



Neutral Citation Number: [2020] EWHC 84 (Admin)

Case No: CO/2052/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22<sup>nd</sup> January 2020

**Before :**

**ROGER TER HAAR Q.C. SITTING AS A DEPUTY HIGH COURT JUDGE**

-----  
**Between :**

**R. (ON THE APPLICATION**  
**(1) GARY PAUL SHARP**  
**(2) FRISTLING HALL FARM LIMITED)**

**Claimants**

**- and -**

**NORTHUMBRIAN WATER LIMITED**  
**T/A ESSEX & SUFFOLK WATER**

**Defendant**

-----  
-----  
**WAYNE BEGLAN** (instructed by **Holmes & Hills LLP**) for the **Claimants**  
**GWION LEWIS** (instructed by **Northumbrian Water Ltd**) for the **Defendant**

Hearing date: 17<sup>th</sup> December 2019  
-----

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Roger ter Haar Q.C. :**

1. The Defendant is a statutory water undertaker appointed by the Secretary of State pursuant to powers now set out in the Water Industry Act 1991 (“the 1991 Act”). In the Essex and Suffolk Region, the Defendant operates as Essex & Suffolk Water (“ESW”).
2. On the 25<sup>th</sup> March 2019 ESW served Notice of Entry on the First Claimant pursuant to sections 158, 159 and 168 of the 1991 Act. On the 23<sup>rd</sup> April 2019 ESW applied to a magistrates court for a Warrant of Entry. (That application was withdrawn in the light of the present application for judicial review).
3. By this claim the Claimants challenge ESW’s decision to serve a Notice of Entry and its decision to seek a Warrant of Entry.
4. By order dated the 28<sup>th</sup> June 2019 Ms. Helen Mountfield Q.C., sitting as a Deputy High Court Judge, granted permission to apply for judicial review.

**ESW’s Statutory Powers**

5. Part VI, Chapter 1 of the 1991 Act grants a series of powers to statutory water undertakers. Section 158 grants powers to undertakers to lay pipes in streets. Section 159 grants powers to undertakers to lay pipes in other land. The powers granted by section 159 include the power “to inspect, maintain, adjust, *repair*, or alter any relevant pipe which is in any such land” (emphasis added): section 159(1)(b). A “relevant pipe” for this purpose includes inter alia a “water main”: section 159(7)(a).
6. The powers conferred by section 159 “shall be exercisable only after reasonable notice of the proposed exercise of the power has been given to the

owner and to the occupier of the land where the power is to be exercised:  
section 159(4).

7. Section 168 of the 1991 Act empowers the undertaker to “enter any premises” for the purposes inter alia of exercising its powers under section 159: section 168(1), (2)(b), (5). Further provision is made for this in Part II of Schedule 6 to the 1991 Act. In particular:

(1) The undertaker may not rely on the power of entry granted by section 168 except (i) in an emergency or (ii) at a reasonable time and after giving 7 days’ notice of the intended entry to the occupier of the premises: Schedule 6, paragraph 6(1), (2)(b);

(2) A justice of the peace may grant a warrant to enable the power of entry under section 168 to be exercised, using force if necessary, if the justice is satisfied that there are “reasonable grounds” for seeking entry and it is “reasonably apprehended” that entry will be refused: Schedule 6, paragraph 7(1), (2);

(3) Where the power of entry under section 168 is exercised by an undertaker, it must compensate fully anyone who sustains loss or damage as a result, subject to the provisions of paragraph 11 of Schedule 6. Disputes about compensation must be referred to an arbitrator or, failing that, the Upper Tribunal: Schedule 6, paragraph 11.

## **Facts**

### The Farm

8. The First Claimant (together with his wife, Julie Sharp) owns land at Fristling Hall Farm, Swan Lake, Stock (“the Land”). The First Claimant (together with his wife), through the Second Defendant, operates a farm holding on the Land (“the Farm”). The Farm consists of a farm house, various outbuildings, a number of cattle barns and sheds, and land totalling around some 1,050 acres.
9. The claim concerns a water pipe which runs under the eastern part of the Farm within two parcels which are part of the Farm known as Margaretting Hall and Little Tressels Farm (“the Pipe”).
10. The Farm is used for grazing and keeping a herd of suckler cows whereby the Claimants rear calves and sell them as stores. As at late 2018 there were approximately 2,000 cattle on the Farm. It is one of the largest cattle farms in the United Kingdom.
11. The Claimants’ farming practice is to farm in a “ring fence style” whereby the cattle predominantly have the run of the Farm and are not partitioned or kept in conventional paddocks. Accordingly, there are no field enclosures within the main open areas of the holding. The whole landholding is fenced with black metal estate fencing, which the cattle are used to. They are not used to barbed wire fencing. The Farm calves all year round.
12. The Pipe is located in one of the open areas. The cattle are able to cross the river which bisects the relevant open area (in at least three locations). Within that open area, at material times, there were some 1,200 cattle.

### **The bursting Pipe**

13. On 21 November 2018 the Pipe burst on the Land. The burst occurred in the area adjacent to Parsonage Lane.
14. This was the second time in recent history that the Pipe had burst. A previous burst had occurred on 12 September 2018 and following discussion between the parties it was agreed that the appropriate course for repairs was for the cattle to be safely removed from the Land before the repairs were undertaken. The way the statutory scheme is framed meant that, as a result, the Second Claimant was entitled to compensation from the Defendant.
15. The Second Claimant had a live claim for compensation (and was in dispute with the Defendant about the same) when the Pipe burst on 21 November 2018. The Claimant was seeking c. £80,000 by way of compensation. The Defendant is proposing to pay around £3,000.
16. It is the Claimants' contention that for the period thereafter (and continuing to date) the Claimants have suffered an insufficient water supply to the Land. The Claimants believe that insufficiency has been caused by the burst in the Pipe. The Defendant was informed of that fact and the Claimants' understanding by, for example, an email of 8 January 2019 from the Claimants' solicitors.
17. There ensued between the parties a detailed set of correspondence as to how the Pipe could be worked on lawfully and safely given the presence of the herd on the Land, and what would be necessary to properly remediate the Land thereafter ("the Works"). The substance of that set of correspondence is set out in the First Claimant's witness statement and exhibited.

18. The First Claimant asked in early course how the safety of the cattle on the Land would be ensured. He drew attention to specific requirements such as a sufficient method statement; the use of appropriate forms of fencing; and the presence of a suitable number of properly qualified herdsmen. The Claimants' position was that (at least) four properly qualified herdsmen would be required to take adequate care of the herd and operatives on site during the Works.
19. The Defendant proceeded (properly) on the basis that the Works should be undertaken with as little disruption to the cattle as was possible and in a way which would ensure the safety of the Defendant's operatives, contractors and the safety of the cattle.
20. The Defendant prepared a method statement seeking to achieve that object [129-134]<sup>1</sup>, but later acknowledged that the method statement was deficient [135-137].
21. On 27 November 2018, Mr. Hopkins, the Claimants' solicitor, wrote to Mr. Skirrow, ESW's Network Services Area Manager. In that email he said [136]:

“I have been informed that is Essex & Suffolk Water's intention to erect a fence to enclose the area where remedial works are required. This is to ensure that there is no conflict with my client's cattle whilst the works are undertaken. A generic risk assessment has previously been produced and provided to me. I have previously outlined to Mr. Duffy and Essex & Suffolk Water's agent that the risk assessment does not deal with the erection of the fence in the first instance and for the potential for conflict with cattle whilst entry to the land and works are carried out. It has been outlined that stockmen will be required during the initial fencing works and to ensure the safety of operatives on site whilst the remedial works are undertaken. Further, issues have been raised as to the adequacy of the fencing that is proposed to be erected.”

---

<sup>1</sup> References are to the paginated court bundle

22. Mr. Skirrow responded to that email the following day, saying “I will send over to you an Updated Method Statement and Risk assessment and will be in touch with the details of our stockmen shortly.” [137]
23. On 29 November 2018 Mr, Skirrow sent Mr. Hopkins another email attaching a copy of a revised Method Statement. The email named three stockmen and set out their qualifications.
24. The Method Statement was dated the previous day [145 to 195]. The following points should be noted:

(1) At [149]:

“Objectives”

NWG’s objectives are to:

Undertake and complete the works in a manner that ensures the safety of NWG’s personnel, personnel from contractors working on our behalf, and members of the general public.

Cause the minimum amount of disturbance to the working activities on the farm, including causing no distress or harm to the cattle within the field.

Cause a minimal amount of environmental damage whilst the work takes place.

(2) At [150] is a detailed section relating to health and safety.

(3) At [151]:

“Training and Authorisation

“The stockmen’s training and competency will be determined by their previous experience in this type of work and the length of service they have undertaken with on the job learning rather than the requirement for certified qualifications. The stockmen will be responsible for identifying the behaviour and warning signs demonstrated by the cattle and ensuring the safe and timely evacuation of the fencing contractor (before themselves)

to the safe evacuation point. All the other skills of a stockman will not be required for the task they are being engaged on this work for.”

The names and qualifications of the stockmen were then set out.

(4) At [152]:

“Health and Safety Local Risks:

“The work area is contained within a field being occupied by cattle. The cattle will remain within the field during the duration of this work. To create a safe work space for the operatives and protect the cattle from injury from the work activities being undertaken, stockmen will oversee the cattle whereabouts and keep the cattle away from the work space where a stock fence will be erected by a fencing contractor to enable safe working on the pipeline.”

(5) At page [154] there is a section dealing with method of working which identified that the stock fence would be barbed wire strung between posts.

25. On 14 December 2018, Mr. Skirrow sent a long email to Mr. Hopkins setting out proposals for the works. This referred to the erection of a stock fence with diagrams showing where the stock fence would run [198-199] and then said [200]:

“I am hopeful that this method of working will address your clients’ concerns and I am of the opinion that there will no longer be a need to separate the whole field, thereby the need for ourselves to take over the care of the livestock will no longer be required.

“With this in mind I am assuming that Mr. Sharp will no longer require us to have four fully qualified to NVQ level 4 (or equivalent experienced) stockmen to be on site 24 hours per day whilst the repair is undertaking nor will we require a vet on standby should the need arise.

“We would look to have our three stockmen with their experience as cattle farmers and formal training within the agricultural industry to provide assistance to our fencing team whilst they erect the stock proof fencing to ensure the livestock



in the field are not stressed by the presence of our workforce, and to help “shepherd” away the livestock from the area being fenced off. We do not believe it is reasonable for our stockmen to take over the care of the livestock whilst they are supporting our fencing contractor, similarly we do not believe that it would be required for our stockmen to provide feed to the livestock whilst we are occupying the field to erect the fencing – the remainder of the field is of sufficient size for the livestock to graze, or if supplemental feed is already being provided for the livestock that this supplemental feed is still able to be provided by Mr. Sharpe within the remainder of this field.

“It would be our intention that as soon as the stock proof fencing has been erected that our Stockmen will be discharged of their duties until they were called back to assist with the removal of the fence after a period of time when any excavated ground has dried out and has been suitably compacted and returned to a condition suitable for the livestock to return onto this area.”

26. On 2 January 2019 Mr. Hopkins wrote to Mr. Skirrow by email [207]:

“I have discussed your proposal with my client and the general issues with the current proposal are (some of which are more practical concerns for you):

- The blocking up/obstruction of the public footpath
- Whether the proposed fencing arrangement will be sufficient to stop cattle accessing the compound “area” via the river
- The height restrictions for the underpass and the level crossing
- The type and number of vehicles using the private roadway and potential conflict with other users
- Whether ground conditions will allow heavy vehicles to gain access across the fields into the “compound” area
- Whether three stockmen will be sufficient and the identity and experience of the stockmen.”

27. On 10 January a site meeting took place. In his witness statement, Mr. Sharp describes what was discussed at that meeting:

“Mr. Skirrow responded by an e-mail dated 10<sup>th</sup> January 2019 proposing a site meeting later that day. A site meeting took place at 4.30pm on 10<sup>th</sup> January 2019. The discussions at the meeting focused on the issues raised in HH’s e-mail dated 2<sup>nd</sup> January 2019 (namely the bullet points [in the preceding paragraph of this judgment]) and a potential alternative proposal for a smaller working area to be constructed around just the inspection chamber. This would allow initial investigation works to be carried out in the hope that the leak to the water pipe could be remedied at this point. We also discussed the extent of the likely remedial works to the land. Mr. Skirrow said that he would need advice from the fencing and landscaping contractors appointed by ESW, ALD. However, we agreed in principle that if the land needed to be fenced off in any event for remedial works to the land and for the land to dry out, this may have an impact on how ESW proceeds. We agreed to arrange a further meeting on site with ALD. At the meeting Mr. Skirrow and his colleague expressed their views that the easiest way for the works to be carried out would be if ESW agreed to the removal of cattle from the land. It was also explained to me that the waterpipe was extremely old and should have been replaced over 10 years ago. I felt that the meeting was extremely positive.”

28. On 16 January 2019 there was another site meeting. Again, Mr. Sharp relates in his witness statement what was discussed at that meeting:

“The site meeting took place with ALD on 16<sup>th</sup> January 2019. HH sent an e-mail to Mr. Skirrow on 21<sup>st</sup> January 2019 ... by way of a follow up to the meeting and to confirm my understanding of the agreed actions to progress the matter as follows:

- 1. An initial inspection of the waterpipe is to take place with ALD fencing off the area around the inspection chamber assisted by the proposed stockmen. Please can you provide a revised method statement for this in due course.*
- 2. It is hoped that the leak to the waterpipe can be remedied from the inspection chamber. If not we will need to reassess the original method statement.*
- 3. ALD has advised that remedial works will need to be undertaken to dry and restore out the land. This will involve the fencing off of a substantial part of the land. ALD is to provide a report outlining the required remedial works. I understand that such works are likely to involve fencing off along the lines outlined in your original method statement and potentially the removal of the cattle from the*

*land. Further, compensation will need to be paid to my client for the loss of use of the land.*

- 4. Once ALD has provided its report and the extent of the remedial works have been agreed, the basis of the compensation that is to be paid to my client will need to be agreed up front and before any works are commenced.*
- 5. An agreement as to the identity of the stockmen still needs to be reached.”*

29. Following this meeting there were email exchanges between Mr. Skirrow and Mr. Hopkins. A significant issue discussed in those emails was the identity of the stockmen. **[210-215]**
30. On 8 February 2019 a paralegal at Mr. Hopkins’s firm wrote to Mr. Kelly, a lawyer within the Defendant company. This referred to the continuing disagreement between the parties in respect of compensation for the earlier burst in the pipe and then said **[216-217]**:

“With regard to the Second Incident, we had a very productive site meeting with Mr. Skirrow and his colleague on 10 January 2019 in which Essex & Suffolk Water’s proposal to carry out works and method statement were discussed in detail.

“I understand that references have been made to Mr. Sharp’s “requirements” and such like. Such terminology is unfortunate and unfair. The issue with carrying out works on Mr. Sharp’s landholding (which to be fair to Mr. Skirrow he appears to understand and appreciates) is that there is potential conflict with cattle which poses a safety risk. The possible conflict arises in respect of the actual remedial works that are to be carried out by Essex Suffolk & Water and also in respect of the construction of compounds around the relevant areas so the works can be carried out safely.

“I attach a copy of the proposal put forward by Mr. Skirrow that was discussed at the meeting on 10 January 2019. I also attach a copy of our subsequent exchange of emails confirming the actions required to progress matters. Mr. Sharp’s current frustration is that since the productive meeting on 10 January 2019 there appears to have been little progress. This may well be because Mr. Skirrow is waiting for third party contractors to come back to him.

“At the meeting on 10 January 2019 it was agreed that:

“1. An initial compound around the relevant manhole cover would be constructed to provide a safe working environment for Essex & Suffolk Water’s operatives. The compound would be constructed with stock-proof fencing and herdsmen would be engaged to keep the cattle away from the fencing contractors whilst they entered the compound. The herdsmen would also escort Essex & Suffolk Water’s operatives to the compound so they could then undertake initial investigation works with the hope that remedial works could be carried out from the manhole cover or its vicinity. However, if works were more extensive we would then need to revisit the initial proposal.

“2. ALD would provide a report on the required remedial works that need to be carried out to the land due to the continued leaking of the water pipes since 21 November 2018.

“3. Once ALD has provided its report in respect of the remedial works, the parties would then seek to agree up front compensation for the disruption and damage caused. Once agreement has been reached works could then commence on site.

“You will not doubt appreciate that in the light of the dispute over compensation in respect of the First Incident, Mr. Sharp is reluctant to allow works to be carried out on site until a full schedule of remedial works and compensation has been agreed in respect of the Second Incident.”

31. This email seems to me significant: it is between lawyers, and seeks agreement on all matters including compensation before the works were to start.

32. That email provoked an email response from Mr. Skirrow on 12 February 2019. That response included the following passage [218]:

“As the Water Industry Act allows us to do we will instruct Savills to act on our behalf, once the leak has been repaired, to enter dialogue with yourself and/or Mr Sharp to discuss damages which have been caused by the leaking pipeline. We will not be discussing this matter further until we have been allowed to gain access to our pipeline and it has been repair[ed]. At this point Savills will be able to assess the damage which has been caused by the leak. If Mr Sharp does

not agree with the assessment which Savills make then Mr Sharp will be free to take the matter to the Lands Tribunal.

“Mr Sharp has made comment that our risk assessment in his words is “rubbish”, and competent herdsmen with experience of cows not pigs as they are different beasts are required to undertake the work we have proposed. The method statement and risk assessment which were submitted to yourself on the 29<sup>th</sup> of November 2018 is in my view suitable and sufficient for the hazards we have been made aware of by Mr Sharp. It addresses our reasonably practicable method of how we will undertake the work, and the experience of the herdsman with knowledge and experience of working with cattle which we have sourced. In addition we have clarified to yourself and Mr Sharp his concerns about blocking the right of way on the private drive which Mr Sharp owns.

“Whilst you and Mr Sharp may not agree that our proposed method of working is suitable, I have received no feedback which gives me any doubt that the hazards presented in undertaking this work have not been addressed.

“Please can you clarify that your client will not allow us access onto the land to maintain the pipeline and fix the leak unless agreement on compensation has been agreed in advance?”

33. In his oral submissions, Mr. Beglan, for the Claimants, said that this email was when a change in ESW’s attitude occurred and ESW went “into litigation mode”.
34. On 21 February the Claimants’ solicitors provided to ESW’s lawyer a four page response by letter to Mr. Skirrow’s email. [220-223]. The letter reiterated the Claimants’ offer, which remained open, to remove the cattle from the Land on the basis of the costs associated with that which had previously been identified to the Defendant. The letter alleged in terms that it appeared ALD did not in fact have the necessary expertise to assess and carry out their element of the Works. The letter included the following passage [223]:

“In order to move this matter forward please can you:

- A. provide details of the alternative contractor instructed by ESW to carry out the fencing works and remedial works to the water damaged land;
- B. confirm availability dates for a site meeting/inspection to take place with the alternative contractor and ESW;
- C. confirm that a report as to the extent and methodology for the remedial works to the land will be provided;
- D. provide details of the identity, qualifications and experience of the herdsman instructed by ESW;
- E. confirm (and provide copies of) which method statement and risk assessment that will be used/relied on by ESW;
- F. provide details of your communications with Essex County Council in relation to the temporary stopping up and/or obstructions to the public footpath.”

### **The Notice of Entry**

35. On 25 March 2019, Savills, on behalf of ESW, sent a Notice of Entry exercising the Defendant’s statutory powers to enter land in order to undertake necessary works to pipes [227-230].
36. On 26 March 2019 ESW’s lawyer sent the Claimants’ lawyers a 3 page letter dealing with the above letter point by point. [224-226] At paragraph 6 it was said:
- “My client has taken into account the requirement for herdsman and has planned the works accordingly. My client is satisfied that its approach in this regard is reasonable, although it understands your client has his own views. I would again reiterate that it is not within your client’s gift to dictate how ESW should approach its statutory works.”
37. This enclosed a revised Method Statement [231-254]. This was in identical terms for all relevant purposes as the previous Method Statement except that the identities and qualifications of the herdsman were now omitted. [237]

38. The 26 March 2019 letter concluded by stating that it was the Defendant's final position, stating that unless access was granted by 4 April 2019 the Defendant would apply for a warrant of entry.

39. On 3 April 2019 the Claimants' solicitors sent a further letter [255-258] which included the following:

“ My client remains of the view, based on professional advice, that only 2 herdsmen (which we understand that ESW intend to employ) will be insufficient to ensure that in excess of 1000 cows that are likely to be in the particular vicinity of the working area will be kept away from the fencing contractors and the compound that is to be created.

“As no information has been provided as to the identity or experience of the herdsmen, my client is unable to take a view as to whether they have sufficient experience for this task.

“Further, the proposed barbed wire stock proof fencing will be insufficient to create a secure compound and will cause a hazard to the cattle. The cattle are used to grazing in fields with black metal estate fencing. ESW is intending to introduce an alien structure which will attract the cattle (together with the activity taking place).

“The cattle are highly likely to rub against the barbed wire which will in turn cause injury. The likelihood of such injury is heightened by the fact that the new alien fencing will be left in situ.

“Accordingly, the manner in which ESW intends to exercise its power of entry is wholly unreasonable.”

40. In response, ESW's lawyer wrote on 23 April 2019, dealing with the barbed wire issue [261]:

“My client does not accept that the use of barbed wire fencing will pose a risk to the cattle. It is common practice for stock proof fencing to have barbed wire in its makeup. As stated in earlier correspondence, my client and its advisors have many years' experience of undertaking works where cattle have been present in the vicinity of the works. It is acknowledged that cattle will be inquisitive, but will then naturally move away. This is not a site where there is a high stocking density in a

small area. On the contrary, there is a huge area of land for cattle to safely move away to. Whilst my client does not share your client's concerns, any suggestion that cattle have been injured as a result of the works can be examined once the works are completed as part of the overall compensation discussions."

41. On 23 April 2019 ESW's lawyer wrote indicating an intention to apply to the Chelmsford Magistrates Court on 21 May 2019 for a warrant authorising ESW to enter the land for the purposes of carrying out the works [263-4].
42. On 20 May 2019 the present proceedings were commenced. The application for the warrant was withdrawn.

### **The Claimants' Concerns**

43. As I understand the Claimants' concerns they are as follows:
  - (1) That the number of stockmen proposed was inadequate and the qualifications of the proposed stockmen were either not clearly articulated or were inappropriate;
  - (2) That stockmen were needed to be present or available not only when the stock fence was being erected but also after the stock fence had been erected;
  - (3) That a barbed wire fence was inappropriate in the vicinity of the Claimants' cattle, who were unused to barbed wire fences.
44. It is not suggested that it is appropriate for this Court on an application for judicial review to assess whether those concerns are well founded or not, still less what the appropriate protections would be.



45. However, timing is important. Whilst particularly items (1) and (2) were points made repeatedly, item (3) was made less clearly, and, so far as I can discern in my review of the documents, was not made or was not made clearly until after the Notice of Entry had been served.

46. I turn now to the grounds of challenge raised.

### **Ground 1: Procedural legitimate expectation**

47. The three limbs of this part of the claim are that ESW, by express representation to the beneficiary of the representation, stated that in the particular circumstances of this case:

(1) It would proceed in exercising its statutory power and execute the works in a way that would ensure as little disruption to the cattle as was possible and in a way which would ensure the safety of the Defendant's operatives, contractors and the safety of the cattle;

(2) It would identify the individual herdsmen it proposed to use, so that the Claimants (acting reasonably) could satisfy themselves that the identified individuals had the requisite expertise for this particular project; and

(3) It would agree an appropriate method of working with the Claimants.

48. Dealing with limb (1), I have some difficulty in discerning why it is said that the Claimants should have any legitimate expectation (other than in a very general way separate from the Claimants' own interests) that ESW would take steps to ensure the safety of its own operatives and contractors.

49. Be that as it may, obviously it was the expectation of both ESW and the Claimants that ESW would exercise reasonable care, and that insofar as ESW failed to do so and the Claimants suffered loss, ESW would pay compensation as required by the 1991 Act. However, that is a very different matter from a public law duty to respect a legitimate expectation.

50. For ESW, Mr. Lewis referred me to *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225 where at page 236 Stuart-Smith LJ said that the doctrine of legitimate expectation

“has many similarities with the principles of estoppel in private law. In my judgment the matters that the applicant has to prove in this case are these. (1) A clear and unambiguous representation .... (2) That since the applicant was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the applicant to rely upon it without more .... (3) That it did rely upon it. (4) That it did so to its detriment.....”

51. He also referred to the Scottish decision in *DM v Secretary of State for the Home Department* [2014] CSIH 29; [2014] SC 635 where at paragraph [13] the Court drew attention to the need for “a promise that is clear, unambiguous and devoid of relevant qualification”.

52. For my part, I recognise the existence of a valid argument that on the facts of this case (particularly the involvement of large numbers of cattle), the Claimants had a legitimate expectation that they would be consulted as to how ESW intended to carry out the works (although the precise grounds for that expectation and the scope or extent of such expectation would need to be very carefully delineated). But, insofar as there was such a legitimate expectation, any such expectation was honoured in ample measure in this case.

53. What the Claimants seek to do on this limb (1) is to create what amounts to a binding promise to minimise disruption to livestock. In my judgment, ESW is right to say that references to minimising disruption to livestock in the “objectives” section of the Method Statements was no more than a statement of what ESW hoped to achieve, and does not amount to a legitimate expectation enforceable in public law.
54. As to limb (2), it is correct that at one point ESW identified the stockmen it intended to use and their qualifications, and in the last Method Statement did not include such details. However, in my view, this was no more than a reasonable attempt to make clear to the Claimants what ESW intended to do. At no time did ESW ever commit to a precise timeframe for definitively identifying the number, identities and contact details of the stockmen to be used. All that ESW was doing, as Mr. Lewis submitted, was dealing with the Claimants’ solicitor’s queries as constructively as it could.
55. As to limb (3), at no time did ESW fetter its powers by leading the Claimants to expect that it would agree an appropriate method of working with the Claimants. What it did, entirely reasonably, was to attempt to reach agreement in the light of an ever lengthening list of difficulties being raised. The final straw appears to have been when the Claimants appeared to be taking the position that they would not permit ESW onto their land until compensation had been agreed.
56. For these reasons, Ground 1 must fail.

**Ground 2: Failure to consider the need to carry out the works in a way that ensures the safety of ESW's operatives, contractors and the Claimants' cattle**

57. Ground 2 is summarised in paragraph 50 of Mr. Beglan's skeleton argument as follows:

“In the alternative to ground 1 above, on a proper construction of the statutory power provided by s.159 the Defendant must take into account the need to execute the Works in a way which would ensure the safety of the Defendant's operatives, contractors and the safety of the cattle. Further, as set out above, the Defendant accepted that imperative in the Statements of November 2018 and March 2019 as set out above.”

58. I have difficulty in accepting the use of the word “ensure” in that formulation. As I have already said, I accept that there was an expectation that ESW would carry out the works so as to minimise any damage, and would pay statutory compensation if it failed in that endeavour. That is a long way from a legitimate expectation in public law.

59. Any such fetter upon ESW's powers would drive a coach and horses through the machinery of the 1991 Act. The powers conferred by statute are there to enable the undertaker to carry out works as of right, subject to the obligation to pay compensation. To hold that an undertaker, by taking steps to consult in order to consider how best to carry out works, was undertaking an obligation (by way of “legitimate expectation”) not to cause any damage to cattle would be simply unworkable, and quite contrary to the understanding inherent in the Act that such works might cause damage which would require compensation to be paid.

60. Further, in my view it is very far from clear to what extent any problems with the stockmen would cause a risk of disruption to the cattle, and, as I have pointed out, the issue with the barbed wire appears only to have been raised after the Notice of Entry had been given.

61. In paragraph 52 of Mr. Beglan's skeleton he argues:

“Further, applying Article 1 of the First Protocol ECHR the interference with the Claimants' property interests (the animals and land) must be proportionate. In this case that equates to carrying out the Works in a way that would ensure as little disruption to the cattle as was possible and in a way which would ensure the safety of the Defendant's operatives, contractors and the safety of the cattle. The Defendant has failed to apply such an approach to the Works.”

62. In my view Mr. Lewis answers that argument correctly in paragraph 27 of his skeleton argument:

“Ground 2 includes an additional sub-ground that ESW's intended approach upon entering the Land is contrary to Article 1 of the First Protocol to the ECHR (“A1P1”) because the “risk assessment and method statement” would not ensure “as little disruption ... as possible”. This submission is mistaken as there is no test of ‘strict necessity’ under A1P1. Rather, A1P1 requires a “fair balance” which means “a reasonable relationship of proportionality between the means employed and the aims pursued”: *National & Provincial Building Society v UK* (1997) 25 EHRR 127. In *James v UK* (1986) 8 EHRR 123, the applicants had argued that they could be deprived of their possessions in accordance with A1P1 “only if there was no other less drastic remedy”, but the Strasbourg court rejected this as it would “amount to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted”. [51] ”

63. It is not for this court to investigate issues such as whether the proposed fencing would or would not be adequate or the requisite number of stockmen or their qualifications. It is sufficient to hold that ESW has approached issues in a manner which on the face of the Method Statements (which incorporate

risk assessments) recognised the need to attempt to minimise disruption to livestock and damage and proposed precautions within a reasonable margin of appreciation in that regard.

64. For these reasons I reject Ground 2 also.

### **Ground 3: Reasoning/taking matters into account**

65. In this case the Claimants contend that ESW was under a duty to give reasons, but even if that is wrong, ESW chose to give reasons, and those reasons can therefore be scrutinised.

66. ESW contends that it was under no duty to give reasons. I agree that the suggestion of an obligation to give reasons sits uneasily with a power granted to an undertaker to enter land promptly to carry out necessary repairs to damaged pipes. In any event, on the facts of this case adequate reasons were given.

67. The four areas in respect of which it is said that the reasoning was insufficient are:

- (1) The number of stockmen;
- (2) Whether the stockmen were to remain on site when workers were present;
- (3) Why traditional estate fencing, rather than barbed wire fencing would not be appropriate;
- (4) How biosecurity would be addressed.

68. I deal with (4) first. This point was not pressed at the hearing before me and was certainly never a significant part of the extensive exchanges and discussions between the parties at the time.
69. I find it difficult to understand why it should be suggested that point (2) should be the subject of any explanation. The workers were either ESW's employees or the contractor's men. Whilst they might have an interest in a permanent team of stockmen being present, it hardly seems to me a matter on which ESW had any public law duty to give explanations to the Claimants.
70. In any event, the simple explanation was that in its assessment, ESW did not regard this as a necessary precaution once the stock fence had been erected.
71. As to (1), ESW made it clear in discussions and correspondence that it relied upon its own expertise and on that of its contractors in assessing how many stockmen of what calibre were needed. Whilst the Claimants disagreed with that assessment, ESW's position was clear.
72. As to the barbed wire issue: this was raised late, and when it was raised, reasons were given: see paragraphs 39 and 40 above.
73. Accordingly I reject Ground 3 also.

#### **Ground 4: Closed Mind**

74. Mr. Beglan deals with this at paragraphs 67 and 68 of his skeleton argument:

“By its letter of 26 March 2019 the Defendant made clear that it had closed its mind to receiving any representations on what was then a new Statement purporting to set out in the necessary detail the proposed approach to the Works. That statement was made in a letter which relied upon statutory powers permitting

the Defendant to obtain access to land by, if necessary, the use of force.

“In those circumstances, and bearing in mind the history of dealings between the parties, it was procedurally unfair for the Defendant to close its mind to any further observations on the new Statement.”

75. I can deal with this equally shortly.
76. By 26 March 2019, the discussions between the parties had been going on for months, with ever more points being taken by the Claimants. ESW, through Mr. Skirrow in particular, had dealt with those points.
77. Mr Lewis submits in paragraph 34 of his skeleton:

“The premise for this ground is that ESW was required to accept the Claimants’ representations on the Statement and to give reasons for rejecting the Claimants’ proposals to carry out the repair work in a different way. The premise is mistaken. ESW had no legal duty to consult the Claimants on the Statement. A general duty of consultation would frustrate the purpose of granting a power to ESW to enter land immediately or promptly to repair a damaged water pipe. As there was no duty of consultation, there was no duty to give reasons for not preferring the Claimants’ proposals as to how the repair should be carried out. ESW was required to make a rational judgment about the type and manner of repair that was required in this case. Given ESW’s considerable experience and expertise in carrying out repairs to pipes, it should be afforded an enhanced margin of appreciation in making the technical judgment as to the most appropriate form of repair: see, by analogy, *Secretary of State for Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 664, [2009] Eu. LR 799. Absent a stark case or irrationality, this is not a judgment that is amenable to review in this court.”

78. I have indicated earlier in this judgment that there seems to me to be a legitimate argument that on the facts of this case there was a duty to consult: to that extent I depart from Mr. Lewis’s submission set out above. However, in this case there was extensive consultation. What I do accept in the above



passage from Mr. Lewis's argument is that ESW should be afforded an enhanced margin of appreciation on the facts of this case.

79. There was no breach of public law in ESW deciding that it had to exercise its right to serve Notice of Entry.

**Ground 5: Unreasonable conclusion**

80. Finally, Mr. Beglan argues:

“The Defendant's apparent conclusions that two herdsmen would be sufficient and that the use of barbed wire was appropriate were unreasonable in the circumstances of this particular case.”

81. This is an impossible submission for the reasons given above. It is simply not open to this court to enter into the debates as to different methods of carrying out the repair works.

**Conclusion**

82. For the above reasons all the Grounds for Challenge must be rejected and this claim shall be dismissed.