Case No: A3/2016/1396

Neutral Citation Number: [2017] EWCA Civ 273
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE PETER SMITH
HC-2014-000601

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE UNDERHILL
and
LADY JUSTICE KING

- -

Between:

LORNA PEIRES	**Claimant/ Respondent**
- and -	
BICKERTON'S AERODROMES LIMITED	**Defendant/ Appellant**

- -
- -

Tim Marland (instructed by **Holland & Knight (UK) LLP**) for the **Appellant**
Edward Denehan (instructed by **DMH Stallard LLP**) for the **Respondent**

Hearing dates: 5 & 6 April 2017

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Judgment

Sir Terence Etherton MR:

1. The principal issue of law on this appeal concerns the meaning and extent of the immunity conferred by sections 76(1) and 77(2) of the Civil Aviation Act 1982 ("the CAA 1982") in respect of noise nuisance from aircraft.

2. The appeal is from orders of Mr Justice Peter Smith dated 17 March 2016 and 25 April 2016 restraining the Appellant, Bickerton's Aerodromes Limited, from carrying on, or causing or permitting to be carried on, certain manoeuvres by helicopters on or above part of its land lying near to the property of the Respondent, Lorna Peires ("Mrs Peires").

The background

3. Mrs Peires is the freehold owner of land in Denham in Buckinghamshire ("the Property"). It comprises a substantial detached dwelling, with 4 bedrooms and 6 living rooms, set in substantial grounds with adjoining staff accommodation.

4. The Appellant is the freehold owner of Denham Aerodrome in Denham ("the Aerodrome"). There has been an aerodrome at the site since around 1907. The Aerodrome is an operational aerodrome. It was first licensed in 1938. It currently has the benefit of a licence from the Civil Aviation Authority ("the CAA") dated 24 June 1988.

5. There is a field between the Property and the Aerodrome. Mrs Peires complains of the noise generated by exercises carried out by helicopters on the part of the Aerodrome which slopes towards the hedge boundary of that field ("the Slope"). So far as relevant to this appeal, the exercises comprise landing, taking off, hovering, turning the helicopter through 180 degrees and landing again. The manoeuvres take place on the Slope because part of the mandatory training requirements for a helicopter pilot is landing and taking off from sloping ground. There is a distance of 58 metres between the Property and the Aerodrome boundary closest to the Property, beyond which the training activity takes place.

The proceedings

6. Mrs Peires commenced these proceedings in the High Court. She claims that the Appellant has wrongfully caused or permitted excessive noise to come from the Aerodrome, causing her and her tenants nuisance and annoyance, by reason of which she has suffered damage. She claims an injunction to restrain the Appellant from continuing the nuisance and damages.

7. In its defence the Appellant asserts, among many other things, that helicopter training, including landing and taking off from slopes near the Property, has taken place for the past 20 years and possibly the last 53 years. The Appellant denies that it has caused or permitted excessive or unreasonable noise to come from the Aerodrome or has done so wrongfully. It denies that any nuisance has been caused to Mrs Peires or her tenants or that she has suffered damage. The Appellant has asserted, "as a preliminary point", that any claim is barred by section 76(1) or section 77(2) of the CAA 1982 or both of those provisions. In addition to reliance on all those matters, the Appellant alleges that, if the Aerodrome operations would otherwise constitute an

actionable nuisance, an easement to cause that noise nuisance has been created by prescription.

The statutory and regulatory framework

8. Section 76(1) of the CAA 1982 provides as follows:

> "76 Liability of aircraft in respect of trespass, nuisance and surface damage
>
> (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order and of any orders under section 62 above have been duly complied with……."

9. Section 77 of the CAA 1982 provides as follows:

> "Nuisance caused by aircraft on aerodromes.
>
> (1) An Air Navigation Order may provide for regulating the conditions under which noise and vibration may be caused by aircraft on aerodromes and may provide that subsection (2) below shall apply to any aerodrome as respects which provision as to noise and vibration caused by aircraft is so made.
>
> (2) No action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome to which this subsection applies by virtue of an Air Navigation Order, as long as the provisions of any such Order are duly complied with."

10. Section 105(1) of the CAA 1982 defines "flight" as:

> "a journey by air beginning when the aircraft in question takes off and ending when it lands".

11. There is a slightly different definition in Article 3 of the Air Navigation Order 2016 SI 2016/765 ("the 2016 Order") (replacing equivalent provisions in the Air Navigation Order 2009 SI 2009/3015 ("the 2009 Order")).

> "3. Meaning of "in flight"
>
> (1) An aircraft is deemed to be in flight—
>
> (a) in the case of a piloted flying machine, from the moment when, after the embarkation of its crew for the purpose of taking off, it first moves under its own power, until the moment when it next comes to rest after landing;

…

And the expressions "a flight" and "to fly" are to be construed accordingly."

12. It is not in dispute that a helicopter is an "aircraft" within those provisions: see Part 1 of schedule 4 to the 2016 Order (replacing equivalent provisions in the 2009 Order).

13. Article 218 of the 2016 Order (replacing equivalent provisions in the 2009 Order) provides that the Secretary of State may prescribe conditions under which noise and vibration may be caused by aircraft on licensed aerodromes.

14. Article 11 of the Air Navigation (General Regulations) 2006 SI 2006/601 ("the General Regulations") (made pursuant to Article 131 of the Air Navigation Order 2005 SI 2005/1970, which was in identical terms to what is now Article 218 of the 2016 Order) contains the relevant prescribed conditions. It provides that noise and vibration are authorised when the aircraft is taking off or landing and in certain other circumstances which are not relevant to this appeal.

15. Article 274 of the 2016 Order provides (subject to an immaterial qualification) that anything done under, or by virtue of, any article or regulation revoked by the 2016 Order, if it could have been done under or for the purpose of the corresponding provision of the 2016 Order, is to be deemed to have been done under or by virtue of the corresponding provision of the 2016 Order and anything begun under, or by virtue of, any such article or regulation may be continued under the 2016 Order as if it had begun under the 2016 Order.

16. Airspace users and aircraft must also comply with the Standardised European Rules of the Air ("SERA") in the Annex to Commission Implementing Regulation (EU) No. 923/2012 of 26 September 2012. SERA 2005 provides that the operation of an aircraft either in flight, on the movement area of an aerodrome or at an operating site shall be in compliance with the general rules, the applicable local provisions and, in addition, when in flight, either with the visual flight rules or the instrument flight rules. SERA 3015 specifies that, except when necessary for take-off or landing, or except by permission from the competent authority, aircraft shall not be flown over certain areas below certain minimum heights. Minimum heights for "VFR flights" (viz visual flight rules) are specified in SERA.5005(f), again with an express exception where necessary for take-off or landing or where the competent authority has permitted otherwise.

17. The CAA has published exceptions to the SERA minimum height requirements. The current exceptions to SERA.5005(f), published in June 2016, are, so far as relevant, identical to those in force at the relevant times. Those low flying rules include exceptions where an aircraft is flying in accordance with normal aviation practice and is practising approaches to land at an aerodrome and where a helicopter is conducting manoeuvres, in accordance with normal aviation practice, within the boundaries of an aerodrome. In the latter case, the helicopter must not be operated closer than 60 metres to any person, vessels, vehicles or structures located outside the aerodrome or site.

18. The Guidance Material to Commission Regulation (EU) No. 1178/2011 published by the European Aviation Safety Agency ("EASA") on flight crew licensing pursuant to Regulation (EC) No. 216/2008 (in force at all times relevant to these proceedings) provides that the skill test for the issue of a Light Aircraft Pilot's Licence (Helicopter) includes landings and take-offs on sloping ground, and in particular testing the pilot's skill in relation to "(A) limitations and assessing slope angle; (B) wind and slope relationship: blade and control stops; (C) effect of CG when on slope; (D) ground effect on slope and power required; (E) right skid up slope; (F) left skid up slope; (G) nose up slope; (H) avoidance of dynamic roll over, dangers soft ground and sideways movement on touchdown; (I) danger of striking main or tail rotor by harsh control movement near ground."

19. The CAA's published guidance for applicants taking the skill test for the grant of a Private Pilot's Licence or a Light Aircraft Pilot's Licence (Helicopter) specifies that the examiner may require demonstration of skill in landing and taking off on sloping ground, including, in particular, identifying a landing area on the slope and conducting a "recce" to consider at least its size, shape, surrounds and surface, and then moving onto the slope conducting an up slope and cross slope landing, and lifting off into a hover before moving away. As explained to us during the hearing of the appeal, this will usually involve hovering to conduct the "recce" before landing, then landing facing one way, taking off, hovering, turning 180 degrees, hovering and landing in the other direction.

20. Prior to Mrs Peires, the Property was owned by Mr Michael Ashworth and occupied by him and his wife. They, together with others living near to the Aerodrome, lodged an application with the European Court of Human Rights ("the ECrtHR") in December 1997 claiming, among other things, that the noise caused by low flying aircraft and helicopters at the Aerodrome, particularly training and maintenance, amounted to an interference with their right to private and family life under Article 8 of the European Convention on Human Rights. The application was made on the footing that the CAA 1982, and particularly section 76(1), barred an action for nuisance regardless of the time of day or night when the noise was made, and regardless of the level or type of noise made, and there were no alternative mechanisms in place to prevent noise nuisance. The ECrtHR rejected the claim under Article 8 on the ground that it was unable to find that, in adopting its policy approach to the regulation of local aerodromes and thereby permitting the regulatory regime in effect at the Aerodrome, the UK Government exceeded the margin of appreciation afforded to it or failed to take appropriate measures to strike a fair balance and to secure the rights of the applicants under Article 8: *Ashworth v United Kingdom* 39561/98. It is common ground in the present proceedings and on this appeal that Mrs Peires is not bound by the applicants' acceptance in those ECrtHR proceedings that the CAA 1982, and particularly section 76(1), barred any claim for noise nuisance arising from the helicopter exercises at the Aerodrome.

Trial and judgment

21. The trial in the action took place before the Judge over several days in January and February 2016. The Judge carried out a site inspection. He handed down his reserved judgment on 17 March 2016.

22. The Judge said that the noise of helicopters is "particularly different to that of aeroplanes". He found that the noise and activity involved in the helicopter exercises on the Slope were very different to the noise of light aircraft and helicopters when they take off and land. By contrast with the latter, the noise of the operations of which Mrs Peires complains, is, the Judge said, "continual and at the same volume". He said that the Appellant has had opportunities to minimise the impact on Mrs Peires' use and enjoyment of the Property but, for reasons which he could not understand, had over 40 years of complaints steadfastly and without justification refused to take any steps to ameliorate the position.

23. During the course of the judgment, the Judge described various ways in which he considered the Appellant might reduce the impact of the helicopter exercises on Mrs Peires' enjoyment of the Property, such as moving the operations along the hedge away from the Property or towards the boundary of an adjacent golf course or by landscaping to provide a slope at some other convenient point. The Appellant gave various reasons why none of those was feasible or desirable but the Judge's view was that the Appellant was simply unwilling to do anything other than carry on as before. He said that the unwillingness of the Appellant to consider alternatives was a factor he could take into account. He referred to the fact that Mrs Peires' husband, Mr Peires, had responded positively to the Judge's suggestion of two set periods for 20 minutes per week, on say Friday morning and Saturday morning, and to the rejection of that proposal by Mrs Amy Paul, a director of the Appellant and the manager of the Aerodrome. He said that he found her suggestion that it would not be possible to do the exercises on a fixed rota unconvincing. He also referred to her rejection of the offer by Mrs Peires to allow a change from the proposed set periods on being given reasonable notice. He said that, in his view, Mrs Paul wanted to claim that flexibility because in reality the Appellant was carrying out far more operations than she was letting on and the Appellant's case suggested.

24. The Judge said that his site inspection strongly supported Mrs Peires' case about the noise. He said that he found the noise excruciating in the garden and clearly noticeable to a significant degree within the rooms in the house.

25. The Judge said that he found Mrs Peires' evidence on the nature of the noise and the frequency compelling. Having considered the evidence of the non-expert witnesses and their credibility, he concluded that Mrs Peires' case on frequency (which we were informed on the appeal by Mrs Peires' counsel was for 3 hours at a time as opposed to the Appellant's evidence of an average of 1.5 times a week for 15 minutes or so per session) was on the balance of probabilities the more likely scenario.

26. Turning to the evidence of the noise experts, he said that they agreed that:

> "there was nothing unusual or extreme about the helicopter hovering noise per se. The helicopters in question were not especially noisy or irritating types of helicopter. It was agreed however that specific slope landing and take off exercises … closest to the Property has a slightly different character than other hovering activities which could be more intrusive."

27. He said that the agreed statement of the experts acknowledged that the helicopter activity at the closest proximate point to the Property is intrusive. That, he said, was an understatement.

28. The Judge said that the real issue between the experts was frequency. He concluded that he preferred the overall evidence of Mrs Peires' expert witness on frequency, which supported the other evidence of Mrs Peires and was far more than that for which the Appellant contended. He said that, when a helicopter carries out the operation, the noise generated is unacceptable; and, if the activity is carried out with the frequency described by Mrs Peires (which was the evidence he preferred), it is an unreasonable use of the Aerodrome and affects the reasonable enjoyment of Mrs Peires and her husband in the Property and is, therefore, prima facie a private nuisance.

29. The Judge then rejected the defence of the Appellant that it had established a right in the nature of an easement to carry on the interference by noise.

30. The Judge held that the Appellant was responsible for all the activities carried out by the helicopters on the Slope by its licensees.

31. The Judge then turned to the statutory defences.

32. He rejected the defence based on section 76(1) of the CAA 1982 for reasons which he stated very shortly (at para. [94]) as follows:

> "I do not accept that the training exercise on the slope is "flight" or any part of it. The section is plainly designed to cover journeys with aircraft passing over other property and the associated take off and landing."

33. The Judge then turned to the defence based on section 77(2) of the CAA 1982. He referred to, and quoted, the former regulations, the current versions of which are quoted above, conferring exemptions from the low flying prohibitions. He said (at para. [100]) that he did not accept that the exemptions applied to the operations on the Slope because he did not accept that those operations involved flying. He said that the helicopters "at best are hovering for a defined period", and that

> "they are not by the operation on the slope carrying out any operation involving take off [because they] do not need to do the exercise to take off…It follows that the procedures are not part of any normal incident of flying or taking off."

34. The Judge then said (at para. [103]) that he agreed with Griffiths J in *Bernstein v Skyviews & General Ltd* [1978] 1 QB 479 that "there is not blanket protection by section 76; the activities must be reasonable". He said that the introduction of the word "reasonable" in section 76 shows that the activity is only permissible if it is carried out in a reasonable way but the Appellant's activities were not reasonable.

35. Finally, on the question of liability for nuisance, the Judge referred to Regulation 11 of the General Regulations. He said (at para. [106]) that it provides no relevant protection because the helicopters carrying out the operation are not taking off or

landing. He said that a helicopter hovering and rising up and down in accordance with the operation cannot be described as "taking off or landing" because "the training operations are not part of the normal incidents of taking off and landing".

36. Having determined that the activities carried on by the Appellant were unreasonable and an unreasonable interference in Mrs Peires' reasonable use of the Property, the Judge went on to consider remedies, in particular the grant of an injunction and damages. He considered that an injunction should be granted, the terms of which should allow (in accordance with what Mrs Peires had indicated during the trial she would be prepared to accept) two periods of training for a fixed duration on fixed dates per week and an element of flexibility if the Appellant wished to change a fixed date on giving reasonable notice. The Judge said that he would expect the parties to be able to agree a location on the Slope to which the exercises would be confined.

37. The Judge rejected Mrs Peires' claim for damages on the ground that, by virtue of the injunction, the question of damages did not arise.

The orders

38. The first order of the Judge following the handing down of his judgment is dated 17 March 2016. The schedule to the order required Mrs Peires and the Appellant to use their best endeavours to agree the precise area of the Slope on which the training exercises would take place ("the training area"). It contained various provisions in relation to the achievement of that requirement.

39. The parties having failed to agree the training area, the Judge himself visited the site and purported to determine the precise extent of the training area. He then made a further order dated 25 April 2016, which defined "the Training Area" as the area marked out on his visit. He substituted, however, for the injunction in the first order an injunction over land that was described otherwise than by reference to "the Training Area" as so defined. A further complication is that there is another order also made on 25 April 2016 which is in identical terms save that the definition of "Training Operations" is different as well as being different to the definition of that expression in the order of 17 March 2016.

The appeal

40. The Appellant appealed on the following four grounds: (1) the Judge was wrong in law in concluding that the statutory immunities in section 76 and section 77(2) of the CAA 1982 do not apply; (2) the Judge was wrong in law in his approach to the extent of activities that might be a nuisance; (3) the Judge reached factual findings that were incapable of being reached on the evidence, failing to take into account significant parts of the evidence, displayed a closed mind and acted unfairly; (4) the Judge was wrong in law in making, and then varying in an impermissible way, an order which prohibited helicopter movements to a greater extent that he found in his judgment to be a nuisance, and is so vague as to be prejudicial and unenforceable.

41. Permission to appeal has been given only for grounds (1) and (4).

42. By order of Patten LJ of 5 August 2016 the Judge's order, as varied, has been stayed pending the final determination of the appeal.

43. Mrs Peires has issued a respondent's notice cross appealing in respect of the Judge's failure to award her damages and interest for historic noise nuisance.

Discussion

44. On the hearing of the appeal, having heard argument on the first ground of appeal, we informed counsel for the parties that we had come to a clear conclusion that the appeal should be allowed on that ground and we would give our reasons in judgments to be handed down in due course. It was unnecessary, therefore, for us to hear argument on the other grounds of appeal or on Mrs Peires' cross appeal.

45. My reasons for allowing the appeal on the first ground of appeal are as follows.

46. The Judge gave two reasons for rejecting the application of section 76(1) of the CAA 1982. The first was that the exercise in which the helicopters were engaged on the Slope did not involve "flight" or the ordinary incidents of "flight". The second was that section 76(1) only applies to flight and the ordinary incidents of flight which are reasonable. I do not agree with either qualification.

47. The Judge said that "flight", for the purposes of section 76(1), is confined to "journeys with aircraft passing over other property and the associated take off and landing". He therefore confined "flight" in this context to lateral travel from one fixed point to another. He gave no justification or explanation for that limitation. I can see no justifiable basis for it. The statutory definition in section 105(1) of the CAA 1982 contains no such limitation unless it is to be found in the word "journey". The word "journey", however, has no such usual limitation.

48. The relevant definition of "journey" in the Oxford English Dictionary is:

> "A 'spell' or continued course of going or travelling, having its beginning and end in place or time, and thus viewed as a distinct whole; a march, ride, drive, or combination of these or other modes of progression to a certain more or less distant place, or extending over a certain distance or space of time; an excursion or expedition to some distance; a round of travel. Usually applied to land-travel, or travel mainly by land, in contradistinction to a *voyage* by sea. The normal word for this in English, often qualified by an adj., or phrase, as a *long*, *short*, *quick*, *slow*, *good*, *bad*, *cold*, *dangerous*, *difficult*, *easy*, *interesting*, *pleasant*, *prosperous*, *successful*, *tedious*, *uncomfortable journey*; a *journey by railway, railway journey, journey on foot*; *journey to London*, *to the continent*, *into the country*, etc. Phrases: to make or undertake a journey.; to take one's journey, to set out and proceed on one's way."

49. I can see no obvious reason why that definition should not apply to an operation under which a helicopter rises a certain distance, turns and lands.

50. That conclusion is reinforced by the definition of the expression "in flight" in Article 3 of the 2016 Order, which is in the same terms as the corresponding provision in the 2009 Order. Under that definition, everything that takes place between the movement

of the flying machine for the purpose of take off until the flying machine comes to rest after landing is "in flight".

51. In the course of oral submissions on the hearing of the appeal, it was put to Mr Edward Denehan, counsel for Mrs Peires, that, if the Judge's definition of "flight" was correct, it would not capture a helicopter or other flying machine which took off but then, without ever proceeding laterally, dropped to the ground due an accident. His answer was that it was all a matter of the pilot's intent rather than the fact of lateral travel from one destination to another. He said that was necessarily implicit in the statutory provision. That, however, was not the reasoning of the Judge and there is no respondent's notice to uphold the judgment of the Judge on that further ground. The fact that it would be necessary to imply such a fundamental provision in the statutory provision simply underscores the unlikelihood that Parliament ever intended section 76(1) to be limited in the way stated by the Judge.

52. Giving the definition of "flight" in section 105 of the CAA 1982 its ordinary meaning is, furthermore, consistent with the relevant EU legislation, and gives effect to the requirement that domestic legislation should, so far as consistent with its "grain", be interpreted in a way that reflects applicable EU legislation.

53. If the Judge's definition was correct, it would not cover a captive balloon or kite. Yet, the CAA's published exceptions to the SERA minimum height requirements specifically authorise a captive balloon or kite "to be flown at heights below the minimum height requirements specified in SERA 5005 and SERA 5015" and describe a captive kite as "a kite that, when in flight, is attached by a restraining device to the surface".

54. Further, it is not in dispute that the manoeuvres carried out in helicopters on the Slope are a mandatory part of the training skills to obtain a helicopter pilot's licence. That is clear from the guidance material issued both by EASA and by the CAA. The CAA's published exceptions from the SERA minimum height requirements include the situation where a helicopter is conducting manoeuvres, in accordance with normal aviation practice, within the boundaries of an aerodrome. That must include the manoeuvres which are a necessary part of helicopter pilot training. As in the case of captive balloons and kites, it is implicit in the CAA's published exceptions to the SERA minimum height requirements that such authorised helicopter pilot manoeuvres constitute flying.

55. The Judge did not make any finding in his judgment that the exercises on the Slope are not being conducted in accordance with normal aviation practice. On the contrary, he recorded the evidence of the noise experts that there is nothing unusual or extreme about the helicopter noise *per se* and that the helicopters in question are not especially noisy or irritating types of helicopter.

56. The exception for helicopter manoeuvres from the SERA minimum height requirements provides that the helicopters conducting such manoeuvres must not be operated closer than 60 metres to any persons, vessels, vehicles or structures located outside the aerodrome or site. The Judge noted in that context that the closest point between the Property and the Aerodrome is 58 metres but there is no finding by the Judge that there are less than 60 metres between the place where the exercises are being conducted on the Slope and the presence of any persons, vehicles or structures

on the Property or that the manoeuvres are not properly authorised for that reason. Nor is that proximity relied upon in the respondent's notice as another ground for upholding the decision of the Judge.

57. Moreover, as Mr Tim Marland, counsel for the Appellant, stated, if standard helicopter training exercises, such as those conducted on the Slope, are not "flight", then none of the SERA provisions and the provisions in the 2016 Order relevant to the safety of flying machines in flight applies. It seems highly improbable that this was the intention of those responsible for making the domestic and the EU legislation.

58. I can see no proper basis for the Judge's conclusion that a further reason why the helicopter training exercises on the Slope fall outside section 76(1) of the CAA 1982 is because they are being carried out in an unreasonable way. He based that conclusion on the presence of the word "reasonable" in section 76, and on the observations of Griffiths J in the *Bernstein* case, and on his conclusion that the Appellant could and should have taken steps to minimise the impact of the exercises on Mrs Peires' use and enjoyment of the Property.

59. There is nothing in section 76(1) which makes it a precondition of immunity that the flight or ordinary incidents of the flight must be reasonable. The only specified requirement as to reasonableness is in relation to the height of the aircraft "having regard to wind, weather and all the circumstances of the case". The Judge made no finding that the height of the helicopters is unreasonable having regard to those factors. That is not surprising since Mrs Peires' real complaint is about frequency and duration rather than height. As to those matters, as Mr Marland observed, the immunity conferred by section 76(1) is only relevant if there would otherwise be an actionable nuisance and so presupposes use that would, aside from the statutory immunity, be unreasonable.

60. Nor can I see anything in the judgment of Griffiths J in the *Bernstein* case which supports the implication in section 76(1) of some general requirement of reasonableness. Mr Denehan did not refer us to any passage in that case on which Mrs Peires relies in support of that view of the Judge. On the contrary, what Griffiths J did say (at p. 489D) was as follows:

> "As I read the section its protection extends to all flights provided they are at a reasonable height and comply with the statutory provisions. And I adopt this construction the more readily because subsection (2) imposes upon the owner of the aircraft a strict liability to pay damages for any material loss or damage that may be cause by his aircraft."

61. My conclusion on the application of section 76(1) of the CAA 1982 to the helicopter exercises in the present case makes it unnecessary to consider the application of section 77(2). There was limited argument on that statutory provision. For the following reasons I consider that it is undesirable on this appeal to express a view about its application generally or on the facts of this particular case.

62. The Judge said that the section 77(2) immunity for noise caused by aircraft taking off and landing are not relevant because "the helicopters carrying out the operation are

not … taking off or landing" and in any event "the training operations are not part of the normal incidents of taking off and landing".

63. I cannot see any proper basis for the Judge's observation that the helicopters involved in the exercises are not taking off or landing. The mandatory skill tests laid down by both EASA and the CAA specifically include landing and take offs on sloping ground. That is precisely what the helicopter pilots are doing in the training exercises on the Slope. As the CAA guidance makes clear, the hovering in the air in the case of the helicopters in the present case is merely to carry out the necessary "recce" and to turn about the helicopter in order to effect the requisite landing.

64. In his oral submissions, however, Mr Denehan made a fundamental point which was not made by the Judge. He submitted that, whereas section 76(1) provides immunity in relation to aircraft "in flight", section 77 is concerned with activities at aerodromes on the ground.

65. He referred, in that connection, to the following statement by the Solicitor-General when moving that the relevant clause be read a second time:

> "…the general idea is that there should be this general uniformity of standard. Section 9 of the Air Navigation Act, 1920, already provides the same sort of protection in the case of aircraft in flight. Once that is accepted as a principle, it is more than illogical not to extend that same protection to aircraft when they land or before they take off. It is not much use having protection in flight, unless there can be similar protection before aeroplanes take off or after they land." (Hansard HC Deb 14.3.1947 vol. 434 cc1717-49)

66. This new point is not, however, raised in the respondent's notice. Nor was it mentioned in Mrs Peires' skeleton argument. It is plainly an arguable point but it would be wrong to determine it one way or the other at the level of the Court of Appeal in the present case in view of the unsatisfactory circumstances in which it has been raised.

Conclusion

67. Those are my reasons for allowing this appeal and dismissing the cross appeal.

Lord Justice Underhill:

68. I agree.

Lady Justice King:

69. I also agree.