CASE COMMENTARY

OPENING THE SEWER-GATES: AN EXPLORATION OF THE SUPREME COURT'S DECISION IN *MANCHESTER SHIP CANAL COMPANY LTD v UNITED UTILITIES WATER LTD (NO 2)**

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INTRODUCTION

Winston Churchill once remarked that '[for] my own part, I see little glory in an Empire which can rule the waves and is unable to flush its sewers'. Had he been alive today, he may have lamented that modern Britain now does neither. Nevertheless, as now confirmed by the Supreme Court in *Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No 2)*,[1] a sewerage undertaker's failure to properly flush the sewers is in principle susceptible to nuisance claims by affected riparian rights-holders, even absent an allegation of negligence.

The case concerned a long running dispute between the Manchester Ship Canal Company ('MSCC'), which owns a canal, and United Utilities ('UU'), a sewerage undertaker that periodically discharges effluent into the canal. The Supreme Court was tasked with determining a preliminary issue as to whether the effect of the Water Industry Act 1991 ('WIA 1991') was to preclude MSCC's nuisance claim against UU for effluent pollution of its watercourse, absent an allegation of negligence (that is, where the sewer's capacity was overloaded, forcing discharges, through no fault of the sewerage undertaker).

UU's position was that although the discharging of effluent was unauthorised, the statutory regime precluded the bringing of private law claims as a remedy. UU's discharges constituted a breach of their section 94 duty, under WIA 1991, to ensure their area of service was 'effectually drained'. Section 18(8), as construed by the House of Lords in the case of *Marcic v Thames Water Utilities Ltd* ('*Marcic*'),[2] mandated that claims targeting a breach of that duty be remedied exclusively by means of a section 18 'enforcement order', imposable at the discretion of the water regulator. Claims under the common law were therefore statutorily ousted. This argument found favour with the High Court and Court of Appeal.

However, the Supreme Court disagreed, allowing the appeal and resolving the preliminary issue in MSCC's favour. The Act did not preclude nuisance claims targeting discharges into watercourses. *Marcic* was distinguished but not overturned, meaning that its determination that discharges onto land (as opposed to watercourses) are disbarred by WIA 1991 remains good law.

WIA 1991 is an Act 'whose roots, in many instances, stretch far into the past, and which cannot be understood without reference to the earlier law'.[3] The consequence is a judgment of great scope and complexity. Given that, as well as the sharp disagreement between the Supreme Court and the lower courts, and indeed the existence of a House of Lords authority that reaches an opposing legal conclusion on nearly identical facts, a proper understanding of this decision requires context and careful study, which this article seeks to provide.

THE RELEVANT STATUTORY FRAMEWORK

WIA 1991 is primarily a consolidation Act, bringing together disparate water legislation following the privatisation and regulatory reforms effected by the Water Act 1989.

Section 94 of the Act imposes on sewerage undertakers a duty to cleanse and maintain their sewers and ensure their area of service 'is and continues to be effectually drained'. Section 18(8) provides that the only remedies for breach of a duty contained in Chapter 1 of WIA 1991 (which includes section 94) are 'those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention'. Sections.117(5) and 186(3), which the Court of Appeal called the 'foul water provisos', made clear that the sewerage undertaker had no authority to discharge effluent into watercourses. There are no analogous express provisions for discharges onto land.

MARCIC

Mr Marcic was a homeowner whose garden was repeatedly flooded by effluent discharged by a sewerage undertaker. The discharges were involuntary and not negligent, in that they resulted from the sewer's hydraulic capacity being overloaded by new inflows. This was caused by rapid population growth around Marcic's Stratford home, coupled with the undertaker's legal duty to connect those new residents to the sewerage network.

The House of Lords held that WIA 1991 ousted his right to bring common law claims, because that would be

* This article is an expanded version of a blogpost which was published on Francis Taylor Building's Environmental Law Blog. The blogpost can be accessed at: https://www.ftbchambers.co.uk/elblog/view/opening-the-sewer-gates-an-exploration-of-the-supreme-courts-decision-in-manchester-ship-canal-company-ltd-v-united-utilities-water-ltd-no-2-2024-uksc-22.

1 [2024] UKSC 22.

2 [2003] UKHL 66; [2004] 2 AC 42.

3 Note 1 above, at para 21.

inconsistent with the statutory scheme. As Lord Nicholls observed, 'Mr Marcic's claim is expressed in various ways but in practical terms it always comes down to this: Thames Water ought to build more sewers'.[4] At paragraph 35, Lord Nicholls set out his interpretation of the statutory scheme. The basic legislative concern he identified was predetermination of sewer development. Sewerage networks serve numerous customers over a vast area, are interconnected, and are highly expensive to upgrade. The result is that, practically speaking, decisions about how to upgrade the infrastructure require a delicate governmental balancing of competing priorities across a wide range of stakeholders. WIA 1991 delegated that discretion to the water regulator.

Affected landowners like Mr Marcic are one factor in that balance, but so is the pressing need to upgrade infrastructure for areas with rapidly growing populations and so on. It was not for the court to determine which upgrades, and which affected householders, ought to be prioritised. Allowing private law claims 'would set at nought the statutory scheme' because it would force the regulator's hand, pressuring them (or forcing them by injunction) to upgrade the network in places that would prevent tortious discharges onto the land of claimants. That would effectively predetermine strategic decisions about how the network needed to be upgraded.

THE JUDGMENT OF THE HIGH COURT

Turning to MSCC's case, Fancourt J dismissed the claim at first instance. He determined, as a matter of fact, that discharges of effluent by UU were 'involuntary' and not negligent.[5] In his conclusions,[6] the judge held, *inter alia*:

- The facts of the case were 'materially indistinguishable from the relevant facts of *Marcic*';
- MSCC was 'inevitably' alleging that UU had breached its section 94 duty, and thereby engaged the ousting provision of section 18(8); and
- The point of the foul water provisos was essentially to make clear the undertaker had no defence of statutory authority, and to emphasise that the watercourses were particularly deserving of protection.

THE JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal dismissed the appeal, affirming the High Court's decision.

At paragraph 53 of their judgment,[7] the Court of Appeal explained that though an 'untutored' reading of s18(8) might suggest that affected landowners could sue for breaches of section 94 in parallel to an enforcement order, the House of Lords decision in *Marcic* established that was 'clearly not the position', and the claimants did not suggest otherwise.

At paragraph 60, the court held that UU's discharges were clearly a breach of section 94.

At paragraph 67, Nugee LJ explains that the case of *Derbyshire Angling Association Ltd v British Celanese Ltd*,[8] which MSCC argued distinguished their claim from *Marcic*, was not on point. That case merely establishes that discharges into watercourses are not authorised; it did not establish, nor was it argued in that case, that the bringing of private claims to remedy such discharges were consistent with the statutory scheme of WIA 1991.

At paragraph 78, the Court of Appeal echoed Fancourt J in observing that the only way to practically remedy the breaches alleged by MSCC was to upgrade the sewerage infrastructure. Indeed, the claimant 'accepted in terms that in effect his complaint was that UU should build more sewers'. Nugee LJ could not see how that was 'materially different' from the case advanced by Mr Marcic.

At paragraph 87, Nugee LJ accepted that the foul water provisos were potentially nugatory if they were construed as merely reiterating that watercourse pollution was unauthorised. Nevertheless, he remained unconvinced that the provisos should be understood as preserving common law claims that clashed with the statutory scheme identified in *Marcic*. They were statutory hangovers, consolidated in WIA 1991, and presumably retained in that consolidating Act to avoid giving the impression that watercourse discharges were no longer opposed by the legislature.

THE SUPREME COURT'S JUDGMENT

The Supreme Court's judgment begins with a discussion of the tort of private nuisance. The court explained, *inter alia*, that:

- Nuisance generally is committed 'where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land';
- The principle arising from *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 is that a landowner can be responsible for a nuisance without creating it, if they (actually or constructively) know of it and fail to take reasonable steps to rectify it;
- While the public benefits of a nuisance may guide judicial discretion as to remedy, it is 'not a defence' to a private nuisance claim; and
- 'Statutory controls over pollution have never been treated as a reason for cutting down' private rights against nuisances.[9]

More generally, an act authorised by statute cannot attract tortious liability: '[what] is duly done under statutory authority is lawful action of which no-one is entitled to complain'.[10] However, given that such statutory provisions effectively oust common law claims, they must be construed in light of the principle of legality.[11] Ousting provisions may be implied into the statute, but only where the making of the nuisance is the inevitable result of undertaking the act authorised by statute,[12] and such implication is less likely where the statute makes no provision for compensating those rights that are putatively to be interfered with.[13] The court observed that WIA 1991's predecessor Acts expressly prohibited the discharging of effluent into watercourses.[14]

4 [2003] UKHL 66 at para 34.
5 ibid para 49.
6 ibid paras 75 to 91.
7 [2004] 2 AC 42 at para 53.
8 [1953] Ch 149 ('*Pride of Derby*').

9 Note 1 above at paras 6, 9 and 14.
10 ibid para 16.
11 ibid para 17.
12 ibid paras 18–19.
13 ibid para 20.
14 ibid paras 24–27.

The court then considered a series of cases, of some vintage, concerning tort claims arising from the discharge of effluent by undertakers operating under the auspices of those statutes. Among the principles identified were:

- That the courts have never accepted as a defence, in the absence of statutory authority, that discharges of effluent into watercourses were inevitable or necessary to facilitate sewerage; and
- That public bodies are presumed to be unauthorised to create nuisances without compensation, that this presumption must be rebutted where the statute is sufficiently clear, and that if the statute 'confers a power but adds a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a nuisance …'.[15]

The court then analysed *Pride of Derby*, which it was 'necessary to consider in detail'.[16] In that case, an angling club sued a sewage treatment plant for polluting their river, and 'based their action on private nuisance'. The Supreme Court explained that this was 'not a case where the complaint was of insufficient drainage, but a case where the complaint was about the consequences of the defendants' drainage'. It was not a claim 'based on the defendants' failure to perform their statutory duty: it was based on the occurrence of a nuisance for which the defendants were responsible'.

Paragraph 50 summarised a series of principles arising from the above discussion, including, *inter alia*:

- Pollution of watercourses is an actionable nuisance at common law;
- Parliament has consistently provided specific protection for watercourses over and above other land and made clear that pollution by sewage is not authorised;
- Sewerage undertakers are liable in nuisance if they 'carry out operations which result in a nuisance which is not authorised by statute and in respect of which no immunity has been conferred', even absent an allegation of negligence;
- However, '[a] claim cannot be brought against a sewerage authority at common law where it is an essential ingredient of the cause of action that the authority has failed to drain its district effectually'; and
- Relatedly, '[an] action may lie against a sewerage authority in respect of a nuisance for which the authority is responsible, where the cause of action does not include as an essential ingredient that the authority has failed to drain its district effectually'.

The court then recited and discussed relevant statutory provisions arising since privatisation of the sewerage undertakers.[17] The court summarised: 'Taken as a whole, these provisions demonstrate a continuity of the parliamentary policy seen in the earlier legislation, in particular in providing specific protection to watercourses'.

Paragraphs 75 to 90 explored the significance of *Marcic*, in light of *Pride of Derby*. Lords Reed and Hodge explained that the House of Lords was concerned with an application of the *Sedleigh-Denfield* principle, namely that they were asked to find there was a nuisance on the basis the sewerage undertaker had not taken reasonable steps to control the nuisance by constructing a new sewer. By contrast, *Pride of Derby* identified a basis for a nuisance claim that did not depend, as an essential ingredient, on the failure of the undertaker to build more sewers. It instead targeted the discharging of effluent into the claimant's watercourse.

At paragraphs 108 to 134, the court examined the statutory language of WIA 1991. Summarising at [133], Lords Reed and Hodge explained that:

- There is no express ouster of common law claims in WIA 1991, nor are such claims ousted by necessary implication;
- Sections 117(5) and (6) and 186(3) and (7) envisage that common law claims will be brought;
- Given the statute grants compensation to victims of authorised harms by sewerage undertakers, it would be incoherent if it ousted private claims and failed to compensate for unauthorised harms; and
- Section 18(8) only ousts claims which depend, as an essential ingredient, on a breach of a relevant statutory duty, but a claim of nuisance arising from effluent discharge does not normally require such a breach to be established.

At paragraphs 128 to 131, the Supreme Court accepts that the granting of injunctions to restrain pollution may result in disruption to the statutory scheme, by predetermining sewerage upgrades. Their answer is that the courts can instead award compensatory damages, thereby avoiding any conflict with the scheme.

Finally, at paragraphs 135 to 136, the court explained why they considered that *Marcic* 'can readily be distinguished', for essentially two reasons:

- An essential ingredient of Marcic's claim was that new sewers ought to have been built, but that was not true here. That meant that the section 94 duty was not breached, or rather, that breach was not targeted by MSCC's claim, and so the partial ouster of section 18(8) was not engaged; and
- Watercourses have special statutory protections (the foul water proviso), which Mr Marcic's land did not.

COMMENT

The very first question the UK's new Prime Minister, Sir Keir Starmer, was asked at his first Prime Minister's Questions, concerned the government's plans for dealing with effluent in rivers. It even included a request that Ofwat be scrapped and replaced with a 'tougher' regulator.[18] The political question of whether sewerage undertakers are sufficiently disincentivised from discharging effluent into rivers is indeed high on the political agenda. And as that first question indicates, that may be said to result from a perceived failure of the current regulatory regime to control those discharges and adequately protect watercourses.

A thread running through the judgments in *Marcic* and in this case was the legal significance of WIA's regulatory

15 ibid paras 31 and 42.

16 ibid paras 44–49.

17 ibid paras 51–67.

18 Hansard, HC Deb (24 July 2024), col 661, question of Calum Miller MP.

regime for protecting watercourses. In the former, the inferred legislative intent to ensure that discharges onto land were remedied on a strategic, network-wide approach, persuaded the House to not allow for private remedies. Here, the scale, frequency, and regularity of discharges may have made such an approach less appealing, given it seems to have left what would otherwise be repeated and continuing tortious discharges onto property without an effective or realistic remedy. Whether or not the current system is fit for purpose is for others to answer, but it was an intriguing feature of this case that UU did not deny that they were routinely discharging effluent into rivers, and indeed that the operation of their current sewerage system essentially depended on the frequent discharging of effluent into the river.

The current regulatory regime was explained in this way by the Supreme Court:

> 125. … In this regime … discussions between the Environment Agency, Ofwat and the relevant sewerage undertaker led to the agreement of a five-year programme of service provision, including capital expenditure on improvements to the sewerage infrastructure, and the level of revenue through charges to customers which the sewerage undertaker may impose to recoup such expenditure. It is said that it will often not be practical for a sewerage undertaker to incur significant additional capital expenditure to abate a nuisance in response to a private law claim.
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> 126. Sewerage authorities also faced practical problems in the past. We have seen in the case law concerning the earlier legislation that courts were aware of the difficulties which public authorities faced in funding and carrying out improvements to their sewerage systems, and took them into account by postponing the operation of injunctions. The courts on granting a postponed injunction often gave the public authorities leave to apply in case practical problems arose.
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> 127. The privatisation of the provision of sewerage services may have increased those practical difficulties because of the way in which the funding of capital expenditure in five-year programmes is agreed between the sewerage undertaker and Ofwat. The Secretary of State and Ofwat operate the provisions for the making of enforcement orders against sewerage undertakers under section 18 and following of the 1991 Act against the backdrop of the agreed five-year programmes. They have a discretion not to make an enforcement order when a sewerage undertaker gives an undertaking to take steps which they consider appropriate: section 19(1).

Ultimately, as the House explained in *Marcic*, the scheme is for Ofwat and other state bodies to take a strategic approach to controlling discharges while expanding and upgrading the sewerage network. Ofwat exercises its discretion on enforcement as part of that strategy. It may be the case, for example, that controlling discharges onto one landowner's property may be so costly, or premature, that it risks disrupting the wider strategy Ofwat is taking in fulfilling its duties to provide an adequate sewerage network for the public as a whole.

This is, of course, a utilitarian way of approaching sewerage. The result of the House's decision was that Mr Marcic had no real remedy. His only option was to wait for Ofwat and the sewerage undertaker to upgrade the network infrastructure in such a way as to prevent discharges onto his land. That was despite property being a crucial right, and despite those discharges plainly being an extremely offensive invasion of that right.

That was the crucial context in which the legal question of this case arose. The legal question here was whether common law claims against UU by MSCC were 'barred on the ground that they would be inconsistent with the legislative scheme established by the Water Industry Act 1991'.[19] The outcome of the case, therefore, turned on the correct analysis of WIA's provisions, but also on the significance of the House's determination, in *Marcic*, as to the proper construction of WIA's statutory scheme.

Given that *Marcic* was not overturned, it remains, as a matter of law, the correct understanding of the statutory scheme of WIA 1991, at least in relation to the bringing of common law claims for effluent discharges onto land. The difficulty is that the *Marcic* principle would seem to read across to effluent discharges into watercourses. Indeed, the similarities between the facts of *Marcic* and this case are substantial. In both cases:

- A landowner complained that effluent was discharged onto their property by a sewerage undertaker;
- Such discharge was accepted by the undertaker to be unauthorised by WIA 1991;
- Such discharge was not the result of negligence but of the sewerage system's hydraulic capacity being exceeded;
- Ultimately the way to remedy the issue was to upgrade the sewerage system's infrastructure (that point being expressly accepted by MSCC in the Court of Appeal, as noted above); and,
- Consequently, the bringing of common law claims in either circumstance would risk predetermining strategic decisions about the upgrading of sewerage infrastructure.

By distinguishing *Marcic*, rather than overturning it, the Supreme Court determined that, while the granting of an injunction or damages to remedy discharges onto land remains anathema to the statutory scheme of WIA, granting the same to remedy discharges onto watercourses is consistent with the statutory scheme.

Why should the legislature be understood as having intended such different outcomes to be occasioned by such similar circumstances? The Supreme Court's reasons were that MSCC's claim did not depend on a breach of section 94, and MSCC's claim had the benefit of engaging the foul water proviso.

The first reason is difficult to accept. Regardless of how MSCC conceptualised their nuisance claim, the reality is that they were making essentially the same argument as Mr Marcic, which was that the overburdened sewers were polluting their property. Lord Nicholls' approach was to identify the statutory scheme (being the avoidance of predetermination of sewerage upgrades by iterative claims), and then consider whether Mr Marcic's claim cut across that scheme. Mr Marcic's claim did cut across that scheme, because it would predetermine sewerage upgrades, and it is very hard to see why the same is not true of MSCC's claim, even if that is conceptualised as targeting only the discharge of effluent as a nuisance, as in the *Pride of Derby* case. In other words, that distinction seems to be one of form, rather than substance.

19 Note 1 above at para 1.

The second reason is more robust. Certainly the foul water proviso denotes some legislative intent to provide enhanced protection for watercourses, and it is plausible that would be effected by preserving the rights of riparian owners to bring common law claims. That reading can be reconciled with *Marcic*, particularly given that the House of Lords did not address the proviso.

Yet it is hard to avoid the conclusion that the Supreme Court's decision opens the floodgates to private claims in precisely the manner the House sought to avoid in *Marcic*. The Supreme Court's answer is that the predetermination problem can be avoided by courts requiring undertakers to pay damages, rather than imposing injunctions. But that is unlikely to avoid predetermination, because the threat of damages will still pressure undertakers to prioritise claimant riparian landowners, for two reasons.

Firstly, as Fancourt J explained at paragraph 95 of his judgment, damages would likely be substantial:

> The quantum of damages … would be determined by assessing the sum that UU and MSC would reasonably negotiate for the grant to UU of the necessary rights. That assessment will be informed by the cost that UU would have to incur to avoid any incident of foul discharge into the Canal, and so will reflect the cost of building a better sewerage system. The damages would be likely to be substantial and, in a given case, could be replicated many times over as a result of cases brought by numerous affected riparian owners. The resources of the statutory undertaker, funded by the consumers, will as a result be being diverted from expenditure approved under the regulatory scheme, and, regardless of payment of damages, the larger environmental objectives will not be being achieved.

Secondly, water and sewerage undertakers are already in the grip of financial crisis. It is not practical to assume they can afford to continuously pay out damages to affected riparian owners, while simultaneously gathering the capital to upgrade their infrastructure and thereby remedy the causes of those nuisances. It is not hard to envisage a vicious cycle in which paying out for repeated and continuing discharges exhausts the ability of undertakers to prospectively upgrade the sewer network, leading to more and more breaches as the population grows and as our already antiquated sewerage infrastructure deteriorates.

With that said, there are plainly real environmental benefits to disincentivising sewerage undertakers from discharging effluent into watercourses. The legislature sought special protections for watercourses because, as the Supreme Court points out,[20] the 'discharge of sewage into a watercourse will affect the downstream environment, and thus have effects on a different scale from a discharge or escape on to land, which will generally affect only the specific area where the escape occurs'. The effect of this judgment is essentially to compel sewerage undertakers to internalise the cost of that pollution. The more hands-off approach taken in *Marcic*, which relies on discretionary enforcement orders being made to control discharges, may often fail to realise the polluter-pays principle. This judgment, by contrast, gives real effect to it.

Nevertheless, though the Supreme Court has identified a plausible basis for reconciling its decision with a narrow reading of *Marcic*, its decision still results in a real clash with what the House authoritatively identified as being the statutory scheme of WIA 1991. At least insofar as their effluent affects watercourses, sewerage undertakers may soon need to take an iterative, case-by-case approach to upgrading their infrastructure. The protection of watercourses from effluent, in other words, is likely to become a much bigger priority. That will have obvious environmental benefits, but may come at a greater cost to consumers and mean a de-prioritisation of non-riparian landowners affected by effluent discharge.

In the weeks since the judgment, though not as a result of it, Ofwat has taken some significant steps to remedy discharges, as part of long-running investigations into the sewerage undertakers. Thames Water, Yorkshire Water and Northumbrian Water, among the largest undertakers, have been fined £168 million for their discharges.[21] And Ofwat currently has open enforcement cases against all 11 of the country's sewerage undertakers, and fines or enforcement orders may result from these.[22]

The fine levied on Thames Water amounts to 9 per cent of their 'relevant turnover', which is nearly the maximum 10 per cent that they can be fined. Ofwat says that the undertakers will be disbarred from offsetting those fines by raising costs for customers, which presumably means Ofwat will not allow for the price rises necessary to pay for fines. That is undoubtedly a significant dent in the balance sheet of these undertakers.

However, the question remains: will record fines help prevent discharges of effluent into watercourses, or will they simply diminish the capital required to upgrade infrastructure, which is the only real remedy to discharges? Whether undertakers are fined by a public regulator or sued for damages by a private landowner, the same issue arises, which is that the punishment for breach seems to make breaches more likely. Ultimately, it may be that the only real solution that protects our watercourses is a long-term strategy to upgrade sewerage infrastructure, which would require sufficient increases on water prices (borne by the consumer), or a suitable reduction in sewerage profit margins (borne by shareholders who may therefore be tempted to invest elsewhere), or indeed both.

20 ibid para 50.

21 https://www.ofwat.gov.uk/thames-yorkshire-and-northumbrian-water-face-168-million-penalty-following-sewage-investigation/#:~:text=Ofwat%20can%20impose%20a%20financial,Yorkshire%20Water%20%E2%80%93%207%25%20of%20turnover

22 https://www.ofwat.gov.uk/ofwat-announces-enforcement-cases-against-four-more-companies-in-wastewater-treatment-investigation/ (last accessed 19 August 2024).