Neutral Citation Number: [2021] EWHC 1571 (Ch)

Case Nos: HC-2010-000054; BL-2020-001972

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 15/06/2021

**Before** :

**MR JUSTICE FANCOURT**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE MANCHESTER SHIP CANAL COMPANY LIMITED** | **Claimant** |
| **- and -** | |
| **UNITED UTILITIES WATER LIMITED** | **Defendant** |

**And between :**

| | |
|---|---|
| **UNITED UTILITIES WATER LIMITED** | **Claimant** |
| **- and -** | |
| **THE MANCHESTER SHIP CANAL COMPANY LIMITED** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr David Hart QC, Mr Charles Morgan and Mr Nicholas Ostrowski** (instructed by **BDB Pitmans LLP**) for **MSCCL**
**Mr Jonathan Karas QC, Mr Richard Moules and Mr James McCreath** (instructed by **Pinsent Masons LLP**) for **UUWL**

Hearing dates: 26, 27, 28 April 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

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

.....

THE HON. MR JUSTICE FANCOURT

**Mr Justice Fancourt :**

1. This is a judgment on a preliminary issue in the original 2010 claim by the Manchester Ship Canal Company Limited ("MSC") against United Utilities Water Limited ("UU") and on a separate Part 8 claim issued by UU in 2018 seeking negative declaratory relief. As its name suggests, MSC is the owner of the Manchester Ship Canal ("the Canal"), which runs for over 35 miles from just east of Salford Quays in Greater Manchester to the Mersey Estuary at Eastham. UU is the water and sewerage undertaker for the North West region, appointed under the Water Industry Act 1991.

2. The preliminary issue is something of a loose end, remaining after UU was granted summary judgment on issues in the 2010 claim by Newey J as long ago as February 2012. His judgment was overturned by the Court of Appeal and finally restored by the Supreme Court: [2014] UKSC 40; [2014] 1 WLR 2576. The preliminary issue for decision relates to only 5 of the 121 sewerage outfalls in total that are vested in UU and discharge into the Canal. It concerns the inter-relationship between the implied statutory right to continue to discharge from outfalls that vested in a statutory undertaker before 1 December 1991, as held to exist by the decision of the Supreme Court, and the termination after that date of contractual licences (or tenancies) then existing permitting use of 5 outfalls ("the licensed outfalls"). The issue is whether the implied statutory right arose and exists as regards (or UU is otherwise entitled to continue to drain from) the licensed outfalls if the discharge was consensual on 1 December 1991.

3. The 2018 claim raises a more substantial point. It was issued by UU when, following refusal by Newey J in 2016 of permission to amend the remainder of its original claim, MSC threatened to issue new proceedings in trespass, claiming damages for the unlawful discharge of inadequately treated sewage effluent from about half the total number of outfalls into the Canal ("the category B outfalls"). It is common ground that any such discharge only happens on occasions, as it does in regions throughout the country when particularly heavy rainfall causes the capacity of the sewerage system to be temporarily exceeded. Complete data on the number of occasions on which contaminated effluent has entered the Canal is not available. MSC contends that even though UU has an implied statutory right to discharge from the category B outfalls, any discharge that is insufficiently treated is unauthorised by statute and therefore a trespass.

4. In the 2018 claim, UU seeks a declaration that any such complaint, premised only on the alleged fact of discharge of contaminated effluent from UU's category B sewerage outfalls into the Canal, is not actionable by MSC in a private law action, as a matter of construction of the Water Industry Act 1991. It contends that the only remedies for the owner of a watercourse in such circumstances as exist here are those provided by the regulatory and enforcement machinery of the Act.

5. The parties exchanged evidence in relation to the preliminary issue in the 2010 claim. UU also served detailed evidence concerning the regulation of its sewerage business and the nature, extent and condition of its sewerage infrastructure, today and in 1991,

in support of its Part 8 claim. MSC decided not to serve any evidence in reply, considering that UU's evidence was irrelevant to the issue of statutory construction raised by the claim.

6. As will be evident from this brief introduction, MSC's original claim and the issues for determination now arise out of the terms and effect of the water industry legislation of 1991, which followed the radical privatisation and regulatory reforms of the Water Act 1989. Under the 1989 Act, the water and sewerage infrastructure, apparatus and functions originally vested in local authorities and then in public sector regional water authorities (under the Public Health Acts 1875 and 1936 and the Water Act 1973 respectively) were vested in approved, private water and sewerage undertakers. The principal 1991 statute is the Water Industry Act 1991, which was in large part a consolidation Act but also includes some reforms recommended by the Law Commission. Other statutes forming part of the 1991 legislation are the Water Resources Act 1991, the Land Drainage Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991. It will not be necessary to refer in any detail to the latter statutes and accordingly I will refer to the Water Industry Act hereafter as "the 1991 Act".

**Decisions of the higher courts on the 1991 Act**

7. The reforms of 1989 and the effect of the 1991 legislation, in particular the 1991 Act, have been considered in some detail by the higher courts, including by the Court of Appeal in British Waterways Board v Severn Trent Water Ltd [2001] EWCA Civ 276; [2002] Ch 25 ("BWB"), by the House of Lords in Marcic v Thames Water Ltd [2003] UKHL 66; [2004] 2 AC 42 ("Marcic") and by the Supreme Court in its decision in this case in 2014.

8. In BWB, the Court of Appeal concluded that, although provisions similar to many sections in the 1991 Act could be found in the Public Health Acts 1875 and 1936, the overall purpose of the 1991 Act was very different, and therefore previous authority on the existence of an implied right to drain into watercourses did not apply under the 1991 Act. The implication of a general power to discharge treated effluent was inconsistent with the provisions of the 1991 Act. Chadwick LJ considered that the judge had been led into error by assuming that the pre-1989 law remained unchanged save to the extent that changes could be identified in the 1989 Act. That, he said, was the wrong approach: the new statutory code had to be construed as a whole.

9. In Marcic, Lord Nicholls of Birkenhead and Lord Hoffmann each explained that the 1991 Act contains an elaborate regime for regulation of the water industry in the public interest, with a view to securing environmental benefits, improvements to the infrastructure, a reasonable return on capital for the private commercial undertaker and a better service for customers, both as regards prices charged and quality of service. The legislation contains its own enforcement and remedial schemes. The various objectives of the regulatory scheme entail that a contravention of a statutory duty does not necessarily result in enforcement.

10. Mr Marcic was held to have no private law claim in respect of severe consequences of flooding of his property because the existence of a private claim would be inconsistent with (indeed, would "set at nought" or "subvert") the detailed statutory scheme, which contemplates an approved scheme of priorities for capital expenditure to achieve the

regulatory objectives as a whole. Although the law of nuisance had previously been to similar effect under the Public Health Acts, in that a mere failure by a local authority to build more or better sewers was not an actionable nuisance, it was on the basis of the different provisions of the 1991 Act, not the previous law, that the Supreme Court allowed Thames Water's appeal and denied Mr Marcic's claim. It will be necessary to consider the basis of that decision in some detail later.

11. In this case, the Supreme Court in 2014 held that the Court of Appeal in BWB had been right to hold that the 1989 and 1991 Acts changed the law that previously allowed a local authority or regional water authority to drain surface water and treated effluent into a watercourse. No such general right was conferred by the 1991 Act: a statutory sewerage undertaker wishing to acquire such a right had to negotiate terms or exercise its powers of compulsory acquisition. However, the Supreme Court allowed UU's appeal on a narrower ground, namely that it was implicit, by reason of the terms of s.116 of the 1991 Act, that where a right to discharge through an existing outfall had vested in the undertaker prior to 1 December 1991, that right continued under the 1991 Act, otherwise UU would not be able to comply with its duties under ss. 94, 106 and 116 of the 1991 Act. The right was held to continue in perpetuity, not just until the necessary rights could be acquired by the undertaker.

12. As a consequence, UU established that it had a right in principle to continue to discharge surface water and treated effluent into the Canal. Despite that, many issues remain between UU and MSC about the extent of the right and whether UU is contravening other statutory provisions.

13. It is clear from the decisions of the higher courts referred to above that decisions on the wording of similar statutory provisions in predecessor legislation, or about the availability of common law remedies alongside that legislation, will not provide a reliable guide to the meaning and effect of the 1991 Act. The question of whether a common law remedy can exist alongside the remedial and enforcement schemes within the 1991 Act has to be approached on the true construction of that Act as a whole. The particular statutory provisions on which MSC now relies were not directly in issue in any of the above cases, save that they were relied on in support of the argument of UU that there was an implied right to discharge surface water and treated effluent.

**Review of the statutory scheme in the 1991 Act**

14. In more detail, the scheme of the 1991 Act can be summarised as follows.

15. Part I creates the Water Services Regulation Authority (commonly referred to as OFWAT) ("the Authority") as the water and sewerage regulatory body and imposes duties on it and on the Secretary of State. Section 2(2A) identifies regulatory objectives to which end the powers and duties of the Authority and the Secretary of State are to be carried out:

> "(a) to further the consumer objective;
>
> (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

> (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;
>
> (d) to secure that the activities authorised by the licence of a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out; and
>
> (e) to further the resilience objective."

16. The "consumer objective" is to protect the interests of consumers, wherever appropriate, by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services. The "resilience objective" is to secure long-term resilience of undertakers' systems as regards environmental pressures, population growth and changes in consumer behaviour, and to ensure that undertakers take steps to meet in the long term the need for supply of water and the provision of sewerage services, including by promoting appropriate long-term planning and investment and by managing water resources in sustainable and efficient ways.

17. In exercising any of the powers or performing any of the duties, the Authority and the Secretary of State must have regard to the principles of best regulatory practice: regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed (s.2(4)). Under s.3, the Authority and the Secretary of State are required to be consistent, so far as possible, and take into account the proposals of the Environment Agency (and in Wales, the Natural Resources Body for Wales).

18. Part 2 of the 1991 Act contains detailed provision for the appointment of relevant water and sewerage undertakers and for the grant of water supply and sewerage licences. Appointments may include such conditions as appear to be requisite or expedient, having regard to the duties imposed on an undertaker. Chapter 2 of Part 2 includes important provision for the enforcement of the duties of undertakers and licensees and, in default, for the imposition of financial penalties. Thus, in the case of any apparent contravention of a statutory requirement or condition, where the undertaker or licensee is causing or contributing to, or is likely to cause or contribute to, that contravention, the Secretary of State or the Authority shall make a final enforcement order or may instead make a provisional enforcement order. In deciding whether it is appropriate to make a provisional enforcement order, regard must be had to the extent to which any person is likely to sustain loss or damage as a result of the contravention before a final enforcement order is made. Importantly, this enforcement machinery only applies to duties imposed on the undertaker or licensee in consequence of its appointment and which are made enforceable in that way under any enactment or subordinate legislation (s.18).

19. There are however significant exceptions to the duty to enforce contraventions, including where an undertaking to remedy is given and where duties imposed on the Authority or Secretary of State under Part 1 of the 1991 Act preclude the making or

confirmation of such an order (s.19(1)). A person served with an enforcement order may challenge it by application to the High Court (s.21).

20. The effect of an enforcement order is specified in s.22. The obligation to comply with it is a duty owed to any person who may be affected by a contravention of the order. A breach of the duty causing such a person loss or damage is actionable at the suit of that person. Without prejudice to the entitlement to bring such civil proceedings, compliance with an enforcement order is also enforceable by the Authority or Secretary of State in civil proceedings for an injunction or other appropriate relief. Under s.22A, separately, the Authority may impose on a statutory undertaker a financial penalty of such amount as is reasonable, not exceeding 10% of the turnover of the company, for contravention of any condition of its appointment or a failure to achieve prescribed standards of performance.

21. Part 3 of the 1991 Act is concerned with the general duties and supply duties of water undertakers and licensed water suppliers, which are not directly material to this claim. However, it is notable that s.37 imposes a general duty on every water undertaker to develop and maintain an efficient and economical system of water supply within its area; to ensure that all such arrangements have been made to provide supplies of water to premises and persons in that area requiring them; and to maintain, improve and extend the water mains and other pipes, as necessary, to meet the undertaker's detailed obligations under Part 3. That duty is stated to be enforceable under s.18.

22. Part 4 of the 1991 Act is concerned with the functions of sewerage undertakers, the provision of sewerage services and the discharge of trade effluent. S.94 imposes on every sewerage undertaker a general duty broadly equivalent to the general duty imposed on a water undertaker by s.37 as regards the provision and maintenance of a system of public sewers and the emptying and effectual dealing with the contents of those sewers ("the s.94 duty"). The s.94 duty is similarly expressed to be enforceable under s.18. I will return below to the exact terms of s.94. S.95 authorises the Secretary of State to prescribe by regulations contraventions of statutory requirements that are to be treated as breaches of the s.94 duty and standards of performance to be achieved in the provision of sewerage services. The regulations may provide that, if a sewerage undertaker fails to meet a prescribed standard, it shall pay such amount as may be prescribed to any person who is affected by the failure (s.95(2)). These are comprised in the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 and the Water Supply and Sewerage Services (Customer Service Standards) (Amendment) Regulations 2017.

23. Chapter 2 of Part 4 contains detailed duties and powers for a sewerage undertaker in relation to the requisition and provision of public sewers, the adoption of sewers and disposal works and the communication of drains and private sewers with public sewers and between public sewers, as well as other ancillary matters, including restrictions on the use or construction of sewers. Of material significance is that, subject to certain conditions, it is the duty of a sewerage undertaker to provide a public sewer for the drainage of any domestic premises (s.98). Provided that a requisition is properly made and the premises qualify, the undertaker must provide a sewer and any necessary lateral drain that is needed to effect a connection and allow effectual drainage. The fact that existing sewers are already overcharged does not entitle the undertaker to refuse a connection.

24. Also directly material is the limited power conferred by s.116 to discontinue use of a public sewer vested in the undertaker. Before any person lawfully using a sewer for any purpose is deprived of its use, the undertaker must provide a sewer which is equally effective for their use for that purpose and carry out any work necessary to connect that person's drains or sewers with the replacement sewer. A sewerage undertaker therefore cannot simply close off a public sewer, if it is causing or contributing to flooding or unlawful discharge, without providing at its own expense a replacement sewer that is effective to serve all those using the existing sewer. (It was a sewerage undertaker's inability immediately to discontinue use of existing sewers that led the Supreme Court to conclude that a right to continue to drain through existing outfalls into watercourses was implicit in the scheme of the 1991 Act.)

25. Part 5 of the 1991 Act contains the provisions that restrict and regulate the amounts that water and sewerage undertakers can charge. Money that the undertaker expends on its apparatus and services has to be funded by customers and the amounts expended and so funded are subject to regulatory control, bearing in mind the consumer objective among other regulatory objectives. Undertakers may produce a charging scheme for each 12 month period and if the Authority considers that the scheme is non-compliant in one or more respects with requirements of the Act or rules made under it, it can give directions to the undertaker to do or not do a thing specified. The undertaker must comply with the directions, which are enforceable under s.18.

26. Part 6 contains various provisions conferring powers on undertakers to acquire land and to lay pipes, and powers of entry on land for various purposes. It also contains provision for compensating those whose interests are damaged by the exercise of certain powers: in relation to street works, where land is diminished in value by the exercise of pipe-laying powers, and in exercising powers under the relevant sewerage provisions, as defined in s.219. The detailed provisions are found in Schedule 12 to the 1991 Act. Part 6 also contains "protective provisions", which limit the powers of a relevant undertaker to do works that interfere with certain interests or property; confer powers on other authorities and undertakers to do works that may affect a sewerage undertaker's property; and confer rights on landowners to require pipes or other apparatus to be moved at their cost to facilitate improvements of the land. One specific provision in this Part in respect of watercourses (s.186(3)) is directly material to the argument of MSC in this case and I will return to it.

27. In parallel with the 1991 Act, the Water Resources Act 1991 confers power on the Secretary of State to require what is now the Environment Agency ("the Agency") to subject particular categories of waters to certain standards of water quality. This is currently performed through the Water Environment (Water Framework Directive) (England and Wales) Regulations 2016, which impose obligations on the Agency as to water quality, and The Environmental Permitting (England and Wales) Regulations 2016 ("the Permitting Regulations"), which regulate discharges of unclean water by a system of environmental permits. The Permitting Regulations make unlawful and impose criminal liability for any "water discharge activity" (which includes a discharge of sewage effluent) except to the extent authorised by a permit. The system operates by placing conditions on permits, depending on the nature of the discharge and the type of receptor, which may relate to the frequency or content of the permitted discharge.

28. In the event of breach of an environmental permit, the Agency may extract an enforcement undertaking from a polluter, in lieu of prosecution: s. 50 Regulatory

Enforcement and Sanctions Act 2008, which applies to the Permitting Regulations. An enforcement undertaking may include the payment of a sum of money to compensate any person affected by an unlawful discharge as well as remedial action.

## The 2018 claim

29. The issue raised in the 2018 claim concerns whether the statutory scheme of powers and duties, regulation, enforcement and remedies described above was intended by Parliament to exclude common law remedies for what would otherwise be tortious conduct of a sewerage company. The parties agree that it is an issue of statutory ouster, namely whether, as a matter of construction of the statute, Parliament intended to survive common law remedies for a state of affairs for which the statute provides a remedy, or whether the only remedies are those provided by the statute. The test is whether "looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended [to] coexist with it": R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2010] UKSC 54; [2011] 2 AC 15 at [34], per Lord Dyson JSC. In the previous paragraph, Lord Dyson said:

> "If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament. A good example of this is *Marcic*, where a sewerage undertaker was subject to an elaborate scheme of statutory regulation which included an independent regulator with powers of enforcement whose decisions were subject to judicial review. The statutory scheme provided a procedure for making complaints to the regulator. The House of Lords held that a cause of action in nuisance would be inconsistent with the statutory scheme. It would run counter to the intention of Parliament."

30. The question now is whether the conclusion is the same where the complaint made by MSC is one of unauthorised discharge into the Canal of sewage effluent through outfalls forming part of UU's undertaking, rather than the escape of sewage from Thames Water's inadequate sewers into Mr Marcic's garden.

31. The statutory provisions that are of primary importance to the argument on this issue are the following.

32. As summarised above, s.18 of the 1991 Act is concerned with the Authority's and the Secretary of State's powers of enforcement of conditions or requirements of an undertaker or licensee. Subsections (6) and (8) are, so far as material, in these terms:

> "(6) For the purposes of this section and the following provisions of this Act –
>
> (a) the statutory and other requirements which shall be enforceable under this section in relation to a company holding an appointment under Chapter I of this Part …. shall be such of

> the requirements of any enactment or of any subordinate legislation as --
>
> (i) are imposed in consequence of that appointment ….; and
>
> (ii) are made so enforceable by that enactment or subordinate legislation
>
> …….
>
> (c) the enforcement authority in relation to each of the statutory and other requirements enforceable under this section shall be the Secretary of State, the Authority or either of them, according to whatever provision is made by the enactment or subordinate legislation by which the requirement is made so enforceable.
>
> ….....
>
> (8) Where any act or omission –
>
> (a) constitutes a contravention of a condition of an appointment under Chapter I of this Part or of a condition of a licence under Chapter 1A of this Part or of a statutory or other requirement enforceable under this section; or
>
> (b) causes or contributes to a contravention of any such condition or requirement,
>
> the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention."

33. Thus, the enforcement scheme introduced by s.18 and the sections that follow it in Chapter 2 of Part 1 of the 1991 Act only applies in respect of those statutory and other requirements that are expressly made so enforceable by a statute or statutory instrument. If no such provision is expressly made in respect of a given requirement applying to a statutory undertaker, s.18 does not apply. Where s.18 does apply in respect of an act or omission, the remedies for such act or omission are: those provided in s.18 itself; those expressly provided by an enactment; and those that are otherwise available on a basis other than that the act or omission is a contravention of such a requirement enforceable under s.18. Even where enforcement under s.18 is available in respect of an act or omission, that therefore does not of itself exclude a remedy for it that arises on some other basis.

34. S. 94 imposes a general duty on an appointed sewerage undertaker and s. 95 empowers the Secretary of State to make regulations about breaches of that general duty and performance standards. They state, so far as material:

> "94--(1) It shall be the duty of every sewerage undertaker –

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and

(b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

(2) It shall be the duty of a sewerage undertaker in performing its duty under subsection (1) above to have regard –

(a) to its existing and likely future obligations to allow for the discharge of trade effluent into its public sewers; and

(b) to the need to provide for the disposal of trade effluent which is so discharged.

(3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above –

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Authority.

(4) The obligations imposed on a sewerage undertaker by the following Chapters of this Part, and the remedies available in respect of contraventions of those obligations, shall be in addition to any duty imposed or remedy available by virtue of any provision of this section or section 95 below and shall not be in any way qualified by any such provision.

…..

95--(1) for the purpose –

(a) of facilitating the determination of the extent to which breaches of the obligations imposed by virtue of the following provisions of this Part are to amount to breaches of the duty imposed by section 94 above; or

(b) of supplementing that duty by establishing overall standards of performance in relation to the provision of sewerage services by any sewerage undertaker,

the Secretary of State may, in accordance with section 96 below, by regulations provide for contraventions of such requirements

> as may be prescribed to be treated for the purposes of this act as breaches of that duty.
>
> (2) The Secretary of State may, in accordance with section 96 below, by regulations prescribe such standards of performance in connection with the provision of sewerage services as, in his opinion, ought to be achieved in individual cases.
>
> (3) Regulations under subsection (2) above may provide that, if a sewerage undertaker fails to meet a prescribed standard, it shall pay such amount as may be prescribed to any person who is affected by the failure and is of a prescribed description.
>
> ……"

Thus, the s.94 duty is expressly made enforceable under s.18 but, subject to any regulations made, other remedies available in respect of other obligations imposed under sections 98 to 141 of Part 4 are not displaced by the s.94 duty or by the remedies provided in sections 94 and 95. But one of the remedies provided by s.95 is for the Secretary of State to require financial compensation to be paid to prescribed persons who are affected by a failure of an undertaker to meet prescribed standards.

35. The first of the statutory provisions on which MSC specifically relies is s.117(5). S.117 concerns the interpretation of various words or provisions in Chapter 2 of Part 4. Subsection (5) provides:

> "Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall –
>
> (a) in contravention of any applicable provision of the Water Resources Act 1991 or the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154); or
>
> (b) for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect prejudicially the purity and quality of the water in the stream, watercourse, canal, pond or lake."

Subsection (6) provides:

> "A sewerage undertaker shall so carry out its functions under sections 102 to 105, 112, 115 and 116 above as not to create a nuisance."

36. Sections 102 to 105 are powers and rights concerned with adoption of sewers. Sections 106 to 109 are powers and rights concerned with the communication of drains and private sewers with public sewers. Section 111 imposes restrictions on what can be put into public sewers. Section 112 permits a sewerage undertaker to prescribe the

specification of private sewers and drains. Sections 113 and 114 confirm powers to alter drainage systems and investigate an ineffective drain or sewer. Section 115 is concerned with the use of highway drains and section 116, as previously noted, confers a limited power to close a public sewer. None of these sections is therefore to be construed as authorising *inter alia* the use of an outfall contrary to the WRA 1991 or the Permitting Regulations or to drain inadequately treated effluent into a watercourse; and a sewerage undertaker is under a duty to exercise certain of these statutory powers so as not to create a nuisance. That is not a duty that is expressed to be enforceable under s.18. It is MSC's case that s.117(5) necessarily implies that a private law claim may be brought in respect of such unlawful activities.

37. The second statutory provision on which MSC relies is s.186(3), in Part 6 of the 1991 Act:

> "Nothing in the relevant sewerage provisions shall authorise a sewerage undertaker injuriously to affect –
>
> (a) any reservoir, canal, watercourse, river or stream, or any feeder thereof; or
>
> (b) the supply, quality or fall of water contained in, or in any feeder of, any reservoir, canal, watercourse, river or stream,
>
> without the consent of any person who would, apart from this Act, have been entitled by law to prevent, or be relieved against, the injurious affection of, or the supply, quality or fall of water contained in, that reservoir, canal, watercourse, river, stream or feeder."

The "relevant sewerage provisions" are defined in s.219 and include sections 102 to 117 of Part 4 but also many other provisions of that Part and various sections in Parts 6 and 7, including the powers to carry out works and to enter on land. MSC relies on s.186(3) as being intended to preserve the rights of riparian or water owners to refuse to allow injurious contamination of water. These provisions do not impose any duty as such and are concerned to negative the implied grant by any of the relevant sewerage provisions of a right to cause incidental harm to such owners. Indeed, with the exception of s.117(6), the provisions relied on are in the form of provisos to rights otherwise expressly conferred on sewerage undertakers.

38. The claim that MSC wished to bring, reflecting the decision in the Supreme Court, was set out in draft re-re-amended Particulars of Claim in the following terms (so far as directly material):

> "16B. As regards outfalls created or adopted in their present form and used to discharge water and materials into the Canal prior to 1 December 1991 ('Pre-1991 Outfalls'), the continuing discharge of water or other materials into the Canal is a trespass unless:
>
> 16B.1 the discharge through the outfall is permitted by a subsisting agreement….

> 16B.2 the right to effect the discharge through the outfall has been acquired compulsorily….; or
>
> 16B.3 it is authorised expressly or impliedly by statute.
>
> 16C. In relation to authorisation by statute for the purposes of paragraph 16B above:
>
> ….
>
> 16C.2 such discharges from Pre-1991 Outfalls are impliedly authorised by the WIA subject to the limitations set out in sub-paragraphs 3, 4 and 5, of this paragraph 16C;
>
> ….
>
> 16C.4 by reason of ss. 117(5) and 186(3) of the WIA 1991, the statutory right impliedly conferred by the WIA 1991 to discharge water and other materials into the Canal does not authorise the Defendant:
>
> 16C.4.1 to use and sewer, drain, or outfall in contravention of any applicable provision of the Water Resources Act 1991 or the Environmental Permitting (England and Wales) Regulations 2010 made pursuant to the Pollution Prevention and Control Act 1999;
>
> 16C.4.2 to use any sewer, drain, or outfall for the purpose of conveying foul water into the Canal (or any stream or watercourse flowing into the Canal);
>
> 16C.4.3 to use any sewer, drain, or outfall for the purpose of conveying foul water into the Canal (or any stream or watercourse flowing into the Canal) without the water having been so treated as not to affect prejudicially the purity and quality of the water in the Canal; or
>
> 16C.4.4 injuriously to affect the Canal or the supply, quality or fall of water contained in, or in any feeder of, the Canal, without the consent of the Claimant."

39. The sub-paragraphs of para 16C.4 reflect the terms of sections 117(5) and 186(3) of the 1991 Act. A new schedule to the draft statement of case identified those outfalls – the category B outfalls – that are said to have contravened those limitations.

40. The paragraphs of the draft statement of case headed "Loss and damage, entitlement to injunctive relief, and interest" then assert that, in consequence of UU's infringement of MSC's proprietary rights, MSC is entitled to a measure of damages that reflects a reasonable price that could have been negotiated for the grant of rights to drain foul water, and that MSC is entitled to a final injunction to restrain unlawful discharge, but instead seeks damages in lieu of an injunction.

41. After permission was refused to make the amendments in paras 16B and 16C among others, there was correspondence between the parties. By letter dated 31 October 2016, MSC's solicitors wrote that MSC intended to claim as trespasses all discharges (in breach of the provisos in section 117(5) and 186(3)), both past and likely to occur unless restrained, that had been observed by witnesses or were recorded in UU's records or could be estimated by modelling as likely to have occurred or as likely to occur. Limited disclosure was agreed to be provided by UU.

42. A year or so later, UU wrote a letter before claim dated 27 October 2017, explaining that even if the use of the category B outfalls breached the statutory provisos it cannot give rise to a private law remedy, but rather the remedy of any aggrieved landowner is through the regulatory regime in the 1991 Act and associated legislation. UU said that, if MSC did not agree with that proposition, it would bring a claim for declarations that it was correct in principle. However, in the same letter, UU said that its position was that if the provisos were breached *absent any negligence by UU* then there was no private law remedy. MSC in response expressed reservations about the utility of seeking to obtain a declaration of law without any factual context.

43. UU's Part 8 claim, when issued, gave details of the claim by first describing the identity of the parties and the claim in trespass that MSC had threatened to bring against UU, and continued:

> "In the events which have happened and the circumstances of the case (as more particularly set out in the witness statements of Mr Haslett and Dr Keith Hendry), the Claimant seeks a declaration that upon the true construction of the WIA 1991 (and in particular Part II Chapter II Part IV and Part VI thereof) a private landowner has no private law action in trespass or nuisance against a sewerage undertaker under WIA 1991 in respect of discharges from sewers and other pipes vested in that undertaker in contravention of WIA 1991 s.117(5) and s.186(3)."

That formulation of the declaratory relief sought refers to "a private landowner" rather than MSC and does not exclude contravening discharges resulting from negligence of the undertaker. Mr Karas QC, who appeared with Mr Moules and Mr McCreath for UU, made it clear that it was on the basis of the evidence about UU's infrastructure and position that the declaration was being sought, as indicated by the introductory words of the paragraph cited above. He also clarified that UU accepted that the declaration sought could not be made so as to exclude a remedy for MSC as a matter of law without acknowledging that in a case in which MSC alleged negligence against UU there might be a valid claim. Mr Karas stressed that the declaration sought is a response to MSC's allegation that the fact of drainage in breach of the statutory provisos without more gives rise to a claim in trespass. It follows that any declaration, if made, would have to be qualified in two respects: first to limit it to the facts of this case, as established in the evidence, and second, to recognise that the legal consequence alleged by UU may not follow if it were alleged and proved that the unauthorised discharge is the consequence of negligence or deliberate wrongdoing on the part of UU.

44. Despite those qualifications, it seems to me that there is a proper and useful purpose served by deciding whether or not UU is entitled to a declaration in those terms. MSC acknowledged as much in its solicitors' letter dated 29 March 2019, explaining that

MSC had decided that it was not necessary for it to serve any evidence in reply, on the basis that the issue was "one of statutory construction and not one that requires a determination of disputed facts". The letter continues:

> "If we have understood correctly the scope of the declaration that UUWL seeks in this claim, then we agree that it would be a proportionate use of the court's time and the parties' resources to determine that issue of law. It would indeed be a large and costly exercise to conduct a proper assessment of the current and likely future water quality in the [Canal] so as to assess whether the current discharges by [UU] have been affecting prejudicially the purity and quality of the water in the canal or will in the future do so, and legal proceedings to resolve the extensive disputes of fact potentially inherent in such an exercise will likely be protracted and costly.
>
> [MSC] therefore welcomes the opportunity to resolve as a preliminary issue, before the parties incur such expenditure, whether any such claim by [MSC] would be actionable in trespass or nuisance."

45. What is not spelt out in the correspondence is what UU contends to be the effect of the evidence of Mr Haslett and Dr Hendry. It is an important factual basis for the argument that UU advanced and the declaration that it seeks. The evidence goes into some considerable detail to explain the nature of the sewerage system that UU inherited in 1989; the way that the regulatory scheme of the 1991 Act operates in practice, including setting and approval of budgets for maintenance and improvements; the reasons why sewer flooding or overflows occur from time to time; and the kind of expenditure on infrastructure improvements that would be required in order to eliminate flooding of the system and to prevent any discharge of inadequately treated effluent into the Canal.

46. The effect of that evidence is twofold. First, that any discharge of foul water into the Canal, in breach of the statutory provisos and therefore without authority, is involuntary on the part of UU. That is to say that it is not caused by anything done or omitted to be done by UU, but is merely the hydraulic and/or mechanical effect of the sewerage system being overloaded on a given day by a combination of ever-increasing quantities of foul water from sewers and sudden, large quantities of surface water caused by storms or persistently heavy rainfall. Second, that the only practical way of preventing the overflow of the system and unlawful discharge into the Canal on occasions is to construct, at very considerable expense, a much more capacious sewerage system. The discharge cannot be prevented – except at the expense of flooding the upstream system – by blocking parts of the system leading to the category B outfalls, and UU is not entitled to discontinue use of a sewer without providing a replacement, or deny any occupier effective access to its sewers. As will be explained further, that factual conclusion is fundamental to the argument of UU that any unlawful discharge does not give rise to a private law claim by MSC.

47. While MSC may not have agreed that evidence, it is nevertheless the only evidence that is before the Court and was not challenged or controverted by MSC. The evidence was not intended to disprove any incident of negligence or misfeasance on which MSC might be able to rely, but to make clear that, subject to such facts being alleged and

proved, the unlawful discharge complained of was and is involuntary and can only be remedied in the way explained in it. I accept the evidence of Mr Haslett and Dr Hendry on that basis.

48. It is common ground that the 1991 Act, though it confers various powers on statutory sewerage undertakers, including a power to continue to drain through outfalls that were vested in undertakers or their predecessors before 1 December 1991, does not confer authority to drain inadequately treated foul effluent into watercourses or rivers, or to contravene environmental limits and permits: ss. 117(5) and 186(3) of the 1991 Act. Thus, although UU lawfully drains properly treated effluent through the category B outfalls and into the Canal regularly, in accordance with the implied statutory right to do so, as soon as the effluent is inadequately treated UU has no power lawfully to drain such effluent into the Canal, only the right to drain clean effluent.

49. It is important to appreciate that any such occurrences of unlawful discharge are not the result of anything done by UU: they are the result of heavy rainfall that causes the capacity of the sewerage infrastructure to be exceeded. That is the effect of the evidence that I have accepted. UU cannot refuse to allow surface or foul water to enter its sewers and it cannot simply close off the outfalls; nor can it lawfully store or release the excessive contents elsewhere, except by constructing a new, more capacious system at huge cost. The entry of foul discharge rather than adequately treated effluent into the Canal is therefore involuntary. UU has done nothing to cause or permit it to happen except abstain from building a more capacious or different system.

50. Although MSC argues that the unlawful discharge of foul water in these circumstances is a trespass to its land, which is unauthorised and actionable *per se*, in my judgment that is not so. A purely involuntary act is not an act of trespass: see Clerk & Lindsell on Torts (23rd ed), para 18-07. UU is entitled to drain treated effluent into the Canal (subject, possibly, to yet further specific objections raised by MSC, which are not issues that are being tried at this stage), and there is no trespass by its so doing. It is only as a result of the discharge being inadequately treated that it becomes unlawful, and the inadequate treatment is not attributable to anything done by or on behalf of UU. The matter would of course be different if UU diverted into the Canal effluent that did not otherwise discharge into it, or if it did something that had the result that other effluent then flowed into the Canal, or if it drained into the Canal when it had no right to do so at all; but those are not this case. MSC is right to say that the contaminated discharge is immediately unauthorised (and therefore unlawful), but a claim in trespass is not the consequence of lawful discharge becoming unlawful because of inadvertent contamination. The true cause of action, if any exists in these circumstances, is nuisance, to which UU cannot raise any defence of authorisation by statute, by reason of the provisos in ss. 117(5) and 186(3) of the 1991 Act.

51. I acknowledge that, at [2] in his judgment in the Supreme Court in this case, Lord Sumption said that "discharge into a private watercourse is an entry on the owner's land, and as such is an unlawful trespass unless it is authorised by statute". However, his Lordship was concerned with the question whether the 1991 Act conferred a right to continue to discharge at all. The focus of the argument and the judgment was not on contaminated discharge, in circumstances where uncontaminated discharge was authorised, but with whether any discharge was authorised. As a matter of principle, a voluntary discharge of water onto land without authority is a trespass; it does not follow

that involuntary discharge through a given outfall, in excess of what is permitted, is a trespass.

52. The real question, however, is whether a common law cause of action in nuisance (or indeed in trespass, if it could otherwise be maintained) is impliedly ousted - in the circumstances of the claim that MSC intends to bring - by the different remedies provided by the scheme in the 1991 Act, or whether on a true construction of that Act it is intended that an owner of land covered by or adjoining water can bring a private law action against a statutory undertaker. Whether brought in nuisance or trespass, the natural relief to seek in such a claim would be an injunction and damages.

## The decision in Marcic

53. The question of implied statutory ouster was considered in detail by the House of Lords in Marcic. The leading speeches were delivered by Lord Nicholls of Birkenhead and Lord Hoffmann. Lord Steyn and Lord Scott of Foscote agreed with both speeches. Lord Hope of Craighead agreed with Lord Nicholls.

54. Lord Nicholls summarised the statutory scheme of the 1991 Act, including section 18(8). He observed that the exception to making an enforcement order, where the duties imposed on the Authority by Part 1 of the Act preclude the making of the order, would cover a case where the Authority considered that making an order would be incompatible with the policy objectives in section 2 of the Act, including that of securing that, by obtaining a reasonable return on capital, a statutory undertaker is able to finance the proper discharge of its functions. Other considerations might be inconsistent with making an enforcement order that would compel the undertaker to rectify any breach ([15], [16]). He then noted that the sewerage undertaker's s.94 duty was enforceable in accordance with s.18 and observed at [21]:

> "Thus, a person who sustains loss or damage as a result of a sewerage undertaker's contravention of his general duty under section 94 has no direct remedy in respect of the contravention. A person in the position of Mr Marcic can bring proceedings against a sewerage undertaker in respect of its failure to comply with an enforcement order if such an order has been made. In the absence of an enforcement order his only legal remedy is, where appropriate, to pursue judicial review proceedings against the [Authority] or the Secretary of State … in respect of any alleged failure … to make an enforcement order as required by section 18(1)"

55. Lord Nicholls noted that instead Mr Marcic had asserted claims based on common law nuisance and under the Human Rights Act 1998:

> "He asserts claims not derived from section 94 of the 1991 Act. Since the claims asserted by him do not derive from a statutory requirement, section 18(8) does not rule them out even though the impugned conduct, namely, failure to drain the district properly, is on its face a contravention of Thames Water's general statutory duty under section 94. The closing words of section 18(8) expressly preserve remedies for any cause of action

> which are available in respect of an act or omission otherwise than by virtue of its being a contravention of a statutory requirement enforceable under section 18."

His Lordship then considered the nature of the remedy required to prevent flooding, which had in fact been provided by the time of the hearing in the House of Lords, and previous authority on the availability of a claim in nuisance against a body responsible for sewerage. He then expressed his conclusion as follows:

> "The common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme. To do so would run counter to the intention of Parliament as expressed in the Water Industry Act 1991.
>
> In my view the cause of action in nuisance asserted by Mr Marcic is inconsistent with the statutory scheme. It always comes down to this: Thames Water ought to build more sewers. This is the only way Thames Water can prevent sewer flooding of Mr Marcic's property. This is the only way because it is not suggested that Thames Water failed to operate its existing sewage system properly by not cleaning or maintaining it." [33], [34]

56. The argument that Thames Water should be liable for not having built more sewers was dismissed in the following terms:

> "The difficulty I have with this line of argument is that it ignores the statutory limitations on the enforcement of sewerage undertakers' drainage obligations. Since sewerage undertakers have no control over the volume of water entering their sewerage systems it would be surprising if Parliament intended that whenever sewer flooding occurs, every householder whose property has been affected can sue the appointed sewerage undertaker for an order that the company build more sewers or pay damages. On the contrary, it is abundantly clear that one important purpose of the enforcement scheme in the 1991 Act is that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers. When flooding occurs the first enforcement step under the statute is that the Director, as the regulator of the industry, will consider whether to make an enforcement order. He will look at the position of an individual householder but in the context of the wider considerations spelt out in the statute. Individual householders may bring proceedings in respect of inadequate drainage only when the undertaker has failed to comply with an enforcement order made by the Secretary of State or the [Authority]. The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It

> would effectively supplant regulatory role the [Authority] was intended to discharge when questions of sewer flooding arise."

It is notable that Lord Nicholls saw no difference in principle between the impact and incompatibility with the statutory scheme of a claim for specific enforcement on the one hand and a claim for damages on the other.

57. Lord Hoffmann identified the s.94 duty and noted that s.18(8) does not exclude other remedies, and that if failure to improve the sewers gives rise to a cause of action at common law it is not thereby excluded. The question, his Lordship said, was whether there is such a cause of action. He then referred to a line of authority which established that the failure of a sewerage authority to construct new sewers did not constitute an actionable nuisance and that the only remedy was the enforcement of the statutory duty pursuant to the statutory scheme. Those were cases in which the local authority had not created or continued the cause of the problem but had done nothing to improve or enlarge the system: see per Denning LJ in Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] Ch 149 ("Pride of Derby"), considered at [55] and [59]. Lord Hoffmann considered that Mr Marcic's claim was indistinguishable in principle from the claims in the older cases: "Mr Marcic can therefore have a cause of action in nuisance only if these authorities are no longer good law" [57].

58. Like Lord Nicholls, Lord Hoffmann did not consider that the exact cause of action relied upon (Mr Marcic had sued in breach of statutory duty, negligence, nuisance and breach of the Human Rights Act) made a difference, because the real complaint advanced by Mr Marcic was that Thames Water had not built enough or better sewers.

59. Referring to the Court of Appeal's reliance on the Goldman v Hargrave [1967] 1 AC 645 line of authority, Lord Hoffmann said:

> "Nevertheless, whatever the difficulties, the court in such cases is performing its usual function of deciding what is reasonable as between the two parties to the action. But the exercise becomes very different when one is dealing with the capital expenditure of a statutory undertaking providing public utilities on a large scale. The matter is no longer confined to the parties to the action. If one customer is given a certain level of services everyone in the same circumstances should receive the same level of services. So the effect of a decision about what it would be reasonable to expect a sewerage undertaker to do for the plaintiff is extrapolated across the country. This in turn raises questions of public interest. Capital expenditure on new sewers has to be financed; interest must be paid on borrowings and privatised undertakers must earn a reasonable return. This expenditure can be met only by charges paid by consumers. Is it in the public interest that they should have to pay more? And does expenditure on the particular improvements with which the plaintiff is concerned represent the best order of priorities?
>
> These are decisions which courts are not equipped to make in ordinary litigation. It is therefore not surprising that for more

> than a century the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators rather than judges. " [63], [64]

60. Having referred to the statutory scheme in the 1991 Act and the trial judge's observation that Thames Water had failed to persuade him that their system of priorities was a fair one, Lord Hoffmann said at [70]:

> "My Lords, I think that this remark, together with the judge's frank admission that the fairness of the priorities adopted by Thames Water was not justiciable, provides the most powerful argument for rejecting the existence of a common law duty to build new sewers. The 1991 Act makes it even clearer than the earlier legislation that Parliament did not intend the fairness of priorities to be decided by a judge. It intended the decision to rest with the [Authority] subject only to judicial review. It would subvert the scheme of the 1991 Act if the courts were to impose upon the sewerage undertakers, on a case-by-case basis, a system of priorities which is different from that which the [Authority] considers appropriate."

61. It is clear therefore that both Lord Nicholls and Lord Hoffmann considered that Mr Marcic's real complaint was that Thames Water had not complied with its s.94 duty, and that although a private law claim was not in terms excluded by the statutory scheme of the 1991 Act, a complaint for which the only remedy was the construction of more or better sewers was necessarily excluded: to allow an individual claim for injunctive relief or damages would subvert the integrity of the regulatory scheme. Although Mr Marcic was a customer of Thames Water, his claim was not brought on that basis but as a neighbouring landowner, hence the reliance in the Court of Appeal judgments on Goldman v Hargrave and the observations of both Lord Nicholls and Lord Hoffmann to the effect that Thames Water was not an ordinary neighbour or occupier of land but a large statutory undertaking. Their decisions, although consistent with pre-1989 cases denying a right of action in nuisance for failure to create sewers of greater capacity, are based on the special position of a statutory sewerage undertaker under the 1991 Act and the existence of the statutory scheme for enforcement of duties owed by such a person.

**MSC's case**

62. MSC's case is that the principles in Marcic do not apply to its intended claims in trespass (or nuisance) because the 1991 Act itself preserves the pre-1991 rights of a person in its position, as owner of a watercourse, to bring such a claim. The basis of that argument is: (a) the terms and purpose of ss. 117(5) and 186(3) of the 1991 Act ("the statutory provisos"); (b) the decision in Pride of Derby, which MSC says establishes a different basis of liability for pollution of a river, canal or watercourse from a claim based on failure to build more sewers; and (c) supportive dicta in other cases since 1991 to the effect that claims by persons in the position of MSC for pollution of a watercourse were intended to be preserved.

63. MSC contends that the statutory provisos make it clear that a sewerage undertaker is given no authority to pollute a watercourse and so untreated (or inadequately treated) discharge that is unauthorised is unlawful, giving rise to a cause of action in private

law. That is indicated by the exclusion of implied statutory authority to commit a nuisance. Mr Hart QC, acting for MSC together with Mr Morgan and Mr Ostrowski, emphasised that the sections of the 1991 Act that the statutory provisos expressly qualify include s.116, which was the section in which (or the basis on which) the Supreme Court implied a continuing right for UU to drain through pre-1991 outfalls, so that any such continuing right to drain is subject to the provisos. Mr Hart submitted that the obligations and rights created by the sections referred to in s.117(5) and 186(3) are distinct from the general s.94 duty and are not expressly made subject to the enforcement regime in s.18. That being so, there is nothing to oust a claim in nuisance that can be brought by the owner of a watercourse that is polluted by a sewerage undertaker. Marcic does not apply, since that was concerned with a breach of the general s.94 duty and was not a case about absence of authority to drain. It was a case based on earlier authorities that were distinguished in Pride of Derby.

64. Pride of Derby concerned the Derby Corporation, which had built and managed a sewerage system in exercise of powers conferred by the Derby Corporation Act 1901. The system as built (and later extended) was adequate but had become inadequate owing to increase in the numbers of inhabitants of the city. It was common ground that sewage was overflowing from the system, discharging into the river Derwent and harming the plaintiff's downstream fishery.

65. The Corporation contended that it was not liable in nuisance because it had done nothing (other than refrain from building a better system with greater capacity) and was not at fault, having neither created nor adopted a nuisance, and that the only remedy of the plaintiffs was to apply to the Minister under the provisions of the Public Health Act. The judge and the Court of Appeal held the Corporation liable in nuisance on the grounds that: there was no relevant distinction between misfeasance and non-feasance, as the Corporation had argued; the cases establishing no liability for failure to build a better sewerage system did not apply where the authority had built and run the system itself, rather than inheriting it by means of statutory vesting; and the terms of the 1901 Act did not confer any authority on the Corporation to cause a nuisance; on the contrary, they made it plain that the Corporation was liable for any nuisance caused. The case was argued on the Corporation's behalf on the basis that there was no liability for non-feasance and that the statute conferred authority to do non-negligently what the Act required.

66. Section 113 of the 1901 Act contained a proviso to the effect that the Corporation was authorised to do nothing that contravened the Rivers Pollution Prevention Act 1876 or section 17 of the Public Health Act 1875. (The latter provision was in broadly similar terms to the proviso in s. 117(5) of the 1991 Act.) Sir Raymond Evershed MR said, at p.168, that the proviso in s.113 was to the effect that the powers conferred by the 1901 Act did not authorise anything that was a breach of the 1875 and 1876 Acts, with the result that there was no power that could validly be exercised if the terms of the proviso were not complied with; and that the proviso did not qualify the Corporation's liability to other persons if in fact they did contravene the 1875 or 1876 Acts. Although it did not form the basis of the decision, the Master of the Rolls also observed that, unlike the previous authorities relied on by the Corporation, this was not a case of a complaint of insufficient drainage of the city but a complaint about the consequences of the Corporation's drainage.

67. Denning LJ agreed that there was no distinction in the law of nuisance generally between misfeasance and non-feasance. He considered that the older "no nuisance" drainage cases depended on the fact that the local authority had no control over the additional building that created the excessive demand on the drainage system, and that on the true construction of the Public Health Acts the only remedy was to apply to the Minister for relief. He considered that the Corporation was liable in nuisance on the ground that it had adopted the nuisance by the way in which it operated the works. He agreed (as did Romer LJ in a short judgment) that the 1901 Act plainly did not authorise a nuisance by discharging effluent into the river Derwent.

68. The legal basis on which a *prima facie* actionable nuisance was held to exist in Pride of Derby (as distinct from the decision on whether there was authority to commit a nuisance) is not wholly clear, beyond the undisputed fact that the Corporation was responsible for large quantities of sewage flowing out of the sewerage works on its own land into the river. The conclusion appears to have depended on the fact that the Corporation had built and operated the works throughout, and that it had no defence of coming to the nuisance without having caused or adopted it. The earlier authorities were restrictively interpreted by Denning LJ as applying only to a case where the local authority inherited the system and had done nothing to create the excessive demand on it. The question why the same principle should not apply if the local authority had built a satisfactory system long ago was left for another day. Lord Hoffmann cited Denning LJ's summary of the older authorities with apparent approval in Marcic, though neither he nor Lord Nicholls said anything about the correctness of the conclusion about nuisance in Pride of Derby.

69. Mr Hart's argument, as I understood it, really comes down to this: that the statutory provisos on which he relies confirm that UU has no authority to do what it is doing, by qualifying its continuing right to drain, and therefore the 1991 Act cannot be construed as removing any private right of action that MSC has arising from it. The Act cannot at one and the same time preserve MSC's proprietary rights, as the statutory provisos do, and yet exclude a remedy for the infringement of them on the basis that a remedy only exists through s.18. Mr Hart points out that what UU is doing, to which MSC objects, is not performing its general statutory duty, since the statute does not authorise UU to do what it is doing. Neither does s.18 apply to the duties in the "relevant sewerage provisions", including s.116, from which the continuing right to drain was held to be implicit. The private right of action is not therefore ousted by the statutory scheme that applies in the case of performance of UU's general statutory duty. Mr Hart did accept, however, that he was not submitting that unlawful discharge could not be a breach of the general statutory duty; only that the particular part of the statutory regime that gives rise to the implied right to discharge has to be analysed to see what remedies lie. Other parts of the 1991 Act have nothing to say about whether there is a private right of action for unauthorised discharge from the category B outfalls into the Canal.

70. In support of that case Mr Hart invoked the principle of actionability established by Pride of Derby, in factual circumstances that he contends are indistinguishable, and he relied on the following judicial observations about the intended effect of the statutory provisos.

71. In the BWB case, Keene LJ, otherwise agreeing with Peter Gibson and Chadwick LJJ that a sewerage undertaker has no implied general power to discharge onto the land of others without consent, considered whether it was implicit in ss. 117(5) and 186(3) that

a sewerage undertaker did have power to discharge clean effluent into a watercourse. The answer was that those provisions did not impliedly confer a right to discharge without consent. Keene LJ stated:

> "The purpose of those provisions is much wider. They are designed to ensure that those who may be affected by a discharge, but whose consent to the discharge itself is not required in terms of property rights, are nonetheless clearly protected against damage. Into such a category would come those downstream of a discharge who have a right to abstract water of a certain quality or who as riparian owners may be at risk of flooding or of other harm. The provisions in question are there to make it clear that their common law remedies, particularly in nuisance, are not affected by the exercise of the statutory powers referred to. On such a construction, there is no necessary implication that the undertaker can discharge without the consent of the owner or occupier of the watercourse."

In other words, even if the owner of the watercourse permits or tolerates drainage, the exercise of any of the statutory powers identified does not entitle the undertaker to override or adversely to affect the proprietary rights owners of other affected interests. The protection afforded to them operates by denying the undertaker statutory authority to cause harm. That is reinforced by the terms of s.117(6). Mr Hart accepts that the dicta of Keene LJ are *obiter* and were made before the decision in Marcic, though he submits that that decision is inapplicable to this case.

72. In Radstock Co-operative and Industrial Society Ltd v Norton-Radstock UDC [1968] Ch 605 ("Radstock"), the owner of a bridge crossing a river sued the local authority in respect of a sewer that had been laid in the bed of the river and caused eddying and turbulence of the water. The owner relied on s.331 of the Public Health Act 1936 (which was in terms substantially the same as s.186(3) of the 1991 Act) as imposing or preserving a liability in favour of riparian owners. The judge and the Court of Appeal (Sachs LJ dissenting) held that there was no nuisance regardless of the terms of s.331. Harman LJ observed that s.331 "merely preserves the common law rights of persons injuriously affected, and does not arise in the absence of nuisance". Russell LJ agreed that the section was "a mere saving of common law rights". Sachs LJ considered that there was a nuisance and that it was for the defendant to seek to justify it or exonerate itself. He too considered that s.331 preserved the rights of riparian owners as regards nuisance, in that it removed the ability of the local authority to rely on implied authority.

73. MSC relies on these dicta to emphasise that the statutory powers are intended to preserve common law remedies of persons such as itself.

**UU's case**

74. The case of UU is essentially as follows.

i) First, Marcic establishes the principle that a duty of a sewerage undertaker that falls within the scope of its s.94 duty cannot be enforced by private action. That is so if the remedy for the matter of complaint in the action would be the

provision of new infrastructure. The question of whether and when new infrastructure is to be provided is a matter for the regulator, not for the courts.

ii) Second, the claim threatened by MSC in respect of unauthorised contamination of the Canal is a complaint that also could only be remedied by the provision of new infrastructure. The undisputed evidence of UU is that any overspills of insufficiently treated effluent are involuntary and cannot be prevented – given UU's statutory duties to allow access to its sewers and provide drainage – without significant expense on the construction of better or more capacious sewers, storage tanks or waste water treatment works.

iii) Third, the allegations of MSC – which do not include any particulars of negligence, operational malfunction or deliberate wrongdoing but rely only on the fact of contaminated discharge – necessarily involve an allegation that there has been a breach of the general duty in s.94(1)(b) of the 1991 Act. That is because the s.94 duty obliges UU to make provision for emptying its sewers and such further provision as is necessary from time to time for effectually dealing with their contents. If the inadequately treated contents of the sewers are spilling into the Canal, otherwise than as a result of negligence, malfunction or wrongdoing, then UU cannot have made such provision as is necessary effectually to deal with them and is in breach of its duty to do so.

iv) Fourth, whether MSC formulates its claim as a trespass to the Canal or in nuisance and whatever relief it actually claims, the only remedy to stop the matters of which MSC complains is to improve the sewerage system. MSC's claim is therefore in substance a claim that the sewerage system is inadequate, just as Mr Marcic's claim was. It is therefore a claim in substance to enforce the s.94 duty.

v) Fifth, Pride of Derby was, when fairly analysed, a claim not about duties in relation to sewers that had vested in the local authority but about a statute conferring on the Derby Corporation power to build and run a sewerage system. The central issue in the case was the interpretation of the statute and, in particular, whether it conferred authority on the Corporation to do what it had done. The position here is that UU inherited an old sewerage system, on 1 December 1991, and did nothing to cause the overflowing.

vi) Sixth, the fact that MSC claims damages rather than an injunction is irrelevant. The question is whether private law claims in trespass or nuisance are excluded because they are inconsistent with the scheme of the 1991 Act. In any event, there is no difference in principle between numerous claimants claiming injunctions that require the construction of better sewers and numerous claimants claiming damages for not constructing better sewers. The relevant question is whether the remedy for the matters complained of is something that Parliament has allocated to the regulator, to be governed by the remedies conferred by the 1991 Act.

## Analysis and conclusions

75. I have not found resolution of this issue a straightforward matter, but in the end I have reached a clear conclusion that UU's argument is to be preferred. My reasons are the following.

76. First, ss. 117(5) and 186(3), on which MSC principally relies, do not confer or preserve a distinct right of action for a person affected by unlawful discharge of foul water into a watercourse. They provide that the exercise by a sewerage undertaker of any of the powers identified in those subsections does not of itself confer on the undertaker an immunity from private law action. That is to say, the specified powers are not to be construed as providing that an undertaker may (without fault) commit a nuisance. The purpose of the subsections is accordingly to remove any argument based on the principle in Allen v Gulf Oil Refining Ltd [1981] AC 1001 that an undertaker has a defence of statutory authority. They are, to that extent, provisions that can be said in broad terms to preserve rights of those riparian owners intended to be protected, but they are not an answer to the question whether, as a matter of construction of the 1991 Act, a private law claim in nuisance can be maintained on the facts of individual cases, any more than the preservation of other remedies by s.18(8) gave Mr Marcic a valid claim in nuisance.

77. Second, it is a misinterpretation of the decision of the Supreme Court and of the structure of the 1991 Act to say that, in discharging into the Canal in breach of the statutory provisos, UU was acting in breach of s.116 of the Act (or any of the other sections of the 1991 Act to which the statutory provisos expressly refer). The sections identified in s.117(5) mostly confer powers on a sewerage undertaker, with some related duties; some of the "relevant sewerage provisions", as defined in s.219 and referred to in s.186(3), also confer rights or make supplementary or ancillary provision. S.116 in particular confers on a sewerage undertaker a qualified power to discontinue use of a sewer, with a related duty, where the power is exercised, to provide a replacement sewer. The unlawful discharge into the Canal is not (and is not alleged to be) the consequence of UU's exercise of this power, or a breach of the related duty.

78. The Supreme Court held that – in view of the terms in which the right to discontinue use of a sewer is expressed in s.116 – it is implicit in the scheme of the sewerage provisions of the Act that there is a right for an undertaker to continue to drain through pre-1991 outfalls. However, the unlawful discharge is neither a breach of s.116 nor of any obligation associated with the continuing right to drain. It is simply discharge that is unauthorised by the Act. If an occurrence of contaminated discharge into the Canal had been caused by UU exercising the s.116 power to discontinue and replace a sewer then the position might well have been different. There would then have been a breach of the duty in s.117(6), which is not enforceable under s.18 and is not authorised by statute. That is truly analogous to the nuisance in the Pride of Derby case because the undertaker only has power to discontinue use of a sewer on the basis that no nuisance is caused. But that is emphatically not this case.

79. Third, by way of contrast with that example, the reason (on the evidence) for such contaminated drainage as has occurred is the effect of sudden heavy rainfall, which causes flooding and results in the capacity of the existing system being exceeded. It has occurred without UU doing anything to cause it or being able to do anything lawfully to stop it, except by spending money on large-scale capital improvements. Any breach of duty by UU is therefore not a breach of one or more of the relevant sewerage provisions but a breach of the s.94 duty to make provision as is necessary from time to

time for effectually dealing with the contents of the sewers in its area. In the absence of an allegation of negligence, malfunction or misconduct, and on the unchallenged evidence of UU's witnesses, the fact that insufficiently treated effluent is discharging into the Canal means that there must be a breach of the general duty in s.94(1)(b): see, by analogy, Dobson v Thames Water Utilities Ltd [2007] EWHC 2021 (TCC); [2008] Env LR 21 ("Dobson") at [74]-[77], [81], [82] (malodours and mosquito infestation caused by sewage treatment works: contents of sewers therefore not being effectually dealt with; breach of s.94(1)(b)).

80. Fourth, the facts of this case, although different, are materially indistinguishable from the relevant facts of Marcic. The complaint, whether it is pleaded as a trespass, a nuisance or a breach of statutory duty, is of uncontrolled escape of untreated sewage, the only remedy for which is the construction of a better sewerage system. It is the substance of the complaint that is made that determines the question, not whether the claim is brought in trespass, nuisance or breach of statutory duty: see Marcic and Barratt Homes Ltd v Dwr Cymru Cyfyngedig (No.2) [2013] EWCA Civ 233; [2013] 1 WLR 3486.

81. Fifth, the argument that UU cannot have been performing its s.94 duty by discharging effluent takes MSC nowhere. MSC seeks to arrive at a conclusion that the s.18 enforcement machinery does not apply because the general duty in s.94 was not engaged. But by complaining about the discharge in general terms, MSC is inevitably asserting that UU was in breach of its s.94 duty as well as complaining that the discharge was unauthorised.

82. Sixth, the fact that MSC is the owner of a watercourse and the claim is for contamination of the watercourse does not make it a claim to which different principles apply. Admittedly, ss. 117(5) and 186(3) did not apply in Marcic or in the older sewer cases, but those subsections do not confer a different cause of action; and Thames Water did not argue that it had authority to flood Mr Marcic's garden with sewage. As noted by Keene LJ in BWB and the Court of Appeal in Radstock, the statutory provisos only operate if there is a cause of action in nuisance. Given that UU cannot assert implied authority to discharge untreated effluent, the question is whether the existence of a private law remedy is inconsistent with the statutory scheme. Pride of Derby was different because the relevant statute was held to be one authorising the construction and use of a sewerage system but subject to a proviso that no nuisance was caused. It would therefore be wrong to conclude that this case, like Pride of Derby, is different because it concerned contamination of a canal or river.

83. Seventh, Marcic was clearly decided as a matter of construction of the 1991 Act, not simply affirming the old sewerage authorities. Both Lord Nicholls and Lord Hoffmann conclude that a claim in nuisance – where the only remedy for the nuisance is the construction of a better sewerage system – cannot co-exist with the statutory scheme in that Act. Marcic therefore stands for a broad principle derived from the structure of the 1991 Act, not a narrow principle that there is no claim in nuisance for failure to build more sewers.

84. Eighth, it would make no difference if MSC did have a valid claim in trespass. The complaint is still that UU is discharging effluent into the Canal. The Supreme Court decided that UU has the right to discharge treated effluent into the Canal, so the only legitimate complaint is that it is untreated effluent that is being discharged. Even if

MSC only has to prove contaminated discharge, the complaint establishes an allegation of breach of UU's s.94 duty as sewerage undertaker. On the evidence, the only means of remedying the unlawful discharge is the construction of a better sewerage system.

85. Ninth, it can make no difference if MSC only claims damages by way of relief. Parliament cannot have intended that an affected watercourse owner would have a choice between claiming damages in lieu of an injunction and pursuing their complaint with the regulator. It is the existence of a private law remedy that is inconsistent with the statutory scheme because it allows an individual, as of right, to pursue and obtain relief where such relief might be contrary to the balance of competing interests under the statutory scheme. The quantum of damages in lieu of an injunction, as threatened by MSC, would be determined by assessing the sum that UU and MSC would reasonably negotiate for the grant to UU of the necessary rights. That assessment will be informed by the cost that UU would have to incur to avoid any incident of foul discharge into the Canal, and so will reflect the cost of building a better sewerage system. The damages would be likely to be substantial and, in a given case, could be replicated many times over as a result of cases brought by numerous affected riparian owners. The resources of the statutory undertaker, funded by the consumers, will as a result be being diverted from expenditure approved under the regulatory scheme, and, regardless of payment of damages, the larger environmental objectives will not be being achieved.

86. Tenth, the position would in principle be different if the complaint was of contaminated discharge as a result of a negligent or deliberate act of the statutory undertaker, or failure of equipment caused by non-performance of a specific duty. An allegation of failure properly to maintain, monitor or operate equipment or of a deliberate act is not, in substance, a claim seeking to enforce an undertaker's s.94 duty (though the failure might amount to a breach), nor does the exercise of adjudicating on it conflict with the process envisaged by the 1991 Act.

87. In this regard, Dobson illustrates where the line is likely to be drawn. The claimants were precluded from claiming in nuisance in respect of bad odours and mosquitoes resulting from the way that the contents of sewers were dealt with at a sewage treatment works. This was because it would be seeking to enforce the s.94 duty to deal effectually with the contents of sewers. But claims in negligence were not precluded where the exercise of adjudicating on such allegations did not conflict with the statutory process of enforcement. Ramsey J said at [140]:

> "I consider that there is, in principle, a boundary to be drawn between matters which would fall within the duties under s.94(1) and are actionable solely under s.18 and matters which are actionable apart from the existence of any statutory duty. That boundary may be difficult to draw and may depend on such uncertain phrases as matters or decisions relating to "policy" or "capital expenditure" matters or decisions as contrasted with "operational" or "current expenditure" matters or decisions. In Marcic the boundary fell between building new sewers and cleaning and maintaining the existing sewers".

88. Having referred to the conclusions of Lord Nicholls and Lord Hoffmann in Marcic, Ramsey J pointed out that:

> "… if there is fault in the form of negligence and if there is a different cause of action which is not inconsistent and does not conflict then I consider there is nothing to preclude a claim being made on that basis. Policy matters are likely to lead to such inconsistency and conflict whilst operational matters are less likely to do so. It must be a question of fact and degree. Where an allegation is tantamount to requiring major plant renewal that will fall on one side of the line whilst an allegation that a filter should be cleaned will lie on the other side. The mere fact that the effect of the cause of action is to enforce the duty in s.94(1) does not in itself preclude the cause of action."

Thus, one would expect a complaint that contaminated discharge resulted from failure to maintain a filter, or from a negligent spillage or deliberate diversion of the contents of a tank, to be actionable. Ramsey J added that he could see no reason why defectively designed sewers would not be actionable. Once again, these are far from the facts and circumstances of the claim that MSC threatened to bring against UU.

89. Finally, UU's interpretation of the 1991 Act might be said to be vulnerable to the argument that the statutory provisos are ineffective if claims in nuisance (or trespass) are ousted on a true construction of the Act. Clearly, the statutory provisos were intended to have some effect beyond signalling that an undertaker would have no defence of implied authority to a claim that an owner had no entitlement to bring. A defence of implied authority would only avail an undertaker that had taken reasonable care to exercise its powers so as not to cause the harm in question, not an undertaker that had acted negligently. However, as indicated in Dobson, there might be cases of non-negligent failures where a defence of implied authority could avail an undertaker and where the claim in nuisance might not be excluded as conflicting with the statutory machinery for enforcement of its s.94 duty. There is therefore scope for the statutory provisos to have some effect. In any event, one purpose of them is to make clear to an undertaker that it is not permitted to pollute watercourses.

90. Although the effect of s.117(5) and 186(3) is therefore reduced, as compared with the equivalent provisions in the Public Health Acts 1875 and 1936, they are not ineffective on UU's interpretation. As established by Marcic in general and in BWB with reference to these provisions in particular, it is in the context of the 1991 Act as a whole that they must be interpreted, not in accordance with their effect in other statutes.

91. For the reasons that I have given, I will therefore make a declaration to the effect that upon the true construction of the 1991 Act, absent an allegation of negligence or deliberate wrongdoing, MSC has no private law action in trespass or nuisance against UU in respect of discharges from the category B outfalls in contravention of s.117(5) or s.186(3) of the 1991 Act. I will of course hear Counsel on the exact wording of that declaration.

## The preliminary issue in the 2010 proceedings

92. In his judgment granting UU summary judgment on the right to continue to drain from pre-1991 outfalls into the Canal, Newey J explained why the decision of the Court of

Appeal in BWB did not preclude his conclusion. He commented as follows, at [50], in relation to the argument on which UU succeeded before him:

> "… I doubt whether Mr Karas' argument could have helped the defendant [in BWB]. The licence pursuant to which the defendant and its predecessor had been discharging could be brought to an end on six months' notice. While the point has not been the subject of argument, my provisional view is that any "right" to discharge which the defendant or its predecessor might have derived from pre-1991 legislation will not have endured beyond the licence. If that is right, the defendant had no option but to found its case on s.159 of the 1991 Act."

93. MSC had not at that stage raised such an argument; but it then did so in re-amended particulars of claim for which Newey J granted permission (and in consequence summary judgement was not granted in relation to the licensed outfalls). These state:

> "The 5 outfalls numbered 23, 26, 35, 36 and 67 were the subject of contractual agreements which included an express right to terminate the agreement on notice and express obligations upon such termination to remove the outfall and/or sewer and reinstate the land and/or to cease to discharge. These agreements were terminated after 1 December 1991." (para 16B.3)

In relation to each of the licensed outfalls, MSC then pleaded that notice was given to terminate the licence, notwithstanding which UU has continued to discharge through each licensed outfall into the Canal, which is alleged to be a trespass and a breach of contract. In substance, MSC is contending that UU only had a terminable right to drain through the licensed outfalls.

94. In its re-re-amended defence and counterclaim, UU pleads in response that at all material times after becoming a public sewer the sewer to which each licence relates could not and cannot be stopped up, save as authorised by statute, and that:

> "in the premises, in each of the instances identified [the licensed outfalls]:
>
> (1) the stopping up and/or removal of pipes to which each agreement relates would put the Defendant in breach of its duties under the Water Industry Act 1991 and the Defendant has no power to stop up the sewers to which each agreement relates; and/or
>
> (2) the Defendant cannot lawfully consent or agree to the stopping up and/or the removal of the pipes to which each agreement relates; and/or
>
> (3) if and to the extent that any of the agreements require the defendant to stop up and/or remove pipes now constituting a public sewer otherwise than in accordance with its powers

> and duties under the Water Industry Act 1991 such agreement is unenforceable. " [para 28]

95. In its reply, MSC denies that the 1991 Act has the effect that use of an outfall permitted by a licence expressly providing for its termination cannot be terminated in accordance with those terms. It is not, however, pleaded by MSC that any of the licences amounted to a consent by MSC to injurious affection of the Canal given under s.331 of the Public Health Act 1936 or s.332 of the Public Health Act 1875, or their statutory successor provisions.

96. The relevant licences are, in date order, the following:

i) an agreement in respect of an easement for overflow dated 2 March 1916 made between Runcorn Rural District Council and MSC (in respect of outfall 26), in which the Council undertook on six months' notice given at any time to remove and put an end to the easement and discontinue to exercise the same, and to reinstate MSC's property;

ii) an agreement to construct and maintain a stormwater overflow sewer made between MSC and the Borough of Eccles dated 24 April 1933 (in respect of outfall 67), granting the privilege and licence to construct a sewer (but restricting its use to appropriately diluted discharge), determinable at any time after 1 January 1963 by MSC giving six months' notice, with an obligation for the Corporation thereupon to remove the sewer and reinstate the land of MSC;

iii) an agreement in the form of a lease between MSC and the Runcorn Rural District Council dated 21 December 1934 (in respect of outfall 36, though MSC denies this) granting the right to construct and maintain an effluent pipe, storm tanks, discharge pipe and storm overflow pipes, and to discharge into the Canal in consideration of a yearly rent, determinable on notice of breach, in which circumstances the Council must remove its works and reinstate the property of MSC;

iv) an agreement in respect of an easement (the validity of which UU does not accept for other reasons) dated 5 September 1939 by Runcorn Rural District Council (in respect of outfall 23), under which the Council agrees to pay rent and undertakes on six months' notice given at any time to remove and put an end to the privilege and discontinue to exercise the same and to reinstate MSC's property;

v) an agreement in the form of a lease made between MSC and the Borough of Warrington dated 24 June 1955 (in respect of outfall 35) granting the right to construct and use a stormwater overflow drain in consideration of an annual rent, until termination by six months' notice in writing given at any time, with an obligation for the Corporation on termination in all respects to remove the works and reinstate the land of MSC;

vi) a licence between MSC and Warrington Borough Council dated 17 November 1987 (in respect of outfall 36), which recites that the Council is desirous of discharging sewage and stormwater into the Canal by means of the licensed works "and have applied to the Company for their consent" and grants licence

> to discharge into the Canal by means of the works, licensed for a term of 15 years from 1 January 1987 and continuing until determined by not less than 12 months' notice, containing an obligation on the Council immediately on determination to remove the licensed works and reinstate the property of MSC.

97. MSC has purported to terminate each of these agreements.

98. UU's case is that these contractual provisions purport to require UU to discontinue the use of a public sewer in circumstances beyond the limited power to do so in successive statutes and now in s.116 of the 1991 Act. UU submits that it has no power to discontinue use of the sewer in these circumstances, and its predecessors had no power to agree to discontinue use in such circumstances. Further, UU is under a general duty to maintain and provide for use the public sewers, including the outfalls, and so continued use of the outfalls, notwithstanding the notices to terminate, must be lawful.

99. The starting point, UU submits, is that a public body cannot fetter by contract its ability to exercise its powers or perform its public duty:

> "… If a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties." (Birkdale District Electric Supply Company Ltd v Southport [1926] AC 355, *per* Lord Birkenhead.)

Similarly, a public authority cannot be estopped from carrying out its statutory duties for the public benefit: Sunderland Corporation v Priestman [1927] 2 Ch 107 at 116, per Tomlin J (a case under the Public Health Act 1875).

100. The relevant powers and duties of UU are: power in s.106 to allow members of the public to drain residential property through the public sewers, which imposes on a sewerage undertaker a duty to permit and facilitate it; the s.94 duty to make provision for the emptying of public sewers, to ensure that its area is effectually drained; and the limited power in s.116 to discontinue use of a sewer (see [24] above). The latter requires an undertaker first to provide a new, equally effective sewer and to make the necessary connection with pipes and sewers of any person draining into the old sewer. Ss. 106 and 116 had statutory predecessors in substantially identical terms in the Public Health Act 1875 (ss. 21, 18) and the Public Health Act 1936 (ss.34, 22), which provisions were applied under the Water Act 1973 (s.14(2)) and the Water Act 1989 (s.69 and Sch. 8).

101. UU argues that an absolute contractual obligation to remove a sewer outfall would have been inconsistent with an authority's duty to provide sewerage services and in excess of the limited power conferred by the relevant Acts to discontinue use of a sewer. As such, the agreement to discontinue is *ultra vires* and void. There can be no implied power to enter into an agreement to do something that is contrary to statutory duties and in excess of powers conferred. Mr Karas argued that the agreement to provide drainage was not itself void; only the agreement to discontinue use of it. That would have the effect that UU enjoys a contractual right to drain that cannot be terminated.

MSC understandably does not assert that the licences themselves were wholly void; it maintains that they were wholly effective.

102. Alternatively, UU submits that the obligations are now unenforceable under the terms of the 1991 Act and UU is therefore entitled to continue to drain, otherwise it will be unable to perform the duties that are imposed on it. It submits that MSC is entitled to compensation under para 4 of Sch. 12 to the 1991 Act if it has sustained damage as a result of the exercise of any power in the relevant sewerage provisions. UU accepts that in principle an express agreement could confer more extensive rights than those implied by the 1991 Act, provided that there was no inconsistency between them, and that such rights could be withdrawn (in other words, such consent could be determinable); but there is no case pleaded that the licences in question do that.

103. In any event, Mr Karas submits that a contractual right, if valid, could not suppress the existence of a statutory right to drain (contrary to the provisional view formed by Newey J). It follows therefore, on UU's case, that even if the licence was validly terminated, the licensed outfalls can be in no different position from unlicensed outfalls, as regards the implied statutory right of drainage. In both cases, the powers and duties relevant to laying pipes and drainage are found in the statute itself – even an agreement to drain must have been made pursuant to a statutory power.

104. In its skeleton argument, MSC contended that the local authorities entered into the licences because of the restrictive effect of the statutory provisos: they needed consent in order to discharge contaminated water into the Canal, which was otherwise unauthorised. Mr Hart referred to the language of the recital and testatum of the 1987 agreement as pointing clearly in that direction. I do not consider that the terms of the licences put it beyond doubt that they were consents given by MSC under the statutory proviso – only the 1987 licence contains language that suggests that that may be the case, but it is principally the works that are licensed. However, in the absence of a pleaded case to that effect, there has been no disclosure, nor has UU investigated the question with its predecessor sewerage authorities. While documentary or other evidence relating to the 1916 agreement may well be unavailable, that is unlikely to be the case in relation to the 1987 licence, on which MSC particularly relies.

105. In my judgment, MSC is not entitled now to take the point that the licences are the grant of additional rights to pollute, rather than agreements to document consensual drainage. As MSC's skeleton argument recognises, "[i]t would have been unlikely for any local authority to seek to do major works interfering with the banks of the [Canal] or to discharge large quantities of water (pure or foul) into the [Canal] without engaging with the MSC". It cannot therefore be inferred that the licences granted a right to pollute for the first time, circumscribed by its terms.

106. The foundation for MSC's case is therefore unsound, in my view. The local authorities were not necessarily obtaining consent for something that was not permitted, and MSC's case to that effect had not been raised before the exchange of skeleton arguments for this hearing. For the reasons that I have given, that is too late. Moreover, even if that argument were available to MSC, it would mean that the licences conferred a right to drain polluted effluent, and unpolluted effluent was drained pursuant to the implied statutory right. In those circumstances, UU would have the benefit of the right to continue to drain (unpolluted effluent) implied in the 1991 Act.

107. Mr Hart argued, alternatively, that there was no incompatibility between terminable rights conferred by the licences and performance of the authorities' statutory drainage duties, nor any fettering of their statutory powers. An authority had power to contract on terms that are of benefit to its activities but which make the contract terminable. Alternatively, it is not possible to sever the terms of the licences and enforce the agreement without the provisions for termination.

108. The licensed drainage therefore overlapped the historic implied statutory right to drain into a watercourse, but in my judgment once the outfalls had been built and were being used as a public sewer (which it is common ground the licensed outfalls are), the absolute obligation to cease use and reinstate (albeit on notice in most cases) is inconsistent with the duty on an authority to permit and facilitate drainage through public sewers with limited power to discontinue use.

109. I therefore consider that the termination and reinstatement provisions of the licences were void. This is a different case from cases like Stourcliffe Estates Co Ltd v Bournemouth Corporation [1910] 2 Ch 12, on which MSC relied. In that case, the Corporation had exercised a general power to purchase land for use by the public as pleasure grounds. The conveyance included a restrictive covenant precluding any further building or erection other than of a specified kind. The Corporation later wished to exercise another general power to provide conveniences for the public by building lavatories and urinals on the land. The Court of Appeal held that nothing prevented the Corporation from buying land subject to a restrictive covenant, and the mere fact that the covenant might prevent the exercise on the land of another perfectly general power of the Corporation did not fetter the exercise of its powers in a way that was objectionable in law. The Master of the Rolls emphasised that there was no dedication of the land in question by statute to any particular purpose, so the covenant did not conflict with the authorised use of the land.

110. That was considered by the Court to be quite different from a case in which the proposed covenant conflicted with the terms in which a public body was authorised to acquire land: Ayr Harbour Trustees v Oswald (1883) 8 App Cas 623. Similarly here, the obligation to give up use of the outfalls is not merely a term of an agreement that the authority was free to make: it conflicts with the limited power of a local authority to discontinue use of any public sewer and with its duty to empty public sewers and deal effectually with their contents. MSC therefore cannot contend that the local authorities were empowered to agree to put an end to their permitted drainage any more than they could agree to give up their statutory right to drain into a watercourse.

111. Whether the licences as a whole were void or the consent was in consequence non-terminable does not matter as regards UU's right to continue to drain through the licensed outfalls. If wholly void, the drainage before 1 December 1991 was pursuant to the implied statutory right and so the implied right under the 1991 Act applies to the licensed outfalls. If only the termination provisions are void, UU has a continuing consensual right to drain, notwithstanding MSC's attempt to terminate the licences.

112. It is also arguable that the implied right under the 1991 Act arose in any event, despite the fact that drainage through the licensed outfalls immediately before that date was consensual. If it did not arise, a licence due to terminate by prior notice on 2 December 1991 would mean that a sewerage undertaker had thereupon immediately to cease use of the sewer in question. The same logic would apply in the case of 6 months' notice

given on 2 December 1991, when it is unclear whether the period of notice would suffice to enable the undertaker to acquire substitute rights by compulsory acquisition or negotiation. However, I prefer to rest my conclusion on the voidness of the cesser and reinstatement agreements in the licences, which means that – if the licences were otherwise valid – the consensual right to drain (that replicates the implied statutory right to do so) continues in the same way that an implied statutory right to drain would have continued.

113. I therefore decide the preliminary issue in the 2010 claim in favour of UU. UU has the right to continue to drain through the licensed outfalls notwithstanding MSC's notices of termination of the licences.