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SPORTING RIGHTS – A QUESTION OF BALANCE

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1. Cases on sporting rights are very rare. The law on such rights is of comparatively modern provenance. Sporting rights are a species of *profits à prendre*. If you look at the only 19th century textbook on *profits à prendre*, John Edward Hall’s *Treatise on Profits à Prendre and Rights of Common* of 1871, you will find that Chapter XXI is headed “Of the Right of Taking and Killing Game”. However, in the eight turgid pages which comprise that chapter, you will only find a discussion of the ancient law on forests, chases, parks and warrens. The modern law on sporting rights did not really exist at that date. It was a combination of the improvement of shotgun technology and the rise of wealthy Victorian entrepreneurs that led to the creation of sporting estates and the law, such as it is, that we now have to go with them.

2. I have recently been involved in one stage of some on-going High Court litigation concerning sporting rights on an estate near Harrogate. That has led to two separate decisions to date. Both of these were decisions of HH Judge Hodge QC sitting as a High Court Judge in Manchester. The first of these was an application for an interim injunction, in *Kitzing v Fuller* [2016] EWHC 804 (Ch), and I was not counsel in that part of the case. The second was a trial of three preliminary issues, two of which were concerned with sporting rights, *Fuller v Kitzing* [2017] EWHC 810 (Ch), now reported at [2017] 3 WLR 615. I was counsel for the Part 20 Defendants in that case, Mrs Diana Kitzing and her son, Mr Mark Kitzing. Mrs Kitzing is the owner of the sporting rights. Mr Jason Fuller is the

owner of Winsley Hurst Hall, over whose land Mrs Kitzing has the sporting rights. Because this litigation is still on-going, it would be wholly inappropriate for me to say anything about the cases that is not in the reports of those two decisions or to comment in any way on the merits. The facts have yet to be established. What is important are the legal issues that were raised in those two decisions which relate to sporting rights, and the important lessons that can be learned from them.

3. I wish to address four issues that arise out of the two cases.

Issue 1

4. The first issue is the extent to which the existence of sporting rights over land can inhibit what the servient owner may do on his or her land.
5. This issue arose and was the subject of some discussion in the first of the two decisions, *Kitzing v Fuller* [2016] EWHC 804 (Ch). The relevant facts, stated briefly, were that when Mr Fuller purchased Winsley Hurst Hall, the transfer was expressly subject to Mrs Kitzing's sporting rights. Those had been granted to her by means of an assent. That gave effect to a gift to her of the sporting rights in her mother's will. One of the rights to which Mr Fuller took subject was "the right to preserve and rear game for normal shooting purposes over the whole of the land known as the Winsley Hurst Estate". What happened next can be conveniently taken from the Lawtel summary of the case, which explains why the litigation was begun by Mrs Kitzing as claimant:

"The claimant's case was that since the defendant's acquisition of the land he had undertaken extensive clearance of the ground cover and trees on the land, reducing the ability of the woodland to hold game and reducing the areas of the shoot in which her rights could be effectively exercised. The defendant's conduct was said to constitute an unlawful infringement of her rights and to be a trespass and/or a nuisance. She sought an interim injunction restraining him from taking any steps which unlawfully interfered with her rights, from felling trees and from removing ground cover."

6. The interim injunction was refused on grounds that were primarily (but not exclusively) concerned with the legal principles that govern the grant of such injunctions. However, the proceedings did raise the very difficult question of the extent to which the existence of sporting rights can restrict what the servient owner may do on his or her land, at least in the absence of explicit provision in, as the case may be, the grant or the exception and reservation of sporting rights.

7. There is a line of authority where the following events occurred:
 - (a) A had sporting rights over B's agricultural land;
 - (b) A had *no* additional rights to preserve and rear game on B's land;
 - (c) B then carried out changes to his land, such as clearing furze, underwood and trees, which did not go beyond the ordinary cultivation of B's farm.

8. For the record, the main cases are:
 - (a) *Jeffryes v Evans* (1865) 19 CB (NS) 246;
 - (b) *Gearns v Baker* (1875) LR 10 Ch App 355; and
 - (c) *Pattison v Gilford* (1874) LR 18 Eq 259;

The nuances of the three cases perhaps inevitably differ, but, as I shall explain, the trend of the cases was tolerably clear.

9. It should be noted that, in some of these cases, the changes made by the landowner were substantial. In *Gearns v Baker* for example, the shooting rights were over a 1300 acre estate. The Court of Appeal regarded it as preposterous that the person with the lease of the shooting rights could be in a position to prevent the landowner from felling and

selling 7500 trees from the estate for timber.¹ There are however limits. If the servient owner's conduct goes beyond the ordinary cultivation of a farm, the person with the sporting rights may have a remedy.

10. The leading case is the decision of the Court of Appeal in *Peech v Best* [1931] 1 KB 1. In essence what happened in that case is that 12 acres of a 700-acre estate, over which the plaintiff had sporting rights under a 14-year lease, were sold for a form of building development. The lessee successfully brought proceedings for a declaration that his sporting rights were infringed and was awarded damages in lieu of an injunction. The governing principles that were applied by the Court of Appeal were probably most succinctly expressed by Greer LJ at p 18, where he said:

“I regard the lease of sporting rights in this case as a lease of rights over farm lands. Though such a grant would not operate to restrain the landlord from interfering with the sporting rights by carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land, he would have no right to put the land to uses which have nothing to do with farming requirements, so as to oust entirely the sporting tenant from exercising his rights over a substantial part of the land included in the grant.”

11. In one of the agricultural cases, which I have not yet mentioned, damages were awarded to the person who had the sporting rights over land, where trees were cut down by the landowner in circumstances that went beyond ordinary cultivation. That case was *Dick v Norton*, one part of which was reported in (1916) 32 TLR 306. That report is only of the decision of Eve J to refuse an interim injunction. When the case went to trial – and the trial judgement was not reported – the judge must have found that the landowner's conduct went beyond ordinary cultivation, unlike the situation in *Gearns v Baker*, because

¹ “It is preposterous to suppose that a man who grants a shooting lease for twenty-one years is to be dictated to by this Court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants”: *per* James LJ at p 357.

Peterson J awarded substantial damages. This was certainly Scrutton LJ's conclusion about the case in *Peech v Best* [1931] 1 KB 1 at 14, which is how we know about Peterson J's decision.

12. Is the answer different if the person with the sporting rights *also* has a right to preserve and rear game, as was the case in *Kitzing v Fuller*? There is one case which suggested that it might. That case is *Pole v Peake*, an unreported decision of the Court of Appeal given on 17 July 1998. The full transcript is now at long last available on *Westlaw*. It was an appeal from Barnstaple County Court. There was a dispute between the landowner defendants and the plaintiff, who had the sporting rights over the defendants' land, as to what the plaintiff was entitled to do on the servient land. In addition to his sporting rights, which arose under a conveyance made in 1974, the plaintiff was also given the right "for the purpose of preserving and rearing game wild fowl and fish to enter upon the said lands woods and premises or any part thereof", that is to say the servient land. The trial judge had made a declaration that the defendants must not change the character of their land from what it had been in 1974 so as substantially to interfere with the plaintiff's rights under the 1974 conveyance. However, he had accepted that the defendants could adopt normal agricultural practices that did not substantially change the character of the land. The defendants did not challenge that declaration on appeal. Buxton LJ in the Court of Appeal referred to it with a hint of criticism. However, there being no appeal from the declaration, Buxton LJ accepted that it was not open to the defendants to adopt farming practices that interfered with the exercise of the plaintiff's shooting and rearing rights.
13. In my opinion, there was some force in the terms of the declaration that was made in the county court in that case. If a person has sold land subject to such an exception and reservation, he or she should not readily be permitted to derogate from what in law is regarded as a grant. If I say to you "you can come on to my land to rear and preserve game", I should not be allowed to frustrate that grant by using my land in such a way as to make that task impossible, even if that user might be an otherwise legitimate agricultural use.

14. The points about *Pole v Peake* that I have made above were considered by Judge Hodge in *Kitzing v Fuller*. At para 25 of his judgment, he concluded:

“it does not seem to me that, on an application for an interim injunction, it is appropriate for the court to embark upon a detailed exposition of the circumstances in which acts of normal estate management by the owner of land burdened, not simply by shooting rights, but also by rights to “preserve and rear game for normal shooting purposes”, may constitute an actionable interference with those rights. On the present state of the authorities, it seems to me, without deciding the point definitively, that it is at least fairly arguable that acts carried out in the normal estate management of one’s land may be actionable at the suit of the holder of rights of shooting, and of preserving and rearing, game if they substantially change the character of the land so as to render it materially less fit for the purposes of shooting and preserving and rearing game for shooting purposes. On the evidence before the court ... I am satisfied that there is just about a seriously arguable case that there has been an actionable interference with the claimant’s rights. However, I put it no higher than that. The matter is one for the trial judge.”

15. As I have indicated, Judge Hodge refused to grant an injunction in any event on other grounds, and, as it happened, Mrs Kitzing discontinued her action, so the point will not be decided in the present proceedings and will have to be decided in some future case. What remains of the action between Mrs Kitzing and Mr Fuller is Mr Fuller’s counterclaim.

16. It is possible to draw the following conclusions from the authorities to which I have referred:

- (a) If A has merely been granted sporting rights over B’s land and nothing more, A cannot prevent B from carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as agricultural land. This is so even though such operations may have a damaging effect upon the sporting rights.

- (b) What B cannot do is undertake acts which go beyond ordinary cultivation, such as building on part of the land or carrying out substantial changes to the land that are deliberately intended to frustrate A's sporting rights or are unconnected with ordinary agricultural activity.
- (c) It may be that where A, in addition to his sporting rights, has the right to enter B's land to rear and preserve game, B may not be able to adopt thereafter agricultural practices that prevent A from carrying out such rearing and preservation.
17. The third proposition cannot be regarded as finally settled, because in *Pole v Peake*, the Court of Appeal did not have to decide the point, because it was not contested. As I have explained there is some force in the third proposition. Even if it is correct, however, it is not clear just how far it limits the powers of the servient landowner.
18. All of this has obvious implications if you are drafting or negotiating either the grant or the exception and reservation of sporting rights. If you are acting for the person who is acquiring the sporting rights, you will need to consider with your client what risk there may be that the servient owner may do something that could have a damaging effect on the sporting rights that are to be acquired. You cannot safely assume that a grant or an exception or reservation of rights to rear and preserve game on the servient land in addition to the usual sporting rights will of itself protect your client from changes that may be made by the owner of the servient land. If your client wants such protection it should be obtained expressly, no doubt at a price, if it is obtainable at all. Conversely, if you were acting for the servient landowner, your client would need to be warned that the grant of rights to rear and preserve game in addition to sporting rights, *could* inhibit what he or she can do on the servient land. You would want to put in protective wording to ensure that his or her freedom of action was preserved.
19. The three remaining issues that I wish to consider arise out of the proceedings on Mr Fuller's counterclaim. Judge Hodge directed the trial of six preliminary issues in relation to that counterclaim, which were principally issues of law. Three of these issues were conceded by Mr Fuller and only three remained to be tried. Only two of those were

concerned with sporting rights and need to be considered today. As I have mentioned, the judgment on the trial of the preliminary issues is now reported at [2017] 3 WLR 615 under the name of *Fuller v Kitzing*.

20. Before I turn to the remaining issues, I wish to make an important preliminary point. It has been clear since the decision of the House of Lords in a Scottish appeal on easements, *Moncrieff v Jamieson* [2007] 1 WLR 2620, that rights that in Scottish law are called servitudes, such as easements and *profits à prendre*, have to be exercised *civiliter* and that this principle applies in England and Wales as much as it does in Scotland. That principle means that the dominant owner with the right over another person's land must exercise that right reasonably and without undue interference with the servient owner's enjoyment of his or her own land: see Lord Scott at p 2634, [35]. That principle has in fact always applied to sporting rights and that was explicitly recognised by Scrutton LJ in *Peech v Best* [1931] 1 KB 1 at 14.² In *Fuller v Kitzing* at [84], Judge Hodge accepted not only that the *civiliter* principle applied to *profits à prendre*, such as sporting rights, but that it worked both ways. It was a reciprocal obligation on both the person having the sporting rights and the servient owner. Each has to act reasonably as regards the other. The *civiliter* principle is important to what follows.

21. I would add that the obligation on the servient owner to act *civiliter* as regards the person with the sporting rights may be underpinned by the legal principle that a person must not derogate from his or her grant. The issue is, in the end, a question of balancing competing interests as it always is with servitudinal rights such as easements or profits.

Issue 2

22. The second issue that I wish to consider, which was determined on the trial of the preliminary issues in *Fuller v Kitzing*, is whether a right to shoot game, which is a *profit à*

² “In *Farrer v Nelson* (1885) 15 QBD 258 a sporting tenant who brought an unreasonable number of pheasants on the land which injured the crops was held liable in damages. This apparently shows that both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action.”

prendre, includes a right to shoot game that had been introduced and reared but then released, or whether it is confined to wild birds. The issue arose because the court was asked to determine whether the sporting rights that had been granted to Mrs Kitzing authorised her to preserve and rear game or introduce poults *on Mr Fuller's land*. There were actually two elements in that inquiry. The first was the question that I have just posed. The second element is addressed as my Issue 3 in this talk.

23. As regards this second issue, Mr Fuller's counsel argued as follows.

- (a) A *profit à prendre* is the right to take from the servient land some part of the soil, or the minerals under it, or some of its natural produce, such as crops growing naturally upon the land or the wild creatures (such as animals and birds) naturally existing upon it.
- (b) The subject of the profit had to be on the land naturally, and not through the agency of man, whether in respect of the initial introduction or the subsequent tending of the subject matter.
- (c) A right to preserve and rear game for normal shooting purposes, which was the right granted to Mrs Kitzing, was a process of industry and not a natural process and could not exist as a *profit à prendre*.
- (d) The right to introduce poults on to Mr Fuller's land was even more clearly not a *profit à prendre* for the same reason.
- (e) It followed that pheasants which were reared but then released were not wild birds and the right to shoot them could not be a *profit à prendre*.

24. That was an ingenious argument, but one, as I shall explain, with potentially very serious consequences if it was correct. Judge Hodge rejected it. Instead, he accepted the traditional view that there were *three* distinct forms of *profit à prendre*, namely, a right to take:

- (a) Some part of the soil or minerals under it;

- (b) The natural produce of the land, or crops which grow naturally, as distinct from those which are cultivated or produced by labour; and
- (c) Wild animals or birds that exist upon the land.

25. The third category was separate and distinct from the second category. Mr Fuller's counsel had attempted to elide those two categories. Judge Hodge relied on the Court of Appeal's decision in *Pole v Peake*, unreported, Court of Appeal, 17 July 1998, to which I have already referred, in which a similar issue had been considered. The Court had there held that the word "game" included "pheasants reared for the purpose of sport irrespective of whether they breed naturally on the estate". Applying that reasoning, Judge Hodge held at [56]:

"In my judgment, a game bird can be a wild bird, and thus properly the subject of a *profit à prendre*, even if it is has been bred and fed by human agency provided it has been released back into the wild; and it matters not that it has been bred on, and then flushed out and beaten or driven onto the servient land from, neighbouring land belonging to a third party, whether the holder of the shooting rights or someone else. Even when reared in pens, pheasants (and other game birds) are wild birds once released from the pens into the wild. Once so released, they are capable of being the subject of a valid *profit à prendre*. I therefore hold that the rights of shooting enjoyed by Mrs Kitzing extend to game birds introduced as poults on to neighbouring land and reared and fed there once they have been released back into the wild."

26. If Judge Hodge had concluded otherwise, there would have been considerable difficulties for the shooting industry. It would have meant that game birds which been reared and released, could never be shot where a person had shooting rights over a third party's land. Shooting reared birds would not be an exercise of the sporting rights. As Judge Hodge pointed out in the same paragraph, it would in practice be impossible to tell whether birds on the wing had or had not been bred in captivity.

Issue 3

27. The third matter that I wish to consider is what the right to preserve and rear game for normal shooting purposes permitted the person with the *profit à prendre* to do on the servient owner's land. As I have mentioned, this was an issue in *Fuller v Kitzing*. It was contended on behalf of Mr Fuller, that such rights could not be ancillary to the *profit à prendre* of sporting rights. That is a very significant point. If Mr Fuller's counsel was correct in what he said, it would have had the following consequences:

- (a) The right to preserve and rear game for normal shooting purposes would not be a property right.
- (b) If that was correct, it would necessarily follow that such rights would have to be granted expressly as a matter of contractual licence between every new landowner of the servient land and the owner of the sporting rights.
- (c) The landowner would be under no obligation to enter into such a contractual licence.

28. Judge Hodge rejected this contention and held that the right to preserve and rear game was ancillary to the sporting rights which were a *profit à prendre*. The relevant part of his judgment is at [74] – [77], and once again he relied upon what was said by the Court of Appeal in *Pole v Peake* to support his conclusions. As I shall explain, in practical terms this is a very important part of the judgment. The following points emerge from the judgment.

- (a) The right to preserve game was a right to protect it, typically by controlling vermin. This right was ancillary to the sporting rights because it ensured that the owner of the sporting rights could shoot all the game that was naturally on the land for the time being.
- (b) The right to rear game was also ancillary to the sporting rights because it helped to make such game ready for shooting.
- (c) The right to rear game included the right to feed game birds that were already present on or above the servient land. This included

- (i) Birds that were hatched on the servient land by game birds already naturally there;
 - (ii) Birds that had flown on to the servient land from neighbouring land where they were hatched; and
 - (iii) Birds which had been introduced on to neighbouring land as poults in pens or some other artificial contraptions and reared there and then later released into the wild.
- (d) The right to rear game did *not* include either:
- (i) Any right to erect pens or other artificial devices on the servient land; or
 - (ii) Any right to introduce poults onto the servient land or to stock it with pheasants.

Such activities were not ancillary to the primary right to shoot game.

29. There are a number of points that arise from the decision on this point.

30. First, this analysis has brought clarity to the issue of the extent of ancillary rights that does arise from time to time in practice. For example, I had a case some years ago where a landowner kept pens for poults on part of his land with the intention of releasing them for shooting. He sold off that part of the land to a purchaser, subject to his sporting rights, which, so far as I recall, were couched in wide terms, as in the *Fuller v Kitzing* case. An issue arose as to whether he could continue to use pens on the servient land. I never heard the final outcome, but following *Fuller v Kitzing*, it is clear that, even if the sporting rights include ancillary rights to preserve and rear game, they will not extend to a right to raise poults in pens on the servient land. Such a right must be expressly obtained, which leads to my second point.

31. Secondly, rights that are ancillary to the sporting rights that constitute the *profit à prendre* will bind any purchaser of the servient land as a property right just as much as the

sporting rights themselves. If a person with sporting rights wishes to negotiate with the owner of the servient land for additional rights that go beyond the ancillary rights, such as a right to place pens on the servient land, any such right can only exist as a contractual licence. As such, it will only bind the parties to it. As I have mentioned, if there is a change of ownership of the servient land, the contractual licence would have to be negotiated afresh with the new owner, who might not agree to it.

32. Thirdly, the decision is concerned only with the situation where there are express ancillary rights to preserve and rear game. In the absence of any such express ancillary rights, the only ancillary rights that are likely to be implied are those without which the sporting rights cannot be exercised. As a matter of drafting therefore, if you are acting for a person who is acquiring sporting rights, you will obviously wish to be certain that he or she obtains all necessary ancillary rights that he or she thinks may be needed.

Issue 4

33. The final question that I wish to consider is whether there are any restrictions on the exercise of sporting rights when those rights include land within the curtilage of a residential property.

34. That issue arose in *Fuller v Kitzing* in a slightly complicated way. All that I need to say for present purposes is that Winsley Hurst Hall and its immediate surroundings – essentially its curtilage – had been leased by Mrs Kitzing's mother in 1989 for a long term of years, together with other adjoining property. There was an assignment to Mr Fuller of the part of demised premises that comprised Winsley Hurst Hall. That lease, which continued, contained a reservation to the landlord of all the sporting rights over the land demised, including specifically the following rights:

- (a) The right to stand guns on the demised premises;
- (b) The right to take game and game eggs; and
- (c) The right to come onto the demised premises for the purpose of exercising the sporting rights and their management.

There was an express exception to these rights, but it is not relevant for present purposes.

35. Those reserved sporting rights had passed to Mrs Kitzing under her mother's will. Although Mr Fuller had subsequently purchased the freehold reversion on the lease, the lease continued and could not be merged in the freehold because it did not include the sporting rights, which had been severed had had passed to Mrs Kitzing. That issue was itself the subject of some strenuous argument in *Fuller v Kitzing* that I need not consider.
36. The issue that the court had to determine was whether there was any restriction on where the sporting rights could be exercised in relation to Winsley Hurst Hall itself, and in particular, whether the rights could be exercised within the curtilage of the Hall. Mr Fuller's counsel argued, with the support of expert evidence, that there should be a 300 metre exclusion zone. Mr Fuller was concerned both because of the noise created by shooting close to his house and because of spent shot falling on his house. If that argument was correct, there could have been no shooting within the area demised by the 1989 lease and indeed there could be no shooting on certain land that lay outside Mr Fuller's ownership.
37. As I have explained, it was common ground between the parties that sporting rights had to be exercised *civilliter*. As I have also explained, that principle applies both to the person having the sporting rights and the servient owner. Each must exercise their own rights with due regard for the rights of the other.
38. HH Judge Hodge rejected the limitations that were proposed by Mr Fuller's counsel. He explained why at [87]:

“The territorial limitations ... would deny Mrs Kitzing the benefit of the rights of shooting expressly conferred on her by the lease. Just as the court cannot imply a term into a contract that would contradict any of its express terms, nor in

my judgment can the court import a territorial limitation on the exercise of a *profit à prendre* that would contradict the express terms of the grant.”

39. However, having regard to the *civiliter* principle, the rights enjoyed by Mrs Kitzing *were* subject to certain limitations. These were listed by Judge Hodge at [89] and they were as follows:

“(1) shooting should not take place from the house itself, its garages, outbuildings or terrace; (2) shooting should not deliberately take place in the direction of the house itself, its garages, outbuildings or terrace; and (3) notice should be given to Mr Fuller the evening before a day’s shooting of the timings of any shooting on any of the drives in the vicinity of Mr Fuller's property.”

40. What the determination of this issue shows is as follows.

41. First, the starting point must always be the terms of the grant of the sporting rights. If the grantee is given sporting rights over property that is close to residential accommodation, effect will be given to that grant. The servient owner cannot try to cut back what has been granted.

42. Secondly, however, the fact that there is residential accommodation in close proximity to where the sporting rights can be exercised is not irrelevant. The *civiliter* principle is necessarily engaged and the sporting rights must not be exercised in a way that causes undue interference with the servient owner’s enjoyment of his or her own land. The person with the sporting rights cannot disregard the fact that he or she is exercising them in close proximity to residential property and must take appropriate steps not to damage or unduly interfere with the rights of the servient owner.

43. There is not much doubt that *Fuller v Kitzing* is the most important case on sporting rights for some considerable time, probably since *Pole v Peake*, though until *Fuller v Kitzing*, *Pole v Peake*, which was only reported in short form, did not receive the attention it

deserved. There were some fundamental issues at stake in *Fuller v Kitzing*. On at least some of the issues, if Mr Fuller's arguments had been successful, some well established practices in the sporting rights industry would have been undermined. The case is also important because it has demonstrated that the *civiliter* principle lies at the heart of how such rights will be interpreted. It is that principle that gives the court the flexibility to balance the competing interests.