CA on appeal from Stoke-on Trent County Court (His Honour Judge Krikler) before Ward LJ, Buxton LJ, Mance LJ. 7 May 2003

JUDGMENT : LORD JUSTICE WARD:

1. Mr Stuart Baddeley and Mrs Margaret Allman appeal against the order of His Honour Judge Krikler, sitting at the Stoke-on-Trent Combined Court Centre on 4th March 2002, when he dismissed their claim again their neighbour, Mrs Barker, for damages for nuisance or in negligence.

The background

2. The facts which give rise to this dispute can be quite shortly stated. The claimants jointly purchased 3 Linley Cottages, Linley Road, Talke, in January 1992. Its position was peaceful and it had potential for modernisation. What seemed to be their idyll turned out to be their nightmare. One evening in November 1993 Mr Baddeley returned home to find Mrs Allman "frantic with worry" because their house was being flooded with dirty water and sewage. The smell was pungent and horrid. The damage was significant. Time was needed for the property to dry. As Mr Baddeley said in his witness statement, "Christmas came and went and we still had no carpets and furniture." But things were back to normal by the end of January. Then on Boxing Day 1994, a year later, disaster struck again: there was another flood. Quoting again from his witness statement, Mr Baddeley said, "Our new Technics Hi Fi, which we had bought each other for Christmas, was `floating' around the room." Once again the furniture was damaged and the carpets were ruined. A month later there was a third flooding; and, two days after that, there was a fourth flooding.

3. What poor Mr Baddeley and Mrs Allman had not appreciated when they bought this idyllic cottage was that it lay at the bottom of a natural valley. Rainwater drained into a hollow on Mrs Barker's land adjacent to their land and formed a pond which at times held over 250,000 square metres of water. There were some land drains across her fields which connected, or used to connect, to a manhole in Linley Road, the A5011, for which either the Staffordshire or the Cheshire County Council was responsible, the county boundary being there or thereabouts. Surface water from the roadway also drained into that manhole and then passed through a culvert under the road and thence to a stream much further away to the north-west.

4. It seems from the papers that Mrs Barker's land agents were writing to the council in May 1993 about "*a drainage problem*" at Linley Cottages, when it was suggested that when the road had been excavated some years previously the drain under the road had been interfered with. The claimants were able to see with their own eyes how the water from the pond area spilled over onto their land and into their house. In January 1995 Mr Baddeley made Mrs Barker aware of the problem, if she did not know of it previously. Although it is not entirely clear to me from the papers, some work, or at least some investigation of the difficulties, was carried out in 1995.

5. But that was not effective. There were further floods at Christmas 1995, on 4th January 1995 and on New Year's Day 1998. The claimants feel that the Gods were against them and seemed to spoil every Christmas or every New Year, and one has sympathy for that view.

6. By now, as one can readily imagine, the claimants were at the end of their tether. They, through their solicitors, called a site meeting on 12th January 1998, which was attended by the defendant's land agent and a Mr Willis, a drainage contractor. Mr Webb of the Staffordshire County Council Highways Department may also have been present at that meeting.

7. In the particulars of claim it was pleaded in paragraph 12 that: *"The following matters were agreed at the site meeting by the three representatives present:*

   (a)There were three underground pipes all of which had been damaged at some time in the past;

   (b)Two of the pipes ran from the Defendant's land across the Claimants' driveway from the area of the pond and towards a manhole located outside the Claimants' premises on the pavement to the highway;

   (c)The third pipe ran along the boundary between the parties premises on the Claimants' land and also towards the manhole;

   (d)The pipes running from the Defendant's land were land drainage pipes and, up to the point where they were damaged and severed, appeared to be in working order; and,

(e)The flooding was occurring because the land drainage pipes were no longer working and were no longer connected either to a former culvert running under the road or any other drainage system."

8. Mr Willis would have said in his witness statement that:

"3.Following flooding in 1995 and the following year I had occasion to be employed by [Mrs Barker] to pump water from this field and to rod the drains. At this time it appeared that the drainage from the field was blocked close to the boundary with the road.

4.Following the further incident of flooding in January 1998 I was instructed by Mr Wallis of Wright-Manley [the land agents] to again pump out this field. Subsequently I was asked to investigate the problem and following excavations I carried out I established that there were three drains from this field. Two 4" land tile drains came from Mrs Barker's property under the boundary fence and across the driveway to the cottage owned by Mr Baddeley at number 3 Linley Cottages. The third drain came from Mr Baddeley's property. All three drains had been severed and it appeared that this was done when a manhole had been installed by others in the pavement and that the three drains had not been re-connected to the manhole. All the drains were in very good order up to 1½ metres from the manhole. The drain pipes were then all broken where the excavation had taken place to install the manhole. If the existing drains had been re-connected then no flooding would have taken place as the water would have continued to flow down its original course. ...

6.I then installed a new drainage chamber which I connected to the drain in the road following permission from the Council."

9. So the position at the end of the carrying out of that work in 1998 was that a new chamber was built on the defendant's land. The land drains fed into that. That, in turn, was connected to the manhole on the pavement, and the manhole then fed the waters away through the culvert under the road.

10. This work, however, did not prove to be wholly effective. On 26th October 1998 the claimants awoke to find dirty, smelly water covering the whole of the lower part of their property to a depth of about 10 inches. Almost to the day there was another flood a year later. By now the house was in need of substantial work to restore it and renovate it. The claimants had to spend weeks in bed and breakfast accommodation. Mrs Allman had a nervous breakdown. But, sadly, it was not the end of their travails. On 6th November 2000 their house was again surrounded by water. Mr Willis was called again. He arrived with his JCB digger. Mr Baddeley would have said in his witness statement:

"79.At 3.30pm Mr Willis, the drainage contractor, arrived because Mr Wallace had told him of our problem. ...

80.Mr Willis rang for some assistance and 20 minutes later a JCB digger arrived. They dug out a large hole in my driveway to expose the drainage tank completely. They `broke into' the concrete rings with a sledgehammer and inserted a large diameter pipe at an angle. The retaining piece of land was dug out and the water flooded into the hole that had been dug. When the hole equibrilised [sic] with the water level, the water went away down the newly inserted pipe. By 10pm that evening no water was left in the field and since then although we have had plenty of rain the field has not even started to fill up again because surface water is being taken away by the `new' temporary pipe."

11. We understand that this new pipe is possibly about six inches in diameter and it runs from the manhole on the pavement for a length of about six metres into the defendant's land and into the area which we have called the pond. Mr Willis has fitted a grill across the face of this pipe. The submission is that all is working well provided, of course, that efforts are made to ensure that the grill is kept free of debris, so as to ensure a full and free flow of water down that pipe.

12. That all took place in November 2000. By then, as one can readily understand, the claimants considered that they had endured "seven years of hell". They were unable to sell the house, blighted as it was with that history of flooding, and so on 28th November 2000 they commenced these proceedings.

The claims brought

13. In setting out their cause of action in nuisance the claimants pleaded that at no relevant time had there been any adequate system of pipes, drains or run-offs to carry away excess water from the pond to prevent damage to their property. They alleged in paragraph 8 of the particulars of claim*: "In the*

premises the absence of any adequate method of carrying away excess water collecting in the pond constituted a nuisance to the Claimants which nuisance was created or continued by the Defendant."

14. In dealing with the cause of the 1998, 1999 and 2000 floods, the claimants alleged in paragraphs 34 and 35 as follows*: "Notwithstanding Mr Willis's work in February 1998 as set out above, the Claimants' believe that the October 1998 and 1999 floods and the November 2000 [flood] occurred because the work carried out by Mr Willis in February 1998 failed to provide adequate drainage to the pond. The drainage system installed by Mr Willis was unable to cope with the sheer volume of water collected in the pond area with the result that the levels of water rose, broke the banks and flooded the Claimants' premises.*

Following the more dramatic works effected by Mr Willis on the 6th November 2000, as set out in paragraph 30 above, the pond has not refilled and appears to be draining properly and promptly notwithstanding continued high levels of rainfall onto waterlogged ground."

15. The claimants pleaded as their alternative cause of action that the defendant was negligent in failing after the first flood to investigate adequately the cause of the flooding and in failing thereafter to take any suitable preventative measures to ensure that pipes and drains adequately served the pond and carried away surplus water to a suitable surface water drain or elsewhere. They also sought an injunction, pleading at paragraph 40 that: *"Notwithstanding the number of floods in the past 7 years and the failure of the 1998 work carried out by Mr Willis, the Defendant has failed to take any adequate steps to abate the said nuisance and in the premises the Claimants verily believe that the Defendant intends to continue the said nuisance unless restrained by this Honourable Court."*

16. The defendant alleged in her defence that the drains laid in her fields appeared to have been adequate and sufficient to drain it in all normal conditions, and she alleged that she took "such steps as were reasonable and proportionate in February 1998 to alleviate the risk of occasional flooding." She asserted that she had no greater right or opportunity than the claimants to arrange for the repair of the drains under the highway.

The progress to the trial

17. It seems that at some time in October 2001 an order was made for the appointment of a jointly instructed engineer, a Mr Bate of A & F Consulting Engineers. He reported on 31st October 2001. The material parts of his report include the following. First, dealing with the adequacy of the drainage system after the works carried out in February 1998, he said this*: "Basically the works done in February 1998 would have improved the drainage of the wet area, known as the pond, and allowed some drainage of it. However, this would not have allowed proper drainage of this wet area if it became flooded. The amount of water these drains would collect would be fairly minimal and although in time they would drain the area, this drainage system would certainly not cope with a large inundation of water over a short period of time."*

18. He then dealt with the adequacy of the drainage system at the time of his report. He said this*: "... when modifications to the defendant's chamber were carried out by Mr Willis, by the insertion of a new 6" pipe via a grill, [that] was an improvement on the work which was carried out in February 1998.*

The drainage work that has been carried out by the defendant to date will allow discharge of water from the wet marshy area to a much better degree than from the land drains previously. ...

The adequacy of the drainage system as designed at the present would be capable of draining the land on a long term basis, but not on a short term basis in periods of heavy rainfall.

A 6" pipe is of adequate size to feed into the manhole into which it is connected, i.e. drainage from the pond area would not be improved if this pipe size was made larger, simply because under periods of heavy rainfall the road drainage system does not cope properly, let alone allow any run-off from the pond area.

The defendant's connection to the road drains is as good as it can be made at the present time. Any improved detail of connection would not result in any measurable improved run-off from the pond area during heavy rainfall events."

19. He addressed the steps to be taken to ensure that the flooding/drainage problem does not reoccur. He said*: "Basically, proper drainage of the pond area will only be achieved by the provision of a properly sized culvert under the public highway (there is circumstantial evidence that there was a culvert or there is still a*

culvert in existence under the roadway, but that this culvert has been covered up, damaged or has failed in some way). It will not be possible to drain the pond area properly during periods of high water flow associated with either prolonged rainfall events or very short but heavy rainfall events.

The modifications that have been carried out to connect into the existing road drains by the defendants are adequate in themselves, but will not solve the problem of flooding to No 3 Linley Cottages."

20. He then dealt with information that had been given to him that there had been some further flooding in 2001. He said this*: "Flooding of No 3 Linley Cottages and Nos 1 & 2 Linley Cottages happened this year as a direct result of water emanating from the roadway. This was obviously compounded by water coming from the flooded pond area, but the primary cause of 2 of the 3 flooding incidents this year (confirmed by the owners of Nos 1 & 2 Linley Cottages to me at my site visit) appears to be from the adjacent public highway (A5011)."*

21. The following question was posed to him by the claimants: *"Is the Expert aware that the Local Highway Authority regard the current connection to their drainage system as temporary. Given so, who so far as the Expert is concerned should deal with any application to render the connection permanent and could the Expert make enquiries to ascertain whether such permission would be likely to be granted or not."*

His answer, which is the passage cited by the judge as apparently being of significance to him, was this: *"Regarding any permanent solution to the drainage problem, if the existing connection were made permanent it would not solve the flooding problem. As I indicated in my report, the only way forward would be the construction of an adequate sized culvert under the road; the existing piped connection is of an inadequate size. Permission for such a culvert would have to be with the local Highway Authority ..."*

The trial

22. The trial was apparently fixed to last over two days. Instead of hearing the witnesses, however, the judge was persuaded by Mr Bird, counsel for the defendant, to deal with the matter on the basis of the material in the expert's report (the expert not having been asked or directed to attend) and on the basis of such material as there was in the witness statements. In effect, as it seems to me, he persuaded the judge to treat the trial as the hearing of an application for summary judgment under Part 24, or perhaps as an application to strike out the claim, or perhaps even as a trial of preliminary issues. But no prior notice was given that this course would be taken. There had been no proper application for any such relief, even though the expert's report had been available to the defendant for some time. It was done, explains Mr Bird to us, in fulfilment of the overriding objective of saving court time.

23. Allocating to a case an appropriate share of the court's resources may be an aspect of the overriding objective, but the true and only objective is to deal with cases justly. Not surprisingly, after having lived through the hell of the past seven years, as they describe it, these claimants feel aggrieved that their claim was summarily dismissed in this way, without their ever having been given the opportunity to put their side of the case fully to the judge. I confess that I have very real sympathy with that sense that they have not had a fair trial.

The judgment under appeal

24. I would not wish it to be thought that the judge was not sympathetic to the claimants. He undoubtedly was. He accepted, however, that the test to apply (if I could quote it from paragraph 55 of perhaps the most recent case on the subject, **Marcic v Thames Water Utilities Ltd** [2002] QB 929, at 986) was as follows*: "... ownership of land carries with it a duty to do whatever is reasonable in all the circumstances to prevent hazards on the land, however they may arise, from causing damage to a neighbour."*

25. The judge said in paragraph 4 of his judgment: *"It does not seem to me that the law itself creates any great problem. If a landowner is through no fault of his own (or in this case her own) put in a position where a nuisance is created, how far does that landowner have a duty to abate that nuisance, even though it was not created by her? The answer is, in my judgment, the art of the possible. If she can abate it then she ought to abate it, but if the steps that she takes and can take are not adequate and the nuisance would continue then it seems to me that it is very difficult to see how any liability can be attributed to her."*

26. He recited the passage from the expert's report to which I have drawn attention, and said this: *"That is the way in which Mr Bate has put forward his report and it is a report which, it seems to me, is binding on the parties in this litigation. It is not open to either party to say, `Well, I think he has got it wrong', because he is a*

jointly appointed expert, and not only are the parties bound by it but since it is the only evidence I have of an expert nature so too am I bound by it."

27. He came to these conclusions: *"The problem between the land of the claimants and the land of the defendant is that there is a road (the A5011) and that road runs between the two properties."*

I am not entirely sure that that is factually correct, but it may not much matter. He continued*: "There is a need for a culvert to be installed under that road in order to create the proper and necessary drainage to stop the field that belongs to Mrs Barker becoming a pond and retaining a large quantity of water that ought to be draining away. Mrs Barker could not possibly go out and instruct contractors at her own expense without the consent of the Local Authority and order them to put a culvert under the A5011. The only people who have the right to make that sort of construction are the Local Authority responsible for the Highway Authority. It seems to me that one of the pities about this litigation is that the Highway Authority has not been a party to the litigation."*

I add that he may well be right in making that observation, but it is not a matter for us to deal with today.

28. He went on to say that the defendant's failure to put pressure on the local authority could not possibly constitute a breach of any duty. He concluded that: *"Here, the only way this problem can be remedied is by a culvert being built and the only people who can do that are the Local Highway Authority. The defendant's duty is to do that which is reasonable for [her] to do.*

The criteria on reasonableness really are what can be done to reduce the danger and, as I say, clearly the parties have agreed, without evidence, that Mrs Barker is a woman of substantial means (considerable wealth I think was the way it was put). It may well be possible that she could have afforded to build a culvert, but I think she would be in serious difficulty if she did so because, as I said earlier in this judgment, members of the public cannot go undermining national highways. The only people who can build culverts in the roads are the Highway Authority. It seems to me, therefore, that however much one would like to be able to assist Mr Baddeley and Miss Allman it is not possible to do so. It seems to me that their case in relation to this matter on the primary liability issue must fail."

The submissions on the appeal

29. The appellants make two major criticisms of the judge's approach. First, the judge appears to have been concerned only with what work needs to be done in the future. He failed to consider whether the inadequacies of the March 1998 works and the failure to carry out more effective work in November 2000 amounted to a failure to abate the nuisance entirely, thus causing the damage which has been suffered; or whether, in the alternative, more damage has been caused than would have arisen if the November 2000 work had been carried out earlier.

30. Secondly, Mr Halliwell, for the appellants, submits that the case could not properly be resolved without hearing evidence from the claimants about the way the water accumulated on the defendant's land and overflowed and also how speedily the pond drained after the November 2000 work was done, and especially how no flooding from the defendant's land has occurred since then. He submits that, if those facts are accepted, the inference can be drawn that the "improvement" noted by the expert was either complete or very substantial.

31. The two fundamental planks of Mr Bird's submission to resist the appeal are, first, that there is a lack of evidence to deal with what might have happened if the work had been done earlier; and secondly, that the only inference from the expert's report is that the new pipe inserted in November 2000 has served only to shift the water from point A to point B. The culvert, he submits, is insufficient to cope both with the water draining from the pond and the water flowing down the road. The result is that it builds up at the lowest point in the land, by the manhole outside the claimants' property. Because of the inadequacy of that culvert the water floods back, and so flooding of the claimants' land is inevitable in any event.

32. In giving permission to appeal Lord Justice Dyson succinctly observed and gave as his reason for giving permission*: "The judge concentrated on what the joint expert's report said about the possibility of abatement as at the date of the making of the report (October 2001), and seems to have overlooked the fact that*

the claim included claims for damages arising from the floods of 1998, 1999 and 2000 after which the defendants had improved the connection to the road drains."

33. I agree with him. I would add that the judge also had to consider the flooding that had occurred from 1993 or perhaps at least from 1995, when Mr Baddeley put the defendant on notice. The judge, as it seems to me, did only look forward, as if the only claim were for injunctive relief. He did not appear to ask himself, as he should have asked, what effect the failure to carry out the November 2000 works earlier than that had in all the circumstances of this case. The view of the expert was, after all, that those November 2000 works had effected an improvement and that they had allowed the discharge of the water to a much better degree than from the previous land drains or even the new land drains installed by Mr Willis in 1998. The judge did not appear to consider the relevance of evidence that could have been given that the work resulted in no more flooding from the defendant's land. He did not appear to take into account that from November 2000 to the date of the trial evidence was available that the defendant's land had not flooded and that the only flooding came from the roadway. He did not consider in that regard the correctness or otherwise of Mr Bird's second fundamental point that all of the 2001 flooding arose simply because the water was shifted, as he submits, from point A to point B.

34. These may not be easy issues to resolve in the absence, for example, of statistical information about the levels of rainfall at material times. It may have been, on the evidence that could have been called, very much a matter of fact and degree or even of trial and error. But that is no greater a problem than, alas, so frequently confronts judges who have to do their best with not as much evidence being presented to them as could have been presented to them to resolve the difficulties. In my view, however, it did call for a decision after hearing the evidence, and the judge failed to provide either the opportunity for that evidence to be called or failed to provide answers to the crucial questions whether the November 2000 work was wholly or only partly or not efficient at all to remedy the cause of the claimants' complaints. In that regard the judge erred.

35. As to Mr Bird's first fundamental point that there is a lack of evidence to deal with what might have happened if the work had been done earlier, his difficulty in that regard is that it may be - I say no more than that - the point upon which his defence runs into difficulties. Although much was cited to the judge, he does not appear to have been referred to paragraphs 84 to 86 of the judgment in **Marcic** which raise the question of the burden of proof. There reference was made to Clerk & Lindsell on Torts, 18th ed, p.904, para 19-32, that: *"In relation to private nuisance there seems no reason why the maxim res ipsa loquitur should not apply in appropriate cases to require the defendant to show that he was not at fault and was not negligent."*

The judgment of the Court of Appeal continues in paragraph 86: *"We agree with this comment. In **Allen's** case [1981] AC 1001, 1013, 1014, the House of Lords held that it was for the plaintiff to prove the nuisance, but then for the defendant to prove absence of negligence, giving that word the special meaning accorded to it. Once a claimant has proved that a nuisance has emanated from land in the possession or control of the defendant, the onus shifts to the defendant to show that he has a defence to the claim, whether this be absence of `negligence' in a statutory authority case or that he took all reasonable steps to prevent the nuisance, if it is a **Leakey** situation."*

36. The burden of proof may be crucial in a case of this sort where there is a paucity of evidence as to what effect exactly the November 2000 works had upon the flooding of the claimants' land. It is a shame that the judge was not invited to consider that aspect of the case. It may - perhaps it may not - have provided a wholly different answer. But it is a matter which in my judgment it was imperative for him to pay respect to, and in that regard, although he cannot be blamed for it, he was also in error.

37. The result, in my judgment, is that these errors by the judge fundamentally flawed his judgment. There is only one consequence, unhappy though it may be, which is that the appeal has to be allowed and the case remitted to the County Court for rehearing.

38. I have said enough to indicate (without too careful a reading between the lines) that the procedure adopted hitherto has been far from satisfactory. We do not know what case management conferences

were held prior to this trial, but a case management conference should now be held at which the judge who is to rehear this matter (and it probably will not be His Honour Judge Krikler, who has retired) should take this case by the scruff of the neck and shake it into shape. It is imperative that, with due and proper help from both parties, the issues in this case be refined and the pleadings considered in the light of what now appear to be the crucial issues, and that attention is paid to what kind of evidence is actually necessary to deal with those issues. In the old days, long before the Woolf reforms, there used to be a thing called an "advice on evidence", but I do not imagine the modern Bar even know what that is. That is a pity. It would help in a case like this to focus on what needs to be established if justice is to be done in a situation where, on any account of it, it is not denied that the claimants have lived through seven torrid, horrible years. Whether they succeed in nuisance or in negligence (which comes to the same thing) is another matter; but justice does demand that they have a fair crack of the whip when they put that complaint before the court.

39. I would, however, go further than that. I have no idea how much this litigation has cost to date, but I assume that it has cost a considerable amount of money. Going forward to a trial, especially if it is a trial which is expanded in the light of the criticisms I have already ventured of the preparation of it hitherto, will mean that it will last longer than two days and require a great deal more investigation than has hitherto been carried out. At the end of the day it may or may not remain a difficult case for the claimants to pursue to the full extent to which they would wish to recover. It is, in other words, a case which cries out for mediation; and if mediation has not already been attempted, then it should be attempted. This court has a mediation service which it will be willing to offer these parties if only they call for it. They will have a copy of this judgment in due course and they might care to send a copy to the highway authority in order that the highway authority may reflect upon its position and its responsibility in the light of the facts already made known to the court. Whether or not the highway authority is joined in these or in other proceedings is not a matter for me to consider, but the highway authority has hitherto been involved and, if there is any mediation, it should be involved in that as well. At least I would encourage those steps to be taken, and to be taken before a vast amount of further money is spent on this litigation.

40. In the result, therefore, I would allow the appeal and send it back to the County Court with no other direction than that an early case management conference be held to consider the future conduct of this unhappy litigation.

LORD JUSTICE BUXTON:

41. I agree.

42. As my Lord has pointed out, the judge was in effect invited to enter upon consideration of an application under Part 24 even though, as it would appear, there had been no suggestion in the previous procedure that such an application was appropriate or would be made. I do not say that it was necessarily out of the question for the judge to consider such an issue on the first day of what was supposed to be the full trial; but he allowed himself to be placed in the unsatisfactory position of considering an application that had not been the subject of any mature consideration in advance, and which does not appear to have been backed by anything other than a short paragraph in the middle of the defendant's counsel's skeleton. Had this issue, if it was going to arise at all, been considered at the proper time, which was as and when a case management conference took place at which the district judge could consider the matter on the basis of proper submissions and give directions on it, it would rapidly have become apparent that the report of the expert could not be satisfactorily relied on to reach conclusions of the sort that the judge reached, or appears to have reached, about the possibility of the amelioration of the nuisance before the works of November 2000 were carried out; as opposed to the conclusions that he did reach as to the feasibility of the complete removal of the nuisance even after the works of November 2000. Indeed, the former question really does not seem to have been considered by the judge at all; and, if he were going to dismiss the entire action, as indeed he did, that was a matter that he needed to address. It was at that stage, and for those reasons, that this case went wrong in the way that my Lord has demonstrated, with the extremely unhappy results and expense that have occurred.

43. In the circumstances that have arisen, there is no alternative than for the case to go back to the County Court, for the reasons and on the terms that my Lord has set out, with which I fully agree. I also, therefore, would also allow the appeal in the terms that he proposes.

LORD JUSTICE MANCE:

44. I agree with the reasoning and the conclusions in both judgments.

45. As, unfortunately, has been the experience of this court before, attempts to save time have in fact led to little more than delay and increased costs. Judges considering the implications of attempting to cut short litigation, in circumstances where it is ready for trial and could in fact be tried or considered in depth and where there may, as here, be a successful appeal, should bear that in mind. I say that it may have led to "little more" than delay and increased costs because it is to be hoped that today's hearing will have clarified the issues involved; and I would also endorse what has been said regarding the suggestion of mediation.

Order: appeal allowed; matter remitted to county court for rehearing with direction that early case management conference be arranged; respondent to pay costs here and below and before Douglas Brown J, to be assessed if not agreed; parties directed to use their best endeavours to mediate a resolution.

Mr M Halliwell (instructed by Messrs Brown & Corbishley, Sandbach, Cheshire) appeared on behalf of the Appellant Claimants.
Mr N Bird (instructed by Messrs Keoghs, Bolton) appeared on behalf of the Respondent Defendant.