Neutral Citation Number: [2022] EWCA Civ 852

Case Nos: CA-2021-000674
CA-2021-000675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Fancourt
[2021] EWHC 1571 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 June 2022

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

THE MANCHESTER SHIP CANAL COMPANY LTD	**Claimant/ Appellant**
- and -	
UNITED UTILITIES WATER LTD	**Defendant/ Respondent**

And between :

UNITED UTILITIES WATER LTD	**Claimant/ Respondent**
- and -	
THE MANCHESTER SHIP CANAL COMPANY LTD	**Defendant/ Appellant**
- and -	
(1) GOOD LAW PROJECT LIMITED (2) ENVIRONMENTAL LAW FOUNDATION (3) LONDON WATERKEEPER (4) STONYHURST COLLEGE (5) KENT ENVIRONMENT AND COMMUNITY NETWORK	**Interveners**

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David Hart QC, Charles Morgan and **Nicholas Ostrowski**
(instructed by **BDB Pitmans LLP**) for the **Appellant**

Jonathan Karas QC, Richard Moules and **James McCreath**
(instructed by **Pinsent Masons LLP)** for the **Respondent**

Tom de la Mare QC and **George Molyneaux** (instructed by **Hausfeld & Co LLP**)
for the **Interveners** (by written submissions only)

Hearing dates: 29, 30 and 31 March 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 27 June 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Nugee:

Introduction

1. There are two appeals before the Court brought by The Manchester Ship Canal Company Ltd (**"MSCC"**) against decisions of Fancourt J on issues arising in a long-running dispute between MSCC and United Utilities Water Ltd (**"UU"**) concerning discharges by UU into the Manchester Ship Canal (**"the canal"**). Fancourt J decided both issues in favour of UU for the reasons contained in a single judgment handed down by him on 15 June 2021 at [2021] EWHC 1571 (Ch) (**"the Judgment"** or **"Jmt"**).

2. MSCC, originally incorporated pursuant to the Manchester Ship Canal Act 1885 as the Manchester Ship Canal Company, is the owner of the canal. It is admitted on the pleadings that it is the freehold owner of, and entitled to possession of, the beds and banks of the canal; there is a dispute whether it has any proprietary right in the waters of the canal, but we have heard no argument on the point and nothing turns on it for present purposes. The canal, constructed pursuant to the 1885 Act, is over 35 miles long and runs from east of Salford Quays in Greater Manchester to Eastham. In its upper reaches the canal is a canalisation of the Rivers Irwell and Mersey, and it drains into the Mersey estuary and hence the sea.

3. UU is the sewerage undertaker for the North West of England, having been appointed as such in 1989 under the provisions of the Water Act 1989. It owns an extensive network of sewers and drains, much of it inherited from its predecessors (local authorities and, under the Water Act 1973, the regional water authority). This includes in the region of 100 outfalls of various types which discharge directly or indirectly into the canal.

4. In 2010 MSCC brought a claim against UU which in summary alleged that all discharges from UU's outfalls constituted a trespass (**"the 2010 proceedings"**). Most of this claim had already been determined in UU's favour, or discontinued, by the time of the hearing before Fancourt J, but there remained a small number of outfalls in issue where the outfall had originally been permitted by MSCC by way of an agreement that on its face was terminable by MSCC. A preliminary issue was ordered as to whether UU would have any continued statutory right to drain through the outfalls if MSCC terminated (or purported to terminate) the agreements. Fancourt J decided this issue in favour of UU. In appeal CA-2021-000674 MSCC appeals this decision with permission of Arnold LJ granted on 6 September 2021. I will refer to this appeal as **"the 2010 appeal"**. Before us the parties treated the 2010 appeal as very much the subsidiary of the two questions, arguing it after the other appeal and more briefly, and I also propose to consider it after the other appeal.

5. This arises in a second set of proceedings, this time brought in 2018 by UU by way of Part 8 claim (**"the 2018 proceedings"**). The issue raised by this claim was whether MSCC has any private law claim in trespass or nuisance against UU in respect of discharges from outfalls that are not authorised by statute (in effect untreated foul water discharges that prejudicially affect the quality of the water in the canal). UU accepted that if there had been any such discharges it would have acted in breach of its statutory duty, but said that the only remedy available was regulatory enforcement under the relevant statutory provisions, not a private law action by the landowner affected. Again Fancourt J decided this issue in favour of UU and MSCC appeals, in this case with

permission granted by Fancourt J himself. This is appeal CA-2021-000675 and I will refer to it as **"the 2018 appeal"**.

6. By Order dated 19 January 2022, Arnold LJ gave permission to a number of bodies with an interest in the environmental health of waterbodies to intervene in the 2018 appeal, by way of written submissions only.

Brief history of the statutory regulation of sewerage

7. It is helpful to start with a brief overview of the history of the statutory provisions regulating sewerage. I do not set out the text of the relevant provisions here, but simply identify the succession of principal statutes and some of their features.

8. Although provision was made by the Public Health Act 1848 for Local Boards of Health to be established with various powers in relation to drainage and sewers, we were not referred to its provisions and the first Act of Parliament to which we were referred was the Public Health Act 1875 (**"PHA 1875"**). This divided England (other than the metropolis) into districts (either urban sanitary districts or rural sanitary districts), each being subject to the jurisdiction of a "local authority" (either an urban sanitary authority or a rural sanitary authority) (s. 5). It vested all existing and future sewers within a district in the relevant local authority, subject to some limited exceptions (s. 13), "sewer" being given a wide definition which included almost all sewers and drains other than drains for draining one building only (s. 4). Various powers in connection with sewers were conferred on the local authorities, some of which I will have to look at in due course.

9. The PHA 1875 also contained a number of provisions which, in various forms, have been reiterated in later legislation. These included a statutory obligation on a local authority to cause to be made such sewers as might be necessary for effectually draining their district (s. 13); a right on owners and occupiers of premises within the district to connect to and use the local authority's sewers (s. 21); a power for a local authority to discontinue a sewer, but only on condition of providing a substitute for anyone lawfully using the sewer (s. 18); and a declaration that nothing in the Act should authorise a local authority to discharge sewage or filthy water into a watercourse (including a canal) without it first being treated to free it from foul matter (s. 17). The Act also contained, in s. 299, a particular statutory procedure for enforcing a local authority's obligations which was by way of complaint to the Local Government Board, which could make an order requiring compliance. Again I will have to come back to the detail of some of these provisions in due course.

10. On 1 October 1937 the Public Health Act 1936 (**"PHA 1936"**) was brought into force. This was a consolidating Act and superseded the PHA 1875 as the principal statute governing sewerage. By that stage there had been some change in the identity of the relevant local authorities, but it remained the case that it was the duty of a local authority to provide such public sewers as might be necessary for effectually draining their district (and in addition a local authority was by then also under a duty to make such provision, by means of sewage disposal works or otherwise, as might be necessary for effectually dealing with the contents of their sewers) (s. 14); that owners and occupiers had a right to connect to and use such public sewers (s. 34); that a local authority had power to discontinue a sewer but before depriving any person of the use of a sewer had to provide a sewer that was equally effective (s. 22); and that nothing in the Act

authorised a local authority to use a sewer for the purpose of conveying foul water into a watercourse (or canal) until it had been treated (s. 30). And the Act again contained a particular statutory procedure for enforcing a local authority's obligations, in this case by complaint to the Minister who might (if satisfied, after holding a local inquiry, that there had been a default) make an order directing them to remedy it (s. 322).

11. On 1 April 1974 the principal provisions of the Water Act 1973 came into force. This established 10 regional water authorities in England and Wales (one of which was the North West Water Authority) with responsibility both for water supply and for sewerage. So far as sewerage is concerned, it imposed on them the duty to provide such public sewers as might be necessary for effectually draining their area and to make provision for effectually dealing with the contents of their sewers (s. 14(1)), and provided that they should exercise the functions conferred on local authorities by the relevant sections of the Public Health Act 1936 (s. 14(2)).

12. In 1986 the Government decided to privatise the water industry. It set out its reasons for the decision in a White Paper published in February 1986: *Privatisation of the Water Authorities in England and Wales* (Cmnd. 9734). In July 1987 the Government supplemented this proposal with a proposal for a new public regulatory body, the National Rivers Authority (**"the NRA"**), in a document entitled *The National Rivers Authority – The Government's proposals for a public regulatory body in a privatised water industry*. Effect was given to these proposals by the Water Act 1989. A successor company, initially publicly owned, was nominated for each regional water authority, and on the transfer date (1 September 1989) the successor company was appointed to be the sewerage undertaker for the relevant area and the relevant assets of the water authority were transferred to it. UU was the successor company for the North West Water Authority and duly appointed as sewerage undertaker for the North West.

13. The general sewerage functions of a sewerage undertaker were set out in s. 67, which imposed a duty on such an undertaker to provide a system of public sewers so as to ensure that its area was and continued to be effectually drained, and to make provision for effectually dealing with the contents of those sewers. By s. 69 and sch 8, the functions of water authorities relating to sewerage services were transferred to sewerage undertakers, and the relevant provisions of the Public Health Act 1936 were to be read as referring to sewerage undertakers in place of water authorities. The Act again contained a special statutory regime for enforcement of the general s. 67 duty, in this case by the Secretary of State, or the Director General of Water Services (**"the Director"**), making orders under s. 20 for the purpose of securing compliance.

14. The final Act which I should refer to here is the Water Industry Act 1991 (**"WIA 1991"**), which consolidated various enactments with amendments. It came into force on 1 December 1991, and (as subsequently amended) remains the principal Act regulating sewerage. The general duty of a sewerage undertaker to provide a sewerage system to ensure that its area is effectually drained and to make provision for effectually dealing with the contents of its sewers is now found in s. 94; the right of any owner or occupier of premises to connect to a public sewer is now found in s. 106; and the right of the undertaker to discontinue a sewer, subject to providing an equally effective sewer for anyone lawfully using it, is now found in s. 116. The special statutory regime for enforcement of a sewerage undertaker's duties, including the general duty under s. 94, is now found in s. 18, which empowers the Secretary of State or the Water Services Regulation Authority (which has replaced the Director, and is commonly known as

Ofwat) to make orders for the purpose of securing compliance.

15. The WIA 1991 also contains, in s. 117(5) and s. 186(3), two provisions which can be called the "foul water provisos". They are to the effect that nothing in specified provisions of the Act authorises a sewerage undertaker (i) to use a sewer or outfall for the purpose of conveying foul water into any watercourse or canal without the water having been so treated as "not to affect prejudicially the purity and quality of the water" in the watercourse or canal, or (ii) "injuriously to affect … the … quality … of water" contained in a canal. The effect of these provisions lies at the heart of the 2018 appeal, and I will consider them in more detail below.

The 2018 proceedings – facts

16. UU served evidence in support of the 2018 proceedings from two witnesses: Mr James Haslett, a senior employee responsible for the operation of UU's wastewater network and treatment works, and Dr Keith Hendry, an aquatic scientist with particular experience of the Mersey basin and the canal. MSCC, while not accepting that evidence, did not serve any evidence of its own, nor was there any oral evidence or cross-examination, MSCC's position being that factual evidence was not necessary to resolve what was in essence a question of statutory construction. Fancourt J did not fully accept that, saying that the evidence of Mr Haslett and Dr Hendry was an important basis for the declaration that UU sought, and that while MSCC might not have agreed it, it was the only evidence before the Court (Jmt at [45]-[47]). He said that it was not intended to disprove any incident of negligence or misfeasance on the part of UU (UU having accepted that the declaration it sought was not intended to prevent MSCC alleging negligence against UU and that in such a case it might have a valid claim); the purpose of the evidence was to make it clear that, subject to such a case being alleged and proved, the unlawful discharges complained of were involuntary and could only be remedied in the way that the evidence explained. Fancourt J said that he accepted the evidence of Mr Haslett and Dr Hendry on that basis (Jmt at [47]).

17. With that introduction I can summarise their evidence as follows. Starting with Dr Hendry's, his evidence, drawn from his own personal experience over many years, was directed to the improvement in the water quality of the canal since the 1980s. He described the canal during the 1980s as being like an open sewer, virtually uninhabitable to fish. He attributed this to sustained underinvestment over successive generations in improvements to sewerage infrastructure, referring to the fact that although there was environmental regulation through the Control of Pollution Act 1974, the bodies charged with regulating discharges were the regional water authorities who were themselves operating the sewerage system, so that there was no genuinely independent regulation. On privatisation an independent regulator was established, initially the NRA and then from 1996 the Environment Agency (**"the EA"**). To meet the regulator's requirements, there had been substantial investment since privatisation by the water industry, including UU, and this had led to a transformation in water quality both nationally and specifically in the canal; fish were now common, with salmon, one of the most pollution-intolerant species, observed in the upper reaches of the Mersey (which requires them to have traversed part of the canal).

18. Dr Hendry also explained how a strategic approach had been taken to addressing environmental concerns which involves identifying spending priorities. He said that there was no point, for example, in addressing discharges into a body of water such as

the canal on its own, without addressing discharges into the water bodies upstream which feed into it. The strategy for the Mersey basin adopted by the NRA was to start at the periphery of the basin, first improving water quality upstream, and then to move in. Dealing first with direct discharges into the canal would have required additional and costly effort to compensate for poor quality water still coming from upstream, and the environmental benefits would have been considerably reduced.

19. Dr Hendry also gave evidence intended to demonstrate that it was not a simple question to assess whether UU's discharges into the canal were such as to "affect prejudicially" or "injuriously affect" the quality of water in the canal within the meaning of the foul water provisos in s. 117(5) and s. 186(3) WIA 1991. (I will use the term "unauthorised discharge" to refer to discharges which are in breach of the foul water provisos in this way). It is not necessary to give the detail, as UU did not ask the Court on the hearing of this claim to make any decision on these questions; the evidence was merely put forward to illustrate that it should not be assumed that UU's discharges were in fact unauthorised, and that there are technical arguments that by adding oxygen to the water in the canal (which by its design tends to suffer from oxygen depletion), and by adding to the volume of water in the canal, the discharges in fact benefit the canal.

20. The thrust of Mr Haslett's evidence was that improvements to sewerage infrastructure are the subject of a sophisticated regulatory regime which seeks to identify priorities for environmental improvements, and to balance the benefits of those against the cost of those improvements, which has to be borne by a sewerage undertaker's customers; and that if it were open to a litigant such as MSCC to force improvements to UU's infrastructure by bringing a private law claim in tort in respect of unauthorised discharges, that would be inconsistent with and undermine that regime.

21. He gave some detail of UU's sewerage infrastructure. The vast majority of it was not constructed by UU itself but inherited by UU in 1989, some of it dating back to Victorian times. It includes four types of outfalls which MSCC contend are responsible for unauthorised discharges, as follows:

(1) Combined sewer overflows

Almost all new sewer systems are separate systems in which there are separate sewers for surface water and foul water. But historically combined systems were used in which both surface water and foul water (from domestic and business premises) enter a single pipe system; such combined systems are very common in UU's network and across the UK. This means that in times of heavy rainfall the combined flow may exceed the capacity of the system. In the absence of an overflow this will back up and cause flooding and pollution (either of highways, external to customers' premises or, more distressingly, internal to such premises). A combined sewer overflow is designed to prevent such flooding by diverting excess flow to an appropriate watercourse. Such flow has by definition not been through any wastewater treatment works, and therefore has the effect of discharging untreated sewage into the watercourse (although it is diluted by stormwater and usually screened to prevent solid matter). At the time of privatisation the system inherited by UU included some 2817 combined sewer overflows. By 2018 that had been reduced to 2047.

(2) Storm tank overflows

UU treats sewage at wastewater treatment works. About a third of these have storm tanks. They are not needed for small treatment works, but for treatment works of any size, which will inevitably receive considerable volume from combined sewer systems, the rate of flow will increase significantly in times of rainfall, and flows may exceed the capacity of the treatment works, the industry standard being that treatment works should be able to treat flows up to three times the dry weather flow. Storm tanks are used to store flow in excess of this capacity. But they too have a finite capacity which may be inadequate in times of heavy rainfall, in which case the excess is diverted to an overflow. UU has 197 such storm tank overflows in its system (a number which is unlikely to have changed much since privatisation since treatment works either have storm tanks, and hence overflows, or not).

(3) Emergency overflows

Emergency overflows operate in times of emergency, most commonly at pumping stations. If pumps suffer mechanical failure or loss of power, the sewage entering the pumping station will back up and flood the station and surrounding area; emergency overflows prevent this by allowing overflows into nearby watercourses. At the time of privatisation there were 630 such overflows in UU's system; in 2018 there were 585 (and another 396 which discharge into a combined sewer overflow).

(4) Discharges from wastewater treatment works

UU operates 568 treatment works, ranging from the very small (serving around 15 people) to the very large (the largest serving a population equivalent of some 1,200,000). After treatment the final effluent is discharged into a watercourse or other body of water, and the treatment processes vary with the size of the works and the environmental needs of the water body receiving the effluent.

22. Mr Haslett explained what would be necessary to prevent or reduce such discharges. In the case of a combined sewer overflow, one could in theory replace the combined sewer system with new separate systems; or install detention tanks to store storm flow until the sewers had sufficient capacity. In the case of storm tank overflows one could in theory install larger storm tanks or increase the capacity of the treatment works so that increased flows proceeded to treatment rather than being diverted to storm tanks. In the case of emergency overflows, better maintenance of equipment, installation of more modern and reliable equipment, and new telemetry informing UU when equipment has failed can contribute (and indeed have contributed) to the emergency overflows being used less frequently. In the case of discharges from treatment works, improvements in treatment processes can reduce the level of pollutants in the final effluent. It can be seen that all of these measures would require expenditure, usually on capital projects, and Mr Haslett gave details of the large amounts of capital expenditure undertaken by UU since privatisation.

23. Mr Haslett explained that under the WIA 1991 sewerage undertakers are subject to two regulators, an economic regulator (formerly the Director and now Ofwat) and an environmental regulator (formerly the NRA and now the EA). (To describe the

Director and Ofwat as merely economic regulators to my mind rather underplays their role which is more extensive but it is not necessary to go into the details). In very broad terms the EA (which has a much broader remit than simply the water industry) has a duty to improve and maintain the quality of surface and ground waters, and as such is responsible for monitoring the quality of waters, and discharges into them. Among other things it controls discharges from individual outfalls through a regime of permits, and has a variety of enforcement tools if discharges are not in compliance with permits. It also works with undertakers to identify capital works that are required to effect improvements. Some such works are required to meet legislative requirements. But where there is no legislative requirement this involves balancing the benefits of schemes for improvement against their costs.

24. Ofwat is responsible for setting the price framework for the charges which undertakers can charge consumers. It undertakes periodic price reviews, intended to ensure that undertakers can perform their functions, including necessary investment in infrastructure, without undue cost to their customers. This process can involve Ofwat in challenging schemes designed to deliver environmental improvements on the basis that the costs outweigh the benefits, leading to further liaison between Ofwat, the EA and the undertaker. At the end of the process Ofwat issues a final determination which sets the level of charges the undertaker can make.

25. Mr Haslett's evidence goes into these matters in considerable detail, but it is unnecessary to do so here. He summarises the position as follows. A key element of the operation of a sewerage undertaker such as UU since privatisation has been liaison with its regulators, working closely with the EA to determine the environmental improvement schemes that are necessary, and with Ofwat to set the consequential price levels to deliver such schemes. Funding for any particular project can only be raised by either increasing bills or by diverting resources from other projects, and (he believes) this regulatory regime provides a sophisticated way for identifying which projects should be prioritised.

Implied rights of discharge

26. We were referred to a large number of authorities, dating back to the PHA 1875. I do not propose to refer to them extensively here, but it is helpful to identify some decisions which form the backdrop to the present dispute.

27. I can start with *Durrant v Branksome Urban District Council* [1897] 2 Ch 291 (***"Durrant"***). The plaintiffs were owners of a stream called the Bourne. The defendant council was the local authority for the purposes of the PHA 1875 and had constructed drains which drained surface water from roads in their district into the Bourne. These were not foul water drains and did not convey sewage, but they were "sewers" for the purposes of the PHA 1875, and they carried sand or silt into the Bourne, which was what the plaintiffs complained of. The plaintiffs claimed that the defendant had no right to discharge into their stream, but both North J and, on appeal, this Court held that on the true construction of the PHA 1875, they had a statutory right to do so. The relevant provisions were as follows: (i) s. 15 which provided that "Every local authority … shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act"; (ii) s. 16 which provided that "Any local authority may carry any sewer … into … any lands whatsoever in their district"; and (iii) s. 17 which provided as follows:

> "**17 Sewage to be purified before being discharged into streams**
>
> Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying any sewage or filthy water into any natural stream or water course, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

This Court held that the inference from reading ss. 16 and 17 together was that s. 16 conferred a right on the local authority to discharge water into any stream or watercourse ("lands" in s. 16 including land covered with water) as long as it was free from the things referred to in s. 17, and the fact that the water here carried down sand and silt was not a breach of s. 17: see per Lindley LJ at 301-2, Lopes LJ at 303 and Chitty LJ at 304-5.

28. *Durrant* therefore established that under the PHA 1875 a local authority had a general statutory right to discharge water into watercourses so long as it was either clean, or had been treated so as not to fall foul of the restriction in s. 17. The same applied under the equivalent provisions in the PHA 1936, namely s. 15 which conferred power on a local authority to construct a public sewer in, on or over any land, and s. 30 which provided as follows:

> "**30 Sewage, and &c, to be purified before being discharged into streams, canals and &c.**
>
> Nothing in this Part of this Act shall authorise a local authority to construct or use any public or other sewer, or any drain or outfall, for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal pond or lake, until the water has been so treated as not to affect prejudicially the purity and quality of the water in such stream, watercourse, canal pond or lake."

These provisions of the PHA 1936 continued to apply to regional water authorities under the Water Act 1973, and to sewerage undertakers under the Water Act 1989.

29. In *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA 276 (***"BWB"***) the question was raised whether the position was the same under the WIA 1991 which replaced the PHA 1936. Severn Trent Water Ltd (**"STW"**) was the sewerage undertaker for its area, having been appointed under the Water Act 1989 as successor to the Severn-Trent Water Authority. It inherited a pipe which discharged surface water into the Stourbridge canal, owned by the British Waterways Board (**"BWB"**). The question raised was whether STW had a right under the WIA 1991 to discharge into the canal without BWB's permission. Arden J held that it did, finding (largely by analogy with *Durrant*) that such a right was implicit in s. 159 WIA 1991 which provides that a sewerage undertaker has power to lay pipes: see [2001] Ch 32. On appeal however this Court held that there was no implied right in the WIA 1991 for a sewerage undertaker to discharge onto the land of another without consent and without compensation, and that *Durrant* was of little relevance: see per Peter Gibson LJ at [32] and [43], Chadwick LJ at [71] and [75] and Keene LJ at [78].

30. It was the decision in *BWB* which prompted MSCC to assert that all of UU's discharges into the canal were acts of trespass, and ultimately to bring the 2010 proceedings. One of UU's defences to the claim was that *BWB* did not apply to outfalls which had vested in UU before 1 December 1991 when the WIA 1991 came into force. That issue was heard successively by Newey J, who held in favour of UU at [2012] EWHC 232 (Ch); this Court, which allowed an appeal by MSCC at [2013] EWCA Civ 40; and the Supreme Court, which allowed UU's further appeal at [2014] UKSC 40 (***"MSCC (2014)"***). The Supreme Court rejected UU's submission that *BWB* was wrongly decided, holding that the reasoning in *BWB* was compelling and unanswerable on the question put before the Court in *BWB* about the effect of s.159: see per Lord Sumption JSC at [15], Lord Toulson JSC at [26] and Lord Neuberger PSC at [57]. But it accepted UU's submission that Parliament cannot have intended by enacting the WIA 1991 to take away overnight the sewerage undertakers' rights to discharge from existing outfalls, and that they therefore continued to have a statutory right to discharge from any outfalls constructed before 1 December 1991: see per Lord Sumption JSC at [18]-[19], Lord Toulson JSC at [29ff], and Lord Neuberger PSC at [58ff]. The essential reasoning, as expressed by Lord Sumption, is that when the WIA 1991 imposed on sewerage undertakers duties which they could only perform by continuing to discharge from existing outfalls and at the same time applied to them the statutory restrictions on discontinuing the use of existing sewers (now found in s. 116 WIA 1991), it implicitly authorised the continued use of existing sewers.

31. The effect of the decision was to put an end to MSCC's contention that the mere continued discharge after 1991 by UU into the canal from any pre-existing outfall was a trespass. It did not however deal with the position in relation to unauthorised discharges in breach of the foul water provisos, which is the subject of the 2018 appeal. (Nor did it deal with the position where discharges had initially been by consent in the form of a terminable licence and the licence is terminated, which is the subject of the 2010 appeal.)

Marcic

32. Before coming to the Judgment, it is convenient to refer to one other authority, which is the decision of the House of Lords in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66 (***"Marcic"***). Mr Marcic was the owner of a house in Old Church Lane, Stanmore. Thames Water Utilities Ltd (**"Thames"**) was the sewerage undertaker for the area. In times of heavy rainfall, surface water caused a foul water sewer under Old Church Lane to become overloaded and cause (external) foul water flooding to Mr Marcic's property. This happened repeatedly and Mr Marcic spent £16,000 constructing a flood defence system in his front garden. He sued Thames for an order requiring Thames to improve the sewerage system and for damages, basing his claim on the tort of nuisance and alternatively on the Human Rights Act 1998. Both claims were upheld by this Court ([2002] EWCA Civ 64) but rejected by the House of Lords. Nothing need be said about the Human Rights Act claim which is not relevant to the present appeal, but the rejection of the claim in nuisance is relied on by UU as demonstrating that MSCC equally has no claim in the present case in tort for unauthorised discharges in breach of the foul water provisos.

33. Reasoned judgments on this question were given by Lord Nicholls and Lord Hoffmann, Lords Steyn and Scott agreeing with both judgments and Lord Hope with that of Lord Nicholls.

34. Both Lord Nicholls and Lord Hoffmann explain that Thames was under a statutory duty (by s. 94 WIA 1991) to cause its area to be "effectually drained" and Lord Nicholls certainly proceeded on the basis that the flooding suffered by Mr Marcic indicated that Thames was in breach of that duty. But that duty was not directly enforceable by Mr Marcic as the only person who could enforce it in the first instance was the Director, who could make an enforcement order under s. 18 WIA 1991, and the effect of s. 18(8) WIA 1991 was to make it clear that the only remedies for breach of the s. 94 duty were the statutory remedies (at [21] and [51]). But s. 18(8) did not exclude any remedies available in respect of an act or omission "otherwise than by virtue of its constituting a contravention" of such a duty. So the question was whether Mr Marcic had a common law claim in nuisance (at [22] and [52]).

35. Both Lord Nicholls and Lord Hoffmann concluded that he did not. Lord Nicholls' reasoning was as follows. This Court had found liability in nuisance on the basis of the general obligation on a landowner to take reasonable steps to prevent hazards on his land from causing damage to his neighbour (at [32]). But Thames was no ordinary occupier of land: it was a sewerage undertaker, and its obligations regarding its sewers could not sensibly be considered without regard to the elaborate statutory scheme under the WIA 1991. The common law of nuisance should not impose on Thames obligations inconsistent with that scheme (at [33]). Mr Marcic's claim in nuisance was inconsistent. However expressed, it always came down to this: Thames ought to build more sewers (at [34]). But it was abundantly clear that one important purpose of the enforcement scheme in the WIA 1991 was that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers. When flooding occurred, the Director would consider whether to make an enforcement order; and the existence of a parallel common law right whereby individual householders who suffer sewer flooding might themselves bring court proceedings when no enforcement order had been made would set at nought the statutory scheme (at [35]).

36. Lord Hoffmann's reasoning was as follows. The question was whether the failure by Thames to improve the sewers to meet the increased demand gave rise to a cause of action at common law (at [52]). But there was a consistent line of authority dating back to *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102 to the effect that the failure of a sewerage authority to construct new sewers did not constitute an actionable nuisance. These cases did not, as this Court had thought, turn on general principles about the law of nuisance; they were cases about sewers (at [54]-[59]). Sewers are different because they do not just involve two neighbouring landowners: if one customer is given a certain level of services then others in the same circumstances should receive the same. That raises questions of the public interest: capital expenditure has to be financed, interest must be paid on borrowings and undertakers must earn a reasonable return, and the expenditure can only be met by charges on consumers (at [63]). These are decisions which courts are not equipped to make in ordinary litigation (at [64]). The WIA 1991 contained an elaborate enforcement procedure. The Director was under a duty to consider complaints but was required to exercise his powers in the manner best calculated to achieve certain objectives (at [65]). Pursuant to these duties he had formulated certain policies, and made decisions whether capital expenditure was reasonable (in which case it is taken into account in assessing the charges which would give the undertaker a reasonable return on capital) or not. It was plain that this Court, in deciding that better sewers should have been laid to serve Mr Marcic's property, was in no position to take into account the wider issues which Parliament required the

Director to consider (at [68]). The WIA 1991 made it even clearer than 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 Director, subject only to judicial review. It would subvert the scheme of the WIA 1991 if the courts were to impose upon the sewerage undertakers, on a case by case basis, a system of priorities different from that which the Director considered appropriate (at [70]).

37. It can be seen that although their analysis is not in all respects identical, there is very little, if any, difference of substance between them. Both considered that the relationship of a sewerage undertaker to landowners is not to be equated with that of two private parties, but had to be considered in the light of the statutory scheme in the WIA 1991 for enforcement of a sewerage undertaker's duties. Both considered that it would subvert that scheme to allow landowners to bring common law claims for nuisance which, however framed, amounted to a complaint that the undertaker should have built more sewers.

38. It is also to be noted that the decision in *Marcic* was not just that no mandatory order should be made against Thames. Indeed by the time of the hearing in the House of Lords work had been carried out to alleviate the flooding, and the live issue was whether Mr Marcic could recover damages (see at [28]). The decision of the House of Lords was that there was no liability in nuisance at all, so that the damages claim was also unsustainable.

39. UU's position in the 2018 proceedings is that the same principles apply to MSCC's claims for trespass or nuisance in relation to unauthorised discharges. MSCC's position is that *Marcic* was concerned with different statutory provisions and should be distinguished.

The 2018 proceedings: Fancourt J's Judgment

40. In the Judgment, Fancourt J referred to the decisions in *BWB*, *Marcic* and *MSCC (2014)* (Jmt at [7]-[13]); reviewed the scheme of the WIA 1991 (Jmt at [14]-[28]); explained the nature of UU's claim in the 2018 proceedings (Jmt at [29]-[52]); analysed *Marcic* in detail (Jmt at [53]-[61]); and set out the parties' respective contentions (MSCC's at Jmt [62]-[73]) and UU's at [74]).

41. At [75] he gave his conclusion that UU's argument was to be preferred. He gave his reasons for this conclusion at [76]-[90] in a series of numbered points. The central reasoning is found in his third and fourth points as follows:

> "79. Third … the reason (on the evidence) for such contaminated damage 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 the area. In the absence of an allegation of negligence, malfunction or misconduct, 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."

42. By his Order dated 15 June 2021 he therefore made a declaration that upon the true construction of the WIA 1991, where a discharge into the canal from sewers vested in UU contravenes s. 117(5) and/or s. 186(3) of the Act, MSCC may not bring an action in trespass or nuisance against UU in respect of such discharge absent an allegation of negligence or deliberate wrongdoing on the part of UU leading to the said discharge.

The 2018 appeal: Grounds of appeal

43. MSCC advances 5 grounds of appeal. In summary they are as follows:

(1) Fancourt J was wrong to conclude that unauthorised discharges necessarily involved a breach of s. 94 WIA 1991, and that the s. 18 machinery operated to the exclusion of private tortious remedies.

(2) Fancourt J adopted an over-broad reading of *Marcic*.

(3) On Fancourt J's interpretation there is little or no point to the foul water provisos.

(4) Fancourt J was wrong to find that the unauthorised discharges were involuntary.

(5) Fancourt J was wrong to find that a purely involuntary act is not an act of trespass.

The 2018 appeal: preliminary

44. Although Mr David Hart QC (who appeared with Mr Charles Morgan and Mr Nicholas Ostrowski for MSCC) argued the appeal under these various grounds of appeal, it seems to me that there is really only one issue in the 2018 appeal. This is whether Fancourt J was right to hold that the principle in *Marcic* applied to the unauthorised discharges in the present case. If he was, then any private law claims that MSCC would otherwise have cannot succeed as they are inconsistent with the statutory scheme.

45. I will say straightaway that I think Fancourt J was right on this question. Reducing the case to its simplest, Mr Marcic's complaint was that Thames was flooding his property with sewage. I do not think it was disputed that that was an interference with the

reasonable enjoyment of his land, and anyone responsible for it would therefore have normally been liable for nuisance. But the House of Lords held that no action in nuisance lay because of Thames' special position as a sewerage undertaker, and because it would undermine the statutory scheme applicable to the enforcement of sewerage undertakers' duties in relation to sewage if such an action could be brought. Similarly, reducing MSCC's complaint to its simplest, it is that UU's outfalls are discharging untreated sewage into the canal without either the consent of MSCC or statutory authority. I will assume that MSCC is right that anyone responsible for such a discharge would normally have been liable for trespass (or alternatively nuisance). But it seems to me that the principle of *Marcic* applies equally to this situation. To hold UU liable for trespass (or nuisance) for unauthorised discharges into the canal would be equally inconsistent with the statutory scheme applicable to it as sewerage undertaker.

46. My conclusion therefore is that the appeal should be dismissed. But I will consider the arguments advanced by Mr Hart in support of each of MSCC's grounds of appeal in turn.

Ground 1 – private remedies in tort are not ousted by s. 18 of the Act

47. Mr Hart's overall submission was as follows. It is common ground that discharges in breach of the foul water provisos are not authorised by the WIA 1991. Given that lack of statutory authority, MSCC retains its ordinary common law remedies in trespass and nuisance. It does not matter that such an unauthorised discharge may or may not involve a breach of the sewerage undertaker's general duty in s. 94 WIA 1991; if it does, that may have other consequences, but it does not affect the lack of statutory authority, and consequential liability in tort, which arises from the discharges being in breach of the foul water provisos.

48. This argument turns on the proper construction of the relevant provisions of the WIA 1991. Starting with s. 94, this provides, so far as relevant, as follows:

> "**94 General duty to provide sewerage system.**
>
> (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.
>
> …
>
> (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.

…"

49. As can be seen, this imposes a general duty on a sewerage undertaker to provide a sewerage system, including by s. 94(1)(b) a duty to make such provision as is necessary from time to time for effectually dealing with the contents of its sewers, by means of sewage disposal works or otherwise. It also provides by s. 94(3) that that duty shall be enforceable under s. 18 by the Secretary of State or by "the Authority" (that is, Ofwat).

50. The relevant provisions of s. 18 are as follows:

"**18. Orders for securing compliance with certain provisions.**

(1) Subject to subsection (2) and sections 19 and 20 below, where in the case of any company holding an appointment under Chapter I of this Part or any person holding a licence under Chapter 1A of this Part the Secretary of State or the Authority is satisfied—

(a) that that company or that person is contravening—

(i) any condition of the company's appointment or the person's licence in relation to which he or it is the enforcement authority; or

(ii) any statutory or other requirement which is enforceable under this section and in relation to which he or it is the enforcement authority;

or

(b) that that company or that person is likely to contravene any such condition or requirement,

he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.

…

(2) Subject to section 19 below, where in the case of any company holding an appointment under Chapter I of this Part or any person holding a licence under Chapter 1A of this Part —

(a) it appears to the Secretary of State or the Authority as mentioned in paragraph (a) or (b) of subsection (1) or (1A) above; and

(b) it appears to him or it that it is requisite that a provisional enforcement order be made,

he or it may (instead of taking steps towards the making of a final order)

by a provisional enforcement order make such provision as appears to him or it requisite for the purpose of securing compliance with the condition or requirement in question.

(3) In determining for the purposes of subsection (2)(b) above whether it is requisite that a provisional enforcement order be made, the Secretary of State or, as the case may be, the Authority shall have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of any condition or of any statutory or other requirement enforceable under this section, is likely to be done, or omitted to be done, before a final enforcement order may be made.

…

(5) An enforcement order—

(a) shall require the company to which it relates (according to the circumstances of the case) to do, or not to do, such things as are specified in the order or are of a description so specified;

(b) shall take effect at such time, being the earliest practicable time, as is determined by or under the order; and

(c) may be revoked at any time by the enforcement authority who made it.

…

(8) Where any act or omission–

(a) constitutes a contravention of a condition of an appointment under Chapter 1 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."

51. As can be seen this by s. 18(1) *prima facie* requires the Secretary of State or Ofwat to make a final enforcement order against a company holding a licence under Chapter I (which includes a sewerage undertaker) if satisfied that it is contravening any statutory requirement enforceable under the section. That (by s. 94(3)) includes the general s. 94 duty. The section also by s. 18(2) empowers the Secretary of State or Ofwat to make a provisional enforcement order and by s. 18(3) requires them in determining whether to do so to have regard to the damage likely to be caused to anyone before a final

enforcement order can be made. It may be noted that s. 18(1) which, by using the words "shall make a final enforcement order", appears to impose a mandatory obligation on the Secretary of State or Ofwat, is expressly subject to s. 19. This provides in s. 19(1) a number of exceptions to the duty to enforce, including the case where the Secretary of State or Ofwat is satisfied that the contraventions were of a trivial nature (s. 19(1)(a)), or satisfied that the duties imposed on them by Part I of the Act preclude the making of the order (s. 19(1)(c)). I will come back to the Part I duties below.

52. Once an enforcement order is made, the obligation to comply with it is a duty owed to anyone who might be affected by a contravention of the order, and a breach of that duty which causes loss or damage is actionable by that person: s. 22(1) and (2). But unless and until such an order is made, the obligation on a sewerage undertaker to comply with its general duty under s. 94 is not actionable as such. This is the effect of s. 18(8) which makes it clear that the only remedies for a contravention of a statutory requirement enforceable under the section as such are those under s. 18 itself, or those expressly provided for in statute, so that no action lies in tort for breach of statutory duty.

53. But s. 18(8) also provides that this does not affect remedies available in respect of an act "otherwise than by virtue of its constituting … such a contravention." As Mr Hart put it, you cannot sue for breach of the s. 94 duty in terms, but if you have another claim, that may subsist. One might have thought, on an untutored reading of s. 18(8), that by enacting it Parliament had provided that if an act was both a contravention of the s. 94 duty and also something that would, apart from the Act, give rise to common law claims in tort, then the common law claims could still be sued on. But in the light of the analysis in *Marcic* this is clearly not the position (and indeed Mr Hart did not suggest as much, making the more modest submission that it was one of a number of pointers suggesting that common law claims may survive). Both Lord Nicholls at [22] and Lord Hoffmann at [52] referred to the effect of s. 18(8) as not ruling out or excluding Mr Marcic's claims, but went on to hold that this did not answer the question whether his common law claims in nuisance survived. That depended on whether they would be consistent with the statutory scheme, and both held that they would not be.

54. As noted above, part of that statutory scheme is that the apparently mandatory nature of the obligation in s. 18(1) to make a final enforcement order is qualified by s. 19(1)(c) where the Secretary of State or Ofwat is satisfied that their Part I duties preclude them from making an order. Part I of the Act establishes Ofwat and imposes various duties on it and the Secretary of State. This includes, by s. 2, general duties with respect to the water industry. So far as relevant s. 2 provides as follows:

> **"2. General duties with respect to water industry.**
>
> (1) This section shall have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties conferred or imposed on the Secretary of State or the Authority by virtue of any of the relevant provisions.
>
> (2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–
>
> (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.

(2B) The consumer objective mentioned in subsection (2A)(a) above 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.

…

(2DA) The resilience objective mentioned in subsection (2A)(e) is—

(a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and

(b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting—

(i) appropriate long-term planning and investment by relevant undertakers, and

(ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources.

…

(4) In exercising any of the powers or performing any of the duties mentioned in subsection (1) above in accordance with the preceding provisions of this section, the Secretary of State and the Authority shall have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed).

…"

55. This means, as noted by Lord Nicholls in *Marcic*, that the duties imposed by Part I may preclude the making of an order. This would cover a case where Ofwat considered that making an order would be incompatible with the policy objectives mentioned in s. 2, such as securing that an undertaker is able, by securing a reasonable return on its capital, to finance the proper discharge of its functions: *Marcic* at [15]. A contravention of a statutory requirement to which s. 18 applies does not therefore necessarily result in an enforcement order; other considerations which Ofwat is obliged to have regard to may be inconsistent with it making an enforcement order: *Marcic* at [16]. (The wording of s. 2 has been amended since the decision in *Marcic* but not so as to affect the points Lord Nicholls there makes).

56. The other provisions of the WIA 1991 to which reference should be made are those containing the foul water provisos. The first of these is s. 117(5), which provides as follows:

> "(5) 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."

57. The second is s. 186(3), which provides as follows:

> "(3) 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 of the supply, quality or fall of water contained in, that reservoir, canal, watercourse, river, stream or feeder."

58. There is a definition of relevant sewerage provisions in s. 219(1). It is not necessary to set it all out. Mr Hart relied in particular on the fact that it includes both s. 106 and s. 116 (both of which are also among the provisions referred to in s. 117(5)): s. 106 is the section which now provides for the right of an owner or occupier of premises to have his drains or sewer communicate with the public sewer of any sewerage undertaker and thereby to discharge foul or surface water from his premises, and s. 116 is the

section which now prevents a sewerage undertaker from discontinuing a sewer used by anyone without providing a substitute, as follows:

> "**116. Power to close or restrict use of public sewer.**
>
> (1) Subject to subsection (3) below, a sewerage undertaker may discontinue and prohibit the use of any public sewer which is vested in the undertaker.
>
> (2) A discontinuance or prohibition under this section may be for all purposes, for the purpose of foul water drainage or for the purpose of surface water drainage.
>
> (3) Before any person who is lawfully using a sewer for any purpose is deprived under this section by a sewerage undertaker of the use of the sewer for that purpose, the undertaker shall—
>
> (a) provide a sewer which is equally effective for his use for that purpose; and
>
> (b) at the undertaker's own expense, carry out any work necessary to make that person's drains or sewers communicate with the sewer provided in pursuance of this subsection.
>
> (4) Any dispute arising under subsection (3)(a) above between a sewerage undertaker and any other person as to the effectiveness of any sewer provided by the undertaker for that person's use may be referred to the Authority for determination under section 30A above by either party to the dispute."

59. It is now possible to consider the submissions advanced by Mr Hart under Ground 1. His argument was that Fancourt J was wrong to hold (i) that any breach of the foul water provisos necessarily involved a breach of the general duty in s. 94(1)(b), and (ii) that that breach meant that the s. 18 enforcement procedure operated to the exclusion of private law remedies.

60. As to the first part of this submission, Mr Hart asserted it but did not really explain it. The complaint that MSCC makes is that UU is discharging sewage into the canal which is either entirely untreated (in the case of combined sewer overflows, storm tank overflows and emergency overflows) or inadequately treated (in the case of discharges from sewage works) in breach of the foul water provisos. By definition it is MSCC's case that each such discharge, even if diluted by rainwater and/or screened, is such as to affect prejudicially or injuriously affect the purity or quality of the water in the canal. The duty on a sewerage undertaker under s. 94(1)(b) includes a duty to make such provision as is necessary from time to time for effectually dealing with the contents of its sewers. As a matter of ordinary language it is difficult to see how it can be said that this duty has been complied with if the contents of the sewers are allowed to discharge into the canal in breach of the foul water provisos.

61. A similar view was taken by Ramsey J in *Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 (TCC) (***"Dobson"***) which concerned a complaint by local residents arising from the operation by Thames of its Mogden sewage works. Ramsey J held that

on the natural meaning of the phrase the contents of sewers had not been effectually dealt with when they caused odours and mosquitoes, one of the purposes of the requirement being to treat the sewage in such a way as to render it reasonably harmless and inoffensive: see at [73]-[74]. We received little argument on this aspect of the case but that seems to me to be right. At any rate, we were not given any example of a discharge which could be at the same time a breach of the foul water provisos but nevertheless an effectual dealing with the contents of the sewers.

62. Mr Hart had another way of putting the point when he said that if the discharges were unauthorised UU could hardly say that it was performing, albeit imperfectly, its s. 94 duties so as to exclude all consideration of its lack of authority. But I have not understood that point. UU is under duties under s. 94 to provide a system of public sewers, to maintain the sewers to ensure that the area is and continues to be effectually drained, to make provision for the emptying of the sewers, and to make such provision as is necessary for effectually dealing with their contents. The sewerage system which UU inherited on privatisation, including the outfalls in question, together with such improvements as it has made since, is the means by which UU seeks to perform those duties. That may or may not lead to unauthorised discharges in breach of the foul water provisos. But if it does, I do not see why it follows that this is not an imperfect performance of its s. 94 duties. That seems to me precisely what it is. UU may be (and as I have already said in my view would be) in breach of its s. 94 duties if there are unauthorised discharges, but that does not mean that the discharges are not part, albeit an inadequate part, of the way it seeks to carry out its duties.

63. But I do not think it is necessary to reach a definitive conclusion on the first part of Mr Hart's submissions on Ground 1. Even if it were the case that there were some unauthorised discharges which did not put UU in breach of its s. 94 duty, that does not answer the real question which is whether a claim in tort is inconsistent with the statutory scheme as a whole. Mr Hart accepted that an unauthorised discharge might well be a breach of s. 94 but said that the same act might give rise to two separate wrongs with two separate legal consequences, one a failure to deal with the contents of sewers (a matter for Ofwat under s. 18), and the other a discharge in breach of the foul water provisos (a matter of which MSCC could complain). He said that there was no essential clash between the common law position and the statutory position.

64. The difficulty that I have with this submission is that it seems to me to fly in the face of the decision in *Marcic*. The very essence of the decision is that there was a clash between permitting Mr Marcic to sue a sewerage undertaker at common law and the statutory scheme. I do not see why it is any less inconsistent to allow MSCC to sue UU for trespass (or nuisance) for operating a sewerage system that discharges untreated sewage into the canal in breach of the foul water provisos than it was to allow Mr Marcic to sue Thames for nuisance for operating a sewerage system that flooded his garden with untreated sewage. I will revert below to how Mr Hart sought to distinguish *Marcic* but to say that an act may be both a breach of statutory duty and a separate tort, each with their own legal consequences, does not seem to me to provide an answer to the question. Of course it may, but the question is whether it is consistent with the statute for the tortious remedy to be available. Unless the case can be sufficiently distinguished from *Marcic*, the answer must be that it is not.

65. Mr Hart referred to a number of authorities with a view to persuading us that there was an established line of authority under the previous legislation to the effect that a

discharge in breach of the (then) foul water provisos, or analogous provisos, was tortious. I can deal with these relatively briefly, as none of them discusses the *Marcic* question, that is whether a claim in tort was inconsistent with the statutory scheme.

66. In *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 the plaintiffs succeeded at trial in a claim in nuisance against, among others, the Derby Corporation on the ground that it was discharging insufficiently treated sewage into the River Derwent from sewage works which it had constructed under a private Act, the Derby Corporation Act 1901. An appeal to this Court was dismissed. Evershed MR said (at 163) that if a public authority so exercises any of its functions as to cause a private nuisance it is liable to be sued unless it can rely on some statute as providing by express language or necessary or proper inference a defence to such an action. The defence that was set up was the 1901 Act. But this contained, in s. 113, a proviso that nothing in that part of the Act should authorize the corporation to construct any works or do any thing in contravention of s. 17 PHA 1875 (set out at paragraph 27 above), and all three judges said that there would in those circumstances be no defence of statutory authority available to the corporation: see per Evershed MR at 180, Denning LJ at 191 and Romer LJ at 193.

67. That illustrates that if an Act says that nothing in it authorises the discharge of untreated sewage into a watercourse, then it cannot be said that the Act confers statutory authority to do exactly that. But that is not the defence relied on here. UU does not say that it has statutory authority to discharge foul water in breach of the provisos, any more than Thames said it had statutory authority to flood Mr Marcic's garden. UU accepts that discharges in breach of the provisos are unauthorised. UU's defence is that to permit MSCC to sue in tort would be inconsistent with the statutory scheme. This point was not run in *Pride of Derby* and unsurprisingly the case says nothing about it.

68. In *Radstock Co-Operative and Industrial Society Ltd v Norton-Radstock UDC* [1968] 1 Ch 605, the plaintiffs owned a bridge over the river Somer. A sewer vested in the defendant authority which had been laid in the bed of the river had become exposed due to increased flow in the river, and the resulting turbulence damaged the plaintiffs' bridge. They brought a claim relying on a number of causes of action, one of which was breach of s. 331 PHA 1936. This section (the predecessor of s. 186(3) WIA 1991) provided:

> "Nothing in this Act shall authorise a local authority injuriously to affect any reservoir, canal, watercourse, river or stream, or any feeder thereof, or 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, if this Act had not been passed, have been entitled by law to prevent, or be relieved against, the injurious affection of, or of the supply, quality or fall of water contained in, that reservoir, canal, watercourse, river, stream or feeder."

All three members of this Court held that this section did not confer a cause of action. Harman LJ said that it "merely preserves the common law rights of persons injuriously affected and does not arise in the absence of nuisance" (at 628); Russell LJ that a claim cannot be founded on s. 331 "for that section is a mere saving of common law rights" (at 631); and Sachs LJ (in a dissenting judgment) that the section "manifestly preserves the relevant rights of riparian owners as regards nuisance" (at 640). But none of them

was dealing the question whether a claim in nuisance would be inconsistent with the statutory scheme, something that was not suggested in that case.

69. Similarly, in *BWB* Mr Hart pointed to the statement by Keene LJ at [84] that the foul water provisos in s. 117(5) and s. 186(3) "are there to make it clear that their common law remedies [ie those of persons affected by a discharge], particularly in nuisance, are not affected by the exercise of the statutory powers referred to." But this was another case decided before *Marcic* and Keene LJ was not considering the present question. He was considering whether the existence of the provisos supported an argument that the pipe-laying power in s. 159 WIA 1991 conferred an implied power to discharge. The question of quite what the consequences would be of a discharge in breach of the provisos was not before him.

70. Finally on this aspect of the appeal, Mr Hart referred to the decision of the Supreme Court in *MSCC (2014)*. There Lord Sumption at [2] said that discharge into a private watercourse is an unlawful trespass unless authorised by statute, and at [17] that unless entitlement to discharge from existing outfalls into private watercourses survived the transfer to privatised water undertakers, the consequence is that in law such discharge must cease forthwith on 1 December 1991 and any continuing discharge thereafter would become tortious from that date. That undoubtedly proceeds on the basis that a discharge without either consent of the landowner or statutory authority is tortious and a trespass, and as a general proposition that is no doubt the case. It does not address the *Marcic* question whether any liability that would otherwise subsist in tort is inconsistent with the statutory scheme, and although *Marcic* is recorded as having been cited in argument, there is no trace in the judgments of there having been any argument about the principle.

71. Mr Hart also pointed to the fact that Lord Sumption referred in his judgment at [22] to the WIA 1991 as containing a large number of protections against the abusive or harmful use by undertakers of their statutory powers, the most important being those in s. 117(5) and s. 186(3), and submitted that on UU's argument the provisos do not in fact confer any significant protection on third parties such as MSCC. But Lord Sumption also said that that was not the place to examine them, and I do not think much can be derived from what he said. What can be said is that UU's argument is not concerned with deliberate abuse of powers (for example taking positive steps to divert untreated sewage into water) nor with the negligent exercise of powers. UU's argument is that it cannot be held responsible for unauthorised discharges where these happen without any deliberate or negligent action on its part.

72. Mr Hart said that the authorities established that the effect of the provisos in the pre-1991 legislation was that the person affected could bring common-law claims, and that in those circumstances it would be surprising if the WIA 1991, a consolidation Act, had altered the position to take this right away, without saying so expressly. But this is an example of the truism that a case is only authority for what it decides. Since none of these cases considered the *Marcic* question, none of them is authority as to whether claims in tort were in fact consistent with the pre-1991 statutory schemes. That is a question which does not arise in the present case (and is unlikely now ever to do so). But whatever the position under the pre-1991 legislation, the *Marcic* principle undoubtedly does exist under the WIA 1991 as that is what the House of Lords decided in *Marcic*. The question is whether it applies to the unauthorised discharges, and that is a question of how broad a principle it is, which is the subject of Ground 2.

73. Before turning to that ground, I will summarise my conclusions on Ground 1. Had it not been for the decision in *Marcic*, Mr Hart's arguments – namely (i) that a discharge into a private watercourse in breach of the foul water proviso without the consent of the owner was unauthorised by statute and a common law wrong and (ii) that s. 18(8) WIA 1991 preserved the owner's right to sue in tort for that wrong even if the discharge was also a breach of s. 94 – would have appeared to have considerable force. But *Marcic* shows that in certain cases the existence of a private law right to sue a sewerage undertaker in tort is inconsistent with the statutory scheme and such a right must be regarded as impliedly ousted. The question is whether this is one of those cases. I do not see that that question is answered, as Mr Hart submitted it was, by the fact that in the present case we are concerned with a breach of the foul water provisos which were not in issue in *Marcic*. That breach establishes that the discharges are not authorised by statute, thereby negating any suggestion that the WIA 1991 conferred statutory authority on UU to discharge foul water into the canal. But it can scarcely be suggested that Thames had statutory authority to flood Mr Marcic's garden with sewage. That was not their defence to his claim (as Fancourt J noted at Jmt [82]). Their defence was that any claim in tort was ousted by the statute as being inconsistent with the statutory scheme.

74. Mr Hart submitted that a case where an undertaker was acting outside the powers set out in the statute was an entirely different legal situation from a case where an undertaker was simply in breach of s. 94. But I do not see that there is any fundamental difference. In each case the undertaker is doing something in breach of its obligations under the WIA 1991. In *Marcic* Thames was required by statute to ensure that its area was effectually drained and failed to do so with the result that sewage was discharged onto Mr Marcic's property. In the present case UU is required by statute not to act in breach of the foul water provisos but did so (or may have done so) with the result that sewage was discharged into MSCC's canal. In each case the explanation put forward by the undertaker is the same: this is the result of the infrastructure we have inherited and not something for which we can be made responsible (at any rate by way of a claim in tort). I do not see the two situations as entirely different. Whether there are any relevant differences at all turns in my view on the breadth of the *Marcic* principle (which is the subject of Ground 2) and not simply on the fact that this is a case concerned with the provisos and *Marcic* was not.

75. I would dismiss this ground of appeal.

Ground 2 – breadth of the Marcic *principle*

76. Fancourt J held (Jmt at [83]) that *Marcic* stood as authority for a broad principle as follows:

> "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."

77. Mr Hart criticised this statement. He said that the ratio of the decision in *Marcic* was to be found in Lord Hoffmann's speech at [52]-[54] where he referred to a line of authority that consistently held that failure to construct new sewers was not a nuisance, and that Lord Nicholls took things no wider.

78. I have had some difficulty in understanding the distinction that Mr Hart sought to draw. It is true that both Lord Hoffmann (at [52]-[54]) and Lord Nicholls (at [34]-[35]) characterised Mr Marcic's claim as being in effect that Thames should have built more sewers. But that was not his complaint in legal terms. His complaint was that the flooding of his garden with sewage was an interference with the reasonable enjoyment of his land and hence a nuisance. What both Lord Hoffmann and Lord Nicholls meant was that in practical terms the only way to stop that was to build more sewers: see per Lord Nicholls at [34]:

> "Mr Marcic's claim is expressed in various ways but in practical terms always comes down to this: Thames Water ought to build more sewers."

I do not see that it is any different here. MSCC's complaint is that the discharges into its canal are either a trespass or a nuisance. But in practical terms the only way to prevent that is for UU to build more infrastructure. This was the conclusion that Fancourt J reached on the evidence, as expressed by him as follows (Jmt at [49]):

> "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."

79. There is no challenge to that factual conclusion, and indeed in answer to a question from the Court, Mr Hart accepted in terms that in effect his complaint was that UU should build more sewers. He later qualified that by saying that although that was the nub of it, MSCC was not in fact seeking to compel UU to build more sewers; its aim was to be able to charge UU a rent or fee for the right to discharge into the canal. I accept that that is what MSCC hopes to achieve by the proceedings. But that does not affect the fact that what MSCC complains of is that UU's existing sewerage system is inadequate. It is in that sense that in effect what MSCC is saying is that UU should have built a larger or better system. I do not see that that is materially different from *Marcic*. And the fact that all MSCC actually wants is money, and the claim in trespass is a means of putting itself in a commercial position to negotiate a fee, does not seem to me to change the position. Indeed as I have mentioned (paragraph 38 above) by the time *Marcic* reached the House of Lords, all Mr Marcic wanted was money (in his case compensation for past flooding and for the costs he had incurred), but his claim still failed.

80. I would therefore dismiss Ground 2.

Ground 3 – effect of foul water provisos

81. Ground 3 is that on Fancourt J's interpretation there is little or no point to the foul water provisos.

82. Fancourt J dealt with this point in two places. First (Jmt at [76]) he said this:

> "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."

Then (Jmt at [89]) he said this:

> "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."

83. Mr Hart said of the first passage that the problem with it was that there is little point in removing any argument based on *Allen v Gulf Oil Refining* [1981] AC 1001 if there could never be a civil claim in which that defence could arise in any event. The *Allen v Gulf Oil* principle was expressed by Lord Wilberforce at 1011E-H as being that when Parliament authorised the construction and use of an undertaking or works, then that carried with it an authority to do what is authorised, with immunity from any action based on nuisance. It is a condition of the principle that the statutory powers are exercised without "negligence", here meaning that the undertaker is required, as a

condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons. The defence of statutory authority therefore only applies to nuisance committed without negligence (in this particular sense). But, Mr Hart said, UU's case is that all such claims are precluded by the *Marcic* principle in any event in which case the provisos achieved nothing.

84. Fancourt J was clearly alive to this point, as this is what he addresses in the second passage, where he identifies that a defence of implied authority only applies to an undertaker that has acted non-negligently. Here he tentatively suggested that there might be non-negligent failures that did not benefit from the *Marcic* principle, as suggested by *Dobson*. Mr Hart said that was difficult to understand as in *Dobson* all the claims were in fact based on negligence. But I do not think that was what Fancourt J was referring to. What he was referring to (as is clear from Jmt [87]-[88]) is the distinction suggested by Ramsey J in *Dobson* at [140] between "policy" or "capital expenditure" matters or decisions on the one hand (to which the *Marcic* principle would apply) and "operational" or "current expenditure" matters (to which it would not). It seems tolerably clear to me that what Fancourt J had in mind was that despite *Marcic* there might be room for an allegation in relation to an operational as opposed to a policy matter where the defence of statutory authority might have been argued to be available were it not for the provisos.

85. We heard no argument on this suggested distinction between policy and operational matters, and it was not suggested that the allegations that MSCC makes of trespass in fact fall on the operational side of the line. In those circumstances it is not necessary to express any concluded views on it, and I would be reluctant to do so. But for the reasons I have given I do not think this particular criticism of Fancourt J is made out.

86. Mr Hart said that even so there remained the general point that UU's case gave the provisos a more limited effect than they had had under the pre-1991 legislation and there was no indication that the WIA 1991 had been intended to have this effect: the provisos were in effect the same old provisos, and with the exception of the more complex enforcement procedures, the structure of the WIA 1991 was effectively the same.

87. I accept that the application of the *Marcic* principle to the unauthorised discharges in question does diminish the role of the provisos and leave it rather unclear what the practical effect of them now is. But Parliament has included similar provisions in the legislation governing sewerage authorities since 1875 and has thereby consistently made it clear that it does not wish them to discharge foul water into watercourses and is not authorising them to do so. As the facts of this and other cases illustrate, Parliament's expectations in that respect have been regularly disappointed as a result of lack of capacity in the sewerage system to cope with increased demand. But there is no reason to think that when the water industry was privatised in 1989, or when the legislation was consolidated in 1991, Parliament's concerns in this respect had diminished. On the contrary, the February 1986 White Paper set out the Government's intention to provide a "clearer strategic framework for the protection of the water environment" and in its July 1987 proposal for the NRA the Government referred to its commitment to ensure that arrangements for privatisation "should also provide for the effective maintenance or, where practicable and necessary, enhancement of the quality of our rivers" and other watercourses.

88. In those circumstances it seems to me entirely understandable that Parliament should wish to reproduce the provisos in the WIA 1991, a consolidation Act, rather than remove them. To deliberately remove them as part of the consolidation exercise would suggest that Parliament was no longer concerned to prevent such discharges, which would have been an odd thing to do. It is not difficult to believe that the precise legal effect of the provisos in the WIA 1991 Act was not something that was actively considered at the time: it is only the decision in *Marcic*, some years later, and its application to unauthorised discharges in the present case, that has exposed the limited continuing role of the provisos. That does not seem to me to be a sufficient basis on which to infer that Parliament intended that common law claims should survive, or a sufficient reason not to apply the *Marcic* principle.

89. I would therefore dismiss Ground 3.

Grounds 4 and 5 – trespass

90. Grounds 4 and 5 can be taken together. Ground 4 is that Fancourt J was wrong to find that the unauthorised discharges were involuntary. Ground 5 is that he was wrong to find that a purely involuntary act is not an act of trespass.

91. In the light of the conclusions I have already come to, I do not think these grounds assist MSCC in any event, as even if UU's discharges would otherwise have been actionable as trespasses, the application of the *Marcic* principle prevents MSCC from suing on them. But I will briefly address the issues on the assumption that the *Marcic* principle does not apply.

92. The starting point is that if A deliberately discharges water onto B's land that is (absent B's consent or any statutory or other right to do it) a trespass. To take an example discussed in argument, if A throws a bucket of water into B's garden, or points his hose at it, that is a trespass. Next, if A builds on his land in such a way that water will from time to time be discharged onto B's land, that would seem equally clearly a trespass. So if A builds his house so that the roof discharges rainwater onto B's land that would seem to be a trespass, even though the rain is intermittent, and even though once A has built it, A is not actively doing anything. Third, some trespasses are continuing. If A parks his car on B's land that is a trespass on the day it is parked, but it is also a trespass every day that A leaves the car there. If it were not so, it is difficult to see how B could obtain an injunction to have A remove the car, or indeed damages for each day it remains, but it seems obvious that in principle B could claim both. Similarly if A builds his house in such a way that part of it is built over the boundary on B's land, that is a trespass on the day it is built, but it is also a trespass every day that A leaves it there, and I would have thought there was no doubt that B could claim damages for each day the building remained on his land and (subject to discretionary considerations) obtain an injunction to have it removed. So too if A builds his house in such a way as to discharge rainwater onto B's land, it seems to me that there will be a trespass on each day that the water is so discharged even if A does nothing positive on those days.

93. The next question is whether a successor in title to A is also liable for trespass even if he does nothing. Suppose for example that A dies and leaves his house to C, or that A sells it to C, is C liable for trespass? The answer here is not quite so obvious, as C has neither built the house nor done anything at all; he has merely acquired an infringing structure. Again however it seems to me that C would be liable. Otherwise B would

simply have to put up with a continuing trespass on his land, which does not seem right, and might even lead to C in due course acquiring either a title to adverse possession (in the case of the house being built over the boundary) or an easement of eavesdrop by prescription (in the case of the roof discharging water). I consider that B could obtain an order requiring C to remove the building (or modify it so as to prevent it discharging water onto B's land), and that this could only be so if C were guilty of a trespass by leaving it there.

94. If that is right, the question is whether (on the assumption the *Marcic* principle does not apply) UU is in any different position. It too has acquired an existing structure which repeatedly discharges onto MSCC's property without MSCC's consent or any statutory authority. Why is UU not equally liable as C would be?

95. The answer that Fancourt J gave can be seen from the Judgment at [49] (cited at paragraph 78 above), namely that UU cannot refuse to allow surface or foul water to enter its sewers and it cannot simply close off the outfalls. That is a reference to the provision now found in s. 116 WIA 1991 (set out at paragraph 58 above). Fancourt J characterised UU's position as "involuntary" and held that as a matter of law a purely involuntary act is not an act of trespass, citing *Clerk & Lindsell on Torts* (23rd ed) at §18-07 (Jmt at [50]). The examples there given are of a person being forcibly carried onto the plaintiff's land (*Smith v Stone* (1646) Style 65) or falling onto railway tracks in an epileptic fit (*Public Transport Commission v NSW v Perry* (1977) 14 ALR 273). Mr Hart said that those cases were a long way from the present case where UU's system is designed in such a way that it will regularly discharge untreated effluent into the canal in certain circumstances.

96. Nevertheless Mr Hart accepted that UU's system had (as all such systems must do) a finite capacity, and he accepted that there would be occasions when there would be exceptional flows which exceeded the capacity. He said that it should not be assumed that all the discharges from the outfalls were of the same character: there were a series of different outfalls (combined sewer overflows, storm tank overflows, emergency overflows and outfalls from treatment works) and it should not be thought that all the discharges from each outfall were on every occasion necessarily involuntary in the sense used by Fancourt J. But he did not dispute that some of them at least would be.

97. It is not necessary to reach any final conclusion on the point as it makes no difference to the outcome of the appeal but I think Fancourt J was right that in circumstances where UU cannot lawfully do anything to prevent the discharges they are to be regarded as involuntary and not trespasses at all. It is not like the case of the house acquired by C where C can always pull down or modify the house. If UU did not build the outfalls and cannot remove them (and assuming on the facts the discharges are not the result of any deliberate decisions made by UU or any negligence) then that does seem to me to be an involuntary invasion of MSCC's rights in the canal.

98. In those circumstances I would dismiss these grounds of appeal as well.

Interveners' submissions

99. The interveners made written submissions in support of the appeal. They summarised their points as follows:

(1) The natural reading of the foul water provisos is that they preserve common law rights in relation to polluting discharges into watercourses.

I have already in effect addressed this submission above when considering MSCC's Ground 1: see in particular paragraph 73 above.

(2) On Fancourt J's interpretation the provisos would be otiose.

I have addressed this under MSCC's Ground 3 above.

(3) *Marcic* does not compel the conclusion that Fancourt J reached.

I have addressed this under MSCC's Ground 2 above.

(4) There is a critical difference between *Marcic* and the present case in that there exists a parallel regime of criminal law environmental regulation under which an undertaker may need to invest in infrastructure.

100. The last is a point I have not yet addressed. I do not think it is sufficient to distinguish *Marcic*. The question that *Marcic* requires to be asked is whether the existence of common law remedies in tort "would be incompatible with the statutory scheme and therefore could not have been intended [to] co-exist with it": *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54 at [34] per Dyson JSC. In *Marcic* that incompatibility was found where in effect the complaint was that Thames should have built more sewers, because "it would subvert the scheme of the 1991 Act if the courts were to impose upon sewerage undertakers, on a case by case basis, a system of priorities which is different from that which the director considers appropriate" (per Lord Hoffmann at [70]). I do not see that the fact that the statutory scheme also includes a system of criminal regulation (with various remedies for breaches of the relevant regulations) weakens or makes inapplicable this incompatibility.

Conclusion on 2018 appeal

101. Neither the grounds of appeal advanced by MSCC nor such additional points as were made by the interveners persuade me that Fancourt J was wrong. I would dismiss the 2018 appeal.

102. UU served a Respondent's notice seeking to uphold the judgment on alternative grounds, but in the light of my conclusion it is not necessary to consider it.

Facts – the 2010 proceedings

103. There are 5 outfalls where MSCC's case is that they were the subject of contractual agreements which have now been terminated. These are as follows:

(1) Outfall 23 – agreement dated 5 September 1939

By agreement between MSCC and the Runcorn Rural District Council the Council agreed to pay MSCC the annual rent or sum of £1.1.0 in consideration of MSCC permitting the Council to lay and maintain an outfall pipe for the purpose of discharging storm water into the canal and on 6 months' notice to

entirely remove or put an end to, or permit MSCC at the Council's expense to remove or put an end to, such privilege.

(2) Outfall 26 – agreement dated 2 March 1916

By agreement made between MSCC and the Runcorn Rural District Council, MSCC permitted the Council to lay a storm overflow into the canal, the Council agreeing to pay MSCC an annual rent of 5/- so long as the easement was allowed to remain. The Council also undertook to remove and put an end to the easement, or allow MSCC to do so, and to discontinue to exercise the same, on 6 months' notice in writing being given by MSCC.

(3) Outfall 35 – agreement dated 24 June 1955

By agreement between MSCC and the Warrington Corporation MSCC demised to the Corporation the right and liberty to construct and maintain a storm overflow drain and use it for discharging stormwater into the canal, paying an annual rent or sum of £3.3.0, until determined by 6 months' notice in writing by either party, with a covenant by the Corporation to remove the works on termination and a provision that in default it should be lawful for MSCC to remove them at its expense.

(4) Outfall 36 – agreement dated 17 November 1987

By agreement between MSCC and Warrington Borough Council MSCC granted licence and authority to the Council to discharge water into the canal from specified works for a term of 15 years and thereafter until determined by either party on not less than 12 months' notice in writing, paying a yearly sum of £1907. The Council agreed to remove the works on the determination of the licence, and that in case of any default by the Council MSCC should be entitled to carry out any required works at the Council's expense.

(In relation to this outfall there is in fact a dispute whether this agreement governs it, as MSCC contends, or whether it is governed by an agreement dated 21 December 1934 for a term of 99 years from 1 January 1935. Nothing turns on this for present purposes.)

(5) Outfall 67 – agreement dated 24 April 1933

By agreement made between MSCC and the Eccles Corporation, it was agreed that the Corporation should be at liberty to construct a stormwater overflow sewer into the canal, paying a yearly rent of £8. It provided that this privilege and licence should be determinable by MSCC at any time after 1 January 1963 on giving 6 months' notice in writing, on receipt of which the Corporation should remove such stormwater overflow sewer and reinstate MSCC's land, in default of which MSCC would be at liberty to do so at the Corporation's expense.

104. It may be noted that the wording of the agreements varies, being variously expressed as the grant of a privilege, licence, right or liberty, an easement or a demise. UU's pleaded case asserts that each of them takes effect as a tenancy subject to the Landlord

and Tenant Act 1954 but we have heard no argument on this question. I will refer to them (as they were referred to in argument) as licences without prejudice to the question whether any or all of them in fact takes effect by way of a tenancy.

105. It may also be noted that not all these outfalls are of the same type. It is common ground on the pleadings that outfalls 35 and 36 are combined sewer overflows discharging foul water and surface water, but that outfalls 23 and 26 are surface water overflows discharging surface and rain water. There appears to be a dispute as to outfall 67: UU's pleaded case is that it is a surface water sewer but MSCC's pleaded case is that it is used as a combined sewer overflow.

106. MSCC has given notices terminating, or purporting to terminate, each of these licences, some in 2008 (outfalls 26, 35 and 67) and the others in 2010 (outfalls 23 and 36).

107. MSCC's case is that the continued use of each outfall after termination of the relevant licence is a trespass. Various defences have been raised by UU, most of which we are not concerned with on this appeal, but UU has also pleaded in relation to each of these outfalls that insofar as the relevant licence requires it to stop up or remove any pipe that constitutes a public sewer then it is unenforceable.

108. It was agreed that this point should be heard as a preliminary issue and it was this that came before Fancourt J and which he determined in favour of UU. It is common ground that if the appeal is allowed, UU's other defences will have to be determined.

The 2010 proceedings: Fancourt J's decision

109. Fancourt J first decided that MSCC were not entitled to take a point that the licences were the grant of additional rights to pollute rather than agreements to document consensual drainage, on the basis that it was too late to do so (Jmt at [105]-[106]).

110. He then considered the substantive question, concluding that UU has the right to continue to drain through the relevant outfalls notwithstanding the notices to terminate that had been given (Jmt at [113]). His essential reasoning can be found in the following passage:

> "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…"

111. It was common ground that this conclusion was dispositive of the claims. By his Order dated 15 June 2021 he therefore made a declaration in the following terms:

> "Notwithstanding the purported termination by the Canal Company of agreements or alleged agreements dated 5 September 1939, 2 March 1916, 24 June 1955, 17 November 1987 and 24 April 1933, United Utilities is and continues to be entitled to discharge water and/or other matter into the Manchester Ship Canal … from each of the outfalls numbered 23, 26, 35, 36 and 67 in Schedule 1 to the Defence and Counterclaim in the 2010 Proceedings."

The 2010 appeal: Grounds of appeal

112. There are two grounds of appeal, as follows:

(1) Ground 1 is that Fancourt J erred in holding that MSCC was not entitled on the pleadings to take the point that the licences were the grant of additional rights to pollute rather than agreements to document consensual drainage.

(2) Ground 2 is that Fancourt J erred in holding that the effect of the licences was to constitute an unlawful fetter on the exercise of relevant powers and duties by the respective local authority parties.

113. UU has served a Respondent's notice in which it seeks to uphold the order on the alternative ground that UU has an implied statutory right to discharge from the outfalls in question which survives the termination of the licences.

Ground 2 – ultra vires

114. Ground 1, a procedural point, was not argued extensively. I prefer to start with Ground 2 which was the focus of the oral argument.

115. The argument for upholding the decision of Fancourt J which was put forward by Mr Jonathan Karas QC (who appeared with Mr Richard Moules and Mr James McCreath for UU) proceeded by a series of steps. The first was that a local authority can only do that which they are authorised, expressly or by implication, to do. This is a well-established principle: see for example *R v Somerset CC ex p Fewings* [1995] 1 WLR 1037 per Sir Thomas Bingham MR at 1042G-H. I did not understand it to be disputed by Mr Morgan (who argued the 2010 appeal for MSCC).

116. Second, it follows that in order to enter into the licences the local authorities here must have been granted statutory powers to do so either expressly or by implication. Again I did not understand the principle to be disputed, although there was some debate as to whether the relevant powers here were express or implied. It is common ground (and clearly the case) that the question has to be considered by reference to the statute in force when each licence was entered into which, as can be seen from their dates (paragraph 103 above), was either the PHA 1875 or the PHA 1936. Mr Morgan submitted that express powers to enter into them were to be found in s. 14 PHA 1875 and s. 15 PHA 1936.

117. s. 14 PHA 1875 provided as follows:

> "**14 Power to purchase sewers**
>
> Any local authority may purchase or otherwise acquire from any person, any sewer, or any right of making or of user or other right in or respecting a sewer (with or without any buildings works materials or things belonging thereto), within their district, and any person may sell or grant to such authority any such sewer right or property belonging to him; and any purchase money paid by such authority in pursuance of this section shall be subject to the same trusts (if any) as the sewer right or property sold was subject to.
>
> But any person who, previously to the purchase of a sewer by such authority, has acquired a right to use such sewer shall be entitled to use the same, or any sewer substituted in lieu thereof, to the same extent as he would or might have done if the purchase had not been made."

The primary purpose of this section (as the headnote, and the final sentence, suggest) was no doubt to confer power on local authorities to acquire existing sewers, but Mr Morgan submitted that the power to "acquire … any right of making … a sewer" was wide enough to enable them to enter into licences granting them permission to construct a new sewer with an outfall into the canal. As a matter of language I agree, and I am inclined to think that this section did confer a sufficient express power.

118. s. 15 PHA 1936 provided as follows:

> "**15 Provision of public sewers and sewage disposal works**
>
> (1) A local authority may within their district, and also, subject to the provisions of the next succeeding section, without their district—
>
> (i) construct a public sewer—
>
> (a) in, under or over any street, or under any cellar or vault below any street, subject, however, to the provisions of Part XII of this Act with respect to the breaking open of streets; and
>
> (b) in, on or over any land not forming part of a street, after giving reasonable notice to every owner and occupier of that land;
>
> (ii) construct sewage disposal works, on any land acquired, or lawfully appropriated, for the purpose;
>
> (iii) by agreement acquire, whether by way of purchase, lease or otherwise, any sewer or sewage disposal works or the right to use any sewer or sewage disposal works."

Mr Morgan relied on s. 15(1)(iii) as the equivalent of s. 14 PHA 1875 and as conferring an express power on the local authorities to enter into the licences in question. That I think is a less promising submission as the sub-section only in terms confers a power to acquire by agreement a right to use a sewer, not a right to make a sewer, which is a

noticeable omission given that s. 15(1)(i) and (ii) do both confer powers to construct.

119. But I do not think it ultimately matters. Mr Karas accepted that whether by virtue of an express power or an implied power the local authorities did have power to enter into agreements permitting them to construct sewers with outfalls into the canal. That was on the basis that it is a general principle that local authorities have an implied power to do anything reasonably necessary or incidental to the powers and duties expressly conferred on them, and that entering into contractual agreements permitting construction of sewers can properly be described as reasonably necessary to the performance of their duties (that is, the duty under s. 15 PHA 1875 and s. 14 PHA 1936 respectively to "cause to be made such sewers" (or in the case of the PHA 1936 "provide such public sewers") "as may be necessary for effectually draining their district").

120. I agree that there is no difficulty in implying the necessary power to construct sewers by agreement. Both under the PHA 1875 and under the PHA 1936 the local authorities had a statutory power to lay sewers. In the PHA 1936 that was found in s. 15(1)(i) (set out above). In the PHA 1875 it was found in s. 16 which was as follows:

> "**16 Powers for making sewers**
>
> Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district.
>
> They may also (subject to the provisions of this Act relating to sewage works without the district of their local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage."

But it would I think be surprising if the local authorities had been obliged to resort to compulsory powers (entailing the payment of compensation for any diminution in value) and could not have negotiated for a contractual licence instead. The licences contain more or less detailed provisions on a range of matters (the size and location of the pipe, the rights of MSCC and the like) as well as agreed annual payments, and it seems self-evident that it is preferable for such matters to be dealt with by consensual agreement rather than by the unilateral exercise of statutory powers. In *BWB* the Severn-Trent Water Authority had entered into a licence in 1976 and Chadwick LJ said (at [48]):

> "It is not, I think, open to doubt – nor is it in dispute – that the water authority entered into the licence of 22 April 1976 for the purpose of enabling them to perform the duty imposed by section 14(1) of the 1973 Act."

The water authority's duty under s. 14 of the Water Act 1973 was again to "provide … such public sewers as may be necessary for effectually draining their area" and as can be seen Chadwick LJ thought it obvious that the agreement was entered into in performance of that duty. See too *MSCC (2014)* at [17] and [21] per Lord Sumption

where he contemplated new rights of discharge being acquired by negotiation.

121. Mr Karas did not dispute that the local authorities had power to enter into the licences here: his contention, at any rate initially, was not that they were *ultra vires* and void from the outset, but that the provisions for stopping up the sewer on termination were void. The third step in his argument was that the local authorities could only agree to such provisions if they had power to do so under the legislation, and power to do that could only be implied if it was consistent with the legislation and specifically with the limitations on the powers of local authorities to discontinue sewers. These were found in s. 18 PHA 1875 and s. 22 PHA 1936 respectively.

122. s. 18 PHA 1875 provided as follows:

> "**18 Alteration and discontinuance of sewers**
>
> Any local authority may from time to time lessen alter the course of cover in or otherwise improve any sewer belonging to them, and may discontinue close up or destroy any such sewer that has in their opinion become unnecessary, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer: Provided that the discontinuance closing up or destruction of any sewer shall be so done as not to create a nuisance."

123. s. 22 PHA 1936 provided as follows:

> "**22 Power of local authority to alter, or close, public sewers**
>
> A local authority may alter the size or course of any public sewer vested in them, or may discontinue and prohibit the use of any such public sewer, either entirely or for the purpose of foul water drainage, or for the purpose of surface water drainage, but, before any person who is lawfully using the sewer for any purpose is deprived by the authority of the use of the sewer for that purpose, they shall provide a sewer equally effective for his use for that purpose and shall at their expense carry out any work necessary to make his drains or sewers communicate with the sewer so provided."

124. Mr Karas said that the problem was that the licences contained an absolute obligation to discontinue and remove the relevant sewer. That he said was inconsistent with the obligations in s. 18 PHA 1875 and s. 22 PHA 1936 which only permitted a local authority to discontinue a sewer that was being used by anyone if another equally effectual were provided. Mr Morgan accepted that where a householder's sewage drained into the system and was discharged, even on an intermittent basis, through an overflow, that person could be said to be lawfully using the overflow. (I suppose it might have been argued that it was different where the overflow was not a combined sewer overflow but merely a surface water overflow which did not drain sewage, but we did not in fact hear any argument to that effect).

125. I have no difficulty with the proposition that it would have been *ultra vires* and beyond the powers of a local authority simply to agree to discontinue an existing sewer other

than in accordance with these statutory provisions. Suppose for example a local authority had laid a sewer under its power in s. 16 PHA 1875. On the authority of *Durrant* that would have given it a right to discharge from the sewer into a watercourse (see paragraph 27 above). Neither the right to keep the sewer physically in place nor the right to discharge from it would be limited in time. If the local authority then purported to agree that it would discontinue and remove the sewer on being requested to do so and without regard to its obligations under s. 18 PHA 1875, I accept that that would have been inconsistent with its statutory obligations. Under s. 18 the local authority would have had power to discontinue the sewer but only on condition of providing a sewer that was as effectual for the use of any person who might be deprived of the user of it (and moreover, as Asplin LJ pointed out in argument, only if in their opinion it had become unnecessary, at any rate under the PHA 1875). To discontinue it without providing an equally effectual sewer (and in circumstances where they did not consider it had become unnecessary) would therefore be contrary to their statutory powers, and to agree to do so would be to agree to do something beyond their powers.

126. Where I have more difficulty however is seeing that this is an adequate account of what the local authorities have done by entering into the licences. On the primary way in which Mr Karas put his case, which was that the licences were valid but the termination provisions were not, the practical effect would be, as Mr Morgan said, to convert what was a precarious grant into a permanent deprivation of property. That seems to me to be a very striking consequence. It is of course the case that statute may confer on statutory bodies the right to acquire property rights compulsorily, albeit usually at the price of paying appropriate compensation. It is also the case that the *ultra vires* doctrine may have the effect of preventing local authorities from entering into certain contracts, and the risk that a purported contract with a local authority may turn out to be beyond their powers and void is a risk that anyone dealing with local authorities takes. But I am not aware that it has previously been held (or even suggested) that the *ultra vires* doctrine can have the effect of turning a limited and determinable contractual right into a permanent one, and as far as I can see without any compensation being payable. That seems a new and different type of risk, namely that a person dealing with a local authority may find that they are bound by a contract they have entered into, but one with a much more far-reaching effect than they ever agreed. I would be very reluctant to reach the conclusion that this was the law unless compelled by authority to do so; but no authority was I think put before us where anything similar had been held to have taken place.

127. There is an analogy (although I accept it is quite a distant one) with *Stourcliffe Estates Co Ltd v Corporation of Bournemouth* [1910] 2 Ch 12 where the Corporation acquired by agreement land for a public park subject to a covenant restricting them from erecting buildings. It was argued that the covenant was void as inconsistent with a statutory power that the Corporation had to build conveniences in public parks, but the argument was rejected. Cozens-Hardy MR said at 18:

> "But, further, if they have taken this conveyance of this land in terms subject to these restrictive covenants, can they hold it free from those restrictions? That again is a proposition which seems to me to be startling. If the deed is wholly ultra vires I can understand it, but to suppose that the corporation could be allowed to retain the land and to repudiate the consideration or part of the consideration for it is a proposition to which certainly I could not give my

adhesion."

128. Similarly, once it is accepted, as Mr Karas did accept, that the local authorities had the power to acquire rights to construct sewers by agreement, then in my judgment there is no reason why they could not agree to acquire limited and determinable rights if that is what they were offered. They did not need to contract on those terms and could have relied on their statutory powers instead; but having chosen to contract on terms that they acquired a determinable, not a permanent, right, that in my view is all they acquired. If such a right is then determined in accordance with its terms, that is not in my view a case of the local authority choosing to exercise a discretionary power in s. 18 PHA 1875 (or its successors) to discontinue the sewer; it is simply the consequence of only having acquired a limited right in the first place. The point can be illustrated by the fact that in each of the licences MSCC reserved the right, if the local authority did not do so, to remove the sewer itself at the authority's expense. What is there to stop it from doing so? On its face s. 18 PHA 1875 merely imposed restrictions on the exercise of powers on local authorities, not on anybody else.

129. When it was put to Mr Karas that he was trying to say that the licences were good in parts and bad in parts, he said that he was content to contend in the alternative that the licences were wholly void from the outset, in which case he would claim that UU had acquired rights by prescription. I need not consider if they would have been able to do so (I can see certain difficulties in claiming a right by prescription if the putative grantee has been making annual payments in respect of it), as I do not accept the premise. Not only was this not the case advanced by Mr Karas before Fancourt J (and accepted by him), nor indeed initially before us, but it seems to me inconsistent with the acceptance that the local authorities had power to acquire rights by agreement. It would amount to a contention that they had no power to acquire anything less than a permanent right. That would mean, for example, that even the 99 year licence would be of no effect at all. That is another proposition that I find surprising. As I have said I do not see why local authorities could not choose to accept a limited right if they wanted to. If they had thought such a right inadequate, they could have resorted to their statutory powers instead, but they might have thought that it was perfectly acceptable, and in some respects preferable, to have an agreed right, even if determinable, in the first instance in the knowledge that if it were ever determined they could always fall back on statutory powers later. Mr Karas suggested that 6 months was far too short for that purpose, but it is not self-evident that it would have been thought too short at the dates the licences were entered into.

130. In those circumstances I would accept that Ground 2 of this appeal is well founded, and, subject to the Respondent's notice point, allow the appeal. It is not necessary in those circumstances to consider Ground 1.

Respondent's notice – statutory right to continue discharging

131. By its Respondent's notice UU seeks to uphold the decision of Fancourt J on the alternative ground that it has an implied right under WIA 1991 to continue discharging from the outfalls. That is put in two ways:

(1) prior to the commencement of the WIA 1991 on 1 December 1991 UU as sewerage undertaker also benefited from a concurrent implied right of statutory discharge from the outfalls in question, which continued notwithstanding the

termination of the licences; and/or

(2) such a right arose as a matter of implication on the commencement of the WIA 1991 and continued notwithstanding the termination.

132. Mr Karas relied on the decision of the Supreme Court in these proceedings in *MSCC (2014)*. There the leading judgment was given by Lord Sumption (with whom Lords Clarke and Hughes agreed; Lord Toulson gave a concurring judgment in which he described his reasons as according essentially with those of Lord Sumption). Lord Sumption's analysis was as follows. By the time of the WIA 1991 there had been well over a century in which sewerage authorities were entitled as of right to construct and discharge from outfalls into private watercourses (that is under the powers initially in the PHA 1875, as interpreted in *Durrant*), and one would expect the degree of dependence to be significant. In those circumstances:

> "unless the entitlement to discharge from existing outfalls into private watercourses survives the transfer to privatised water undertakers the consequence is that in law such discharge must cease forthwith on 1 December 1991"

(at [17]). When therefore the WIA 1991 imposed on the privatised sewerage undertakers duties which they could perform only by continuing for a substantial period to discharge from existing outfalls, and at the same time applied to them the statutory restriction (now in s. 116 WIA 1991) on discontinuing the use of existing sewers, it implicitly authorised the continuing use of them. The inescapable inference is that:

> "those rights of discharge which had already accrued in relation to existing outfalls under previous statutory regimes survived."

(at [19]).

133. As can be seen, this analysis rests upon the survival of existing rights of discharge. I do not see that it can have the effect of creating *new* rights of discharge on the coming into force of the WIA 1991. Nothing in Lord Sumption's analysis suggests that he contemplated any such new rights springing up on 1 December 1991.

134. Nor is there any support for such an idea in the judgment of Lord Neuberger (with whom Lord Clarke and Lord Hughes again agreed). His analysis was that the right to discharge that water authorities had had prior to privatisation had passed to the new privatised undertakers under the Water Act 1989 and that the WIA 1991 did not remove them. As can be seen that analysis too rested on the survival of pre-1991 rights, not the creation of new rights in 1991. Indeed he himself made the point that a court should not be easily persuaded that a new right has been created by implication, particularly where that right interferes with the private rights of third parties and arises out of a long and detailed statute (at [58]).

135. I would therefore reject the second way in which Mr Karas put this point, namely that new implied rights to discharge from the outfalls in question arose on the coming into force of the WIA 1991. In my judgment it is necessary for UU to establish that it had a pre-existing implied statutory right of discharge before the WIA 1991.

136. The difficulty however with that is that I do not think that it did. What it had were rights to discharge under licences that were terminable. If the argument that those licences were wholly or partially *ultra vires* is rejected (as I have done), then on their face they obliged the local authorities (and UU as their successor) to remove the pipes on their termination. I do not see how an implied statutory right to discharge from the pipe can exist consistently with a contractual obligation to remove the pipe. In truth this is simply another way of saying that once MSCC has granted a limited and determinable right, the sewerage undertaker has somehow acquired a permanent and indefeasible right to maintain its pipes despite agreeing the very opposite. I do not think that can be right.

137. Nor do I think that there is anything in *MSCC (2014)* which would support it. Indeed Lord Sumption was careful to say, for the avoidance of doubt, that his conclusion:

> "in no way affects any binding agreement under which the parties may have regulated for themselves the use of particular outfalls. We were informed that there may be such agreements with some proprietors, but we have not been concerned with them."

(at [23]).

138. I would reject the argument put forward in the Respondent's notice.

Conclusion on 2010 appeal

139. I would allow the appeal and substitute a suitable declaration for that in Fancourt J's order. That will not determine the issue in relation to these outfalls as it is common ground that the proceedings will have to continue to enable UU's other defences to be considered. Nor have we been addressed on the practical consequences for the parties if UU's other defences fail. But it appears from the pleadings that MSCC is not seeking injunctive relief, merely declarations and damages, so there would seem to be no question of its claim actually preventing use of the overflows.

Lord Justice Arnold:

140. I agree.

Lady Justice Asplin:

141. I also agree.