Neutral Citation Number: [2022] EWHC 3282 (Admin)

Case No: CO/123/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2022

Before :

THE HONOURABLE MRS JUSTICE THORNTON DBE

- -

Between :

THE MANCHESTER SHIP CANAL COMPANY LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	
(2) UNITIED UTILITIES WATER LIMITED	**Defendants**

- -
- -

Charles Morgan and Nicholas Ostrowski (instructed by **BDB Pitmans LLP**) for the **Claimant**
Guy Williams (instructed by the **Government Legal Department**) for the **First Defendant**
James Strachan KC and **Jonathan Darby** (instructed by **Pinsent Masons**) for the **Second Defendant**

Hearing dates: 19th and 20th October 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 4:30pm on Monday 19th December 2022.

The Hon. Mrs Justice Thornton :

Introduction

1. The Manchester Ship Canal Company ("MSCC"), the owner, statutory undertaker and navigation authority for the Manchester Ship Canal, challenges the decision of the Secretary of State to confirm the United Utilities Water Limited (Eccles Wastewater Treatment Works) Compulsory Purchase Order 2016 ("CPO"). The CPO authorises the sewerage undertaker for the North West of England, United Utilities ("UU"), to compulsorily discharge water, soil and effluent from its sewers into the Manchester Ship Canal. The challenge is brought pursuant to section 23 Acquisition of Land Act 1981, which provides that a person aggrieved by a compulsory purchase order can apply to the court to question the validity of the order on the ground that there was no power to make it, or a relevant requirement has not been complied with.

2. The need for the CPO arises because UU is responsible for the public sewerage system in the North West of England which serves circa 7 million customers and 200,000 businesses. To meet its sewerage obligations, UU operates a Wastewater Treatment Works at Eccles, which currently discharges treated wastewater into Salteye Brook, a tributary of the Manchester Ship Canal. The brook also receives the outflow from a combined sewer outfall at the inlet of the treatment works. In order to satisfy regulatory standards, set by the Environment Agency for the brook, and having considered various alternative options, UU proposes to discharge treated wastewater and storm overflows directly into the Canal via a new outfall, rather than into the brook. A gravity outfall pipe, approximately 1.16km long will be constructed, to carry the final effluent from its treatment works to the new outfall, which will sit within the canal bank.

3. Whilst UU has a statutory right, pursuant to section 159 of the Water Industry Act ("WIA"), to lay its pipes across land without the need for landowner consent, the new right to discharge into the Canal must be acquired either by agreement, or, failing that, by compulsory acquisition under section 155 WIA.

4. Having failed to secure MSCC's agreement to the scheme, UU proceeded by way of compulsory purchase order which led to the convening of a public local inquiry by the Secretary of State, conducted by an Inspector, to consider objections to the CPO, primarily those of MSCC. The inquiry sat for 29 days.

5. For the majority of the inquiry, MSCC advanced an 'in-principle' objection to the Order; that is to say, its case was that the Order should not be confirmed at all. Shortly before the close of the inquiry, MSCC withdrew its principled objection. Accordingly, by the close of the inquiry, and to date, MSCC accepts that there is a 'compelling public interest' for UU to discharge into its Canal. However, before the Inspector,

MSCC challenged the width of the order, describing it as 'an unfettered private law right for UU to discharge effluent in perpetuity in the Canal.'

6. At the end of the inquiry, the Inspector produced a 235 page report concluding that there was a compelling case in the public interest for authorising UU to discharge effluent into the Canal. The Secretary of State agreed and confirmed the CPO by decision letter dated 14 October 2021.

7. The Court was told that the CPO is the first made pursuant to section 155 of the WIA, so as to provide an express grant of authority to discharge water, soil and effluent for the benefit of a sewerage undertaker. MSCC says that the right of discharge into its Canal is the only one nationwide without specific statutory protection for the landowner. This is because the vast majority of discharges are implicitly authorised by the 1991 Act, subject to protection for the landowner via sections 117, 183 and Schedule 12 of the Act. It is these provisions that MSCC sought, unsuccessfully, at the public inquiry to include within the terms of the CPO. The Inspector recommended that the order be confirmed without the inclusion of the protective provisions (report dated 20 February 2020) and the Secretary of State agreed (decision letter dated 3 December 2020).

8. The grounds of challenge are as follows:

    1. The Secretary of State and/or the Inspector misdirected themselves as to the proper legal and procedural context in which to evaluate and determine the inclusion of the protective provisions sought by MSCC, by concluding that the correct test was whether they were necessary.
    2. The Secretary of State and/or the Inspector erred in law in their determination that the purposes for which the Order was made sufficiently justified the interference with MSCC's rights under Article 1 of the First Protocol to the European Convention on Human Rights. There were no countervailing considerations advanced by UU to those relied upon by MSCC and a fair balance required the inclusion of the protective provisions.

9. Except where expressly stated or apparent, references in the judgment below to the Inspector are to be read as also referring to the Secretary of State who agreed with the recommendation of the Inspector.

Background

The terms of the CPO

10. As confirmed, relevant extracts from the CPO provide that UU is authorised

'…under section 155(1) and section 155(2)(a) of the Water Industry Act 1991 … to purchase compulsorily the land and the new rights over land, each described in paragraph 2 …. for the purposes of and in connection with the carrying out of its functions as a sewerage undertaker namely to lay and use a new pipeline for the benefit of the acquiring authority's undertaking generally and its land at Eccles Wastewater Treatment Works, for the discharge of water and effluent to the Manchester Ship Canal……'

11. The right under scrutiny is set out in a schedule, in relation to land referred to as Plots 6D, 6E and 6H, as follows:

'The right… to discharge water, soil and effluent from the sewers and outfall and groundwater into the Manchester Ship Canal…'

The protective provisions sought by MSCC

12. MSCC proposed protective provisions to be inserted into the terms of the CPO by way of an amendment to terms of the CPO, as follows:

'…. the rights hereby granted shall be subject to the provisions of Schedule 1 in order to protect the statutory undertaking of the Manchester Ship Canal Company Limited (MSCCL).'

13. Schedule 1 provides in material part:

'3. Any right to discharge "water soil and effluent" under this Order shall be subject to the following provisions of the Water Industry Act 1991 (or any re-enactment, replacement or amendment of those provisions), which shall apply as conditions to which the right to discharge is subject in the like manner as if the right arose impliedly under section 116 of the Water Industry Act 1991:

a. Section 117(5)(a) and (b)
b. Section 117(6)
c. Section 186(1), (3), (6) and (7)
d. Schedule 12 paragraph 4

(the 'discharge proviso').'

14. Before the Inspector, MSCC referred to the collection of provisions as the 'discharge proviso'.

The legal framework

Compulsory purchase

15. Section 155 of the WIA provides as follows:

> *'155.— Compulsory purchase.*
>
> *(1) A relevant undertaker may be authorised by the Secretary of State to purchase compulsorily any land anywhere in England and Wales which is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions.*
>
> *(2) The power of the Secretary of State under subsection (1) above shall include power—*
>
> *(a) to authorise the acquisition of interests in and rights over land by the creation of new interests and rights.'*

16. Section 154(4) WIA provides that the statutory procedure set out in the Acquisition of Land Act 1981 applies to a CPO under section 155. This includes a test of serious detriment for acquisition of a right over a statutory undertaker's land (paragraph 3 in Part II of Schedule 3 to the 1981 Act).

17. Government guidance on compulsory purchase provides as follows at paragraphs 12 and 13:

> ***'12 How does an acquiring authority justify a compulsory purchase order?***
>
> *There are certain fundamental principles that a confirming minister should consider when deciding whether or not to confirm a compulsory purchase order*
>
> *……*
> *A compulsory purchase order should only be made where there is a compelling case in the public interest.*
>
> *An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights*
>
> *……*
>
> ***13. How will the confirming minister consider the acquiring authority's justification for a compulsory purchase order?***

The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be.'

18. Once a CPO is confirmed, the Secretary of State's decision to do so is open to challenge in the courts on limited grounds, analogous to those of a judicial review. The principles of review of a compulsory purchase order were laid down by Elias LJ in Margate Town Centre Regeneration Ltd v SSE [2013] EWCA Civ 1178:

'17. The applicable law is not in dispute and so I will summarise the relevant principles briefly.

a) A CPO should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected."

b) A consequence of principle (a) is that "the draconian nature of the order will itself render it more vulnerable to successful challenge on Wednesbury/ Ashbridge grounds unless sufficient reasons are adduced affirmatively to justify it on the merits."

c) The grounds of challenge under section 23 do not entitle the court to revisit the merits of the decision, only to see whether there is any legal or procedural error in the confirmation.

d) When deciding whether or not to confirm an order, the Secretary of State must have regard to all material considerations and must not take into account immaterial considerations. But it is for the court to decide what are material considerations.

e) The reasons for a decision must be intelligible and adequate. In determining whether those criteria are satisfied the decision letter must be read fairly as a whole, as if by a well-informed reader.

f) The Court should interfere only if the decision leaves a "genuine as opposed to a forensic doubt" as to what has been decided and why.

g) *Where a decision maker has erred in law the decision should be quashed unless the court is satisfied that the decision maker would necessarily have made the same decision had the error not been made.'*

The legal provisions which formed the discharge proviso sought by MSCC before the Inspector

19. At the inquiry, MSCC proposed that UU's right of discharge be subject to sections 117(5), (6), 186(1)(3), (6) and (7) and Schedule 12 paragraph 4 of the WIA. These provisions provide as follows:

20. Section 117(5) and (6) WIA provides:

> *'(5) Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall –*
>
> a. *in contravention of any applicable provision of the Water Resources Act 1991 or the Environmental Permitting (England and Wales) Regulations 2016 (5.1. 2016/1154); or*
> b. *for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect prejudicially the purity and quality of the water in the stream, watercourse, canal, pond or lake.*
>
> *(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'.*

21. Section 186(1)(3)(6) and (7) WIA provides as follows:

> *'186 — 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.*

...

(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."*

22. Schedule 12 paragraph (4) provides as follows:

'(1) Subject to the following provisions of this paragraph, a sewerage undertaker shall make full compensation to any person who has sustained damage by reason of the exercise by the undertaker, in relation to a matter as to which that person has not himself been in default, of any of its powers under the relevant sewerage provisions.

(2) Subject to sub-paragraph (3) below, any dispute arising under this paragraph as to the fact of damage, or as to the amount of compensation, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, by the Authority.

(3) If the compensation claimed under this paragraph in any case does not exceed £5,000, all questions as to the fact of damage, liability to pay compensation and the amount of compensation may, be referred to the Authority for determination under section 30A of this Act by either party.

...

(5) No person shall be entitled by virtue of this paragraph to claim compensation on the ground that a sewerage undertaker has, in the exercise of its powers under the relevant sewerage provisions, declared any sewer, lateral drain or sewage disposal works, whether belonging to that person or not, to be vested in the undertaker.'

23. It was common ground that 'relevant sewerage provisions' does not extend to section 155 of the WIA (see section 219).

The Inspector's report

24. The Inspector's report sets out a detailed summary of the cases of UU and MSCC (pages 4-179). At the start of his summary of UU's case, the Inspector states that '*the case set out below is an edited summary of the Acquiring Authority's closing submissions... The text below omits matters such as… compensation, which would be a matter for the Upper Tribunal.'* (§15).

25. The summary of each party's case is followed by a shorter section on the Inspector's conclusions, which cross refers to relevant aspects of the case of each party. The Inspector directs himself that the statutory authority for the acquisition is section 155 WIA and addresses the test set out in the CPO guidance as follows (the numbers in square brackets refer to relevant paragraphs of the Inspector's summary of the case for each party):

'848…Much of the advice within the CPO guidance refers to land acquisition under s.226(1)(a) of the Town and Country Planning Act 1990. While this Order is made under s.155 of the 1991 Act, the CPO guidance is nonetheless relevant to the compulsory acquisition of land and rights within the Order. Paragraph 2 of the CPO Guidance states that:

a. *An Acquiring Authority should use CPO powers where it is expedient to do so, but a CPO should only be made where there is a compelling case in the public interest;*
b. *An Acquiring Authority will be expected to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement.*
c. *Acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. [437, 438]*

849. Paragraph 12 of the CPO Guidance restates points a) and c) as being fundamental principles that an Acquiring Authority should address to justify a CPO. Guidance in paragraph 13 confirms the need for it to be shown that sufficient resources would be available to deliver the scheme. [439, 440]'

26. The Inspector also notes the test of serious detriment for the acquisition of a right over a statutory undertaker's land before saying

'However, before addressing these fundamental matters, I shall deal with the detailed terms of the Order that remain in dispute between the two remaining parties…' (§853).

27. He addresses various matters in dispute as to the terms of the order before turning to the protective provisions under scrutiny before the Court, which he addresses as follows:

'<u>Dispute over the Discharge Proviso</u>

908. MSCCL have proposed the inclusion of a discharge proviso… In doing so, MSCCL notes that the justification for the discharge proviso is independent from the evidence that had been heard during the Inquiry as the protections it seeks to provide are already a matter of general law. However, the evidence to the Inquiry includes the Acquiring Authority's case, which is the basis of its view that the discharge proviso is not required. [409-411, 738]

909. The Acquiring Authority is unambiguous that it is the right to discharge that resulted in the need for this Inquiry as other matters could have been addressed through the powers provided under s.159 of the 1991 Act. The company is also clear in its view that MSCCL's proposed discharge proviso is an unnecessary addition to the Order, not least as any discharge would be regulated. Water quality in the Canal and other watercourses that feed into it, such as Salteye Brook, are regulated by the Environment Agency. Also, the Acquiring Authority has dealt with the meaning of s.186 of the 1991 Act, including its application as set out in s.186(1). Consequently, the discharge proviso's reference to s.186 of the 1991 Act would seek to duplicate the regulation that already applies to these watercourses and would do to the proposed outfall. And in any event, and as set out in the detailed legal view provided at paragraph 415 of this report, it has not been shown that s.186 is applicable to the Order Scheme. [48, 72, 74, 102, 137-140, 298, 299, 406-408, 411- 413, 415, 434, 547, 550, 737, 738, 740-777, 815, 824]

910. Turning to the discharge proviso's reference to s.117(5) and (6) of the 1991 Act. The Acquiring Authority notes: this Inquiry to have provided the independent scrutiny sought of the potential interference with private rights resulting from acquisition under s.155; that s.117 is intended to be applied to rights exercisable through other sections of the 1991 Act, rather than s.155 which is the subject of this Inquiry; the relevance of environmental permitting as set out above; that as a result of these, constraining a private right would be unnecessary; and, the proviso would be unreasonable and unnecessary as the water quality evidence that sought to support it has been abandoned. I find the Acquiring Authority's arguments on this matter to be convincing. [408, 413, 414, 737, 738, 740-777]

911. The Acquiring Authority has also addressed the proposed inclusion of reference to Schedule 12(4) of the 1991 Act in the discharge proviso and noted MSCCL's previous query regarding Schedule 12's relevance for its protection. It is clear from paragraph 1 of Schedule 12, that Schedule 12 protections do not apply to s.155 of the 1991 Act and were not intended to be used as MSCCL propose in its Schedule 1 to the Order (MP/INQ/71.1). As noted above, discharges from the new outfall would be regulated by the Environment Agency and be the subject of an environmental permit. In addition, compensation would be payable for any damage sustained from the Order Scheme. Accordingly, paragraph 3 should be deleted from Schedule 1 of MSCCL's proposed protective provisions. [416-421, 743-760]'

28. The Inspector then turns to consider the justification for the order. He notes that the starting point for justification is the test in section 155(1) WIA, namely, that the order is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions. He observes that the Inquiry heard extensive evidence from UU regarding the background to the Order Scheme and the regulatory environment that has shaped UU's decision making (912). He goes on to set out the relevant evidence as follows:

> *'914. The Acquiring Authority is the statutory water and sewerage undertaker for the North West of England and is obliged to drain its areas and to meet regulatory requirements for its discharge. The Order Scheme is part of the ongoing investment to improve quality of water courses in the catchment, including Salteye Brook. It was the EA's preferred option to divert the Eccles WwTW's final effluent discharges from Salteye Brook to the Canal to improve the water quality in Salteye Brook. The Order Scheme would achieve this through a gravity system that reduces the need for pumping. [17, 25, 30, 44, 47, 73-83, 101, 104, 105, 116-118, 145, 164, 173-193, 422, 423, 427, 431]*
>
> *915. Environmental regulation of the Acquiring Authority's operations is closely aligned with the economic regulation of the company. This has provided the Acquiring Authority with clear objectives for improving the drainage of its areas. The works that are needed to meet those objectives are planned within the context of the company's five-year AMP cycle. Requests to change the 28 February 2015 date for meeting the EA's regulatory objectives have been turned down, and the missed regulatory delivery date is a matter that highlights the Order Scheme is required. [74, 102, 104-108, 120-122]*
>
> *……*
>
> *918. Alternative options have been considered by the Acquiring Authority, and suggested during the Inquiry. None have been shown to be preferable to the Order Scheme for the meeting of current regulatory requirements. There is no remaining objection in relation to alternatives. [115, 116-120, 140-144, 150, 432, 433, 824]'*

29. His conclusion on the requirement for the proposed scheme is as follows:

> *'924. The Order Scheme is required to enable the delivery of the Full Scheme and the public interest (and environmental) benefits that would be realised by completing the Full Scheme. In doing so, the Order Scheme would provide necessary infrastructure that would enable regulatory objectives for Eccles WwTW to be met. [422, 423, 427, 430, 461-463]*

...

926. The evidence, and the testing of it during the Inquiry, demonstrated that: there is a clear regulatory (and environmental) requirement for the Order Scheme; it is the most appropriate option for meeting that need; ....

927. Consequently the Order Scheme and the lands within it, subject to amendments detailed in the Annex below, meet the requirement test in s.155(1) of the 1991 Act.'

30. He applies, by analogy, the CPO guidance on acquisition of land by local authorities for planning purposes relevant to justification, (paragraphs 104 – 106 of the guidance), and concludes that the purpose of the CPO fits within the adopted planning framework; there are no impediments to implementation; the purpose for which UU is proposing to acquire the land could not be achieved by any other means and the project is financially viable.

31. He then turns to consider the public interest as follows:

'Compelling case in the public interest

938. Paragraph 2 of the CPO Guidance confirms that an Acquiring Authority should use CPO powers where it is expedient to do so, but a CPO should only be made where there is a compelling case in the public interest. While MSCCL has raised concerns on two matters, which are dealt with above, no objector now disputes the need for the Order or the compelling case in the public interest for it to be confirmed. [24, 424, 437-439, 441, 523]

939. Paragraph 106 of the CPO Guidance confirms the factors the Secretary of State will take into account in decisions on whether to confirm a CPO to include the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area. These matters were addressed by the Acquiring Authority's evidence in this case and are summarised in my conclusions on 'Requirement' above. [425- 429]

940. As set out above, alternatives to the Order Scheme have been explored, both in terms of: the method by which regulatory and environmental objectives would be met; and for the option chosen, the broad design principles for what is now proposed. [432, 433, 445-455]

941. The Inquiry heard extensive evidence regarding: the operation of the

Eccles WwTW; the steps taken to improve the quality of water courses in the catchment that includes the Canal and Salteye Brook; and, how the Order Scheme would contribute to the economic, social and environmental well-being of the area. The Order Scheme would provide the improvements in water quality sought for Salteye Brook, and while the new outfall would discharge directly into the Canal, it would nonetheless have an overall beneficial effect on the Canal and the environment around it. [33, 47, 117-120, 124, 456-463, 824]

942. In addition to the environmental improvements in relation to water quality, the proposed option would be a better use of resources that would result in economic benefits for both the undertaker and its customers. The astute and convincing fiscal argument for the chosen option, along with the resulting efficient use of resources, would result in social benefits from economic efficiency, and that would be expected to be reflected in reduced bills to the Acquiring Authority's customers. Social benefit would also be derived from a reduction in the level of flood risk to properties on Peel Green Road that connect to the sewer network upstream of Eccles WwTW. [30, 114, 151, 152, 164, 168, 171, 433, 452, 824]

943. Given the Acquiring Authority's statutory function, and the regulatory requirements it seeks to meet through the Order Scheme, a compelling case in the public interest has been clearly made for confirmation of the Order. [16-19, 25, 29, 30, 75-83, 422-436, 480, 495, 824].'

32. His report concludes by addressing human rights:

'<u>Human Rights</u>

944. Paragraph 2 of the CPO Guidance confirms that when making or confirming an order "...acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected...".

945. The Acquiring Authority draws attention to benefits that would result from the Order Scheme, including: addressing the need to improve the water quality of Salteye Brook; provision of upgraded sewerage infrastructure next to a regionally significant site; and benefits for the locality, which would include flood risk in the Peel Green Road area. Further details on the Order Scheme's social, economic and environmental benefits are set out above. Also, compensation would be

available to those entitled to it.

946. The evidence, along with exchanges during the Inquiry and submissions to it, demonstrate that the Acquiring Authority has considered realistic alternative approaches that were discounted for various reasons and eventually led to selection of the option that is the Order Scheme. In regard to the European Convention on Human Rights and the Human Rights Act 1998, it is apparent that the benefits of the Order Scheme, which would be gained through the purposes for which the compulsory purchase order is made, would justify any interference in interests otherwise protected by Convention rights. [Section 13 of the SoR CD/CPO/3, 474-477]'

The Secretary of State's decision

33. In a "minded to" letter, dated 3 December 2020, the Secretary of State said:

'*…the Secretary of State agrees that the requirement for the discharge proviso is unnecessary because [---] the discharge will be regulated by the Environment Agency. In addition, compensation is payable for any damages sustained by the order scheme.'*

34. Turning to human rights, the letter stated:

'13. The Secretary of State has carefully considered whether the purposes for which the compulsory purchase order was made sufficiently justify interfering with the human rights of the objectors under section 12(2A) of the Acquisition of Land Act 1981 and he is satisfied that such interference is justified. In particular he has considered the provisions of Article 1 of the First Protocol to, the European Convention on Human Rights. In this respect the Secretary of State is satisfied that in confirming the compulsory purchase order a fair balance would be struck between the public interest and interests of the objectors.'

35. By decision letter dated 14 October 2021, it was said:

'The Secretary of State has carefully considered whether the purposes for which the compulsory purchase order was made sufficiently justify interfering with the human rights of the objectors under section 12(2A) of the Acquisition of Land Act 1981 and he is satisfied that such interference is justified. In particular he has considered the provisions of Article 1 of the First Protocol to, the European Convention on Human Rights. In this respect the Secretary of State is satisfied

that in confirming the compulsory purchase order a fair balance would be struck between the public interest and interests of the objectors.' (§8)

Ground 1 Erroneous application of a test of necessity

36. MSCC's overarching case on Ground 1 is that the Inspector erroneously applied a test of necessity in deciding not to include the discharge proviso within the terms of the CPO. More particularly, MSCC alleges seven specific errors in the decision making, as follows:

    1. The Inspector treated the issue as being one as to which MSCC bore a persuasive burden whereas, the issue having been raised, the correct approach in law was to impose upon UU as the Acquiring Authority the burden of demonstrating why it needed an unlimited right uncircumscribed by the discharge proviso.
    2. The Inspector accordingly disregarded as irrelevant the fact that UU did not advance any positive argument in favour of the grant of a wider right and confined its submissions to criticism of MSCC's case, which did not include any suggestion that the inclusion of the discharge proviso would in any respect undermine the purposes and objective of the scheme underlying the Order.
    3. The Inspector construed the protections afforded by the discharge proviso as being equivalent to and no greater than the protection afforded by the regulation of the discharge by the Environment Agency (and accordingly unnecessary since they would add nothing to that method of control), despite the fact that in the 1991 Act Parliament had expressly imposed equivalent provisos upon all similar discharges made pursuant to implied statutory power, notwithstanding that all such discharges would likewise be regulated by the Environment Agency.
    4. The Inspector treated the compensation provisions of the compulsory purchase code as being apt and sufficient to compensate MSCC for the injuries and losses whose actionability the discharge proviso would have expressly preserved, whereas the compulsory purchase code is not intended to provide, and does not provide, a substitute for private law remedies for intermittent future injury caused by the exercise of any right granted.
    5. The Inspector treated as a material counter-argument to the inclusion of the discharge proviso, the fact that the 1991 Act did not apply the statutory provisos to the operation of section 155, whereby the Secretary of State was empowered in general terms to authorise the compulsory purchase of land by inter alia sewerage undertakers;
    6. The Inspector treated the scrutiny of the scheme afforded by the compulsory purchase code, and in particular the process of the Inquiry, as rendering the protections afforded by the discharge proviso unnecessary or otiose.
    7. The Inspector treated as a material counter-argument to the inclusion of the discharge proviso the fact that on the evidence the discharge as currently proposed would not be deleterious to water quality in the Canal.

Discussion of Ground 1

The discharge proviso sought by MSCC before the Inspector

37. Before the Inspector, MSCC sought the inclusion of sections 117 (5)(a) and (b); 117(6); 186(1), (3), (6) and (7) and Schedule 12 paragraph, 4 WIA in the terms of the CPO. The provisions were presented, in effect, as a package of measures. MSCC did not order the provisions in any sort of hierarchy or suggest alternative approaches. Taken together, in broad terms, they provide that the sewerage undertaker is not authorised to use the outfall in breach of any environmental regulation or so as to 'affect prejudicially the purity and quality of the water' or so as to 'injuriously affect' the receiving water. The sewerage undertaker must not create a nuisance. The landowner's consent is required for certain works. Full compensation for 'damage' sustained by a person by reason of the exercise of the undertaker's powers is payable. I have not been pointed to any discussion before the Inspector as to the practicalities of how the provisions, which may be said to form their own complex interlocking scheme of regulation, would operate, alongside the grant of authority to UU to discharge 'water, soil and effluent from the sewers and outfall and groundwater into Manchester Ship Canal'. There do not appear to have been any detailed discussions or negotiations between the parties as to the machinery of the provisions, as might have been expected given the terms of the CPO were the only outstanding issue by the end of the inquiry. As examples; there appears to be the potential for conflict between the grant of a right to UU to discharge effluent into the Canal and section 117(5)(b) which provides that an undertaker is not authorised to convey 'foul water' without treatment. It is not clear how the broad concepts of 'injuriously to affect' or 'prejudicially to affect' would be interpreted. It is not clear whether, in the event of an alleged 'injurious affection' of the canal, the proviso would enable MSCC to seek an interim injunction, to shut down UU's operations pending resolution of the dispute between the parties.

MSCC's case before the Inspector

38. In closing submissions to the inquiry, MSCC made its case in relation to the inclusion of the provisions as follows. Its case was said to be 'independent' of the evidence before the inquiry, including the water quality evidence as to the impacts of the proposed scheme. It was said to rest on parity with the application of the provisions to pre-1991 implied rights of discharge under the Act (it was common ground that the provisions apply to an implied right to discharge). Without the proviso, it was said, UU's discharge to the Canal would be the only one nationwide not to include protective provisions for the benefit of the landowner. The right to discharge would be expressed in the widest possible terms. MSCC drew a contrast, in this regard, with the position in the absence of a CPO where use of a new outfall would require the consent of the owner of the receiving watercourse and the need for consent would itself enable the owner to *'...to regulate carefully the parameters of the outfall and the discharges*

from it, by reference to the location and dimensions of the outfall and the flows, total volumes and constituency of the discharges through it.' The lack of parity with an implied right to discharge was said to present an anomaly that could not be justified in the public interest. A similar reference to public interest considerations appears at §236 of the submissions. UU had not justified why it needed such a broad unlimited right to discharge or why there is a compelling case in the public interest for such a right. There was no good reason why the more restricted right proposed by MSCC was not sufficient and it was for UU to demonstrate a compelling case in the public interest for the full extent of the right it sought.

39. MSCC further submitted that the additional layer of statutory protection offered by section 117(5)(b) is to be regarded as separate from and additional to the controls set out in the environmental permitting regime. The drafting of section 117(5) makes clear that the protection afforded by sub-paragraph (b) is in addition to the protection afforded by sub-paragraph (a). The arguments in relation to section 117(6) were said to be essentially the same.

40. It was said that if the terms of the order were given literal effect:

> *'...it is an entirely unfettered private law right for UUWL to discharge, in perpetuity, whatever it sees fit into the Canal, including (by way of example) unlimited quantities of entirely untreated raw sewage. No limitation on that right is proposed on the face of the draft Order, either in terms of what may be discharged, the frequency and volume of discharge, or its effects on the Canal. Indeed there is nothing expressed on the face of the order to prevent UUWL in the future from enlarging without limit the outfall and the pipework serving it'* (§235 closing submissions).

41. As regards the ability of a landowner to take action to enforce the protection provided, the following was said:

> *'Issues as to enforcement of statutory protections*
>
> *253.Arguments as to whether or not the owner of a receiving watercourse would or would not themselves be able to take legal action to enforce certain of these statutory protections (the subject of separate legal dispute between the parties) are irrelevant for present purposes. If there are disputes about those matters they are for another day and another forum. Parliament has created the protections and considered them to be appropriate in the public interest regardless of who would ultimately prove to be the person or body able to enforce them. The answer to that question does not detract from their appropriateness for*

implied rights to discharge and equally it does not detract from their appropriateness in relation to rights to discharge acquired by compulsion.'

An unfettered private law right for UU to discharge effluent in perpetuity

42. MSCC's characterisation of the right granted by the CPO as "an unfettered private law right for UU to discharge effluent in perpetuity into the Canal" ignores the statutory context in which the right was granted; the process by which it was granted and the economic and environmental regulation of UU. In turn, these factors provide necessary context to assess the Inspector's decision and the alleged errors in his decision-making.

43. It is apparent from the relevant paragraphs of the Inspector's report that his reasons for considering the proviso to be unnecessary include: that the discharge will be regulated by the Environment Agency; the public inquiry had provided an opportunity for an independent scrutiny of the potential interference with MSCC's rights; the legal provisions within the discharge proviso do not apply to a right granted under section 155 WIA; the water quality evidence demonstrated a beneficial impact on the water quality of the Canal and compensation would be payable for any damage sustained (§908-911).

The statutory context underpinning the provision of sewerage services

44. Sewage disposal and drainage have been the subject of statutory regulation for 500 years. The current legislation comprises the Water Industry Act 1991 and was analysed by the House of Lords in Marcic v Thames Water [2003] UKHL 66 at §11 onwards.

45. UU carries on its business as a sewerage undertaker within the statutory framework of the WIA, which lays down the powers and duties of sewerage undertakers. In particular, section 94 of the Act sets out the principal general duty on every sewerage undertaker to ensure its area is properly drained, by providing an appropriate system of sewers:

'(1) It shall be the duty of every sewerage undertaker—

(i) 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…'

46. An undertaker's duty under s94 is enforceable by the Water Service Regulation Authority (Ofwat), the regulator of the water and sewerage industry, through the

imposition of enforcement orders pursuant to section 18 of the WIA. A company is required to comply with an enforcement order (section 18(5)). A contravention of a statutory requirement to which section 18 applies does not necessarily result in an enforcement order. As an example, the sewerage undertaker may put matters right pursuant to an undertaking, or Ofwat may conclude that other considerations, to which the regulator is obliged to have regard, militate against the making of an order. Where contravention of a statutory requirement is enforceable under section 18, section 18(8) limits the availability of other remedies:

> '*(8) Where any act or omission constitutes a contravention of ... a statutory or other requirement enforceable under this section, the only remedies for that contravention, apart from those available by virtue of this section, shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention.'*

47. Pursuant to section 22 WIA, a company's obligation to comply with an enforcement order is 'a duty owed to any person who may be affected by a contravention of the order'. A breach of this duty causing loss or damage to the person to whom the duty is owed is actionable at the suit of that person. In any ensuing court proceedings, the company has a 'due diligence' defence. An enforcement order is also enforceable by civil proceedings brought by the Director for an injunction or other appropriate relief.

Compulsory purchase under section 155 WIA

48. Sewerage undertakers are provided with various powers under the 1991 Act to enable them to fulfil their statutory functions. These include the power to lay and maintain pipes under private land under section 159 and, of particular relevance for present purposes, the power of compulsory purchase under section 155 WIA. The latter power extends, not just to the acquisition of land, but also to the creation of new interests and rights.

49. A compulsory purchase order should only be made where there is a 'compelling case in the public interest' (Compulsory Purchase Order Guidance paragraph 12 and Margate Town Centre Regeneration Ltd v SSE [2013] EWCA Civ 1178 at (§17)). By the end of the inquiry, MSCC did not dispute that there was a compelling case in the public interest for the Order. The Inspector and Secretary of State concluded to the same effect.

50. Section 155(4) WIA applies the procedure for compulsory purchase set down in the Acquisition of Land Act 1981 to an order under section 155 WIA. When an order is

made, notice is given to owners and occupiers who have a specified timescale in which to object. If objections are received a public inquiry will be held at which any objector may be heard. The acquiring authority must make good its case in support of the acquisition by fully detailed evidence which can be challenged by the landowner. It is at this stage that the merits of the proposed acquisition are examined and assessed. A Ministerial decision to give authority for the compulsory acquisition will generally be based on the facts found and recorded in the report produced by the Inspector following the inquiry.

51. The nature of the public inquiry into a CPO was explored by the Court of Appeal in R v Secretary of State for Transport ex p de Rothschild [1989] 1 All ER 933. The Secretary of State's decision to confirm a CPO is not a hearing simply between the parties. In the event of objections, it follows a public inquiry at which the acquiring authority and the objectors are present and put forward their cases. There is also an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Secretary of State to have regard to the public interest. In making his decision, there are a multitude of different and competing factors which the Secretary of State has to take into account and into the balance of the decision making. All the facts and arguments are investigated and ultimately the decision maker performs a balancing exercise, balancing factors against each other which are not all compatible; and cannot be the subject of direct comparison. These principles are reflected in the Government's CPO guidance, cited by the Inspector in his report, which provides that the minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest (paragraph 13 of the CPO Guidance).

Economic regulation of UU

52. Economic regulation of UU is provided by Ofwat. The role of Ofwat is set out in the WIA and includes; protecting the interests of customers and promoting competition; ensuring water companies can finance their statutory functions; and securing long term resilience of companies' water and wastewater systems so that they are able, in the long term, to meet customers' expectations of the service.

Environmental regulation of UU

53. Environmental regulation of UU is of particular relevance to the issues raised by the challenge. It is principally provided by the Environment Agency, which participates in the process of regulation by Ofwat, but also sets relevant environmental restrictions on UU's activities. The Agency is responsible for implementing, monitoring and enforcing the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154). The reason UU has found it necessary to seek the right to discharge into

the Canal is because its discharges into Salteye Brook are not meeting the requisite environmental standards set by the Agency. Going forwards, UU will be required to obtain an environmental permit in respect of any discharge from the new pipe and outfall into the Canal. Under the 2016 Regulations:

> *'12. (1) A person must not, except under and to the extent authorised by an environmental permit*
>
> *(a) operate a regulated facility, or*
>
> *(b) cause or knowingly permit a water discharge activity or groundwater activity.'* (Regulation 12)

54. The terms of an environmental permit are determined by the Environment Agency pursuant to Schedule 5 of the Regulations and may cover the quality and volume of the discharged effluent and the circumstances in which it is permitted to occur. The permit will enable ongoing supervision and control of the discharge of effluent into the Canal. In the event of any failure to comply with the permit there are a range of enforcement measures, including revocation of permits and prosecution. Any entry or discharge of poisonous, noxious or polluting matter or of sewage or trade effluent to waters is a criminal offence unless done under and in accordance with an environmental permit (Regulations 12 and 38).

Parity of landowner protection: implied and express right to discharge (Errors 3 and 5)

55. Before the Inspector MSCC's case for inclusion of the proviso was based, in large part, on a point of general principle, namely that it should have parity of protection with the protection available to a landowner under an implied right to discharge under the WIA, which is the basis for the existing discharge into Salteye Brook. This principle underlies Errors 3 and 5.

56. Under the WIA, there is, however, a material distinction between an express and implied right to discharge effluent. As was common ground, the various provisions of the WIA which comprises the discharge proviso, do not apply to the grant of a right pursuant to section 155 WIA. Parliament has therefore seen fit to exclude them.

57. An explanation for the distinction is provided by the Supreme Court in Manchester Ship Canal Ltd v United Utilities Water plc [2014] UKSC 40, a case in which MSCC sought damages for trespass in respect of UU's discharges from its outfalls into its canals. UU applied for summary judgment on the basis that on privatisation of the water industry it inherited a pre-existing implied statutory power to discharge into private watercourses without the owner's consent. The Supreme Court held that a general right to discharge into private watercourses could not be implied in the WIA 1991 but the Act implicitly authorised the continued use of existing sewers since otherwise it would be impossible for undertakers to lawfully perform their functions.

In his judgment Lord Sumption explained the rationale for the distinction and made specific reference to the position where, as in the present case, the undertaker, proposes to bring an outfall into use for the first time after December 1991:

> *'17 ... A sewerage undertaker bringing an outfall into use for the first time after 1 December 1991 can reasonably be expected to have obtained any necessary consents to discharge onto private property in advance of laying the pipes, either by negotiation or by compulsory purchase in the course of the planning or the works. But if the outfall was already in use at that date, it cannot do this. The pipes will already have been laid. The location of their outfalls will have been determined…..*

The importance of the inquiry process (Error 6)

58. As alluded to by Lord Sumption in his analysis above, the process by which an Order under section 155 is obtained enables a case by case assessment of the appropriate protection for a landowner. This takes place either by consensual negotiation or by way of public inquiry. The latter provides a landowner whose interests will be affected by the order with the opportunity to raise objections which are independently scrutinised by an Inspector. The Inspector balances the interests of the landowner in question against the intentions of the acquiring authority, the concerns of other objectors (if any) and the wider public interest.

59. The Inspector was alive to the role of the inquiry, as is apparent from his reference to '*this Inquiry to have provided the independent scrutiny sought of the potential interference with private rights resulting from acquisition under s.155; that s.117 is intended to be applied to rights exercisable through other sections of the 1991 Act, rather than s.155 which is the subject of this Inquiry;' (§909).* There is therefore no error of law in him treating the scrutiny of the scheme afforded by the inquiry process as significant (Error 6).

The significance of environmental regulation (Error 3)

60. MSCC seeks to criticise the Inspector for construing the protection afforded by the proviso as equivalent to the regulation of the discharge by the Environment Agency (Error 3). This criticism seeks to downplay the precise and detailed system of control provided by the environmental regulation of UU's activities (see above).

61. Moreover, in closing submissions, to the Inspector, MSCC highlighted the position without a CPO in place, where the owner of a receiving watercourse could, it was said, *'…<u>regulate carefully</u> the parameters of the outfall and the discharges from it, by reference to the location and dimensions of the outfall and the flows, total volumes and constituency of the discharges through it'*. (underlining is Court's emphasis). The

implication of the submission appears to be that MSCC ought to exercise some form of supervisory control over UU activities. This would be to subject UU to two 'regulators'- regulation by the Environment Agency, operating a detailed and precise regulatory regime and regulation by MSCC operating via statutory provisions expressed in loose terms with next to no machinery for their effect and operation. Given the litigious history between MSCC and UU, the result could produce uncertainty for UU which has a statutory duty under the WIA to provide a public sewerage system in the North West of England. Accordingly, there is no error in the Inspector placing weight on the Environment Agency regulating the discharge, over and above the 'regulation' afforded by the discharge proviso.

The relevance of the water quality impact of the scheme (Error 7)

62. I am not persuaded of any error of law in the Inspector treating as material the evidence that the discharge will not be deleterious to water quality in the Canal (Error 7). There is an obvious rationale for the Inspector to take account of the evidence given the provisions sought by MSCC are directed in large part to the impact on the receiving water. The inquiry looked in detail at the water quality evidence before MSCC withdrew its objection to the evidence. In this respect the Inspector was doing no more than considering the evidence and balancing the relevant factors (R v Secretary of State for Transport ex p de Rothschild [1989] 1 All ER 933 and paragraph 13 of the Guidance). The ground is, in essence, a repeat of MSCC's case before the Inspector that the discharge proviso should be considered independently of the evidence. Given the water quality evidence supports a conclusion that the proviso is not needed, there may be said to be some force in UU's submission that MSCC is simply seeking to exclude unfavourable evidence from consideration.

Compensation (Error 4)

63. Before the Inspector MSCC sought the inclusion of Schedule 12, paragraph 4 WIA, which provides, in relevant part, that a sewerage undertaker shall make full compensation to any person who has sustained damage by reason of the exercise by the undertaker of any of its powers under the relevant sewerage provisions.

64. Schedule 12, paragraph 4 WIA does not apply to the grant of a right under section 155 WIA and the only point made by MSCC in relation to the issue in its closing submissions was as follows:

> *'As with the other statutory provisions identified above, there is no proper public interest rationale for leaving MSCCL in a worse position than it is at present, simply because the right is acquired by compulsion'* (§252 closing submissions).

65. Accordingly, before the Inspector the point being made was a repeat of MSCC's broader case, considered above, that it should have parity of protection as between rights implicitly and explicitly authorised under the WIA. However, as pleaded, error 4 is that the Inspector treated the compensation provisions of the compulsory purchase code as being apt and sufficient to compensate MSCC for the injuries and losses whose actionability the discharge proviso would have expressly preserved, whereas the compulsory purchase code is not intended to provide, and does not provide, a substitute for private law remedies for intermittent future injury caused by the exercise of any right granted. It is apparent from a review of the MSCC's closing submissions that nothing was said as to the compulsory purchase code being inadequate. The absence of submissions is also apparent from the fact the Inspector expressly excluded compensation from his summary of UU's case, on the basis it was a matter for the Lands Tribunal.

66. Accordingly, error 4 seeks to criticise the Inspector and Secretary of State for not dealing with a case that was not put to them. They cannot be criticised for taking matters on the basis they did, namely that compensation would be available for damage sustained by the order scheme.

Persuasive burden erroneously imposed on MSCC and failure of UU to justify the grant of the wider right (Errors 1 and 2)

67. I am not persuaded that the Inspector treated inclusion of the discharge proviso as an issue on which MSCC bore a persuasive burden (Error 1). His consideration of the proviso was an integral part of his wider decision making and followed, in this respect, his rejection of MSCC's proposition that he should consider the proviso independently from the evidence (§908). His report begins with a detailed summary of the cases of UU and MSCC, which runs to approximately 180 pages. His conclusions are expressed succinctly, by means of cross references to the relevant paragraphs from the parties' case, on which his conclusions are based.

68. He begins his conclusions by directing himself on the legal framework, as to which there is no challenge, namely that the statutory authority for the acquisition is section 155 WIA. A CPO should only be made where there is a compelling case in the public interest. The purposes for which the compulsory purchase order is made must justify interfering with the human rights of those with an interest in the land affected. As a statutory undertaker, MSCC's land can only be taken if it can be done without serious detriment to the company (section 16(2) Acquisition of Land Act). The Inspector then states:

> *'However, before addressing these fundamental matters, I shall deal with the detailed terms of the Order that remain in dispute between the two remaining parties…'.*

69. He addresses the inclusion of the discharge proviso at §908- 911, concluding that the proviso is not necessary before turning to consider the requirement for the CPO and the compelling case in the public interest for the order.

70. There is nothing in the language of §908-911 to suggest the Inspector is applying any burden of proof. It is apparent from the paragraphs in question, particularly the cross referencing, that the Inspector has formed his view by taking into account the arguments and evidence put forward by both parties and by weighing up the competing factors. This is the task he was required to perform ((R v Secretary of State for Transport ex p de Rothschild [1989] 1 All ER 933), as reflected in paragraph 13 of the CPO guidance to which he directed himself to). His decision was reached on the basis that he found the case advanced by UU to be 'convincing' (the Inspector's own words).

71. MSCC submits that the Inspector failed to take into account that UU did not advance any positive argument in favour of the grant of a wider right and confined its submissions to criticism of MSCC's case (Error 2). This rests on an artificially narrow assessment of paragraphs 908-911. The Inspector's analysis is based on all the evidence before him, having specifically rejected MSCC's suggestion that the proviso be considered independently from the evidence. It is apparent, therefore, that UU's justification was extensively explored over 29 days of public inquiry and set out in the Report. It included evidence which demonstrated a beneficial impact on water quality in circumstances where the discharge proviso is directed in large part to the quality of the receiving water. Having assessed the evidence and arguments the Inspector concluded that that discharge proviso was unnecessary.

Drawing the strands together

72. Drawing the strands together: the Inspector reaches an assessment that inclusion of the protective provisions sought by MSCC in the CPO is unnecessary. This is not because he treats necessity as a legal test, as MSCC contends under Ground 1. It is a judgment reached in the public interest, based on a lengthy examination of the evidence, over twenty nine days of the inquiry, where MSCC was represented and put its case fully (as the only remaining objector). His main reasons for considering the proviso to be unnecessary are because the discharge will be regulated by the Environment Agency; the public inquiry had provided an opportunity for an independent scrutiny of the potential interference with MSCC's rights; the discharge provisions do not apply to a right granted under section 155 WIA; the water quality evidence demonstrates that the scheme will have a net beneficial effect on the water quality of the Canal and compensation is payable.

73. The Inspector's decision discloses no error of law. Given the nature of the legal provisions sought by MSCC, there is an obvious rationale to the Inspector taking account of the availability of a detailed and precise environmental regulatory regime, backed up by criminal sanctions and overseen by a specialist regulator, as well as the water quality evidence which demonstrates the scheme will have a net beneficial impact on the Canal. The procedure for the grant of a CPO, in particular the public inquiry, provides an appropriate forum in which to assess any necessary protection for a landowner whose land is subject to a compulsory use. There is a material distinction, in this regard, between an implied right of discharge and the express grant of a right under (Manchester Ship Canal Co Ltd v United Utilities Water plc [2014] UKSC 40). It is apparent from a reading of the relevant paragraphs of the Inspector's report that his decision was not reached on the basis that MSCC had failed to satisfy any particular burden of proof but was because he found the case advanced by UU to be, in his words, 'convincing'. None of the matters referred to at paragraphs 908 – 911 are immaterial and it is not alleged that the overall exercise of the discretion is irrational or that the reasoning is deficient. The Inspector exercised the discretion available to him and formed his view, taking into account arguments and evidence put forward by both parties, as he was required to do so by the inquiry process (R v Secretary of State for Transport ex parte Rothschild [1989] 1 All ER 933).

Raising new points on appeal

74. Before the Court, MSCC developed its case in in ways that were not put to the Inspector (or the Secretary of State).

The scope of the discharge proviso

75. Before the Inspector MSCC sought to include sections 117(5)(a) and (b); 117(6); 186(1)(3), (6) and Schedule 12 para 4 of the WIA to the terms of the order. Before the Court, the company confined the scope of its challenge to sections 117(5) and 186(3) WIA (Counsel for MSCC said during submissions that the company was 'neutral' on the inclusion of section 117(6) WIA).

Private law remedies

76. The Inspector was specifically told that arguments as to whether or not the owner of a receiving watercourse would be able to take legal action to enforce the statutory protections were the subject of a separate legal dispute between the parties and were irrelevant for present purposes. Any disputes about these matters were said to be 'for another day and another forum' (closing submissions at §253). Before the Court, Counsel for MSCC sought to downplay the submission but it appears in MSCC's closing submissions and it is difficult to see how it can be read in any other way than a disavowal of the relevance of private law remedies to the issues before the inquiry.

77. The reference in the closing submission to a 'separate legal dispute' is assumed to be a reference to the ongoing litigation between MSCC and UU concerning the availability of private law remedies in nuisance and trespass in the event of discharges which lack authorisation (by virtue of the provisions of section 117(5) and section 186(3)). The first instance decision ((Manchester Ship Canal Co Ltd v United Utilities Water Ltd [2021] 1 WLR 5871 (Fancourt J)) had been handed down by the time the company issued its grounds for judicial review in this case and is referred to in the grounds for judicial review. The grounds explain that Fancourt J held that the tortious remedies were ousted by section 18 WIA and related provisions of the Act and there that was an extant appeal before the Court of Appeal. By the time of the hearing in this case, the Court of Appeal had handed down its judgment (Manchester Ship Canal Co Ltd v United Utilities Water Ltd [2022] 3 WLR 1193), a decision I return to below.

78. Before the Court, MSCC's case for inclusion of sections 117(5) and 186(3) included the consequent availability of private law remedies to the company in the event of future problems. The effect of the provisions was said to be to deny a sewerage undertaker any authority, in particular a defence of statutory authority, to make polluting discharges (MSCC Grounds). Regulation by the Environment Agency was said to be a form of public law protection which provides no remedy to those affected by breaches of permit. Private law causes of action in trespass or nuisance were said to constitute the only fully effective remedy for injurious discharges. It was said that, absent the discharge proviso, such claims would be met with a version of the defence of "consent" arising from the unfettered terms of the statutory grant of the right of discharge by exercise of compulsory powers (MSCC's skeleton argument). Reliance was placed on the expression of the doctrine of statutory authority in Allen v Gulf Oil Refining Ltd [1981] AC 1001 ('*We are here in the well chartered field of statutory authority. It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away'* [1011] Lord Wilberforce).

79. MSCC continued to refine its case further during the hearing, narrowing its focus to the value of the discharge proviso being to protect MSCC's right to bring a claim based on negligence or deliberate wrongdoing by UU in breach of its environmental permit. Without the proviso, it was said that UU would have a defence of statutory authority to a claim which could otherwise be pursued by MSCC. In his reply, Counsel for MSCC produced, for the first time, a copy of the order of Fancourt J in the first instance proceedings in Manchester Ship Canal Co Ltd v United Utilities Water Ltd. The order provides as follows at paragraph 2:

> '*Upon the true construction of the Water Industry Act 1991, where a discharge into the Canal from sewers vested in United Utilities contravenes ss.117(5)*

and/or 186(3) of the Water Industry Act 1991, the Canal Company may not bring an action in trespass or nuisance against United Utilities in respect of such discharge absent an allegation of negligence or deliberate wrongdoing ....' (underlying is the Court's emphasis)

80. In the circumstances, I permitted all parties to submit written submissions on the point after the hearing. MSCC put its case in writing as follows:

'The matter was addressed in closing in the light of questions from the court as to how practical effect was to be given to the provisos and their use of the general terms of "foul water" and "injurious affection" to define limitations upon statutory authority. It is sufficient on the facts of this case to say that the concession made at the Inquiry represents an acknowledgment that the proposed discharges, if properly permitted by the Environment Agency and made in compliance with the terms of such permit, would not be harmful to water quality in the canal. In this respect (and this respect alone) the point made by UU concerning the rigorous examination of the issue at the Inquiry has relevance and force. Thus on the facts of this case, it is inherently unlikely that discharges made in compliance with an environmental permit (and thus not contravening a proviso in the form of section 117(5)(a)) could be stigmatised as nevertheless contravening a provision in the form of section 117(5)(b) or section 117(6) or section 186(3).

It is however inherently likely that a discharge in exceedance of permit limits might also contravene the provisos in sections 117(5)(b), 117(6) and 186(3). It is in those circumstances that MSCCL asserts that there can be no good reason why such discharges should be permitted (as they prima facie would be) by the terms of the grant in its unfettered form. If such discharges were being made pursuant to the statutory implied right then they would lack statutory authority. The defence of statutory authority would thus not be available to claims in nuisance or trespass. If the discharges were made in circumstances of operational negligence or deliberate misconduct then nor could the principle in Marcic be invoked to oust such claims and to require instead that complaint to Ofwat under section 18 of the Water Industry Act 1991. There would be no possibility of a defence of consent. Private law claims in trespass and nuisance could proceed by way of litigation in the High Court. That possibility cannot properly be stigmatised as an unwarranted "inhibition" on the activities of the undertakers. It is a proper limitation on their powers which is inherent in the statutory scheme. The Supreme Court went to great pains in 2014 to ensure that such was the case.

……

The paradigm example is that due to operational negligence in the management of the treatment works, there is a catastrophic failure of treatment and a discharge of undiluted, untreated sewage through the new outfall into the canal, with resulting pollution and injurious affection. Another example would involve premature spilling of the overflows, resulting in a discharge of (somewhat) diluted untreated sewage. Such circumstances would ordinarily (including in the case of the existing discharges into Salteye Brook) constitute the torts of trespass and nuisance and private law claims would not be "Marciced" since the element of negligence or deliberate misconduct would be present. Such discharges do occur and frequently come before the criminal courts for trial and sentence (see e.g. the sentencing remarks of Johnson J in Environment Agency v Southern Water Services Ltd, 9 July 2021, unreported.

If the grant in the Order remains as confirmed, then, as identified above, the defence of consent is prima facie available. There would be nothing in the terms of the Order to preclude such discharges so long as they satisfy the description of "water, soil or effluent"'.

Adequacy of compensation

81. In relation to the adequacy of compensation, the following was said in MSCC's grounds for appeal:

'53…The modified form of section 7 of the Compulsory Purchase Act 1965 which is applicable …. is apt to provide compensation for what might be termed "chronic injurious affections" arising from the permanent and/or inevitable effects of the creation and routine exercise of a new right over land, but manifestly inapt to do so in the case of "acute" loss or damage arising from a serious pollution discharge occurring on some future occasion at some distance in the future. That is not its purpose. Nor does it provide any remedy by way of injunction in such circumstances.'

82. In written submissions produced after the hearing, MSCC made the following points:

'*MSCCL repeats its contention, fully developed in oral submissions, that it is no purpose of a statutory compensation scheme, including that operative here, to anticipate future tortious claims that might arise out of the wrongful use of acquired land or the wrongful exercise of a right acquired over land. That is not a criticism of the Compensation Code, merely an accurate statement of its limited purpose, which is to compensate on a once and for all basis for the then current value of land taken or the then current diminution in value of retained land as a resulting of the scheme underlying the exercise of compulsory purchase powers'*

'If the grant remains as in the Order, then any discharge of "water, soil and effluent" is prima facie lawful and within the scope of the right acquired. To that extent, it might indeed be reflected in the assessment of compensation

immediately following acquisition by some sophisticated method of discounting valuation process seeking to identify and quantify the diminution in current market value of the canal including by reference to the possibility of injury at some future date. That only has to be stated for its failure to meet the needs of the present situation to be apparent. The discounting would plainly be significant and the resulting valuation would inevitably be on a very "broad brush" basis. Since it would be attempting to value a chance, it would be bound to be "wrong", in the sense that it will not accurately represent the situation if no injurious breach in fact ever occurs, nor the situation if such a breach does occur. The actual consequences of a breach will not be the subject of full compensation. Compensation which is discounted to reflect a chance (as opposed to reflecting, say, simply early receipt of a future payment) is not full compensation if that chance comes up. It is simply no part of the role of the Upper Tribunal to speculate upon such eventualities.

Such a rough and ready approach is neither satisfactory nor inevitable. Compare and contrast the position if the grant is limited in scope by the discharge proviso. Then only discharges that do not contravene the limits of the proviso will be within its terms. The effect of the right to make those upon the value of the canal will be determined under the Compensation Code. The consequences of the making of future discharges which fall foul of the discharge proviso will instead be the subject of tortious proceedings where available (as discussed above) seeking damages.'

83. In its written representations submitted after the hearing, UU explained that MSCC's evidence in relation to compensation was provided at the inquiry by a witness, Mr Rhodes, who did not cover the points now made before the Court about the adequacy of the compensation regime (a point disputed by MSCC). It was, however, common ground that Mr Rhodes was not called to give evidence. UU further explained that its evidence at the inquiry in relation to the statutory compensation scheme was presented by Mr Smith, who was subject to detailed cross examination, during which the points taken before the Court were not canvassed. UU explained that there was no mention of any of the points now advanced, either in MSCC's closing submissions or in a note provided in response to UU's closing submissions, despite the fact that the latter addressed the adequacy and availability of compensation.

84. In Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] EWHC 3028, in the context of an application for statutory review of a development plan the Court said as follows:

'*77 In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought*

to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information…' (Holgate J)

85. In my view, the proposition above also applies to the compulsory purchase context. A CPO can only be confirmed by the Secretary of State on the basis of a compelling public interest and there can often be multi party interests in play at a CPO inquiry. As explained above the public inquiry process provides the appropriate mechanism for an examination of the appropriate protection for a landowner. The interests in play in the present case extend beyond the parties to the Court proceedings. There were other objectors at the start of the public inquiry into the order under scrutiny. There are wider public interests in the proper performance of UU's sewerage functions under the WIA and in the water quality issues that led to the Environment Agency requiring an alternative sewerage solution for Salteye Brook.

86. Had the case now advanced by MSCC been put before the Inspector, it would, in my judgment, have been necessary for further evidence to be produced to consider UU's regulatory performance including; the history of its regulatory performance; previous pollution episodes; the scope of the environmental permit; and the monitoring provisions in the permit. Mr Rhodes and Mr Smith could have given evidence on whether/how MSCC could be compensated for the risks of damage to MSCC's land interests as a result of the right granted and if/how the compensation regime could deal with future uncertainty of damage. The Inspector could then have made any necessary additional factual findings or judgments to feed into his assessment as to inclusion of the discharge proviso in the terms of the compulsory purchase order. As an example, had the evidence demonstrated a history of poor regulatory compliance by UU then it may have become necessary for the Inspector to consider greater protection for MSCC, itself a statutory undertaker and navigation authority for the Canal.

87. Turning to the refinement of MSCC's case during the hearing. The Court has repeatedly emphasised the need for procedural rigour in judicial review. The following statement is taken from the decision of the Court of Appeal in Dolan -v- Secretary Of State For Health And Social Care [2020] EWCA Civ 1605:

'116 In a number of recent cases this Court has noted that there is "increasing concern about the need for appropriate procedural rigour in judicial review cases": see R (Spahiu) v Secretary of State for the Home Department: Practice Note [2018] EWCA Civ 2064; [2019] 1 WLR 1297, at para. 2, where earlier

authorities are set out (Coulson LJ). The present case leads us to repeat that concern.

117. Procedural rigour is important not for its own sake. It is important in order for justice to be done. It is important that there must be fairness to all concerned, including the wider public as well as the parties. It is important that everyone should know where they stand, so that, for example, the defendant can properly prepare evidence in a timely fashion.'

88. Whilst I permitted all parties the opportunity to make submissions in writing after the hearing to deal with MSCC's refined case, the outcome has been a limited opportunity to explore the complexities raised by the case, in particular in relation to the availability of compensation; the assessment of the interference with the company's property rights and the availability of the defence of statutory authority in negligence claims (see further below the discussion in Ground 2).

89. A challenge under section 23 of the Acquisition of Land Act does not entitle a disappointed party to attempt a second go at its case and the Court must be astute to prevent any attempt to do so. The role of the Court is to consider whether there is any legal or procedural error in the confirmation (Margate Town Centre Regeneration Ltd v SSE [2013] EWCA Civ).

90. For the reasons set out above, the Inspector, and Secretary of State, cannot be criticised for not dealing with a case that was not put to them and I decline to do so. I am satisfied that there is no error of law in their assessment of the matters put before them.

91. Ground 1 fails.

Ground 2 Article 1 Protocol 1

MSCC's case

92. Ground 2 is that the Secretary of State and/or the Inspector erred in law in their consideration of MSCC's right to peaceful enjoyment of its possessions (Article 1 Protocol 1 ECHR).

93. MSCC submits that the requisite fair balance to justify the interference with the peaceful enjoyment of its property requires the inclusion of the discharge proviso and the Inspector failed to identify any reasons why the balance would be disturbed by its inclusion. The Inspector failed to consider whether a less intrusive measure could have been used (i.e. the CPO with discharge proviso), as required by Bank Mellat v HM Treasury (No. 2) [2013] UKSC 38. The margin of appreciation is highly context and fact specific. In the particular context of the compulsory purchase at issue in the present case the Court

should not afford the Inspector a particularly wide margin of appreciation, if any. The Court should emulate the rigorous and detailed assessment of alternative approaches adopted by the first instance judge (and approved by the Court of Appeal) in R (Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2020] EWCA Civ 649, [2020] 1 WLR at [79] - [80]. Moreover, compensation is not available to MSCC for discharges by United Utilities in breach of any environmental permit.

Legal framework

94. Article 1 Protocol 1 (A1P1) reads as follows:

> '*1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'*

95. A1P1 is, in substance, a guarantee of the right to property. It comprises three distinct, but interconnected rules. The first is a general principle that every natural or legal person is entitled to the peaceful enjoyment of his possessions (first sentence of the first paragraph). The second is that there should be no deprivation of possessions except in the public interest and by lawful means (second sentence of the first paragraph). The third is an explicit recognition that states are entitled to control the use of property in accordance with the general interest (second paragraph). The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, § 61 and James v United Kingdom (1986) 8 EHRR 123, § 37).

96. Accordingly, assessment of whether there has been a violation of A1P1 involves consideration of whether a "possession" exists, whether there has been an interference with the possession, and, if so, the nature of the interference. More broadly, to establish whether an interference amounts to a violation of the right to the peaceful enjoyment of possessions:

> *'The court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the*

protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of article 1.' (Sporrong and Lonnroth v Sweden (1983) 5 EHRR 35, at [69]).

97. The parties were agreed that, in the present case, there is a possession (MSCC's ownership of the Canal) and the CPO constitutes an interference with the possession, (by means of a control on use given MSCC's land is not taken but UU is permitted to discharge into its canal).

98. If, as in the present case, an interference has been established, it is necessary to consider whether the interference constitutes a violation of the A1P1 right. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim. By virtue of my analysis under Ground 1, I have concluded that the CPO was granted by lawful means. The parties were agreed that the CPO pursues a legitimate aim (provision of sewerage services and environmental improvement).

99. The final question, and the one at large in the proceedings, is whether the interference with MSCC's property is proportionate.

100. The parties were agreed that Lord Sumption's analysis in Bank Mellat v HM Treasury (No. 2) [2013] UKSC 38 and [2013] UKSC 39 provides a structured framework for the assessment of proportionality, as follows:

> *'20 ...the question [of proportionality] depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine:*
>
> *i) whether its objective is sufficiently important to justify the limitation of a fundamental right;*
> *ii) whether it is rationally connected to the objective;*
> *iii) whether a less intrusive measure could have been used; and*
> *iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.'*

101. The parties were at odds as to whether, in the compulsory purchase context, proposition iii) applies, namely whether it is necessary for the CPO to amount to the least intrusive measure in order for the interference to be proportionate. In this respect the relevance of the discharge proviso, and the rights said to be preserved by them, goes not to the degree of interference caused by the Order itself but rather to whether there is a less intrusive measure that could have been used without compromising the achievement of the objectives of the Order, and how that feeds into the fair balance

assessment. There was also a dispute as to the appropriate margin of judgment to be afforded by the Court to the Inspector.

The assessment of proportionality in the context of a CPO

102. Proportionality in the context of a compulsory transfer of land was addressed by the Court of Appeal in R (Clays Lane Housing Co-operative Limited v The Housing Corporation [2004] EWCA Civ 1658, a case relied on by Counsel for the Secretary of State. The regulatory body for registered social landlords came to a determination that there was a compelling case in the public interest for requiring the claimant housing association to transfer its land to another registered social landlord following mismanagement by the claimant. The claimant contended that the first instance judge failed to apply a sufficiently rigorous test of proportionality in considering its A1PI rights. In his judgment, Kay LJ observed that the presumption against the removal of property rights means that a compulsory purchase order must be '*sufficiently justified by the Secretary of State'* and went on to observe that:

> *'Even before the Human Rights Act 1998, the courts of this country were alert to the need to scrutinise compulsory purchase orders with rigour*' (§12).

103. He characterised the decision making as:

> *'although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in Lough v First Secretary of State [2004] 1 WLR 2557; namely "a situation where the essential conflict is between two or more groups of private interests.'* (§25)

104. He concluded as follows:

> *'I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision-making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences, would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as Lough and the present case.'* (§25)

105. The case of Lough v First Secretary of State, referred to by the Court in Clays Lane, concerned a challenge to the grant of planning permission. There the Court of Appeal characterised the decision making as involving competing private interests between landowners and also a public interest in beneficial land use; observing that: *"The concept of proportionality is inherent in the approach to decision making in planning law…[49]"*.

106. In both Lough and Clays Lane, the Court of Appeal distinguished cases involving a direct interference with an individual's rights by a state body (as in Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150) with the planning context where the essential conflict is between two or more groups of private interests in the context of a wider community interest. The question whether the objective of the measure under scrutiny can be achieved by means that do not interfere as much with a person's rights under the Convention was said not to be wholly appropriate to decision making in the planning context in not taking account of the right of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general (Pill LJ in Lough at §49).

107. In the first instance decision of Pascoe v First Secretary of State [2007] 1 WLR, a challenge to a CPO, Forbes J followed the approach in Clays Lane, in accepting that a measure can be proportionate even if it is not the least intrusive means possible. He also accepted the proposition that the decision maker ought to be afforded a wide margin of appreciation in the assessment of the proportionality of a measure and that the policy requirement that a CPO will not be confirmed unless there is a compelling case in the public interest fairly reflects the necessary element of balance required in the application of A1P1. In addition, he observed that:

> *'… there is no requirement to set out in a formulaic way the extent to which rights are interfered with. The inspector's report and the Secretary of State's decision letter should be read as a whole in order to determine whether the necessary balancing exercise has been properly carried out.'* (§66)

108. Counsel for MSCC sought to distinguish Clays Lane on its facts, on the basis it concerned a housing regulator requiring a transfer of land, which is not a conventional CPO. I do not see, however, that the distinction is material. The test applied by the housing regulator was the same – a compelling public interest. Moreover, I bear in mind that the approach of the Court of Appeal in Clays Lane and Lough is consistent with the nature of the public inquiry into a CPO as explored by the Court of Appeal in R v Secretary of State for Transport ex p de Rothschild [1989] 1 All ER 933. Counsel also sought to distinguish between the acquisition of land (on a once and for all basis) and the acquisition of a right of discharge where the extent of future interference will vary. In my view the point goes to the evidential context for assessing the interference rather than to a principle of general distinction.

109. Counsel for MSCC further submitted that Clays Lane and Pascoe predated Bank Mellat which sets down a requirement for the measure to be the least intrusive. I am not however persuaded that there is any tension between Bank Mellat (No. 2) and the approach in the compulsory purchase context (Clays Lane and Pascoe).

110. Bank Mellat was not a planning case. It was concerned with the imposition of sanctions on an Iranian Bank. The focus was, as here, on the question of the least intrusive measure. Lord Sumption acknowledged the overlap between the four propositions in the proportionality framework:

> *'the four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective.'*

111. In his assessment, Lord Reed referred to the development of the more structured approach to proportionality adopted by the common law. He explained the attraction of this approach as a heuristic tool: '*by breaking down an assessment of proportionality into distinct elements it can clarify different aspects of such an assessment and make value judgements more explicit*' (§72 and §74). As to the wider principle, he observed that a search for fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is inherent in the whole of the Convention and that *'... an assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon'* (§74) (underlining is Court's emphasis).

112. I take from the analysis of Lord Sumption and Lord Reed (above) that the structured framework for the assessment of proportionality should not be allowed to obscure the application of the underlying principle of fair balance, as is apparent from the expression of the fourth principle in Bank Mellat ("*whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.")*. The factors identified in the proportionality framework will "*inevitably*" overlap. The effectiveness of the measure and the degree of interference are not absolute values, but questions of degree inversely related to each other (Bank Mellat). The fact that an alternative proposal may give rise to a different or lesser effect of compulsory purchase is to be

taken into account in the balancing exercise, but it does not, of itself, erode the public interest test in the submitted scheme (Clays Lane at §25).

The role of the Court

113. The role of the Court was, largely, common ground between the parties. Under the Human Rights Act the question of justification for an interference with a Convention right is a substantive question and not merely a process question. The Court must go beyond the task traditionally adopted to judicial review in a domestic setting. There is no shift to a merits review, but the intensity of review is greater than that appropriate to domestic judicial review. Proportionality must be judged objectively by the Court. What matters is whether the ultimate decision taken is, or is not, objectively justified. Unlike in domestic public law cases, it will not necessarily be fatal if a decision-maker has failed to take into account an issue under the European Convention on Human Rights. It is the compatibility of the outcome of the process with Convention rights which has to be assessed by the Court, not the process by which that outcome was reached. That said, it is also well established that the fact that an issue has been considered by a decision maker is relevant to the question which the Court has to determine. It may affect the weight which the Court should give to the views of the decision maker when coming to its own assessment of justification (R(Begum) v Headteacher, Governors of Denbigh High School [2006] UKHL 15 and R (on the application of TD v Secretary of State for Work and Pensions) [2020] EWCA Civ 618 (§52-53).

114. The decision-maker has a margin of judgment which is highly fact and context specific. A wide margin of judgment may be appropriate in a compulsory purchase context, but not necessarily. It will depend on the particular context. However, it is not for the court to take over the role of the decision-maker. In the particular context of assessing a less intrusive measure 'a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation especially if he is unaware of the relevant practicalities and indifferent to considerations of cost'. (Lord Reed in Bank Mellat at §74. See also Lord Sumption at [21])

Application of the legal framework to the facts

115. Counsel for MSCC submitted that the human rights assessment by the Inspector and Secretary of State was cursory. However, there is no requirement to set out in a formulaic way the extent to which rights are interfered with (Pascoe at §66). The Inspector's assessment of human rights at §944-946 of the Report is be viewed as a

concluding expression of the matters of fact and judgment set out in the report as a whole. The same can be said for the Secretary of State's assessment.

116. The CPO interferes with MSCC's ownership of the Canal. The provision of sewerage services and the environmental improvement of Salteye Brook is sufficiently important to justify a limitation on MSCC's right of ownership. The right for UU to discharge effluent into the Canal is rationally connected to the provision of sewerage services.

117. Before the Inspector MSCC proposed a less intrusive measure namely the order with discharge proviso. The Inspector came to a judgment that the protection was unnecessary for reasons that I do not consider to be tainted by legal error. He did so on the basis of the case put to him by MSCC (which focussed, largely, on a point of principle and in the language of public interest). Before the Inspector MSCC made clear that its case for inclusion of the proviso was not based on its right to be able to bring a private law claim against UU.

118. For the reasons explained at paragraphs 37 and 68 above, I have a concern that the protection sought by MSCC could undermine the objective of the CPO. It is a concern that I sought to explore during the hearing with Counsel for MSCC. Before the Inspector, MSCC sought the inclusion of sections 117 (5)(a) and (b); 117(6); 186(1), (3), (6) and (7) and Schedule 12 paragraph, 4 WIA in the terms of the CPO. Taken together, they may be said to form their own complex interlocking scheme of regulation to sit alongside the grant of authority to UU to discharge effluent into the Canal as part of the terms of the Order. This would appear to give rise to the potential for a conflict, on the face of the order, between UU's right to discharge effluent with the removal of authority for the company to discharge 'foul water', without treatment (Section 117(5)(b)). It is not clear how the broad concepts of 'injuriously to affect' or 'prejudicially to affect' would be interpreted. It is not clear whether, in the event of an alleged 'injurious affect' on the canal, the proviso would enable MSCC to seek an interim injunction, to shut down the statutory undertaker's operations, pending resolution of the dispute between the parties. In closing submissions to the inquiry, MSCC appeared to posit a role for itself as a second regulator of UU's operations. This presents an unfortunate scenario in which UU's operations are supervised by two 'regulators' – the Environment Agency, operating a detailed and precise regulatory regime and MSCC operating via statutory provisions expressed in loose terms with next to no machinery for their effect and operation. Such an outcome would produce too much uncertainty for UU in seeking to discharge its statutory duty to provide sewerage services. There may be an impact on the wider public interest in the proper performance of UU's sewerage functions, given the history of litigation between these two statutory undertakers. In the words of the Court of Appeal in Clays Lane, it could amount to a recipe for poor public administration.

119. Stepping back then (as I am required to do by proposition iv) in Bank Mellat) I turn to consider the question of a fair balance.

120. By the end of the inquiry it was common ground that there was a compelling public interest in the compulsory purchase order. The Inspector reached the same view in his decision:

> *'924. The Order Scheme is required to enable the delivery of the Full Scheme and the public interest (and environmental) benefits that would be realised by completing the Full Scheme. In doing so, the Order Scheme would provide necessary infrastructure that would enable regulatory objectives for Eccles WwTW to be met.*
> *……*
> *926. The evidence, and the testing of it during the Inquiry, demonstrated that: there is a clear regulatory (and environmental) requirement for the Order Scheme; it is the most appropriate option for meeting that need;*
>
> *……*
> *940. As set out above, alternatives to the Order Scheme have been explored, both in terms of: the method by which regulatory and environmental objectives would be met; and for the option chosen, the broad design principles for what is now proposed.*
>
> *941. The Inquiry heard extensive evidence regarding: the operation of the Eccles WwTW; the steps taken to improve the quality of water courses in the catchment that includes the Canal and Salteye Brook; and, how the Order Scheme would contribute to the economic, social and environmental well-being of the area. The Order Scheme would provide the improvements in water quality sought for Salteye Brook, and while the new outfall would discharge directly into the Canal, it would nonetheless have an overall beneficial effect on the Canal and the environment around it.*
>
> *942. In addition to the environmental improvements in relation to water quality, the proposed option would be a better use of resources that would result in economic benefits for both the undertaker and its customers. The astute and convincing fiscal argument for the chosen option, along with the resulting efficient use of resources, would result in social benefits from economic efficiency, and that would be expected to be reflected in reduced bills to the Acquiring Authority's customers. Social benefit would also be derived from a reduction in the level of flood risk to properties on Peel Green Road that connect to the sewer network upstream of Eccles WwTW.*

943. Given the Acquiring Authority's statutory function, and the regulatory requirements it seeks to meet through the Order Scheme, a compelling case in the public interest has been clearly made for confirmation of the Order. [16-19, 25, 29, 30, 75-83, 422-436, 480, 495, 824].'

121. I afford the Inspector a considerable margin of judgment in his assessment in this regard. He had overseen the inquiry and heard the evidence over 29 days of a public inquiry. I was not taken to the evidence, which was a matter of common ground.

122. Turning to the severity of the consequences for MSCC. MSCC accepts that the order with the discharge proviso amounts to a fair balance, but submits that the order without the discharge proviso amounts to a disproportionate interference with its property right.

123. However, the evidence in relation to the interference generated by the order without the discharge proviso, as compared with the proviso, remains theoretical. The impacts of the scheme underlying the Order on water quality and quantity was the subject of detailed evidence at the public inquiry, which demonstrated a benefit to the water quality of the Canal. It was common ground that the Environment Agency will supervise the discharge. Discharge standards will be set and monitored. The regulatory framework under which the Environment Agency operates was common ground. It is a detailed regulatory regime, backed up by criminal sanctions and overseen by a specialist regulator. MSCC has not produced any evidence of poor regulatory compliance by UU or inadequate regulation of UU by the Environment Agency to indicate a need for the discharge proviso. On the evidence before him, the Inspector did not consider the proviso to be necessary.

124. Before the Court, MSCC advanced a case that the value of the discharge proviso comprises the private law protection (in nuisance and negligence) provided by sections 117(5) and 183(6) WIA in the event of future polluting incidents.

125. However: so far as a claim in nuisance is concerned, the difficulty with MSCC's case is the decision in Marcic v Thames Water Utilities Ltd [2003] UKHL 66 and, more recently and specifically, in the decision in Manchester Ship Canal Company Ltd v United Utilities Water Ltd [2022] EWCA Civ 852). The latter was handed down after pleadings were filed in this case and before the hearing. On behalf of MSCC, I was informed after the hearing that the Supreme Court has granted permission to appeal. However, for present purposes, I am bound by both decisions. Their effect is that MSCC does not have a private law claim in nuisance against UU in respect of discharges from outfalls in breach of the foul water provisos, identified by the Court as discharges in breach of section 117(5) and section 186(3) WIA, such as to affect prejudicially or injuriously affect the purity or quality of the water in the canal (these

are the provisions relied upon by MSCC before this Court). In his judgment Nugee LJ said as follows:

> *'64…. I do not see why it is any less inconsistent to allow MSCC to sue UU for trespass (or nuisance) for operating a sewerage system that discharges untreated sewage into the canal in breach of the foul water provisos than it was to allow Mr Marcic to sue Thames for nuisance for operating a sewerage system that flooded his garden with untreated sewage.*
>
> *73. … Marcic shows that in certain cases the existence of a private law right to sue a sewerage undertaker in tort is inconsistent with the statutory scheme and such a right must be regarded as impliedly ousted.'*

126. On this basis, Nugee LJ arrived at the view that the role of the provisos is diminished, leaving their practical effect unclear (§87).

127. So far as a claim in negligence is concerned; there was limited opportunity to explore the issue with the parties at the hearing because the point was developed primarily in reply and in written submissions after the hearing. However, the answer to this complaint appears to be that no defence of statutory authority arises where the powers in question been carelessly exercised:

> *'it is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works that carries with it an authority to do what is authorised with immunity from any action based on nuisance… To this there is made the qualification or condition that the statutory powers are exercised without "negligence" that word here being used in special sense to require the undertaker, as a condition of obtaining immunity from action to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons.'*
>
> Allen v Gulf Oil [1981] AC 1001 Lord Wilberforce at [1011]. Underlining is the Court's emphasis.

128. If so, MSCC can bring a claim at common law, in the event of any negligence or deliberate misconduct by UU, with, or without, the discharge proviso.

129. On the analysis above therefore, I have come to the view that there may be said to be limited value in the protection provided by the discharge proviso. The interference is, evidentially, theoretical. The tortious remedy of a nuisance claim is ousted. The tortious remedy of a negligence claim remains available.

130. MSCC sought to advance a case that compensation for the interference with its property is inadequate. I accept that the availability of compensation for interference

with a person's A1P1 rights is, and has long been held to be, highly relevant to proportionality. Generally, a right to compensation is a necessary part of ensuring the deprivation or control of use of property is proportionate:

> *'76 Mr Maurici's fourth key point was that other than in exceptional circumstances, compensation is required in cases involving the deprivation of property. However, he submitted, correctly, in my view, that the Strasbourg case law shows a marked reluctance to entertain allegations that the quantum of compensation is inadequate, unless the method for its calculation is manifestly without any reasonable foundation.'* (Pascoe at paragraph 76).

131. MSCC's case that compensation is inadequate for the interference with its property right was not developed at the inquiry despite the availability of witnesses with considerable experience in compensation. Valuation is a complex exercise. MSCC's grounds and skeleton argument did not provide me with any detail as to the framework and operation of the compensation code. Accordingly, in the words of the Court in Pascoe, I am 'reluctant to entertain allegations' that the compensation code is inadequate.

132. In his oral submissions, in response to my queries, Counsel for the Secretary of State provided a general explanation that, pursuant to S.7 of the Compulsory Purchase Act 1965 (as modified by the Water Industry Act 1991) compensation is payable for the diminution in the value of MSCC's land as a result of the acquisition of UU's right to discharge. On reference to the Lands Tribunal, MSCC can make its case in relation to the terms on which the order was granted (i.e. where the right is not constrained by the discharge proviso). Any award will seek to put MSCC in the same position so far as money can do so as it was in in the absence of the grant of the right. MSCC will be compensated with reference to, and on the strength of, its evidence as to that depreciation in reality. The method of valuation is not a matter of law but of valuation judgment. Risk is an element of the valuation exercise. The compensation regime is well versed in dealing with future uncertainty, even on a 'once and for all' basis, where the assessment of valuation is fixed at the valuation date and albeit in practice that valuation issues may be complex. If the extent of the effect of the restriction imposed by the CPO on MSCC's land interests depends on future events then the assessment of risk will reflect the terms of the right granted, and evidence as to the risk. How risk influences the valuation depends upon the valuation method used. Whatever valuation method is used it will necessarily involve a consideration of MSCC's land interests in the absence of the order compared to its land interests with the Order, as at the Valuation Date. The valuation will reflect that the right granted confers the right to discharge water, soils and effluent into the Canal. I did not understand Counsel for MSCC to dispute this general explanation.

133. As developed, MSCC's argument on compensation appeared to be that the compensation code provides compensation for when things go right but not when they go wrong. It is the common law and the availability of damages that provides compensation for when things go wrong as where the conditions of an environmental permit are breached and loss/damage is caused at some point in the future. Without having heard detailed argument on the point, I am inclined to accept as arguable, MSCC's contention as to the difficulty in using the compensation code to arrive at a capital figure which is supposed to express in present value terms the effect on the value of the land of not being able to bring a common law claim for damages in the future. It does not appear easy to arrive at an estimate of how likely a breach of a permit would be, how serious the breach or how much loss, or how far into the future. The complexity of this issue highlights why it would have been essential for this point to be taken at the inquiry. The fact remains however that the point was not taken and the issue is, on present facts, theoretical, for the reasons explained above. Similarly, on present caselaw, the issue does not arise because a common law claim in nuisance is ousted (Marcic v Thames Water Utilities Ltd [2003] UKHL 66 and Manchester Ship Canal Company Ltd v United Utilities Water Ltd [2022] EWCA Civ 852)) and a common law claim for negligence remains open to MSCC (Allen v Gulf Oil [1981] AC 1001 Lord Wilberforce at [1011]).

134. Further, I note that in Marcic, in the context of the flooding of a garden with sewage, the House of Lords concluded that a human rights claim was ill founded because of the presence of the statutory scheme. The balance struck by the statutory scheme between the interest of customers of the sewage company whose properties suffer damage with the conflicting interests of the remaining customers in the event that more sewers (necessitating higher bills) had to be built to alleviate the flooding, is to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the different interests involved (Lord Nicholls at §42). The Court concluded in this respect that the question whether the system adopted by a sewerage undertaker is fair was a matter inherently more suited for decision by the industry regulator than by a court and the statutory scheme provided a remedy.

135. Applying this analysis to the present context, it may be said that the balance struck by the statutory regime is to provide a procedure under section 155 WIA, whereby landowners can seek appropriate protection from any interference, via independent scrutiny of their interests, alongside the wider public interest. Applying the language of Marcic, it may be concluded that whether the CPO strikes a fair balance is inherently more suited for decision by the inquiry process (with further protection of judicial review) than private law litigation involving only the parties to the litigation and without any obvious role for the wider public interest.

136. Accordingly, on the case advanced before by MSCC, for the reasons set out above, I remain satisfied that the terms of the Order strike a fair balance.

137. Ground 2 fails.

Conclusion

138. For the reasons set out above the claim is dismissed.