt's judgment. In both of those cases the claim in nuisance failed. In *Robinson v Kilvert* the plaintiff's brown paper (sold by weight) was affected, through drying out and becoming brittle, by a level of heat from the defendant's basement premises which would not have affected paper generally. In *Eastern and South African Telegraph Co* the plaintiff's submarine telegraph cable and receiving instruments were vulnerable to interference to even minute currents of electricity escaping from the conductor used in the defendant's operations. The plaintiff's later construction of a twin-core cable to overcome the problem showed that the defendant's operations only affected instruments made in a certain way.

55. The eighth point above illustrates that a nuisance be actionable even if it is temporary, provided the interference with the claimant's use of his land is substantial: compare *Barr v Biffa Waste Services Limited* [2012] EWCA Civ 312; [2013] QB 455, at [36(iv)] per Carnwath LJ. As a matter of principle, therefore, a neighbour's building work in the otherwise unobjectionable development of his land is capable of creating a nuisance.

(B) The locality principle

56. The locality principle forms a central part of the present case in which the falcons in the Aviary are sensitive animals. As I read the decision in *Fearn*, a "special use" – which involves a claimant placing the principles of reciprocity and give and take under excessive strain – falls to be identified by reference to what is *not* the common or ordinary use of his land having regard to the locality. Whether land is being put by the claimant to special or unusual use, so that he has no actionable complaint about interference with that use if the neighbour is only using his land for ordinary purposes, cannot be answered in isolation from the locality.

57. Considering the position in relation to the defendant's use of his land, in *Sturges v Bridgman* (1879) 11 Ch D 852, at 865, Thesiger LJ reasoned: "*what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*."

58. In my judgment, it is not open to the court simply to categorise the claimant's use of the land as a special or sensitive one (interference with which will not support a claim in nuisance) without considering whether it is too sensitive for the surroundings where it is taking place. Only an assessment of the surrounding locality will determine whether the claimant is impermissibly seeking to "*increase the liabilities of his neighbour*" or, instead, claiming no more than an immunity from interference of a kind that might be reasonably expected in the locality. This is especially so when the potential liability of that neighbour arises out of *temporary* activity, such as particularly noisy building work carried out on otherwise generally peaceful agricultural land, which might be "*conveniently done*" at certain times to accommodate the sensitivity of the claimant's use; as opposed to an exposure to liability which would fetter the defendant's use of his land more permanently.

59. Otherwise, there would be certain uses of land, including business or trade use, which, regardless of the character of the surrounding neighbourhood in which that use took place, would be unprotected by the law of nuisance (save possibly in the case of malicious interference with that use). To take an extreme example, if the operation of two separately owned aviaries on adjoining land in the middle of nowhere each constitutes a special use, even if (as the presence of both indicates) the locality is an ideal place to breed falcons, the owner of each aviary would not benefit from *any* protection by the law of nuisance against other non-avian activity by his neighbour (however intrusive and heedless they might be) which substantially interferes with his breeding business.

60. Although I understood part of Mr Auld's argument to be that ROP cannot maintain a claim in nuisance because its falcons are particularly sensitive, in my judgment, therefore, *Fearn* does not support that unqualified submission. It is important to bear in mind that, whereas most of the earlier authorities address this question in the context of a regular or continuing use of the defendant's neighbouring land, ROP's allegations of nuisance are based upon isolated acts of interference. They involve claims arising out of "temporary" activity on UCE's land (in the sense addressed above) rather than its long-term use for growing grass or crops or grazing livestock. They also concern a particular sensitivity in ROP's operations during the breeding season rather than all year round.

61. Further, in my judgment, it is important to note that the locality principle is just that. It requires the court to assess the immediate neighbourhood. I say this because Mr Auld made points about how the Aviary might have been built some metres further away

from UCE's land. The locality principle does not descend to that type of detail and that line of argument appears to run up against the sixth proposition in paragraph 53 above.

62. In *Ray v Windrush Riverside Properties Limited* [2022] EWHC 2210 (TCC) I was required to consider the locality principle (and the notion or "give and take" or "live and let live") in the context of a claim for alleged nuisance caused by the emission of noise and smells from restaurant premises in Bourton-on-the-Water in the Cotswolds. The focus was upon the nature of the use each party wished to make of its property in that busy tourist town. This decision pre-dated that of the Supreme Court in *Fearn* though it referred to the Court of Appeal's decision in the case and also to the decision of the Supreme Court in *Lawrence and another v Fen Tigers and others* [2014] UKSC 13; [2014] AC 822 which Lord Leggatt addressed in *Fearn*.

63. I also referred to the decisions of the House of Lords in *Southwark London Borough Council v Mills* [2001] 1 AC 1 and *Cambridge Water Co v Eastern Counties Leather* [2004] 2 AC 264. In *Southwark*, at 20C-21A, Lord Millett had addressed the fifth point in paragraph 53 above by saying a substantial interference with the neighbour's use and enjoyment will not be actionable if is the consequence of acts which are "necessary" for the common and ordinary use and occupation of land and which are done with proper consideration of the interests of neighbouring properties. In *Fearn*, at [31], Lord Leggatt recognised and affirmed that Lord Millett was applying the test laid down by Bramwell B in *Bamford v Turnley*.

64. In *Ray v Windrush*, I said:

> "139. This shows that the concept of a reasonable user extends beyond consideration of the user's activities as if he is splendidly isolated in the enjoyment of his own property. It is also about what the neighbour might reasonably be expected to put up with. Although Mr Wignall and Ms Jabbari did not refer to the decision, I note that the Court of Appeal has observed that "*the broad unifying principle in this area of the law is reasonableness between neighbours*": see *Fearn and Others v The Board of Trustees at the Tate Gallery* [2020] EWCA Civ 104, [36]. In that case the court also clarified that the "necessity" of the defendant's acts, which provides him with a defence despite the loss of amenity of the claimant's land, does not mean that the land would be incapable of occupation without the acts being done at all. Instead, necessity in this context draws its meaning from the common and ordinary use and occupation of land. That is why an assessment of the locality is all important.
>
> 140. The objective elements of the test to determine whether or not what the neighbour considers noisome is in law an actionable nuisance, imported by the concept of a reasonable user having regard to the locality, also mean that the court will approach the question of what the neighbour might reasonably be expected to put up with by applying the standards of the average person. On this aspect, a number of subsequent cases have applied the test formulated by Knight Bruce V.-C. in *Walter v Selfe* (1851) 4 DE G & Sm 315, at 322, where he put the point as follows:
>
> "… ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, nor merely

according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

141. One of those later cases was *Emms v Polva* [1973] EDG 906 where Plowman J found that the plaintiff (a playwright whose work required a high degree of concentration) was more sensitive to noise than the average person and accordingly he expected a higher degree of quiet than would the average person. Nevertheless, even making allowance for the claimant's greater sensitivity, the judge found that the noise created by the defendant's operations did constitute a nuisance.

142. In the note of its decision in *Whycer v Urry* [1956] JPL 365 the Court of Appeal said the test in *Walter v Selfe* was not satisfied in circumstances where the plaintiff's business and profession as an ophthalmic optician and occulist meant that his work was of an especially delicate character; and a claim in nuisance was not available to him as a result of the noise and vibration caused by the defendant's dancing school on the floor above.

143. In *Whycer v Urry* the defendant had been running his dancing school for at least two years before the claimant took up occupation of the floor below. As Mrs Ray's proposed holiday let business had not begun to operate by the start of the nuisance period, I asked Ms Jabbari whether she took any point about Mrs Ray's concerns being nascent ones so far as the impact of the noise and smell from St Kevins upon that yet-to-be-established business was concerned. Ms Jabbari confirmed she did not and in my judgment that was the correct position to adopt when the authorities focus not upon the history (if any) of the claimant's use of the neighbouring land but instead upon whether the defendant is unduly interfering with the use which the claimant would like to enjoy. Whether or not that use is a reasonable one to be protected against such interference should not necessarily depend upon it being an established use before the defendant's activities commence, even though that will often if not usually be the case.

144. Past use of the parties' respective properties must, however, feed into an assessment of the locality (the Bermondsey versus Belgravia point) for the purposes of conditioning their respective expectations when applying the principle of give and take. Similarly, the previous grant and implementation of planning permissions (and any conditions attached to them) for the development of those or other properties in the neighbourhood will be relevant to that evaluation, as the Supreme Court confirmed in *Lawrence v Fen Tigers*. However, the decision of the majority in that case was that the grant of planning permission for the development of the defendant's property, which then leads to the alleged nuisance, cannot be a major determinant of the issue of liability."

65. I believe these observations, with their focus upon the parties' respective uses of their properties, are consistent with the later decision of the Supreme Court in *Fearn*. One of the issues in the present case is whether or not the Aviary, like Mrs Ray's desired place of tranquility for clients staying at her cottage close to the centre of the busy Cotswold town, is to be categorised as special and unusual use of the Nicholases' land.

66. So far as the point in paragraph 143 of *Ray v Windrush* is concerned, it is clear that "coming to a nuisance" is no defence: see also *Fearn* at [42] and [46]. Lord Leggatt's judgment addressed the point made in paragraph 144, by reference to *Lawrence*, by observing that the planning laws are not a substitute or alternative for the protection provided by the common law of nuisance: see *Fearn* at [109]-[110]. The eighth point identified in paragraph 53 above, about the defendant's freedom to build on his land, addresses matters from the common law perspective. I imagine that point about the significance of planning permission would be of some importance in the type of extreme case contemplated by Lord Leggatt where the design or construction of a building might determine the outcome of a nuisance claim.

67. Both the Aviary and UCE's barn (to the extent already built) have been built in accordance with planning permission from the local authority. Applying the decision in *Lawrence*, those respective planning permissions are relevant to though not determinative of a decision which reflects the application of the locality principle; and also consideration of whether or not UCE's barn-building activity was "conveniently done." The Aviary was built (or very substantially built and in use) before the defendants' activities of which the claimants complain. Those activities either were or are capable of being viewed as agriculture related. It therefore follows that Lord Leggatt's reference to the potential need to consider the point, discussed obiter in *Lawrence v Fen Tigers*, as to whether the defendant's use of land which pre-dates a change in use of the claimant's land (and upon which the claimant relies to allege nuisance) may support a defence by contributing to the character of the neighbourhood is not relevant here: see *Fearn* at [46].

(C) Malice

68. Neither *Ray v Windrush* or *Fearn* concerned an allegation that the defendant's operations were conducted with an element of malice. Activities which substantially interfere with the claimant's enjoyment of his land and which are "*done maliciously and without cause*" (the phrase in *Bamford v Turnley*) could hardly be said to have been done with proper consideration of the interests of neighbouring properties and could not be excused by the notion of give and take. Such malicious interference with enjoyment would be completely at odds with the principle of reasonableness between neighbours.

69. *Bamford v Turnley* did not involve an allegation that the defendant had acted maliciously in erecting a temporary brick kiln on his land (temporary in the sense that it was for burning bricks to build his own house on the land). Instead, as appears from the passage in the judgment referred to by Lord Sales in *Fearn*, Bramwell B relied upon the proposition that such activity would be a nuisance if done "*wantonly or maliciously*" to conclude that the burden must shift to the defendant to establish that it is nevertheless part of the common and ordinary use of his land, and done with proper consideration for his neighbours, if he is to escape liability. The defendant failed to do so and judgment was entered for the plaintiff.

70. In *Christie v Davey* [1893] 1 Ch. 316 the parties occupied adjoining semi-detached houses separated by a not very sound proofed party wall. The defendant had reacted to the singing and playing of music in the Christie household (by members of the family, a lodger and students of Mrs Christie's music classes), and of which he had complained

in letters, by making his own excessive and unreasonable noise through the playing of instruments (in "*mock concerts*"), blowing whistles, knocking on trays or boards, hammering, shrieking and shouting, and otherwise making loud noises. North J granted an injunction to restrain this activity on the basis that he was "*persuaded that what was done by the Defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the Defendant's house to use if for the purpose of vexing and annoying his neighbours*." The judge said he would have taken an entirely different view of the case had it been one where the noise between "*two sets of persons both perfectly innocent*." The terms of the injunction did not prevent the defendant from using his house for the legitimate purpose of his business (as an engraver of wood) or from continuing with his musical evenings as they were before his retaliatory conduct.

71. In *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 the plaintiff company's business was that of breeding silver foxes in a number of pens on land which was partly bounded by land belonging to the defendant. The defendant had objected to a notice board advertising the fox farm on the basis that he considered it would be detrimental to his plans for the development of his land as a building estate. The defendant had threatened that, if the notice board was not removed, he would fire shotguns during the breeding season as close to the pens as could be so that "*you will not raise a single cub*." That threat was carried out by the defendant through his son, using bird-scaring cartridges, over four evenings in April 1935. Macnaghten J (at p. 471) accepted the plaintiff's evidence about the adverse impact this had had on successful breeding and (at pp. 477-8) granted an injunction restraining a nuisance by the discharge of firearms or making other loud noises during the breeding season of 1 January to 15 June. He did so having considered a number of authorities (including *Christie v Davey*) which addressed the significance of malicious wrongdoing in the law of private nuisance; and despite the defendant's argument that operating a silver fox farm was not an ordinary use of the land and the noise of the guns would not have caused alarm to the type of animal usually to be found on Kentish farmland. The headnote to the case indicates that damages were also awarded but the report contains no details about that.

72. Mr Auld submitted that malice has to be the dominant purpose motivating the defendant's actions if a liability in nuisance is to be established when it would not otherwise be made good. He relied upon the finding in *Christie v Davey* that what the defendant did was "*done only for the purpose of annoyance*". Indeed, Mr Auld went further in submitting that, as ROP had no right to a view over UCE's land, even driving a crane up and down UCE's land with the sole purpose of disturbing the falcons would not be actionable. He said that is because it is not an actionable wrong to do on one's own land something one is entitled to do. Mr Auld referred to a passage in *Clerk & Lindsell* (24th ed) at para. 1-72 to the effect that motive on the part of the defendant, in the absence of other wrongdoing, cannot give rise to liability.

73. That second submission appears to me to run up against the essence of the liability in nuisance as explained in *Fearn*. As I observed in response to the submission, Mr Davey would have had the right to bang on his own wall, and to make noises in his own home, but that did not mean he was not liable in nuisance given the motive behind his acts. *Clerk & Lindsell*, at para. 1-74 citing *Christie v Davey*, goes on to state: "*In nuisance, conduct otherwise tolerable will be regarded as an unreasonable interference if pursued with an improper or spiteful motive*." It cannot be neighbourly

conduct, not going beyond the principle of give and take, or more pertinently, live and let live, to exercise one's landowning rights so as to inconvenience the life of a neighbour.

74. In support of his first point Mr Auld relied upon the decision of the House of Lords in *Horrocks v Lowe* [1975] AC 135, at p. 149, where Lord Diplock said the desire to injure must be the dominant motive and knowledge that it will have that effect will not be enough if the defendant is either acting in accordance with a sense of duty or in a bona fide protection of his own legitimate interests. That decision concerned a claim in defamation. The issue was whether or not the defendant had been actuated by express malice, such as deprive him of the qualified privilege attached to the occasion at which the defamatory words were spoken. ROP's claim is not a defamation case (nor, for that matter, a claim founded upon a conspiracy to injure) but a nuisance claim. Allowing for potential shifts in the evidential burden, a claim in nuisance which is based on otherwise unobjectionable acts being actionable, because they were done maliciously, is one on which the claimant bears the legal burden of proof to be satisfied on the balance of probabilities.

75. Again, in my judgment, Mr Auld's submission does not accurately reflect the law of nuisance. If it did it would be almost impossible to establish a claim of the kind contemplated by the ninth proposition, to the extent that the courts would have to question whether an exception for cases of malice really exists. It would almost always be an answer for the defendant to say he did "have cause" to do what he did; that his actions did not go beyond the ordinary exercise of landowning interests and claimant cannot prove otherwise. Yet in the *Hollywood Silver Fox Farm* case Macnaghten J referred to the case of *Ibbotson v Peat* 3 H&C 644 where the court rejected a defence that letting off fireworks, rockets and bombs (for the purposes of frightening away the grouse that had been attracted away from the Duke of Rutland's land to Mr Ibbotson's land) was justified because they were the Duke's birds. Again, it was no defence for Mr Davey to say he was banging his own wall.

76. In the cases of *Christie v Davey* and *Hollywood Silver Fox Farm*, Mr Davey and more so Mr Emmett may have been a little foolish in trailing their acts of nuisance as clearly as they did but I do not regard the exception as limited to cases where the requisite malice can be established by relying on the defendant's own previous statements of unlawful intent.

(D) Liability of a Director

77. Mr Auld also submitted that, if ROP established an actionable nuisance, including one resting on a finding of nuisance, then that could only lead to liability on the part of UCE and not also Mr Thomas personally. He said UCE owned the land and any such acts of nuisance were caused by those working on behalf of the company. He cited *Clerk & Lindsell*, at paras. 5-75, 5-79 and 5-81 for the propositions that a limited company may be sued for wrongs involving harassment, fraud or malice and in general a director is not liable for the torts committed by his company, even if he is its sole director and shareholder. The "mere fact" of his directorship will not lead to liability.

78. That is the general position in relation to liability not, without more, attaching to the office of director, at least in cases where the director is not alleged to have conspired in the wrongdoing or to himself have been guilty of deceit or fraud (see the discussion in *Clerk & Lindsell* at paras. 5-82 to 5-83 of the leading authorities on the question of attribution of the latter types of wrongdoing to the company). In cases outside those situations, the extent of the director's personal involvement in the company's tort will have to be carefully examined to see whether he committed, authorised, directed or procured the company's acts or, in a claim of negligence, himself assumed a duty of care to the claimant. The language used in Mr Thomas's own claim of harassment (the fifth allegation relating to Mr Brady's obstruction of workers) illustrates the point.

79. I deal separately below with Mr Thomas's potential liability "as a director" (when, as explained below, that is not an accurate way of expressing the point) under ROP's alternative claim in negligence.

80. In addressing the defendants' submission it is necessary to drill down a little further than the textbook passages relied upon by counsel and consider some of the authorities mentioned in those passages.

81. The court needs to test the claim against the director personally though a "*fact-sensitive and context-dependent*" inquiry as to whether he would be liable as a primary tortfeasor if the company had not existed. In expressing matters that way (by reference to a more recent decision of the Court of Appeal) *Clerk & Lindsell*, at para. 5-80, cites the decision of the Court of Appeal in *C Evans Ltd v Spritebrand* [1985] 1 WLR 317.

82. That was an infringement of copyright case and the decision was given on the director's unsuccessful application to have the claim against him struck out. Slade LJ, at 324A, introduced his analysis of the authorities by referring to "*judicial dicta of high authority ... which suggest that a director is liable for those tortious acts of his company which he has ordered or procured to be done*". He recognised that they "*clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs*." Slade LJ also made it clear that the strike out application was not the appropriate occasion for the court to attempt a comprehensive definition of the circumstances in which a director who has authorised, directed and procured a tortious act to be done will be held personally liable.

83. Slade LJ said, at 330H, that the nature and extent of participation in the tortious act which will render the director liable as a joint tortfeasor was an "*elusive question*".

84. The more recent Court of Appeal decision, referenced in *Clerk & Lindsell* in support of the proposition that the answer to that question will depend upon an investigation of the facts (beyond the fact of directorship) and context, is *Barclay-Watt v Alpha Panaretti Public Limited* [2022] EWCA Civ 1169.

85. That case concerned an unsuccessful allegation that the second defendant director was personally in breach of a duty to warn the claimants about certain currency risks (as the first defendant company was found to have been) or was liable as an accessory to the tort committed by the company. Males LJ addressed the authorities (most of them intellectual property cases) concerning the basis of accessory liability of a director. He noted, at [62] that they indicated the danger of "*attempting to formulate what may come*

to be regarded as prescriptive principles of general application in this fact sensitive and policy-driven area." He said, at [66], that the liability of a director (or senior manager) may differ according to the nature of the tort in question.

86. Males LJ said the decision about a director's liability requires a two-stage analysis: see [70]-[83]. The first stage is to consider whether "*the individual defendant's participation in the tort was sufficient to render them liable as a joint tortfeasor*". If so, the next stage is to consider whether the fact of directorship provides a defence to the director who says he was doing no more than carrying out his constitutional role within the company. That defence is a narrow one, albeit not necessarily limited to voting at board meetings. In particular, it would be anomalous if personal liability (or not) were to depend on the formality of a board resolution.

87. If the court were to find that the company's state of mind is an essential ingredient of liability (c.f. the allegation of malice) then equivalent actual or constructive knowledge on the part of the director will need to be established: compare *Evans Spritebrand* at 329E and 331A. However, as the sole director of the UCE, Mr Thomas was its directing mind and will. If the company is to be attributed with malice then that can only be done through him, so he too will be found to have been motivated by malice to cause it to act as it did.

88. Mr Mitchell pointed out that some of the workers who gave evidence on behalf of Mr Thomas had worked for him personally, in the building works at Pengelly, and not just UCE. He also expressed concern that UCE may be a company without any real assets (though it owns the land) but neither of those points are material to the issue of liability in the claim in nuisance so far as it rests upon the use of UCE's land close to the Aviary and whether Mr Thomas personally could be liable.

89. I should note that Mr Auld's submission could not, I think, extend to ROP's complaint about the firework display on 6 November 2021. Although Mr Thomas said the location was fixed by reference to a bonfire of some leftover straw from the pigs on the land, it is clear that the display was for personal enjoyment and not to be categorised as corporate activity of UCE.

(E) Damages for Nuisance

90. The Amended Particulars of Claim seeks injunctive relief which in part is aimed at preventing excessive noise and visual disturbances in the vicinity of the Aviary as well as damages in respect of losses ROP is said to have suffered in respect of dead falcons, non-breeding falcons, eggs lost and ongoing breeding losses. The damages claim in respect of the loss of fertile falcons and the chicks they would otherwise have reared is an economic loss to its business.

91. The Amended Defence pleads that, even if ROP had suffered those losses then "the defendants will object that they are too remote to be recoverable *in particular* because many are in the nature of pure economic loss" (my emphasis). This point was not developed in Mr Auld's skeleton argument for the trial (or the skeleton for the ineffective summary judgment application listed at the PTR, which said simply said that ROP had no real prospect of establishing the pleaded losses). The claimants'

closing submissions engaged with the point only by saying (in relation to ROP's claim for ongoing breeding losses) "*the notion of pure economic loss raised by the defendants does not apply*."

92. However, in his closing submissions Mr Auld referred to the decision of the Court of Appeal in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 in submitting that only losses resulting directly from physical damage (such as a falcon dying or breaking its eggs) is recoverable but other losses (such as breeding losses over future years) are too remote.

93. In Section F(8) below I question whether, as a matter of analysis, even ROP's claim in respect of future breeding losses is properly to be treated as a claim for pure economic loss, unrelated to the notion of harm (i.e. physical damage) to the breeding birds over a 10 year period.

94. Mr Auld's submission struck me at the time as a very broad submission and further reflection upon it has led me to conclude it raises wider questions than the one addressed in *Spartan Steel*. At that time, and in the light of the distinction drawn by him between the 'property damage' of the 3 falcons which died in 2022 and loss of profit in later breeding years, I raised the question as to whether those falcons should be treated the same as Spartan Steel's furnace rather than the "melts" which it produced. For a modern summary of the *Spartan Steel* principle in cases of negligence, see *Armstead v Royal & Sun Alliance Ltd* [2024] UKSC 6, at [19].

95. The defendants' submission questions the basis on which damages are awarded under the law of private nuisance.

Remoteness

96. The decision in *Spartan Steel* of course concerned a claim in negligence and concerned a negligent physical act which disrupted the electricity supply to the claimant's furnace. The majority in the Court of Appeal held that the claimant could recover damages for the lost profit on the melt which had to be poured away to prevent the metal solidifying and damaging the furnace but not the lost profit on the four further melts that would have been completed but for the power cut.

97. Likewise, the decision of the Privy Council in *The Wagon Mound (No. 1)* [1961] AC 388 (upon which Edmund Davies LJ relied in his dissenting judgment in *Spartan Steel*) was concerned with a claim in negligence based upon the spillage of furnace oil in Sydney Harbour. Mr Auld did not rely upon this decision (or any authority beyond *Spartan Steel* in support of the pleaded defence) but the principle established by it, which precludes recovery for consequential loss which is too remote from the wrongdoer's act, requires the court to identify the type of damage that the negligent defendant ought reasonably to have foreseen. The Board remitted to the Supreme Court of New South Wales the issue of whether or not the otherwise too remote damage resulting from the fire at the claimant's wharf might be recoverable in nuisance, if not in negligence.

98. The later decision of the Privy Council in *The Wagon Mound (No. 2)* [1967] AC 617 (which concerned a different claim by the owners of two vessels at the wharf arising out of the same oil spillage) concerned a claim in public nuisance not private nuisance. Many of the authorities cited in the judgment of the Board were cases of public nuisance, though some involved a private nuisance and the decision addressed claims of nuisance generally when deciding that, as with negligence, foreseeability of loss is an essential element of liability. In giving the judgment, Lord Reid said, at 640B-D:

> "It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable."

99. In *Northumbrian Water Limited v Sir Robert McAlpine Limited* [2014] EWCA Civ 685, at [18], the Court of Appeal concluded that "*foreseeability of harm of the type suffered by the plaintiff is necessary for the defendant to be liable in damages for nuisance*." That was a case of private nuisance, involving an escape of material (concrete which had then set) which caused physical damage to the claimant's sewer. The claimant had brought a claim for damages in respect of the expense it had incurred in unblocking the sewer. The court reached that conclusion by reference to authoritative statements about the nature of the liability for nuisance which were made by the House of Lords in two earlier decisions that were in fact directly concerned with the rule in *Rylands v Fletcher* (1868) L.R. 3 H.L. 330.

100. One of those decisions was *Cambridge Water* (see paragraph 63 above) where the claimant water company had sued the defendant in negligence, nuisance and under the rule in *Rylands v Fletcher* seeking an injunction and damages arising from the pollution of its borehole by solvents used in the defendant's tanning business. The damages were sought in respect of the cost of developing an alternative borehole which was up-catchment from the defendant's premises. The other decision was *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1 where the claimant relied upon *Rylands v Fletcher* in seeking to recover damages for the costs it had incurred in taking remedial steps to reinstate the support for its gas main which a prolonged and undetected leak from the defendant's water pipe had caused to be eroded.

101. As already noted, the interference with the claimant's property in *Northumbrian Water* was also a tangible one, causing physical damage, rather than intangible interference with the amenity of utility of the claimant's land without attendant physical damage to his property. However, unless the case could be brought within the rule of strict liability under *Rylands v Fletcher* the Court of Appeal held it was still necessary to show that the type of damage suffered by the claimant was reasonably foreseeable if there was to be a claim in nuisance.

102. With the exception of Mr Auld's reliance upon *Spartan Steel*, counsel did not engage with the legal principles governing the recoverability of damages under the tort of private nuisance. Mr Mitchell's skeleton argument proceeded on the basis that ROP needed to establish that its losses were the result of the "damage" caused to the Aviary by the defendants' torts (nuisance and negligence being pleaded) and were foreseeable. His written closing submissions recognised that, if the court were to grant injunctive relief preventing interference with the Aviary during future breeding seasons, then that would have the effect of capping ROP's losses to those suffered in the period 2022 to now.

103. *Northumbrian Water* establishes that damages for nuisance can only be recovered where the type of loss suffered by the claimant is one that the defendant could either reasonably have foreseen or (if it established that he has acted maliciously in committing his acts of nuisance) can be said to have intended. Although that case concerned loss arising out of physical damage to the claimant's property, there is in my judgment no basis for concluding that the test of reasonable foreseeability does not apply to a nuisance claim for damages for loss of amenity. If the harm is intended and the result of malicious acts then questions as to the remoteness of damage resulting from it do not really arise.

104. Nor in my judgment is there any reason why, as in a negligence claim, the burden of establishing that the loss is too remote to be recoverable (i.e. that it is not the type of loss that was reasonably foreseeable at the time of wrongdoing) should not be upon the defendant: see *Armstead* at [59]-[64].

Pure Economic Loss

105. This leaves Mr Auld's further, related point (relying again upon *Spartan Steel*) that there can be no recovery in nuisance for pure economic loss. This was not a point I was required to address in *Ray v Windrush* where, in addition to a claim for injunctive relief, the claimant sought damages for loss or rental income (past and future) from the affected property which was part of her property-letting business. That was a claim for economic loss suffered by an unincorporated business.

106. As noted above, I understood Mr Auld to accept that the death of a falcon is to be regarded as physical damage (and the lost value of the bird is not therefore to be treated as pure economic loss for the purpose of his argument based on remoteness) even though the thing damaged was something in the Aviary, as part of ROP's stock in trade, rather than any part of the Aviary itself. By comparison with the three cases just discussed above, the closest analogy would appear to be between the dead birds and the polluted water in the borehole which the water company could no longer use to supply its customers. In *Cambridge Water* the trial judge had dismissed the claim in nuisance (and negligence) on the ground that the defendant could not reasonably have foreseen the damage to the borehole (by the solvents percolating through the ground). There appears to have been no argument or discussion over any point that, even if that damage should reasonably have been foreseen, the economic loss incurred in creating a replacement borehole was irrecoverable as a matter of principle.

107. The discussion in *Spartan Steel* and *The Wagon Mound (No. 1)* about the need, when considering the tort of negligence, to assess the recoverability of purely economic loss by reference to the nature of the duty owed by the defendant (and what is reasonably foreseeable damage arising out of its breach) is one that can now be traced through to the 6 stage approach to the issue of causation identified by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2022] AC 783, at [6]. On this question of principle over the recoverability of economic loss in a claim for private nuisance, an initial and very basic question arises as to whether and to what extent that approach – in particular invoking 'the scope of duty question' (stage 2), 'the duty nexus question' (stage 5) and 'the legal responsibility question' (stage 6) - applies at all in a claim in private nuisance.

108. That question arises because (as the principles I have sought to distil from *Fearn* tend to indicate) nuisance could be said to be a tort where the conditions required for establishing liability, if satisfied, determine the extent of that liability so far as any recoverable damages are concerned. Put simply, it might be said that in the common law tort of nuisance the only 'duty' upon a neighbour is not to cause a nuisance (leading to liability under the principles summarised in *Fearn*) *and the damage, of whatever kind, which results from it*.

109. In my judgment, Mr Auld's acceptance that recovery of the value of a dead bird within Aviary should *not* be treated as the recovery of economic loss, even though the alleged acts of nuisance did not cause damage to the Aviary itself, is another reason why this basic question falls to be addressed. The question is also prompted by my conclusion that, unless the loss is intended by malicious acts, a neighbour should not be liable in nuisance for loss of a type he could not reasonably have foreseen (the burden of establishing that being upon him). Therefore, it may be that the requirement that the *type* of damage (of whatever type) should be reasonably foreseeable is all that is needed as a control mechanism, in relation to the recovery of damages, on a tortious claim which can arise in the absence of any physical damage to property.

110. It is important to have well in mind that liability for nuisance may be established without proof of physical intrusion or damage. If a claimant suing in private nuisance can succeed by showing that the defendant's activities have adversely impacted upon the amenity or utility of his land (including its usefulness for commercial purposes) even in the absence of any physical damage, there may simply be no place for the reasoning in *Spartan Steel* (or *Manchester Building Society*) as that applies in a claim in negligence for recovery of economic loss.

111. In my judgment it is also important, with that point in mind, to have regard to the other available remedy in a claim of nuisance which is a less common feature in negligence claims: an injunction to prevent continuing harm. In negligence claims seeking damages in respect of economic loss that loss has usually crystallised by the time the claim is issued and is less likely to take the form of prospective loss on the basis that the defendant continues to act negligently. By contrast, alongside damages, the other remedy often if not usually sought in a nuisance claim is an injunction to restrain continuing wrongdoing. One is sought in this case.

112. In the case of a continuing nuisance the court may and often will grant an injunction to restrain such wrongdoing and prevent any ongoing harm or loss to the claimant. However, it also has power to award damages as a substitute for such injunctive relief.

113. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 (a case involving noise nuisance suffered by the claimants in their home near the defendant's racetrack) the Supreme Court said that prima facie the remedy in a case of nuisance was an injunction, in addition to damages for past nuisance, to restrain the defendant from committing the nuisance in the future.

114. Lord Sumption said, at [161], that there was much to be said for the view that damages are ordinarily an adequate remedy for nuisance, particularly in cases where potentially conflicting interests of third parties are engaged. He went on to say "*it may well be that an injunction should as matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission*." This was said by reference to authority relied upon by the defendant to the effect that the public interest may be a relevant factor in the court deciding whether or not to award damages in lieu of an injunction. However, Lord Sumption said there had been no argument at trial on such points and they were a matter for decision in another case. Lord Neuberger PSC (at [127]), Lord Mance (at [167]-[168]), Lord Clarke (at [171]) and Lord Carnwath (at [246]) expressed slightly different notes of caution about placing too much significance upon the grant of planning permission or public benefit from the defendant's ongoing activities.

115. The court's discretion to award damages in lieu of such an injunction is now confirmed by section 50 of the Senior Courts Act 1981 but has existed since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)). The factors governing its exercise were addressed in *Lawrence,* by reference to such authority, by Lord Neuberger PSC at [100]-[132], Lord Sumption at [159]-[161], Lord Mance at [167], Lord Clarke at [171] and Lord Carnwath at [238]-[247].

116. At the risk of over-simplifying the conclusions reached by each of those judges, the decision in *Lawrence* marked a move away from too rigid an application of the four-limbed "working rule" in *Shelfer v City of London Electric Lighting Co*. [1895] 1 Ch 287, 322-323 for identifying cases where it would appropriate to award damages in place of an injunction. Instead, they favoured a more flexible approach. A less mechanical approach than that laid down in *Shelfer* will enable the trial judge to reach a fact-sensitive decision upon the exercise of the discretion; one that is informed by consideration of whether or not damages would be an adequate remedy or an injunction would be oppressive (particularly when considered against the likely measure of damages), alongside any element of public interest (whether or not reflected in the grant of planning permission to the defendant) as well as by any other relevant factors. In *Fearn,* at [129], Lord Leggatt provided a fuller summary of this aspect of the decision in *Lawrence*.

117. The present case of course involves allegations of malice on the part of the defendants in their acts of alleged nuisance. There are passages in the judgment of Lord Neuberger, at [121]-[122] and [149], which indicate that an innocent state of mind on the part of the defendant ("*if the defendant has acted fairly and not in an unneighbourly spirit*" as Lord Macnaghten expressed it in a passage quoted by Lord Neuberger) might generally point to an award of damages instead of the grant of an injunction. Committing acts of nuisance maliciously or being fully mindful of the consequences for the neighbour, as alleged against Mr Thomas in this case, is the antithesis of a neighbourly spirit; and I recognise that, if that is proved, it *might* point to the grant of injunctive relief in respect of his ongoing actions rather than damages in lieu.

118. Nevertheless, addressing the point of principle raised by Mr Auld's submission, the existence of the statutory discretion to award damages instead of an injunction indicates to me that it cannot be right that that such damages can never extend to loss unrelated to physical damage to the claimant's property. Instead, the discretion appears to relate to different types of nuisance case across the board.

119. Therefore, and reverting to his elementary point about pure economic loss, it is important to recognise that, whether or not it decides to do so by reference to the facts of the particular case before it, the court has a discretion to award damages instead of an injunction to restrain any continuing nuisance. That discretion exists in any case of ongoing nuisance, including one that does not involve any physical damage to the claimant's property. The tort is property related but not necessarily property-damage related as the decision in *Fearn* very clearly confirms.

120. Nothing in *Lawrence* or *Fearn* supports an argument that a claim in nuisance will not be actionable in damages if the consequence is purely economic loss arising out of adverse impact upon the 'utility' of the claimant's land caused by something intangible and not occasioning any physical damage.

121. In *Lawrence*, the trial judge had awarded the claimants damages for past nuisance, in addition to injunctive relief granted by him in respect of ongoing nuisance. Those damages were fixed by reference to the difference in the rental value of the claimant's property not subject to the nuisance and its rental value subject to the nuisance: a basis of assessment which was "*notional rather than actual*": see [2011] EWHC 360 (QB) at [314]-[317]. The issues for the Supreme Court reviewing the correctness of the Court of Appeal's decision reversing his judgment did not extend to a challenge to that damages award.

122. In *Fearn*, both Lord Leggatt (at [10]-[11]) and Lord Sales (at [168]-[169]) prefaced their observations about the wide scope of the tort of private nuisance by citing the decision of the House of Lords in *Hunter v Canary Wharf* [1997] AC 655. Lord Sales referred to the judgment of Lord Hoffmann in *Hunter* (addressing the decision of the House of Lords in *St Helen's Smelting Co. v Tipping* (1865) 11 HL Cas 642) before observing:

> 169. In *Hunter* [1997] AC 655 Lord Hoffmann analysed this passage at pp 705-707. As he pointed out, Lord Westbury LC was not seeking to suggest that there were two torts of nuisance, one relating to material injury to property and the other concerned with causing sensible personal discomfort such as that arising from excessive noise or smells. There is one tort, concerned in both types of case with injury to land. In the latter case, the injury to the land is because its utility has been diminished by the existence of the nuisance. Referring to *Bone v Seale* [1975] 1 WLR 797, which concerned a nuisance arising from smells from a pig farm, Lord Hoffmann observed the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not; in the case of a transitory nuisance, the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted; as he said, the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness (p 706)."

123. In *Hunter*, Lord Hoffmann said, at 706E, that fixing compensation for the loss of amenity value of a property (as opposed to loss of its capital value) "*[t]o some extent ..... involves placing a value upon intangibles*." The nature of the compensation in the second type of case identified by Lord Sales in that passage is further highlighted by the discussion in *Lawrence* (see [128]-[138], [173] and [248]) as to whether or not an award of damages might extend beyond damages for the diminution in value of the claimant's property so as to reflect the value to the defendant of what, in effect, is a licence to commit the nuisance. An award of damages on that basis could not in my judgment sensibly be described as arising out of physical damage in the *Spartan Steel* sense.

124. Neither *Lawrence* or *Fearn* involved such physical damage. In the first case the Supreme Court decided that the injunction granted by the trial judge should be restored but that the defendant should have liberty to apply to have it discharged on the basis that damages should be awarded instead. It seems clear that what the court had in mind was the loss of the amenity value of the claimant's property and, potentially, what Lord Clarke, at [172] referring to *Hunter*, said "*could be in the form of general damages if it is not possible to prove a specific loss of value*." In *Fearn* the Supreme Court remitted the case to the Chancery Division to determine the appropriate remedy for the nuisance, including the questions of quantification of any damages award (if awarded in place of an injunction).

125. I would add that if Mr Auld's point was a good one it would have provided a short (if alternative) answer to the outcome in many of the cases considered by the Supreme Court which pre-date and post-date *Spartan Steel*: see, e.g., *Eastern and South African Telegraph Co* (where the unsuccessful claim for damages comprised the cost of conducting experiments to overcome the electrical interference with the plaintiff's submarine telegraph as well as damages for loss of business due to the disturbances. The House of Lords rejected the "ingenious suggestion" of counsel that physical injury was done to the paper used in the plaintiff's recording instruments by being smudged through the eccentric action caused by the defendant's electricity); *Andreae v Selfridge & Co* [1938] 1 Ch 1 (where the trial judge had awarded the plaintiff £4,500 for the loss of clientele to her hotel, which she operated before selling the premises to the defendant, caused by the noise and dust of the defendant's adjacent building operations but which the Court of Appeal reduced to £1,000 on a "*broad common-sense view of the situation*" having regard to the more limited wrongdoing than that found by the judge); *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] EWCA Civ 987; [2011] JPL 429 (where the claimant sought to recover a financial loss that it attributed to noxious smells created by the defendant's manufacture of an ingredient smelling of curry and/or garlic on the basis that it made some of its staff nauseous so that they had to be sent home and alternative accommodation leased); and to the damages claim in *Ray v Windrush*.

126. For all these reasons, Mr Auld's submission that the approach in *Spartan Steel* applies to damages claims in nuisance is not correct. It is at odds with the very nature of the tort which is actionable because there has been interference with utility or amenity value of the claimant's property, even if it has not been physically impacted and damaged by the defendant's actions. Subject to the need for the claimant to establish that the loss is of a kind that results from the interference (i.e. is connected with the use to which that

property is put) I see no reason for drawing a distinction between a property which is put to personal use and one which is put to commercial use.

127. That said, I can see that the need to establish that the loss in question was reasonably foreseeable (see *Northumbrian Water* and *Armstead*) is perhaps likely to produce greater scope for the defendant to argue that the type of loss is too remote where the claimant is a business rather than a private dweller. There are only so many ways a house in private occupation can be enjoyed, and perhaps a neighbour who interferes with that enjoyment may be taken to be aware of most of them, whereas there is no real limit to the potential complexity and vagaries of business, or the financial arrangements underpinning a particular business, so some losses of profit may not be properly attributable to him.

(2) NEGLIGENCE

128. As an alternative to its claim in nuisance ROP advances a claim in negligence.

129. The relevant duty alleged against Mr Thomas and UCE is "*a duty of care not to cause or permit the falcons to suffer excessive noise or visual threats, in particular during the Breeding Season*." I have already explained that excessive noise is pleaded as 70dB within the Aviary. The breeding season is pleaded as the start of March to the start of August. The basis of the alleged duty is said to be conversations and messages between Martin and Mr Thomas from December 2020 which put the defendants on actual notice of the risks posed to the falcons by excessive noise and disturbances during the breeding season. ROP relies upon its allegations of nuisance as breaches of the duty of care.

(A) A Duty of Care?

130. It might be said to be legally incoherent to advance a claim which could be summarised as "*you are under a duty of care to your neighbour not to commit a nuisance against him*".

131. The question as to whether a parallel claim in negligence exists is inevitably prompted by the absence of any limit, in principle, upon the type of activity that may constitute a private nuisance; and recognition that there could be a claim in nuisance arising out of building works (not inherently negligent so far as the level of skill deployed in undertaking them is concerned) if care is not taken to avoid undue inconvenience to the neighbour: see the second and eighth proposition derived from *Fearn* in paragraph 53 above. Likewise, the decision in *Northumbrian Water* and my conclusion above about the recoverability of economic loss on a nuisance claim – indicating that a claim in negligence does not add much to a nuisance claim on the damages front – provide further prompts for asking it.

132. Counsel's skeleton arguments addressed the legal principles governing the negligence claim only at a very elementary level. Their closing submissions focused upon a Canadian case addressed below.

133. In his skeleton argument Mr Mitchell referred to the well-known Lord Atkin's judgment in *Donoghue v Stevenson* [1932] A.C. 562 at 580:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

134. *Donoghue* v *Stevenson* of course had nothing to do with litigation between neighbours and established 'the neighbour principle' for the purpose of categorising the relationship between the manufacturer of the ginger beer and the person who drank it. In a case like the present, where the parties are actual neighbours, in physical proximity, where the alleged breaches of the duty of care are claimed to be grounds of actionable nuisance, and where (per *Northumbrian Water*) the recoverability of damages in nuisance is also subject to considerations of remoteness of loss, there may be no further legal space for that principle.

135. Mr Auld submitted that the duty of care pleaded by ROP was entirely novel and cannot be fair just and reasonable. His focus was therefore upon the third of the factors identified in *Caparo Industries Plc v Dickman* [1990] AC 605, at 617-8. after consideration of the foreseeability of harm and the proximity of the relationship between the parties. The defendants' ineffective summary judgment application said: "….. *if such a duty existed it would mean that a party by electing to carry on a highly sensitive operation immediately next to the boundary, could thereby impose a restrictive covenant on his neighbour's land*."

136. In *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] A.C. 736, at [26]-[29], Lord Reed confirmed that what is fair, just and reasonable informs the court's judgment as to whether a duty of care should be recognised in a situation where established principles do not provide the answer. It is part of the incremental, analogy-based approach required in a decision as to whether or not a duty of care should apply in a situation where one has not previously been recognised.

137. Reference to many of the cases cited in the authorities addressed in the previous section of this judgment (nuisance) reveals that a lot of the nuisance claims were also advanced as claims in negligence. Some of them involved alleged acts of carelessness on the part of the defendant in relation to activity on his own land and others were based upon negligent omission. In *Northumbrian Water* the negligence claim (brought alongside the claim in nuisance) had included both an allegation that the defendant had failed to undertake proper site investigations which would have revealed the existence of an old drain connected to the claimant's sewer and that its piling work had not been carried out with reasonable skill and care, though the latter complaint was not pursued at trial.

138. In support of the existence of a parallel duty of care in this case, Mr Mitchell relied upon *Grandel v Mason* [1953] 1 S.C.R. 459, a decision of the Supreme Court of Canada. He recognised this was not binding on me but said I should regard it as highly persuasive.

139. *Grandel* is cited in *Clerk & Lindsell* op. cit., at 19-17, alongside *Christie v Davey* and *Hollywood Silver Fox Farm* in the text in the chapter on nuisance which addresses "acts done with the intention of annoying".

140. Mr Auld submitted that *Grandel* should not be relied upon by me. He correctly noted that there had been no compliance with the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 which requires a party seeking to rely upon the decision of a foreign court to set out the proposition of law the authority is said to demonstrate, indicate what the authority adds that is not to be found in this jurisdiction and certify that there is no authority in this jurisdiction that precludes acceptance by the court of the proposition that the foreign authority is said to establish. I should note that Mr Mitchell said that he had only been able to produce a copy of the law report after the initial authorities bundle had been prepared. He produced it during his closing submissions and I therefore gave Mr Auld permission to make observations about it in further written submissions after the end of the trial.

141. Mr Auld also said that, in relation to the law of nuisance, *Grandel* (which discussed the authorities of *Robinson v Kilvert and Eastern and South African Telegraph Co*) did not add any point of law that cannot be found in the English authorities. He said that, so far as the suggestion that it supported ROP having a free-standing claim in negligence, *Grandel* pre-dates *Caparo* (and the English cases which followed it) and appeared to engage legislative provisions that are irrelevant to English law.

142. In my judgment, Mr Auld is correct in what he says about *Grandel* being of no further assistance to me in relation to questions of liability under the law of nuisance, for which the court now need look no further than *Fearn*.

143. The answer to his second submission in relation to its irrelevance to ROP's claim in negligence is less straightforward.

144. *Grandel* was a case where the claimant operated a mink farm. Noise from bulldozers and tractors used by the defendant in undertaking highway repair and construction works on land adjacent to the mink farm, during the whelping season, had resulted in a loss of a number of female mink and their young. At the start of the whelping season the claimant notified officials at the Highway Department that noise from the operations would endanger the lives of female mink and their young. Orders were therefore given by the engineer in charge to leave a 1200 feet gap in the roadworks so as to avoid such disturbance but the defendant nevertheless operated its machinery within the prohibited area.

145. The trial judge dismissed the claim on grounds which included the particular sensitivity of the claimant's business (so far as the susceptibility of female mink to noise was concerned) and the Court of Appeal of Saskatchewan reversed that decision. The majority in the Canadian Supreme Court dismissed the further appeal. They noted that the claim had only been pleaded in nuisance but that a claim in negligence had been considered at the trial and raised in the notice of appeal to the Court of Appeal. It was the fact that negligence had not been pleaded (and concern that, had it been, further evidence would have been relied upon by the defendants when they were carrying out their work as servants of the Crown) that led the minority to conclude the appeal should be allowed.

146. The decision of the majority, however, was (at p. 466) that "*quite apart from any question of nuisance, it would appear that the appellants are liable on the basis of their own negligence.*" Much of the judgment of Estey J (for the majority) was expressed in terms of the defendants having failed to act with reasonable care; and many of those

statements were made for the purpose of clarifying that there could be no claim to immunity on the ground that the work undertaken had been authorised by statute. Having referred to two authorities (those addressed in *Fearn* at [25]) which confirm that a claim in nuisance cannot be supported by a use of the land which is unusually sensitive to the effects of such work, he said, at pp. 463-4:

> "That however in the circumstances of this case does not necessarily conclude the matter. The point at which the work was done and the noise caused which disturbed the mink and caused the damage was under the concurrent findings at the northwest corner of respondents property and therefore well within the gap and some 300 or 400 feet closer to the mink than had the work been done according to instructions north of the gap. The grade foremen Neilson and Appenheimer and the operators of the machines were not only acting contrary to instructions given to avoid damage to the mink but were in place where as hereinafter described reasonable men would have foreseen damage would probably result and taken those precautions which under the circumstances were possible to avoid it. It was their failure to take this reasonable care that created the noise from which the damage resulted.
>
> A defendant who seeks to avoid liability for nuisance on the basis that he has pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care.
>
> > "Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under specific duty if they wish to make good that defence to use that reasonable and proper care and skill. (Sir Wilfrid Greene M.R in *Andreae v Selfridge & Co* [1938] 1 Ch. 1, at 9.)""

147. As I read the decision, *Grandel* is therefore authority for the proposition that there can be a liability in negligence arising out of building works, which might not also be actionable in private nuisance, if those works have not been undertaken with reasonable skill and care; and that a particular duty of care may arise through the defendant being put on prior notice by the claimant of the need to make adjustments to the works to accommodate the claimant's concerns. Estey J said (at p. 466) "The maxim *sic utere tuo ut alienum non laedas* is applicable to both nuisance and negligence."

148. The question still remains as to whether or not in this case the tort of negligence has a proper place alongside the tort of nuisance. As already noted - see the fifth proposition in paragraph 53 above - Lord Leggatt in *Fearn*, at [37], recognised that the law of nuisance may still lead to liability where the defendant's exercise of his freedom to build does not carry with it his observance of "*all reasonable and proper steps ... to ensure that no undue inconvenience is caused to neighbours*." Alongside the rule of "give and take", Lord Sales also referred, at [210], to the Latin maxim in saying:

> "The maxim was criticised by Lord Wright in *Sedleigh-Denfeld v O'Callaghan* ("*Sedleigh-Denfield*") [1940] AC 880, 903, as lacking in precision. As he pointed out, "An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability". However,

> both formulas provide a useful reminder that the aim of the tort of nuisance is that the freedom of neighbouring landowners regarding the use of their property should be maximised in a symmetrical way, so far as possible. An occupier is not confined to using their property in a way which matches the ways in which neighbours use theirs. Rather, as Lord Wright put it, "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with"."

149. Bramwell B had also referred to the same maxim in *Bamford v Turnley*, at pp. 82-83, before concluding that the defendant had infringed it. His building and use of a brick kiln did not come within the exception to the maxim, based upon common or ordinary use of the land, and nor was it a defence to say such exceptional use of it could be described (allowing for the inherent uncertainty in the term) as "temporary".

150. The reasoning in *Grandel* supports the conclusion that the facts of a particular case may mean that the principle – "*so use your own property as not to injure your neighbour's*" – applies to the *timing and manner* of what otherwise would be the defendant's unobjectionable common and ordinary use of his land. Also, and significantly for present purposes, a duty of care arising out of such facts may overcome a defence to a nuisance claim that (per Estey J at p. 465) "*recovery should be denied because of the delicate and sensitive nature of the respondent's business*." In other words, *Grandel* indicates that a claim in negligence could qualify the impact of the fourth proposition (in the law of nuisance) in paragraph 53 above. The law of negligence *may* operate to protect even sensitive uses of land during periods of heightened susceptibility.

151. That proposition is already qualified in claims of nuisance where the defendant acts maliciously: compare the decision in *Hollywood Silver Fox Farm*. And the eighth (and fifth) proposition in relation to a landowner's freedom to build is also qualified by the need for him to take reasonable and proper steps to ensure that no undue inconvenience is caused to neighbours. An actionable nuisance could, for example, arise though disturbances caused by building works undertaken late at night when there would be no such nuisance if they took place during normal working hours.

152. The decision in *Grandel* about a separate liability in negligence seems to have found a springboard in the court's references in earlier cases (including *Andreae v Selfridge*) to a need for the exercise reasonable skill and care in carrying out permissible operations if a liability in nuisance is to be avoided. As Mr Auld noted, it also seems clear from the dissenting judgment of Locke J (and may have been clearer in the judgments below) that the finding in negligence may have been of some significance to an issue of immunity under statute and to the issue of joint or several tortfeasorship under the Saskatchewan statute.

153. Nevertheless, in my judgment and without me benefiting from compliance with the 2001 Practice Direction, *Grandel* does support the conclusion that a defendant who has committed an actionable nuisance may also be held liable in negligence where (1) there is no want of required skill and care, whether by act or omission, in the performance of the activity (as an activity in itself) on the defendant's land but (2) the circumstances in which that (otherwise not negligent) activity is undertaken put him in breach of a duty

of care to the claimant. The circumstances must support it being fair, just and reasonable that he should be subject to that duty.

154. Any such liability in negligence, including to a claimant whose operations are particularly sensitive to such activity, would exist alongside and (resting upon carelessness) would obviously be wider than the liability of the neighbour whose liability in nuisance is dependent upon him having acted maliciously and so as to cause harm (c.f. *Hollywood Silver Fox Farm*).

155. The duty in negligence is a duty not to inflict damage carelessly: see *Clerk & Lindsell* op. cit. at para. 7-08. In my judgment, the decision in *Grandel* is persuasive in the sense that it highlights that (in a situation broadly similar to those alleged by ROP in its negligence claim) there is potential for a liability in negligence where positive acts on a neighbour's property have caused physical damage to the claimant's property through the defendant acting carelessly.

156. As Estey J expressed the basis of liability, at p.p. 467-8:

> "A reasonable man in the position of the grade foremen and the operators of these large machines would have known of the presence of the respondent's mink, foreseen the possibility of damage and taken reasonable care to avoid it. Their failure to do so constituted breach of duty owing by them to the respondent.
>
> > In considering whether person owes to another duty breach of which will render him liable to that other in damages for negligence it is material to consider what the defendant ought to have contemplated as reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage i.e., to the question of compensation not to culpability but it is also relevant in testing the existence of duty as the foundation of the alleged negligence i.e. to the question of culpability not to compensation. Lord Russell of Killowen in *Hay or Bourhill v Young* [1943] AC 92, at 101.
>
> There is here present evidence of markings - [*this was a reference to two signs on the plaintiff's land reading* "*Mink, no trespassing*"] - and conversations which, in the exercise of reasonable care, would have brought home to the appellants the presence of the mink and the damage that might result from the noise."

157. As Mr Auld submitted in his objection to any reliance being placed upon *Grandel*, things have moved on in English law since *Bourhill v Young* (certainly in addressing losses arising otherwise than through personal injury) in terms of the authorities which address the circumstances in which a duty of care will arise. Nevertheless, consideration of the relationship between the parties remains at the core of any judicial decision as to whether or not a duty of care should be recognised. In *Robinson v Chief Constable of West Yorkshire* the Supreme Court confirmed that, in novel situations lying outside established categories of liability, the law proceeds incrementally and all three factors identified in *Caparo* remain relevant. It is the facts of any novel case, particularly so far as an assessment of the parties' relationship for the purpose of

deciding whether it is fair, just and reasonable, that will determine whether the law of negligence does extend to cover their consequences.

158. If ROP can establish by reference to proven facts both that Mr Thomas was made aware that the activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and that the harm might reasonably have been avoided then it would be open to the court to conclude that it is fair, just and reasonable that the person responsible for that activity (be that Mr Thomas, UCE or possibly both) should be held liable in negligence.

159. However, such a finding of liability would rest upon conventional analysis of foreseeability, proximity and fairness, justice and reasonableness. That finding would be in accordance with the approach in *Robinson v Chief Constable of West Yorkshire* and not simply because the outcome in a Canadian case decided 65 years before the Supreme Court's decision is consistent with it.

160. Addressing the contention in the defendant's summary judgment application, to the effect that the tort of negligence has no business imposing restrictive covenants on a neighbour's land, this to my mind ignores the distinction between what may not be lawfully done *at all* by an owner of land (if a restrictive covenant prevents it) and what may lawfully be done but should not be done carelessly so that foreseeable damage to his neighbour results.

161. There should be no controversy over the proposition that an owner of land may be liable to his neighbours in respect of activity which is itself lawful but carried out in a negligent manner: compare the negligence claim (not pursued) in *Northumbrian Water*. I consider my conclusion, for the purposes of this case, that a negligence claim may be triggered not just by a failure to undertake competently what is otherwise lawful activity on the land but also by the *timing* of such activity to be an incremental development of the law of negligence (if it is that) which does not fall foul of principles of land law.

(B) Liability of a Director

162. There remains the question as to whether Mr Auld's point about the liability in nuisance being that of UCE rather than Mr Thomas should be addressed in the same way for ROP's claim in negligence.

163. *Clerk & Lindsell* op. cit., at para. 5-81, cites the well-known case of *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 for the proposition that personal liability of a director will rest upon the need to show that an assumption of personal responsibility by him to the claimant. That case concerned a claim for negligent misstatement and, therefore, the need to establish a special relationship between the claimant and the director, if there was to be such personal responsibility for the purposes of liability under the principle of *Hedley Byrne v Heller*. The House of Lords held one had not been established on the facts (and also rejected the argument that the director should be held liable under the 'extended Hedley Byrne principle' relating to the provision of services).

164. For ROP's case in negligence, it needs to be established that Mr Thomas personally assumed a duty of care to ROP (as ROP alleges against "*the defendants*" both in respect of the existence of a duty of care and its breach), the existence of which is supported by the approach in *Robinson v Chief Constable of West Yorkshire*, and also that the extent of Mr Thomas's personal involvement in acts by UCE (or others acting on the company's behalf) is such that he should be held liable as a joint tortfeasor.

165. As stated in the textbook, what is critical for the latter is "*the presence of a 'common design' that the company's tortious acts should take place. The question is fact-sensitive and context-dependent*."

(3) HARASSMENT

(A) The meaning of Harassment

166. The material parts of section 1 of the Protection from Harassment Act 1997 ("**the 1997 Act**") provide as follows:

> "(1) A person must not pursue a course of conduct—
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (1A) […]
>
> (2) For the purposes of this section […] the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.
>
> (3) Subsection (1) […] does not apply to a course of conduct if the person who pursued it shows—
>
> (a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

167. Section 7 of the 1997 Act governs the interpretation of that section by providing that:

> "(1) […]

(2) References to harassing a person include alarming the person or causing the person distress

(3) A "*course of conduct*" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person

[…]

(3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another-

(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and

(b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring).

(4) "*Conduct*" includes speech.

(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual."

168. Section 2(1) of the 1997 Act provides that a person who pursues a course of conduct in breach of section 1(1) (or (1A) which concerns harassment of 2 or more persons (accompanied by a certain intent) is guilty of an offence. Section 3 (headed "Civil remedy") provides that a victim of harassment may be protected by the grant of injunctive relief and may be awarded damages (per s. 3(2)) "*for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.*"

169. In *Hayden v Dickenson* [2020] EWHC 3291 (QB) (in a passage that was later approved by the Divisional Court in *Scottow v Crown Prosecution Service* [2021] 1 WLR 1828) Nicklin J summarised the provisions of the 1997 Act as follows:

> "[44] The principal cases on what amounts to harassment are: ***Thomas -v- News Group Newspapers*** **[2002] EMLR 4;** ***Majrowski -v- Guy's and St Thomas's NHS Trust*** **[2007] 1 AC 224;** ***Ferguson -v- British Gas Trading Ltd*** **[2009] EWCA Civ 46; [2010] EWHC 2612 (QB);** ***Dowson -v- Chief Constable of Northumbria Police*** **[2010] EWHC 2612 (QB)** ***Trimingham -v- Associated Newspapers Ltd*** **[2012] EWHC 1296 (QB); [2012] 4 All ER 717;** ***Hayes -v- Willoughby*** **[2013] 1 WLR 935;** ***R -v- Smith*** **[2013] 1 WLR 186;** ***Law Society -v- Kordowski*** **[2014] EMLR 2;** ***Merlin Entertainments LPC -v Cave*** **[2015] EMLR 3;** ***Levi -v- Bates*** **[2016] QB 91;** ***Hourani -v- Thomson*** **[2017] EWHC 432 (QB);** ***Khan -v- Khan*** **[2018] EWHC 241 (QB);** ***Hilson -v- Crown Prosecution Service*** **[2019] EWHC 1110 (Admin); and** ***Sube -v- News Group***

Newspapers Ltd **[2020] EMLR 25**. From these cases, I extract the following principles:

i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; "*a persistent and deliberate course of targeted oppression*": ***Hayes -v- Willoughby*** [1], [12] per Lord Sumption.

ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2: ***Majrowski*** [30] per Lord Nicholls; ***Dowson*** [142] per Simon J; ***Hourani*** [139]-[140] per Warby J; see also ***Conn -v- Sunderland City Council*** **[2007] EWCA Civ 1492** [12] per Gage LJ. A course of conduct must be grave before the offence or tort of harassment is proved: ***Ferguson -v- British Gas Trading Ltd*** [17] per Jacob LJ.

iii) The provision, in s.7(2) PfHA, that "*references to harassing a person include alarming the person or causing the person distress*" is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it: ***Hourani*** [138] per Warby J. It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results: ***R -v- Smith*** [24] per Toulson LJ.

iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective: ***Dowson*** [142]; ***Trimingham*** [267] per Tugendhat J; ***Sube*** [65(3)], [85], [87(3)]. "*The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant*": ***Sube*** [68(2)].

v) Those who are "targeted" by the alleged harassment can include others "*who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it*": ***Levi –v- Bates*** [34] per Briggs LJ.

vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that they felt offended or insulted: ***Trimingham*** [267]; ***Hourani*** [141].

vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes "*alarming the person or causing the person distress*". However, Article 10 expressly protects speech that offends, shocks and disturbs. "*Freedom only to speak inoffensively is not worth having*": ***Redmond-Bate -v- DPP*** **[2000] HRLR 249** [20] per Sedley LJ.

viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality: ***Hourani*** [142]-[146]. The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the "*ultimate balancing test*" identified in ***In re S*** **[2005] 1 AC 593** [17] per Lord Nicholls.

x) The context and manner in which the information is published are all important: ***Hilson -v- CPS*** [31] per Simon LJ; ***Conn*** [12]. The harassing element of oppression is likely to come more from the manner in which the words are published than their content: ***Khan -v- Khan*** [69].

x) The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amount to harassment: ***Hilson -v- CPS*** [31] per Simon LJ.

xi) Neither is it determinative that the published information is, or is alleged to be, true: ***Merlin Entertainments*** [40]-[41] per Elisabeth Laing J. "*No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do*": ***Kordowski*** [133] per Tugendhat J. That is not to say that truth or falsity of the information is irrelevant: ***Kordowski*** [164]; ***Khan -v- Khan*** [68]-[69]. The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under s.1(3)), particularly when considering any application interim injunction (see further [50]-[53] below). On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger: ***ZAM -v- CFM*** **[2013] EWHC 662 (QB)** [102] per Tugendhat J. The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.

xii) Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: ***Thomas -v- News Group Newspapers*** [34]-[35], [50] per Lord Phillips MR; ***Sube*** [68(5)-(6)].

170. In *Sully v Mazur* [2024] EWHC Civ 123 Mr Aidan Eardley KC, sitting as a deputy High Court judge, said:

> "[16] It is the course of conduct itself that must have the requisite harassing quality, not each individual piece of conduct. Harassment can, and often does, arise through the persistent, unwanted repetition of acts which, viewed in isolation, may be innocuous: see *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123 at [45]"

171. *Iqbal* was a case where the harassment arose out of inter partes correspondence in a legal dispute where it was the fact that many elements of it could be categorised as part of a malicious campaign that formed the basis of the harassment.

(B) Damages for Harassment

172. As noted above, section 3(2) provides that damages may be awarded for (amongst other things) any anxiety caused to the victim of harassment. The APOC seeks damages for Martin's and Scott's "*anxiety and distress*" and "*injured feelings*" in the sum of £30,000 each. In closing submissions Mr Mitchell submitted that the allegations against Mr Thomas justified an award of £56,200 to each of them.

173. In support of that claim Mr Mitchell referred to the 'Employment Tribunals' Presidential Guidance on Updated Injury to Feelings Awards, 24th March 2023.' The pleaded £30,000 is within the middle band in the 2023 Guidance. The £56,200 figure is that for the highest band and must be predicated upon most if not all of his clients' allegation of harassment being made good.

174. As I remarked when he referred me to it, that 2023 Guidance addresses (with my then emphasis now underlined) "injury to feelings and psychiatric injury following *De Souza v Vinci Construction Limited (UK) Ltd* [2017] EWCA Civ 879". It refers to the "*Vento* bands". In his closing submissions Mr Mitchell told me the relevant bands are periodically revised and applied as at the date of the issue of the claim (April 2023 in this case). He said that the *Vento* bands typically form the basis of assessment in employment discrimination cases involving injury to feelings and he said the same measure is used in harassment cases. No authority was cited in support of that second observation so far as applicable to the 1997 Act.

175. Although Mr Auld did not challenge that submission or advance any rival legal submissions about damages under the 1997 Act, I am not persuaded that Mr Mitchell's submission is a reliable one so far as adopting the *Vento* bands in this type of harassment case is concerned. I was not referred to *De Souza* decision but have since looked at what the Court of Appeal (adopting its earlier decision in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871) said about the approach to awards for injury to feelings. The case concerned claims under the Equality Act 2010 for disability discrimination (including through harassment and victimisation) an award

of damages for "injured feelings" under section 119(4): see the judgment of Underhill LJ at [13]. *Vento* itself was a decision concerning (amongst other heads of damage under appeal) the appropriate level of compensation for injury to feelings under section 66(4) of the Sex Discrimination Act 1975.

176. To my mind, not only are "injured feelings" not (or, perhaps, not entirely or necessarily) the same as "anxiety" but a quick and easy reference to *McGregor on Damages* (22nd ed), at para. 44-019, indicates (including by reference to the obiter dicta of Lord Nicholls in a decision of the House of Lords in 2007) that damages awards under the 1997 Act are likely to be modest at least in cases where the harassment is of a less intrusive nature. There are references in that passages to awards of £7,000 in a case in 2009 about harassment for an unpaid debt and £5,500 (which the author suggests was on the low side) in a 2010 decision concerned with harassment in the form of persistent, offensive, abusive, intimidating, bullying, humiliating and insulting behaviour of a woman soldier by army officers. Damages at those levels (after the decision in *Vento* in 2002) provide no support for applying guidance to Employment Tribunals to this case under the 1997 Act.

177. The APOC also seeks aggravated damages in an unspecified sum under the harassment claim. In his closing submissions Mr Mitchell suggested an award of £10,000 to each of Martin and Scott.

178. Neither Mr Mitchell nor Mr Auld cited any authority to me in relation to the award of aggravated damages in a case under the 1997 Act. For the purposes of preparing this judgment I have, again, gone no further than consulting *McGregor on Damages* op. cit., at para. 44-024, and a passage which includes the statement: "*Yet the few cases on harassment that there are to date reveal no awards of, or indeed claims for, aggravated damages.*"

179. As the parties have not engaged with the principle of aggravated damages in this context, I have not consulted the authorities mentioned in that passage. Yet it seems obvious reading the language of section 1(1)(b) and 1(2) of the 1997 Act that there must be a real question mark over a place for an award of aggravated damages - presumably reflecting such matters as the nature of the conduct and the actual (as opposed to constructive) knowledge and intent of the perpetrator - alongside those provided for by section 3(2). Certainly for the purposes of this case I have not been persuaded by legal argument that there is a place for one.

D. FACTUAL EVIDENCE

180. In this section of the judgment I provide my assessment of the principal witnesses of fact. By that I mean those witnesses whose testimony relates to more than one significant event in issue and where that assessment is required to determine which side is giving the truthful account of a particular event or closely related events. Many witnesses were called by the defendants who addressed only or more potentially isolated events and my assessment of their credibility can be addressed in that context in Section F below.

181. With two exceptions, this means that the principal witnesses of fact for this purpose are the parties and members of their respective families. The exceptions are the claimants' witness John Brady and Mr Thomas's partner Daniel Ambler.

182. To the extent necessary, I address the evidence of other witnesses (even if they were concerned with more than one event) in the context of my findings, in relation to each of the dozens of allegations of nuisance and harassment, in Section F below.

183. The expert evidence is addressed in Sections E and F(1) below.

(1) General Observations

184. In relation to witness credibility, Mr Mitchell cited the well-known passage in the judgment of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22] about the factors which may operate to undermine the reliability of testimony which, as presented to the court, appears to reflect the witness's genuine belief that his account of past events is an accurate one. Those factors may operate subconsciously to undermine its accuracy.

185. The present case is not really the *Gestmin* type of case where the risk of those factors operating to produce unreliable testimony means it is generally safer for the court to look to the documentary evidence (alongside any less controversial facts) when making factual findings or drawing inferences. In this case there is little contemporaneous documentation of past events. There are some video recordings of some of those events (or parts of them) which, so far as the film captured them, show what they record. Neither, therefore, does the present case raise the type of issue addressed by Cockerill J in *Jaffe v Bull Capital LLP* [2024] EWHC 2534 (Comm), at [230]-[231], where the flawed 'encoding' of a person's memory may come to be reflected, entirely innocently, in a contemporaneous written record of an event about which "*two equally patently honest and truthful witnesses*" later give conflicting testimony.

186. Instead, this is a case where the parties' respective accounts (including that given by third party witnesses) of certain key events is in such direct conflict that the court is left to decide whether or not the event happened at all, or happened in the way the alleging party said it did. On such matters, one witness (possibly more than one) was not telling the truth. The nature of the event or alleged event, generally, is such that the conflicting testimony cannot be because one witness's memory has over time and through the litigation process unwittingly become distorted by *Gestmin* type factors. The events in question are not that long ago and generally involve some kind of confrontation or personal inter-reaction. Rather, it must be the case that the witnesses decided not to tell the truth in the witness box.

187. Unsurprisingly, this creates difficulties for reliable decision-making in the way the deliberately untruthful witness must intend. On my assessment of the testimony, the process of cross-examination *alone* has not given the court sufficient material to conclude, in relation to any particular witness, that his or her testimony can simply be ignored on a key point. With the possible exception of Adrian Thomas developing his evidence by saying he put draft heads of terms produced by Mr Brady in the Aga, without troubling his son with them, the cross-examination did not elicit from any

witness some confession, concession or self-contradiction, or produce evident discomfort for that witness, as a pointer towards the truth. Therefore, any conclusion as to which of two conflicting witnesses was telling the truth about a particular event must rest on wider considerations. That involves looking at the event in context and, where relevant, assessing the reliability of a witness's account of other matters or what others (supportive or not) have said about it.

188. If the result is that the court has been hoodwinked on a particular point by the evidence of an untruthful witness then that is obviously deeply regrettable. Intending that consequence is not within the rules of litigation (or the true spirit of it, even in this very hostile neighbours' dispute) but any such consequence is a reflection of the obvious limitations and risks of the trial process and of the court operating within it to the civil standard of proof (even in relation to allegations under the 1997 Act which also constitute an offence).

189. In this case, my approach to the assessment of directly contradictory testimony reflects the following more general observations:

    i) The clear indications that the evidence of Mr Thomas and Adrian Thomas has sought to downplay their knowledge of the concern expressed by Martin and Scott about the impact of UCE's building work on the wellbeing of the falcons. I refer below to my acceptance of the evidence of Martin, Scott and Mr Brady which bears upon this point. Further, there is a statement made by Mr Thomas in his 'rebuttal response' to the letter of claim dated 12 December 2022 which he provided to Dr Forbes for the purpose of Dr Forbes providing an initial report. This document was not put to Mr Thomas in cross-examination because it was only produced at the end of the trial (in the circumstances I explain below when addressing Dr Forbes's evidence). In the rebuttal response Mr Thomas stated: "*I have no knowledge that my building works were creating a problem for the claimants breeding season until Mr John Brady (claimants' representative) spoke to my father on 6 May 2022*." However, in his witness statement, confirmed in testimony, Mr Thomas confirmed that an email from Martin dated 24 October 2022, about the building works causing the birds harm, was "*the first time any of the Claimants had ever raised direct concerns with me regarding their birds*" and the claimants had "*never voiced that birds had died in 2022 until the letter of claim was issued in December 2022*." In testimony, he went on to say that "*they had been through lots of other people, but not to me directly*." In cross-examination, he referred to getting "*snippets*" from Adrian Thomas and his (Mr Thomas's) brother-in-law, Tom Patrick, about their communications with Mr Brady and Martin, respectively, in May 2022. He did accept that he understood through Mr Patrick that "*eggs were dying*". Addressing Mr Brady's involvement, Mr Thomas said Mr Brady introduced himself as having been sent by Martin's "*Arab business partner*" regarding the issue of the septic tank (which Mr Thomas thought was "*weird*") and that his father had also relayed to him that Mr Brady was working for Mr Lootah. Archie Pilcher's witness statement used almost identical language in describing the encounter. This evidence is at odds with Mr Brady's evidence. Mr Thomas said it was "*absolute nonsense*" that he knew he had been causing harm to the birds. He was also anxious to make clear that Mr Patrick was not acting on his

instructions in communicating with Martin. As for Adrian Thomas, Mr Thomas accepted that his father was acting on his behalf. Mr Thomas said he did not see the more detailed heads of terms presented by Mr Brady (which addressed the cessation of building works during the breeding season) until disclosure in this claim; and in several of his answers in cross-examination he was reluctant to expand upon what his father had reported back on his meetings with Mr Brady. Although the two statements in his witness statement quoted above have not been shown to be strictly untrue, I have the clear impression that, now faced with ROP's claim, Mr Thomas (and his father) has sought to distance himself from the concerns Martin and Mr Brady were expressing in May 2022 about the harm the building works were having on the falcons. The statement in his rebuttal response provided to Dr Forbes appears to summarise succinctly the point that Mr Thomas learned from his father in early May 2022 that Mr Brady was acting on behalf of the claimants rather than Mr Lootah and that their concern, expressed through Mr Brady, was about the welfare of the birds rather than focussed upon the septic tank (or, as Adrian Thomas said in his witness statement, the septic tank, silage bales and stone piles in the field).

ii) Following on from that first point, there have been two recent attempts by the defendants to obtain the dismissal or postponement of ROP's financial claim in respect of the falcons. I refer to the issue of the summary judgment application returnable at the PTR and Mr Auld's submission at the start of the trial that the timing of the service of ROP's Summary (see below) was such that the nuisance/negligence claim should be deferred. It is of course open to any litigant to seek to avail himself of any relevant provisions of the CPR to say that the court should not entertain a claim on it is merits; and I recognise that a failure to persuade the court to act accordingly obviously does not mean that there is no defence to it that can be made good at trial. Nevertheless, the summary judgment application was late and hugely ambitious: Mr Auld's analysis of *Fearn* (which was a big part of it) did not match my own above and was certainly not compelling enough to forestall full investigation of the falcon claim at a trial. It is clear that Mr Thomas has been keen to avoid that investigation, including his own part in the claim, and the court cannot ignore that.

iii) My finding that the evidence of Martin Nicholas, Karen Nicholas and Mr Brady was generally reliable. This carries with it inevitable doubt over the reliability (on key points of conflicting evidence) of the competing accounts given by Mr Thomas, Adrian Thomas, Ed McFadden and Mr Pilcher, in particular, on some of the more significant events under scrutiny.

iv) Certain remarks about Mr Thomas's character, mentioned below in addressing the evidence, made by Mr Thomas's father and brother-in-law (and by Mr Thomas himself when telling Martin about his time in Mousehole) which suggest it is not an emollient one. The evidence in this case supports Adrian Thomas's remark to Martin (which I accept was made) that Mr Thomas has an angry side if things do not go his way. This inevitably creates doubt as to whether Mr Thomas really is someone who, as he protested a number of times in the witness box, adopts the position of live and let live with his neighbours.

He has proved to be a controversial neighbour. His creation of a lake on UCE's land and his removal of a stile on the public footpath (later reinstated in the light of complaints) have provoked opposition within the wider neighbourhood, and Land's End Airport which is concerned about the increased risk of bird strikes from birds visiting the lake, and the first was the subject matter of an article in the Daily Mail in June 2024. Yet, in evidence before the court were a number of social media posts and an article in the Daily Express (from November 2021) which show that Mr Thomas appears to be ready to see himself as the victim and to publicise that as widely as he can.

v) The force of some of the criticisms about the witness statements of the defendants' witnesses made in the claimants' closing submissions. The claimants' solicitors had pointed out a number of respects in which some of those witness statements did not comply with Practice Direction 57AC following exchange of witness statements in June 2024. I regard those points as going to credibility (in some cases) rather than admissibility as the claimants suggested. It has been correctly pointed out that 7 of the witnesses (and Mr Thomas's expert, Dr Forbes) mentioned the noise from aeroplanes and helicopters in the vicinity of the Aviary in what became a rather formulaic approach and one which, alongside the reference by some witnesses to noises caused by the Nicholases themselves, smacked of an attempt to argue a case on causation (going beyond a description of the area for the purposes of the locality principle). For example, the evidence of Mrs Caroline Gill , who lives with her husband in Keigwin and who was open in her support for Mr Thomas, was largely devoted to such matters about other disturbances. The witness statements of Mr Thomas and Mr Pilcher also used materially identical language in describing their first encounter with Mr Brady. This included each of them saying that Mr Brady introduced himself as having been sent by Martin's business partner in relation to the septic tank. Given what I have said in point (i) above and my acceptance of Mr Brady's evidence that he had come down on behalf of Martin to discuss the issues relating to the falcons (Mr Lootah appearing to have no interest at all in the septic tank) the similarity in those two statements is troubling.

(2) Claimants' Witnesses

Martin Nicholas

190. Martin made three witness statements, the last in response to Mr Thomas' summary judgment application.

191. I found Martin to be a reliable witness on matters of fact. He gave his evidence in calm and considered way. He was anxious to understand the point being put to him in cross-examination and to address it thoughtfully. However, as I explain below in addressing ROP's nuisance claim, I feel unable to rely upon the conclusions drawn by Martin in his post-mortem of Gyr 05.

192. Martin's considerable experience in breeding and raising falcons was evident from his witness statement and testimony. He began breeding falcons as a hobby in about 1995

when he was 11 under the guidance of his "mentor" Jeremy Edwards. Martin's evidence explained that breeding falcons in the approximate location of the Aviary is not a new venture and pre-dates UCE's purchase of its land by a number of years. He said the garden behind ROP's office was filled with aviaries – he referred to 23 or 24 pens – and one "four pair" aviary is still there.

193. Martin explained that the Aviary had been built closer to public footpath running between his and Scott's land and the land then owned by Deborah Trembath (than as had been indicated by design drawings prepared for planning permission purposes) because that was necessitated by the discovery that a South-West Water mains pipe was not positioned where drawings indicated it to be. The soil bunds to the west and north of the Aviary – using the soil excavated to create a flat area for the Aviary within a sloping field - were part of the planning requirement that the Aviary should be partially screened from sight rather than motivated by protection of the birds.

194. He also explained that he had put birds he had imported from Canada in 2019 into some of the Western Pens (those then built) before UCE bought the neighbouring land. He said that the imported birds put into some of those pens in 2022, including Gyr 03, Gyr 05 and Gyr 06, were all of breeding age and, not having previously been in a breeding pen, were capable of breeding straight away. Agreeing with a statement by Mr Garland, the claimants' expert, he said that moving a female falcon from one breeding pen to another may mean she will not lay eggs for one or two years before she settles into the new pen. This, he said, did not apply to the birds put into the Western Pens in 2022. Martin also said that there was no room in the Aviary in 2022 to move birds out of the Western Pens and that moving emotional birds that are paired together would result in them trying to kill one another. They could not go into the hack pens, where the chicks were reared, as they would claim it as their territory and kill every other bird in there. I accept this evidence.

195. Martin's evidence, corroborated by Scott's evidence, is that the brothers had a conversation with Mr Thomas in December 2020, when relations between them were good, about the building of a barn on UCE's land and that there was a discussion that the works should not proceed during the falcons' breeding season due to the sensitivity of the birds. He says that he told him that the birds would treat excessive noise or visual disturbances as a threat and would try to fly away if scared; and a lack of escape could result in them panicking and smashing or abandoning their eggs or abandoning their young. Martin says he showed Mr Thomas an article on his phone about a breeder of falcons in Germany who had lost birds to aspergillosis caused by a nearby mushroom farm. I accept this conversation took place. However, I have not been persuaded that the breeding season was identified in this conversation as being from March to August. Martin's own evidence is that February to May was identified as the most sensitive time.

196. I accept Martin's evidence, again corroborated by Scott's evidence, about the distress caused to birds in the Western Pens by the activity on UCE's land in March and May 2022.

197. I leave any other observations upon Martin's evidence, in relation to particular allegations of nuisance or harassment, to my findings in Section F below. The incident between Roger Nicholas and Daniel Ambler on 10 May 2021 does not form part of those pleaded allegations but Martin addressed his visit to Mr Thomas's parents at their

home, Nanquidno Farm, later that day. Martin said it was not related to any such incident, which he did not know about, and that he visited because he had seen Ed McFadden removing the cover to the Drain early one morning (it having been removed for the first time a few days earlier). Martin said that, on his visit to Nanquidno Farm, Adrian Thomas (who he has known for about 30 years) admitted that Mr Thomas has a nasty side if he does not get his own way, that he would speak to him about the Drain but said "*I wouldn't hold your breath*". I accept Martin's account of that visit.

198. There is no basis in the evidence for the suggestion that Martin is homophobic or has made homophobic remarks at or about Mr Thomas. Indeed, the evidence points the other way. Although not gay himself, when they were getting along Martin was happy to engage in the "gay banter" (as it was described in evidence) prompted by Mr Thomas in WhatsApp exchanges.

199. Martin prepared a document titled 'Summary of Breeding for 2021, 2022, 2023, 2024' ("**ROP's Summary**") which he said summarised his records for each of those years evidencing the number of birds on site, the number of birds of breeding age, the maximum number of birds (including chicks), and the number of deaths each year. ROP's Summary was produced on the eve of trial and it will be apparent from what I say about it below that it is unfortunate that the timing of it has raised some further significant questions which I have been left to ponder for the purposes of this judgment. Martin said he had prepared it in response to the defendants' application for reverse summary judgment on the falcons claim (listed at the PTR on 29 November 2024 but which I declined to entertain given the imminent trial and a completely unrealistic time estimate of 1 hour) as his third witness statement made in response to that application said he would. Martin also said, and this was borne out by Dr Forbes's evidence, that ROP's Summary reflected what Dr Forbes had said during an August 2024 site visit about the need for evidence about the identification of birds and breeding records.

200. Martin said he had prepared ROP's Summary using the same parameters as those used by Dr Forbes in an expert report dated 19 March 2020 which he had prepared on behalf of Mr Bryn Close who was concerned about the impact of significant building works being carried out adjacent to his business of Marra Falcons in Doncaster.

201. ROP's Summary is based upon information contained in his diary, egg charts, chick feeding sheets, export lists and the mortality reports he is required to make for the Animal Plant Health Agency for the purposes of his registration for the purposes of the Balai Directive: the EC Directive setting out conditions for the import and export of certain species of animal. It also replicated some information about mating habits that had already been included in a CPR Part 18 response. Save perhaps for the mortality report at the end of it, ROP's Summary was based on documentation disclosed either before or since the summary judgment application.

202. The reference in ROP's Summary (for each of 2021 and 2022) to "*just side effected*" (sic) was to the pens marked in pink in Annex 3 to this judgment (excluding pens 35, 36 and 37 which were not then in use): the Western Pens. Those pens were used for naturally breeding and imprinted falcons (as opposed to the pens on the other side of the Aviary – the eastern side – which were used just for imprinting) and Martin explained they had not been used in 2023 and 2024. He said the fertility level of eggs laid in those pens had dropped from 76% in 2021 to 50% in 2022. The "hatchability" levels for eggs in those pens was said to have dropped from 100% to 50%. Across the

entire Aviary (for fertility levels and hatchability levels for both naturally bred and imprint eggs) the equivalent drop was said to be from 100% to 58% and from 81% to 53% respectively.

203. The tables containing those figures in ROP's Summary (followed by further details including the identify of birds in the pens on the allegedly affected side) are as follows:

Summary of breeding for 2021, 2022, 2023, 2024

Total Number Of Birds At Our Facility

Year	Total No. Of Birds	No. Of Birds At Breeding Age	No. Of Birds Chicks Bred	(Including Chicks) Maximum No. Of Birds at Facility	No. Of Bird Died Per Year
2020	68	31	13	81	3
2021	84	50	25	108	4
2022	113	83	36	192	11
2023	137	122	86	223	6
2024	132	126	109	235	3

	2021 just side effected		2022 just side effected	
4.0 imprint hen at breeding age	0%		100%	2/2
4.1 Parent reared birds at breeding age	78%	14/18	100%	18/18
4.2 Eggs laid per imprint hen	0		0	
4.3 Eggs laid per naturally breeding hen	4	Average (17/4)	6	Average (24/4)
4.4 Fertility levels of eggs laid by imprint hens	0%		0%	
4.5 Fertility levels of eggs laid in natural breeding aviaries.	76%	13/17	50%	12/24
4.6 Hatchability levels for imprint and naturally bred eggs	100%	13/13	50%	12/24
4.7 Rearing levels for naturally bred and ex imprint female eggs to exportation	100%	13/13	100%	12 Chicks Hatched & 12 Survived
4.8 Survival levels for male and female (imprint and naturally bred) parent birds	95%	20 birds and 1 died	85%	20 birds and 3 died
4.9 Numbers of falcons exported and sold	13	chicks	12	chicks

	2021 Full Breeding		2022 Full Breeding		2023 Full Breeding		2024 Full Breeding	
4.0 Birds at breeding age	60%	50/84	73%	83/113	89%	122/137	95%	126/132
4.1 Eggs laid per imprint hen	4	Average (8/2)	5	Average (31/6)	7	Average	8	Average
4.2 Eggs laid per naturally breeding hen	4	Average (21/5)	6	Average (45/8)	6	Average	4	Average
4.3 Fertility levels of eggs laid by imprint hens	100%	8/8	58%	(24/45)	67%	67/100	82%	98/120
4.4 Fertility levels of eggs laid in natural breeding aviaries.	81%	17/21	53%	(18/31)	76%	44/58	75%	40/53
4.5 Hatchability levels for imprint and naturally bred eggs	100%	(17/17)(8/8)	86%	36/42	77%	86/111	79%	109/138
4.6 Rearing levels for naturally bred and ex imprint female eggs to exportation	100%	25 Chicks (25/25)	97%	36 Chicks and 1 died fell from nest	98%	86 Chicks and 2 died (84/86)	95%	109 Chicks and 5 died (104/109)
4.7 Survival levels for male and female (imprint and naturally bred) parent birds	95%	84 Birds and 4 died	90%	113 Birds and 11 died (102/113)	96%	137 Birds and 6 died (131/137)	98%	132 Birds and 3 died (129/132)
4.8 Numbers of falcons exported and sold	21	chicks	34	chicks	77	chicks	91	chicks
4.9 Numbers of falcons bred and retained for future breeding	4		1		4		13	chicks
5.0 Number of Pairs & imprints that were relocated away for the effedted side and bred in 2023.					23			

204. ROP's Summary said that the birds in the affected pens had been moved to new pens for the 2023 breeding season.

205. ROP's Summary showed that the 3 birds (owned by ROP rather than Mr Hussain) which died in 2022, identified in the Particulars of Claim and Part 18 responses – Gyr 03, its mate Gyr 06, and Gyr 05 -were in pens 1 and 2, respectively, on that allegedly affected side of the Aviary.

206. Martin was asked about those 3 dead falcons. The race-winning Gyr 03 which died on 3 April 2022 had been kept in ROP's freezer and the experts, Dr Madeiros and Dr Forbes, carried out a post-mortem upon it in September 2024. The experts agree it died of amyloidosis. Martin carried out a post-mortem on Gyr 05. The claimants' Part 18 response dated 26 January 2024 referred to a mortality report prepared by Martin which said Gyr 05 died on 14 April 2022 from amyloidosis, pneumonia and enteritis. In his evidence he said that the bird died of an infection in its respiratory system. Martin explained that Gyr 06 died and fell off the perch late one evening on 10 May 2022. He said he did open up the bird to see if there was anything obvious and then put her in the freezer to await further examination. However, one of ROP's workers inadvertently disposed of the carcass so it was not available for further examination. Therefore, no post-mortem was carried out on Gyr 06.

207. ROP's Summary concluded with the following mortality report ('PM' denotes post-mortem):

MORTALITY REPORT 2020, 2021, 2022, 2023

208.

Date	No. Of De	Species	A10 Number	Disease Presen	Owner	Reason Of Death
04.09.20		Peregrine Falcon	592847/02	No	HUSSAIN	Broke Leg, died at Neil Forbes during Operation
28.09.20		Peregrine Falcon 1	589500/07	No	HUSSAIN	Still in the freezer
02.10.20		GyrFalcon 1	580948/03	No	HUSSAIN	Still in the freezer
23.06.21		Barbary Falcon 1	540427/02	No	ROP	Killed by mate in nest
30.10.21		GyrFalcon 1	588518/04	No	HUSSAIN	Put to sleep, infection dissolved bone in shoulder couldn't fly
04.11.21		GyrFalcon 1	588518/03	No	HUSSAIN	Still In freezer
06.11.21		GyrFalcon 1	616630/04	No	HUSSAIN	PM Chris Gardner (vet)
20.02.22		GyrFalcon 1	614960/09	No	HUSSAIN	PM Martin heart problem In Freezer
03.04.22		GyrFalcon 1	614959/03	No	ROP	Still In Freezer
14.04.22		GyrFalcon 1	616630/05	No	ROP	PM Martin
10.05.22		GyrFalcon 1	614959/06	No	ROP	PM Martin
14.07.22		Peregrine Falcon 2	595425/02 595427/02	No No	ROP	Killed by something possibly 3rd party
20.07.22		Gyrx Peregrine Falcon 1	617803/20	No	ROP	Fell out of the nest
13.09.22		GyrFalcon 1	580948/04	No	ROP	Still in the freezer
22.09.22		GyrFalcon 1	618379/04	No	HUSSAIN	PM by Paul Hall (vet)
6.10.22		GyrFalcon 1	580948/02	No	HUSSAIN	Still In Freezer
26.12.22		GyrFalcon 1	614960/01	No	HUSSAIN	PM Martin in freezer
06.01.23		GyrFalcon 1	614960/02	No	HUSSAIN	Liver Problem Still in Freezer
22.05.23		Merlin 1	535724/03	No	ROP	Prolapsed while laying
24.07.23		GyrFalcon 1	589500/10	No	HUSSAIN	Still In Freezer
09.08.23		Peregrine Falcon 1	2011BE1633/CA	No	ROP	PM Martin Mycoplasma & secondary infection
13.09.23		GyrFalcon 1	629607/06	No	HUSSAIN	Asper Still In freezer
20.09.23		GyrFalcon 1	618379/05	No	HUSSAIN	Still In freezer

The mortality report therefore showed 3 deaths in 2020 (4.4% of the 68 birds in the Aviary that year); 4 in 2021 (4.76% of the 84 birds); 11 in 2022 (9.73% of the 113 birds though this would drop to 7.96% if the two peregrines said to have been "*killed by something, possibly a third party*" are excluded); and 6 in 2023 (or 4.37% of the 137 birds).

Scott Nicholas

209. On my assessment of the evidence, Scott is quicker to anger than Martin. This is clear from the language of a message which curtailed his WhatsApp exchanges with Mr Thomas, his own and his father's evidence about the need to avoid being baited by Adrian Thomas when the new waste disposal system was being installed in November 2022 and the video evidence showing he took exception to Mr Ambler taking a video of the Aviary in January 2025. I say that recognising that Scott considers that, on each occasion, he had been given reason to react.

210. Like Martin, Scott got on well with Mr Thomas in the early stages. He exchanged WhatsApp messages with him about the wildlife visiting Mr Thomas's newly created lake on UCE's land. He sent a message to Mr Thomas on 14 July 2021 telling him that some of his silage bales had been slashed and saying "*this had nothing to do with us before you start pointing fingers*." It was Mr Thomas's reaction to say that he would be phoning the police about that and Scott pulling down the sign about camping that led to Scott ending their exchanges using expletives (see paragraph 532 below). Scott accepted that he had previously pulled down the sign which Mr Thomas had put up on a gate next to the public footpath saying there would be no camping that year because of a dispute with his neighbours over pollution. He said that the sign gave a false impression: see harassment allegation (13).

211. Scott denied that he had poisoned the newly planted apple trees on UCE's land and said he had no idea where the apple trees are. He also denied that he had stopped a water supply to troughs on UCE's land. These are not matters relied upon in Mr Thomas's counterclaim. Scott said the stopping off of the relevant water supply had been done many years ago after Roger Nicholas had agreed with the former owner that he could make use of the supply while he undertook building works about 20 years ago. I accept this evidence.

212. Scott's evidence corroborated Martin's evidence about their conversation with Mr Thomas in December 2020 about the falcons' sensitivity to noise and visual disturbances in the breeding season. He also corroborated it in relation to the distress of some birds in the Western Pens was a result of the works on UCE's land in early 2022. He said he saw birds stepping off their eggs, which they do not normally do. He said that Martin was "*almost inconsolable*" at that time.

213. As with Martin, I leave any other observations upon Scott's evidence, in relation to particulars of alleged nuisance or harassment, to my findings below on the particular allegations between the parties.

214. There is no basis in the evidence for the suggestion that Scott is homophobic or has made homophobic remarks at or about Mr Thomas. Although the evidence indicates that Scott was less friendly with Mr Thomas before the falling out, and did not engage in any "gay banter" with him, there is nothing to indicate that Scott regarded Mr Thomas's sexuality as at all relevant. Scott's question "*are you a pervert too?*", recorded in a video of 3 January 2025 and directed at Mr Thomas when Scott took exception to what he says was Mr Ambler filming his family while they were on electric bikes, related to his concern that Mr Ambler had been taking pictures of Scott's two children aged 4 and 8 (rather than recent works to the Western Pens, with no children in sight, as Mr Ambler testified) and it was this that would risk Mr Ambler getting "*30 years in jail*".

Karen Nicholas

215. Karen Nicholas is Martin's wife. Her evidence was clear, convincing and not shaken at all in cross-examination. She rejected in forthright terms the suggestion that she had blocked Adrian Thomas's exit to the road on one occasion and tried to ram his Land Rover. Her clear account of the incident (which she said was a Tuesday because she was taking her daughter and niece to their musical theatre class and not Sunday 20 November 2022 as stated by Adrian Thomas) struck me as completely reliable and indicative of the temper of Adrian Thomas. Likewise, she said that the statements by Mr Thomas and Mr Ambler that she had been in her car late one evening, acting as a lookout and temporarily blocking their access, while Martin cut electric fences on UCE's land, was completely false.

216. I accept the evidence of Karen Nicholas as truthful. This includes her evidence that in March 2022 she telephoned both the RSPB and the RSPCA to express concern about the welfare of the birds in the light of the activity on UCE's land. This is significant when assessing the conflict between her and Ed McFadden as to whether she expressed concern about the noise he was making with his digger on 2 May 2022 by reference to her own welfare or the welfare of the birds. Her evidence did not, however, address harassment allegation (8) even though Martin identified her as directly witnessing the event complained about.

Roger Nicholas

217. Roger Nicholas gave evidence which in the main was consistent with his witness statement. So far as the septic tank issue was concerned, he confirmed that there had always been a soakaway from the tank and how (having read about possible ways of overcoming a leak from it) the Nicholases had tried to alleviate the problem of the leakage in Field 8440 by covering it with a mixture of soil and rubble.

218. I accept as true Roger Nicholas's denial that he filled in the cattle grid installed by Mr Thomas near Scott's home with rubble. I also accept his evidence that when the extension to his home was built in 2016 (which involved relocation of the kitchen) he did not arrange for grey water to discharge into the Drain. He said that, as before, the water from the kitchen went into the sewer.

219. In his testimony Roger Nicholas did, however, depart from the terms of his witness statement when dealing with an event on 10 May 2021 involving him and Daniel Ambler. His witness statement downplayed this in suggesting there really was no altercation between them over the storm drain outside his home. However, in his testimony he accepted he was not best pleased (as he was replacing the cover for the storm drain which had already been removed once and shortly before) and that, as Mr Ambler came by on a Gator farm vehicle, he did approach him carrying the crowbar which he had been using to lever a replacement cover into place. He was mouthing things to Mr Ambler over the noise of the vehicle, and accepted he came right up to Mr Ambler's face, though he denied threatening him with the crowbar or calling him "*a*

fucking faggot". But he also appeared to accept it was likely that he may have told Martin that he had threatened Mr Ambler though did not remember doing so.

220. The incident involving Mr Ambler on 10 May 2021 does not form part of Mr Thomas's counterclaim for harassment and therefore I address it here. My finding is that Roger Nicholas did not threaten Mr Ambler with the crowbar that he was holding and using for the job in hand before Mr Ambler arrived. However, in the light of Mr Ambler's evidence, I find that he did (in anger) use those words as Mr Amber drove away from him.

John Brady

221. As a non-party, Mr Brady was an important witness. He features in three of the five allegations of harassment in the counterclaim. I indicated at the outset of the trial that, such was the conflict between the parties in their account of key events, that my assessment of Mr Brady's evidence (as a non-party and in relation to his attempt to speak to Mr Thomas and his dealings with Adrian Thomas) might prove to be influential in my overall assessment of the evidence. That has proved to be the case.

222. Three short videos were played at the beginning of Mr Brady's evidence. Two of them related to Mr Thomas's fourth and fifth allegations of harassment. This related to Mr Thomas's fourth allegation of harassment. None of the videos showed Mr Brady acting in an aggressive manner.

223. Mr Brady confirmed (as was put to him in cross-examination) that he had been brought down by Martin to talk to Mr Thomas. He denied that he had introduced himself to Mr Thomas or Adrian Thomas as acting on of Mr Lootah. Mr Brady said he did not know of Mr Lootah's existence until two or three days after his arrival on 5 May 2022 when Martin mentioned his business partner. He said he knew there was an issue with the septic tank but Martin had involved him to deal with "*the contentious issues*" relating to the falcons.

224. Mr Brady explained how, after his unsuccessful attempt to talk with Mr Thomas on 5 May 2022, and after Adrian Thomas had arrived soon after at the bungalow 'Broadlands' (the Nicholases' property where Mr Brady was staying and which is at the top of the upper field shown on Annex 1) in a state of some agitation, he agreed with Adrian Thomas that they would have a discussion about the issues relating to the falcons. Mr Brady said they did so at Broadlands over a couple of beers and cigarettes. He says he showed Adrian Thomas a photo of smashed eggs and said it was the result of the machinery and noise and the birds being frightened. Mr Brady said six points were discussed as the basis of heads of agreement, including that UCE's building operations would cease during the breeding season. Mr Brady then asked a friend, with some legal knowledge, to prepare the heads of agreement and Adrian Thomas collected them a couple of days later to discuss with Mr Thomas. Mr Brady said a few days after that Adrian Thomas returned to say that Mr Thomas would not sign the document and that Mr Brady should send it to Mr Thomas's solicitors whose details were given. Mr Brady said he was disappointed by this.

225. Mr Brady also explained how Adrian Thomas had expressed disappointment that he had spoken to Savills about a technical report they had prepared in relation to technical findings in relation to the new lake created on UCE's land by damming. As some Facebook messages from an action group in the trial bundle showed, the creation of the lake has proved to be controversial among local residents. Mr Brady is a qualified civil engineer and Janet Gardiner, one of the residents opposed to the lake, had asked him to review the Savills report. Mr Brady said Adrian Thomas's disappointment in him doing so led to the end of potentially constructive discussions between them about the falcons.

226. Mr Brady also explained how he had a discussion with Tom Patrick, Mr Thomas's brother-in-law, in early May 2022 when Mr Patrick called at Broadlands having arranged with Martin to do so. Martin and his wife and mother were present. Mr Brady said they discussed the six points for the heads of agreement and that Martin had talked about the breeding season which could extend into August. Mr Brady said Mr Patrick was, like him, attempting to mediate between the neighbours. Mr Brady said Mr Patrick was very nice and pleasant and said "*my brother-in-law's an arsehole, I think you both know that*" and that he and Martin responded "*of course we do*."

227. I deal with the pleaded allegations involving Mr Brady in my findings below. Mr Brady said it was a total fabrication that (which is not pleaded) he had said to Mr Thomas that he wanted just himself and Mr Thomas in a corner of a field. I accept the truth of that denial.

(3) Defendants' Witnesses

Mr Thomas

228. The evidence indicates that Mr Thomas would not be the easiest of neighbours, though whether any of his or UCE's activities are actionable by the claimants (or carried out with malice) is obviously another matter. I have reached this conclusion despite his protests that his approach has been "live and let live".

229. The claimants' evidence referred to statements by others (including those made by Mr Thomas himself to Martin and his wife) which indicated that Mr Thomas's temperament is perhaps not best suited to good neighbourliness. I have already referred to what Martin and Mr Brady said about the comments respectively made about Mr Thomas by his father and brother-in-law.

230. Mr Thomas himself accepted that, before they fell out, he had told Martin and Karen Nicholas in October 2020 that he may have been "*the most hated man in Mousehole*" (he had previously lived in Mousehole) and went on to say that he may now be the most hated man in St Just. This was a reference to Mr Thomas pre-empting the switching on of the village's Christmas lights in Mousehole by him and his immediate neighbours illuminating their own decorations shortly before the village switch-on after a full countdown. Mr Thomas showed Martin and Karen a picture of a large inflatable swan he said had put in Mousehole harbour in response to him not being allowed to moor a boat there; though he said in evidence that he did not in fact launch it. Martin said he

sensed these things were said in a show of bravado. In testimony, Mr Thomas accepted that he had made these statements though he said they had been taken out of context.

231. Having heard his evidence, I am satisfied that Mr Thomas is someone who is prone to overreacting to events. I base that conclusion upon the following matters in particular:

a) My finding below (on Mr Thomas's harassment claim) in relation to the incident on 5 May 2022 involving Mr Brady (as a passenger in a white van) pursuing Mr Thomas.

b) Mr Thomas's decision, once Ed McFadden had told him of the incident on 3 May 2022 (when Martin nudged Mr McFadden's worker, Jack Parsons-Brown, to the ground because he was removing paving blocks to the storm drain outside Roger Nicholas's house) to report the matter to the police. Mr Thomas was not present during the incident and neither Mr McFadden nor Mr Parsons-Brown appear to have considered it a matter for the police. When the police arrived Mr Parsons-Brown told them he did not want to press charges.

c) Mr Thomas's evidence in cross-examination that (although he was not present on the occasion when the septic tank on Mr Joint's land was replaced with a new waste disposal system and was acting on a report from his father) he thought it appropriate to contact Cornwall Council to report that the (old) septic tank was "overflowing onto a public footpath". The replacement system was installed to overcome the issues of the former septic tank and its soakaways leaking effluent. Mr Thomas accepted that he was unaware that the septic tank had been professionally emptied the previous day, prior to its removal. Mr Thomas said he reported it to the Council and the Environment Agency to protect his position in relation the risk of watercourses on his land being polluted but in circumstances where he had brought (though not by that stage served) proceedings on the Nicholas family and Mr Joint in relation to the old system septic tank, and its failings, this could be viewed as an unnecessary and antagonistic step.

d) Mr Thomas's position, confirmed in evidence, that he was not willing to engage further with formalities of a deed of surrender (as provided for by the Tomlin Order compromising the septic tank proceedings) and a proposal on behalf of the defendants upon one aspect of it until the position raised by the issues in the case is clarified. He said his view was that the implementation of the Tomlin Order had to be "*shelved*" until matters were clearer.

232. There were also the aspects of Mr Thomas's evidence which raise questions about its reliability. I have referred to these already in my preliminary observations upon the factual evidence more generally.

Daniel Ambler

233. My strong impression is that, as Mr Thomas's partner, Mr Ambler has done little to soothe relations between these litigating neighbours and probably exacerbated the

problems between them.

234. He told me that he found the children of Martin and Karen Nicholas annoying (the causes of this being them playing in the yard outside Bosavern Cottage and them asking questions about the value of paintings on visits with their parents to Pengelly) and was annoyed by the amount of time each of Martin and Scott would spend with Mr Thomas on their visits to Pengelly.

235. Mr Ambler said he now rarely went around UCE's land without being ready to video members of the Nicholas family. This otherwise odd and unneighbourly conduct he considered justified by his fear that he might otherwise be threatened or assaulted. The implied suggestion was, therefore, that one or more members of the adults in the Nicholas family would risk engaging in a criminal assault and a resulting prosecution if it was not supported by video evidence. Having heard all the evidence and formed by my own (necessarily limited and imperfect) assessment of the Nicholas family, this was an irrational fear on his part. None of Martin, Scott, Karen or Roger Nicholas came across as a person who would assault their neighbour if only they could be sure it was not captured on film. Martin nudging Mr Parsons-Brown, as he knelt down to remove the Drain cover, is the only evidence of physical confrontation in this case.

236. The risks involved in what generally is the anti-social behaviour of regularly filming one's neighbours are highlighted by what happened on 3 January 2025, and therefore shortly before the trial. Mr Ambler's videoing that day generated a flashpoint between him and Scott. During Scott's evidence I was shown a video (from the CCTV at Pengelly) of Mr Ambler walking back towards Pengelly with Mr Thomas coming out of the front of the house, videoing matters on his own phone, and Scott shouting at Mr Ambler (who was videoing over his shoulder as he retreated).

237. I was also shown a video of the incident taken by Mr Thomas on which Scott (with Roger Nicholas present) could be heard shouting at Mr Ambler as he retreated and which I have addressed above in the context of Scott's evidence. During Mr Ambler's evidence-in-chief some photos (of the 17 he mentioned) of the Aviary he had taken before returning to Pengelly were introduced in evidence. He said in cross-examination that he had gone into the field with a view to recording any work being done on the Aviary, specifically the use of any noise-generating use of drills or a concrete pecking machine. He then offered to produce, from the witness box, the videos he took on that visit (not of the aviaries but for his own safety). Counsel later informed me that some videos were then provided. Those did not show the filming of Scott's children.

Adrian Thomas

238. Adrian Thomas was, on my assessment of his evidence, an unsatisfactory witness. I found aspects of his evidence on some key points to be unreliable.

239. In the witness box he was anxious to keep to the script of his witness statement and his testimony therefore suffered in not providing a spontaneous and frank account of events which are relatively recent and uncomplicated. In that respect it was in marked contrast to the testimony of Mr Brady.

240. Adrian Thomas's account of his part in the visit of Martin to his home, Nanquidno Farm, on 10 May 2021 is not only at odds with Martin's testimony but I also found it to be unclear and not easy to reconcile with the evidence of his wife, Sarah Thomas. When Adrian Thomas met Martin in the yard at Nanquidno Farm he says he had been led to believe (by his daughter Holly who told him Martin had arrived) that Martin had been abusive to his wife Sarah. He also said that Martin was angry and agitated. Yet his witness statement and testimony focussed upon Martin then expressing concern about something his father had done; and becoming upset that Roger Nicholas was going to get into trouble over an altercation he had had with Daniel Ambler.

241. This evidence therefore involves the notion that Martin arrived expressing grievances about Mr Thomas's actions (I refer below to Sarah Thomas's evidence about this) but ended up being tearful, distressed and remorseful about what Roger Nicholas had done. As the altercation between Roger Nicholas and Daniel Ambler took place at the point where the cover of the Drain had been removed (and the Nicholases believed Mr Thomas was responsible for that) it is possible that Martin went through both sets of emotions. However, Adrian Thomas's evidence about Martin only "*alluding*" to his father's altercation, without him asking Martin for further details of a "*situation*" that he says he told Martin he would try to sort out, was confusing and unsatisfactory. I have already expressed my preference for Martin's account.

242. I regret to say that I have concluded that Adrian Thomas has tailored his account of Martin's visit in an attempt to magnify the significance of the confrontation between Roger Nicholas and Daniel Ambler (outside Manor Cottage and in connection with the Drain) earlier that same day.

243. Likewise, I have concluded that Adrian Thomas's account of his part in the events of 5 May 2022 (on which Mr Thomas relies in his counterclaim for harassment and I make findings below) must be treated with caution. In my introduction to the factual evidence I have already noted the wider concern that some of the evidence appears to involve an attempt to shift focus away from Mr Thomas's awareness that activities on UCE's land might be harming ROP's falcons.

244. In his witness statement Adrian Thomas said he left the meeting with Mr Brady the next day, 6 May 2022, with a sheet of A4 with the points Mr Brady had identified as the basis of some heads of terms. In that statement he said that it was not for him to make a decision and he would talk to his son about it. Yet in the witness box he said for the first time that he has thrown the paper in the Aga that evening as something not worthy of further consideration.

245. As with other witnesses, I address Adrian Thomas's account of specific events relied upon in the Particulars of Claim or Counterclaim in my findings below.

Sarah Thomas

246. Mrs Sarah Thomas gave evidence in relation to two of the events relied upon by her son in his counterclaim for harassment, both involving Mr Brady. I address what she said

about those in my findings below.

247. Her evidence also addressed the first part of Martin's visit to Nanquidno Farm on 10 May 2021 before he went on to talk to her husband Adrian Thomas. Her account of that first part of Martin's visit accords with Martin being indignant about Mr Thomas's actions. She had to remind Martin that it was her son she was talking about. So far as the second part of that visit was concerned, her witness statement made it clear that she relied upon what her husband said (after Martin had left) about Martin expressing concern that his father, Roger Nicholas, had done something stupid and was going to get into trouble for it.

248. In the light of my finding in relation to the events of 5 May 2022 I have concluded that Sarah Thomas's account of events has been influenced by what she has been told by her son and her husband. It is understandable that a mother, being told by her son that he is fleeing from a stranger for fear of his own safety, will probably side against that stranger (in this case Mr Brady). She said that Mr Thomas and Archie Pilcher were sitting in her kitchen for hours afterwards in a distressed state. I do not doubt that evidence but my conclusions about what happened that day mean that her own perception of matters (and in particular the degree of menace presented by Mr Brady whose identity she did not then know) have become distorted as a consequence. I accept her account of the event (videoed by her) of the brief meeting with Mr Brady on 27 July 2022.

E. EXPERT EVIDENCE

249. The court gave permission for expert evidence about the breeding of falcons in captivity, the valuation of falcons and the veterinary science concerning the cause of death of Gyr 03, Gyr 05 and Gyr 06.

Ian Garland

250. Mr Garland gave expert evidence on behalf of ROP in relation to the breeding of falcons in captivity and the valuation of falcons.

251. Mr Garland is a very experienced breeder of birds of prey. He has over 40 years of breeding them and has bred over 16 different species of eagles, hawks and falcons. His business produces 150 to 200 falcons a year. He has supplied birds to the UAE, Saudi Arabia, Japan, Korea and Europe.

252. Mr Garland acknowledged that he knew Dr Forbes (the defendants' expert) from his own experience as a breeder and said he was one of the best avian vets in the world but that he had no experience of breeding falcons.

253. He explained that he was responsible for the first successful breeding of gyr falcons in the UK, from two young birds imported from the Yukon.

254. Mr Garland said the Aviary was similar in design to his own, though his own imprint pens were more open. He said it was important that naturally breeding birds do not see

out so much though it was important that they can see through the roof. He explained that his own business was near a road, a clay pigeon shooting ground and an industrial site. The shooting ground is accessed via a bridlepath next to his aviary and that if a big shoot is scheduled then over 500 vehicles may use it. He said the shooting took place 6½ days a week and his birds become acclimatised to it. A younger bird moved into a new aviary will acclimatise more quickly than an older bird. The two young birds from the Yukon, mentioned above, were moved from quarantine into a big pen and eggs were laid 14 days later.

255. Mr Garland referred to peregrine falcons living in cities to illustrate his point that falcons will acclimatise to the regular noise of their surroundings but what will alarm them is a "*shock noise*" which is unexpected. He said it is important to avoid such noises, to which the birds have not become accustomed, in the months of March, April and May. He said that if his own neighbour started to make loud irregular noises in the month of March "*I'd make sure it couldn't happen*".

256. He said that, as with the transportation of eggs, the incubation of eggs has moved on in terms of efficiency so that there is less scope for good and bad breeding seasons. He said that in his experience the success rate for a hen of breeding age to lay eggs was around 80%. He did not include recently introduced birds, who have yet to acclimatise, in that figure. However, he would not exclude from that calculation birds who were only in their first year in the pens, though his answer did suggest that it would only be if birds put together the previous autumn "*and we see good courtship, food passing, things like that, the male has to feed the female, and then you see a copulation, you'd be expecting eggs*". He said the period of acclimatisation depended upon the particular birds. Mr Garland and Dr Forbes agreed that "*not all female falcons of breeding age necessarily lay eggs in the first year*." He disagreed that Gyr 03, Gyr 05 and Gyr 06 had been in their pens for too short a time to acclimatise to their surroundings for the purposes of successfully breeding in 2022.

257. Addressing the number of eggs laid by a female, Mr Garland said that if a lot of eggs are pulled from a bird then it may not lay eggs again for "*so many years*". If, however, the bird has had only a few eggs then they may lay eggs more regularly and for longer. Mr Garland also said that a breeder would hope to get 80% saleable chicks from the eggs laid but agreed with Dr Forbes that the percentage of fertile eggs that are reared to sale age will vary between different breeders but is not expected to exceed 70% to 80%. He said if an egg is totally clear than that is almost always a male bird fertility problem. When asked about ROP's claim for non-breeding falcons, and 3 pairs of gyr falcons being expected to 15 chicks, Mr Garland was clear that he would expect to breed 15 chicks "*if they were good birds in their prime*".

Dr Neil Forbes

258. Dr Forbes BVetMed DipECZM(avian) FRICS gave expert evidence on behalf of the defendants upon the veterinary science concerning the cause of death of the three dead falcons referred to in the Particulars of Claim. He therefore engaged with Dr Clive Madeiros BVetMED MRCVS, ROP's expert in that discipline who conducted the post-mortem on Gyr 03 with Dr Forbes and prepared a Report dated 3 October 2024 but who did not give evidence at trial.

259. Dr Forbes also engaged with Mr Garland over the causes of death in falcons in captivity more generally. He confirmed that he does not breed falcons himself but said he was commonly consulted and has been flown to various parts of the world to investigate problems with their breeding. He also said he had been consulted in relation to the relocation or setting up of breeding centres in the UK and abroad.

260. Dr Forbes is a very experienced and well-respected avian vet. He gained his Royal College of Veterinary Surgeons specialist status in bird medicine in 1992. He became a fellow of the Royal College of Veterinary Surgeons by examination in exotic bird medicine in 1995. He became a European diplomat of the European College of Zoological Medicine (avian speciality) in 1996. He left full−time veterinary practice in 2017, when he was awarded the RCVS specialist emeritus in wildlife and a zoo and wildlife (avian). He said that, until 2017, he was seeing 3,000 birds of prey a year and consulting with a number of breeding stations internationally, including Saudi Arabia, Qatar, Spain, France, America as well as the UK.

261. In their closing submissions the claimants subjected Dr Forbes's evidence to heavy criticism, saying the court should feel unable to attach any weight to his evidence. As in his cross-examination, it was correctly pointed out that his reports omitted to identify Practice Direction 35 or the Guidance for the Instruction of Experts in Civil Claims 2014 as the source of the obligations underpinning the overriding duty identified in CPR 35.3. However, each of Dr Forbes's 'CPR 35 Expert Witness Statements' (as he titled them) did comply with the substance of Part 3 of PD 35: see paragraphs 1.2, 13 and 14 of his Report dated 26 (or 31) October 2024 and pages 2, 41 and 42 of his Supplemental Report dated 25 (or 29) January 2025.

262. I am not persuaded by the claimants' submission that I should, in effect, ignore Dr Forbes's evidence and I regard it as a highly ambitious one where he has made joint statements with Dr Madeiros and Mr Garland. Mr Auld pointed out that Dr Madeiros's Report referred to compliance with Part 19 of the Criminal Procedure Rules, rather than CPR 35.

263. The claimants' criticism of the timing of Dr Forbes's Supplemental Report, served during the trial, is also not well-founded. As explained further below, that report engaged with ROP's Summary served the day before the start of the trial. It is therefore unsurprising that the court had not by pre-trial directions given permission for the service of a further report from Dr Forbes. The untidy way in which this element of expert evidence came to be introduced into the case is of the claimants' own making. Dr Forbes said he had asked Martin for clarification of the bases of ROP's claimed losses at a site meeting on 23 August 2024. It seems likely that ROP's Summary would not have been produced at all had the defendants not issued their summary judgment application on 12 November 2024. I accept that there was evidence that Martin had suffered an injury as a result of an accident in the Middle East, which meant it could not be produced by the time of that application, but the short point is that it should not have required that application for it to be produced in accordance with the pre-trial directions made at the CCMC in December 2023.

264. The claimants successfully resisted an application that the trial in respect of falcon-related issues should be adjourned in the light of the late service of ROP's Summary. My extempore ruling on that informal application on the first day of trial reflected the claimants' point that it was only the mortality report which contained new information

not to be found in previously disclosed records (though much of that disclosure had also been given in the month or so before trial). By that ruling I indicated that Dr Forbes should obviously be given the opportunity to consider ROP's Summary and to assist Mr Thomas's legal team with their consideration of it.

265. By putting in new evidence (in the form of ROP's Summary) otherwise than in accordance with the timetable laid down at the CCMC the claimants cannot complain about the consequences. They having successfully resisted the defendants' adjournment application, it is reasonably clear to me that both sides were still grappling with its implications as the trial progressed. This is illustrated by the fact that the claimants' written closing submissions invited me to take note of suggested errors within the Dr Forbes's Supplemental Report which were said to have been identified only following a review of his oral evidence at trial. The making of such post-trial points is not something envisaged by orderly observance of pre-trial directions.

266. Nevertheless, some of the criticisms of Dr Forbes's evidence had more force. There are passages in his expert evidence where he can be said to have perhaps lost sight of the need to remain objective in assisting the court on matters within his expertise. For example, his Report went into some detail about the flying activity from RNAS Culdrose (including the types and specification of aircraft flying from the base) and the suggested resulting impact of noise and vibration within the Aviary. His Report expressed the opinion that "*Bosavern is the wrong location for a falcon breeding farm*" (his language in the joint statement, with which Mr Garland did not agree, was "*not ideal*"). He relied upon photographs of bonfire smoke near the Aviary, said to be from fires on ROP's land, and said this was "*an incredibly dangerous and risky thing to do in the vicinity of birds*". The photos were taken in December 2023, so significantly after the dates of the alleged acts of nuisance. He made a comment about further evidence being required of ROP to establish the quantum of its losses and about ROP's unrealistic expectation that no rotting or degrading or fermenting material should be within 400m of the Aviary "*when the breeder only owns 10% of the land that is within 400m of his Aviary*."

267. Dr Forbes also expressed his understanding that Martin was in breach of the Veterinary Surgeons Act 1966 in carrying out a post-mortem on Gyr 05 and giving evidence of his conclusions. As I understand the point, it is Martin's making a diagnosis of disease, rather than undertaking the post-mortem, which Dr Forbes considers may contravene the provision in section 19 which restricts the practice of "veterinary surgery" (as defined in section 27) to those registered as veterinary surgeons. In testimony he said he had discussed the matter with the legal department of the Royal College of Veterinary Surgeons who has invited him to submit material to them following this case. That this is a point to be raised and pursued (if pursued at all) by the lawyers acting in the case, rather than by an expert in his evidence while the case continues, is illustrated by the fact that Mr Auld's skeleton argument made reference to the point with a view to discouraging Martin from confirming his diagnosis in testimony on the ground he might incriminate himself. It is an adversarial point aimed, indirectly, at excluding evidence.

268. During the course of Dr Forbes's cross-examination it emerged that, prior to his formal instruction as an expert by Nalders Solicitors on 17 June 2024, he had been retained by Mr Thomas and had provided for his benefit what he described in his evidence as an

earlier 'statement'. He went on to say that much of what he said in that earlier statement would have been reflected in his Report dated 31 October 2024.

269. This was revealed during a part of Mr Mitchell's questioning to the effect that, in parts of his Report, Dr Forbes had assumed the role of an investigator or advocate for Mr Thomas. Further, although Dr Forbes's Report listed the court documents he had consulted for the purpose of preparing it, it did not set out the substance of his instructions from Nalders. Having heard submissions from counsel, I made a direction under CPR 35.10(4) that the earlier statement should be disclosed. The purpose was to establish whether or not it revealed material instructions of Dr Forbes prior to those given by Nalders. I made it clear that, if it was claimed that, in addition to any summary of Mr Thomas's instructions, the document contained legally privileged material (CPR 35.10 confirms the expert's instructions are not privileged but are generally beyond the scope of disclosure or interrogation on the basis that the expert has set out the substance of them) then the relevant material should be redacted pending my further decision on any challenge to that claim.

270. The upshot of that ruling was disclosure of one page of Dr Forbes's earlier statement dated 14 January 2023 (and referring to his instruction by Mr Thomas) together with Mr Thomas's 5 page 'rebuttal response' to the letter of claim dated 12 December 2022. I have referred to the rebuttal response above in connection with my general observations upon the factual evidence. These documents were only provided to me after the conclusion of the trial.

271. On 29 January 2025 (and therefore during the course of the trial) Dr Forbes prepared his Supplemental Report which responded to ROP's Summary.

272. Dr Forbes engaged with the summary of breeding in ROP's Summary by saying that instead of the parameters adopted by Martin (following the approach of Dr Forbes's earlier report prepared for Bryn Close) the performance of a breeding facility should normally be monitored by reference to the following:

> "*Numbers of Falcons (female of breeding age)*
>
> *The percentage of hens of breeding age who are laying eggs*
>
> *The average number of eggs laid per laying hen*
>
> *The fertility level of eggs.*
>
> *The assessment of what percentage of days viable normal semen was available for insemination*
>
> *The % of laid eggs, resulting in a sold/exported chick*
>
> *For falcons bred and exported for racing – the percentage of chicks which were race winners"*

273. Dr Forbes said he had not been provided with all this information. However, he went on to explain that the numbers given in ROP's Summary (see paragraph 203 above) did

not show that breeding was adversely affected. He said that chick production in 2022 was not less than normal when compared to the two previous years (even if lower than for 2023 and 2024). In 2022, 36 chicks bred from 83 birds of breeding age (or 0.43 chicks per bird) compared with 25 chicks from 50 such birds in 2021 (or 0.5) and 13 chicks from 31 (or 0.42) in 2020. He said that the average number of eggs per laying hen (imprint and naturally breeding) in 2022 was high and within the normal range: 6.3 compared with 4 for 2021, 6.6 for 2023, and 5.8 for 2024. Likewise, he said the average fertility of eggs laid in 2022 was marginally below the normal range (47% when compared with 61% for 2021, 54% for 2023 and 63% for 2024).

274. Dr Forbes was strongly criticised in cross-examination and even more heavily in the claimants' closing submissions for introducing new variables – including "*percentage of hens of breeding age who are laying eggs*" – in his calculations of the breeding success rate of the Aviary, which were different from those he had used in his report for Bryn Close and which Martin had adopted in ROP's Summary. I consider that criticism to be unjustified when (save for the fact that Dr Forbes also introduced references to the percentages of chicks that were sold for racing and became race winners and even that had in mind the way ROP has presented one of its heads of loss) Dr Forbes's methodology was not materially different from what he had agreed with Mr Garland (at point 15 of their Joint Statement) are "*the standard performance indicators of a falcon breeding facility*".

275. His observations were made by reference to the breeding numbers in the Aviary as a whole. The Supplemental Report did not directly engage with Martin's point that fertility level of eggs laid in the allegedly affected pens had dropped from 76% in 2021 to 50% in 2022 and the hatchability levels for eggs in those pens was said to have dropped from 100% to 50%. However, as one of a number of points highlighting allegedly flawed data (or use of it) in ROP's summary, Dr Forbes did question (his query no. 5) whether 3 eggs had been smashed in pen 5 in 2022 and made another point (his query no. 6) about the reliability of the comparison with 2021. He also made more general points about ROP being a young developing falcon breeding facility and that "*aspects of actual production will vary from year to year depending on methods of egg manipulation applied, also the spring weather variation from year to year has a major effect*.".

276. At this point I need to return to a point concerning this part of Dr Forbes's evidence. I have already mentioned that the claimants' closing submissions invited me to act upon suggested errors in Dr Forbes's response to ROP's Summary which had not occurred to them before he left the witness box.

277. In relation to those suggested errors, with my dismissal of the defendants' adjournment application in mind, there is only so much that a litigant can reasonably expect from the court in terms of it forming a conclusion on contentious points that have not been put to a witness when they should have been. Acting upon the claimants' written closing submissions on this point would, in my judgment, risk transgressing the overriding objective in at least three particular respects.

278. The risk is highlighted by me also noting that, despite Mr Auld inviting the court to agree that the defendants should have an opportunity to file fuller written submissions after the conclusion of the trial proper, I decided against that course. The parties had agreed upon a 9 day trial (an extension from the 5 days originally directed because of

the number of witnesses to be called by the defendants) and the last day, for closing submissions supported by whatever written summary each side chose to prepare beforehand. The last day followed a one-and-a-half day break after the eighth day for the parties to prepare their closing submissions.

279. Despite equal opportunity being given to the parties on that front, (and equal division of time on the ninth day for oral submissions) Mr Auld suggested it would be unfair for the defendants not to have the right to file further general written closing submissions (as opposed to the more limited responsive ones I permitted to be filed). I did not accept that submission, given the trial timetable outlined above and that equal opportunity. However, in my judgment it would be unfair for me to make findings, as urged by the claimants' written submissions, that Dr Forbes (whose Supplemental Report relied heavily upon alleged flaws in ROP's Summary) was himself acting on flawed data. None of the detailed points in the three pages of submission (containing 2 tables covering pen production over 11 pens in 2021, 2023 and 2024) were put to him in cross-examination. Nor were they addressed in Mr Mitchell's oral submissions in circumstances when the written ones were provided to the court and to the defendants just before the start of hearing on the ninth day. Mr Auld was not able to read them until after he had made his oral submissions.

280. I do not reproduce the tables in the claimants' written closing submissions here but they reveal an expectation that, after the conclusions of counsel's submissions, the court will undertake its own research into the trial bundles (including analysis of detailed manuscript diary notes where they are referenced) and make its own findings on points that were not raised with the expert witness.

281. In my judgment, that would not be a fair way to proceed. Instead, I should address ROP's Summary not as the claimants would like to further analyse it, but as it was, on their analysis of it when Mr Mitchell chose to ask Dr Forbes such questions as he did about the document's extensive detail. Even though I did give the defendants permission to file in short order any submissions correcting suggested errors in the claimants' document (and to address the authority of *Grandel* produced during the claimants' closing submissions) I did not, for present purposes, envisage those "corrections" going to matters not covered in testimony (i.e. engaging with points not put to the expert witness and which, if to be engaged with by Mr Auld, would almost inevitably involve Dr Forbes giving the equivalent of further "evidence" after what should instead be treated as the conclusion of the trial).

282. In my judgment, the claimants' expectation loses sight of the overriding objective in two other respects. The first is that, as I have said, this situation has come about as a result of the very late service of ROP's Summary. That was certainly not in accordance with the court's pre-trial directions which the court is expected to enforce.

283. The second is that court cannot be expected to devote more than an appropriate share of its resources to hearing and deciding this case. This point in fact has underpinned Mr Mitchell's own submissions when resisting the adjournment of the falcons claim on day one of the trial and then resisting Mr Auld's suggestion that there should have been an opportunity for filing more general written submissions after the end of it. It is clear to me (and may be obvious to the reader from the length of this judgment and certain observations within it) that writing this judgment, even without this further fact-finding and analysis urged by the claimants, has taken a significantly disproportionate amount

of time compared with the 9 days of trial. That is the consequence of counsel having to address some very significant issues in the case (most obviously, I think, those relating to quantum) at such a pace that even a 9 day trial time estimate was hugely ambitious; and the court being left in the position of deciding matters without the benefit of their more considered reflection upon them. However, the parties have held themselves to 9 days of fact-finding and submission (plus a site visit) and neither of them can expect the court to proceed otherwise. Other court listings in the weeks and months following that ninth day mean that the luxury of inviting the parties back to provide me with more assistance, and the prospect of streamlining the judgment-writing, was not an option.

284. I therefore approach Dr Forbes's evidence in relation to breeding numbers only by reference to the points put to him in connection with his Supplemental Report.

285. Dr Forbes's Supplemental Report accepted that the 2022 mortality rate lay outside the normal range (i.e. it was significantly higher than normal) but he made the following statements in response to the mortality report (see paragraph 207 above) within ROP's Summary:

> *"**It is this Expert's Opinion that no mortality event at ROP should be considered unless:-***
>
> ***1. There has been a full post mortem, conducted by a RCVS recognised veterinary surgeon, with histology (if recommended by the vet/pathologist).***
>
> ***2. There must be a legible closed ring and an associated A10 (with the same number on it)***
>
> ***3. Unless bred on site, there must be a transfer or importation certificate with authentication that the bird was on site at ROP at the time of its demise***
>
> ***On the occasion of the experts site visit to ROP, after MN had recovered various carcases from the freezer, Dr Forbes asked MN if there were any other carcases of falcons which had died in 2022, remaining in the freezer. MN stated quite categorically that there were not**."*
>
> ……
>
> *".....MN has determined that disease was not present in any of these mortalities, despite finding disease in some and having not opened up others.*
>
> *These are high value birds, maintained for a commercial purpose, it seems amazing to this Expert that no professional post mortems have been undertaken in the nine birds which were not subjected to a veterinary post mortem examination."*
>
> ……
>
> ***"Other considerations of these Mortalities***
>
> *We know that 3 of 26 birds that died were in what is described as the 'effected side'. Of those cases one was postmortem examined by Madeiros and Forbes with a confirmed diagnosis of amyloidosis. One bird was examined by Martin*

Nicholas (who is not a vet), who believed that the bird had died of amyloidosis (whilst Madeiros and Forbes agreed that they could not comment as no veterinary post mortem, or histology had been undertaken). In the latter case, the experts (for both sides) had been informed that the carcass remained available for inspection, but was then discarded by MN prior to the experts site visit. The third carcass (subject to this hearing), no post mortem has been conducted and the cause of death remains conjecture, although this report states that it has also been PM by MN. As an expert well versed in the importance of 'evidential material', it surprises me greatly that evidential material (carcasses) have been disposed of. One is left wondering why some carcasses have been kept and made available and others have not.

ROP report eight additional deaths in the 'unaffected group of birds (87). Whilst there is only evidence that one (580948/02 in Pen 22) of these seven other mortalities had ever been at ROP. But if one accepts that these further 7 deaths (9.2% of the group), in the 'unaffected' birds, then this indicates a significant disease incidence which one would have expected to be thoroughly investigated and no doubt the post mortem findings would be made available to the court. The point being that if an additional cause of illness and death was on going in the collection during 2022, affecting birds in the 'unaffected group', then any such disease might have also been causing some or all of the claimed reduction in breeding success.

The cause of the disease outbreak in 2022, was no longer present

Less gyrfalcons imported

Gyrfalcons being screened for amyloidosis prior to importation

Improved observation of birds for signs of illness

Improved veterinary treatment."

Ian Garland and James Forty

286. Mr Garland is also ROP's expert on the valuation of falcons.

287. The defendant's expert on this issue is Mr James Forty BEng (Hons), Meng, DipFa. Mr Forty's expertise comes from the fact that he is a falcon breeder, operating Forty Falcons at Royal Wootton Bassett, where he breeds, sells and keeps falcons.

288. By a joint statement dated 4 November 2024 the experts agreed upon most matters of valuation in issue in the case (such as the value of Gyr 03, Gyr 05 and Gyr 06) though Mr Forty was not able to agree Mr Garland's figures for lost eggs (in part because it is unclear whether they can be attributed to Gyr 03, the race-winning bird) and ongoing breeding losses.

F. FINDINGS

289. I set out below my findings in respect of the principal matters in issue between the parties. I address matters relating to the claim in nuisance and negligence first before turning to the parties' claims of harassment.

(1) The Cause of Death (as a matter of Veterinary Science) of Gyr 03, Gyr 05, and Gyr 06

290. In this section of the judgment, I address the evidence (factual and expert) relating to the cause of death of the three birds from a veterinary science perspective. Whether or not the death of any of them, or a loss of eggs or fertility in other birds, was caused by acts of nuisance or negligence is addressed later.

291. The Particulars of Claim rely upon a conversation in December 2020 in which Martin informed Mr Thomas that "*stress could cause the falcons to smash their eggs and abandon their young. It could also cause a disease called aspergillosis which is potentially fatal to the falcons*." Aspergillosis is also mentioned as presenting a risk to the breeding falcons in the context of the two allegations of harassment based upon the placing of silage bales to the rear of Scott's home.

292. The histology report (prepared by Dr Stidworthy, a pathologist) on Gyr 03, which is appended to Dr Madeiros's report, includes the comment that amyloidosis may be caused by chronic inflammatory conditions of which aspergillosis can be one. Dr Forbes confirmed in evidence that aspergillosis is an infection which will kill a bird within a relatively short period of time of between one week and 6 weeks. However, his view is that aspergillosis is not a relevant underlying infection causing amyloidosis.

293. Dr Forbes's report recognises that aspergillosis can be caused by stress (though it went on to say that there is "*no statistically significant link between aspergillosis and amyloidosis*"). He said aspergillosis can also be caused by *Aspergillus spp*. spores present in hay bales. He says the spores are unlikely to be found in silage. By their joint statement Mr Garland and Dr Forbes agreed that "*in terms of aspergillus avoidance, one needs to minimize STRESS to birds and also minimize exposure to aspergillus spores*".

294. Mr Garland's expert opinion was that the noise and visual disturbances of which ROP complains would have caused the falcons distress and anxiety which ultimately can cause aspergillosis. In testimony Mr Garland said that stress causes the immune system to degrade and that means a bird is more likely to develop aspergillosis.

295. However, Dr Forbes said he had seen no evidence at all that any of the birds died of aspergillosis. I accept that conclusion which is not at odds with any other veterinary evidence (or Martin's evidence) in the case.

Gyr 03

296. The veterinary experts are agreed that Gyr 03, the only bird on which they carried out a post-mortem, died of amyloidosis on 3 April 2022. Dr Madeiros's report included the histology report on the bird which referred to it having had severe diffuse amyloidosis of the liver. There was also severe diffuse amyloidosis of the spleen (indicating that the falcon's immune system had been severely compromised) and mild/moderate multifocal amyloidosis of the kidney.

297. Dr Madeiros and Dr Forbes agreed that they were unable to express an opinion as to the cause of death of Gyr 05 and Gyr 06 as neither had been subject to a veterinary post-mortem and nor have confirmatory histopathology samples been tested by a pathologist. I have referred above to Martin's evidence to the effect that Gyr 05 died from amyloidosis, pneumonia and enteritis and an infection in its respiratory system. However, I accept Dr Forbes's point that Martin is not professionally qualified to reach such conclusions. This is illustrated by the detail of the histology report upon Gyr 05 when compared with Martin's non-veterinary diagnosis. Martin's experience as a breeder of falcons cannot be doubted but he is not an avian vet.

298. Dr Forbes's report explained that amyloidosis – specifically Amyloid A amyloidosis (AA amyloidosis) of which avian amyloidosis is a type - is a disease caused by the abnormal deposition (extracellular or within blood vessels) of insoluble amyloid proteins. Its precursor is a serum amyloid A (SAA) which is mainly synthesized by the liver. Dr Forbes's report said the liver is stimulated to synthesize SAA "*when the body is exposed to trauma, chronic infections, inflammatory stimuli and sustained immune stimulation, typically caused by chronic inflammatory disease or malignant tumours*." Dr Forbes referred to and highlighted a section in a published article by Landman, Gruys and Gielkens '*Avian amyloidosis*' (Avian Pathology (1998) 27, 437-449) which noted that *"....ongoing stress may also be responsible for the development of amyloidosis in captive birds*."

299. In cross-examination, by reference to a 1968 paper on 'Avian Amyloidosis' by Cowan (which was based on a study of birds in the family *Anatidae* - i.e. water birds such as ducks, geese and swans - at the Philadelphia Zoological Garden) Dr Forbes did accept that amyloidosis can develop in response to "environmental stressors" to which the bird cannot adapt and that "*amyloidosis is not caused by one thing"* and "*arises when the immune system is overstimulated for a long period of time"*. Allowing for the fact that this was an old paper, as Dr Forbes commented, and was not concerned with amyloidosis in raptors, the conclusion reached by the paper (analysing birds both with coincident tuberculosis and those without) was that, unlike aspergillosis, classifications such as primary and secondary amyloidosis do not apply to avian amyloidosis. However, noting Dr Forbes's point that about long-term overstimulation, it is clear that the study was based upon birds that had been in the zoo for many years. The paper noted that the only bird dying without amyloidosis had "*been in the zoo only 24 months*".

300. Dr Forbes referred to older, exotic, poorly adapted or excessively aggressive birds being more susceptible to amyloidosis. He referred to gyr falcons, whose natural habitat is in the northern regions, being kept in the Middle East (though, as mentioned below, his evidence was to the effect that their relatively pampered lifestyle there ought not to lead to stress). He relied upon the fact that Gyr 03 died only 11 weeks and 5 days after importation from the Middle East (on 12 January 2022) and Gyr 06 only 17 weeks after that date.

301. Mr Garland and Dr Forbes agreed that "*amyloidosis is extremely rare in UK falcons, typically only ever seen in gyrfalcons that have been imported from the Middle East*".

302. Dr Forbes said that the current hypothesis is that amyloidosis is triggered by the adjuvant used to stimulate immune responses in falcon vaccines (antigenic stimulation) that are manufactured and administered to falcons in the Middle East. This was also mentioned in the comments within the histology report on Gyr 03 alongside the suspicion that gyr falcons may be genetically predisposed to amyloidosis. Dr Forbes also recognised that a chronic infection might be the cause of excessive stimulation of the bird's immune system. His report referred to bumblefoot and visceral gout but in evidence he said the two infections to which amyloidosis has been statistically proven to be linked are tuberculosis and bumblefoot. His report also recognised that some literature suggests stress may be a causative factor in the development of amyloidosis but "*this is only relevant for a bird which is resident in the Middle East*".

303. In response to some questions from me about that statement, Dr Forbes said that another scientific paper suggested amyloidosis might be caused by a prion, which is a filament of protein, similar to the bug which caused BSE in cattle, and which can be passed from one bird to another though faeces. Therefore, "*the infection or vaccination, which has triggered the excessive stimulation of the immune systems and thereby amyloidosis, is only caused at a time when the bird is in the Middle East, even if clinical disease goes undetected until a later time*." It is clear that Dr Forbes's expert opinion rested largely upon the fact that across his long career "*he has only treated four gyr falcons in the UK with amyloidosis and each one has been an imported gyr falcon from the Middle East*" and "*he has never diagnosed amyloidosis in any other species of raptor in the UK*."

304. Dr Forbes's testimony made clearer the point he sought to make in his report about stress only being a causative factor in death when there has been either an infection or vaccination (in the Middle East) triggering excessive stimulation of the immune systems. He said stress itself does not cause suppression of the immune system. If it did then it would be seen in gyr falcons living in the UK because they are "*stress monsters*". He said no one quite knows the underlying cause of the disease, that suggestions will be put forward and that in time some of them will be shot down. He said: "*the point is, what caused it to die, the underlying causes [of] the amyloidosis which, in itself, in this situation, is not in my expert opinion, caused by stress*." He said that stress would not be a cause of gyr falcons dying of amyloidosis in the Middle East because they are highly prized, of great value, and are extremely well-looked after in air-conditioned accommodation.

305. His expert conclusion in relation to Gyr 03 (the only bird on which a veterinary post-mortem was performed with a diagnosis of amyloidosis) was, therefore, that the falcon "*will already have been suffering from amyloidosis when he was imported into the UK.*"

306. Mr Mitchell cross-examined Dr Forbes about a report dated 19 March 2020 which he had prepared on behalf of Mr Bryn Close of Marra Falcons in Doncaster. Mr Close is a successful breeder of gyr, peregrine and gyr/peregrine crosses. Dr Forbes had prepared his report to assist Mr Close in his dealings with a neighbour who was engaged in construction works for a substantial industrial unit at the start of the breeding season. By that report, Dr Forbes referred to the delicate and fragile nature of the business of

Marra Falcons and (referring to his own writing in the Respiratory chapter in the BSAVA Manual (1996), which was not before the court) said it:

> "… stresses the importance of avoiding stress to captive raptors (especially gyr falcons), as stress causes a suppression of the immune system, which effects [sic] gyr falcons specifically resulting in dramatic increased susceptibility to Aspergillosis, a typically fatal fungal respiratory disease. Hockin et al (1991), stresses that human induced disturbance (specifically industrial developments results) of breeding birds has a significant negative effect on breeding success by causing nest abandonment and increased predation."

307. When asked about that statement, Dr Forbes said "*But I've never rejected or denied that stress disturbance on gyr falcons will cause a potential for aspergillosis*."

308. I have already referred (see paragraph 292 above) to a link, which Dr Forbes rejects, made by the histology report on Gyr 03 to AA amyloidosis and aspergillosis (and other inflammatory conditions).

309. Mr Garland disagreed with Dr Forbes's conclusion that the bird had to have been suffering from amyloidosis when it left the Middle East. He said that 11 weeks is a long time and if there was something wrong with the falcon, especially a gyr falcon, it would show up soon after shipment and one would know early on. His view was that the noise and visual disturbance alleged by ROP are likely to have caused the death of Gyr 03. He said that stress could cause a bird to die though physical injury (such as by flying into the pen wall) on the same day as the stress-inducing event(s) but it is more likely that its immune system was weakened by the bird becoming stressful.

310. As mentioned above, the first ever gyr falcons bred in the UK (by Mr Garland) were young birds who in fact settled to their surroundings so quickly that they copulated whilst in quarantine following arrival and the female laid eggs about 14 days after being moved into a new pen. Mr Garland referred to this in explaining that older birds generally need more time that younger ones to acclimatise to their surroundings. He rejected the suggestion that Gyr 03, Gyr 06 and Gyr 05 had not been in their respective Western Pens long enough to acclimatise to their surroundings before they died. He said there was a difference between introducing a bird into a pen in a neighbourhood with its existing noise and visual instructions and it being in the pen before new disturbances started up. So far as the pairing of Gyr 03 and Gyr 05 was concerned, Mr Garland said putting a bird in a pen with a new mate would not normally cause stress.

311. So far as Dr Forbes's conclusion in relation to Gyr 03 was concerned (i.e. that it came from the Middle East with amyloidosis) Mr Garland said that birds are subject to veterinary checks on shipment and on arrival. He said that amyloidosis is not unique to birds coming from the Middle East though he stood by his agreement to the point in paragraph 301 above.

312. Mr Garland said that he stopped importing birds from the Middle East about 3 years ago (so around 2022). Dr Forbes had undertaken inspections for him for quarantine purposes on importation. Mr Garland said the health checks before shipment involving the "scoping" of birds, and possibly an X-ray, and this would be to check the lungs and

for any enlargement of the liver. He said amyloidosis in gyr falcons imported from the Middle East longer ago (he referred to 10 years ago) used to be quite common because a lot of them would come from the local market, rather than being birds from specific blood lines, and they were imported without proper health checks and being subject to modern regulation. His general experience is that amyloidosis in birds from the Middle East is now less common. This evidence was consistent with Dr Forbes's statements (in his report) that he advises his clients to have birds tested for amyloidosis before shipment and that the central veterinary laboratory in Dubai undertakes SAA blood tests. However, in testimony Dr Forbes said that the current situation in the Middle East is that 60% of gyr falcons dying there do so as a result of amyloidosis (he said he had been told that was the current figure).

313. When asked about the 8 other birds (not in the Western Pens) which died in the Aviary in 2022, Mr Garland said that the age of the birds and circumstances of their deaths would need to be considered in deciding whether there was a cause for concern about the mortality rate in the Aviary generally.

314. The fundamental point of disagreement between Mr Garland and Dr Forbes, therefore, is whether Gyr 03 already had amyloidosis when it was imported or developed it only once it was in pen 1 as a result of the noise and visual disturbances complained about by ROP (whether or not they, or any of them, are actionable in law).

315. This is a difficult question to decide but I am persuaded by the evidence of Mr Garland over that of Dr Forbes.

316. I therefore conclude that the underlying cause of death of Gyr 03, diagnosed on post-mortem as having died through amyloidosis, was stress following its introduction into pen 1. On my assessment of the evidence that is more likely than the bird having come to the UK with amyloidosis.

317. So far as the expert evidence is concerned, I have reached this conclusion for the following principal reasons:

    i) Martin's evidence was that Gyr 03 (and Gyr 05 and Gyr 06) was a fit and healthy bird before it died. The falcon was 4 years of age when it died (Gyr 05 was 3 and Gyr 06 was also 4). If the bird came to the UK with amyloidosis then there was no indication of the disease until almost 3 months later. However, this point falls to be qualified Dr Forbes's observation that amyloidosis may go undetected until a later time. The article by Murakami *et al*, put to Dr Forbes in cross-examination and referred to below, states "*Typically, avian AA amyloidosis rarely exhibits clinical symptoms and its diagnosis is often determined on postmortem examination."* That said, however, Dr Forbes accepted in cross-examination – by reference to an article he wrote – '*Raptor Medicine*' (Seminars in Avian and Exotic Pet Medicine, Vol 9, No. 4 (October 2000), pp. 197-203) – that the owner of the bird will often have an instinctive feeling as to when a bird is not quite right, even in the absence of overt clinical signs. He said that birds can hide the signs of illness and, with reference to them possibly losing weight, "*they have a faster metabolic rate than mammals, they get sicker quicker*."

ii) The evidence was unclear as to how quickly amyloidosis can develop to the point of causing death. Dr Forbes emphasised the need for "*long-term*" overstimulation of the bird's immune system resulting in amyloidosis. Addressing the relative speed with which aspergillus kills a bird, Dr Forbes said a 6 week period would not "*be long enough to normally stimulate amyloidosis.*" That indicates that a period of 3 months might be long enough for a bird to develop amyloidosis. As noted above, Mr Garland said 11 weeks from importation is a long time for the symptoms of an unhealthy bird not to have manifested themselves. I have also already noted Dr Forbes's general observation about birds which hide the signs of illness become sick more quickly than mammals.

iii) The expert evidence, including that of Dr Forbes, supports the conclusion that amyloidosis can be brought on by stress. The evidence supports the conclusion that amyloidosis is caused by the compromise (through overstimulation) of the bird's immune system. Dr Forbes says this can only be as a result of infection or vaccination (in the Middle East) – i.e. some other reason if stress is to be the cause of any death diagnosed on post-mortem as amyloidosis – but he recognises there is literature to suggest that, as with aspergillosis, stress may be a causative factor in the disease. For reasons summarised in the next points, I am not persuaded by his evidence to the effect that stress cannot be the proximate cause of the disease.

iv) Dr Forbes's observation that, "*if stress was a factor at all ….. it would not in my Expert Opinion, be possible to ascribe the cause of stress "on the balance of probability" to disturbance on the defendants land as opposed to stress that has arisen consequent to importation, quarantine, pairing with a new mate in a new aviary"* (my emphasis through underlining) appears to provide some recognition that, if the amyloidosis has been caused by stress, then stress-induced amyloidosis can affect a gyr falcon resident in the UK (albeit one imported from the Middle East) just as it might do for one remaining in the Middle East (though Dr Forbes said they were generally kept in stress-free environments there). So too, Dr Forbes's reference to other potential causes of stress within the Aviary, albeit with the emphasis upon the likely success in birds breeding chicks, such as further construction work on the Aviary at the time or regular light aircraft and night-time helicopter flights in the vicinity of the Aviary, which might even cause birds to damage themselves, further illustrates the point. Section 3 of Dr Forbes's report provided a resume of findings in published materials about the impact of anthropogenic disturbance (noise in particular) and said: "*Noise contributes to the development of some animal diseases and disorders caused by stressful conditions such as high blood pressures, immune suppression and other psychosomatic diseases*." (my emphasis again through underlining)

v) Dr Forbes's conclusion that Gyr 03 (and also Gyr 06 and Gyr 05) must have had amyloidosis before it left the Middle East, because that is supported by the circumstances in which he has only seen four cases of gyr falcons with amyloidosis in the UK, must in my judgment be treated with some caution. It is not clear when (presumably before Dr Forbes's retirement in 2017) those cases occurred, having regard to Mr Garland's point about amyloidosis in

Middle Eastern birds not being as prevalent as it used to be, nor how long each of the birds had been in the UK following importation (compared with the 11 to 12 week period Gyr 03 spent in the UK before it died) or whether (compared with the apparent healthiness of Gyr 03 prior to death) the birds in question appeared to be fit and healthy during the relevant period. Further, both in his report and in testimony, Dr Forbes referenced a study by Hampel *et al*: '*Increasing fatal AA amyloidosis in hunting falcons and how to identify the risk: a report from the United Arab Emirates'* (Amyloid, September 2009, 16(3) pp. 122-132). That study did highlight the prevalence of AA amyloidosis in pure gyr falcons and reported that 30.3% of the falcons examined were susceptible to amyloidosis compared with 12.7% of the peregrine falcons examined. Dr Forbes said that the gyr falcon is the only species of raptor likely to be imported to the UK from the Middle East. Although the Hampel study was based upon an examination of birds within the UAE, and amyloidosis within peregrine falcons is not an issue in the present case, it does raise a question as to whether there is any good veterinary scientific reason why a non-imported peregrine falcon living in the UK should not (despite the greater resistance of that species to the disease) die of amyloidosis. Although Dr Forbes's evidence indicates he has not diagnosed such a case, and noting that peregrines may not quite be the "*stress monsters*" that gyrs are, I think the assumption behind his position must be that no peregrine falcon which has spent its entire life in the UK will ever have died from amyloidosis (whether or not a post-mortem was carried out to establish that as the cause of death). That is a possibility but the boldness of the proposition, if my assumption is correct, inevitably prompts a question about its soundness.

vi) When I asked Dr Forbes why a gyr falcon at all times resident in the UK could not develop amyloidosis as a result of stress, just as one in the Middle East might, he recognised that is a key point. He repeated his position that it is only a bird coming from the Middle East (with an immune system already compromised before shipment either by vaccination or infection or possibly a prion) that can die of stress-induced amyloidosis. In his report Dr Forbes had mentioned but not attached a paper by Murakami *et al* '*Systemic AA amyloidosis as a prion-like disorder*' (Virus Research 207 (2015) pp. 76-81). This contained the statement: "*Birds that are bred under stressful conditions are known to frequently develop AA amyloidosis*". Dr Forbes had referred to the paper in the context of his mention of a prion infection being a potential underlying cause and he accepted that there was potential for the court to have been misled through not being aware of the statement; though he maintained the key point that amyloidosis is not seen in the UK unless it is in gyr falcons imported from the Middle East. However, it is what Dr Forbes said in his own March 2020 report for Mr Close which causes me to doubt that matters are as simple as saying that any gyr falcon dying of amyloidosis in the UK must be one that came to the country from the Middle East with its immune system already compromised. Although the passage quoted in paragraph 306 above did specifically refer to aspergillosis, Dr Forbes referred to his own writing in emphasising the importance of avoiding stress to captive falcons (especially gyr falcons) "*as stress causes a suppression of the immune system*". I have already referred above to section 3 of Dr Forbes's report about noise

potentially contributing to the suppression of a bird's immune system and also his inclusion of "*trauma*" within the causes of the liver synthesizing SAA. In my judgment, in his expert evidence in this case Dr Forbes has rather downplayed the impact that stress (without more) might have in compromising a falcon's immune system as a precursor to amyloidosis.

318. In his closing submissions Mr Mitchell suggested that Dr Madeiros and Dr Forbes had carried out a post-mortem on another gyr falcon (not forming the subject matter of ROP's claim or, therefore, the direction for their expert evidence) which showed that the bird died of amyloidosis. He said that this was a bird identifiable by reference to an A10 Certificate in the trial bundle as having been imported from Canada in 2018 (my emphasis).

319. In his re-examination Dr Forbes did mention that he and Dr Madeiros had carried out post-mortems on 3 birds (including Gyr 03). In his closing submissions Mr Auld initially indicated that the two others died of amyloidosis. However, Dr Forbes's evidence was that there was no evidence that they had died of aspergillosis (he referred to one of the birds having "*a bit of exudate in the air sac*"). In any event, the birds in question were not identified by number nor, so far as I can recall, addressed further in written or oral evidence; and Mr Mitchell accepted he had not cross-examined Dr Forbes about a bird imported from Canada dying of amyloidosis. Had he done so, and obtained the hoped-for confirmatory answer, that would have been very relevant and perhaps provided a much shorter route to reaching my conclusion, against Dr Forbes's evidence, upon the death of Gyr 03. As it is, I place no reliance upon the submission to that effect.

320. In my judgment it is important, when testing that conclusion, to stand back and consider all the evidence – factual as well as expert – when determining the likely cause of death of Gyr 03 for the purpose of (this element of) the issue of factual causation. This is especially so when I infer that the way ROP pleaded its case, both with reference to aspergillosis and the impact of noise of 70dB, may have been heavily influenced by the content of Dr Forbes's March 2020 report for Mr Close. The pleading pre-dated the post-mortem of Gyr 03, which confirmed aspergillosis was a red-herring, and it is that post-mortem which has generated the detailed technical evidence about amyloidosis: what it is, what triggers it and (less clearly) how quickly it develops before death.

321. Martin's evidence is that Gyr 03 died on 3 April 2022 following a period in which the scaffolding business had been operating on UCE's land near the Western Pens and dumper trucks and diggers had been in operation. He says the use of dumper trucks to drop large stones and build up a soil bank began in early January 2022. Simon James, the owner of the scaffolding business, said his scaffolding materials arrived on UCE's land, with the poles being offloaded from the delivery lorry using a HIAB crane, at the end of January 2022. Martin referred specifically to scaffolding poles being dropped from a truck on 25 March 2022 and watching on CCTV some of the birds in those pens flying into the walls (showing Scott the footage of a bird in pen 7 doing this). He said a bird in pen 11 flew into the walls on 27 March 2022, a day the scaffolders had been working on UCE's land, bruising a foot and damaging a back talon (so that the toe had to be amputated).

322. I accept Martin's evidence about the stress in the birds caused by such activity and it supports more generally a conclusion that Gyr 03 died as a result of the stress suffered within pen 1 caused by those external disturbances. Although Martin produced some published figures about noise levels created by certain types of commercial or industrial activity, there is no evidence about the noise levels within the Western Pens and whether or not they reached or exceeded 70db. ROP cannot be expected to have had recording equipment in place in anticipation of such disturbances. However, that the noise levels were sufficient to cause distress among the falcons is clear from his and Scott's factual evidence.

Gyr 05 and Gyr 06

323. The question then arises as to whether the same conclusion about the veterinary scientific cause of death holds good for each of Gyr 06 and Gyr 05. There is no expert veterinary post-mortem report for either bird pointing to the true pathological (if any) cause of death of either bird.

324. It is one thing to draw an inference that the two birds also died as a result of stress-induced amyloidosis. There are grounds for doing so in relation to Gyr 05 where Martin's post-mortem and photographs appear to show a correlation with the symptoms described in the post-mortem and histology report for Gyr 03. So far as Gyr 06 is concerned (the mate of Gyr 03 which occupied the same pen) it might be said the bird's death about a month later than her mate (on 10 May 2022) is wholly consistent with the development of stress-induced amyloidosis during the period commencing with the disturbances described by Martin.

325. However, mere inference does not find an easy resting place, alongside court directions which provided for a veterinary examination of all three birds, for the purpose of sustaining a conclusion that the proven pathological cause of one death holds good for two others when they have not been subject to veterinary scientific diagnosis. In my judgment, a judicial decision about a pathological cause of death would be highly questionable, even as the product of weighing the balance of probabilities, when there is no expert evidence about it. That is obvious enough from the fact that the directions at the CMC provided for expert evidence upon the veterinary science concerning the cause of all three deaths and the reference in the Particulars of Claim to aspergillosis (not amyloidosis) as the likely fatal disease. The fact that ROP's Summary contains a mortality report which shows 8 other birds died in the Aviary in 2022 (5 of them gyr falcons and some owned by Mr Lootah not ROP) is a further reason for not proceeding on this technical, scientific point simply on the basis of an inference.

326. I have therefore concluded that it cannot be said that either Gyr 05 or Gyr 06 died of amyloidosis. However, as I explain below, that conclusion does not in my judgment mean that, as a matter of factual causation on the nuisance/negligence claim, ROP's claim in respect of Gyr 05 and Gyr 06 is thereby stopped in its tracks.

(2) The Locale

327. Any finding that Mr Thomas and/or UCE is liable in nuisance must begin with consideration of the potential impact of the locality principle. Consideration of the neighbourhood in which ROP carries on its business is also likely to feed into an assessment of whether it is fair just and reasonable that the defendants should owe the duty of care alleged by the claimants.

328. The Aviary is built on land acquired by Martin and Scott in 2017. It has been very close to the location of Martin's earlier aviaries (the structure of one of which still stands).

329. My visit to the site on 17 January 2025 confirmed the rural setting of the Aviary. The Atlantic (Celtic Sea) can be seen from site where the coast dips at the mouth of the Cot Valley approximately a couple of miles distant.

330. Although there are buildings nearby (including the parties' respective homes, other neighbours' properties and a community farm on the other side of the B3306) the Aviary is surrounded by agricultural land. A public footpath runs between the Aviary and UCE's land. UCE's barn on the other side of the footpath is of course an agricultural building and work on it commenced after the Aviary was substantially completed. Building the barn (not yet completed) has not changed the agricultural character of the neighbouring land.

331. The Aviary is flanked to the north and west by substantial soil bunds which Martin explained was an aspect of the planning requirement that the Aviary should to some extent be screened from view, rather than created for the purpose of shielding the birds from noise or visual intrusion. Nevertheless, the bunds (created using soil from the levelling of the site for the Aviary) do shield them to some extent. The Aviary (which is closer to UCE's land than the road partly for the reason explained by Martin) is shielded from the road by a roadside hedge.

332. A business operation such as ROP's could of course be built in the middle of nowhere, such as the top of an isolated moor, but it does not follow that the Aviary is not suited to its own location. On my understanding, its location is no less rural and possibly more so than that of Mr Garland's successful aviary (the defence of which from disturbances on neighbouring land Dr Forbes has himself supported).

333. There seemed to be no dispute between the parties that, given its proximity to Land's End, the B3306 is busy with traffic during the summer months, and I think it can probably be assumed that the hum of traffic would be heard at least within the pens on the eastern side of the Aviary. During the site visit several small and quite noisy propeller-driven passenger planes were also coming in to land at Land's End Airport a short distance away; and conversation had to pause briefly to await their passing overhead. These would be heard and seen overhead by the falcons through the netting of the hack pens and other openings in breeding pens giving a view above. However, the factual and expert evidence in this case demonstrates that regular noises and sights, to which the birds become accustomed, do not present a threat to their welfare.

334. The evidence about the location of Mr Garland's own aviary, Mr Bryn Close's aviary, the history of Martin's breeding of falcons at the site (before the Aviary was built) and the overall success of ROP's business in breeding birds all point to this being a suitable location for the sensitive operation of breeding falcons.

.

(3) The Defendants' Awareness

335. The allegations of nuisance and negligence in this case relate are time (or season) and event specific in that they relate to particular, one-off activities on UCE's land during the breeding season rather than a continuing nuisance of the kind alleged in *Fearn* or *Ray v Windrush*. I have explained in Section C(1) above how a claim in nuisance, like negligence, can arise out of temporary activity.

336. As to the seasonal aspect of the claim, I preface my findings below by repeating my concern that, in these proceedings, Mr Thomas has sought to downplay his knowledge that building-related activity on UCE's land near the Aviary during the breeding season (the length of which I address below) could lead to the falcons being harmed.

337. As already noted, I accept the evidence of Martin and Scott that they had a conversation with Mr Thomas in December 2020 (when relations between them were good) about the danger and that construction noise and visual disturbances would present a danger to the birds. This was prompted by a discussion of Mr Thomas's plans to build the barn. His awareness of that risk, during the breeding season, is to an extent evidenced by the terms of some WhatsApp messages between him (his given name is misspelt) and Martin and, on the last exchange, Karen Nicholas. The references to hats and heads are to the male birds' sperm collected by Martin for imprinting. They were as follows:

> "19/12/2020, 21:28 - Barns Thomas: How's the breeding going?
>
> 19/12/2020, 21:30 - Martin: No more children expected anytime soon.😄
>
> 19/12/2020, 21:30 - Barns Thomas: You're obviously or wearing that hat enough
>
> 19/12/2020, 21:31 - Martin: Birds don't kick off till march so just get everything clean around ready.
>
> 19/12/2020, 21:31 - Barns Thomas: Ready to rock
>
> 19/12/2020, 21:33 - Martin: Hopefully, my friend in dubai won some of the races in Abu Dhabi the other day, so hopefully my time is coming.
>
> 19/12/2020, 21:33 - Martin: Yeah only get one chance a year, they only breed once.
>
> 19/12/2020, 21:34 - Barns Thomas: Time is coming? Sounds ominous;-)
>
> 19/12/2020, 21:34 - Barns Thomas: I won't make any noise in March then
>
> 19/12/2020, 21:35 - Martin: You will be fine noise is fine its just stuff they can see that put them off. Unless there is a crane next to them then you are all good.
>
> 19/12/2020, 21:36 - Barns Thomas: A crane would put me off."
>
> ……..

"03/01/2021, 17:30 - Barns Thomas: U been busy with the birds?

03/01/2021, 17:33 - Martin: Yeah starting to get stuff ready for the breeding season. It takes 2hrs just to feed them. ……"

……

"07/01/2021, 12:03 - Barns Thomas: Am about to light my fire. Will it upset your birds"

……

"08/01/2021, 20:54 - Martin: I feel like I would like to do nothing for a day. If that make any sense

08/01/2021, 21:08 - Barns Thomas: Yes

08/01/2021, 21:08 - Barns Thomas: I do

08/01/2021, 21:08 - Barns Thomas: Luckily I can be manic and stop

08/01/2021, 21:18 - Martin: Mine gets worst again when the birds start. Goes to about 18hrs a day if lucky, while doing two jobs

08/01/2021, 21:19 - Barns Thomas: Think of the money love

08/01/2021, 21:20 - Barns Thomas: That and all of that spunk on your head. 🤣

08/01/2021, 21:33 - Martin: Liquid gold

08/01/2021, 21:33 - Barns Thomas: Granted

08/01/2021, 21:38 - Martin: £500-£1000 a shot

08/01/2021, 21:40 - Barns Thomas: Is that what u charge

08/01/2021, 21:41 - Martin: No mines alot more, obviously if it comes out ginger you get your money back 😂"

……

"03/03/2021, 21:16 - Barns Thomas: Those birds bonking on your head

03/03/2021, 21:22 - Martin: Not yet none of the girls are ready. It all starts another week or 2 then it will be full on.

03/03/2021, 21:23 - Barns Thomas: Ooo er

03/03/2021, 22:00 - Barns Thomas: Full on breeder."

……

24/03/2021, 19:15 - Martin: <Media omitted>

24/03/2021, 20:32 - Barns Thomas: Open wide

24/03/2021, 20:33 - Martin: £500 for that dribble

……

"30/03/2021, 20:39 - Martin: It's Karen... 😃 Martin is mating with his birds! Hope all is smokin in London!

30/03/2021, 21:11 - Martin: Apologies... one to many baileys this evening and hadn't twigged I had Martin's phone... I wondered why you were messaging me 😂

30/03/2021, 21:53 - Barns Thomas: 🤣🤣🤣

0/03/2021, 22:02 - Barns Thomas: Love a Baileys

30/03/2021, 22:05 - Martin: He's still out with his other lovers! 😅"

338. In his evidence Martin explained that the 'media omitted' in his message of 24 March 2021 was a photo of a copulation hat. That day Mr Thomas had driven past Martin, holding the hat, and he explained it was the hat he used for collecting bird semen.

339. The first of those WhatsApp exchanges on 19 December 2020 raises the question as to whether Mr Thomas was made aware that noise (as opposed to visual threats) posed a danger to the birds. In his evidence Mr Thomas (when asked about his comment "*I won't make any noise in March then*") accepted that there would have to be some form of quiet for Martin to collect semen for imprinting.

340. I also accept the evidence of Martin and Scott that Ed McFadden made a joke to them in March 2021 about starting work on the barn during the breeding season. At the time relations between them and Mr McFadden were good. He had previously done work for them, including some work on the Aviary and the installation in February 2021 of a septic tank connected to ROP's offices, and they had put Mr Thomas in touch with him. Mr McFadden had been shown around the Aviary and been shown falcons flying in the hack pen. Although Mr McFadden said the claimants' evidence about his light-hearted remark was fabricated, I am persuaded that their evidence on this point is true. It would be a strange thing for them to make up such evidence about a teasing remark. Martin said he visited Mr Thomas as a result of it, and Mr Thomas confirmed that, in the light of their earlier discussion, works would not commence during the breeding season. I refer below to what Mr McFadden said about building work not taking place in the "breeding season" of 2022.

341. Although I have found that Mr Thomas was aware that the birds were particularly sensitive to disturbances during the breeding season, I do not accept that Martin made it clear to Mr Thomas during the December 2020 conversation, or at any time before the acts of nuisance complained about (in the period January 2022 to early May 2022) that the season was as long as from March and August each year. Had he done so then I

would have expected Mr Thomas to have questioned that further when the barn was to be finished by the winter of 2022 (as Mr McFadden explained, though he was unclear about timing in terms of when another builder would take over the build after his preparatory groundworks).

342. Mr Thomas's Defence says that he understood that the breeding season was March only. I do not accept that either.

343. On my assessment of the evidence Mr Thomas was made aware that March to the beginning of June was the time to avoid excessive noise and visual disturbances near the Aviary. In his witness statement Martin said he explained to Mr Thomas that "*the most sensitive time for the birds was between February to May when they were breeding and laying*." However, his WhatsApp message of 19 December 2020 would have been understood by Mr Thomas (and his response indicates was understood by him) to say that breeding really commenced in March. The question then arises as to when he was led to understand the breeding season ended.

344. I have already indicated that I prefer the evidence of John Brady over that of Adrian Thomas concerning their relatively brief dealings in May 2022. However, it is important to note that Mr Brady's arrival on the scene post-dated (and reflected the claimants' concern about) the pleaded acts of nuisance and their impact on the falcons.

345. During the trial it became apparent that there was some confusion over the form of the document (the heads of terms) which Mr Brady said he gave to Adrian Thomas, after their second meeting for him to take away to Mr Thomas, after a friend with some legal knowledge had prepared the heads of terms from Mr Brady's notes of the meeting.

346. In cross-examination Mr Thomas denied having seen before disclosure in the proceedings a three-page document (including a plan and signature page) headed 'HEADS OF AGREEMENT BETWEEN BARNES THOMAS AND MARTIN NICHOLAS'. Adrian Thomas said he had not seen it before giving evidence. Its terms indicate (though no more than that) that it could have been prepared on 11 May 2022 and was intended to be effective from 9 May 2022.

347. In anticipation of agreement, that document (with a plan identifying the two fields either side of the lane closest to the Aviary as "HOA Quiet Area During Raptor Breeding Season") said this in relation to the falcons and the breeding season:

> "(2) Mr. Barnes Thomas confirmed the cessation of all works associated with construction within the red outlined area, as shown on the attached maps, in Appendices A and B to this HOA, to commence on 09/05/2022 until the end of the breeding periods of the Raptors as located in the aviaries as owned by Mr. Martin Nicholas and his Dubai based business partner, Mr. Hussain.
>
> Commencement of said works to be on 30/06/2022 or sooner by mutual agreement. For the avoidance of doubt, this particular matter shall be deemed as an annual event from March to June and dated annually by agreement."
>
> "(3) Mr. Barnes Thomas confirmed that he shall remove the large stones and soil berms currently located within the red zone adjacent to the aviaries. These

materials shall be relocated by agreement at the end of breeding season or by the end of June 2022, whichever is sooner."

…….

"(7) Mr. Barnes Thomas confirmed that materials or mechanical implements that degrade or ferment shall not be stored within 400 metres from any point within the locii of the aviaries at any time."

348. On Mr Brady's evidence, that more formal document matches the description of the one he says he provided to Adrian Thomas once his friend had drafted it. Mr Auld cross-examined Scott on the basis that this was the document containing the claimants' proposals presented through Mr Brady.

349. However, Adrian Thomas identified a different document which was attached to an October 2022 email which his son-in-law, Tom Patrick, later sent as an attachment to Mr Thomas (headed 'Agreement from John Brady'). Mr Patrick said in the email he "*was witness to*" that agreement. This would therefore appear to be the document Mr Brady said he discussed with Mr Patrick in May 2022. It is typed single sheet headed 'Possible Agreement'. In relation to the falcons and the breeding season, that document said:

"No work on the new barn until June because of the nesting season."

"A schedule of noise works for the barn project given to next door".

350. Mr Brady's evidence was that Adrian Thomas took away the longer document in anticipation that Mr Thomas would sign it. Adrian Thomas said in his witness statement that it was "*a piece of A4 paper, with some points on, with some sort of suggested agreement from their side*". He said he told Mr Brady that he would talk to his son about it. In cross-examination he identified the shorter document as the one given to him by Mr Brady. His witness statement went on to say: "*I spoke to Barnes after the meeting with John Brady at Broadlands and Barnes agreed to stop all works until end of May as requested*."

351. However, in cross-examination Adrian Thomas said for the first time that he had destroyed the document he took away from his meeting with John Brady when he got home. He said he threw it in the Aga because "*I read through it and thought this is nonsense. Nobody can sign up to it. Nobody in their right minds is going to sign up to a binding agreement based on this without legal representation*." He referred to leaving the meeting feeling distrustful of Mr Brady. He said he did not show the document to his son though he did speak to him about stopping works in May.

352. I do not accept Adrian Thomas's evidence that he did not show Mr Thomas any form of proposed agreement. It is not credible that he would have discussed the temporary cessation of the works with his son without reference to the points formulated in writing by Mr Brady. As there is no suggestion that Mr Brady typed any document during the meeting with Adrian Thomas, for him then to take away, I prefer the

evidence of Mr Brady and to the extent anything turns on it (see below) it was the three-page document which Adrian Thomas took away from a later meeting to discuss with his son. Mr Patrick did not give evidence but the single page was probably produced for his separate meeting with Martin and Mr Brady.

353. Like the shorter document, the more formal one (not identifying "*the end of the breeding periods of the Raptors*" by reference to any date) is perhaps capable of being read as indicating a breeding season which ends *before* the end of June: see the second paragraph of clause (2) and the "*whichever is sooner*" language of clause (3).

354. In his evidence Ed McFadden confirmed that it was Mr Thomas (not Mr Brady) who told him that work had to stop during the breeding season. He said that Mr Thomas referred to there having been a meeting with Mr Brady (it is no part of the claimants' case that Mr Thomas was at such a meeting) requesting this. Mr McFadden said he initially understood this to mean the month of May but, on returning to the work after the end of that month, he then became aware of the claimants' position that it extended to June. Mr McFadden said in his evidence that he was still unsure about the duration of the breeding season.

355. Mr McFadden's initial understanding is supported by an exchange of phone texts between Martin and Tom Patrick on 10 June 2022. Martin texted that day to say: "*Hi Tom just to let you known that Eds digger has turned back up next to the birds. I have pens of babies with parents on that side*." Mr Patrick replied: *"…. I thought you said for the whole of May for no work and June was ok for digger*." Martin responded: "*Hi Tom it was the end of June. If they carry on, they will be held accountable*."

356. In one sense, the uncertainty in relation to whether the breeding season extended until the end of June, or beyond, is largely academic so far as the pleaded allegations of nuisance are concerned, though the length of the breeding season could be very relevant to any injunctive relief the court might be persuaded to make. The pleaded allegations cover the period from January to early May 2022. They do not extend into June in the way that Martin's text indicated might lead to the defendants being held accountable.

357. Those pleaded acts also took place before Mr Brady's visit and his representations on behalf of the claimants. Gyr 03 and Gyr 05 died before Mr Brady's arrival and Gyr 06 died within a week of it. Mr Brady therefore arrived too late to avoid the building and other activity which ROP alleges (in paragraph 26 of the APOC) resulted in those three deaths, if not perhaps the adverse impact on 7 breeding pairs and the loss of seven eggs in 2022.

358. Therefore, the greater focus (speaking in general terms rather the particular requirements for actionability under the law of nuisance) should be upon whether or not Mr Thomas was aware of the need to avoid those pleaded activities that are said to have taken place in the period January to early May 2022.

359. So far as those allegations are concerned, I am satisfied by reference to the evidence identified above that Mr Thomas knew that both excessive noise and visual disturbances on UCE's land were to be avoided during the period March to May (inclusive) of 2022.

360. He had that understanding for over a year before the Spring of 2022, from the time when he was getting on with Martin and Scott. By the start of the 2022 breeding season the parties had fallen out so badly, over issues relating to the septic tank and the Lane, that their interactions before that season have now resulted in twenty-two of the claimants' and two of Mr Thomas's allegations of harassment addressed below.

361. I now turn to my finding in relation to them and the particular allegations resulting from those interactions in 2021 and 2022.

(4) Nuisance

362. The numbering of allegations below in this part of my judgment reflects their terms set out in Section B(1) above.

363. Allegation (1). This allegation has been proved so far (but only so far) as the months of March and April 2022 and the allegation of excessive noise are concerned.

364. I accept the evidence of Theresa James, her son Simon James (and Mr Thomas) that the request to store the materials of Mr James's new scaffolding businesses came from them. No matter how temporary the arrangement, while Mr James found a permanent base for his business, this was not a common or ordinary use of UCE's land. Although not determinative of the allegation of nuisance based on the operation of a scaffolding business from UCE's land, there was no planning permission for it.

365. The place on that land where Mr Thomas permitted Mr James to deposit his scaffolding materials could hardly have been closer to the Aviary. It was between the site of UCE's proposed barn and adjacent to pens 8, 9, i1 and i2 in the Western Pens on the other side of the public footpath.

366. The evidence of both Martin and Simon James was that scaffolding poles and equipment were delivered to that place by a delivery company using a lorry-mounted 'Hiab' crane and, thereafter, the scaffolding was moved, for the purposes of doing scaffolding jobs off site, using a flat-bed truck onto which the poles would be slid. Mr James, whose evidence on this point I accept, said the two deliveries took place at the end of January 2022 and therefore before the start of the period when Mr Thomas was aware of the need to avoid excessive noise near the Aviary. The evidence contained a photograph of one delivery taking place on 27 January 2022. I note that Gyr 03, Gyr 06 and Gyr 05 were not placed in pens 1 and 2, respectively, until 9 February 2022.

367. Although Scott (who with Martin also runs a scaffolding business) produced evidence of noise levels typically generated by the operation of a Hiab crane in the context of road works, indicating a noise level of 105 dBA, I therefore do not regard this as relevant to my finding that the scaffolding business created a nuisance in the months of March and April 2022. The same follows for the Hiab breaking the falcons' line of sight. I do not accept Mr James' evidence that the operation of the Hiab crane, which he explained dropped 40 tubes in each stillage, was "*not very noisy*" (his witness

statement said it was "*pretty well silent when being operated*") but a Hiab did not operate next to the Aviary in those months.

368. My finding in relation to March and April is instead based on Martin's evidence about the impact of the sound of scaffolding poles being dropped at the site. I have referred to his and Scott's evidence about them seeing birds in distress via CCTV on 27 March 2022. Martin also referred to an egg being smashed and another damaged in the Western Pens in April 2022 following the loud noise of scaffolding poles being dropped. They referred to the loud clanging noise made by dropping metal on metal and I consider that judicial notice can be taken of the significant level of metal-on-metal noise which often accompanies scaffolders re-stacking poles. Mr James accepted that, if the poles were not dropped on mud but on one another or a hard surface, they would make a noise.

369. Their evidence is supported by the concern expressed by Martin at the time. On 29 March 2022 Martin sent the following email to the Trading Standards Officer at Cornwall Council:

> "*Sorry to contact you direct but we are not having much joy with this through the planning sector of the council.*
>
> *Our neighbour has opened/operating a scaffold yard trading from a green field site located next to the aviaries.*
>
> *This causing issues with noise and access issues into and out the purposed site. The noise from the banging, cutting of steel & and operating hours is not* [sic] *causing and issue with the falcons located next door, which is an existing business and I do not seem* [sic] *why we have to suffer from someone operating out of an illegal site?*
>
> *Also they are constantly working in the early hours and late at night, including working weekends.*
>
> *They are constantly in and out with deliveries and loading/unloading their vehicles on a lane which is for agricultural proposes and for access to our properties.*
>
> *The area is a green field site and not for commercial use, therefore they are not paying rates etc.etc*
>
> *It has been put there just to a nuisance to us, by our neighbour.*
>
> *I've attached so photos for you* [sic] *record.*
>
> *They had about 10 lorry loads of equipment delivered which has been used and replaced, there were two more recently deliveries which is shown in the photos.*
>
> *The company is Zenith Scaffolding and can be found on facebook."*

370. Allegation (2). This allegation has not been proved. The reason for that finding is that I am not persuaded (even if it had been clearly alleged) that this activity took place during the breeding season.

371. The pleaded allegation is that large stones and soil piles were deposited on UCE's land adjacent to the Aviary "*from early January 2022*." Scott referred to the stones being deposited between November 2021 to February 2022. Paragraph 15 of the Reply says the stones "*continued to be deposited until February 2022*."

372. Mr Adrian Semmens delivered the very large stones (which on the site visit remained in their position as delivered) and in his witness statement he said he did this using a stone dumper and a tractor in November 2021. In the cross-examination of Mr Semmens it was initially suggested, before the pleaded allegation was put to him, that he was moving the stones from November 2021 through to January 2022. Likewise, it was put to Mr Thomas that stones and soil were placed there from the start of the year (the transcript of evidence refers to 2021 but it is clear from the context that Mr Mitchell and Mr Thomas understood this to mean 2022). Mr Semmens, whose evidence I accept, was that it may have been later than November 2021 that he delivered the stones, over two or three visits, but he was clear that it was winter when he delivered them.

373. The soil was not deposited by Mr Semmens but by Mr McFadden having been excavated from the site for the barn. Mr McFadden could not remember when he started work on those groundworks. Mr Semmens said he did not recall the soil being there when he delivered the stones and Mr McFadden was uncertain that the stones were there when he deposited the soil. Scott said the soil arrived soon after the stones. As the site visit revealed the soil to be between the stones and the public footpath, I would have expected Mr McFadden to have noticed them. Although there is uncertainty as to which was deposited first, there is no clear evidence to support the conclusion that the soil was deposited (or levelled off by Mr McFadden as he explained in his evidence) after the beginning of March 2022. It was put to Mr McFadden in cross-examination that the mounds of earth were there at the start of 2022.

374. Having heard the evidence the evidence of Mr Semmens and Mr Thomas I am also not persuaded that the stones were deposited for the purpose of creating a nuisance as the claimants suggested. Their evidence might raise a nice question among Cornish hedge purists as to whether or not what Mr Thomas had in mind, in terms of creating a boundary to his field qualifies as such a hedge. They both referred to it as being similar to such 'Cornish hedges' both on and in the vicinity of Mr Semmens' own farm, which Mr Thomas wanted to match. However, my understanding of a proposed boundary created by embedded, closely abutting monoliths (the stones that are presently lying horizontally but the idea is that they would be placed vertically) supports the conclusion that the creation of such a boundary would be in accordance with the ordinary and common use of UCE's land. As for the soil accumulated near the aviary, Mr Thomas explained that this would be used both in connection with the hedge and for infilling at a new boundary between UCE's barn and the adjacent field.

375. The fact that the stones and soil were to be used in the ordinary and common use of the land does not (on the above analysis of the law) mean that the noise and visual disturbance involved in depositing them could never amount to a nuisance. Mr Semmens accepted that dropping the large stones from the dumper made a sound

similar to thunder. However, in this case it would only have been a nuisance if it was done without proper consideration of ROP's breeding season.

376. The claimants relied upon the fact that by 2025 the stones and soil have still not been put to their intended use in support of their contention that these were acts of nuisance and nothing more. However, as with the yet to be completed barn, I accept Mr Thomas's response which was to the effect that the present litigation has put a hold on many of his plans.

377. Allegation (3). This allegation, which is distinct from allegation (1), has not been proved. Although Scott in his witness statement referred to the use of a crane in March and April 2022, until Mr James moved his scaffolding base elsewhere, I am not persuaded that a crane was used in connection with Mr James's business after the scaffolding poles were first delivered to the site next to the Aviary. Scott referred to them being delivered in March but I have found it took place in late January 2022.

378. Allegation (4), (5), (6), (7) and (8). These allegations can be taken together on the basis that they all relate to building work on UCE's land which caused excessive noise (and in one instance vibration) within the Aviary. These allegations have been proved.

379. Martin's third witness statement introduced 4 video recordings taken on his phone on 31 March 2022, 18 April 2022, 29 April 2022 and 2 May 2022.

380. Those videos record a significant amount of noise from within the incubation room of the Aviary which he said is fully lined and insulated. The video recorded Mr McFadden operating either a digger or a tractor (on one occasion with a steel trailer for loading and offloading blocks of granite). Martin said he took the videos because he knew the noise was excessive and could harm the birds. The video from 2 May 2022 showed the noise upsetting the birds. Martin was cross-examined about the video from 29 April and said that day Mr McFadden was pecking out granite for the barn area. He said that as the Aviary stood on the same bedrock the whole building was vibrating. He said on that occasion the noise from approximately 6 metres away was "*100 and something decibels*" (referring to his own position on scaffolding industry technical committee) but accepted that, before the 2025 breeding season, no decibel meters were installed in the Aviary.

381. I accept the evidence of Karen Nicholas about Mr McFadden's work on 2 May 2022. I prefer her evidence over his as to the reason why she asked him to stop work that day. She said it was not only because it was a bank holiday but because he was causing noise and vibration next to the Aviary and the birds were showing signs of distress. Karen Nicholas says she also referred to the stress it was causing Martin and the family but I do not accept Mr McFadden's evidence that she only referred to her own mental wellbeing. I also accept her evidence that, although Mr McFadden said he would stop work, he carried on the work for another hour.

382. These activities, related to the building of the barn, cannot be said to be outside the ordinary and common use of agricultural land but they were carried out without proper consideration of ROP's breeding season. Mr Thomas was aware this was the breeding season. Contrary to what he had said in his WhatsApp message of 19 December 2020, about not making noise in March 2021, he was responsible for Mr McFadden creating significant noise close to the Aviary on those days in March, April and May 2022.

383. The evidence does not support a case for saying the work had to be undertaken on those days to meet a defined schedule of building work. Mr McFadden explained that he was doing the groundworks for the barn around other jobs and I note 18 April (Easter Monday) and 2 May (early May Bank Holiday) were holidays. However convenient it may have been for Mr Thomas and UCE for some progress to be made on those days, they appear to have paid no thought to the interests of ROP. Those interests had been well in mind, for the previous breeding season, when relations between Mr Thomas and Martin and Scott were good. Despite their recent dialogue, before the 2021 breeding season, Mr Thomas did not think to first check with them whether this kind of activity during the period in question would result in a substantial interference with the 2022 breeding season.

384. Allegation (5). This allegation has been proved.

385. The use of a JCB digger on agricultural land is part and parcel of the ordinary and common use of the land and it must follow that when such a machine breaks down during such use that is an incidence of such use. However, the JCB did not break down in the place to which it was then moved adjacent to the Aviary on 7 April 2022, the day after its breakdown some distance away on UCE's land, with its bucket raised. The evidence of Mr Geoffrey Hoad, who had been operating the digger to clear out ditches on "*the far side of the farm land*", is that it stayed there, with the bucket raised, until the digger was taken away on a low loader trailer (the bucket lowered after loading) because it could not be repaired on site. For the purpose of on-site inspection by an engineer the bucket was raised. With the bucket raised next to the Aviary for those 3 days the machine broke the line of sight of at least some birds in the Western Pens. Scott's evidence was that the birds were "*going mental*" at the sight of this alien object.

386. Mr Hoad was a patently honest witness and I am persuaded that he acted entirely innocently in this matter. The JCB was moved to the position adjacent to the Aviary on the instructions of Adrian Thomas. Adrian Thomas is a farmer himself and explained that he helps out on his son's farm.

387. My finding in relation to allegations (4), (5), (6), (7) and (8) – particularly allegation (8) relating the noise and vibration caused by a functioning digger near the Aviary some 3 weeks later – is consistent with this conclusion on the present allegation based on the creation of a visual threat by a non-functioning one. The WhatsApp exchanges in December 2021 show that he knew not to create visual threat from the month of March ("*A crane would put me off*"). Placing the digger on the birds' line of sight on 7 April 2022 was entirely at odds with ensuring that no undue inconvenience was caused to ROP (to adopt Lord Legatt's reformulation of the language of Bramwell B).

388. The evidence of Mr Hoad and Adrian Thomas was that the bucket was raised in order to provide access to the JCB's engine and that, the vehicle having broken down and lost its hydraulics, this was not an easy operation to reverse and then repeat as necessary. They explained that an engineer had not been able to fix the problem after it had been moved to the access track near the Aviary and it had been moved there because the track provided a length of land sufficient for the two tractors required to put the JCB on a trailer to be put on a trailer and towed away. I was shown a photograph of the 3 vehicles in a line (the JCB on a trailer with its bucket down) before it was towed away.

389. However, having visited the Site, I am not persuaded that this was the only place where the JCB could have been towed (if necessary) for the purposes of an engineer's visit and, if that was not successful, then being taken away on a trailer. Even if it had been the only place where the engineer could inspect it, it should not have been left there with its bucket raised once it was apparent he could not fix it on site. The evidence indicates that Adrian Thomas had no difficulty in towing the JCB from its place of breakdown a significant distance away so it could have been moved a shorter distance away from the Aviary.

390. In my judgment, therefore, there is no difference, in terms of either principle or relative ease of discontinuance, in avoiding a nuisance caused by the noisy operation of machinery near the Aviary and the breakdown of a machine which ends up in the same place and creates a visual disturbance.

(5) Malice

391. I have explained above the basis for my conclusion that ROP would need to establish an element of malice on the part of the defendants (Mr Thomas being UCE's directing mind and will) on the balance of probability. My findings of nuisance above have been reached without ROP having needed to prove malice. The issue of malice is therefore potentially relevant to the measure of damages (otherwise limited to losses reasonably foreseeable for the reasons explained) and, as he is the individual alleged to have been motivated by malice, is clearly relevant to the issue of Mr Thomas's potential personal liability for acts of nuisance committed by others on behalf of UCE.

392. By the Spring of 2022 relations between the Nicholases and Mr Thomas were moving towards their lowest ebb. ROP's allegation of malice must be considered in the light of the competing allegations of harassment (Martin's and Scott's dating back to January 2021 and Mr Thomas's to June 2021).

393. Referring to allegations (4), (5), (6), (7) and (8), Martin said in cross-examination "*Ed McFadden has been used as a tool to harass us. Mr Thomas gets Ed McFadden to do everything against myself and my family.*" Having regard to the actions of Adrian Thomas, and my conclusions in relation to the unreliability of his evidence, allegation (5) prompts thought as to whether Mr Thomas decided upon creating deliberate acts of nuisance.

394. However, having considered the evidence overall, I am not persuaded that ROP has established that the proven acts of nuisance involved malice as opposed to carelessness. That reflects my assessment of Mr Thomas's evidence taken as a whole. The activity which gives rise to those findings was farming or farm-building related activity and is to be contrasted with the inherently negative behaviour of the kind considered in *Christie v Davey* and *Hollywood Silver Fox Farm*. In relation to allegation (5), it was not suggested to either Mr Thomas or Adrian Thomas in cross-examination that the son had informed the father that "*cranes*" were to be avoided near the Aviary during the breeding season.

(6) Basis of Liability (Nuisance)

395. Even though malice has not been established, the proven acts of nuisance are in my judgment actionable because they were undertaken without proper consideration of the sensitivity of ROP's birds during the breeding season. Mr Thomas was previously aware of the need to avoid disturbances during the breeding season, and appears to have accepted that could be done, and yet the activities were undertaken regardless.

396. The conclusion that they are actionable is consistent with the fifth and eighth propositions I have taken from *Fearn*, the decision in *Barr v Biffa Waste*, and with my assessment that ROP' breeding of falcons (which includes their heightened sensitivity during the breeding season) does not fall foul of the locality principle.

(7) Negligence

397. I also find that those same tortious acts under the law of nuisance support a finding of negligence. By parallel reasoning from the established facts, the exchanges between Martin (primarily) and Mr Thomas in December 2020 establish the requisite proximity between the parties, the foreseeability of harm and that it was not unduly onerous (but instead fair, just and reasonable) that the building works on UCE's land should not be carried out near the Aviary during the breeding season. Adopting the incremental, analogy-based approach under *Robinson v Chief Constable of West Yorkshire*, a duty of care not to create disturbances that would harm the falcons during their breeding season should be recognised. The otherwise tortious acts of nuisance also breached that duty.

398. A key element of this finding is Mr Thomas's awareness, as explained above, that such activity on UCE's land during the breeding season was likely to harm the falcons on the Western Pens and could reasonably have been avoided by working around that season. I have explained why, on ROP's pleaded case, the focus is upon whether it is fair, just and reasonable that the defendants should be held to duty of care covering the months of March, April and early May 2022 (and therefore before Mr Brady arrived to make representations on behalf of the claimants) rather than a later part of the breeding season. The uncertainty, which has emerged from the evidence, as to whether Mr Thomas (or Mr Brady for that matter) understood the breeding season to extend into June or beyond June, or was as long as the 6 month period suggested by Martin, would raise obvious questions about the foreseeability of harm and the fairness, justice and reasonableness of holding the defendants to a more enduring duty of care. Those questions do not apply to the activity undertaken between the beginning of March and the beginning of May.

(8) Causation

399. Each head of pleaded loss must be approached separately on the issue of factual causation. I think it is fair to say that, although the rival submissions did grapple with

this issue in relation to the death of the 3 birds, the other heads of loss were the subject of an extremely light touch in this respect. In his closing submissions Mr Mitchell asserted that ROP's losses were as pleaded. Mr Auld highlighted that, as at 2022, ROP's business was a developing one which (per Dr Forbes's Supplemental Report) had inherent and significant levels of infertility within the Aviary.

400. Indeed, the reasoning and detail behind ROP's pleaded quantification of losses, generally and beyond the straightforward claim arising out of the death of the 3 birds, was not the subject of forensic analysis by counsel. Mr Auld simply said that any loss other than that arising from the deaths (and, when I raised the point, the eggs that they dead birds might have produced) was "*too remote*". The lack of deep analysis on either side may be a reflection of the large measure of agreement between Mr Garland and Mr Forty upon the value of birds and eggs. However, those experts were dealing with quantum, not causation. That is illustrated by Mr Forty's comments in support of his non-agreement of the 'eggs lost', 'ongoing breeding losses' and 'loss of the Western Pens' heads of claim.

401. The consequence is that I have been left to conduct my own analysis of ROP's less straightforward heads of loss (and to interrogate ROP's analysis accordingly).

Death of Gyr 03, Gyr 05 and Gyr 06

402. I have referred above to the references in the Particulars of Claim to aspergillosis, which has not been shown to be of relevance in this case. The particulars go on to allege that "*the Defendant's nuisance and/or negligence caused the falcons to suffer intolerable stress which led to the death of three falcons, prevented seven pairs from breeding and led to the loss of seven eggs in the 2022 breeding season*."

403. I have explained above the basis of my conclusion that the underlying cause of death of Gyr 03, diagnosed on post-mortem as having died through amyloidosis, was the bird's stress following its introduction into pen 1.

404. When the veterinary scientific cause of death of Gyr 03 (only) has been established to be stress-induced amyloidosis the next question to be addressed is whether that death, the deaths of Gyr 05 and Gyr 06 and any loss of eggs and fertility in other birds was caused by the established acts of nuisance and negligence.

405. I find that the death of Gyr 03 was caused by the established acts of nuisance. I have already explained why I have concluded that the post-mortem diagnosis of amyloidosis in that bird can be attributed to stress following its introduction into pen 1. I have referred to the evidence of Martin and Scott about the impact the proven acts of nuisance were having on the birds in terms of them becoming highly stressed. I am satisfied that the evidence shows on the balance of probability that the falcon would not have died if those acts had not taken place.

406. In the light of what I have said above about it being wrong to conclude, simply on the basis of an inference, that Gyr 05 and Gyr 06 also died of amyloidosis the question arises as to whether the same conclusion applies to them.

407. In my judgment it is important at this point to reflect upon a wider question. That is whether or not the expert veterinary evidence which has been obtained in relation to Gyr 03 means that, at least in relation to the deaths of Gyr 05 and Gyr 06, for which there is no such evidence, the court should proceed no further with an analysis of ROP's claim in terms of the defendants' potential liability for their deaths.

408. I have not seen a transcript of the hearing of the CCMC on 1 December 2023 at which Mr Neil Moody KC, sitting as a deputy High Court judge, made the direction for veterinary scientific expert evidence "*concerning the cause of death of the three deceased falcons*" which, I think is clear, it was then assumed would involve three post-mortem examinations. The judge will have been persuaded that such evidence was reasonably required to resolve the proceedings for the purposes of CPR 35.1. If, by that date, it had been clear that none of the three carcasses remained for post-mortem examination then the question would have arisen as to whether or not a direction in those terms would still have been made. The point made by Dr Forbes about gyr falcons only dying of amyloidosis in the UK having contracted it in the Middle East suggests to me that it would have been made.

409. However, even without a direction for such evidence, which presumed there would be post-mortem examinations of all three birds, I see no reason in principle why ROP's claim could not be established by reference to the other evidence in the case. The non-veterinary evidence of Mr Garland (alongside that of Martin) shows that, in principle, ROP might establish on the balance of probability that its losses, including those arising out of the three deaths, were caused by the activities of the defendants (or one of them). Although Dr Forbes's evidence, relying upon the recent importation of the birds from the Middle East, points against that conclusion, his evidence (on this hypothesis perhaps *assuming* that all three birds arrived in the UK with amyloidosis) would also inform the court's decision.

410. Of course, the absence of expert veterinary evidence (post-mortem based or otherwise) has no impact upon ROP's claims based upon infertility and loss of eggs. Findings on those aspects rest upon the factual evidence and Mr Garland's evidence in the directed field of breeding falcons in captivity.

411. With that wider question in mind I have concluded on the evidence that, consistent with my finding in relation to Gyr 03, reached following consideration of the veterinary evidence directed to the post-mortem findings available for that bird, that Gyr 05 and Gyr 06 also died as a result of the established acts of nuisance. For the reasons explained above, this conclusion must rest upon the factual evidence in the absence of any veterinary scientific diagnosis as to a pathological cause of death.

412. It cannot be said, therefore, that they also died of amyloidosis even though Martin is convinced that Gyr 05 did. However, for the purpose of deciding whether or not ROP succeeds on its pleaded case, it can in my judgment be said that they died as a result of stress created by the acts of nuisance. For the purpose of reaching that conclusion on the balance of probabilities, the evidence of Martin and Scott about the effect those acts had on the birds in the Western Pens is persuasive. The conclusion is reinforced by the fact that all deaths occurred within a relatively short period of time and that two of the birds were in the same pen.

413. In reaching this conclusion I should make it clear that I have considered the potential (and late) impact of the mortality report reproduced in paragraph 207 above. As I indicated during counsel's submissions about whether ROP's Summary should be admitted in evidence, and if so with what effect, a quick glance at the wider mortality figures for the Aviary (as a whole and over 4 years) raises a question as to whether these deaths in 2022 should be attributed to the tortious acts. However, as I have noted and as Dr Forbes recognised, a mortality rate of 7.96% (if not 9.73%) for 2022 is still higher than the rate in the other years and the mortality report therefore does not undermine and perhaps reinforces the factual evidence about the cause of death of these three falcons.

Non-breeding falcons

414. Martin's evidence was that ROP's falcons usually produce two clutches of eggs each year and that each clutch can produce as many as 5 eggs. He referred to getting an average of 8 eggs from a breeding female. ROP's claim in respect of non-breeding falcons is calculated on the basis that each of 5 breeding pairs and 2 imprint birds in the Western Pens would have respectively produced 5 chicks in 2022. He said this was a conservative number relative to the average number of eggs laid.

415. His evidence identified pens 2, 3 and 4 (each housing a pair of gyr falcons), 7 and 8 (each housing a pair of peregrine falcons) and pens i1 and i2 (each housing an imprint peregrine falcon) as the basis of the claim. Pen 2 was the pen in which Gyr 03 (with its 4 year old female gyr mate) was housed before it died. Therefore, Gyr 03 accounts for one of the three pairs of non-breeding pair of gyr falcons that is the basis of this head of claim.

416. As pleaded, however, Gyr 03 and Gyr 06 (in pen 1) do not feature in this head of claim even though, through death, they were "non-breeding" in 2022. As I explain below, in addressing ROP's claim for ongoing breeding losses, the loss of Gyr 03 and Gyr 06 can also be regarded as forming part of that additional claim provided that there is no double counting for the year 2022.

417. ROP's Summary shows that Gyr 03, Gyr 05 and Gyr 06 (with its mate in pen 2) did not produce any eggs before they died. In the light of my finding that their deaths were caused by the acts of nuisance, and the scope of that additional claim (to cover Gyr 03 and Gyr 06 in the year 2022), I regard the current head of claim to be the appropriate one to consider in terms of non-breeding in pens 1 and 2. This requires an assessment of the prospect that, but for the acts of nuisance, the breeding pairs in each of those pens would otherwise have laid eggs which would have successfully hatched (as ROP's Summary shows the bird in pen 6 later did by producing an apparently successful clutch of 3 later in the season). I turn to that question below in addressing the quantum of ROP's claim.

418. The less straightforward question is whether ROP has made good its claim to the loss of chicks in 2002 attributable to the birds in the other pens: pens 3, 4, 7, 8, i1 and i2.

419. It is at this point that issues over the proper analysis of ROP's Summary and its evidential impact on the question of causation arise. The difficulty in resolving them is

largely a reflection of its timing which I have already commented upon in addressing Dr Forbes's responsive evidence.

420. The most obvious way of testing whether or not it is has shown to be more likely than not that acts of nuisance in 2022 were the cause of birds not breeding in those pens would be to compare the breeding success of the same pairs (as were in those pens) with the breeding season 2021 and, ideally, the subsequent breeding seasons in 2023 and 2024.

421. Martin attempted to do this (with his suggestion that the fertility level in the Western Pens had dropped from 76% in 2021 to 50% in 2022) but Dr Forbes was the only person at the trial who subjected the detailed information within ROP's summary to any real in-depth analysis. Even he did not focus upon the particular pairs or imprints – within pens 3, 4, 7, 8, i1 and i2 – to compare their breeding success before and/or after 2022.

422. Having since attempted my own analysis of ROP's Summary for the purpose of preparing this judgment I am not persuaded that it establishes that the loss of breeding in those pens was caused by acts of nuisance.

423. As a general point, I observe that ROP's Summary is apt to confuse. For example, even though not material (I think) to Martin's suggested drop from 76% to 50% as he identifies the relevant birds to chick ratio for each year, on the face of it this *suggests* that each of Gyr 03 and Gyr 06 were in pen 1 in 2021. This is despite the fact the claimants' RFI identified their importation date as 12 January 2022 (and referred to Gyr 03 winning the President's Cup race in Dubai on 29 January 2021). Then, in relation to the pair of birds that were in pen 3 in 2022 (and 2021) it appears to give contradictory information about their respective sex and age when recording their details for 2023 (and it seems most likely to me that they have become mistaken with the pair of gyrs that was in pen 19 in 2022, not pen 3). There is also a contradiction as to the sex of each bird between the RFI and ROP's Summary.

424. More specifically, ROP's Summary reveals that, although the breeding pairs in pens 4 and 8 each produced 5 eggs from which 5 chicks were successfully hatched in 2021, in that same year the pairs in pens 3 (no eggs) and 7 (4 eggs laid but none hatched – the male peregrine was then 12 years old) did not; and neither did the imprint females in pens i1 and i2 (separately owned by Mr Hussain and his sister) produce any eggs. The details provided in the RFI show that (unlike Gyr 03 and Gyr 06 but like Gyr 05 which was imported in March 2021 and put in pen 2 with his mate that year) the non-breeding pairs in pens 3 and 7 were in those pens that year. Gyr 05 and his mate (which was the same mate in pen 2 at the time of his death in 2022) did not produce any eggs in 2021.

425. This information, when coupled with the point that the infertility of Gyr 03, Gyr 05 and Gyr 06 (through death) feeds into Martin's percentage drop between the two years, does not support the conclusion that – across the 7 pens identified for this head of claim – the acts of nuisance in 2022 caused the loss of 35 chicks.

426. I note that, in 2023, the pair that had been in pen 3 (allowing for the confusion noted above) produced 3 chicks from 9 eggs laid; the pair that had been in pen 4 produced 1 chick from 3 eggs; the 12 year old male that had been in pen 7 was paired with a different female (a 14 year old Peale's falcon which produced 3 chicks from 4 eggs);

and that no information for 2023 is provided in ROP's Summary for the pair (there described as Peale's falcons not peregrines) that had been in pen 8. Allowing for a likely clerical error (the number given for Mr Hussain's imprint female ends "02" and not "01" as for 2022), in 2023, the imprint female that had been in pen i1 produced 5 chicks from 6 eggs and the imprint female that had been in pen i2 produced 4 infertile eggs. This further undermines the case for attributing infertility within the relevant pens in 2022 to the acts of nuisance on the balance of probabilities.

427. Instead, I find the only impact on breeding was in pens 1 and 2 through the deaths of the 3 birds. The hypothetical question as to the number of chicks that would have resulted from two breeding pairs (Gyr 05 being paired with a 4 year old female gyr) is appropriately addressed below in terms of quantum.

Eggs Lost

428. In his witness statement Martin referred to 7 infertile, smashed or damaged eggs and 2 chicks found dead in their shell in the Western Pens in April and May 2022. He said that one egg had been smashed by the falcon (said to be a race-winning gyr falcon) and another damaged in pen 5 on 11 April 2022, two chicks were found dead in their shell in pen 6 (said to house another race-winning gyr) on 13 April and 22 April 2022 and 3 gyr falcon eggs in pen 3 were found to be infertile. He attributes the infertility of those three to the falcons being disturbed while they were copulating.

429. The claim in respect of the 3 infertile eggs in pen 3 duplicates the claim for the non-breeding pair of gyr falcons in that pen and I have found that claim not to have been proved.

430. On my reading of it, therefore, Martin's witness statement did not address 2 of the 7 lost eggs though ROP's Summary indicates that 4 (not just 2) of the first clutch of 6 eggs of the bird in pen 5 were lost. I have already noted the query raised in Dr Forbes's Supplemental Report about the number of eggs smashed in pen 5 in 2022. I am not satisfied on the evidence that more than 2 eggs in pen 5 were damaged.

431. On the basis of Martin's evidence and Mr Garland's evidence I am satisfied that the damage of 2 eggs in pen 5 and the death of 2 chicks in pen 6 was caused by the acts of nuisance creating stress in the parent.

432. However, in the light of Dr Forbes's observations in his Supplemental Report about fertility levels within the Aviary over the five years and my analysis above of ROP's Summary, I have not been persuaded on the balance of probabilities that the infertility of the eggs in pen 3 (I bear in mind no second clutch was laid in that pen in 2022) was caused by those acts. As I have said above in relation to this same claim presented (by way of duplication) as part of the previous head of alleged loss, to conclude otherwise would in my judgment involve me paying too little weight to the significant level of infertility within Aviary in that and other years.

433. ROP's Summary records the birds in Pens 5 and 6, with the damaged eggs and dead chicks, were owned by Mr Lootah. This is relevant to quantum.

Ongoing breeding losses

434. The same average number of 5 chicks per breeding pair, as mentioned above in addressing non-breeding birds in some of the Western Pens, is used by ROP in its calculation of ongoing breeding losses over 10 years. Martin referred in his witness statement to those losses as being attributable to the "*effected* [sic] *pens/birds*". The calculation of 50 chicks (at £9,000 per chick) over 10 years shows that it is based upon the loss of chicks from a breeding pair of gyr falcons over that period. Martin said that the falcons sexually mature at the age of 2 or 3 and have a life expectancy in captivity of between 15 and 20 years. Mr Garland and Dr Forbes agreed that, for natural breeding as opposed to imprints, 3 to 4 years is the age when male and female gyr falcons reach breeding maturity. Gyr 03 and its mate Gyr 06 were both 4 years old when they died. This indicates that they were in what Mr Garland described as their prime.

435. As already noted above, counsel's submissions did not address in any detail the factual premise behind this head of loss.

436. As a starting point, it seems to me that, in order to avoid some potential overlap with the claim to the loss of chicks from 3 pairs of gyr falcons in the Western Pens in 2022 (*assuming* Gyr 03 and Gyr 06 form one of those pairs and Gyr 05 to be one half of a pair) the 10 year period would either have to be taken as starting with the 2023 breeding season or, if it is to be treated as starting in 2022, would operate to reduce the value of the previous head of claim based upon the infertility of one pair of gyr falcons (namely Gyr 03 and Gyr 06).

437. However, that observation prompts a further point having much wider potential impact under 'the factual causation question' (as it is described in the *Manchester Building Society* case). In essence, the question is whether ROP can say this head of loss over a 10 year period (including any part of it that is attributable to the death of a breeding pair or and a third bird at the start of it) can be said to be the consequence of the tortious acts in the Spring of 2022.

438. This point obviously arises when the impact of 2 to 3 months of wrongful activity is said to carry through to 10 years of harm to ROP's trading 'stock' and when, as the basis of the claim in respect of the dead birds illustrates, ROP is claiming to recover the lost income-producing value of some of that stock under its first head of loss. That first head of loss is presented on the basis of a valuation which (although Gyr 03 was a race winner) is predicated upon each of those birds being kept in the Aviary for breeding rather than themselves competing in races and having a chance of winning significant prize money.

439. On my understanding of this head of claim, it is predicated upon a pair of gyrs being rendered infertile (rather than killed) for the remainder of their anticipated breeding life. This requires consideration and analysis of the evidence of Martin and Mr Garland for the purpose of assessing how quickly a pair whose breeding in 2022 had been thwarted by the tortious acts in that year, but who had survived, might recover from that disturbance and start breeding again. Neither of them indicated it would be anything like 10 years, or to put it another way, that birds of say 4 or 5 years of age would effectively be rendered infertile for the remainder of their anticipated breeding life.

440. In my judgment this illustrates the flawed premise behind this head of loss, which is that it assumes a case of continuing nuisance rather than the nuisance which took place in the Spring of 2022. Irrespective of the contention that pure economic loss is irrecoverable on a claim in nuisance (which I have rejected) this loss is predicated upon ongoing harm (i.e. physical damage to the birds) so as to be indistinguishable in principle from the 'eggs lost' head of loss.

441. The true position, however, is that the only potentially lasting effect on breeding that nuisance in 2022 will have had is through the curtailment of the breeding lives of Gyr 03, Gyr 05 and Gyr 06 at the ages of 3 or 4.

442. Even if the *death* of a breeding pair (i.e. of Gyr 06 and one of the males Gyr 03 and Gyr 05) is taken as the premise behind this head of loss then I cannot see how it is made good as a matter of factual causation.

443. Although Mr Garland and Mr Forty did not in their joint statement say so in terms, it is clear that (like the bloodstock of a highly successful but now retired racehorse) it is the bird's bloodline which determines its value. So much is obvious from the fact that they attribute a significantly higher value to Gyr 03 than the other two. In his testimony Mr Garland confirmed that the value of a breeding bird reflects its pedigree in the sense of whether it is itself a race-winner or has produced a winner. This value must also obviously reflect the age of the bird (and I would assume also its breeding history) as any buyer of it, at a given price, would want to know how many more chicks it is likely to produce over the remainder of its life.

444. The Aviary does not have limitless capacity: it can only accommodate so many breeding birds. If, under its first head of loss, ROP is indemnified in damages for the value of a pair of breeding birds that would otherwise have been expected to produce an average of 5 successfully hatched eggs each year over the next 10 years then those damages can be used to buy a replacement pair which can be put in the Aviary and who will. Even by reference to the relatively low bar set by the duty to mitigate (requiring the injured party to act reasonably in adopting remedial measures) it seems obvious that ROP cannot claim *both* the loss of future income from a bird *and* the value of that bird which largely if not wholly reflects its ability to generate that income.

445. In my judgment, therefore, ROP has failed to establish that the tortious acts have caused this loss.

Loss of the Western Pens

446. Martin explained that ROP's claim for £344,250 per annum in respect of future loss of breeding in the Western Pens over one breeding season. It is based upon the loss of 5 chicks in each of the 14 pens respectively occupied by 9 pairs of gyr falcons and 3 pairs of peregrine falcons. The sum reflects the value of 70 lost chicks (worth £9,000 in the case of a gyr and £8,500 in the case of a peregrine) net of costs and expenses.

447. This head of claim was not subject to detailed analysis in counsel's submissions. It seems to me that, to avoid duplication with the other heads of claim, it must relate not to 2022 but to the breeding season 2023 and onwards.

448. I have not been persuaded that the established acts of nuisance and negligence in 2022 (which, as I have emphasised, were of a temporary rather than continuing nature) can be said to be the cause of any such loss. As with the previous head of loss, there is a disconnect between the lost value of the Western Pens (whether as originally built or as adapted) for 2023 onwards and the proven acts of nuisance/negligence. I also note that Mr Forty did not understand the logic behind this claim and the suggested differentiation from ongoing breeding losses.

449. The absence of a causal connection is illustrated by the fact that, since this head of loss was formulated, work has begun on adapting the Western Pens to reflect their proximity to UCE's land. ROP does not advance a claim that the future profitability of the Aviary, overall, has been adversely impacted by the need to make these changes and (as is highlighted by ROP's pleaded claim for injunctive relief to restrain further activity near the Western Pens) there would still be an issue of legal causation as to whether that loss can be attributed to the events in the Spring of 2022.

(9) Foreseeability of Loss

450. I have dealt with Mr Auld's submissions at the level of principle, addressing issues of economic loss and remoteness, in addressing the authorities in Section C(1)(E) above.

Death of Gyr 03, Gyr 05 and Gyr 06

451. In my observations above about the evidence more generally I have highlighted the point that Mr Thomas was anxious in his evidence to point out that he was not aware of the risk that birds might die as a result of the pleaded activity until well after the deaths of Gyr 03, Gyr 05 and Gyr 06. I have noted that there is nothing which directly contradicts that evidence; as opposed to his awareness, from what Martin had said to him, that aspergillosis presented a risk to life and also that disturbances inducing stress might cause the falcons to panic, fail to breed and to either abandon or damage their eggs or young.

452. Mr Auld's submission about damages in nuisance not extending to economic loss (which I have rejected) was, so I understood it, predicated upon a recognition that the loss arising from the death of a bird would not be too remote to be recoverable.

453. If, however, I have read too much into his submission I would still conclude that the death of birds was within the scope of harm that Mr Thomas (and UCE through him) could reasonably have foreseen to have resulted from the acts of nuisance. The decision in *Northumbrian Water* requires the defendant to have reasonably foreseen harm of *the type* which results in the damages claimed. A negligent driver who crashes into another car, and who can foresee the need for the damage to it to be made good, ought not to escape liability if it is so bad that the car proves to be a write-off.

454. The death of the three birds was the most serious form of harm to their wellbeing which resulted (as I have found as a matter of causation) from the stress created by the acts of nuisance. The fact that such terminal harm (through stress as opposed to

aspergillosis) was not expressly flagged by Martin in December 2020 does not in my judgment mean that it is to be classed as a different type of harm. The relevant *type* of damage, for these purposes, is harm to the birds.

Eggs Lost

455. Mr Auld accepted that if a falcon breaks an egg through being stressed as a result of the tortious acts then in principle damages for the loss of that egg are recoverable.

456. I also understood Mr Auld to accept, in response to my question raised in connection with his reliance upon *Spartan Steel*, that, if the court was persuaded on the balance of probabilities that one or more of the dead birds would have produced an egg in 2022, then damages for the loss of that egg (by reference to the prospect of it successfully hatching) would also in principle be recoverable. I likened that to a *Spartan Steel* situation where the furnace had been put out of action rather than saved through prompt action in pouring away the first melt that would otherwise have solidified in it when its temperature fell.

457. ROP's Summary shows that the eggs lost in pens 5 and 6 in 2022 were laid by falcons owned by Mr Lootah. The claim in respect of those 4 eggs is quantified at £227,000. However, in his witness statement Martin (who explained a figure of £230,000) said *"£115,000 is for the sale of falcons and £75,000 is ROP's half of the re-sale value of a winning falcon and £40,000 is ROP's share of the prize money*". No mention is made to the costs of exporting and rearing the race-winner which one would expect to be an expense recorded in the accounts of Mr Lootah's business in Dubai and to perhaps be a deductible in his arrangement with ROP. The reference to prize money is based on Martin's expectation that, given the pedigree of race-winning of the parents in pens 5 and 6, one of the birds that would otherwise have hatched from one of the 4 lost eggs would have gone on to win a race. The anticipated race winner would, at some point in the future, have therefore produced £115,000 under the proceeds (as opposed to profit) sharing arrangement between ROP and Mr Lootah. The other £115,000 would be ROP's profit share from 3 less successful chicks had they hatched.

458. Counsel did not make any detailed submission about this. However, it seems obvious that an *expectation* that, on reaching maturity, one of the lost chicks would at some future point in time have become a winner, in the highly competitive sport described by Martin, is not a promising starting point for suggesting that such loss of profits fall within the range of risk created by the tortious acts. Damaging a breeding bird of value is one thing but damaging an unborn chick whose value is uncertain (and whose future entry in the accounts of ROP would reflect a business and profit-sharing arrangement between ROP and Mr Lootah beyond the reasonable contemplation of the defendants) is quite another.

459. Mr Forty was unable to agree the value of £227,000 advanced by ROP. His reason was that he was unable to verify that the eggs were of race-winning pedigree. In the joint statement, and addressing the scenario of the offspring being sold with an established race-winning pedigree supported by records, he said "*there would be no saying what these falcons could be worth. They could fetch more than £227,000.*" The fact that the expert understandably cannot yet determine what any of the 4 eggs *might* be worth

shows that the defendants cannot be taken to have reasonably foreseen the value ROP would like to give them.

460. It is not necessary for me to address the claim that in respect of the 3 infertile eggs which Martin said would otherwise have each been worth £9,000 if a chick had hatched (ROP's summary indicating that the birds in pen 3 were owned by ROP and Mr Lootah respectively) as that head of loss has not been established. However, that value of £9,000 per egg, which is agreed by Mr Forty and Mr Garland to be the value of a successfully hatched gyr egg, serves to illustrate further the point as to what is and is not to be taken to be within the reasonable contemplation of a person who damages it.

Ongoing breeding losses

461. It is not necessary for me to address the foreseeability of this suggested loss as I have found that the defendants did not cause any such loss (if any).

Loss of the Western Pens

462. It is not necessary for me to address the foreseeability of this suggested loss as I have found that the defendants did not cause any such loss (if any).

(10) Liability for Loss

463. The next issue is whether liability in nuisance should be confined to UCE on whose land the acts of nuisance took place or also extends to Mr Thomas.

464. On the facts of this case, having regard to the nature of the company's tortious acts, Mr Thomas's position as its sole director making decisions on its behalf with apparent informality and the evidence which shows the acts were carried out on his instructions, it is clear in my judgment that Mr Thomas is also personally liable alongside UCE. In the language of the authorities addressed above, he authorised, directed and procured a tortious act to be done. For example, when Mr McFadden ceased work on 2 May 2022, Mr Thomas asked him to undertake work the next day which is the subject matter of the claimants' harassment allegation (27).

465. Even in the absence of any finding of malice, which could have only have been attributed to UCE through Mr Thomas, in my judgment the facts clearly show that he would be liable as a primary tortfeasor if the company had not existed. The mere fact of his directorship is not the basis of his personal liability and neither does it provide him with a defence to such liability.

466. For the same reasons I find Mr Thomas is also personally liable for the acts of negligence committed by UCE. The facts show that he did personally assume a duty of care to ROP. In my judgment, in the light of the personal dealings between him and the claimants and his part in procuring the acts of negligence, this is a plain case of a director being liable in negligence alongside the company.

(11) Quantum (Nuisance/Negligence)

467. The damages that fall to be quantified on the established heads of loss are designed to put ROP in the position it would have been in had it not been the victim of the tortious conduct.

Death of Gyr 03, Gyr 05 and Gyr 06

468. In the light of my finding that the defendants' tortious acts caused the death of Gyr 03, Gyr 05 and Gyr 06, and the agreement between Mr Garland and Mr Forty upon the value of those birds, ROP has established damages of £200,000. As pleaded in the APOC, they agree that Gyr 03 was worth £150,000, Gyr 05 was worth £20,000 and Gyr 06 was worth £30,000.

469. Mr Garland and Mr Forty do not agree upon the value of eggs lost, though Mr Forty's non-agreement reflects a lack of a clear understanding of the basis of the claim and a question about the evidential basis for attributing particular lost eggs to particular birds (including whether certain eggs were from a race-winning pedigree).

470. At trial Mr Thomas questioned ROP's ownership of the birds (particularly Gyr 03) given its value for the purpose of supporting any damages claim in respect of their loss. Martin identified three A10 Certificate for the birds. They identify Martin (not ROP) as the holder but the explanation was that at the time they were issued (the position has since changed) they had to be in the name of an individual rather than a company. The claimants' Part 18 response dated 26 January 2024 (verified by Martin) confirms that, since 2016, as between Martin and ROP, all birds are owned by the company. I am satisfied that ROP owned these three birds. ROP's Summary also clearly differentiates between birds in ROP's ownership and those in Mr Lootah's ownership. Mr Mitchell correctly pointed out that ROP's ownership had not been put in issue by the Defence and that, had it been, the claimants would have called Mr Lootah as a witness statement by him had been served and it addressed the division of ownership shown by ROP's Summary.

471. It is the case, as Mr Auld pointed out, that ROP's accounts for the year ended 31 March 2022 did not appear to reflect the value of Gyr 03 (or Gyr 05 and Gyr 06) – at "*the lower of cost or net realisable value*" per the accounts – even though they had been acquired before the year end. Martin said that the accountants who prepared the accounts for that year (which were signed off in December 2022 by which time it was known the birds had died) and for the following accounting year said it would look "*a bit iffy*" if their value was shown in one year and then written off the next. Martin said that new accountants retained by ROP had advised the value of the birds should have been noted. I was shown a letter dated 8 January 2025 from the new accountants which supports this evidence. For present purposes, the simple point is that the very fact that there has been this discussion about ROP's accounting treatment of the dead birds shows that they were owned by ROP.

472. I am therefore satisfied that ROP has suffered damages of £200,000 in respect of the 3 dead falcons.

Non-breeding falcons

473. The value of the claim in respect of the dead birds not breeding in 2022 lacks the certainty over their own value because it involves conjecture over how many eggs would have been laid in pens 1 and 2 and how many healthy chicks would have hatched from them.

474. I have considered whether it would have been appropriate (or, more pertinently, a course driven by the duty to observe the overriding objective) to ask the parties for further assistance in relation to the quantification of this less straightforward head of loss, so far as the hypothetical scenario of successful breeding in 2022 and Gyr 03 and Gyr 06 and Gyr and its mate is concerned. The lack of prior interrogation and analysis of this point by them means I would have required a hearing after further skeleton arguments on it.

475. However, I have decided against that course, not least because such a hearing would have been unlikely to have been before the autumn of 2025 given other court listings and consequential judgment-writing commitments. The parties have chosen to shoehorn into their trial dozens of allegations (the harassment cases) which, to the extent there was anything in them in terms of causes of action, would have been better suited to the Septic Tank Claim (either in its inception, or by amendment or by its compromise under the terms of the Tomlin Order). This claim was issued in the TCC in London (the Claim Form stating "*the claim should be heard in a specialist High Court list, namely TCC*") and was transferred to the Property, Trust and Probate List in the Bristol BPC by the Order of Mr Moody KC dated 1 December 2023. At earlier hearings, I was told (in connection with the defendants' later request that the trial before me should take place in Truro County Court for the convenience of the majority of the witnesses) the transfer to Bristol was made on the defendants' application. My assumption is that the transfer to the Chancery Division reflected the more basic territorial aspects of the dispute and my distinct impression is that the transfer out of the TCC probably marked the point when the parties began to lose sight of the need to focus, both at the trial and well in advance of it, on the more technical and complex aspects of ROP's claim, particularly its quantum.

476. The lawyers have given equal if not greater attention to the skirmishes between the neighbours and the ructions that form the basis of the harassment claims. Although perhaps not atypical of a significant element of the work in that Chancery list, those might even have been better suited to non-specialist County Court proceedings. That focus has come at the obvious expense of a more thorough analysis (both of the applicable legal principles and the evidence) of the quantum of ROP's claim. But that was the parties' choice and, echoing my comments above about the ongoing analysis of the late produced ROP's Summary and Dr Forbes's Supplemental Report in response, there is only so much they can reasonably expect of the court after a trial on other issues they have chosen to explore at some length. The interests of other litigants in the Bristol BPC is at odds with a proposal that the assessment of quantum of ROP's damages (over and above the £200,000 in respect of the dead birds) should be the subject of a further hearing.

477. Although I was not addressed on this, I therefore proceed on the basis that where the court is satisfied on the balance of probabilities that a claimant has established an actionable head of loss but that loss is not capable of being established with precision (perhaps because it involves conjecture about future events), the court is entitled to make a reasonable assessment of it on the evidence available. It does not have to be persuaded that the precise amount it decides upon has been proved on the balance of probabilities. Instead, "*it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account*": per Toulson LJ in *Parabola Investments Ltd and another v Browallia Cal Ltd (formerly Union Cal Ltd) and others* [2010] EWCA Civ 548, [2011] QB 477 at [22]-[24] (a case involving the assessment of damages for deceit) and endorsed by the Supreme Court in *One Step (Support) Ltd v Morris-Garner and another* [2018] UKSC 20; [2019] AC 649, at [37] (a breach of contract case).

478. The authorities are clear that, where a particular head of loss (to be proved on the balance of probabilities) does involve conjecture and reflects the loss of a chance – in this case, the chances that a certain number of eggs would have been laid and that a certain number of those would have led to a chick successfully hatching – then the claimant must establish he has lost a real o substantial chance. It has been established in other contexts that this does not require him to show a 51% or better chance it would have happened. Instead, if that standard of proof threshold has been passed in establishing that relevant loss has been suffered (a finding of fact) then the court's quantification of it is a matter for an evaluative judgment (one addressing the chances of a hypothetical fact): see *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 and *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352. Where, as here, the contingencies are interdependent or overlapping (one cannot have a chick later hatching without an egg first being laid) it is not appropriate to multiply the chances to produce a final figure. Instead, the court makes an evaluative judgment as to the overall figure: see *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm); [2019] Bus LR 229, at [432]-[449]; [2020] EWCA Civ 1151; [2021] Bus LR 142 at [207]-[209].

479. My evaluation of the evidence, including ROP's Summary showing the performance of other breeding pairs in the Aviary and Mr Garland's evidence about varying success between pairs, leads me to conclude that 5 chicks would have hatched over pens 1 and 2 if there had not been the deaths in them. I base this on there being a real chance that the breeding pairs in each of those pens would otherwise have produced a hatch of eggs. I estimate that hypothetical hatch at 7 eggs across the two pens (4 plus 3) and I evaluate the chance of those eggs successfully hatching at approximately 70%. This produces a figure of 5 lost chicks.

480. For the reasons explained in the section above about foreseeability of loss, the correct value to be given to each egg as the basis of a damages award is £9,000. As Mr Garland confirmed, falcon eggs cannot lawfully be sold in this country so the value has to be assessed by reference to the prospect that the egg will hatch and the chick will be successfully reared. The experts are agreed that, for a gyr falcon egg not of race-winning pedigree, the value is £9,000.

481. Accordingly, this head of loss produces a damages award of £45,000.

Eggs Lost

482. For the same reasons the figure of £9,000 per damaged egg (or dead chick within an egg) is the appropriate starting value for the 4 eggs lost in pens 5 and 6.

483. However, as already noted, the birds in those pens were owned by Mr Lootah. The question arises as to what ROP's loss is in respect of those eggs. Although Martin explained ROP's financial interest by reference to what the offspring (race winning or not) would realise through racing and sale in Dubai – see the above section on foreseeability of loss – I believe it follows from his evidence (see paragraph 21 above) that ROP has a 50% share in such eggs.

484. Applying an approximate 70% successful hatch rate to the 4 eggs in question (which I consider to be appropriate also for the 2 eggs where a chick was apparent) produces a lost value of £27,000. I interpret the authorities as permitting a slight rounding up from an impossible 2.8 eggs, particularly when the 70% evaluation is an approximate one. ROP's loss was 50% of that figure.

485. Accordingly, this head of loss produces a damages award of £13,500.

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(12) Claim to an Injunction (Nuisance)

486. The Particulars of Claim seek the following prohibitory injunctive relief:

    i) an injunction restraining Mr Thomas and UCE (whether by themselves, their employees or agents) between 1st March to 10th August each year, from causing or permitting (a) noise levels of 70 decibels or above within the Aviary or (b) operating or positioning machinery (including diggers and cranes) over 3 metres in height, within 10 metres of the Aviary; and

    ii) an injunction restraining Mr Thomas (whether by himself, his employees or agents) at all times from causing the Aviary to vibrate.

487. I am not persuaded that it is just and convenient to grant final injunctive relief in these terms. The first limb of the relief sought is predicated upon the defendants having committed acts of nuisance notwithstanding Mr Thomas's knowledge (from December 2020) that March to August was a sensitive time for the birds. However, I have explained above why I have not been persuaded that the breeding season was identified by Martin (or Mr Brady) as being as long as that. I also take into account that UCE has to this date still not completed the building of its barn because of this litigation, in which Mr McFadden's preparatory groundworks play a significant part, and the recent adaptation of the Western Pens which might ameliorate the effects suffered in 2022.

488. Now that the litigation has resulted in this judgment, the sensible way forward, and certainly before any renewed application for injunctive relief (perhaps most obviously in the County Court) is made, is for the parties to reflect upon the outcome of their dispute, and my findings in support, with a view to them attempting to reach a sensible solution for the completion by UCE of any building or landscaping works in the

vicinity of the Aviary at an appropriate time of year. Constructive engagement through their solicitors over a way forward for completing those works, possibly upon giving advance notice of them, should be attempted before they resort to a third set of legal proceedings. In these proceedings, I am not persuaded, by reference to the temporary acts of nuisance established against the defendants, that it is just to issue what in effect would be an edict as what may done on the neighbouring land for the duration of UCE's ownership of it, either in the terms sought or in modified terms.

(13) Harassment (Claimants' case)

The Allegations

489. The numbering in this part of my judgment reflects the factual allegations set out in Section B(3) above. I deal with the question of whether a finding that two or more proven allegations constitute harassment within the meaning of the 1997 Act after addressing the factual allegations.

490. Allegation (1). I find this allegation has not been proved.

491. Mr Thomas was aware that the septic tank was just that (rather than just a cesspit as remained his pleaded position in this case) and drained into a soakaway system. So much is clear from a letter dated 8 July 2021 written by his solicitors, David James & Co, in response to a letter before action written on behalf of the Nicholas family and Mr Joint. Mr Thomas's solicitors headed their letter 'Septic tank and land drains at Bosavern Manor' and they referred to the soakaway system being on title number CL 184450 (the land purchased by UCE in October 2020) albeit that its precise location was a matter of disagreement between the parties. This was written after the damage to the soakaway system in January 2021. Yet in his testimony Mr Thomas said he could not accept a soakaway existed. He did accept that he was aware of leakage from the system within about 3 metres from the tank.

492. At the time of that damage Mr Thomas was aware of the issue in relation to the septic tank overflow as appears from his letter dated 24 October 2020 to Ben Joint. He knew the Environment Agency had become involved. That letter also contained his offer to buy an area of land from Mr Joint to improve the access to Pengelly past Keigwin, which Mr Joint did not accept. After the damage to the soakaway, Mr Thomas sent an email to Mr Joint (copied to Martin) questioning his right to instate or reinstate land drains. He later sent another email to Mr Joint (copied to Martin) saying "*Although historically there may have been a land drain from the tank it is now not capable – there is also no written legal agreement.*"

493. These matters raise an inference that Mr Thomas knew full well that damage to the soakaway system would (he believed) support his position that the septic tank should not be supported by draining into UCE's field. He made his first complaint to Cornwall Council about the overflow from the septic tank running into the public footpath on 29 April 2021, which was a month after the solicitors then acting for the Nicholases and Mr Joint had written a letter before action, dated 27 March 2021, saying that the failure of the soakaway had been caused by Mr Thomas's building works.

494. However, Nigel Semmens, who is said to have caused the damage by driving a dumper truck over the soakaway, said he had not carried out any work near it. Mr Semmens was an honest and straightforward witness. I accept his evidence that he did not act so as to deliberately cause such damage. It is clear from the terms of his witness statement that he had made in circumstances where he understood it had been said he had been guilty of criminal damage (he said that Mr Thomas had sent him a text with a quote from a solicitors' letter which said as much). That is not the pleaded allegation and no pre-action correspondence appears to have attempted to implicate Mr Semmens in that way.

495. Even if Mr Thomas had caused Mr Semmens to drive over the soakaway with a view to it being damaged, as the claimants allege, I believe that, as an experienced builder with a good reputation (he said his good reputation was extremely important to him) Mr Semmens would quickly have become alive to the issue of likely damage to the soakaway. He would then have avoided it or, if too late to avoid it, noticed it. Yet his evidence is that he was unaware of it. By reference to the evidence of Mr Semmens, I accept Mr Thomas's evidence that he also did not have such damage in mind and had simply asked Mr Semmens to move soil from the levelling of the area for UCE's barn to another part of its land.

496. Allegation (2). I find this allegation has not been proved.

497. I accept Mr Thomas's position that stones (which he had purchased from Martin) were used by him as part of the works involved in clearing the Lane. He said that they were used to separate an open gully (running down from the Drain) from the rest of the Lane. I was shown a photo of a tanker of Pellows (the waste disposal company) which had managed to reverse down the Lane so as to be able to extend its suction hose to the septic tank. Martin said the septic tank was emptied just before it was replaced by the new waste treatment system in November 2022. The emails exchanged between the parties in March 2021 (Mr Joint had pointed out the existence of the large stones in an email dated 11 March 2021) do not appear to have resulted in any serious or lasting issue over the stones.

498. Allegation (3). I find this allegation has not been proved. The way it was described in Martin's witness statement shows that it is linked to (the unproven) allegation (2). An exchange of emails between Martin and Mr Thomas on 8 April 2021 shows that Martin understood that Mr Thomas had verbally agreed that the septic tank on Mr Joint's land and the septic tank serving Scott's property and the Braggs' property might both be emptied on a single visit by a tanker driving to the rear of Nos. 1 and 2 Bosavern Manor Farm. Martin explained that this had been done in the past. Mr Thomas said that no access would be given other than via the Lane and "*to save embarrassment please ensue* [sic] *the tanker will fit*." Mr Thomas was simply responding to say that the right of access was as asserted in the letter before action written to him on 27 March 2021.

499. Allegation (4). I find this allegation has not been proved. I accept that there is evidence that Mr Thomas (and Ed McFadden on one occasion) has driven past the claimants' properties too quickly, and that Karen Nicholas made a complaint to the police about it given that children and animals would also be about, but the claimants' evidence about staring and gesturing was vague and to some extent inconsistent with the allegation of speed. Scott said one of Mr Thomas and Mr Ambler would be driving and the other staring (there is no allegation of harassment against Mr Thomas which extends to Mr

Ambler's actions) and he said that the staring would be into his garden rather than his house. Scott said he understood that CCTV recordings of this had been disclosed but none were in evidence before me.

500. Allegation (5). I find this allegation has not been proved. There is no issue on the pleaded cases that Mr Thomas was responsible for removing the cover of the septic tank and sent photos to the Nicholases and Mr Joint with a message complaining about the leakage on UCE's land. However, aside from any trespass on Mr Joint's land, the allegation of wrongdoing is that this was done to taunt Martin and Scott. Instead, Mr Thomas was putting forward his position in relation to what later became the Septic Tank Claim.

501. Allegations (6), (20) and (21). I find these allegations (in relation to Mr Thomas's alleged purpose in causing a noise disturbance and pursuing a vendetta) have not been proved. It is inconsistent with Martin's recognition in WhatsApp exchanges with Mr Thomas on 27 February 2021. Those exchanges show that Martin knew that Mr Thomas intended to have peacocks on his land; and that bird flu restrictions meant they would have to be contained rather than left to roam free. Scott also exchanged messages with Mr Thomas that same day which show he knew the peacock house was to be positioned over the septic tank serving his and the Braggs' property, though he said in evidence that he did not think Mr Thomas would actually get peacocks. The area containing the peacock house was padlocked for the short time the peacocks were alive but Scott's evidence confirmed that this did not prevent him from gaining access to the septic tank at a time when such access was needed. As Scott confirmed, because the peacocks were killed soon after their arrival they were not there long enough to cause a problem.

502. Allegation (7). This allegation has been proved. Mr Thomas accepts that he was responsible for the removal of the cover from the Drain. He says this was done by Mr Ambler and his friends Yvette Barnett and Archie Pilcher on 7 May 2021 and by contractors on 10 May 2021. On the first occasion Scott and Roger Nicholas retrieved the cover from Mr Thomas's yard. No good reason has been put forward by Mr Thomas for this repeated act. The Drain is on UCE's land and, so he believes, Roger Nicholas was draining household water into it. His actions appear to be part of his preoccupation with the wider issues of drainage (including to the septic tank on Mr Joint's land) that he inherited on UCE's purchase of the land and his preferred use of the Lane to gain access to Pengelly. In the trial bundle there were some photographs of the Drain, with the cover removed, which showed some bubbles in the water beneath the drain pipe in it, and it was suggested by Mr Thomas and Mr Ambler that these were soap suds. In the Septic Tank Claim Mr Thomas alleged that Martin and Karen (though not Roger Nicholas) were draining waste water from their kitchen into the drain and the ditch below and he sought an injunction to prevent that. However, as Martin explained in his evidence to me this allegation has never been supported by evidence and has been shown to be unfounded both by Building Control and the Environment Agency who dye-tested the water and established that only rainwater was entering the Drain. There is no evidence to suggest that the piped connection to the Drain has been altered since the summer of 2021, when Roger Nicholas made a connection between the inlet and outlet using a slotted pipe as he said he was concerned that Mr Thomas's removal of the cover signalled an intention to fill in the drain with gravel. By the Tomlin Order in

the Septic Tank Proceedings the Nicholases were content to agree that the Drain was for rainwater only and not domestic water.

503. Allegation (8). I find this allegation (which in part involves Mr Thomas acting maliciously) has not been proved. It was supported only by the hearsay evidence of Martin (reporting what Karen Nicholas had seen and identifying Archie Pilcher) and, not having been addressed in Mr Pilcher's statement, it was not a point picked up by Karen Nicholas in her (responsive only) witness statement. Although Martin did receive a visit from the Trading Standards Officer soon after this alleged event, who indicated that Mr Thomas was perhaps behind it, Mr Pilcher denied that he had emptied ROP's bin bags to enable Mr Thomas to make a complaint to Trading Standards. I feel unable to reject that denial when Karen Thomas did not give evidence on the point.

504. Allegation (9). This allegation has been proved. The email in question was written by Mr Thomas's then solicitor to the Nicholases' solicitors, on 11 May 2021, and stated: "*I understand that your clients Mr Martin Nicholas and Mr and Mrs Roger Nicholas have been making threatening and homophobic comments towards my client and his partner which are unacceptable*." The email was said to have been written having "*been advised by my client*". The homophobic comments attributable to Martin have not been identified and Mr Thomas accepted in cross-examination that Martin was not a homophobe and that he made no allegation of homophobia against him.

505. Allegation (10). This allegation (with Mr Thomas acting maliciously) has not been proved. Mr Thomas said in evidence that he had been told by his solicitor to contact the Council.

506. Allegation (11). This allegation has been proved. The Instagram post did not name Martin or Scott. It featured a picture of Mr Thomas in a dress and holding a pitchfork above the lake on UCE's land. The post said "*Some of my neighbours don't like the fact that I'm gay and feel that I'm creating a Disney World with a hint of Versailles … The reality. I'm a cross dressing, bisexual farmer who likes aesthetics, architecture, planting trees and eating spuds!*". Referring to this post in his witness statement, Mr Thomas said he truly believed that if he and Mr Ambler were a heterosexual couple then what he described as the bullying and harassment from the Nicholases would never have started. In cross-examination he "maybe, yes" he had been referring to Martin and Scott. He made it clear that he did not believe Martin was homophobic but his answers indicated that he believed that Scott may have become so as the neighbours' dispute developed.

507. Allegation (12). This allegation has not been proved. Mr Thomas said it was a complete fabrication and the cross-examination of Mr Thomas indicated that Mr Ambler might have been responsible. Mr Ambler denied doing so in cross-examination and he was not pressed on the point with details of the allegation.

508. Allegation (13). This allegation has been proved. The sign said:

> "MANOR FARM
>
> Regrettably due to mounting legal costs regarding a neighbour dispute over pollution we have had to resort to taking campers for 56 days this summer.

> Planning is not necessary. We apologise for the inconvenience caused and hope not to be in this position in 2022."

This was not an accurate representation (to passers-by) of the position between the neighbours. At the time the sign was put up the letter of claim on behalf of the Nicholases and Mr Joint had been received by Mr Thomas but his solicitors had not yet responded to it. He is likely to have incurred some legal costs in relation to what became the Septic Tank Claim but the sign read as if he had been thwarted for 2021 in running the more substantial glamping business he intended on UCE's land. Yet he confirmed in his testimony that he did not have planning permission for that, as opposed to camping for no more than 56 days which did not need planning permission. With its reference to pollution the sign was expressed in curious terms if it was to attract any campers for 2021. Mr Thomas's confirmed that no campers came in 2021. I find that the real purpose of the sign was to ramp up the hostility between the neighbours over what was to become the Septic Tank Claim.

509. Allegation (14). This allegation has been proved but it is an allegation against Adrian Thomas, not Mr Thomas or "*his employees or agents*" (per paragraph 23 of the APOC). I find that Adrian Thomas was not acting on behalf of Mr Thomas when he made the remarks to Derek Thomas MP. That he made them is supported by the terms of a letter written by the MP (mistakenly identifying the date of his visit as 25 May not 25 June 2021) and by Adrian Thomas's testimony.

510. Allegation (15). The factual allegation of stacking of silage bales has been proved (and not disputed) but I do not accept this was an act of harassment, done with the purpose of blocking a sea view from Scott's family home. There was no complaint at the time (for example when Scott reported to Mr Thomas in April 2021 that some bales had been slashed). The evidence (including a photograph of Scott's home in 2021 covered by scaffolding and plastic sheeting identified by Mr Thomas in cross-examination) indicates that Scott and his family were not living in the house at the time of its renovation but instead in a caravan on the other side of the sea view. I have taken account of the fact that, in response to Scott saying that the Braggs' property had holiday bookings for April to September that year, Mr Thomas responded with a WhatsApp message on 27 February 2021 saying "*They won't want to come with no sea view ....*" This probably related to his plans for a peacock house behind the Braggs' property, though he told me in evidence that the rook of the peacock house is not materially higher than the hedge behind their property.

511. Allegation (16). This allegation has been proved. Mr Thomas and Adrian Thomas had no evidence to accuse either Martin or Scott of having slashed the silage bales. Scott had drawn Mr Thomas's attention to the fact that they had been slashed in his WhatsApp message of 14 July 2021 and Mr Thomas's reaction was to blame Scott because he had removed the sign which is the subject matter of allegation (13). In his testimony, Mr Thomas said he believed that Scott was responsible for the bale slashing but accepted he had no evidence.

512. Allegation (17). The factual allegation that farming contractors working on behalf of UCE were moving and re-stacking silage bales early one morning has been proved (and is not disputed) but I do not accept this was an act of harassment. The contractors were re-wrapping the slashed bales and I was shown a video of their activity (though the machine used to re-wrap them in plastic could only be heard and not seen as it was

behind the stack of bales). I accept that this woke Scott and his family (Scott took the video) and that guests who were staying in the Bragg's house at the time wrote later wrote a letter (incorrectly identifying the date of the activity) saying they had been disturbed.

513. Allegation (18). This allegation has not been proved. Mr Thomas accepted that he used the Lane (accessed past Martin's and his parents' homes) but denied he had driven past the Nicholases' homes repeatedly at around midnight on 17 July 2021. This was not pressed in cross-examination.

514. Allegation (19). This (so far as it relates to a complaint to Trading Standards) is related to allegation (8). Indeed, the only evidence in connection with it was that relied upon in respect of allegation (8). Accordingly, this allegation has not been proved.

515. Allegation (22). This allegation has not been proved. Mr Thomas explained that he had the firework display on 6 November 2021 where he did because he also had a bonfire of leftover straw from the pigs and some other ground clearance materials. This allegation has to be considered against what Martin said in an email to Mr Thomas of 3 November 2022. In that email Martin had asked whether Mr Thomas would be having a fireworks display that year and asked that he might consider using noiseless fireworks and that the fireworks are directed away from the aviaries to prevent harm to the falcons. In the email Martin said: "*You held a firework display last year and we had no problem with the location of the display*." He confirmed in his evidence that he made no complaint that the 2021 fireworks had been directed towards the Aviary, though he did express some concern that Mr Thomas had felt it appropriate to have let off fireworks over his own cattle.

516. Allegation (23). This is a repetition of the pleaded acts of nuisance (said to have been committed maliciously) which I have addressed above.

517. Allegation (24). This allegation includes the stacking of silage bales (from April 2022 onwards) which is the subject matter of allegation (29) in relation to them creating a risk of aspergillosis. Consistent with my finding on allegation (15), this allegation has not been proved so far as the purpose imputed to Mr Thomas is concerned. Aspergillosis has not been shown to be a factor in this case. I also accept Mr Thomas's evidence that the materials in the parcel of land adjacent to Scott's house were not large stones and piles of earth but instead some ornamental garden and smaller construction materials that had been moved from the location of UCE's barn. Some of them were there on the site visit.

518. Allegation (25). This allegation has not been proved and, on the claimants' evidence, it appears to relate to an event (on 3 May 2022) which is the subject matter of allegation (27).

519. Allegation (26). This also relates to allegation (27). This allegation has been proved and is supported by the evidence of Adrian Thomas. He confirmed that he did not report the alleged homophobia to the police officer who attended the incident. However, this is an allegation levelled against Adrian Thomas and, as with allegation (14), I am not persuaded that he was in this respect acting as an "agent" of Mr Thomas.

520. Allegation (27). This allegation has been proved in relation to the removal of the kerbing but not the alleged resulting flooding. It relates to the removal of some kerbing across the Lane installed to direct rainwater to the Drain (which took place on 3 May not 11 May 2022 as pleaded). Roger Nicholas explained that the kerbing had been installed to direct rainwater into the storm drain. He said that it helped to avoid flooding of his property and the property on the other side of the Lane. Mr Thomas instructed Ed McFadden to remove the kerbing (Mr McFadden having been asked by Karen Nicholas to discontinue groundworks for UCE's barn the previous day, the Bank Holiday). The evidence indicates that Susan and Roger Nicholas's property flooded soon after when a water connection to some troughs in UCE's fields was reinstated by Mr McFadden. Martin sought to explain in his evidence that when building works were done to his and his parents' property, some years before UCE acquired the land, they connected to a water supply with the tenant farmer's permission (on the basis that they would cap off the supply once the works were finished) and the flooding in May 2022 indicated that, for their permanent water supply, the properties had been mistakenly connected to the water supply for the fields. Adrian Thomas gave evidence to the same effect.

521. Allegation (28). I find this allegation in relation to Mr Thomas's purpose in creating a noise disturbance has not been proved. The cattle grid was installed significantly closer to Scott's property than where a gate to UCE's access (which the cattle grid replaced for purposes of livestock containment) was previously located. I accept that, until the cattle grid was fully installed, this made it difficult for Scott and his wife to manoeuvre their cars and also that their dog injured itself going over the grid. However, the cattle grid was on UCE's land and was installed to contain cattle.

522. Allegation (29). Consistent with my findings in relation to allegations (14) and (24), this allegation has not been proved.

523. Allegation (30). Although Mr Thomas did make a complaint to the Council about the discharge from the septic tank, this allegation has not been proved. The claimants' evidence in support of it was based on hearsay (what Ben Joint said he had seen) and Ed McFadden said he did not carry out any digging (as opposed to fencing) near the septic tank. Mr Thomas said the nearest digging work would have been about 11 metres away for the purpose of erecting a shed near Pengelly.

524. Allegations (31) and (32). These allegations have not been proved. Roger Nicholas denied that he filled the cattle grid and said that Adrian Thomas had drawn the wrong conclusion about seeing him with a wheelbarrow doing work on Scott's garden. Having regard to Scott's unhappiness with the cattle grid and the competing accounts of Roger Nicholas and Adrian Thomas (who was not cross-examined on his witness statement on this point) I feel unable to conclude that any accusation against Roger Nicholas about filling in the cattle grid was a false one. Scott's evidence confirms that he had a reasonably amicable discussion with Ed McFadden about where the soil and rubble removed from the cattle grid should be put. Mr McFadden said it was not a heated discussion and had no recollection of Scott threatening to call the police.

525. Allegation (33). This allegation has not been proved. Mr Thomas explained that Ed McFadden had erected a new fence on the field side of the lane adjacent to the septic tank. Mr McFadden said he had only put up some stock proof fencing at the entrance to

UCE's field. That fence did not prevent the Nicholases accessing Mr Joint's land when they replaced the septic tank.

526. Allegation (34). This allegation (with Mr Thomas making a false and malicious complaint) has not been proved. Mr Thomas, acting on what his father had told him about the replacement of the septic tank (which he had not been told about beforehand) considered that the leaking of effluent in the process of its replacement meant that he was concerned about it running into the water course and him or UCE being fined as a consequence. I accept this was a genuine concern of Mr Thomas which is at odds with him making a false and malicious complaint.

527. Allegation (35). This allegation has been proved. The Nicholases called the police about Adrian Thomas's threatening behaviour but he left before the police arrived. Adrian Thomas (who for these purposes can therefore be taken to have been acting at his son's direction) considered they did not have permission to use UCE's land for the purpose of replacing the septic tank using a digger and says he was concerned about health and safety aspects for any members of the public using the footpath, but accepts he verbally confronted them.

528. Allegation 34 (not proven) and allegation 35 (proven) illustrate the danger of escalation in a dispute between neighbours which has already resulted in a breakdown in dialogue. The Nicholases believed (quite possibly with solid grounds to support their belief) that they had a right of access over UCE's land to replace and not just maintain the septic tank. They had been liaising with the Environment Agency for some months over its replacement with the new sewage treatment system. In a letter to Martin dated 8 August 2022 the Environment Agency had noted that "*the septic tank is currently leaking and poses a potential risk to the environment and public health*." The claimants should not be too quick to allege harassment by Mr Thomas if his reaction is in part the result of them not involving him in their plans.

(14) The 1997 Act

529. The question therefore arises as to whether the proof of allegations (7), (9), (11), (13), (16), (27), (33) and (35), as against Mr Thomas, supports a claim under the 1997 Act.

530. In my judgment, those proven acts on the part of Mr Thomas (or his father acting on his behalf) fall well short of the grave standard of misconduct identified by the decision in *Hayden v Dickenson*. The events concerning the drain are properly to be viewed as a particularly silly aspect of a wider neighbours' dispute about property rights rather than some independently actionable wrongdoing based upon a campaign to cause the brothers (or their parents) alarm, fear or distress.

531. Although Martin and Scott said they were extremely upset by the suggestion they were homophobic, I am not satisfied that this clearly more serious conduct crossed the boundary into what would also be criminal behaviour. I am not persuaded that either brother would have felt directly exposed, and victimised, by the Instagram post (contrast allegation (14) in relation to Adrian Thomas) and there is no evidence that any persons reading that post did so believing they were its targets. It is therefore not necessary for me to consider its Article 10 implications.

532. My assessment of their characters is that Martin is the less robust of the brothers and more likely to have been upset and that Scott (who in fact had less cause to be upset by allegations (7), (13) and (27) than Roger Nicholas who is not a party to the harassment claim) is more capable of looking after himself. I refer to the video of the January 2025 confrontation; the evidence in relation to paragraph (35) that Scott would probably have been prepared to stand up to Adrian Thomas (if not advised against that by his father); and the fact that, when he curtailed his WhatsApp communications with Mr Thomas (over allegation (16)) Scott felt able to say: "*Fuck off prick, you're a hateful and hated cunt*." However, I am not persuaded that a case of either brother being sufficiently alarmed or distressed by targeted and oppressive conduct is made out.

533. Accordingly, the claim for damages under the 1997 Act fails. If I had reached the contrary conclusion the damages award would have been very modest (I would have had in mind a figure of £2,000 for each of Martin and Scott) and, for the reasons explained in Section C(3) above, nothing like the level of damages claimed by them.

(15) Claim to an Injunction (Harassment)

534. The Particulars of Claim seek the following injunctive relief:

    i) a prohibitory injunction to restrain Mr Thomas (whether by himself, his employees or agents) from (a) removing any part of, or otherwise interfering with, the storm drains on the Lane, (b) blocking the sea view from Scott's property and (c) storing items outside Scott's property; and

    ii) a mandatory injunction requiring Mr Thomas to immediately (a) remove the cattle grid next to the entrance to Scott's property, reposition it to the location of the previous gateway and restore the road to a professional standard; (b) remove the silage bales located outside Scott's property and make good any mess; and (c) remove all other items stored outside Scott's property and make good any mess.

535. I am not persuaded that it is just and convenient to grant injunctive relief in these terms or modified terms.

536. So far as concerns the prohibitory injunctive relief sought, it would not be consistent with my individual findings in relation to allegations (15), (17) and (24) for me to grant injunctive relief in relation to the placing of silage bales or storage items on UCE's land adjacent to outside Scott's property. My finding in relation to allegations (7) and (24) does provide a potential basis for the future grant of injunctive relief but, as with my decision above in relation to the injunction sought to prevent further acts of nuisance, both parties would be best advised to first consider the implications of this judgment before any further actions are taken in relation to the Drain. They were able to agree a Tomlin Order in settlement of the Septic Tank Claim, even though they have yet to fully implement it, and they should explore doing so in relation to the Drain. I am not prepared to grant an injunction in the wide terms sought which dictates what may not be done with the Drain for so long as the Lane remains in UCE's ownership.

537. For the same reasons in relation to the silage bales and storage items on UCE's, and because of my findings in relation to allegations (28), (31) and (32) in relation to the cattle grid, I am not persuaded to grant mandatory injunctive relief directing what should be done by Mr Thomas (or indeed by UCE) on UCE's land.

(16) Harassment (Mr Thomas's case)

538. The numbering in this part of my judgment reflects the factual allegations in Mr Thomas's counterclaim set out in Section B(4) above.

539. Allegation (1). This allegation of harassment has not been proved. Scott did remove the sign but he did not enter UCE's land to do so. The sign was on the public footpath side of the gate to UCE's land. I have found that the claimants' competing allegation of harassment through Mr Thomas's erection of the sign has been proved. In the light of my reasons for that finding it cannot be said that removing the sign was an act of harassment.

540. Allegation (2). This allegation of harassment has not been proved. The allegation (pleaded in vague terms) appears to relate to an incident when Scott was using a mini excavator to raise the level of the shared access over UCE's land which would prevent rainwater running into his garage. I was shown a photograph taken by Mr Thomas of Scott at work. Scott said that when they were on speaking terms he had told Mr Thomas of his intention to put in some kerb stones for that purpose. He accepted that he had not told Mr Thomas he intended to do the work that day, 6 November 2021, when he brought approximately 5 tonnes of material on to the accessway to create the water barrier. Scott accepted he did confront Mr Thomas with his concern that he was also photographing his children. He denied he was threatening or abusive. The contrary case was not put to him in cross-examination with any specificity and has not been made out.

541. Allegation (3). This allegation of harassment has not been proved. I prefer Mr Brady's evidence (about the nature and extent of his unsuccessful attempt to speak to Mr Thomas on 5 May 2022 in Field No. 8440) over the evidence of Mr Thomas and Archie Pilcher (and the less direct evidence about a "chase" given by Sarah Thomas which suggested that Mr Brady's pursuit continued to Nanquidno Farm). Mr Brady did attempt to speak to Mr Thomas but did not, I find, use threatening language of wanting to speak to him in the corner of a field or continue the attempt (which was not the hot pursuit suggested by Mr Thomas given that his powerful Range Rover had a head start over the van in which Mr Brady was being driven) for very long after he had got on to the B3306.

542. I conclude that Sarah Thomas was mistaken in believing (once she later learned Mr Brady's identity) that she had seen Mr Brady in a white van at Nanquidno Farm that day. As she said in evidence that she had given those in a van a welcoming look, if it had been Mr Brady that would probably have encouraged him to have stopped to ask if she had seen two men in a Range Rover. The evidence of Adrian Thomas also indirectly supports Mr Brady's account, in that it is clear from my assessment of Adrian Thomas's character that if he had remained persuaded of his initial understanding that Mr Thomas and Mr Pilcher had had to hide from Mr Brady in a hay field (the reason

why Adrian Thomas had turned up at Broadlands in an angry state until Mr Brady calmed him down) I do not believe he would have had anything further to do with Mr Brady.

543. Allegation (4). This allegation of harassment has not been proved in that I do not accept that preventing Mr Thomas's exit for no more than a couple of minutes or so was an act of harassment. A video of this incident (taken by Sarah Thomas as a passenger in Mr Thomas's car about to leave UCE's land for the B3306) was shown to the court and supports the facts alleged. I have already made passing reference to it in addressing Mr Brady's evidence. Mr Brady accepted that the parking of the car on the accessway was part of an attempt to speak to Mr Thomas and the video shows him coming towards Mr Thomas's driver's window. Mr Thomas told Mr Brady that he did not want to speak to him and that he should speak to Mr Thomas's solicitor. Mr Brady went away and moved the car. In my judgment the video evidence undermines Mr Thomas's pleaded case that he "*reasonably felt extremely threatened by Mr Brady*." The video gives no impression of him feeling threatened and it certainly provides no basis for concluding that would have been a reasonable reaction to Mr Brady's acts. Mr Neave-Hill was also in Mr Thomas's car, as a passenger in the back seat. His evidence was that he was anxious, and annoyed, not because of anything Mr Brady said but because the access had been temporarily blocked. He confirmed that Mr Brady walked away when told by Mr Thomas to go through a solicitor and that any anxiety on his part dissipated at that point. This evidence also fails to support the pleaded allegation.

544. Allegation (5). This allegation of harassment has not been proved in that I do not accept the temporary blocking of access, in the particular circumstances, was an act of harassment. Mr Brady accepted that he had caused a car to be parked so as to prevent Mr Thomas's builders from gaining access, but not otherwise. Mr Brady said he had done this so that he could ask them what work they intended to do that day as, if it was near the Aviary, it would cause the birds problems. There is a video of part of this incident, which I have also mentioned above, and which records the act of blocking but no more than that. The evidence of Declan Prowse, one of the builders, indicates that their access was blocked for about 20 minutes before the police arrived. Mr Prowse said Mr Brady referred to health and safety officers and representatives of the Council coming to the site. It is not alleged that on this occasion Mr Brady caused anyone to feel threatened and the video does not support such an allegation. If anything, it shows that Adrian Thomas had arrived in an angry state and referred to Mr Brady as a "*goon*". Although not recorded on video, I accept Mr Brady's evidence that Adrian Thomas was extremely aggressive, and looking for confrontation, and called Mr Brady a "*twat*" and "*a drunken, whisky-drinking Scottish cunt*." Mr Brady said he gave a statement to the police when they arrived and that, when they asked where Adrian Thomas was, one of the builders said he had gone to the lake.

545. Accordingly, there is no basis for a claim by Mr Thomas under the 1997 Act.

G. DISPOSAL

546. ROP therefore succeeds in its claim for damages in nuisance and negligence against Mr Thomas and UCE in the sum of £258,500. All other claims (save for the claim to

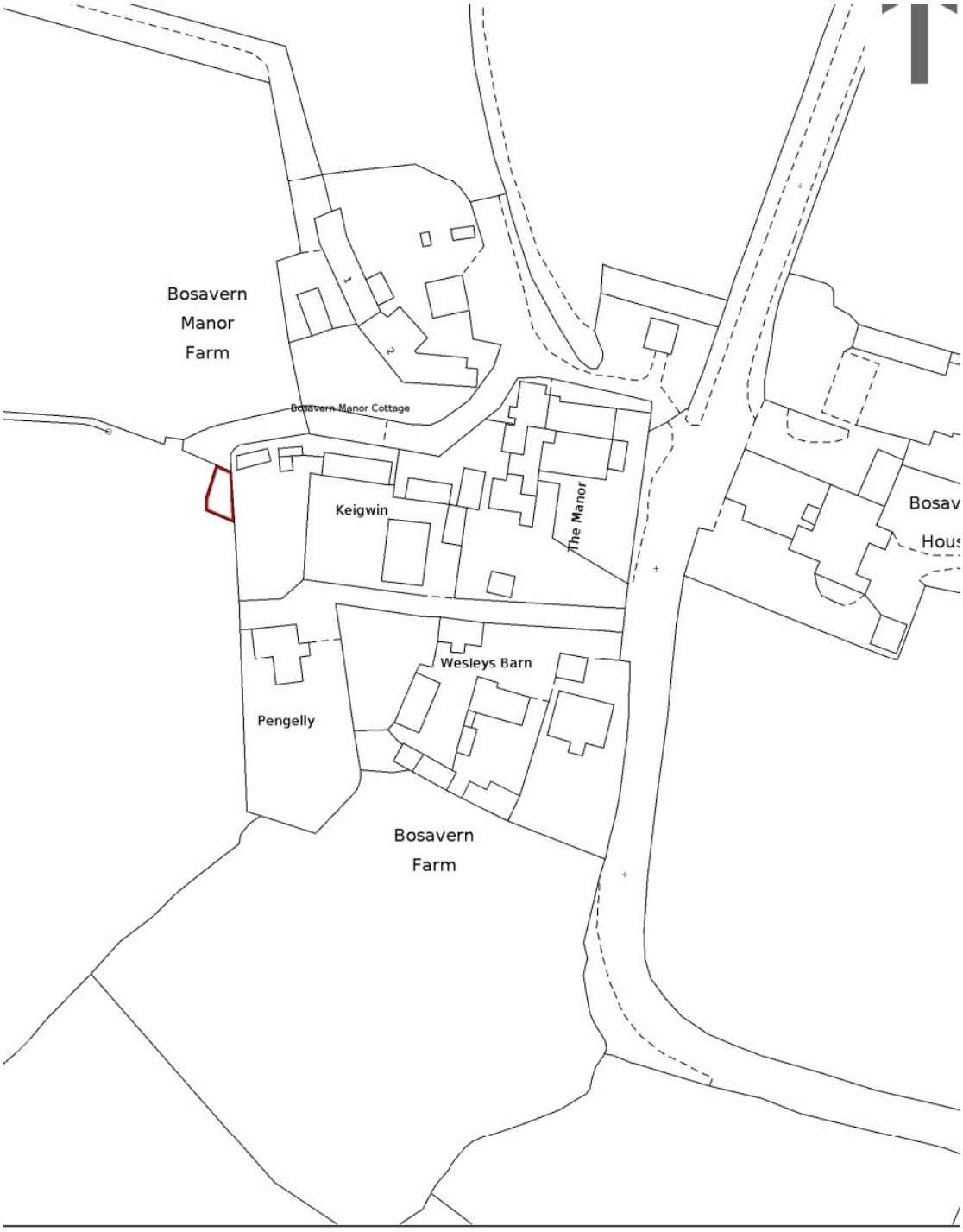
interest on that sum) and counterclaims are dismissed.

547. This judgment will be handed down remotely by email to the parties' legal representatives and its uploading to The National Archives. For the purpose of preserving the time for filing any appellant's notice under CPR 52.12 only, the handing down is adjourned. I will make a direction in relation to the time for filing any such notice at the next hearing to determine consequential matters arising out of this judgment or in any order containing the parties' agreement on such matters.

Annex 1

Colour	Details
RED - outlined	Land jointly owned by Martin Nicholas and Scott Nicholas and occupied by Raptors of Penwith Ltd pursuant to a Lease entered into on 1 June 2020.
RED - highlighted	Location of the aviaries.
YELLOW	Land owned and occupied by Martin Nicholas (Title no. CL161117).
ORANGE	Land owned and occupied by Benjamin Joint (Title no. CL190546).
GREEN	Land owned and occupied by Scott Nicholas (Title no. CL109613).
BLUE	Land occupied by Barnes Thomas.
PURPLE	Land occupied by Upper Cot Estate Limited.

Annex 2


Bosavern
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Farm
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The Manor
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Wesleys Barn
Pengelly
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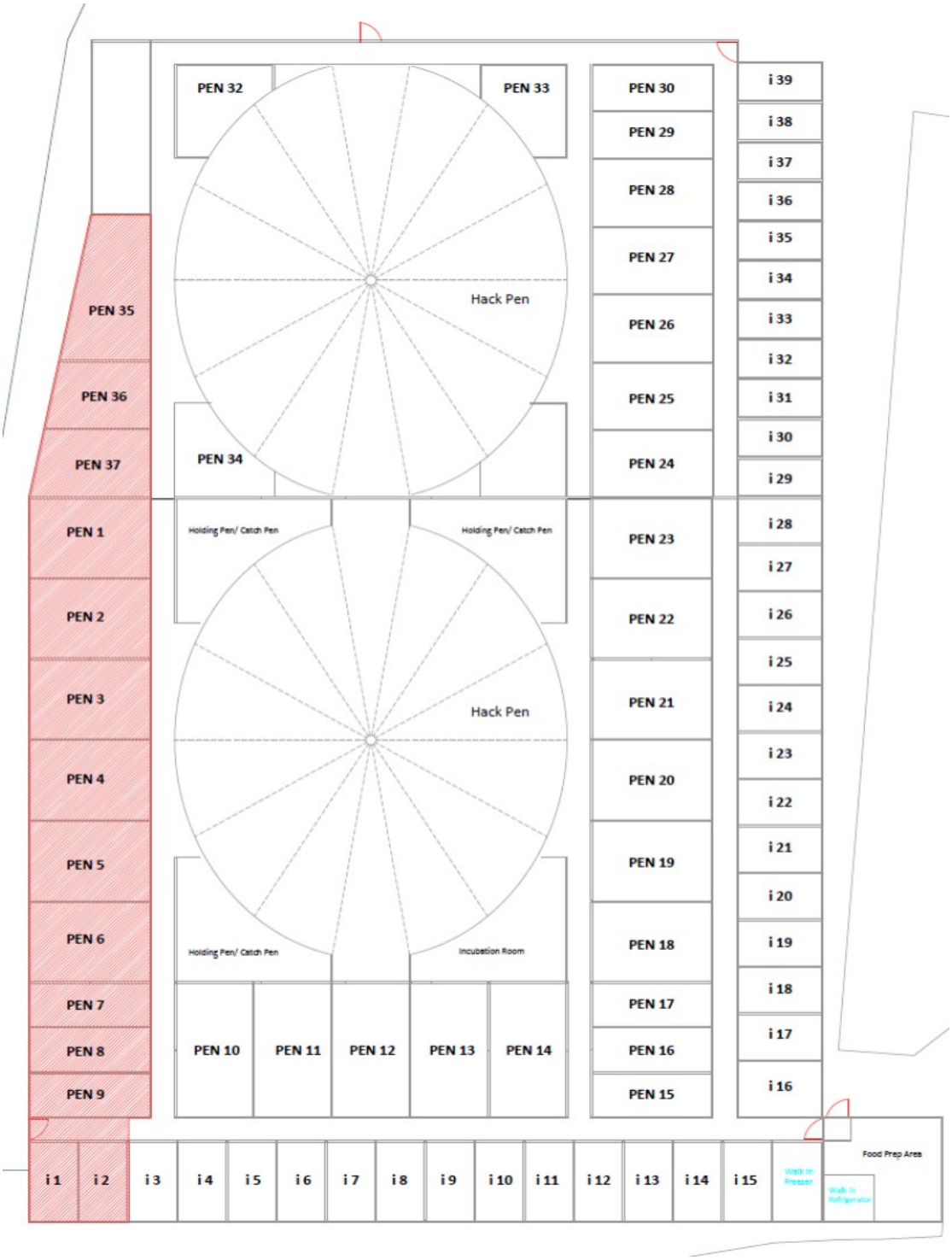
Annex 3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Walk in Freezer
Food Prep Area
Walk in Refrigerator