Neutral Citation Number: [2019] EWHC 1495 (Ch)

Case No: PT-2017-000163

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Thursday 13th June 2019

Before :

THE HONOURABLE MR JUSTICE BARLING

- -

Between :

THE MANCHESTER SHIP CANAL COMPANY LIMITED

Claimant

-and-

UNITED UTILITIES WATER LIMITED

Defendant

- -
- -

Charles Morgan and Nicholas Ostrowski (instructed by **BDB Pitmans LLP**) for the **Claimant**
Jonathan Karas QC, Julian Greenhill QC and James McCreath (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 13 - 16 November 2018

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JUDGMENT

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

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GLOSSARY OF ABBREVIATED TERMS

ABBREVIATION	PARA WHERE FIRST DESCRIBED	EXPLANATION
"the Canal"	**2**	The Manchester Ship Canal
"Couch 1"	**6**	The first witness statement of Mr Graeme Couch, solicitor for MSC
"Couch 2"	**6**	The second witness of Mr Graeme Couch, solicitor for MSC
"Couch 3"	**6**	The third witness statement of Mr Graeme Couch, solicitor for MSC
"the Deeming Provision"	**149**	Subsection 186(2) of the Water Industry Act 1991
"the Davyhulme Works"	**2**	Davyhulme Waste Water Treatment Works based in Urmston, Greater Manchester
"the Marshbrook Sewer"	**3**	A sewer adopted as part of its public network by UU on 5 October 2007 pursuant to an agreement with a developer, which drained waste water and effluent from properties at Marshbrook Drive, Manchester. The sewer may have been connected to the public network prior to that date.
"MSC"	**1**	Manchester Ship Canal Company Limited, the Claimant in the Present Claim and the 2010 Claim
"New Outfalls"	**9**	Outfalls commissioned by sewerage undertakers on or after 1 December 1991 discharging treated waste water and effluent into waterways
"New Sewers"	**9**	Sewers constructed by sewerage undertakers on or after 1 December 1991
"Newly-Adopted Outfalls"	**9**	Outfalls not constructed by sewerage undertakers themselves, but adopted by them under the relevant statutory provisions on or after 1 December 1991.These outfalls may have been constructed either before or after this

		date.
"Newly-Adopted Sewers"	**9**	Sewers not constructed by sewerage undertakers themselves, but adopted by them under the relevant statutory provisions on or after 1 December 1991. These sewers may have been constructed either before or after this date.
"Old Outfalls"	**9**	Outfalls which were either constructed or adopted by sewerage undertakers (or by their statutory predecessors) and in use for the discharge of treated waste water and effluent into waterways before 1 December 1991
"Old Sewers"	**9**	Sewers which were either constructed or adopted by sewerage undertakers (or by their statutory predecessors) and in use before 1 December 1991
"the Origin Point"	**3**	The argument forming the basis of the Present Claim, to the effect that the right of discharge held by the SC Decision to exist in respect of Old Outfalls such as Outfall 61 does not apply to waste material originating in a Newly-Adopted Sewer such as the Marshbrook Sewer, with the result that discharge of such material into the Canal *via* Outfall 61 is a trespass by UU
"Outfall 61"	**3**	An Old Outfall in use since about 1957 for the discharge into the Canal of treated waste water and effluent from the Davyhulme Works
"the Present Claim"	**1**	A Part 8 claim brought by MSC against UU in respect of an alleged trespass by reason of the discharge into the Canal *via* Outfall 61 of treated waste water and effluent originating in the Marshbrook Sewer
"RSP"	**149**	Relevant sewerage provision within the meaning of section 219 of the

		1991 Act
"RSPs"	**149**	Relevant sewerage provisions within the meaning of section 219 of the 1991 Act
"Smith 1"	**6**	The first witness statement of Mr Michael Smith, solicitor for UU
"Smith 2"	**6**	The second witness statement of Mr Michael Smith, solicitor for UU
"UU"	**1**	United Utilities Water Limited, the Defendant in the Present Claim and the 2010 Claim
"the s.186 Point"	**139**	A proposed additional ground, by way of a test case, for the allegation by MSC that MSC's consent is required by virtue of section 186 of the 1991 Act for the discharge into the Canal *via* Outfall 61 of treated waste water originating in the Marshbrook Sewer, and that such discharge without consent is a trespass by UU
"the 1936 Act"	**17**	The Public Health Act 1936
"the 1989 Act"	**17**	The Water Act 1989
"the 1991 Act"	**2**	Water Industry Act 1991
"the 2010 Claim"	**6**	A Part 7 claim brought by MSC against UU for trespass, claiming *inter alia* damages in lieu of an injunction in respect of the discharge of treated waste water and effluent into the Canal *via* a number of outfalls, including Outfall 61

Mr Justice Barling:

Introduction

1. There are two main applications before me in respect of this Part 8 claim ("the Present Claim") brought by the Manchester Ship Canal Company Limited ("MSC"), represented by Mr Morgan and Mr Ostrowski. The defendant is United Utilities Water Limited ("UU") represented by Mr Karas QC, Mr Greenhill QC and Mr McCreath.

2. MSC is the corporation in which the Manchester Ship Canal ("the Canal") is vested. UU is a sewerage undertaker for the purposes of the Water Industry Act 1991 ("the 1991 Act"), and the owner and operator of the Davyhulme Waste Water Treatment Works, in Urmston, Greater Manchester ("the Davyhulme Works").

3. The claim form, issued on 28 November 2017, seeks a declaration that the discharge by UU of water and other materials into the Canal through an outfall situated near the Davyhulme Works ("Outfall 61") is a trespass against MSC to the extent that the water and other materials so discharged include water and materials which originate from a sewer constructed or adopted[1] by UU in or about 2007 to receive water from properties developed at or about that time at Marshbrook Drive, Manchester M9 2NN ("the Marshbrook Sewer"). I shall refer to the argument which is the basis of the Present Claim as "the Origin Point".

4. By its application dated 28 February 2018, UU applies for an order pursuant to CPR 3.4(2) striking out the Present Claim, or pursuant to CPR 24.2 giving summary judgment dismissing the claim, on the following grounds: that it is subject to cause of action estoppel and/or issue estoppel, and/or is an abuse of process under the *Henderson v Henderson* principle, and/or has no realistic prospect of success at trial, and/or that the declaration sought would serve no practical purpose.

5. By an application dated 29 October 2018, MSC applies to amend the claim form, seeking to add a further ground for the claimed declaration that the discharge of water at Outfall 61 is a trespass to the extent that the water so discharged originates in the Marshbrook Sewer. On the last day of the hearing a revised version of the proposed amendment was supplied to the court. UU opposes the amendment sought.

6. In order to understand the issues, it is necessary to set out some background, including an account of other proceedings between the same parties in which a decision of the Supreme Court and a consequential ruling of Newey J (as he then was) have featured in the argument before me ("the 2010 Claim"). A considerable amount of factual material is contained in three witness statements of Mr Graeme Couch, MSC's solicitor, and two witness statements of Mr Michael Smith, UU's solicitor. (I shall refer to these witness statements as "Couch 1", "Couch 2" or "Couch 3", and "Smith 1" or "Smith 2", as the case may be.) However, the essential facts are not in dispute.

[1] In fact the sewer was adopted by UU on 5 October 2007 pursuant to an agreement with the developer. It may have been connected to the public network prior to that date.

Background

7. A sewer is a conduit which carries off surface or waste water and discharges it somewhere. Some sewers have "outfalls" through which material can pass out of the sewer into watercourses. Outfalls may be located at points along the length of the sewer and/or at its end (such as when a surface water sewer discharges into a watercourse). Some sewers may discharge their contents into other sewers, and ultimately into wastewater treatment works. Once treated at such works, waste water will flow through a "disposal main" and out of an outfall into a watercourse.

8. Sewers may be public or private. Public sewers are those which vested in a sewerage undertaker on privatisation in 1989. A sewer also becomes a public sewer when a sewerage undertaker constructs it, or adopts an existing but previously private sewer. Public sewers are the subject of certain statutory rights and obligations. Private sewers are the property of persons other than sewerage undertakers, and are not subject to the same statutory rights and obligations that affect public sewers.

9. Sewerage undertakers have the power to construct sewers and pipes under private land by virtue of ss.158 and 159 of the 1991 Act. During the hearing before me, counsel used the term "New Sewers" to describe sewers constructed by sewerage undertakers after 1 December 1991 (the date on which the 1991 Act came into force). Sewers which were not constructed by sewerage undertakers themselves, but were *adopted* by them under the relevant statutory provisions after 1 December 1991 were termed "Newly-Adopted Sewers"; these sewers may have been constructed either before or after that date. Sewers which were either constructed or adopted by sewerage undertakers (or by their statutory predecessors) on or before 1 December 1991 were termed "Old Sewers". The same terminology was used in respect of "New Outfalls", "Newly-Adopted Outfalls", and "Old Outfalls". I shall adopt these terms in the judgment.

10. UU is the sewerage undertaker for the North West of England. Its area extends from north of Carlisle to south of Crewe, and includes the conurbations of Greater Manchester and Merseyside. However, this case concerns the Davyhulme Works operated by UU, and the disposal of its treated waste water. It is common ground that continuously since at least 1957 treated effluent has been discharged by UU and its predecessors from the Davyhulme Works via a "disposal main" into the Canal at Outfall 61, which is situated near Urmston, Greater Manchester. Output 61 pre-dates 1 December 1991 and therefore for present purposes is an Old Outfall.

11. The Davyhulme Works serves a very considerable area, including substantial parts of Manchester, Salford and the surrounding countryside. It is more particularly described in Smith 1, at paragraphs 7 and 33:

> "7. Davyhulme WwTW is the principal WwTW serving Greater Manchester with a catchment area of approximately 185.8 sq km and discharged a total of 111,390.3 Mega-litres (ie over 111 billion litres) into the Canal in 2017. Davyhulme WwTW itself comprises a wastewater treatment facility covering 73.6 hectares, ... Davyhulme WwTW is a very large, complex facility which treats incoming flows of sewage from an upstream network of public sewers serving an "Annual Average Resident Connected Population" as at June 2017 of 780,620 persons and a population equivalent (ie including trade waste) of 1.2 million persons with a flow rate up to 8,264 litres per second. The WwTW comprises infrastructure performing the following functions: grit removal, screening, storm water storage, primary settlement, secondary activated sludge plant and tertiary ammonia removal, and sludge digestion with thermal hydrolysis. Each of these processes has

> multiple separate process streams to provide security of service and to facilitate maintenance. All flows received at the Davyhulme WwTW inlet are discharged to the Canal at Outfall 61. The outfall is a reinforced concrete conduit equivalent to a 3,700mm diameter pipe with a cascade and spillway apron at the discharge point.
>
> ….
>
> 33… Davyhulme serves most of the City of Manchester and large parts of Oldham, Middleton, Stretford, Dale, Urmston and Bucklow as well as smaller parts of other areas. Davyhulme is the largest WwTW in UU's north-west region, the second largest WwTW in England after Beckton in East London, and among the largest WwTWs in Europe."

12. As I have said, the dispute concerns the fact that the water and other materials discharged into the Canal through Outfall 61 include water and materials originating from a sewer adopted by UU in 2007 which receives waste water from Marshbrook Drive, an area on the other side of Manchester from the Davyhulme Works. Marshbrook Drive is described in Smith 1, at paragraph 36, as follows:

> "… the Marshbrook Drive area… constitutes one very small part of the total catchment area that is being drained to and treated at Davyhulme WwTW and the effluent from which is discharged into the Canal from Outfall 61. Mr Rathbone informs me that the area of the Marshbrook Road development comprises 0.12 square km. As a proportion of the Davyhulme WwTW catchment area as a whole of 185.5 square kilometres, Marshbrook Road therefore constitutes 0.065% of the total catchment area. … [T]he new sewer at Marshbrook Drive, … was first laid and used after 1 December 1991 and was adopted by UU on 5 October 2007."

13. It is not in dispute that as and when waste water leaves the Marshbrook Sewer and enters other parts of UU's sewerage system on its way to the Davyhulme Works, it is mixed with and becomes undifferentiated from any other water or waste material in the system. Similarly, when it reaches the Davyhulme Works it is treated as an undifferentiated part of whatever else is being treated there prior to discharge *via* Outfall 61.

14. In Smith 2, Mr Smith refers to the increasing volume of treated water discharged from Outfall 61 since 1989, as compared with the decreasing quantity of pollutants. He also describes MSC's need for the water in order to maintain navigable levels in the Canal and facilitate other functions of the waterway:

> "I attach at page [3] a table and graphs charting the quantity of potential pollutants actually discharged from Outfall 61 in each of the years from 1989 to 2017. It can be seen from this that the overall quantum of potential pollutant actually being discharged into the Canal from Outfall 61 has fallen dramatically over the period since 1989 regardless of the new sewer connections.
>
> Since 1989 there has been a steady increase in the impermeable developed area within the Davyhulme catchment from which surface water will drain to Davyhulme WwTW through combined sewers. For this reason the total volume of treated effluent discharged from Outfall 61 has increased since 1989. However, for the reasons just given the quantum of potential pollutants in that treated effluent is significantly less than in 1989.
>
> New sewer connections are not the determining factor in the volume of treated effluent or potential pollutant entering the Canal from Outfall 61. Of far greater importance are long term changes in population, industry and the sewage treatment process.
>
> …
>
> Although the amount of surface water being discharged from Outfall 61 has increased since privatisation this is surface water all or most of which would have found its way naturally into the

> Canal in any event. Furthermore, up to 60% of the water in the Canal is comprised of effluent from UU's WwTWs. This point was made in MSCC's own evidence from John Rhodes OBE BSc RICS to the ongoing CPO Inquiry in relation to the nearby Eccles WwTW (John Rhodes Proof of Evidence, paragraph 3.65), an extract of which I attach at page [4] Davyhulme WwTW is by far the largest single contributor of water to the Canal. The Canal is dependent upon the receipt of treated effluent from UU's WwTWs which enables MSCC to maintain the water levels necessary for navigation, facilitates the operation of locks, especially in dry weather, and provides sufficient water to enable MSCC to grant abstraction licences."
>
> (See paragraphs 8 (5) to (7), and 10).

The suggestion that the treated water from the Davyhulme Works is needed for the Canal to fulfil its function is disputed by MSC.[2]

15. It is common ground that the Marshbrook Sewer is a Newly-Adopted Sewer within the definition explained above, and Outfall 61 is an Old Outfall.

Relevant legislation

16. Before looking at the decisions of the courts, and in particular that of the Supreme Court in the 2010 Claim, it is appropriate to describe the relevant legislation and set out some of the key provisions.

17. Prior to 1973, sewerage services were generally provided by local authorities. They had originally enjoyed powers under local Acts of Parliament, which were superseded by powers conferred by successive Victorian statutes and then the Public Health Act 1936 ("the 1936 Act"). In 1973 the Water Act of that year transferred the sewerage and water supply functions of local authorities to statutory regional water authorities. This was followed by the Water Act 1989 ("the 1989 Act"), which privatised the water industry, and transferred those functions to commercial water and sewerage undertakers. The 1989 Act represented a fundamental revision of the statutory powers and duties of those undertakers. Next came the 1991 Act, which consolidates with amendments the provisions of the 1989 Act and several other relevant statutes, to give effect to recommendations of the Law Commission. Enacted at the same time was the Water Consolidation (Consequential Provisions) Act 1991, which effected consequential amendments, repeals, and transitional measures in connection with the 1991 Act.

18. In large measure the 1991 Act re-enacted the provisions of the 1989 Act and certain provisions of the 1936 Act, albeit in some cases in amended form. Relevant provisions of the 1991 Act include those set out below. (In each case the measure is cited so far as relevant and in the form in which it was originally enacted):

- Sections 158 and 159, give sewerage and water undertakers the powers to lay pipes "in streets" and "in other land".

- Section 94 provides:

> "**General duty to provide sewerage system.**

[2] See Couch 3, at paragraph7.

(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 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."

- Section 105A provides:

"**Schemes for the adoption of sewers, lateral drains and sewage disposal works**

(1) The Secretary of State may by regulations provide for him to make schemes for the adoption by sewerage undertakers of sewers, lateral drains and sewage disposal works of the descriptions set out in paragraphs (a), (aa) and (b) of section 102(1) above.

(2) The regulations may require sewerage undertakers to prepare draft schemes and to submit them to the Secretary of State.

(3) Each scheme shall relate to—

(a) the area of a sewerage undertaker, or part or parts of it; or

(b) the areas of more than one sewerage undertaker, or part or parts of them.

(4) It shall be the duty of a sewerage undertaker, in specified circumstances, to exercise its powers under section 102 above with a view to making the declaration referred to in subsection (1) of that section in relation to sewers, lateral drains or sewage disposal works which—

(a) fall within the area to which a scheme relates; and

(b) satisfy specified criteria."

- Section 106 provides:

"**Right to communicate with public sewers**

(1) Subject to the provisions of this section—

(a) the owner or occupier of any premises in the area of a sewerage undertaker; or

(b) the owner of any private sewer draining premises in the area of any such undertaker,

shall be entitled to have his drains or sewer communicate with the public sewers of that undertaker and thereby to discharge foul water and surface water from those premises or that private sewer."

- Section 116 provides:

"**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."

- Section 117 provides:

"**Interpretation of Chapter II.**

…

(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)…

(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.

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

- Section 219 provides:

"**General interpretation**.

In this Act, except in so far as the context otherwise requires—

…

"the relevant sewerage provisions" means the following provisions of this Act, that is to say—

(a) Chapters II and III of Part IV (except sections 98 to 101 and 110 and so much of Chapter III of that Part as provides for regulations under section 138 or has effect by virtue of any such regulations);

(b) sections 160, 171, 172(4), 178, 184, 189, 196 and 204 and paragraph 4 of Schedule 12; and

(c) the other provisions of this Act so far as they have effect for the purposes of any provision falling within paragraph (a) or (b) of this definition"

19. Certain other provisions of the 1991 Act which are relevant to MSC's application to amend the Present Claim are set out later in this judgment.[3]

20. I now turn to consider the 2010 Claim.

[3] Section 186 is at paragraph 147 of this judgment.

The 2010 claim

21. Both Mr Couch and Mr Smith, in their evidence, and counsel in their submissions, have referred at length to the 2010 Claim, which was brought by MSC against UU in March 2010. Following about two years of pre-action investigation and discussions, MSC began the 2010 Claim in respect of over one hundred outfalls into the Canal from sewers vested in UU, including Outfall 61. Some of those discharges were the subject of contractual arrangements. However, in relation to the other discharges, including from Outfall 61, MSC alleged that they constituted an actionable trespass.

22. The basis of the trespass allegation, as pleaded in the Amended Particulars of Claim served in the 2010 Claim,[4] was as follows:

> "8. Since the Canal was constructed and at all material times until 1 December 1991, the Defendant's respective predecessors in title and the Defendant have had statutory authorisation under the Public Health Acts 1875 and 1936 to discharge water into the Canal so long as the water discharged did not prejudicially affect the purity and quality of the water in the Canal.
>
> 9. Since 1 December 1991 the statutory scheme governing sewerage undertakers has been contained in the Water Industry Act 1991. In *British Waterways Board v Severn Trent Water Ltd* [2001] Ch 31, the Court of Appeal held that a sewerage undertaker, such as the Defendant, does not have statutory power to discharge water or other matter from its drainage pipes onto the land or into the waters of others. Accordingly, any discharge now made by a sewerage undertaker without the permission of a relevant land owner constitutes a trespass."

23. MSC contended that in respect of relevant discharges UU did not have the benefit of any express or implied agreement, or statutory or common law right, entitling it to make such discharges into the Canal, and that each individual discharge from the outfalls in question (which included Outfall 61) was a trespass actionable by MSC.[5] At paragraph 40 there was an allegation that MSC was suffering loss and damage as a result of the trespass, and was entitled to an award of damages. In addition, at paragraph 43, the pleading asserted MSC's entitlement to a final injunction in respect of all the unlawful discharges:

> "to restrain [UU] from causing, permitting or suffering the discharges to be made or to continue…
>
> [MSC] does not claim such an injunction but pursuant to s.50 of the Senior Courts Act 1981 claims damages in lieu of an injunction."

In the prayer, the relief sought included a declaration that UU was not entitled to make any of the discharges identified in the pleading, other than with the consent of MSC, and damages for trespass, including damages "in lieu of an injunction under s.50 of the Senior Courts Act 1981, to be assessed".

24. Mr Karas submitted, and Mr Morgan did not dispute that (1) whatever element of the discharges from Outfall 61 originated in Marshbrook Drive was within the scope of the general allegation of trespass, given that the Marshbrook Sewer had been adopted

[4] Although there is some interchangeability of usage in the pleadings in the 2010 Claim, when the parties refer to a "discharge" they appear in general to mean the substance which discharges from an outfall into a watercourse, and when they refer to "outfall" they appear in general to mean the physical structure (usually a pipe) from which a discharge emerges.

[5] Amended Particulars of Claim, paragraph 15.

some three years before the 2010 Claim was commenced; and (2) the compensation for past and future trespasses sought by MSC in the 2010 Claim included damages in respect of the part of the discharge originating in Marshbrook Drive.

25. In its Amended Defence and Counterclaim, UU denied that any discharge then made by a sewerage undertaker without the permission of a relevant land owner constituted a trespass, and that the discharges identified in the Amended Particulars of Claim, including from Outfall 61, constituted a trespass.[6] A number of defences were relied upon.[7] Among these was the contention that notwithstanding the decision of the Court of Appeal in *British Waterways Board v Severn Trent Water Ltd* [2001] Ch 31, the statutory authorisation which admittedly existed under the legislation in force prior to the 1991 Act, continued under that enactment in respect of discharges from outfalls constructed prior to its coming into force on 1 December 1991.[8] UU's Counterclaim sought a declaration reflecting that contention.

26. Thus, the 2010 Claim included an issue whether or not the discharge by UU after 1 December 1991 of treated waste water and material into the Canal from outfalls in use before that date, including Outfall 61, constituted an actionable trespass or, as UU contended, continued to be authorised by statute after that date. This issue went to the Supreme Court,[9] which accepted UU's submission that the Court of Appeal in *British Waterways Board* (above) had reached no binding decision on whether a sewerage undertaker continued to have statutory authorisation to discharge water or other matter into the waters of a canal or watercourse where the said discharge was authorised before 1 December 1991.

27. The present issue relates to the post-December 1991 right to include in the discharge from an Old Outfall (such as Outfall 61) waste water originating in a Newly-Adopted Sewer (such as the Marshbrook Sewer). That formulation of the issue does not appear to have been expressly raised in the pleadings in the 2010 Claim. Nor was any defence based on a distinction as to the *origin* of the waste water discharged into the Canal. UU submits that it can reasonably be inferred that in the nearly 20 year period between 1991 and 2010, its sewerage network would have been extended on many occasions by the addition of Newly-Adopted Sewers.

28. On a summary judgment application by UU, Newey J held that the 1991 legislation did not affect UU's entitlement to discharge effluent *via* outfalls dating from before 1 September 1989, and that UU continued to enjoy the rights of discharge which their predecessors had had up to then. The Court of Appeal allowed an appeal by MSC, and UU appealed to the Supreme Court.

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[6] Amended Defence and Counterclaim, paragraph 15.
[7] In Smith 1, at paragraph 13, Mr Smith states that UU's Defence and Counterclaim (amended in 31 May 2011), took seven and a half months to prepare, comprised a 26-page main pleading with three lengthy schedules and 117 separate fully-pleaded annexes pleading UU's case in relation to each of the 117 outfalls in question.
[8] Amended Defence and Counterclaim, paragraphs 16-17.
[9] *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] UKSC 40, [2014] 1WLR 2576 ("the SC Decision").

Judgment and Order of the Supreme Court

29. The issue in the appeal was whether under the 1991 Act a sewerage undertaker has an implied statutory right to discharge surface water and treated effluent into private watercourses such as the Canal without the consent of their owners.

30. Lord Sumption pointed out that the 1989 Act expressly incorporated all the provisions of the 1936 Act previously found in its Victorian predecessor, the Public Health Act 1875. These were the provisions on which the Court of Appeal in *Durrant v Branksome Urban District Council* [1897] 2 Ch 291 had relied in order to find that a right to discharge surface water and treated effluent into private watercourses was impliedly granted to local authorities by the Act of 1875. The provisions in question were: that which prevented undertakers from discontinuing the use of a sewer without providing an alternative sewer, that which afforded protection against the discharge of foul water into watercourses, that which granted to the owner or occupier of any premises the right to void his drains or sewers into a public sewer, and that which imposed the obligation to make full compensation for any damage sustained by the exercise of the undertaker's powers (see Schedule 8, paragraph 1 to the 1989 Act). For that reason, Lord Sumption concluded that the draftsman of the 1989 Act must have intended that that implied right should subsist (see paragraphs 6-8 of the SC Decision).

31. In the next section of his judgment, he pointed out that the same features "can be traced through the labyrinthine scheme of amendments, repeals and re-enactments into the legislation of 1991, but with significant changes of both form and context." (See paragraphs 9-11 of his judgment.) Those changes in the legislation led him to dismiss UU's argument that a *general* right of discharge through outfalls into private watercourses, regardless of whether those outfalls were in use at the time of the coming into force of the 1991 Act or were future outfalls, could be implied into the 1991 Act. He considered that the much more elaborate statutory scheme in the 1991 Act made the implication more difficult, and he was of the view that for this reason the Court of Appeal in *British Waterways Board* (above) had rejected the same argument. Lord Sumption cited the Court of Appeal's conclusion, as summarised by Chadwick LJ at paragraph 71 of the judgment in that case:

> "The fallacy, as it seems to me, lies in the underlying (but unspoken) premise that Parliament must have intended that sewerage undertakers should have facilities to discharge (which, plainly, they do require in order to carry out their functions) without paying for those facilities. Whether or not that premise could have been supported in the context of a public authority charged with functions imposed in the interests of public health, it cannot be supported, as it seems to me, in the context of legislation enacted following a decision to privatise the water industry."

Lord Sumption declined UU's invitation to hold that the decision was wrongly decided. He considered that the Court of Appeal's reasoning for rejecting the only argument before them, viz that a general power to discharge was derived from section 94(1) and 159 of the 1991 Act, was "compelling". (See paragraphs 13-15 of the SC Decision.)

32. He next turned to consider the situation where an outfall was already in use on 1 December 1991 pursuant to a right transferred to the privatised sewerage undertakers under the Water Act 1989. He noted that no argument had been addressed to the Court of Appeal in *British Waterways Board* (above) about the significance of that situation,

which was "critical" to the appeal the Supreme Court were considering. A sewer could only lawfully be used if it was lawful to discharge from it. If an outfall was first brought into use after 1 December 1991, the undertaker could reasonably be expected to have obtained the necessary consents to discharge into a private watercourse (or exercised compulsory purchase rights) before laying pipes. But if the outfall was already in use at that date the pipes would already be laid and the location of the outfall determined. Further, the outfall would have been created under a statutory regime entitling the sewerage undertaker or its predecessor to discharge from it. He went on:

> "After well over a century in which sewerage authorities were entitled as of right to construct and discharge from such outfalls one would expect the degree of dependence to be significant. 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. Any continuing discharge thereafter will become tortious from that date.
>
> 18. Under the Water Industry Act, the statutory duties of a sewerage undertaker include a duty to operate the system of public sewers so as effectually to drain their area (section 94) and a duty to allow the owners or occupiers of premises to connect to the public sewer system (section 106). Moreover, the undertaker is not permitted to discontinue the use of a sewer until it has provided an alternative sewer capable of serving as effectually (section 116). The result, if the right to discharge into private watercourses ceases as the canal owners suggest, is to make it impossible for the sewerage undertakers lawfully to perform their statutory functions or observe the statutory restrictions on the discontinuance of existing sewers from the moment that the new Act comes into force."

33. Such a situation was, Lord Sumption said, "legally incoherent" and "preposterous". It was not the effect of the current legislative scheme:

> "19. In my opinion, when the Water Industry Act 1991 (i) imposed on the privatised sewerage undertakers duties which it could perform only by continuing for a substantial period to discharge from existing outfalls into private watercourses, (ii) at the same time applied to them the statutory restrictions in section 116 on discontinuing the use of existing sewers, it implicitly authorised the continued use of existing sewers. A restriction on discontinuing the use of an existing sewer until an alternative has been constructed is not consistent with an obligation to discontinue its use forthwith under the law of tort. The inescapable inference is that although there is no provision of the Act of 1991 from which a general right of discharge into private watercourses can be implied, those rights of discharge which had already accrued in relation to existing outfalls under previous statutory regimes survived.
>
> 20. The basis of this implication is not section 30 of the Public Health Act 1936, whose statutory predecessor was the basis of the decision in the *Durrant* case, but section 116 of the 1991 Act viewed against the background of the general duties of sewerage undertakers under the Act. It follows that the repeal of section 30 by the Water Consolidation (Consequential Provisions) Act 1991 is irrelevant. In any event, its repeal would not affect rights of discharge which had already accrued by virtue of the use of existing outfalls: see section 16(1)(c) of the Interpretation Act 1978.
>
> 21. It is true that although over a period of time after the coming into force of the Water Industry Act new rights of discharge could have been acquired by negotiation or compulsory purchase or existing sewers or outfalls replaced, the effect of the conclusion which I have reached is that a sewerage undertaker is entitled under the Water Industry Act 1991 to continue discharging into private watercourses from existing outfalls indefinitely. The solution is therefore more extensive than the problem. But that is a lesser anomaly and one which is inherent in the nature of the issue."

(See paragraphs 17-21 of the SC Decision)

34. Having considered and rejected a suggestion that his conclusion would leave owners of watercourses worse off than they were under the 1989 Act in terms of compensation for damage and more limited protections available against abuse, Lord Sumption concluded, at paragraph 23:

> "I would accordingly allow the appeal to the extent of declaring that subject to section 117(5) of the Water Industry Act 1991, the Appellants are entitled to discharge into the Respondents' canals from any sewer outfall which was in use on or before 1 December 1991."

35. Lord Clarke and Lord Hughes agreed with Lord Sumption. Lord Toulson gave a separate judgment in which he concluded, for reasons which "accord essentially with those given by Lord Sumption," that under the 1991 Act

> "sewerage undertakers are impliedly empowered to continue to discharge surface water and other non-pollutant water through sewers vested in them into watercourses to which they were already discharging at the time the Act came into force, but have no right to create new outfalls into canals or rivers without the agreement of the body which owns or is responsible for the canal or river."

(See paragraphs 24-5 of the SC Decision.)

36. Lord Neuberger reached the same conclusion as Lord Sumption albeit by a somewhat different route. He said, at paragraph 39:

> "… sewerage undertakers have the statutory right to discharge surface water and treated effluent into streams and canals (subject to payment of compensation for any damage thereby caused), but only in respect of outfalls in existence before the coming into force of the 1991 Act. I agree with the reasons given by Lord Sumption and Lord Toulson although I would place greater weight on the assistance which can be gained from the provisions of the earlier legislation relating to public sewers and the Interpretation Act 1978 ("the 1978 Act")."

37. He rejected the submission that there was a general right, implied by virtue of s.159 of the 1991 Act, to discharge into private watercourses, regardless of when the discharge came into use. He did so for the reasons given by Lord Sumption and Lord Toulson. He regarded the reasoning of the Court of Appeal in *British Waterways Board* as "unanswerable" (see paragraph 57). As to UU's alternative argument that it was a necessary inference from the terms of the 1991 Act that sewerage undertakers have a right to discharge from existing outfalls, he stated:

> "…there are two alternative reasons for concluding that the new water undertakers had the right to discharge from existing outfalls under the 1989 Act, and one reason for concluding that that right continued under the 1991 Act."

(Paragraph 60 of the SC Decision)

38. As to the two possible routes to an implied right under the 1989 Act, Lord Neuberger said:

> "Accordingly, it seems to me to follow that the sewerage undertakers had an implied right (subject to payment of compensation in case of damage) to discharge from existing outfalls from the sewers vested in them in 1989, because (i) the provisions of the 1989 Act conferred such a right on them by implication in accordance with the reasoning in *Durrant* or, if that is wrong, (ii) the implied right to discharge from those outfalls enjoyed just before the 1989 Act came into force was transferred by the water authorities to them. The effect of conclusion (i) is, as I see it, that the

> right to discharge applied to outfalls created after 1989, including those from sewers brought into use after the 1989 Act came into force, as section 30 (as amended to apply to the sewerage undertakers) continued in force, and, following the reasoning in *Durrant*, so did the right to discharge."

(Paragraph 70 of the SC Decision)

39. As to the position under the 1991 Act, Lord Neuberger held that as section 30 of the 1936 Act had been repealed, a right to discharge could no longer be established under route (i). However, he considered that the factual context of the 1991 legislation, as discussed in the judgments of Lord Sumption and Lord Toulson, strongly supported the presumption in section 16 of the Interpretation Act 1978 that the existing right to discharge from existing outfalls survived the repeal of section 30. For the practical reasons to which he had referred, it was impossible to accept that in 1989 private sewerage companies were to be deprived of the right to discharge from existing sewers and were to be left to negotiate what rights they could. Whilst that proposition was not in principle fanciful, it was, he said, very unlikely that such a deprivation could have been intended to have been effected by the 1991 legislation without express provision and without any consultation or recommendation from the Law Commission. It was even more unlikely that such a deprivation was intended so soon after the 1989 Act.

40. For those reasons Lord Neuberger concluded:

> "that sewerage undertakers had, and therefore continue to have, a statutory right to discharge surface water and treated effluent from existing outfalls from sewers which had been vested in them by the time that the 1991 Act came into force, but not from subsequently created outfalls or outfalls from sewers which they may have laid after that date."

(Paragraph 75)

41. Following that judgment, the Supreme Court set aside the order of the Court of Appeal, and restored paragraph 1 of the order of Newey J of 8 March 2012. Paragraph 1 was a declaration that, on the true construction of the relevant legislation and relevant transfer scheme, where the relevant sewerage undertaker had been entitled to discharge water and other material into the Canal immediately prior to 1 September 1989, UU was so entitled thereafter including after 1 December 1991, and where UU was so entitled immediately prior to 1 December 1991 it continued to be so entitled thereafter. The parties were unable to agree the consequences of the SC Decision, and further consequential orders were not made, in circumstances where MSC wished to amend the 2010 Claim in respect of particular outfalls. The case was therefore remitted to Newey J to deal with UU's application for judgment on the claim and counterclaim, and MSC's application to amend in order to include a new claim in similar terms to the Present Claim.

Judgment and Order of Newey J on the matter being remitted

42. The matter came back to Newey J on UU's application for a declaration that (subject to not prejudicing the purity and quality of the water in the Canal) UU continued to be entitled to discharge from specified outfalls, including Outfall 61, and that such continued discharge was lawful, and for an order dismissing MSC's claim in respect of specified outfalls, including Outfall 61. MSC applied for permission to re-re-amend

the 2010 Claim, and for the determination of a preliminary issue relating to Outfall 61.

43. One of the proposed amendments to MSC's Particulars of Claim was to add a new paragraph 16C, asserting that UU's rights in respect of Old Outfalls (pre-1 December 1991) are subject to three limitations, one of which was:

> "16C.3 the statutory right impliedly conferred by the [1991 Act] to continue to discharge from Pre-1991 Outfalls does not authorise discharges of water and other materials through outfalls where the water and materials originate from sewers laid or adopted by [UU] on or after 1 December 1991, or from new connections made to existing sewers after 1 December 1991"

44. Thus, MSC wished to continue the 2010 Claim in respect of, *inter alia*, Old Outfalls where New Sewers and/or Newly-Adopted Sewers connected directly or indirectly to those Old Outfalls. Some 90 outfalls, including Outfall 61, came within this category.

45. In refusing permission to amend, Newey J made the following general comments, at paragraph 35 of his judgment:

> "MSCC could be expected to have put forward by that stage all the points that it wished to advance as entitling it to be allowed to continue the proceedings in respect of the 106 outfalls, the more so since Floyd J had directed MSCC to serve its evidence in answer to the application to [*sic*] for summary judgment by 18 November 2011. Further, as I recorded in my judgment, counsel then appearing for MSCC accepted at the hearing before me that the parties had had an adequate opportunity to address the issues and did not suggest that I lacked any relevant evidence.
>
> The claims that would be introduced by the proposed amendments could all have been put forward in time for the hearing before me in 2012. The Class 2 amendments have, I gather, been prompted by paragraph 75 of Lord Neuberger's judgment in the Supreme Court, but the passage in question did no more than suggest to MSCC a legal argument that had always been available to it… In short, the amendments were not dependent on the Supreme Court's decision;
>
> …The fact that additional arguments may have occurred to new counsel does not normally represent a compelling reason for granting permission to amend…
>
> The amendments would put United Utilities to a very great deal of work. A witness statement explains that, if the amendments were permitted, United Utilities:
>
> "would be required to undertake very substantial investigations into facts which it has not had to investigate as a result of any of the allegations raised in these proceedings to date, including without limitation as to the date of construction of sewers and properties which ultimately connect to sewers discharging through the outfalls in issue, as to the frequency and extent with which individual discharges can be said to have exceeded the statutory limits on [United Utilities'] authority to discharge, and as to its tankering operations…"
>
> It is, moreover, reasonable to assume, I think, that Mr Karas is correct that past work would be wasted (because some would inevitably need to be done again in going over historic documents)…
>
> The fact that, if denied permission to amend, MSCC may seek to litigate some or all of the points raised by the proposed amendments in fresh proceedings does not seem to me to provide an adequate justification for allowing it to introduce them into proceedings issued nearly six years ago, especially since the points have not been the subject of pre-action correspondence."

46. He concluded as follows in relation to the specific amendment relevant to the present claim (referred to as "Class 2"):

> "The Class 2 amendments are, as I have mentioned, prompted by paragraph 75 of Lord Neuberger's judgment in the Supreme Court. He referred to sewerage undertakers having the right to discharge from "existing outfalls from sewers which had been vested in them by the time the 1991 Act came into force, but not from subsequently created outfalls or outfalls from sewers which they may have laid after that date". MSCC contends that the words I have underlined indicate a limitation on United Utilities' entitlement to discharge through Pre-1991 Outfalls. It maintains, moreover, that such a restriction is consistent with the scheme of the WIA and the basis on which the Supreme Court held sewerage undertakers to have implied rights of discharge.
>
> Mr Karas suggested that I should decline to allow the Class 2 amendments on the basis that MSCC's argument is wrong in law. It would, he argued, be legally incoherent to suppose that discharges of material originating from connections to United Utilities' sewers after 1 December 1991 are unlawful. In this connection, he stressed section 106 of the WIA, which (he said) confers an "absolute right" to connect premises to a public sewer (as to which, see *Barratt Homes Ltd v Dwr Cymru Cyf (Welsh Water)* [2009] UKSC 13, [2010] 1 All ER 965).
>
> In my view, however, it would not be appropriate for me to attempt to determine whether United Utilities' rights of discharge are (or are not) restricted in the way suggested by MSCC. For understandable reasons, argument on the point was quite limited before me. I am not confident that the issue was addressed fully. I do not, in the circumstances, feel that I should "grasp the nettle" and decide it.
>
> However, other objections that Mr Karas put forward to the Class 2 amendments strike me as more compelling. It is fair to say (as Mr Karas did) that the amendments are wholly unparticularised: MSCC baldly asserts in respect of the 90 relevant outfalls that the discharge from each of them "is now in whole or in part from new sewers laid or adopted by [United Utilities] on or after 1 December 1991". Further, Mr Karas must surely be right that, unless at least MSCC's claim were dismissed as legally unsustainable at a very early stage, the Class 1 [*sic*] amendments would put United Utilities to a great deal of work. As to this, a witness statement filed on behalf of United Utilities says:
>
> > "Even if proper particulars are provided, I understand from [United Utilities] that, at present, there is no obviously satisfactory way of establishing which sewers connecting into sewers discharging into the Canal were constructed after that date. If this amendment were to be permitted, it is at this stage unclear to [United Utilities] precisely what factual investigations would be best undertaken. However, whatever method was chosen, given the sheer amount of infrastructure in issue, it is clear that a very significant amount of investigation would be necessary, and [United Utilities] would request an initial period of 6 months to respond following the provision of proper particulars, although anticipates that a request for a further extension is likely to be necessary."
>
> Taking such matters in conjunction with the lateness of the application to amend (on which I have commented above), it seems to me that I should not grant MSCC permission to make the Class 2 amendments. The claim that MSCC wishes to put forward should, in my view, be pursued, if at all, in new proceedings."

47. The order ultimately made by Newey J on 13 June 2016 included dismissal of the claims in respect of the Schedule 1 outfalls, including Outfall 61. The recitals recorded (a) that MSC had informed the court and UU that it intended to bring what is the Present Claim, (b) that the declaration granted was to the effect that UU benefited from a statutory right to discharge from *inter alia* Outfall 61 but did not determine whether or not particular discharges exceeded any limits on that right, and (c) that nothing in the order was intended to restrict either MSC's ability to bring the proposed new claim or UU's ability to contend that it was an abuse of process or should otherwise not be permitted.

48. The 2010 Claim did not come to an end with Newey J's order. It continues in respect of certain preliminary issues, including the extent to which a number of existing

agreements interact with statutory rights. There are also residual questions concerning local rights, which have yet to be resolved. I am told that of the 113 outfalls originally within the scope of the 2010 Claim, some 7 remain unresolved. No hearing date for the trial of preliminary issues has yet been fixed.

UU's strike out/summary judgment application

Preliminary observations

49. Mr Karas submitted that it was appropriate first to deal with the parties' respective arguments on UU's strike out application, and then to deal with the application to amend. I consider that is the appropriate approach here. This is not just because the proposed amendment has been to some extent evolving, with a revised draft of the amendment put before the court only during the hearing. But I consider that the interests of justice are also better served by first seeing how UU's application to strike out the claim as currently formulated would be resolved. I will therefore adopt that approach.

50. In its application to strike out the Present Claim, UU relies upon the following main grounds:

(1) Cause of action estoppel.

(2) Issue estoppel.

(3) *Henderson v Henderson* abuse.

(4) The effect of the SC Decision, either as binding this court and/or as indicating that the present Claim has no real prospect of success and is bound to fail.

51. These grounds are not watertight and overlap to a certain extent.

(1) The effect of the SC Decision

52. Mr Karas, while acknowledging that the estoppel points might logically come before the effect of the SC Decision, found it convenient to deal with the latter ground first, as it is part of the essential background. I shall do the same.

The parties' submissions

53. Mr Karas submitted that the Supreme Court reached the clear conclusion that, subject only to the provisos in section 117 of the 1991 Act, sewerage undertakers have a continued entitlement to discharge from Old Outfalls such as Outfall 61. He submitted that nowhere in its reasoning did the Court draw any distinction between (1) the discharge into watercourses through Old Outfalls of waste water which originated in Old Sewers and (2) the discharge into watercourses through Old Outfalls of waste water which originated in New or Newly-Adopted Sewers. The Court's reasoning applied equally to both.

54. Nor, he submitted, was Lord Neuberger saying in paragraph 75 of his judgment[10] that discharges *via* Old Outfalls from sewers to which New or Newly-Adopted Sewers were connected were unlawful, as MSC suggested. That would be inconsistent with the reasoning of the Supreme Court, and in particular the acceptance by all its members that it was "incoherent" to suggest that sewerage undertakers could not lawfully continue to discharge effluent from Old Outfalls which they were unable lawfully to stop up by reason of section 116 of the 1991 Act. The fact that effluent originated in a New or Newly-Adopted Sewer did not prevent the application of the section.

55. It was submitted that in these circumstances, quite apart from the question whether MSC could properly bring the Present Claim in the light of the estoppel and abuse arguments, the reasoning and conclusions of the Supreme Court in the SC Decision are binding and determinative, with the result that the Present Claim would have no real prospect of success and would be bound to fail.

56. Mr Morgan, in response, submitted that although the Supreme Court found an implied right of discharge to exist, which derived from *inter alia* the terms of section 116 and the obligation to make continuous provision of sewers to those lawfully using them, the Court had not determined the scope or limits of the implied right. Mr Morgan emphasised the following italicised[11] words in paragraph 19 of Lord Sumption's judgment:

> "The inescapable inference is that although there is no provision of the 1991 Act from which a general right of discharge into private watercourses can be implied, those rights of discharge *which had already accrued in relation to existing outfalls under previous statutory regimes survived*."

57. He submitted that this formulation of the right did not address the issue of discharge *via* an Old Outfall of material originating from a post-1991 addition to the network of sewers. That issue was raised in the Present Claim.

58. Mr Morgan relied in particular on paragraph 75 of Lord Neuberger's judgment. He pointed out that the passage in question ("but not from subsequently created outfalls or outfalls from sewers which they may have laid after that date.") apparently meant that the implied right held to exist did not extend to discharges *via* Old Outfalls of material from sewers laid after 1 December 1991. Mr Morgan submitted that that meaning was to be preferred, as it made more logical sense of the syntax and words used, and was consistent with the ultimate order made by the Supreme Court, which he submitted did not extend the implied right to a discharge originating from a post-1991 addition to the sewerage network.

59. In the light of the judgment of Lord Neuberger, with which Lords Clarke and Hughes agreed (as they also did with the judgment of Lord Sumption), Mr Morgan submitted that either the point had been decided in MSC's favour, or it was undecided. In the latter case he submitted that it should be decided favourably to MSC.

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[10] See paragraph 40 of this judgment.

[11] The emphasis was in MSC's skeleton argument and not by Lord Sumption.

60. Mr Morgan pointed out that the Supreme Court's holding that a right of discharge should be implied into the 1991 legislation was based on the reasoning that without it the sewerage undertakers would not lawfully be able to meet their obligations or discharge their statutory functions and duties under, in particular, sections 94, 106, and 116 of the 1991 Act. However, in relation to section 106, he argued that the relevant duty was not a duty to permit new connections post-1991, but to permit those whose premises or private sewers were *already connected pre-1991* to continue "thereby to discharge foul water and surface water from those premises or that private sewer". In that limitation there would be no "legal incoherence" of the kind that persuaded the Supreme Court to hold that sewerage undertakers were not incapable of making lawful discharges on 1 December 1991. For, he submitted, where one is concerned with the creation of a new sewer to serve a new development, the procedure under section 106 would only be invoked after the planning process had been engaged. That would generally allow a considerable amount of time in which the undertaker could obtain any necessary consents to new discharges.

61. In addition, Mr Morgan drew attention to *Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water) (No 2)* [2009] UKSC 13; [2013] 1 WLR 3486 as authority for the proposition that a sewerage undertaker was not liable in private law in respect of its unlawful refusal to accept a connection under section 106. Thus, if, after 1 December 1991, an undertaker were to delay making a connection under that section while procuring the necessary consents, there would be no question of tortious liability.

62. By his proposed amendment, Mr Morgan also seeks to raise a case, based on section 186 of the 1991 Act, which was not relied upon by MSC in the Supreme Court (although the section was discussed in the course of the hearing in that Court). Mr Morgan acknowledges that, if correct, this argument would cut through all these points, and render unlawful any discharge from Outfall 61, or from any other outfall, without the consent of MSC. He indicated that in the Present Claim this point would only be relied upon in respect of the discharge originating in the Marshbrook Sewer, as a test case. As stated earlier, I propose to examine that application for amendment separately.[12]

Discussion and conclusion

63. It is clear that in the 2010 Claim, and in the appeal to the Supreme Court, no point was taken by either side based on the origin of waste material discharged *via* an outfall.

64. Leaving aside paragraph 75 of the judgment of Lord Neuberger, it would be difficult to argue that the SC Decision did not decide that, provided the relevant *outfall* was already in use on 1 December 1991, the sewerage undertaker was entitled (subject to various protective provisions) to continue to discharge from it, regardless of the source of the waste water and material. The Supreme Court was very much alive to the fact that sewerage undertakers were required to accept new connections to private sewers by virtue of section 106, and that by virtue of section 116 flows from any sewer, including from such new connections, could not be stopped without alternative

[12] See paragraphs 139ff of this judgment.

arrangements being put in place.[13] Indeed, both those sections were expressly relied upon as part of the legislative context which persuaded the Court to find that there was an implied statutory right to continue to discharge through Old Outfalls. In each of the three judgments the right was expressed in terms which focussed solely on the outfall, and which were unqualified as to the source of waste water (see per Lord Sumption, at paragraphs 21 and 23, per Lord Toulson at paragraph 24, and per Lord Neuberger at paragraph 39). Had the Court intended the implied statutory right not to apply in respect of material originating from connections or adoptions occurring after 1 December 1991, the Court could not have adopted the reasoning it did, as the same "legal incoherence" would have arisen. Moreover, one would have expected such an important distinction to have been emphasised.

65. Mr Morgan attempted to get around this problem by submitting that the duty under section 106 which supported the implied right of discharge was not a duty to permit new connections post-1 December 1991, but a duty to permit those whose premises or private sewers were already connected pre-1991 to continue to discharge waste material after that date. I am not convinced by that submission.

66. First, that limitation on the duty is at odds with the unqualified terms of section 106 itself. Further, the right to connect has been described as an "absolute right", and the sewerage undertaker "cannot refuse to permit the connection on the ground that the additional discharge into the system will overload it. The burden of dealing with the consequences of this additional discharge falls directly upon the undertaker and the consequent expense is shared by all who pay sewerage charges to the undertaker." (See per Lord Phillips in *Barratt Homes Ltd v Welsh Water* [2009] UKSC 13, at paragraph 23.) In *Marcic v Thames Water Utilities Ltd* [2004] 2 AC, Lord Nicholls, at paragraph 34, pointed out that "every new house built has an absolute right to connect". In the same case Lord Hoffmann, at paragraph 53, stated that the sewerage undertaker has a duty "to accept whatever water and sewage the owners of property in their area choose to discharge." This absolute duty necessarily operates in respect of connections after the 1991 Act came into force.

67. Mr Morgan's rationale for the limitation, namely that where a new sewer was being created to serve a new development there would be plenty of time during the planning process to satisfy the procedure under section 106, assumes that there is only one way in which the relevant statutory obligations can be triggered. In fact, this may happen in a number of ways. For example, a property owner's private drain or sewer may already exist when the right to communicate with the public sewer system is exercised under the section. In those circumstances the owner's drains or sewer remain private but the owner's flow of waste water and material is added to the public system – quite possibly into an Old Sewer. There may well not be any protracted planning process in such cases. A further example would be where a sewerage undertaker is required to adopt a private sewer under other provisions of the 1991 legislation, such as by a scheme made under section 105A (added by the Water Act 2003 with effect from 1 April 2007). In addition, under section 105ZA, in the absence of an adoption agreement, an order can be made requiring an undertaker to agree to adopt a private sewer in future.

[13] See, for example, the discussion in the Supreme Court in the transcript for 7 May 2014, pages 116-154, in the context of the effect of section 186 of the 1991 Act.

68. In any event, if there is need to speculate that the various interacting processes might in certain cases provide sufficient time to prevent the sewerage undertaker falling into breach of statutory duty and unlawfulness, that would in my view attract the same label of "legal incoherence" which motivated Lord Sumption and the other members of the Court to imply a statutory right to discharge from Old Outfalls. It is difficult to see how MSC's contentions can avoid the consequence that a sewerage undertaker could be compelled to accept a new connection or adopt a private sewer which would automatically result in the undertaker committing a trespass by discharging the contents of such new connection or sewer.

69. There is certainly a difference in wording between Lord Neuberger's unqualified "composite answer" in paragraph 39[14] to the questions raised in the appeal, and paragraph 75[15] of his judgment. It is not possible to be sure what was meant in the latter by "or outfalls from sewers which they may have laid after that date." I agree with Mr Morgan that the syntax and the remainder of the sentence would support "outfalls" meaning "any outfalls, whether new or existing". However, it would be difficult to reconcile that interpretation with the terms of paragraph 39 of the judgment or with his express agreement with the reasons of Lord Sumption and Lord Toulson. Mr Karas suggested that, since paragraph 75 refers only to "sewers which [sewerage undertakers] may have laid after that date", it did not in any event affect new connections under section 106 or new adoptions of private sewers.

70. It is clear that Lord Neuberger was not intending a result which would fall foul of the legal incoherence label. He, like the other members of the Court, was subscribing to the effects of *inter alia* sections 106 and 116 of the 1991 Act in requiring the implication of a statutory right. Whether or not he was expressing a different view in respect of the case where an undertaker took it upon itself to lay an entirely new sewer, I do not consider that Lord Neuberger could have intended to exclude waste water drained pursuant to post-1 December 1991 adoptions or connections from the benefit of the implied right of discharge *via* Old Outfalls. He certainly did not say so, and in paragraph 74 of his judgment he clearly contemplated that the 1991 Act had imposed increased (more onerous) burdens on waterway owners, which were ameliorated by the provisions for compensation and other safeguard provisions in the legislation. In this respect, too, he expressly agreed with the reasoning of Lord Sumption in paragraph 22 of the latter's judgment.

71. It follows that in the light of the SC Decision[16] there is no requirement for MSC's consent to discharge *via* Outfall 61 treated water and material, including that originating in the Marshbrook Sewer, and that such discharge does not *ipso facto* amount to a trespass. Even if the SC Decision is not strictly binding, the reasoning, to which all the members of the Court subscribed, would strongly support a finding to that effect, so that there would be no real prospect of success in the Present Claim, as currently formulated.

[14] Cited at paragraph 36 of this judgment.
[15] Cited at paragraph 40 of this judgment.

[16] Subject to MSC's argument based on section 186 of the 1991 Act, comprised in the proposed amendment to the claim form.

72. I am not to be taken to be suggesting that there would be a different result where the material discharged *via* Outfall 61 originates in a New Sewer, as distinct from a Newly-Adopted Sewer or an unadopted but newly-connected private sewer. Mr Karas pointed out that it would be equally anomalous (or, as he put it, "absurd") for the implied right to be excluded in such cases.

(2) Cause of action estoppel

73. In case I am wrong in my conclusions about the effect of the SC Decision, I turn to consider UU's argument that the Present Claim is in any event precluded by cause of action estoppel.

Cause of action estoppel: the case law

74. The leading case on cause of action and issue estoppel is *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160, in which, once again, judgments were delivered by Lord Sumption and Lord Neuberger, with both of whom the other members of the Supreme Court agreed. In the course of his judgment, at paragraph 17, Lord Sumption said:

> "The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> …
>
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198."

75. At paragraph 20 he referred to the following comments of Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, at page 104:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.
>
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

76. Lord Sumption continued, at paragraphs 20 and 22:

> "The case before the committee was treated as one of issue estoppel, because the cause of action was concerned with a different rent review from the one considered by Walton J. But it is important to appreciate that the critical distinction in *Arnold* was not between issue estoppel and cause of action estoppel, but between a case where the relevant point had been considered and

> decided in the earlier occasion and a case where it had not been considered and decided but arguably should have been…
>
> "*Arnold* is accordingly authority for the following propositions: (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

77. Finally, it is appropriate to cite his observations at paragraphs 25 -26:

> "25…Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process."
>
> 26. It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in *Arnold*, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

Cause of action estoppel: discussion and conclusions

78. In relation to the nature of a cause of action, I was referred[17] to a number of cases. In *Hoechst United Kingdom Limited and another v IRC and another* [2003] EWHC 1002 (Ch), Park J said, at paragraph 24:

> "Two critical concepts which feature in the foregoing formulations of the legal position are those of a cause of action and of the limitation period. A cause of action in this context is not so much the label attaching to a claimant's claim (for example "breach of statutory duty" or "money paid under a mistake of law"). Rather, it is the set of facts which entitles the claimant to relief:-
>
> > "Every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse".
>
> (Brett, J. in *Cooke v Gill* (1873) 8 CP 107 at 116). See also Diplock, LJ in *Letang v Cooper* [1965] 1 QB 232 at 242-3:
>
> > "A cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person"."

[17] See also the discussion of the caselaw in Warren J's judgment in *Harland & Woolff Trustees Ltd v Aon Consulting Ltd* [2010] ICR 121, at paragraphs 39-68.

79. My attention was also drawn to the statement by Millett LJ (as he then was) in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, at page 405:

> "The classic definition of a cause of action was given by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at p. 116:-
>
> "Cause of action" has been held from the earliest times to mean every fact *which is material to be proved* to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse" (my emphasis).
>
> In the *Thakerar* case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 CA at pp. 242-3 and approved in *Steamship Mutual Underwriting Association v Trollop & Colls* [1986] 33 BLR 77 at p. 92:-
>
> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"
>
> I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

80. In *Diamandis v Wills and another* [2015] EWHC 312 (Ch), a decision of Mr Stephen Morris QC sitting as a Deputy High Court Judge, there is a helpful compilation of the principles derived from those and other cases dealing with the nature of a "cause of action", in the context of section 35 of the Limitation Act 1980. At paragraph 48, the Deputy Judge said:

> "As regards Stage 2 (new cause of action) from the recent analysis of the authorities by Longmore LJ in *Berezovsky v Abramovich* §§59 to 69, the following principles arise:
>
> (1) The "cause of action" is that combination of facts which gives rise to a legal right; (it is the "factual situation" rather than a form of action used as a convenient description of a particular category of factual situation: *Lloyds Bank v Rogers* at 85F and *Aldi Stores* at 21).
>
> (2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: *Darlington* at 370C-D and see also *Berezovsky* §59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).
>
> (3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. *Berezovsky* §60 citing *Cooke v Gill* (1873) LR 8 CP 107 and *Paragon Finance*, supra.
>
> (4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading: *Berezovsky* §§61 and 62.
>
> (5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: *Berezovsky* §64 and *Aldi* §26. Nor is the addition of a new remedy, particularly

> where the amendment does not add to the "factual situation" already pleaded: *Lloyds Bank v Rogers* per Auld LJ at 85K."

81. I have already described[18] in some detail the nature of the 2010 Claim. The cause of action in both that claim and the Present Claim is trespass. It is common ground that the trespass alleged in the 2010 Claim included the whole of the discharge *via* Outfall 61. Mr Morgan does not dispute that the waste water and material originating in the Marshbrook Sewer was within the scope of the 2010 Claim. Nor is there any issue that the compensation for trespass claimed by MSC in that action included past *and future* damages in respect of the Marshbrook Sewer element of the discharge *via* Outfall 61. For the remedy sought in respect of future trespasses was not an injunction, but damages in lieu of an injunction. That remedy enables compensation to be awarded in respect of loss and damage that will be suffered in the future in the absence of an injunction (see, for example, *Jaggard v Sawyer* [1995] 1 WLR 269, at pp. 276 - 277 and 286, per Sir Thomas Bingham MR and Millett LJ). It is, therefore, not disputed by MSC that had the 2010 Claim succeeded and had the claimed damages in lieu of an injunction been awarded, such compensation would have included an element for past and future trespasses resulting from the Marshbrook Sewer element being discharged *via* Outfall 61. As we have seen, the 2010 Claim failed in that respect, the claim for trespass being ultimately dismissed by Newey J.[19]

82. UU submits that, in these circumstances, if MSC had been successful in the 2010 Claim, it would plainly have been precluded from asserting a further common law cause of action for trespass by reason of the discharge from Outfall 61. Its claim would have been satisfied by the award of damages. In this respect Mr Karas referred to Snell's Equity, 33rd ed., paragraph 20-066:

> "The court can properly award damages once and for all in respect of future infringements because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented. Since the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs, the doctrine of res judicata operates to prevent the claimant and their successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the claimant has been fully compensated."

83. He argues that, conversely, since it was held that there was no trespass (either for the past or prospectively) in respect of the discharge from Outfall 61, and that UU was entitled to continue to discharge from Outfall 61 subject only to the statutory provisos, MSC cannot now claim otherwise in a fresh action.

84. In so far as MSC wishes to raise a new point relating to the origin of effluent, in order to argue that *some* of the discharge from Outfall 61 constituted and continues to constitute a trespass, UU submits that MSC falls foul of the principle in *Arnold*, as interpreted by Lord Sumption in *Virgin Atlantic*, viz. that cause of action estoppel bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. In that regard Mr Karas relied upon the findings of

[18] See paragraph 21ff of this judgment.
[19] See paragraph 47 of this judgment.

Newey J[20] that MSC "could be expected to have put forward by [the time of the hearing in January 2012] all the points that it wished to advance", and that the proposed amendments were "prompted by paragraph 75 of Lord Neuberger's judgment" but "the passage in question did no more than suggest to [MSC] a legal argument that had always been available to it…. [T]he amendments were not dependent on the Supreme Court's decision". Newey J went on to hold that the fact that further arguments had occurred to new counsel was not "a compelling reason" to grant permission to amend.

85. Mr Karas submitted that the cause of action in the Present Claim is the same cause of action as that unsuccessfully pursued in the 2010 Claim. The parties are the same and the subject matter (lawfulness of discharge from Outfall 61) is the same. Cause of action estoppel therefore bars the Present Claim.

86. Mr Morgan submits, first, that cause of action estoppel is not an absolute principle. He relied upon an *obiter dictum* of Arden LJ (as she then was) in *Lemas v Williams* [2013] EWCA Civ 1433. Having referred to the speech of Lord Keith in *Arnold* (see above), Arden LJ said:

> "Where, as here, a cause of action or issue was not raised in the previous proceedings but could have been so raised, the court has a discretion not to apply cause of action estoppel or issue estoppel if there are "special circumstances". The judge relied on this exception in relation to Mr Sealy. There is, of course, no exhaustive definition of what constitute special circumstances but they must by definition be circumstances which make it unjust to insist on the estoppel applying. This may occur where a party obtains relevant new material which was not previously available, as in *Arnold* itself. Sometimes the same result is achieved by granting permission to appeal out of time from the first decision."

87. However, in the light of Lord Sumption's judgment in *Virgin Atlantic*, and his citations from *Arnold*, it appears that the broader concept of "special circumstances" mentioned by Arden LJ is more associated with issue estoppel than cause of action estoppel. Where the latter is involved, then, absent fraud or collusion, there is an absolute bar if the new point could with reasonable diligence, and should in all the circumstances, have been raised in the original proceedings (see *Virgin Atlantic*, at paragraphs 20-22).

88. Mr Morgan reminded me that the burden of establishing that the causes of action in the two claims are the same lies on the party who relies upon the estoppel, and that the identity of a cause of action is determined as a matter of substance, not form. I do not understand these propositions to be contested. The authorities for them are, respectively, *Edevain v Cohen* (1889) 43 Ch D 187 CA), and *Wright v Bennett* [1948] 1 All ER 227 (CA).

89. He also pointed out that the relevant cause of action in the 2010 Claim was for trespass to land, which is a continuing tort with a new cause of action arising every day for so long as the trespass continues. Thus, where the trustees of a turnpike road built buttresses to support it on the claimant's land, who sued them for trespass and accepted money paid into court in full satisfaction of the trespass, it was held that the claimant could bring another action for trespass against the trustees when they failed

[20] See paragraph 45 of this judgment.

to remove the buttresses after being requested to do so. Denman CJ held that the trespass which was the subject of the original action was a separate trespass from that which formed the basis of the subsequent complaint. (See *Holmes v Wilson* (1839) 10 Ad & El 503, 113 ER 190. See also *Freshwater v Bulmer Rayon Co Ltd* [1933] 1 Ch 162.) Mr Morgan also submitted that the tort of trespass to land is actionable without proof of special damage. Neither of these propositions was disputed by Mr Karas.

90. In its written submissions[21] MSC relied on the first proposition to argue that there can be no cause of action estoppel here because the trespass in respect of which a declaration is sought in the Present Claim is a separate trespass, and therefore a separate cause of action, from the trespass alleged in the 2010 Claim which was limited to those trespasses which had occurred at the time of the determination of that claim. However, this point is not in my view a good one. The 2010 Claim was clearly also prospective, in that it included a claim in damages in lieu of an injunction for future trespasses in respect of the discharge from, *inter alia*, Outfall 61. I did not understand Mr Morgan to be contesting that when he made his oral submissions.

91. In the course of argument Mr Morgan, understandably, made the forensic point that at the hearing before Newey J, in the context of a proposed amendment by MSC to add the claims which have now become the Present Claim, Mr Karas had argued that those amendments embodied new claims, not arising out of the same or substantially the same facts as those already pleaded, for the purposes of section 35 the Limitation Act 1980. In other words, he was then arguing that the proposed claims represented new causes of action. Mr Karas acknowledges this, but submits that his submission at that time was in error.

92. Mr Morgan contends that although the amendments were refused by Newey J on grounds other than limitation, there is nevertheless a contradiction in UU having successfully fought off the amendments then, but now submitting that they would have added nothing to the 2010 Claim as they were already subsumed within it.

93. These submissions show that the question whether or not the Present Claim constitutes the same or a separate cause of action is not entirely straightforward. UU characterises the Present Claim as encompassing a new legal argument, always available to MSC, put forward in respect of the same subject matter (the discharge from Outfall 61) to support the same tort (trespass) and the same relief (damages in lieu of injunction/a declaration). That analysis would suggest that one is dealing, in substance, with the same cause of action as in the 2010 Claim. MSC, on the other hand, adopts an approach which, on the face of it, is similar to that referred to in *Hoechst* (above), and focuses on "the set of facts which entitles the claimant to relief", arguing that the relevant set of facts includes the fact that the discharge complained of originates in a specific sewer (the Marshbrook Sewer) which was not connected to UU's network and/or not adopted until after 1 December 1991.

94. Mr Morgan summed up the difference between the two claims by stating that the 2010 Claim had looked at what happened at the Canal end of the pipe, whereas the Present Claim looks at the beginning of the pipe. On that basis it is argued that the set of facts which allegedly leads to the relief sought in the Present Claim includes facts which

[21] At paragraph 74 of MSC's main skeleton argument.

are different from those relevant to the 2010 Claim. That analysis, it is said, indicates that one is dealing with a separate cause of action, albeit also in trespass and in respect of the same discharge from Outfall 61.

95. After some initial hesitation, I have reached the conclusion that on close inspection the latter approach misapplies the principle to which reference was made in *Hoechst*, and is flawed. I therefore consider that Mr Karas was in error in his submissions to Newey J on this point, as he now agrees (and submits) he was.

96. I do not regard it as conclusively in favour of cause of action estoppel in the present case that (as MSC apparently accepts) MSC could not properly have brought the Present Claim if it had succeeded in obtaining damages in lieu of injunction in the 2010 Claim. In that event, leaving aside any question of double recovery (which would clearly not be permissible in any event), or a *Henderson v Henderson* argument, there might have been a substantive *res judicata* bar of a different kind, akin to Lord Sumption's second principle in *Virgin Atlantic*, at paragraph 17:

> "Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336."

97. Be that as it may, in my view a more compelling factor relates to the facts which define the cause of action in question, namely trespass to land. One bears in mind that these facts are to be taken "at the highest level of abstraction."[22] Applying this to the tort of trespass to land, a claimant needs to show, first, that he is in possession, or is entitled to possession, of the land in question, and second, that the defendant has interfered with that possession or right to possession by a direct and immediate physical interference. (See, for example, *Southport Corporation v Esso Petroleum C*o. [1954] 2 QB 182.) Once wrongful interference with the claimant's land is alleged, it is for the defendant to establish by way of defence, if he can, that the interference was lawfully authorised and therefore not wrongful. It does not fall to the claimant to establish an absence of authority i.e. to prove a negative. The existence of lawful authority for what would otherwise be wrongful interference is a matter for the defendant.

98. It is perhaps worth noting in relation to both the 2010 Claim and the Present Claim, that on any view no trespass could take place through the medium of the waste water and effluent originating in Marshbrook Sewer until it was discharged into the Canal *via* Outfall 61. If the tort is committed, it is committed only at that point, when the waste water enters the Canal and the alleged wrongful interference with MSC's land occurs.

99. The pleadings in the 2010 Claim reflect these features of the cause of action. Thus, the claim form claims declarations and damages for "various trespasses being discharges of water and sewage made unlawfully and without permission by the defendant onto and into land and water owned by or vested in the claimant…" The particulars of claim allege that each of the discharges in question, including that from

[22] See the citation at paragraph 79 of this judgment.

Outfall 61, is made without authority or consent and is an actionable trespass.[23] As seen, the 2010 Claim necessarily included the Marshbrook Sewer discharges within the allegation of trespass. In its defence and counterclaim UU set up various defences, including the existence of statutory authority to make the discharges.

100. In the Present Claim, MSC seeks a declaration that the discharge by UU of water and other materials into the Canal through Outfall 61 is a trespass against MSC *to the extent that the water and other materials so discharged include water and materials which originate from the Marshbrook Sewer*. Therefore, unlike the 2010 Claim, the Present Claim is limited to the discharges of Marshbrook Sewer origin.

101. Notwithstanding that factual limitation, I have come to the conclusion that the Present Claim is based on one and the same cause of action as the earlier claim. This is because, taken at the highest level of abstraction, that factual limitation is not a necessary element of the cause of action in trespass relied upon by MSC. In my view there is no difference of substance between the two claims. What is different relates to the defence of statutory authorisation in the Present Claim. In this claim, as in the 2010 Claim, UU will rely upon a defence based on implied statutory authorisation to discharge from Outfall 61. The factual limitation relating to the origin of the material discharged is a matter which would be relied upon by MSC *in order to defeat that defence*, and is not an element of MSC's cause of action in trespass. Thus, MSC would contend (as it has already unsuccessfully contended in the course of this hearing) that the implied statutory right to discharge *via* Old Outfalls, put forward by UU in its defence, does not apply to material originating in Newly-Adopted Sewers, and that therefore UU's defence fails. I therefore conclude that the cause of action in the Present Claim is essentially identical to the cause of action relied upon in the 2010 Claim.

102. I am also of the view that, for the reasons given below[24] in relation to the *Henderson v Henderson* issue, the Origin Point could with reasonable diligence and should in all the circumstances have been raised in that claim. It was not dependent on the SC Decision, as submitted by MSC. There being, as I have said, no wider discretion in respect of cause of action estoppel, there exists an absolute bar to the Present Claim, as that claim is currently formulated.

103. In opposition to the cause of action and issue estoppel arguments, MSC raises a further point, based on its proposed amendment. The argument is as follows: the 2010 Claim for trespass was by MSC in its capacity as a private land owner, whereas if the proposed amendment to introduce section 186 of the 1991 Act is granted, the trespass arising from a lack of consent under that section to the discharge would constitute a different cause of action, as MSC would be claiming in a different capacity. This would preclude cause of action and issue estoppel. I will examine this argument when I consider the amendment application.

[23] Paragraphs 10-15 of the particulars of claim in the 2010 Claim.
[24] See paragraphs 121 -134 of this judgment.

(3) Issue estoppel

104. Issue estoppel is described by Lord Sumption in the extracts from his judgment in *Virgin Atlantic* cited above.[25] It arises where the cause of action is not the same in the later action as in the earlier one, but an issue necessarily common to both actions was decided on the earlier occasion. The decision on that issue is binding on the parties, except in special circumstances where injustice would be caused. Issue estoppel also operates as a bar to points which were not raised if they could with reasonable diligence and should have been raised (see *Virgin Atlantic*, at paragraphs 17-22).

105. UU submits that if, contrary to its primary contention, the Present Claim is not barred by cause of action estoppel, then issue estoppel applies, because the issue common to both the 2010 Claim and the Present Claim is the issue of statutory authorisation. That, Mr Karas submits, has been decided against MSC in respect of all relevant trespasses, since the Supreme Court found that there is a statutory authorisation defence to the trespass alleged, based on UU's statutory entitlement to discharge from Outfall 61, subject to the provisos in section 117 of the 1991 Act. On this basis the relevant trespass claims were dismissed *in toto*, which means that the element of the alleged trespass referable to the Marshbrook Sewer was also dismissed. It is submitted that that is an absolute bar to the Present Claim in which MSC asserts that the discharge referable to that same element was unauthorised.

106. Thus, issue estoppel was put as an alternative to UU's cause of action estoppel argument. Moreover, Mr Morgan in his submissions[26] put his case on issue estoppel very much in conjunction with his arguments on UU's *Henderson v Henderson* challenge, even though they are conceptually separate grounds. In the circumstances, including my findings in relation to cause of action estoppel, I do not consider it necessary to deal separately with issue estoppel.

(4) *Henderson v Henderson* abuse of process

107. UU argues that the Present Claim is abusive within the principle formulated in *Henderson v Henderson* 3 Hare 100 and that, consistently with Newey J's conclusions,[27] the proper place for the Origin Point to be taken was in the 2010 Claim.

108. *Henderson v Henderson* was an action by the former business partner of a deceased for an account of sums due to him by the estate. The personal representatives sought to restrain the proceedings on the ground that there had been similar proceedings for an account to be taken between the same parties in Newfoundland, in which sums had been found due to the estate. The question was whether the partner could reopen the matter in England, relying on transactions not put before the first court. Wigram V-C said:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction,

[25] See paragraph 76 of this judgment.
[26] At paragraphs 77ff of MSC's main skeleton argument. See also transcript Day 3, pages 39-40.
[27] See paragraph 45 of this judgment.

> the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

109. It is acknowledged by both parties that the principle was authoritatively re-stated by Lord Bingham of Cornhill (with whom, either in terms or in substance, the other members of the House of Lords agreed) in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at page 31:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

110. Lord Millet, at page 59, said:

> "In *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* 3 Hare 100 is abuse of process and observed that it "ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation" There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court.".

111. It is UU's contention that the Origin Point plainly could have been taken in the 2010 Claim, as Newey J found. Had it been relied upon then, it would have operated as an

answer to UU's defence and as a defence to the declaration sought by UU in its counterclaim, as well as an answer to UU's application for summary judgment in the proceedings (in each case, with respect to those elements of the discharges originating in the Marshbrook Sewer and in other New or Newly-Adopted Sewers).

112. UU relies upon the finding of Newey J that MSC "could be expected to have raised" this point prior to the High Court hearing in January 2012. Thus, UU submits, the issue should have been raised for determination by Newey J, the Court of Appeal, and the Supreme Court. It was right for each of those courts to have before them all issues with a bearing on the extent to which there was, on privatisation and thereafter, a statutory right of discharge, which could represent a defence to a claim in trespass. To bring forward MSC's whole case at that time would also have been efficient in terms of the courts' finite resources.

113. UU also emphasises that, by the same token, to require it to litigate again over discharges from Outfall 61 amounts to unjust harassment and is oppressive. It contends that the various strands of litigation initiated by MSC for over a decade have been very expensive and time-consuming. Prior to the 2010 Claim there were two years of pre-action interaction between the parties involving a good deal of work. UU points out that there have already been costs orders in its favour amounting to about £1,200,000. The Present Claim is once more generating costs for UU.

114. Further, UU asserts that, as the Present Claim is apparently a "test case", it is presumably only the prelude to further claims alleging trespasses by reason of discharges into the Canal from other Old Outfalls of waste water from New or Newly-Adopted Sewers. Yet again UU will be required to consider on an outfall-by-outfall basis what rights it has under local legislation and under any relevant contractual agreements. This exercise has already been carried out in meeting the 2010 Claim so far as the right to discharge generally is concerned. UU submits that some of that work will have to be done again, but with additional investigations which could and should have been dealt with in the earlier proceedings, such as whether each outfall discharges any materials originating in New or Newly-Adopted Sewers. In connection with the extensive and onerous nature of the investigations carried out by UU in respect of the 2010 Claim, which it is contended will have to be repeated if and when the issue in what is said to be a test case is extended to other outfalls, UU referred to the 2016 judgment of Newey J, at paragraph 35, and to the evidence in Smith 1, at paragraphs 28ff.

115. UU also disputes that the Origin Point was dependent on anything said in the SC Decision. In that regard reliance is placed on Newey J's express finding to the contrary in his February 2016 judgment, at paragraph 35.[28] Further, UU argues that if, as Newey J held, the fact that a legal point has only occurred to lawyers late in a case is not normally a compelling reason to grant permission to amend in order to plead that point in existing proceedings, then, *a fortiori* it cannot be a good reason for allowing MSC to raise that point by way of wholly new proceedings.

116. In response, MSC began by pointing to Lord Bingham's statement in *Johnson v Gore Wood & Co* (above), that because a matter could have been raised in earlier

[28] Paragraph 45 of this judgment.

proceedings, it does not mean it should have been raised, so as to render the raising of it in later proceedings necessarily abusive, and that a broad, merits-based approach should be applied to the issue of abuse, taking account of the public and private interests involved and of all the facts of the case. MSC also referred to *Davies v Carillion Energy Services Ltd* [2018] 1 WLR 1734, per Morris J at paragraph 53, as indicating that the broad, merits-based approach is not a matter of discretion but a judgment to be made by assessing and balancing all the relevant factors in the case. Further, even if there were a finding of abuse of process, MSC submitted that the court had a residual discretion not to strike out the claim, albeit that would only apply in unusual circumstances: *Stuart v Goldberg Linde* [2008] 1 WLR 823, at page 832.

117. MSC pointed out that, as with the other *res judicata* grounds, the burden is on UU to establish that it is oppressive or an abuse of process to be subjected to the present Claim (per Lord Bingham in *Johnson v Gore Wood & Co*).[29]

118. I understand those statements of principle to be common ground.

119. Mr Morgan disputes that with the exercise of reasonable diligence the Origin Point could have been raised in the 2010 Claim and should in all the circumstances have been so raised. He submits that in so far as Newey J made a finding to that effect, he was wrong to do so.

120. In his submission, the legal issues between the parties went all the way up to the Supreme Court in one form and returned in a very different and unpredictable shape. He described the pre-SC Decision landscape as being shaped by the decision of the Court of Appeal in the *British Waterways Board* case, which was understood by the whole industry to have decided that sewerage undertakers had no implied right of discharge under the 1991 legislation. In the SC Decision, the Supreme Court held that, whilst that was correct so far as any implication based on section 159 of the 1991 Act was concerned, it did not apply to other sections, in particular sections 106 and 116. These sections, in the Supreme Court's view, formed the foundation for an implied right to discharge into waterways, including the Canal, from existing outfalls. Mr Morgan submits that in those circumstances it would not have occurred to any operator in MSC's position that they should plead the Origin Point, against the possibility that the Supreme Court would find a new basis for an implied right of discharge.

121. Attractively though this submission was presented, I do not feel able to accept it, any more than Newey J did. In its Defence and Counterclaim in the 2010 Claim, UU was already contending[30] that in the *British Waterways Board* case the Court of Appeal had reached no binding decision about whether a sewerage undertaker continued to be entitled to discharge where such discharge was authorised by statute immediately *prior* to the 1991 Act coming into force, and that its decision only related to authorisation to discharge from outfalls created *after* that date. As Mr Karas pointed out, UU's case took that form until the matter reached the Supreme Court. There, for the first time, UU was also able to argue (albeit unsuccessfully) that the Court of Appeal had been wrong in respect of New Outfalls. The Court rejected UU's

[29] See paragraph 109 of this judgment.
[30] Defence and Counterclaim in the 2010 Claim, at paragraphs 16(4) and 17.

contention that the Court of Appeal had been in error about post-1 December 1991 outfalls. However, the Court agreed with UU's submission as to the scope of the Court of Appeal judgment.

122. Thus, early on in the 2010 Claim UU was clearly arguing that the *British Waterways Board* case, regardless of whether it was wrong in relation to New Outfalls, had left open the question of rights of discharge from Old Outfalls. In those circumstances, I do not see why people would have been perplexed, as Mr Morgan suggested, if MSC had retorted "Well, even if that is correct, we have a point about the origin of material discharged *via* Old Outfalls which precludes the right in certain instances." Like Newey J, I consider that the point was always available and was not dependent on the SC Decision.

123. As an additional point, MSC states that, in its argument before the Supreme Court, UU did not suggest that there was a distinction between discharges from outfalls connected to sewers created before 1 December 1991 and discharges from outfalls connected to sewers created after 1 December 1991. MSC submits that it is therefore not surprising that MSC did not refer to this issue in the 2010 Claim, and that it cannot be suggested that the issue ought to have been raised by MSC.

124. This point does not, in my view, provide any assistance to MSC. There is no reason why UU would have wished to refer, or should have referred, to any such distinction. Their secondary (and successful) argument in relation to the right to discharge *via* Old Outfalls did not distinguish by origin between elements of the materials so discharged. It was for MSC, not UU, to draw the distinction upon which it relies, as it did before Newey J in 2016. UU's contention is that origin is irrelevant.

125. That essentially determines MSC's main grounds for disputing UU's contention that the Origin Point could with reasonable diligence have been taken at an appropriate stage in the 2010 Claim, and was not dependent on the SC Decision. I find in favour of UU on this aspect.

126. However, it is also necessary to consider whether the Origin Point *should* have been so raised, given that, as Lord Bingham pointed out, it would be wrong to hold that because a matter could have been raised in the first claim, it is necessarily abusive to do so in a later claim. In relation to this wider question a "broad, merits-based judgment" is to be applied, taking account of all the facts of the case, including the public and private interests involved, and considering in particular whether in all the circumstances a party is abusing the process of the court.

127. It is MSC's submission that the issues raised in this case are of general public importance to the industry and to landowners affected by the activities of sewerage undertakers. They are also of significant importance to the private interests of the parties. MSC refers to UU's own concerns about the effects on their sewerage operations and on their business if the case were to be determined against them. Further, it remained open to other owners of watercourses to bring similar claims even if the Present Claim did not go ahead. It was therefore clear that the determination of the issue in these proceedings would be beneficial generally.

128. MSC contends that it had sought to have the Origin Point determined at the first opportunity following the SC Decision, but Newey J had declined to determine it,

whilst referring to the possibility of MSC pursuing the issue in new proceedings. Thus, there was no question of MSC manipulating the process of the court in order to repeatedly vex UU with an issue which should have been raised before. MSC submitted that for all these reasons, it was not an abuse of process to bring this matter before the court now to obtain a determination. However, even if it was, the court should still consider whether it should exercise its residual discretion not to strike out the claim, albeit such a discretion would only be exercised in very unusual circumstances. MSC acknowledged that, if a court finds that there is an issue which could and should have been raised in the original proceedings, and that it was abusive to raise the matter in a later claim, then the court would not be likely to exercise its discretion not to strike the claim out. However, it was submitted that for all the reasons urged the Present Claim was not such a case.

129. The arguments of both sides must be carefully weighed in the balance, in order to arrive at the broad, merits-based judgment which is required. I also bear in mind that the burden of establishing that the Present Claim is abusive is on UU. I have already found that the Origin Point could with reasonable diligence have been brought at the appropriate stage in the 2010 Claim.

130. It is clear that if the Present Claim is not struck out it will go to trial – possibly as a Part 7 claim. Being a test case, the claim may well lead to appeals and multiple claims of a similar kind. If that occurs, I accept the evidence in Smith 1 as to the extensive, repeated and onerous work which will be involved for UU in investigating the history of all relevant Newly-Adopted Sewers, New Sewers, and post-1 December 1991 connections under section 106. On any view both sides will incur very substantial costs over several years. Those costs will be in addition to the costs of more than a decade of argument and litigation that has already taken place, in respect of which UU states that costs orders have been made in its favour to the tune of £1,200,000. Costs ultimately falling on UU will find their way down to local residents, businesses and taxpayers in the form of their water and sewage charges. Costs falling on MSC will also fall ultimately on its customers and shareholders.

131. It is also clear that the 2010 Claim has already absorbed a considerable amount of court and judicial resources, with no doubt considerable expense to the public purse. Newey J recorded that, for the original summary judgment application before him in 2012, both sides had had adequate time to raise by way of claims and defences all such matters as they thought fit. The arguments so raised were considered in depth at first instance, in the Court of Appeal and in the Supreme Court. If the Present Claim goes ahead, much of that ground may well need to be trodden again.

132. It is true that if the Present Claim is struck out, then *pace* my finding on the lack of merits, the Origin Point could be raised between other sewerage operators and other watercourse owners. Depending on the outcome of such claims, MSC may find itself in a less advantageous position than other watercourse owners, at least so far as UU's discharges into the Canal are concerned. Even taking account of that possibility, I do not consider that the risk of prejudice to MSC if the Present Claim does not proceed is in the same order as the oppression to UU if it does.

133. I am very conscious that one should not lightly deny a litigant the right to have a case adjudicated. But this is to be put against the need to have finality in litigation and the

entitlement of an opponent not unnecessarily to be vexed repeatedly in the same or closely related matters.

134. Weighing these considerations, along with the other points urged upon me by both parties, and all the surrounding circumstances, I have come to the conclusion that the Origin Point not only could but should have been raised in the 2010 Claim, and that the Present Claim is oppressive to UU and an abuse of process, as explained by Lord Bingham in *Johnson*. I have considered carefully whether there is any exceptional feature of this case which would justify the exercise of any residual discretion not to strike out a claim which could and should have been brought in earlier proceedings and is an abuse of process. I have not identified such a feature. I would therefore strike out the Present Claim pursuant to the principle in *Henderson v Henderson*.

135. For the avoidance of doubt I should record that in making this assessment I have left out of account my conclusion as to the lack of merits of the Origin Point. That conclusion was based to a considerable extent on the SC Decision which, obviously, was not known to MSC at the material time.

(5) Other issues relating to the Present Claim

136. In its skeleton argument UU raised a number of arguments in support of a submission that the declaration sought in the Present Claim is wholly inappropriate in a Part 8 claim. The main point is that in the 2010 Claim UU has pleaded specific defences, independent of the implied statutory right to discharge under the 1991 Act, in relation to the claim for trespass *via* Outfall 61. These defences include rights of discharge under various local statutes, under the Manchester Ship Canal Act 1885, and under contractual arrangements affecting Outfall 61. They are not, in UU's submission, fit to be determined in a Part 8 claim, and require a Part 7 claim with proper pleadings and live evidence. UU also contends that in these circumstances the declaration sought in the Present Claim would serve no useful purpose, as it would not resolve the dispute between the parties. Given that declaratory relief is a discretionary remedy, the court should not therefore grant such relief.

137. These points were not developed to any great extent in Mr Karas's oral submissions, and it was not entirely clear whether they are put forward as a further ground on which the Present Claim should be struck out, or are setting the scene for further debate and directions should the claim not be struck out.[31] For his part Mr Morgan indicated that there would not necessarily be any objection on MSC's part to the matter proceeding as a Part 7 claim.

138. In the circumstances I do not propose to consider these points further at this stage. If necessary, they can be examined in the light of the outcome of the other issues before the court.

[31] See Transcript Day 2, pages 37-41.

MSC's amendment application

Introduction

139. I have already referred to MSC's application to amend the claim form in the Present Claim.[32] The latest version of the proposed amendment, submitted to the court on the final day of the hearing, is set out in the Annex to this judgment. Essentially it seeks to add a further ground for the declaration that the discharge via Outfall 61 of treated waste originating in the Marshbrook Sewer is a trespass: the proposed new ground is that the consent of MSC pursuant to subsection 186(1) of the 1991 Act has not been sought or obtained by UU. The proposed amendment also contains the assertion that MSC "uses [the Canal] for draining land under the provisions of the Manchester Ship Canal Act 1885". I will refer to the proposed ground as "the s.186 Point".

140. In the course of submissions, Mr Morgan frankly accepted that, if correct, the s.186 Point would require the consent of MSC to any discharge into the Canal from any outfall, and would, in effect, render the hearings at all court levels in the 2010 Claim, and the outcome in the Supreme Court, otiose. For the implied statutory right of discharge held by the Court to exist would be trumped by the requirement for consent under section 186.

141. Although, as I shall explain, section 186 was discussed in some detail during submissions in the Supreme Court, the s.186 Point was not raised by MSC in the 2010 Claim, or in the Present Claim until the application to amend was issued on 29 October 2018, nearly one year after the issue of the Present Claim, and shortly before the strike out hearing.

142. UU submits that the amendment should be refused, as the amended claim falls foul of the principles of *res judicata* for the same or very similar reasons to those which apply to the Present Claim. It also contends that in any event the amended claim stands no reasonable prospect of success, given the absence of proper particularisation and evidence in support. UU makes a number of further submissions, including a contention that to establish a case of trespass MSC will need to raise factual issues which cannot be dealt with in a Part 8 claim, and would also inevitably lead to the stay of proceedings under the Arbitration Act 1996, sections 9 and 94.

Principles relating to amendment

143. Both sides referred me to familiar case law relating to the principles applicable to applications to amend pursuant to CPR Part 17. Understandably each party emphasised different aspects of the principles developed by the courts.

144. It is common ground that MSC requires permission under CPR Part 17.1(2)(b). CPR Part 17 itself identifies no general principles which the court should apply in determining whether, in the exercise of the court's discretion, a proposed amendment should be permitted. However, the principles developed by case law are well-known. Both sides drew attention to the principle that the proposed amendment should have a

[32] See paragraph 5 of this judgment.

reasonable prospect of success: see *Groveholt Limited v Hughes* [2010] EWCA 538. The test is the same as for summary judgment.

145. In addition, MSC referred to CPR 1.1 and the overriding objective of dealing with cases justly and at proportionate cost, which includes the following considerations:

> "(a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate -
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

146. Mr Morgan submitted that each of these factors militated in favour of MSC's application.

Section 186 of the 1991 Act

147. Section 186 provides:

> "**Protective provisions in respect of flood defence works and watercourses etc.**
>
> (1) Nothing in this Act shall confer power on any person to do anything, except with the consent of the person who so uses them, which interferes—
>
> (a) with any sluices, floodgates, groynes, sea defences or other works used by any person for draining, preserving or improving any land under any local statutory provision; or
>
> (b) with any such works used by any person for irrigating any land.
>
> (2) Without prejudice to the construction of subsection (1) above for the purposes of its application in relation to the other provisions of this Act, that subsection shall have effect in its application in relation to the relevant sewerage provisions as if any use of or injury to any such works as are mentioned in paragraph (a) or (b) of that subsection were such an interference as is mentioned in that subsection.
>
> (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.
>
> …
>
> (6) A consent for the purposes of subsection (1) above may be given subject to reasonable conditions but shall not be unreasonably withheld.
>
> (7) Any dispute—
>
> (a) as to whether anything done or proposed to be done interferes or will interfere as mentioned in subsection (1) above;
>
> (b) as to whether any consent for the purposes of this section is being unreasonably withheld;
>
> (c) as to whether any condition subject to which any such consent has been given was reasonable; or
>
> (d) as to whether the supply, quality or fall of water in any reservoir, canal, watercourse, river, stream or feeder is injuriously affected by the exercise of powers under the relevant sewerage provisions,
>
> shall be referred (in the case of a dispute falling within paragraph (d) above, at the option of the party complaining) to the arbitration of a single arbitrator to be appointed by agreement between the parties or, in default of agreement, by the President of the Institution of Civil Engineers."

The s.186 Point

148. In his oral submissions, Mr Morgan explained the s.186 Point thus: For the purposes of subsection 186(1):

> (i) MSC is a person who "uses" a relevant facility and whose consent is required under the subsection;
>
> (ii) UU is a person who is prohibited from "do[ing] anything…which interferes" with that relevant facility without MSC's consent;
>
> (iii) the relevant facility includes "sluices" and also "other works", namely, the Canal;
>
> (iv) the Canal (including relevant sluices) is used by MSC "for draining…any land under any local statutory provision"
>
> (v) the local statutory provision is the Manchester Ship Canal Act 1885.

149. The sting, however, is said to be in subsection 186(2). This provides that "in its application in relation to the relevant sewerage provisions [subsection 186(1)] shall have effect as if any use of...any such works…were such an interference as is mentioned in that subsection." I will call subsection 186(2) "the Deeming Provision" and will refer to "relevant sewerage provisions" as "RSPs" or "RSP" as the case may be.

150. The definition of RSPs is to be found in section 219 of the 1991 Act. It is common ground that such provisions include sections 102-105, 105A and 105ZA (adoption provisions), section 106 (right to connect), section 116 (obligation not to stop up a sewer), and section 117 (obligation not to discharge untreated water into watercourses), but not sections 94 and 158-159.

151. Mr Morgan submits that the RSPs have "come into play" in the light of the effect ascribed to them by the Supreme Court, and that accordingly use of the Canal by UU in discharging *via* Outfall 61 is deemed by the Deeming Provision to be an interference with the Canal which requires the consent of MSC under subsection 186(1), in the absence of which there is a trespass by UU.

152. Mr Morgan explained the interaction between certain RSPs and section 186. When UU has connected its network to a private sewer or to premises in its catchment area, pursuant to the absolute right enjoyed by a resident under section 106, the resultant augmented discharge through Outfall 61 means that UU is "do[ing]" something for the purposes of subsection 186(1). Similarly, if one considered UU's obligation under section 116 not to stop up a sewer except after providing for an alternative facility, the continued discharge of the relevant waste water represents UU "do[ing]" something. This automatically triggers a deemed "interference", and the consent of MSC is required. It is not necessary to establish *actual* interference, as would be necessary if one was dealing with the application of a provision which is not an RSP, or with a case of what is apparently known as "injurious affection" under subsection 186(3).

153. In order to support the assertions, referred to under sub-paragraphs 148 (iv) and (v) above, that the Canal is used by MSC "for draining…any land under" the Manchester Ship Canal Act 1885, Mr Morgan referred to a factual account appearing in the judgment of Moses LJ in *R (oao The Manchester Ship Canal Co Ltd) v Environment Agency* [2013] EWCA Civ 542, at paragraphs 3-5:

> "3. The Manchester Ship Canal Act 1885 was the first of the Manchester Ship Canal Acts and Orders 1885 to 2009 pursuant to which the Canal was constructed and maintained. The Canal allowed the heavy tariffs imposed by the Liverpool docks and railway companies to be avoided and, consequently, trade flourished in Manchester. The feature of its construction which is of particular significance in this appeal is that the river courses, particularly those of the Irwell and Mersey, were canalised. The Canal also intercepted or shared the flow of other rivers such as the Irk and the Medlock and, in the Lower Reaches, the Weaver.
>
> 4. The canalisation of the rivers gave the Canal another important role besides navigation. It enabled flood water to pass safely down the Canal to the Mersey Estuary and thus provided land drainage for the Manchester conurbation and beyond, a total catchment area of 3,000 km². Before the Canal was built there was a history of flooding in the Manchester to Warrington area (in 1729, Daniel Defoe described a bridge in Manchester built 'so high because floods could cause the river to rise four or five yards in a night'). Since 1894, when the Canal was completed, the canal structure and its associated systems have safely passed all flood flows to the Mersey Estuary. This success in flood prevention fulfilled and surpassed the statutory obligations of the undertaker, the Manchester Ship Canal Company Limited, to allow the passage, discharge and escape of flood waters from rivers and land, (see sections 71(13), 84(5), 84(16), 101(6), 114(1) and 118(2) of the 1885 Act). The width and depth of the channel formed by the Canal far exceeded the natural river channels it replaced; the Canal with its associated structures improved the flow of the rivers and thereby reduced the risk of flooding.
>
> 5. The sluices control the water level by enabling the waters which enter the Canal from rivers and other sources to pass down the Canal in a regulated manner. They are electrically powered and are normally operated automatically from a central control room, but can, as a back-up, be operated

> electrically, hydraulically or manually from equipment located on the structure of the sluices. The respondents emphasise the reliability of the sluices; the annual probability of all the sluices failing to operate in a 1% probability flood is less than 0.01%."

154. Although for the purposes of the proposed amendment MSC is restricting the application of the s.186 Point to the Marshbrook Sewer element of the discharge at Outfall 61, by way of a test case, the argument would admittedly apply to the whole of that discharge and also to discharges from any outfall into any watercourse by any sewerage undertaker regardless of when the outfall and any piped infrastructure by which it is supplied was brought into use. In all such cases, consent of MSC/the watercourse owner would be required, subject to any applicable subsisting consent.

155. When I put to Mr Morgan that if his argument was correct, the implied statutory right found by the Supreme Court to exist by virtue of sections 106 and 116 was not a "right" at all, as it could not be exercised without the consent of the owner of the waterway in question, he agreed. He also agreed that compliance (without trespass or other unlawfulness) with the sewerage undertaker's statutory obligations under those sections would depend upon there being enough time to obtain that consent before the statutory obligation crystallised.[33]

156. At the hearing in the Supreme Court Mr Morgan was not representing MSC but an intervener, the Middle Level Commissioners, a body usually described as a "water level or flood management organisation" or an "internal drainage board". In that capacity he seems to have raised a similar point on their behalf. In the application to intervene, it was argued by the Commissioners that they would be deprived of the protection of the Deeming Provision if the implied statutory right under discussion in the appeal were held to arise under section 94 and/or section 159, as those were not RSPs.[34] I have been shown a transcript of part of the hearing in the Supreme Court. Section 186 was considered at some length in exchanges between counsel and the members of the Court. Various possibilities were put by the Court to counsel as to the circumstances in which the consent requirement under subsection 186(1) might be triggered if, for example, there arose an increased volume of discharge at an outfall. Nothing can properly be deduced from this debate, except that the Court was alive to the contents of section 186, and had had their attention specifically drawn to the Deeming Provision.

157. At no stage in those discussions, or at any other stage in those proceedings, did MSC rely upon or raise the s.186 Point as applicable to itself. It is common ground[35] between Mr Morgan and Mr Karas that, although the interveners before the Court included such bodies as the Canals and Rivers Trust, who intervened on behalf of canal and river owners generally, no-one suggested to the Court that subsection 186(1) might apply for the benefit of the Canal or any canal. Subsection 186(1) was discussed in the context of the Middle Level Commissioners' intervention. There was no dispute that the subsection applied to such bodies.

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[33] Transcript, Day 2, pages 76-78.
[34] Paragraph 38 of the application to intervene.
[35] Transcript, Day 2, pages 100-101.

The amendment application

158. Mr Morgan urged and I accept: (1) that this is not a late amendment in the sense that, if allowed, there would be a risk of disruption of the timetable for procedural steps and/or vacation of trial dates – the Present Claim is still in that sense at an early stage, although the application was not made as soon as it could have been; (2) that the application to amend did not jeopardise the hearing dates for the strike-out application, although it did add significantly to the length of the hearing and has meant that a second round of skeletons has been necessary; (3) that the amendment raises an issue which is of importance to both parties, and no doubt to others in a similar position – it is admittedly a test case; and (4) that, subject to UU's argument as to the inadequacy of the claim form and the absence of supporting evidence, there has been no specific breach of a rule of court, practice direction or court order. Therefore, some of the authorities to which I was referred, such as *Quah v Goldman Sachs International*]2015] EWHC 759 (Comm), and *Soo Kim v Youg* [2011] EWHC 1781 (QB), are not much in point.

159. Mr Morgan also submitted that the s.186 Point was an interesting question in a developing area of law, and as such the court should be slow to shut down the point. However, I do not consider that these factors add much to the fact that the issue is admittedly potentially significant for both parties. Whether or not the issue is interesting is something of a subjective question. As to this being a developing area of law, the law in this area has been developing for some years, as we have seen. A certain amount of clarification has now been achieved as a result of the SC Decision.

160. Most of the debate before me has concerned (1) the estoppel and *Henderson v Henderson* arguments; (2) whether the s.186 Point is doomed to fail or has a real prospect of success; and (3) whether the proposed amended claim in its latest manifestation is embarrassing in its lack of particularity and evidence.

Estoppel arguments

161. Both parties essentially relied upon the same arguments, *mutatis mutandis,* which they respectively made in regard to the Origin Point. I do not therefore propose to repeat those arguments or the principles of law by reference to which they fall to be decided. They are set out earlier in this judgment.

162. I have already mentioned that section 186 was debated at some length by the members of the Supreme Court in the course of the appeal hearing in the 2010 Claim, and was referred to in their judgments. Mr Morgan, as counsel for the Middle Level Commissioners, was arguing that if a statutory right of discharge was to be implied on the basis of section 159 of the 1991 Act, then the Commissioners would lose their protection under the Deeming Provision. Counsel for MSC did not argue that either the consent requirement under subsection 186(1) or the Deeming Provision had any bearing on MSC's or UU's rights vis a vis each other. As I have explained, the s.186 Point was not taken by MSC in the Present Claim until this application was made in October 2018.

163. Mr Morgan did suggest that the RSPs had "come into play" because of their effect as identified by the Supreme Court, and that this had triggered the Deeming Provision in relation to the use of the Canal by UU in discharging *via* Outfall 61. I also understood

him to be arguing that the s.186 Point was not reasonably foreseeable, prior to the SC Decision, for more or less the same reasons relied upon in respect of the Origin Point. I do not accept the argument for the same reasons. The point has clearly been available to MSC at all material times, and was not dependent on the SC Decision. It could in my view have been taken at an appropriate stage in the 2010 Claim with reasonable diligence. I also consider that the burden of establishing that it *should* have been taken at that stage is satisfied in all the circumstances, again for the same reasons (and applying the same broad, merits-based approach) as applied in relation to the Origin Point. Indeed, if anything, the need to take the s.186 Point in those proceedings was even stronger, given that, if correct, it would have put an entirely different complexion on the arguments made before the courts involved, including the Supreme Court, and may have rendered much of that argument otiose. Further, Newey J's conclusion, that MSC could be expected to have put forward by January 2012 all the points that it wished to advance in the 2010 Claim, would equally apply to the s.186 Point.

164. As to whether the cause of action encompassing the proposed amendment is the same as in the 2010 Claim, for the purposes of cause of action estoppel, MSC raises a separate point. It submits that the trespass alleged in the 2010 Claim was for trespass against MSC in its capacity as a private land owner. In this regard, Mr Morgan referred to the claim form in that claim, which refers to "Discharges … made unlawfully, and without permission by the Defendant onto and into land and water owned by or vested in the Claimant, being the bed and banks of the Manchester Ship Canal…" He contrasted that with the additional ground for trespass now being pursued by the proposed amendment. This is based on a lack of MSC's consent which is required by virtue of subsection 186(1) because MSC "uses [the Canal] for draining land under the provisions of the Manchester Ship Canal Act 1885". He submitted that this allegation of trespass is therefore made in a different capacity, and is a different cause of action, which MSC is not estopped from advancing.

165. Mr Karas, in response, submitted that the different capacity in which the s.186 Point would be brought did not make it a different cause of action for the purposes of cause of action estoppel. The cause of action would still be about interference by UU with the Canal, and the only difference would relate to the nature of the alleged limit on UU's statutory authority to discharge *via* Outfall 61. Just as with the Origin Point, so with the s.186 Point, the assertion of that limit would be a matter for MSC to raise by way of an answer to UU's defence of statutory authority to discharge, and would not therefore constitute a necessary element of the cause of action in question. The cause of action would still be the trespass by discharging into the waters of the Canal.

166. I do not agree with that submission. In my view there is a material difference in the nature of the cause of action represented by the s.186 Point. Although it is brought under the heading of trespass, a claimant does not apparently need to be an owner or entitled to possession of land. What must be established is that there is a specified item of infrastructure which the claimant uses for draining certain land under the provisions of a local statutory provision, and that the defendant has done something which interferes with that infrastructure (or is deemed so to interfere). Those are contentions which, at the highest level of abstraction, must be made in order properly to plead the cause of action in question. It may be questionable whether the label "trespass" is appropriate. The cause of action may be more akin to breach of statutory

duty. Be that as it may, I do not consider that the same cause of action is involved as in the 2010 Claim. No cause of action estoppel therefore arises.

167. What of issue estoppel? As seen,[36] this normally operates as a bar where the cause of action is not the same in the later action, but an issue necessarily common to both actions was decided on the earlier occasion. It also operates as a bar to points which were not raised if they could with reasonable diligence and should have been raised. The bar may not operate in special circumstances where injustice would be caused.

168. As in the case of the Origin Point, UU submits that the issue common to both the 2010 Claim and the proposed amendment is the issue of statutory authorisation to discharge from Outfall 61, and that this has been decided against MSC by the Supreme Court, which found that UU has a statutory entitlement to do so, and dismissed the relevant claims including that referable to the Marshbrook Sewer. UU submits that the s.186 Point was relevant to that point, and could and should have been raised by MSC, if not as part of its claim, then by way of reply to UU's defence.

169. Mr Morgan countered by arguing that a property owner or a drainage body could not be forever shut out from making a complaint about a discharge. He drew the distinction between a case where a claimant had succeeded in an action and obtained damages in lieu of an injunction, which might well represent finality, and a case where, as here, the original case had failed. He submitted that there was not the same sense of finality about failure. In this context he also referred me again to the *dicta* of Lord Sumption in the *Virgin Atlantic* case which emphasised that *res judicata* rules and abuse of process were distinct but overlapping principles, with the common purpose of limiting abusive and duplicative litigation, which qualified both cause of action and issue estoppel where the conduct was not abusive.[37]

170. Notwithstanding the skill of Mr Morgan's submissions, I am of the view that issue estoppel would apply to bar the proposed amendment based on the s.186 Point. I have already found that the point could and should have been taken in the 2010 Claim. I accept Mr Karas's contention that there is a common issue of statutory authorisation for the discharge *via* Outfall 61, to which this point would have been relevant. None of the factors urged by Mr Morgan amount to special circumstances such that injustice would be caused by imposing the estoppel. As stated in earlier parts of this judgment, MSC had adequate time to raise all the points it wished to raise in good time for them to be determined in the 2010 Claim. For the reasons I gave in relation to the Origin Point,[38] I consider that there would be injustice to UU if the amendment were allowed. It is not acceptable, and is not within the spirit of the overriding objective, for litigation to be conducted in a linear manner, with different points being taken *seriatim* over the course of several years, rather than together at the appropriate time.

[36] See paragraph 104 of this judgment.
[37] See paragraph 25 of the judgment in that case. See also paragraph 22.
[38] See paragraphs 102, and 121-134 of this judgment. See also paragraph 172.

Henderson v Henderson argument

171. There remains the issue of *Henderson v Henderson* abuse. In that connection Mr Karas relied upon the same points as with the Origin Point. Nor did I understand Mr Morgan to make any additional argument, applicable specifically to the s.186 Point.

172. I have determined[39] that the s.186 Point could with reasonable diligence, and should in all the circumstances, have been brought in the 2010 Claim. In considering the "should" element, I have adopted the broad merits-based approach identified by Lord Bingham in *Johnson*. There was no good reason not to include the argument as part of the 2010 Claim. Most of the factors which I found applicable to the Origin Point also apply here. (See, in particular, paragraphs 129-134 above.) For those reasons, I have reached the conclusion that to allow the s.186 Point to be litigated in the Present Claim would be unjust and oppressive to UU. The proposed amendment would in my view constitute an abuse of process within the *Henderson v Henderson* principles, and I do not consider that there is any exceptional feature which would justify the exercise of a residual discretion not to strike it out.

Other issues relating to s.186 Point

173. As seen,[40] it is common ground that permission to amend should only be granted if the claim which is the subject of the proposed amendment has a real (as distinct from fanciful) prospect of success. The test is the same as for summary judgment. I have detailed the nature of the s.186 Point. It is UU's submission that it has no real prospect of success and is bound to fail, both because of a fatal lack of particularity and evidence, and on its substantive merits as a matter of statutory construction. Mr Karas has also raised an issue concerning the arbitration provision in subsection 186(7) and an issue about the utility of the relief sought.

174. None of these issues needs to be determined, given my conclusion on estoppel and *Henderson v Henderson* abuse. Further, as far as the arbitration issue and the matter relating to the utility of the relief sought are concerned, Mr Karas appeared to indicate that they were not raised as grounds for a strike out, and only arose if the amendment was allowed. I will not therefore consider the latter two questions in this judgment, and will comment only very briefly on the arguments relating to the alleged inadequacy of particularity and evidence, and the construction of the 1991 Act.

175. UU refers to the fact that the Present Claim is a Part 8 claim, and that CPR 8.5(1) provides:

> "The claimant must file any written evidence on which he intends to rely when he files his claim form".

176. UU then submits that the declaration sought necessitates a factual investigation, but the evidence served on UU with the claim form does not identify or particularise adequately or at all the necessary elements of the proposed claim. There is no application to adduce further evidence.

[39] See paragraphs 161-163 of this judgment.
[40] See paragraph 144 of this judgment.

177. For example, MSC does not just rely on the Canal as a whole but also on "sluices" as being the infrastructure "interfered with". Yet no sluice has been identified in evidence. Whilst MSC identifies itself as the person "using" the Canal and sluices for "draining land" under the provision of a local statutory provision, there is no evidence identifying any land which is said to be drained; nor any evidence explaining how the infrastructure in question is being "used" by MSC for that purpose, or how UU's discharge at Outfall 61 interacts, if at all, with the relevant infrastructure so used. Nor has any evidence been adduced to identify any specific provision under which that use is said to be carried out. Only a blanket reference to the Manchester Ship Canal Act 1885 is made in the draft amended pleading. Although Mr Morgan referred in argument to some factual material in the judgment of Moses LJ in the *Environment Agency* case (above[41]), in which there is a reference to certain sections of that Act, there is no evidence that really explains how any of these provisions is said to bring section 186 into play. Nor is there any explanation as to how any of the provisions in question, and the infrastructure or part of the Canal to which the provision applies, relates to the discharge at Outfall 61.

178. Mr Karas took me to these provisions in the 1885 Act. Subsection 71(13) appears to oblige MSC to provide remedial works, for the protection of the Trustees of the River Weaver Navigation, in respect of any obstruction to the passage of the flood waters of the River Weaver; subsection 84(5) requires MSC to maintain a lock and flood gates at Latchford; subsection 84(16) requires MSC to restore and make good the drainage of a riparian owner, the Bridgewater and the Ellesmere Trustees; subsection 101(6) requires MSC to provide and maintain culverts for a riparian owner, Henry Stanton, to take away certain brooks, and to construct infrastructure which prevents the Mersey flooding into those culverts; subsection 114(1) requires outlets to be constructed at the Dock at Warrington to allow the drainage of surrounding land; and subsection 118(2) requires MSC to maintain various apparatus in a particular part of the Canal.

179. UU submits that all these works are for the use and benefit of other persons and not for MSC's "use", and therefore do not bring MSC within the scope of subsection 186(1). The subsection, it is submitted, applies to statutory bodies such as internal drainage boards and the Middle Level Commissioners who, pursuant to local statutory provisions, use flood defence works and watercourses for the purpose of drainage. Other persons, such as the trustees mentioned in the measures referred to, for whose protection certain structures are required to be provided, might also fall within the subsection as "users" of those structures. However, Mr Karas submitted that the subsection plainly had no application at all to MSC, which did not "use" such infrastructure. That, he said, was hardly surprising, as there was an express provision specifically for the protection of owners of canals and watercourses in subsection 186(3). That provision required the canal owner's consent where there was what is known as "injurious affection" to the quality of the water, for example. However, that provision would be otiose if subsection 186(1) applied to canal and watercourse owners such as MSC. Nor was it likely that "other works" could have been intended to include canals and other watercourses, given that these are expressly referred to in the very next subsection.

[41] Paragraph 153 of this judgment.

180. Mr Karas submitted that the issues raised were mixed questions of fact and law, upon which there was simply insufficient evidence. As such, the claim was doomed to fail, given that in a Part 8 claim the evidence must be served with the claim form. Although it was a proposed amendment, the evidence should still have been provided in support of the application. He submitted that the amendment should be refused on that ground.

181. Mr Morgan's answer to these criticisms of the draft amended claim form and the absence of specific evidence was to state that if factual issues are raised by the proposed amendment, then MSC would not oppose the case going forward as a Part 7 claim, with directions for pleadings and disclosure in the normal way.

182. He also referred me to *In Soo Kim v Youg* (above), a decision of Tugendhat J, and to the application of that decision by Master McCloud in *Breeze v Chief Constable of Norfolk* [2018] EWHC 485 QB. This was a late application to amend without the proposed amended particulars of claim being available at the time of the application. At paragraph 37 the Master said:

> "It seems to me that the decision whether to take a strict approach to pleading and therefore to bring this aspect of the claim to an end is essentially discretionary but must be exercised rationally, that is on some sensible basis. I do not in my judgment have to have, for example, a draft amended pleading before me. I take the view that in principle a credible request from counsel could in some circumstances be enough to persuade me to allow an effort to amend appropriately, but in this there is more material than that to go on."

183. In my view, Mr Karas's criticisms are justified. As it stands, the amended claim is not properly particularised in the draft amended pleading nor adequately supported by evidence. It is embarrassing, and would *prima facie* be vulnerable to a strike out on that ground. Nor do I consider that the claim would be suitable for the Part 8 procedure. There would clearly be issues of fact that would need to be explored, as Mr Karas submits, and Mr Morgan appears to acknowledge.

184. In these circumstances it is difficult to form a firm view of whether there would be a real prospect of success if the case were properly particularised and evidenced. I have described the way in which MSC puts the s.186 Point,[42] and also the basis for UU's submission that the point would have no realistic prospect of success as a matter of construction.[43] Whilst both parties have touched on certain question of statutory construction, the arguments addressed to me on those questions have not been as detailed as in relation to the Origin Point. I do not feel it would be sensible, on the basis of the material available and the arguments I have heard at this stage, to attempt to form a concluded view on whether the s.186 Point would be bound to fail or not, if there were a properly particularised statement of case.

185. Had the lack of particulars and supporting evidence been the only aspect of the case, and, in particular, had there been no issue estoppel or *Henderson v Henderson* abuse, then in the light of the potentially significant nature of the issue, I might have been inclined, as an alternative to simply disallowing the amendment, to order the case to proceed as a Part 7 claim, with appropriate directions for full and proper pleadings.

[42] Paragraphs 148-154 of this judgment.
[43] See paragraph 179 of this judgment.

Overall conclusion

186. It follows from the above that UU's application to strike out the Present Claim succeeds, and MSC's application to amend the claim form is dismissed.

187. I invite the parties to agree a draft order which reflects the conclusions I have reached.

ANNEX

Claim No. PT-2017-000163

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND WALES

PROPERTY TRUSTS AND PROBATE LIST (ChD): PROPERTY

BETWEEN:

THE MANCHESTER SHIP CANAL COMPANY LIMITED

Claimant

-AND-

UNITED UTILITIES WATER LIMITED

Defendant

Revised Draft / **AMENDED CLAIM FORM**

16 November 2018

Original proposed amendments are underlined. Revisions to the proposed amendments are shown in red.

The Claimant is the owner of the Manchester Ship Canal which it uses for draining land under the provision of the Manchester Ship Canal Act 1885.

The Defendant is a sewerage undertaker for the purposes of the Water Industry Act 1991 and relevantly for the purposes of these proceedings, the owner and operator of Davyhulme Waste Water Treatment Works, Rivers Lane, Urmston M41 7JB. The Defendant is responsible for the discharge into the Manchester Ship Canal of water and sewage from an outlet pipe, drain or sewer known to the parties as Outfall 61, the location of which is described in the witness statement of Mr Graeme Andrew Couch made in support of this claim and dated 17th November 2017.

For the reasons set out more fully in the witness statement of Mr Couch and/or pursuant to section 186 subsections (1) and (2) of the Water Industry Act 1991, the Claimant seeks a declaration that the discharge by the Defendant of water and other materials into the Manchester Ship Canal through the outfall situated near Davyhulme Waste Water Treatment Works within the Metropolitan Borough of Trafford (known to the parties as outfall 61) is a trespass against the Claimant to the extent that the water and other materials so discharged include water and materials which originate from a sewer or sewers constructed or adopted by the Defendant in

or about 2007 to receive water from properties developed at or about that time at Marshbrook Drive, Manchester M9 8NN, which additional water and materials are being discharged into the Manchester Ship Canal without the consent of the Claimant pursuant to section 186 subsection (1) of the Water Industry Act 1991 or otherwise having been either sought or obtained.