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Queen's Bench Division

***Cameron and others v Network Rail Infrastructure Ltd
(formerly Railtrack plc)**

[2006] EWHC 1133 (QB)

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2006 March 7, 8, 9;
May 18

Sir Michael Turner

Human rights — Public authority — Functions of public nature — Defendant company owning and controlling infrastructure of national railway network — Deceased killed in train crash — Executors and relatives of deceased bringing claim in damages against defendant — Whether defendant “public authority” — Human Rights Act 1998 (c 42), s 6(3)

C

In 1994, as part of the privatisation of the national railway network, the defendant company was created and the railway infrastructure was vested in it. The defendant was made the infrastructure controller of the national railway network with powers to regulate safety on the network and responsibility for setting railway group standards, which included engineering and safety standards.

D

After the coming into force of the Railways (Safety Case) Regulations 2000 the defendant no longer had any regulatory functions concerning the railway network or operations carried out on it and its responsibility for setting railway group standards was removed. In May 2002 a number of people were killed in a train crash which occurred on a stretch of railway owned and controlled by the defendant. The claimants, the daughters and executors of one of the deceased, brought proceedings against the defendant under section 7(1)(a) of the Human Rights Act 1998¹ claiming, inter alia, damages for breach of the deceased's right to life under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The defendant applied for summary judgment under CPR Pt 24 on the ground that it was not a “public authority” within the meaning of section 6(3) of the 1998 Act.

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On the application—

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Held, granting the application, that although as originally set up by statute the defendant had functions which were of a public nature, there were a number of factors which demonstrated that at the material time it was not a public authority within the meaning of section 6(3) of the 1998 Act; that those factors were (i) that the business of running a railway was not intrinsically an act of government, (ii) that there was a clear commercial objective in the defendant's performance in that it was concerned to make profits for its shareholders from its operations as an infrastructure company, (iii) that there was no obligation on the defendant to conduct its operations in a manner subservient to the public interest, (iv) that the defendant was not democratically accountable to central or local government, (v) that the appointment of the defendant's board of directors was not subject to government influence or control, (vi) that the defendant possessed no special powers nor did it enjoy immunities which might have been indications of publicness, (vii) that the defendant was not publicly funded and (viii) that the defendant had no special powers beyond those which resulted from those which regulated relations between individuals; and that, accordingly, the defendant was not a public authority for the purposes of the 1998 Act and the claim had no real prospect of succeeding (post, paras 28–29, 37, 49).

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¹ Human Rights Act 1998, s 6(3): see post, para 11.
S 7: see post, para 12.

The following cases are referred to in the judgment:

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)

Foster v British Gas plc (Case C-188/89) [1991] 1 QB 405; [1991] 2 WLR 258; [1990] ECR I-3313; [1990] 3 All ER 897, ECJ

R (Middleton) v West Somerset Coroner [2004] UKHL 10; [2004] 2 AC 182; [2004] 2 WLR 800; [2004] 2 All ER 465, HL(E)

R (Takoushis) v Inner North London Coroner [2005] EWCA Civ 1440; [2006] 1 WLR 461, CA

The following additional cases were cited in argument:

Bubbins v United Kingdom (2005) 41 EHRR 458

D v East Berkshire Community Health NHS Trust [2005] UKHL 23; [2005] 2 AC 373; [2005] 2 WLR 993; [2005] 2 All ER 443, HL(E)

Keenan v United Kingdom (2001) 33 EHRR 913

Osman v United Kingdom (1998) 29 EHRR 245

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA

Powell v United Kingdom (2000) 30 EHRR CD 362; Reports of Judgments and Decisions 2000-V, p 397

R (Amin) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 AC 653; [2003] 3 WLR 1169; [2003] 4 All ER 1264, HL(E)

R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056; [2004] 1 WLR 233, CA

R (Goodson) v Bedfordshire and Luton Coroner [2004] EWHC 2931 (Admin); [2006] 1 WLR 432; [2005] 2 All ER 791

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA

R (Khan) v Secretary of State for Health [2003] EWCA Civ 1129; [2004] 1 WLR 971; [2003] 4 All ER 1239, CA

Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52; [2004] 1 AC 309; [2003] 3 WLR 1091; [2003] 4 All ER 987, HL(E)

Sieminska v Poland (Application No 37602/97) (unreported) 29 March 2001, ECtHR

Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 4 All ER 969, HL(E)

APPLICATION for summary judgment

By an amended claim form dated 10 May 2005 the claimants, Mr Colin Cameron, Ms Celia Mary Cameron, Ms Patricia Marie Smith and Ms Ann Theresa Smith, brought proceedings against the defendant, Network Rail Infrastructure Ltd, in respect of the death of Mrs Agnes Quinlivan (“the deceased”) at the Potters Bar rail crash on 10 May 2002, claiming: (1) by the first and second claimants as joint executors of the estate of the deceased (i) damages against the defendant as a public authority, pursuant to sections 6, 7 and 8 of the Human Rights Act 1998, for breach of the deceased’s right to life under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms; (ii) damages for the wrongful death of the deceased, such a remedy being necessary in order for the court to meet its obligations under article 2 of the Convention and the 1998 Act; and (iii) funeral and associated expenses pursuant to the Law Reform (Miscellaneous Provisions) Act 1934; (2) by the second, third and fourth defendants as daughters of the deceased (i) damages for the wrongful death

- A of the deceased and their loss and damage suffered as a result, such a remedy being necessary in order for the court to meet its obligations under article 2 and/or article 8 of the Convention and the 1998 Act; (ii) damages against the defendant as a public authority, pursuant to sections 6, 7 and 8 of the Human Rights Act 1998, for breach of the deceased's right to life under article 2 of the Convention and their consequential loss and damage;
- B (iii) damages against the defendant as a public authority, pursuant to sections 6, 7 and 8 of the Human Rights Act 1998, for breach of their right to respect for family life under article 8 of the Convention; (iv) bereavement damages under section 1A of the Fatal Accidents Act 1976, on the basis that the 1976 Act should be so interpreted so as to provide such a remedy under section 3 of the 1998 Act in order to be compatible with article 2 and/or article 8 of the Convention; and (v) a declaration that section 1A of the 1976
- C Act was incompatible with article 2 and/or article 8 of the Convention.

By an application notice dated 5 January 2006 the defendants applied for: (1) summary judgment pursuant to CPR Pt 24 in respect of the entirety of the claimant's claim on the ground that the claim had no real prospect of succeeding; alternatively, (2) an order striking out the claimants' particulars of claim, pursuant to CPR r 3.4(2), as disclosing no reasonable grounds for bringing a claim.

- D The facts are stated in the judgment.

Oliver Campbell for the defendant.
Robert Weir for the claimants.

Cur adv vult

- E 18 May. SIR MICHAEL TURNER handed down the following judgment.

Preliminary

- F 1 This is the defendant's application for (1) summary judgment pursuant to CPR Pt 24 on the grounds that the claimants' claim has no real prospect of succeeding, (2) the particulars of claim to be struck out as disclosing no reasonable grounds for bringing a claim, and (3) the costs of the application.

- G 2 What lies at the heart of this application is that under English law, as distinct from the law of Scotland, there is a restricted class of person able to bring proceedings on behalf of a deceased person or his/her estate, which does not include the daughters of a deceased person who were not financially dependent upon that person. The only right which was available to the family was the recovery of funeral expenses which is quite insufficient to provide "just satisfaction" (see later) to the family within the meaning of human rights jurisprudence.

- H 3 These proceedings arise out of the Potters Bar train crash ("the accident") which occurred on 10 May 2002. A consequence of the accident was that one Agnes Quinlivan sustained serious injuries from which she died almost instantaneously. Her injuries were caused when part of a bridge, which carried the railway over the road along which she was walking, was damaged, thereby dislodging debris which fell onto the deceased, causing those injuries. She was the mother of the second, third and fourth claimants.

Introduction—history of the defendant

4 On 1 April 1994, the former British Rail Board was privatised and Railtrack plc (“Railtrack”) was created; the railway infrastructure was vested in this company. As an infrastructure controller, Railtrack was given statutory powers to regulate, among other matters, safety on the railway network. On 7 October 2001, Railtrack was put into railway administration by order of the High Court. In the same month, the company changed its name to Network Rail Infrastructure Ltd and was purchased by Network Rail Ltd.

5 Since the Railways (Safety Case) Regulations 2000 (SI 2000/2688) came into force on 31 December 2000, Railtrack has no longer had a regulatory function in respect of safety, or any other matter, concerning the railway network or operations carried out on it. It is worthy of note that the Regulations were made under powers contained in the Health and Safety at Work etc Act 1974. Under regulation 4 it became a condition precedent to the right of Railtrack to use or permit the railway infrastructure to be used for the operation of trains or stations that it prepare a safety case which was accepted by the Health and Safety Executive.

Nature of the claims

6 (a) A claim for damages under the Human Rights Act 1998, on the grounds that there were breaches of article 2 (right to life) and/or article 8 (respect for family life). It was conceded during submissions that if the claimant were to fail on his article 2 claim, he would have no prospect of succeeding under article 8. (b) A claim for damages for “wrongful death” by the creation of a new tort that becomes necessary to fill the lacuna in the common law represented by the restricted class of persons entitled to sue in the circumstances described; contrast the law on this topic in Scotland. (c) A declaration that section 1A of the Fatal Accidents Act 1976, as inserted by section 3(1) of the Administration of Justice Act 1982, is incompatible with the claimant’s or the deceased’s rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. The submission was that by restricting the persons who are entitled to claim a “bereavement” award to the wife or husband of the deceased, in the circumstances of this case, the court was disabled from according “just satisfaction” to the claimants. Moreover, the provisions of section 1(1A) of the Law Reform (Miscellaneous Provisions) Act 1934, as inserted by section 4(1) of the Administration of Justice Act 1982, which prevent a claim for bereavement damages surviving for the benefit of the estate had the same unjust effect.

7 It is a necessary incident of any or all of these claims, if they are to succeed, that, at the material time, the defendant was a public authority, and acting as such, at the date of the accident. The defendant disputes that it was or was at any material time a, or acting as a, public authority in respect of the state of maintenance of the track and points at the accident site. It further disputes that the claimants have any realistic prospect of establishing breaches of either article 2 or article 8 of the European Convention.

8 The defendant also relies on the provisions of section 7(5) of the 1998 Act in that the proceedings were not issued in this case until the third anniversary of the accident whereas the ordinary time limit for bringing claims under section 7(1) is one year.

A *The defendant as a public authority*

9 It may be illuminating to examine the manner in which Railtrack viewed its own position in the transitional railway safety case which it prepared and was dated 1 May 2002, just nine days before the accident which is at the centre of this claim. Thus it announced:

B “This railway safety case demonstrates Railtrack’s capability and competence to discharge its safety responsibilities as the infrastructure controller of the national railway network . . . in accordance with the requirements of the Railways (Safety Case) Regulations 2000.

“1. Overview

“Purpose

C “1.1 This railway safety case demonstrates Railtrack’s capability, commitment and competence to discharge its safety responsibilities as the infrastructure controller of the national railway network . . . in accordance with the Railways (Safety Case) Regulations 2000.

D “1.2 It describes Railtrack’s activities and health and safety responsibilities . . . and how these relate to the activities of train operators, and other parties, eg contractors. It demonstrates how risks on Railtrack-controlled infrastructure (so far as they are within Railtrack’s responsibility) are effectively controlled.

“Objectives

E “1.3 The four main objectives of this railway safety case are: to demonstrate to the Health and Safety Executive, as acceptor of this railway safety case, that Railtrack as infrastructure controller . . . has the capability, commitment and competence to identify, assess and control the risks, associated with its undertaking, to the health and safety of . . . the public, and to provide the Health and Safety Executive with a working document against which it can check that the accepted risk control measures have been put into place and continue to operate in the way in which they are intended . . .

F “1.4 Railtrack, as infrastructure controller for the national rail network, has a key role to play in ensuring the overall safety and security of the network that forms its controlled infrastructure. Railtrack’s statutory obligations in this respect are very wide, encompassing general health and safety duties under the Health and Safety at Work etc Act 1974 and other relevant statutory provisions . . . under the Railways (Safety Case) Regulations 2000 . . .”

G 10 This description of the way in which Railtrack saw itself, is close to a claim that it has the *power* to regulate (as an incident of statutory provision) what happens across its network. Examination of the Regulations, however, discloses that any such perception should be viewed as little more than self-aggrandisement, since the only public bodies (authorities) which had the *power* to regulate safety at the relevant time were the Health and Safety Executive and the Railways Standards Board. The former is independent by statute and plainly a public authority in the terms of the 1998 Act and, indeed, has the responsibility of accepting or otherwise the safety case which Railtrack must submit to it. The latter is not answerable to Railtrack and is independent of it.

H 11 The involvement of public authorities in the 1998 Act is prescribed by section 6 of that Act which, where relevant, provides:

“(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.” A

“(3) In this section ‘public authority’ includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature . . .”

“(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”

“(6) ‘An act’ includes a failure to act . . .” B

12 So far as material to the present application, it is also to be noted that section 7 provides:

“(1) A person who claims that a public authority has acted . . . in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.” C

“(5) Proceedings under subsection (1)(a) must be brought before the end of—(a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances.” D

13 Finally, with regard to remedies provided by the 1998 Act, it should be noted that section 8 empowers the court to grant what remedy it “considers just and appropriate” but by subsection (3) restricts this power by providing:

“No award of damages is to be made unless, taking account of all the circumstances of the case, including—(a) any other relief or remedy granted, or order made, in relation to the act in question . . . and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford *just satisfaction* to the person in whose favour it is made.” (Emphasis supplied.) E

Subsection (4) then deals with the question whether the court should award damages and, if so, in what amount. What is left open is the class of person to whom “just satisfaction” should be accorded if there is a breach of one of the substantive obligations in the 1998 Act. F

Statutory provisions concerning railways

14 The search for the answer to the question whether or not the defendant is a public authority has to begin with an examination of its statutory origins. The seminal Act for these purposes is the Railways Act 1993 which was the vehicle employed to take the railways out of public ownership and vest them in private companies, of which the defendant was one. Section 6 of the 1993 Act requires any person who acts as the operator of any “railway asset” (as was the defendant in this case) to be authorised by licence. Licences were to be granted by the Secretary of State after consultation with the designated bodies: section 8. The defendant asserts, and so much is common ground, that it was not *directly* responsible for determining or setting safety standards for the railway industry. It further admits that it is an “infrastructure controller” within the meaning of the G H

A 2000 Regulations and that it owned and controlled the railway, including the track, signalling and bridge works, on the stretch of line on which the relevant accident occurred. In passing it is to be noted that by section 205 of the Transport Act 2000, the Strategic Rail Authority was created with the statutory purposes of promoting and developing the use of the railway network. By section 207 of the same Act, the Strategic Rail Authority was required to have regard to the need to protect persons from dangers arising from the operation of the railways and in particular “by taking into account any advice given by the Health and Safety Executive”. The role of the Strategic Rail Authority at the relevant time was described by its chairman (Sir Alastair Morton) as “the instrument by which Government policy in regard to railways is effected”.

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D 15 As previously noted, the 2000 Regulations were made under powers conferred by the Health and Safety at Work etc Act 1974. These Regulations revoked the similarly titled Regulations of 1994 under which the defendant had had specific duties of a public nature, namely the preparation of safety cases for submission to and approval by the Health and Safety Executive. By regulation 4(1) of the current Regulations the defendant, among others, is prohibited from using or permitting others to use the railway infrastructure unless: “(a) he has prepared a safety case . . . (b) the [Health and Safety] Executive has accepted that safety case . . .” Regulation 4(2) provides:

“An infrastructure controller [the defendant] who prepares a safety case shall—(a) procure the carrying out of an assessment of that safety case by an assessment body [other than the infrastructure controller itself] . . .”

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F 16 Regulation 5 of the 2000 Regulations prohibits the operation of a train unless the person who operates it has prepared a safety case and the Health and Safety Executive has accepted it. Such safety case has also to be submitted to the infrastructure controller who is required to submit it to an assessment body which is to provide a report of its assessment with a recommendation whether it is satisfactory or not for the purposes of the infrastructure controller, and whether or not such safety case will interfere with the infrastructure controller’s own safety case. The infrastructure controller is then required to scrutinise the train operator’s safety case and make its own recommendation whether the safety case should be accepted by the Health and Safety Executive: regulation 5(4).

G 17 Importantly, prior to 1 January 2001, the defendant was legally responsible for setting railway group standards which included engineering and safety standards, but under the Regulations, this responsibility was transferred to the Railway Standards Board. The duty which the defendant had with regard to safety cases was, it was submitted correctly, no more than to ensure that its own safety case was not rendered non-compliant because of non-compliance by some other operator’s safety case.

The relationship between sections 6(3)(b) and 6(5)

H 18 It is clearly the first of these statutory provisions which gives rise to the possibility that a public authority may possess legal characteristics which are both of a public and, antithetically, a private nature. That is to say that an authority having the latter characteristic may exhibit both, and thus be termed what is known as a “hybrid” authority.

19 The determination of the character of a body which may be either private, public or sometimes one or the other is a problem which has confronted courts on a number of previous occasions. The leading case on this topic is *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546. The subject matter was arcane concerning, as it did, the liability of owners of rectorial land for the cost of repairs to the chancel of the parish church. In the holding it is stated, at p 547:

“that a ‘public authority’ for the purposes of section 6 . . . could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public nature; that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils . . . were not core public authorities . . .”

20 Lord Nicholls of Birkenhead, who delivered the leading speech, said, at paras 6–12:

“6. . . the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country . . .”

“7. Conformably with this purpose, the phrase ‘a public authority’ . . . is essentially a reference to a body whose nature is governmental in a broad sense of that expression . . . The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution . . .”

“8. A further, general point should be noted. One consequence of being a ‘core’ public authority . . . is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of a Convention right. A core public authority seems inherently incapable of satisfying the Convention description of a victim: ‘any person, *non-governmental organisation* or group of individuals’ (article 34, with emphasis added) . . . In itself this feature throws some light on how the expression ‘public authority’ should be understood and applied. It must always be relevant to consider whether Parliament can have been [sic] intended that the body in question should have no Convention rights.”

“9. In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged

A varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society. . . .

B “10. Again, the statute does not amplify what the expression ‘public’ and its counterpart ‘private’ mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description ‘public’, essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. . . .

C “11. . . . Giving a generously wide scope to the expression ‘public function’ in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

D “12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? . . . Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”

21 Lord Hope of Craighead said, at para 47:

E “The test . . . is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of article 34 ought not to be regarded as a ‘core’ public authority for the purposes of section 6. That would deprive it of the rights enjoyed by the victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1) . . . It would undermine the protections against state control which are the hallmarks of a liberal democracy.”

He continued, at para 54:

G “The types of organisations and bodies against whom the provisions of a directive could be relied on were discussed in *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405. The court noted in para 18 that it had been held in a series of cases that provisions of a directive could be relied on against organisations and bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals. . . . Its conclusions were set out in para 20: ‘It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable to relations between

individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.’”

22 Lord Rodger of Earlsferry, at para 145, noted the features which had led the Court of Appeal, whose decision was overturned in the House of Lords, to conclude that the parochial church council was a public authority, for the purposes of section 6, as having been that it was created and empowered by law, that it formed part of the church established by law and that its functions included the enforcement through the courts of a common law liability resting upon persons who need not be members of the church. Lord Rodger continued, at para 160:

“A purposive construction of [section 6(1)] accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.”

Then he concluded, at para 166:

“what matters is that the PCC’s general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not in any sense under the supervision of the state . . .”

Accordingly Lord Rodger did not uphold the decision of the Court of Appeal that the PCC was a core public authority.

23 The speeches of the House of Lords have to be accorded the utmost respect. In commenting as I do, below, it is not to be thought that I diminish the importance of this proposition. However, it will not have escaped attention that there is an element of circularity in all the attempts which have been made to identify the key legal elements of what constitutes a core public authority.

24 Lord Nicholls, with seeming approval, referred to the article “The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act” [2000] PL 476 written by Dawn Oliver. Interestingly, the author wrote, at pp 480–481:

“But it is far from clear what the criteria are for determining why these bodies [the security services, the armed forces] are public, and thus how to determine whether other possibly-public bodies, such as the privatised utilities, regulatory bodies in sport, charities, universities, and private schools, colleges, hospitals and nursing homes and the like, should be treated as ‘public authorities’ under the Act. Given that the Human Rights Act binds both ‘true’ public authorities and others exercising public functions, it would be circular to define an authority as a public authority solely or even largely by virtue of the fact that it performed some public functions. It is suggested [by the author] that a better approach would be to concentrate on the nature of the body itself, its relationships with other bodies, whether ‘public’ or not, and its position in our constitutional arrangements. A number of criteria apart from the nature of their functions could be applied to explain why we treat the bodies mentioned above as public authorities. No single criterion will be satisfactory, but various combinations might explain the position and

A help in deciding whether a particular body is a ‘public authority’ under the Human Rights Act.”

25 The author goes on to discuss the extent to which there may be significance in the use of the word “authority” in the subsection. She draws attention to the fact that there may be an indication that bodies which have special authority “in the sense of coercive powers” over the civil and political rights of individuals may be what the Act intends. She continues, at p 481:

B “However, it would be anomalous if the single fact that a body possesses special powers or enjoys immunities in certain, possibly very limited, circumstances were to result in the position that it was subject to section 6(1) when exercising entirely different or separate functions in which it was not exercising special powers or authority. Such a construction would make the special provision for private bodies exercising public functions otiose.”

C The author goes on to opine that the mere fact of public funding cannot be a defining characteristic. By way of contrast, she draws attention to the importance of democratic accountability as the traditional means of ensuring the public interest in the proper conduct of government in that it assists in ensuring that (public) bodies do not act in their own interests, but “altruistically and in the public interest”. This it is suggested, at p 483, is a strong indicator of “publicness”. Under the cross-heading “The primacy of altruism and the public interest”, the author summarises her position:

D “Leading on from the previous set of considerations, it is suggested [it is her opinion] that the most reliable indicator of ‘publicness’ which the government and other bodies mentioned above have in common is that generally in our constitutional theory they are regarded as being under duties to act *only* in the public interest as they perceive it to be. Above all they are not regarded as having self-serving interests. Democratic accountability is largely designed to prevent self-serving activity and to promote the pursuit of public interest. This point was made in regard to public authorities specifically in *Griffiths v Smith* [1941] AC 170, 205–206: a body is a ‘public authority’ if it performs statutory duties and exercises public functions, and is not ‘carrying out transactions for private profit . . . but they must not be a trading corporation making profits for their corporators’.”

E 26 Explicitly, Dawn Oliver addressed the jurisprudence of the European Court of Human Rights. Since much of the article has been drawn from that corpus of law, it would only serve to lengthen this already lengthy discourse by making further express reference to the text of any such decisions.

F 27 It will be enough if I indicate that she refers to the landmark decision in *Foster v British Gas plc* (Case C-188/189) [1991] 1 QB 405. The contrast between that case and the present is striking and, in my judgment, informative. The defendants (the British Gas Corpn) were, of course, the nationalised suppliers of gas to the nation. The British Gas Corpn was by statute a body with a legal persona operating under the supervision of the authorities. Its members were appointed by the Secretary of State, who also determined their remuneration. The statutory objective set was the development and maintenance of an efficient, co-ordinated and economical supply of gas for Great Britain. In conjunction with the Secretary of State it

was to settle a research programme into matters which affected the supply of gas. Additionally, the Secretary of State had power to require the British Gas Corpn to report to him and comply with any directions he might give. The list of powers which the Secretary of State had the right to exercise over the British Gas Corpn is lengthy and can be found conveniently set out in paras 3 and 4 of the Advocate General's opinion in *Foster's* case.

28 From these authorities, as well as the academic article from Dawn Oliver, it is possible to put together a combination of factors which, in my judgment, demonstrate that *at the material time*, the emphasis is deliberate, the defendant was not a "core public authority" and in respect of its maintenance functions could not have been acting as such.

29 The primary purpose of the 1993 Act was to take the railways out of the public sector and return the industry to private ownership from which it had been transferred by virtue of the Transport Act 1962. In so far as there were public authorities which had responsibility for the railway industry at the material time, those must surely have been the Secretary of State for Transport and the Strategic Rail Authority, a body created by the Transport Act 2000. Arguably in the period immediately following privatisation, Railtrack did have functions of a public nature, in that it was responsible for setting group railway standards, a role or function that was removed by the 2000 Regulations. Although it is to be accepted that a simple list of functions and duties will not suffice to determine the question which is at issue here, I see no escape from descending in some detail to what will be the determining factors, or at least some of them. Thus:

(1) The business of running a railway is not intrinsically an activity of government, although it should be recognised that as in this country, so in others, governments have taken control, by nationalisation, of railways. It would have been hard to dispute the proposition that under the Transport Act 1947 with the powers vested in the Minister of Transport, the former British Railways Board was an emanation of government. The very purpose of privatisation was to break that mould and sever the railways from direct government control. Hence the interposition of the Office of the Rail Regulator between the Department of Transport and Railtrack as well as the train operating and rolling stock companies.

(2) There was a clear commercial objective in Railtrack's performance. It was concerned to make profits for its shareholders from its operations as an infrastructure company. Railtrack had been stripped of any regulatory function by the 2000 Regulations. Its duties which may affect third parties under those Regulations can be considered, for present purposes, to relate to ensuring that not only its own safety case(s) is or are compliant but also that the safety cases of other companies which use its tracks were compliant with its own. This latter function, however, is quite separate from having power to regulate the manner in which those other companies conducted their railway business.

(3) There is no obligation on Railtrack to conduct its operations in a manner subservient to the public interest. It was free to conduct its business, albeit in compliance with its licence terms and conditions, in the manner in which it saw fit and best calculated to make profits for its shareholders. By way of an historical aside, this may have led indirectly to its downfall as a plc.

(4) Railtrack was not democratically accountable to central or local government. In so far as it was accountable to any person other than its

A shareholders, it was to the Office of the Rail Regulator, which was an office separate from central government control.

(5) Railtrack's board of directors was appointed by the company and their appointment was not subject to government influence or control.

(6) Railtrack possesses no special powers nor does it enjoy immunities which might have been indications of 'publicness', if they had existed.

B (7) Contrary to the claimants' case, it was not publicly funded. Its income was derived from the receipt of track access charges from the train operating companies, part only whose income was derived from public subsidy.

(8) Railtrack had no special powers beyond those which resulted from those which regulate relations between individuals.

C 30 The parties were at issue as to whether or not the defendant had a (public) function to ensure safety on the railways. The claimants submitted that the defendant had that obligation, whereas the defendant's case was that, in so far as it had a public function to perform, it was to operate the infrastructure, it was the function of the Health and Safety Executive to ensure safety. The question may be whether or not the obligation of the Health and Safety Executive, in this respect, was to the point of exclusion of the defendant in also having a public role. In this respect, it may be illuminating to note the manner in which Railtrack viewed itself for the purposes of its transitional safety case published only days before the accident out of which these claims arise: see para 9 above.

D 31 This whole topic was discussed at length in the Cullen Report: Ladbroke Grove Rail Inquiry Part 2 Report (2001). I do not propose to burden this judgment with extensive quotations from this major work. It will be sufficient to alert the reader to the following passages: paras 8.1 to 8.25. The next paragraphs are of crucial importance to an understanding of the issues which arise in the present case. Under the cross-heading "Discussion and conclusions", Lord Cullen draws attention to the position, not accepted by Railtrack, that they were in the position of "quasi-regulator" and added that "that description was justified since they clearly exercised control through the rules and restrictions which they imposed" on the train operators who used their network: para 8.26. Lord Cullen went on to express the view that:

"8.27 . . . it was inappropriate that a commercial organisation, such as Railtrack became in 1996, should continue to fulfil such a role in regard to other commercial organisations such as train operators . . .

G "8.28 . . . I endorse the transfer from Railtrack to the safety regulator of the function of acceptance of the safety cases of train operators and removal from the [Safety and Standards Directorate] of their functions in regard to safety cases and group standards."

Then he said, at para 8.33:

H "It is and remains correct . . . to regard Railtrack as having control of 'premises', namely their railway infrastructure of their network. Thus they are for the purposes of the [2000] Regulations an 'infrastructure controller'. They have an important interest in regard to whether the safety case of a train operator or a material revision of such a safety case is accepted or not, since how the train operator manages the risks which are its concern, in conjunction with the activities of other railway operators, may affect the question whether Railtrack comply with their

own duties under health and safety legislation. However, the provision that the safety regulator is to look to Railtrack for a recommendation indicates a continuing dominance on the part of Railtrack which is not justified.”

32 With respect to the eminent views expressed by Lord Cullen, it is not necessarily the case that he was directly concerned with the specifics of public versus private functions and the applicability of the 1998 Act to circumstances which are directly relevant for present consideration. On the other hand, this passage confirms my understanding of Railtrack’s role in relation to the appraisal of the safety cases of others: see para 17 above.

33 It is tolerably clear, however, that as originally set up by statute, both in primary and delegated legislation, Railtrack had functions which were of a public nature. The point of interest is whether as the result of the 2000 Regulations, Railtrack no longer possessed functions of a public nature or whether it had become a hybrid such that it is still caught by the provisions of section 6(3)(b) of the 1998 Act or whether in exercising the particular functions in regard to maintenance of the track and points it was performing an act, the nature of which was private within subsection (5) of the same section.

34 It was accepted on behalf of the claimants that Railtrack was, in general terms, exercising hybrid functions. But the contention went further in that it was said that in regard to safety of the network, Railtrack was acting as a public authority in that: (1) it was publicly funded in respect of its safety obligation; (2) it exercised statutory powers by the 2000 Regulations; (3) it performed functions previously performed by central government through the former British Railways Board and was “the vehicle selected to perform the function of ensuring safety on the rail network”; (4) the rail network was for the benefit of the public and therefore was a public service; (5) once a public authority, it could not be shorn of its “publicness” (pace Dawn Oliver, above) as the result of privatisation.

35 For the defendant it was submitted that there was no single or simple test to determine whether an organisation was performing a public function or not. The contentions of law advanced by the claimant in the further information cannot satisfy whatever the limits of the appropriate test may be. Thus, the fact that the defendant held an operating licence does not satisfy the test: all infrastructure, train and station operators are required by the same statutory provisions to hold a licence issued by the Secretary of State for Transport. This feature cannot be decisive, yet in conjunction with other features it could be a factor to be taken into account. It was said that the defendant had a central role in regard to safety, but so, too, does every other employer owe duties under the provisions of section 3 of the 1974 Act. Safety is merely an aspect of the manner in which the business is carried out, and not a function of the business, as such. Whereas, prior to the 2000 Regulations, the defendant had a duty to establish and maintain railway group standards as well as to monitor and control the safety cases of others who used the railway infrastructure, by the date of the Potters Bar accident, it had been relieved of this *function*.

36 At the heart of the claimant’s pleaded case is the allegation that the cause of the accident was the failure to maintain the points which were defective. In my judgment, such a function is hard to allocate to one that is “public” within section 6 of the 1998 Act.

A 37 On this part of the case, my conclusion is that Railtrack was not, and therefore was not acting as, a public authority for the purposes of the 1998 Act. Had I reached the opposite conclusion in respect of the first part of this question, I should without hesitation have rejected the proposition that having responsibility for the maintenance of points and track on the railway network would have involved Railtrack acting as a hybrid authority. Such a function plainly could not reasonably be construed as the function of a public authority.

B
Article 2—The right to life

38 It is by now accepted jurisprudence that the concept of “right to life” goes further than the mere preservation of life itself. As Lord Bingham of Cornhill said in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 2–3:

C “2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life . . .

D “3. The European court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.”

E Lord Bingham summarised what were the perceived defects of the traditional short form coroner’s verdict and said, at para 45:

F “It follows from the reasoning earlier in this opinion that the judge’s declaration”—that by reason of the restrictions on the verdict at the inquest into the death of the deceased that inquest was inadequate to meet the procedural obligation in article 2 of the European Convention—“was correctly made, although not for all the reasons he gave. There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. The jury’s verdict . . . did not express the jury’s conclusions on these crucial facts. This might have been done by a short and simple verdict . . . Or it could have been done by a narrative verdict or a verdict given in answer to the coroner’s questions. By one means or another the jury should, to meet the procedural obligations in article 2, have been permitted to express their conclusion on the central facts explored before them.”

H 39 The essence of the decision in the *Middleton* case was that there had to be an investigation which would not merely demonstrate “where and how”, but also in what circumstances, the deceased had met his death at the hands of a public authority.

40 In the present case, the claimant does not complain about the failure to investigate, rather that there is a failure by the state to provide an adequate remedy as providing the basis of its failure to protect life. The position is, however, that the estate of the deceased has a right to claim in respect of loss which she suffered under the Law Reform (Miscellaneous Provisions) Act 1934; if there was any financial loss caused to the third and fourth claimants, they would have had a claim under the Fatal Accidents Act in the usual way. Furthermore, on the (safe) assumption that the death was caused by the negligence of the defendant, that would inevitably have led to a breach of section 3 of the 1974 Act.

41 The defendant drew attention to the fact that it was not alleged against it that the death had been caused by gross negligence on its part. The possible relevance of this fact is that the procedures which exist in the present case are sufficient to meet the obligations of the state under article 2. In this context reference was made to *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461. In giving the judgment of the court Sir Anthony Clarke MR said, at paras 105–107:

“105. Subject to what is said in paras 97–103 above, we agree with those conclusions [of Richards J in *R (Goodson) v Bedfordshire and Luton Coroner* [2006] 1 WLR 432]. It seems to us that, however it is analysed, the position is that, where a person dies as a result of what is arguably medical negligence in an NHS hospital, the state must have a system which provides for the practical and effective investigation of the facts and for the determination of civil liability. Unlike the cases of death in custody, the system does not have to provide for an investigation initiated by the state but may include such an investigation. Thus the question in each case is whether the system as a whole, including both any investigation initiated by the state and the possibility of civil and criminal proceedings and of a disciplinary process, satisfies the requirements of article 2 as identified by the European court . . . namely (as just stated) the practical and effective investigation of the facts and the determination of civil liability.

“106. The question is whether the system in operation in England in this case meets those requirements. In our opinion it does. The system includes . . . the possibility of civil process and, importantly, the inquest. We can understand the point that the possibility of civil proceedings alone might not be sufficient because they do not make financial sense and may not end in a trial at which the issues are investigated . . .

“107. In these circumstances, while article 2 is engaged in the sense described above, the present system including the inquest does not fall short of its requirements in any way. On the contrary it complies with it.”

42 The claimants did not accept that this was a complete statement of the applicable law, as laid down in European jurisprudence. The submission was to the effect that the approach of the Court of Appeal was incomplete and that, in its reference to gross negligence (see para 96), the court was not attempting to define what was required in order to require a state initiative in regard to investigating the circumstances of the death, but was giving examples of what might do so. In the present case, it was argued, on the assumption that Railtrack was acting as a public authority, the absence of a remedy which could provide “just satisfaction” meant that the state was in

- A breach of its article 2 obligations. In my judgment, the mere fact that two of the relatives of the deceased, who have no claim other than in respect of funeral expenses arising from the death of the deceased in present circumstances, does not involve the state in any breach of its obligations under article 2. Gross negligence, or manslaughter, is not alleged against Railtrack. There is a civil remedy. It is within the reasonable margin of appreciation of the state to limit those who are entitled to claim compensation to those who are financially dependent on the deceased. Who otherwise should say where the line should be drawn between those who may claim from those who may not?

Limitation

- C 43 Section 7 of the 1998 Act prescribes a limitation period of one year from the date of the occurrence giving rise to, and the initiation of, the proceedings except that, if the court considers it equitable to extend the period, it may do so. The word “equitable” in this statutory context has an obvious resonance with its use in the Limitation Act 1980. Section 33(1) of that Act permits the court to direct that the primary period of limitation shall not apply if it appears to the court that it would be “equitable” to allow an action to proceed, having regard to the extent to which prejudice would be caused to the claimant or the defendant as the case might be. While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in section 33(3), which are inclusive and not exclusive of “all the circumstances”, it would not make any sense to disregard them as having no relevance to the circumstances which the court should consider in exercising its discretion whether or not to extend time under these provisions of the 1998 Act.

E 44 The facts, material for present consideration, are set out in the witness statements. On 3 March 2003, the first claimant, who is a solicitor and practises in Scotland, met the then chief executive of the defendant in order to discuss the claim. The note of that meeting states:

- F “Camerons are also fully aware of the terms of the Fatal Accidents Act 1976 and the Administration of Justice Act 1982 as they affect the case of [the deceased], but are also aware of the potential situation under articles of the European Convention on Human Rights.”

- G 45 On 4 July, solicitors acting on behalf of Railtrack wrote to the claimants stating that, for the claim which had been put forward, there was no legal basis. At the same time, the writer of the letter, without making a formal admission of liability, said that “the railway industry [had] agreed to settle claims . . . where recoverable at law. This process is proceeding as if liability for the accident had been established”. The first claimant acknowledged, with understandable protest, this to be Railtrack’s position. Unhappily, the first claimant took no effective action to challenge the position which had been adopted by Railtrack, until the commencement of the present proceedings.

- H 46 There are, in my judgment, no circumstances present which would make it equitable for time to be enlarged. The facts are that, as already noted, the first claimant is a solicitor. Within a few days, he had contacted English solicitors for advice in regard to the consequences which flowed from the death of the deceased. By his own admission he was, if only

vaguely, aware that there was the possibility of there being a Human Rights Act dimension to his potential claim and yet, for a full year after the denial of liability, the basis that in law there was no recoverable claim, he did nothing to investigate the legal position. He had the ability to have done so. The defendant had done nothing to lull him into a sense of security that limitation might not become an issue.

47 As a matter of the proper construction of the section, the presumption has to be that the need to prove that it would be “equitable” not to apply the limitation provisions rests on those who seek that result. In other words, the burden must be on the claimant to prove that there are circumstances which make it “equitable” why the defendant should not be able to take advantage of the limitation provisions. There are, in my judgment, no circumstances present in this case where it would be appropriate to rule that they should not apply. Quite clearly, a huge administrative burden would fall on the defendant if it was forced to meet the claim on its strict merits. The disadvantage to the claimant is that he has lost the claim, but that is the consequence of failing to issue his proceedings in time.

48 If it were appropriate to follow the provisions contained in section 33(3) of the Limitation Act 1980, the answer would still be the same. The length of the delay and the reasons for it (paragraph (a)) are all attributable to the claimants’ action or lack of it. As to paragraph (b) it is unlikely that the evidence of either party will be less cogent than if the action had been brought within time; there has been a full investigation and no doubt witness statements will have been taken, witnesses will be able to refer to their statements. The defendant has responded to requests for information or inspection (paragraph (c)); the claimant cannot show, however, that he took timely steps to seek legal advice in relation to a problem which he knew might exist under the 1998 Act.

Conclusion

49 In the above circumstances, there is no likelihood of the claimant establishing that the defendant is or was acting as a public authority in regard to the maintenance of the points and track at Potters Bar at the material time. There exists no basis upon which it would be appropriate to extend the time for bringing the proceedings. The allegation that the defendant was in breach of article 2 of the European Convention is bound to fail. In these circumstances it is unnecessary to consider whether a new tort for causing wrongful death should be devised. In these circumstances the proper order is that there be judgment for the defendant under the provisions of CPR Pt 24 in regard to the whole of the claim.

Judgment for the defendant.

Solicitors: Bridge McFarland, Grimsby; Kennedys.

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