IN THE HIGH COURT OF JUSTICE **Claim No. D40BS457**
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT
[2017] EWHC 1309 (TCC)

Before: HIS HONOUR JUDGE HAVELOCK-ALLAN QC

Dated: 31 May 2017

Between:

ANTHONY HALL

Claimant

- and -

ENVIRONMENT AGENCY

Defendant

Michele de Gregorio (instructed by **DAC Beachcroft Claims Ltd**) appeared for the claimant

Nicholas Ostrowski (instructed by **The Environment Agency**) appeared for the defendant

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JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

1. This is an application to strike out the claim on the ground that it should have been brought in the Upper Tribunal (Lands Chamber) and that this Court has no jurisdiction to determine it.

2. The application raises a point of some interest, which does not appear to have been decided before, namely, whether the statutory scheme for compensation in the Water Resources Act 1991 ("the WRA 1991") provides an exclusive remedy and precludes the bringing of an action at common law for negligence.

Background to the claim

3. The claim in the action is for damages arising out of the flooding of a property owned by the claimant, Mr Hall, in Morpeth in Northumberland. The property is called Manse Yard, Newgate Street in Morpeth, Northumberland The flooding occurred on 31 March 2010. The property was one of a number of properties in Morpeth which suffered from flooding on or about that date following heavy rainfall in the locality. Although the rain was heavy, the claimant says that it was not exceptional. His case is that the amount that fell was equivalent to a rainfall event with no more than a 1 in 3 year return period.

4. The flood water affecting the property came from the Cotting Burn, which is a stream flowing in a North West to South East direction at the rear of the property. Where the Cotting Burn passes behind the property it runs through a culvert which is prone to run surcharged when the Cotting Burn is swollen upstream of the culvert after heavy rainfall.

5. Following significant flooding in and around Morpeth in September 2008 the Environment Agency ("EA") instituted a Flood Alleviation Scheme for Morpeth, part of which involved replacing a section of the roof of the culvert which had been found on inspection to be in a poor structural condition.

6. Sometime around the week beginning Monday 15 March 2010, the EA's contractors removed a section of the roof of the culvert at the rear of the property, leaving an exposed opening measuring approximately 5 m by 2.5 m. The opening was left uncovered over the next fortnight. After the rainfall on 31 March, the water level in the Cotting Burn rose to bank full. It rose so high that, where the Cotting Burn passed through the culvert, water escaped out of the opening in the roof of the culvert and entered the claimant's property, causing damage to the building and its contents.

7. The claimant began this action against the EA on 29 March 2016 in the County Court Money Claims Centre, claiming special damages amounting to £52,012.28 and general damages for physical inconvenience and discomfort. It is to be noted that this was just before the 6 year time limit expired. The action was subsequently transferred to the County Court at Bristol and into the Technology and Construction List. At the hearing I transferred the action into the TCC High Court List because of the importance of the central issue on jurisdiction.

8. The claimant alleges in the particulars of claim that the EA knew or ought to have known that the culvert was likely to run surcharged after heavy rainfall and that water would escape if any opening in the roof was left uncovered. He relies on various written warnings of which he says that the EA's engineers should have been aware. One of them was a notice on a manhole cover set into the top of the culvert just upstream of the section of roof being replaced which said: "*Warning: this culvert runs surcharged. Plate should only be removed if the culvert is depressurised. Ensure plate is refitted and bolted down after use*".

9. The claimant alleges that the EA owed to him a duty "*to exercise reasonable care and skill in planning and/or commissioning and/or carrying out the works to the Culvert so as not to cause or create any unnecessary risk of causing damage to the property*". He alleges that the EA was negligent because it, or its servants or agents:

"1. *Caused or permitted* a *section of the Culvert roof to the rear of the Property to be removed, leaving an exposed opening measuring approximately 5m by 2.5m, without taking or requiring to be taken any or any adequate measures to prevent the escape of water from the opening after heavy rainfall and/or to contain such water, for instance by constructing a temporary sealing plate with a weight (such as a kentledge block) to the opening or by creating a sand bag bund around the perimeter of the opening or otherwise*;

2. *Failed to give any or any adequate consideration in planning and/or commissioning and/or carrying out the works, whether by way of sufficient risk assessment or otherwise, to the known risk that water levels could rise rapidly in Cotting Burn and/or the Culvert thereby giving rise to a risk of flooding to the Property, unless appropriate measures were taken to remove or reduce that risk;*

3. *Failed when planning and/or commissioning and/or carrying out the works to have any or any sufficient regard to the warnings and/or other available information, ... as to the risk of the Culvert running surcharged during heavy rainfall*;

4. *Failed to take any or any adequate precautions when planning and/or commissioning and/or carrying out the work to the Culvert roof to guard against the risk of flooding to the Property, having particular regard to the absence of rain gauges or river level recorders on Cotting Burn;*

5. *Failed to give any or any adequate consideration to the high water levels observed during the course of carrying out the works to the Culvert, prior to removing the section of the roof;*

6. *Failed to take any or any sufficient emergency action, whether by constructing an emergency bund or otherwise, to prevent damage being caused to the Property by the possible escape of water from the open roof of the Culvert after high and/or rising levels of water*

observed in Cotting Burn and/or the Culvert during the evening of 30 March 2010;

7. *Failed in the premises to plan and/or commission and/or carry out the works to the Culvert roof with adequate care and skill.*"

10. I will assume, for the purposes of this application only, that the claimant is likely to succeed in establishing at trial all of the essential factual allegations in the particulars of claim and that the loss and damage was caused by negligence of the Environment Agency in one or more of the foregoing respects.

The statutory compensation scheme

11. It is common ground that: (1) the Morpeth Flood Alleviation Scheme was a scheme of works undertaken under powers conferred on the EA by section 165 of the WRA 1991; (2) that the Cotting Burn is designated as a "main river" for the purposes of the WRA 1991 and is not in the ownership of the EA, therefore the power of the EA to do works to the roof of the culvert as part of the Morpeth Flood Alleviation Scheme was derived from section 165, and (3) that the removal of the roof of the culvert was a necessary part of the works comprised within the Morpeth Flood Alleviation Scheme.

12. Section 177 of the WRA 1991 provides for a Compensation Scheme for those whose property is adversely affected by the exercise by the EA of its statutory powers under the Act.

13. Sections 165 and 177 of the WRA 1991 provide so far as is material:

"***165. General powers to carry out works***

(1) The Agency shall have power, in connection with a main river—

(a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or any drainage work;

(b) to improve any existing works, that is to say to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work;

(c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act (other than an act referred to in paragraph (a) or (b) above) required for the drainage of any land.

(2) The Agency shall also have power irrespective of whether the works are in connection with a main river, to maintain, improve or construct drainage

works for the purpose of defence against sea water or tidal water; and that power shall be exercisable both above and below the low-water mark.

(3) The Agency may construct all such works and do all such things in the sea or in any estuary as may, in its opinion, be necessary to secure an adequate outfall for a main river.

...

177. Compensation etc. in respect of exercise of works powers

Schedule 21 to this Act shall have effect for making provision for imposing obligations as to the payment of compensation in respect of the exercise of the powers conferred on the appropriate agency by sections 159 to 167 above and otherwise for minimising the damage caused by the exercise of those powers.

14. Schedule 21 of the WRA 1991 is entitled "Compensation etc. in respect of certain works powers". Paragraph 5 of Schedule 21 is in the following terms:

"5. Compensation in respect of flood defence and drainage works

(1) Where injury is sustained by any person by reason of the exercise by the Agency of any powers under section 165(1) to (3) of this Act, the Agency shall be liable to make full compensation to the injured party.

(2) In case of dispute, the amount of any compensation under sub-paragraph (1) above shall be determined by the [Upper Tribunal].

(3) Where injury is sustained by any person by reason of the exercise by the Agency of its powers under subsection (1)(b) of section 167 of this Act—

(a) the Agency may, if it thinks fit, pay to him such compensation as it may determine; and

(b) if the injury could have been avoided if those powers had been exercised with reasonable care, provisions of sub-paragraphs (1) and (2) above shall apply as if the injury had been sustained by reason of the exercise by the Agency of its powers under section 165(1) to (3) of this Act."

15. It is important to note that the statutory provisions for the payment of compensation is not based on strict liability. The claimant must prove that his claim is one actionable at common law i.e. in negligence, nuisance or under the rule in *Rylands v Fletcher*.

The rival arguments

16. On behalf of the EA, Mr Ostrowski submits:

(1) that the statutory Compensation Scheme is an exclusive code for compensation for loss or damage arising out of works carried out by the EA pursuant to its powers under section 165 of the WRA 1991;

(2) that, where the Scheme applies, all other civil remedies e.g. for damages for nuisance or negligence or for an injunction, are excluded and the common law is superseded;

(3) that the only exceptions to this exclusionary rule are those described by Jenkins LJ in *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284 at 309;

(4) that this case does not fall within any of those exceptions; and

(5) that, accordingly, Mr Hall has no claim for negligence which can be pursued in the County Court and his action should be struck out under CPR 3.4(2)(b) on the ground that the Particulars of Claim discloses no reasonable grounds for bringing the claim.

17. For Mr Hall, Mr de Gregorio contends:

(1) that the Compensation Scheme under the WRA 1991 is not an exclusive code because it is subject to the exceptions identified by Jenkins LJ in the *Marriage* case;

(2) that it is not appropriate to conduct a mini-trial on an application to strike out, so the Court must assume that one or more of the Claimant's pleaded allegations of negligence will be proven at trial.

(3) that the claimant need only show on the present hearing that he has a real prospect of establishing that the negligence claim which he advances is one which is not precluded by the Scheme, but lies within one of the exceptions in the *Marriage* case where ordinary rights of action at common law can still be pursued.

(4) that the claimant can do so because: (i) the damage to his property was not the result of "*the exercise by the Agency of any powers under section 165(1) to (3) of this Act*" but is "*for damages for negligence at common law in respect of the manner in which the works to the Culvert were carried out, planned and commissioned by the Defendant*" (see paragraph 3 of the Reply), in other words was the product of some negligent act occurring in the course of an exercise of the EA's powers but was not itself an act which the EA was authorised to do, alternatively, (ii) the damage was not the product of an operation which the EA intended to carry out, but was an unintended occurrence brought about in the course of carrying out the work owing to negligence in carrying it out.

18. I have already accepted the second of Mr De Gregorio's propositions and will assume that one or more of the particulars of negligence will succeed. He places particular emphasis on particulars 1-3 and 5-6 (see paragraph 9 above). As to his third

proposition, whilst it is true that the test which governs striking out and summary judgment applications is the "real prospect of success" test, the question here is really one of law, namely, whether, on the given facts and assuming the alleged negligence will be proven, the claim is one which falls within one of the exceptions referred to by Jenkins LJ in the *Marriage* case. As such it is a point which merits a definitive answer rather than a decision by reference to the real prospect test, and that is how I intend to approach it.

Discussion

19. The difference between the parties lies in the application of the exclusionary principle and the ambit of the exceptions to it outlined by Jenkins LJ in *Marriage v East Norfolk Rivers Catchment Board*. That case concerned drainage operations conducted under section 34 of the Land Drainage Act 1930 (a predecessor of the WRA 1991). Section 34(1) and 34 (3) of the Land Drainage Act 1930 provided:

> "(1) Every drainage board acting within its district shall have power
>
> (a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work:
> (b) to improve any existing works, that is to say, to deepen, wide, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work:
> (c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district.
>
> ...
>
> (3) Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts."

20. The works performed by the East Norfolk Rivers Catchment Board ("the Board") involved dredging the River Waveney. Spoil from the dredging was deposited along the South bank of the river opposite Mr Marriage's property on the North bank, known as Limbourne Mill. The spoil was deposited on the South bank near a bridge crossing the river which gave access to the Mill. The bridge was also owned by Mr Marriage. Deposition of the spoil raised the height of the South bank by 1-2 feet. The dredging was completed in January 1944. The River Waveney flooded in December 1946. The increased height of the South Bank meant that the flood water could not escape over the bank of the river to the South. Instead it was forced to run

over the North bank and to flow around the buttresses supporting the bridge on that side of the river, which were so undermined that the bridge collapsed.

21. Mr Marriage brought an action against the Board for nuisance and an injunction. Those claims were dismissed at the trial by Byrne J on the ground that, although the Board had created what would have been a nuisance at common law if it had been the riparian owner over the South bank, since the Board was not the riparian owner no cause of action in nuisance would lie. He held that Mr Marriage's only remedy against was for compensation under the statutory scheme in section 34(3) of the 1930 Act.

22. Mr Marriage appealed. The Court of Appeal allowed him to amend the statement of claim to add a claim for negligence, provided it was confined to the particulars already pleaded. The amendment involved adding the word "negligently" to the particulars of the existing allegation of nuisance. However, the amendment did not save the day for Mr Marriage. The judgment of Byrne J was upheld and the appeal was dismissed. Tucker and Singleton LJJ were of the view that even with the word "negligently" added, the statement of claim did not disclose a case of negligence by the Board in carrying out the works. At any rate they were not prepared to find negligence without additional findings of fact having been made by the trial judge (Tucker LJ at page 295, Singleton LJ at page 300).

23. Jenkins LJ was inclined to the view that the Board owed no duty of care not to prevent flood water flowing over the marshland to the South of the river and only at best a duty to refrain from blocking any defined flood channel (see pages 303-304). He was not persuaded that the facts disclosed that there had been a breach of the latter duty. He concluded (at page 310) that the matters pleaded in the amended statement of claim amounted to no "worse than an error of judgment in underestimating the effect which the heightening of the south bank at this particular point on the river might have in times of severe flood. In my view an error of judgment of that order falls very short of the degree of negligence or reckless conduct on the part of the board which is required to remove the injury sustained from the category of injuries covered by the compensation provision". In other words, if the Board's conduct was arguably negligent, the negligence was not so egregious that the case fell outside the ambit of the scheme for compensation in section 34(3). Crucially, however, Jenkins LJ recognised (at page 304) that a sustainable claim in negligence was one from which the Board did not have immunity by virtue of section 34 of the Land Drainage Act 1930.

24. All three members of the Court of Appeal explored the boundary between the statutory compensation scheme in the 1930 Act and the circumstances in which a common law claim might be brought against the Board. Tucker LJ quoted (at p. 192) the statement by Lord Blackburn in *Caledonian Railway Co v Walker's Trustees* 7 App Cas 259 at 293) that:

> "No action can be maintained for anything which is done under the authority of the legislature, though the act is one which if unauthorised by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him: ..."

25. But this principle applies to the doing of authorised works without negligence. Each of the three lords justices in the *Marriage* case referred to the speech of Lord Blackburn in *Geddis v Proprietors of the Bann Reservoir* 3 App Cas 440, where he said (at 445-456):

> "... I take it, without citing cases, that it is now thoroughly well-established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently".

26. They also all referred to the following passage in the speech of Lord Dunedin in *Manchester Corporation v Farnworth* [1930] AC 171 (at 183):

> "When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible, according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."

27. This led Singleton LJ to the following conclusion (at page 298):

> "Examination of the Land Drainage Act 1930, and of section 34 in particular, leads irresistibly to the view that Parliament recognised that there might be, and frequently must be, a nuisance created by the carrying out of works under the powers given by the section; and compensation for any damage sustained thereby is provided. ... It is this which satisfies me that a person who sustains injury through the operations has no right of action for nuisance. On a fair reading of the section it is shown with sufficient clearness that the intention was that the remedy should be by way of compensation alone. ... These leaves untouched the question of negligence."

28. However, what has or has not been authorised, and whether the statutory compensation scheme is the exclusive remedy for injury thereby caused, is a matter of construction of the statute in question. By and large statutes do not authorise works to be done negligently, but Jenkins LJ recognised that sometimes there is a grey area between authorised works which arguably have been performed negligently, inasmuch as they could have been performed with less injury, and authorised works where it is alleged that something negligent has been done in carrying them out which was wholly avoidable. His judgment in the *Marriage* case is the most important of the three for endeavouring to establish the dividing line.

29. Jenkins LJ proposed a 4 point test (at pages 305-306) for determining whether, in any given case, the statutory compensation scheme was to be construed as the exclusive remedy: (1) was the act which occasioned the injury authorised by statute?

(2) did the statute contemplate that the exercise of the powers might cause injury? (3) was the injury complained of an injury of the kind contemplated by the statute? (4) did the statute provide compensation for this kind of injury?

30. Jenkins LJ went on (at page 309) to define "the limits outside which the ordinary rights of action remain" in the following terms:

> "(a) the injury must be the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers but not in itself an act which the board was authorised to do. For example, an injury caused by flooding on one side of the river due to the heightening by the board of the bank on the other side would be a proper subject of compensation, as opposed to action in the courts; but an injury caused by the negligent driving of one of the board's lorries bringing materials to the site would be actionable in the ordinary way. (b) The injury must be the product of the operation which the board intended to carry out, and not of some unintended occurrence brought about in the course of carrying out the work owing to negligence n carrying it out. Thus, if the board dig a drain which when dug as planned has the effect of depriving a riparian owner of the full supply of water from the river to which he is entitled, the remedy of the riparian owner will be compensation under the Act, not action in the courts; but if, through negligence in digging the drain, the board undermined and breached a dyke, and thereby inundated the countryside, I apprehend that they could not claim, by way of defence to an action by a person whose land was flooded, that the breaching of the dyke brought about by their negligence, and forming no part of the operation in hand, was done in exercise of heir statutory powers, and therefore a matter of compensation, not action. (c) The operation must not be one which on the face of it is so capricious or unreasonable, or so fraught with manifest danger to others, that no catchment board acting bona fide and rationally, not recklessly, would ever have undertaken it. The last of these three limitations or requirements inevitably introduces questions of degree, but, as will be seen from the terms in which I have stated it, I think that a very strong case of something amounting to reckless conduct on the part of the board must be made out to enable an action to be maintained on account of an injury which, in the other two respects which I have mentioned, is a matter for compensation under the Act as opposed to action in the courts."

31. The *Marriage* case is important in the present context because the relevant provisions in the WRA 1991 are drafted in terms similar to section 34 of the Land Drainage Act 1930. A number of other cases decided before and after *Marriage v East Norfolk Rivers Catchment Board* were referred to by counsel, but only two of them (*East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 and *Webb v Environment Agency* [2011] EWHC (QB)) were decisions on these two statutes.

32. Three nineteenth century cases cited by Mr de Gregorio were *Imperial Gaslight & Coke Co. v Broadbent* (1859) 7 HLC 600; 11 ER 239, *Coe v Wise* (1866) LR 1 QB 711 and *Cracknell v Mayor and Corporation of Thetford* (1869) LR 4 CP 629.

33. In the *Imperial Gaslight* case a claim was brought for damages to a market gardening business allegedly caused by noxious gas emissions from the respondent's plant. Damages for nuisance were awarded in arbitration and an injunction to restrain the nuisance was granted by the court. The gaslight company, which was a public body created by Act of Parliament, appealed the result on the ground, amongst others, that the claimant's exclusive remedy was an award of compensation under section 68 of the Lands Clauses Consolidation Act 1845. The appeal on this ground was dismissed by the House of Lords because: "their Lordships were of opinion that the 68th section of the Lands Clauses Consolidation Act only applied to cases where injury was occasioned by works necessarily done under the authority of the Act, but not to those where injury was occasioned by a careless or improper mode of conducting the business of the company" (see pages 605/241).

34. *Coe v Wise* was a decision of the Court of Exchequer Chamber allowing an appeal by the plaintiff against the dismissal of his claim for damages for negligence by the resident engineer and sluice keeper employed by drainage commissioners engaged in improving the drainage and navigation of the Middle Level of the Fens. The jury found negligence in the maintaining of a sluice and failure to provide an effective remedy when the sluice gave way and was destroyed. The commissioners asserted, successfully below, that the action was not maintainable and that the plaintiff's sole remedy was compensation under section 217 of the statute under which the drainage works had been authorised. This argument failed on appeal because section 217 was held to apply "only to the authorised acts of the commissioners, and to damage or injury ... resulting there-from". Section 217 provided: "If any person, at any time after the said commissioners shall have begun to carry this act into execution, shall sustain any damage or injury in consequence of any act of the commissioners, their agents, servants, or workmen, for which no recompense is hereby otherwise provided", he may claim compensation. Erle CJ, delivering the judgment of the Court held that: "The words of the section do not in their ordinary sense comprise the cause of action in question. The commissioners are not sued for any act done by them. The cause of action is for non-feasance, - for an omission on the part of their agents contrary to their intention and against their will. If the legislature intended to exempt the commissioners from liability to action, we think that plainer words would have been used."

35. In *Cracknell v Mayor and Corporation of Thetford*, the defendant corporation, in the exercise of its statutory powers, had erected staunches in a river as guides for navigation. These had combined with natural weed growth and the accumulation of silt to cause the river to burst its banks and flood the plaintiff's property. He brought an action in negligence which failed because, as Bovill CJ held on appeal (at 634): "... if [the staunches] had been placed there for purposes other than navigation, or had been erected improperly or negligently an action might have lain, but the facts here do not disclose any such cause of action. I think, therefore, that their erection came within the power of the defendants under the Act, and was lawful, and that there is no remedy by action for injury resulting from them, but that the remedy, if any, would be by an application for compensation under the Act of Parliament."

36. Mr de Gregorio also referred to *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In that case a very high tide had breached a sea wall near the coast in Suffolk. The Board was empowered to repair the sea wall under the Land Drainage

Act 1930 but was not obliged to do so. However it embarked on works to repair the breach which the plaintiffs alleged were so inefficiently conducted that the tide went on flooding his land for another 4 months. The claim for damages failed. Viscount Simon LC accepted that if the plaintiffs could have shown that the Board had inflicted fresh damage on them after the initial flooding, through breach of a duty of care, it would have been liable in an action for that damage, notwithstanding the statutory compensation scheme in the 1930 Act. It was held, however, that the Board owed no duty of care to effect the repairs to the sea wall with any particular expedition and that, even if it could have been shown that the works had been carried out negligently in other respects, the flooding by the tide over the ensuing 4 months had caused no damage additional to that caused when the sea wall was first breached. Thus, there was no cause of action for negligence.

37. These cases, pre-dating the *Marriage* case, simply illustrate that a statutory compensation scheme does not run in parallel with common law claims, and that, where statutorily authorised works are performed negligently, or there is a negligent omission by a public body to take action, a claim in negligence can be brought notwithstanding the existence of the scheme.

38. Two of the later decisions in which the *Marriage* case was considered are *Webb v Environment Agency* [2011] EWHC (QB), and *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* [2014] All ER (D) 181. The *Webb* case is not particularly enlightening because it was a decision as to the appropriate order for costs on the discontinuance by Mr and Mrs Webb of their action for damages for nuisance and/or negligence against the Environment Agency after they had resolved to pursue their claim as one for statutory compensation under section 165 of the WRA 1991 in the Lands Tribunal. Their decision to switch tribunal was provoked by an application by the EA to strike out the action on the ground that compensation in the Lands Tribunal was the exclusive remedy. Mr and Mrs Webb disputed the striking out, but since they were not facing a limitation defence in the Lands Tribunal, they must have thought that discretion was the better part of valour and that the better course was to discontinue the action and start again in the Lands Tribunal before the application to strike-out was heard.

39. *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* [2014] All ER (D) 181 concerned group litigation brought by special agreement in the English courts by about 15,000 members of the Bodo community in Nigeria against the Shell group's Nigerian subsidiary. The claim was for damages at common law and/or statutory compensation under the Nigerian Oil Pipelines Act 1956 ("OPA 1956") for two oil spills from a pipeline running through the area inhabited by the Bodo community. The action was tried by Akenhead J in the TCC in London. For present purposes only the first issue he had to decide is of interest. That issue was whether the scheme for compensation in OPA 1956 was the only remedy available to the claimants and excluded them from bringing a claim for damages at common law. Akenhead J reviewed a number of English and Nigerian authorities on the exclusionary effect of statutory compensation schemes, including *Marriage v East Norfolk Rivers Catchment Board* . Akenhead J was required to apply Nigerian law. In paragraph 40 of his judgment, he summarised his understanding of the principles of Nigerian law which are relevant to whether a statutory compensation scheme supersedes common law rights of action. He examined in detail the compensation

provisions of OPA 1956 (paras. 42-51). He concluded (in para. 55) that the compensation scheme provided for by OPA 1956 was "very broadly drawn". In section 11(5)(a) (dealing with damage to land and interests in land), the scheme covered acts that would constitute nuisance and trespass and provided a degree of strict liability for some acts which would otherwise be lawful. Section 11(5)(b) provided compensation for "any person suffering damage by reason of any neglect ... to protect, maintain or repair any work structure ..". This effectively covered acts of negligence. Section 11(5)(c) related to "any person suffering damage ... as a consequence of any breakage of or leakage from the pipeline or an ancillary installation". This equated to liability under the rule in *Rylands v Fletcher*. Not surprisingly, when Akenhead J came to ask himself whether the statutory regime provided a comprehensive framework, he found that it did (paras. 57-63). He concluded, therefore, that "under Nigerian law the common law has been superseded by the OPA in respect of the financial remedies available ..." (para. 64).

40. I need mention only three other cases, which are of interest as examples of the public body in question relying on its own negligence in order to avoid liability to pay compensation under a statutory regime: the exact reverse of the present case.

41. The first in point of time is *President, Councillors and Ratepayers of Colac v Summerfield* [1893] AC 187. This was a decision in the Privy Council on appeal from the Supreme Court of Victoria in a case where compensation had been claimed under the Local Government Act 1874 of the Colony of Victoria for works carried out by the appellant municipal authority in connection with a rain on the respondent's land. Section 384 of the Act authorised the authority to make and keep open ditches and drains, but expressly provided that the authority should "make compensation to the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this section". The compensation claim was tried by a jury, which was asked to decide two questions: (1) whether the municipal authority had been negligent in the design and construction of the drain, and (2) the amount of compensation, if any. The first question was put to the jury at the request of counsel for Mr Summerfield. The jury decided the first question in the affirmative and fixed the compensation at £824. The trial judge held that whether there had been negligence was immaterial because the statute provided for compensation. He gave judgment for Mr Summerfield in the sum of £824. The municipal authority applied for a new trial, which was refused by the Supreme Court. On appeal from that refusal to the Privy Council, the municipal authority argued that Mr Summerfield could not recover statutory compensation because the jury's finding of negligence conclusively showed that the drainage works had not been constructed in the exercise of the powers conferred by section 384. The Board rejected hat contention. Delivering its decision, Lord Watson said:

> "... their Lordships think it is very plain that, by his averments of negligence, the respondent did not intend to charge, and was not understood to charge the appellants with excess of their statutory powers; and that the jury, by their verdict, only meant to affirm that the appellants, if they had seen fit to do so, might have so planned and executed their works as to occasion less injury to the respondent's land. In the Courts below, the case, from first to last, was conducted upon the footing that what the appellants had done was done in the exercise of the powers conferred upon them by sect. 384. So long as they act

within their statutory powers, negligence is, in any question of compensation, immaterial, and cannot affect the extent of their liability, which is for all damage resulting from the construction or maintenance of their works."

42. The second case is *Welsh National Water Development Authority v Burgess* (1974) 28 P & CR 378 CA. This was an appeal by way of case stated from the Lands Tribunal. It concerned a claim by Mr Burgess against the Gwynedd River Authority (later subsumed within the WNWDA) for compensation under section 34 of the Land Drainage Act 1930 for diminution in the value of his fishing rights on the river Dovey. The Authority had carried out works between 1967 and 1970 to "retrain" the river and reduce the risk of a recurrence of severe flooding which had occurred in 1964 and 1965, and which had caused damage to surrounding farmland. The work involved the removal by bulldozers of a great deal of material from the banks and the bed of the river, which was alleged by Mr Burgess to have spoiled the fishing. The President of the Lands Tribunal awarded Mr Burgess £7,000 of compensation under the 1930 Act. On appeal, the Authority argued that some of the findings made by the Lands Tribunal amounted to findings of negligence by the Authority's contractors in carrying out the works, and that, accordingly, the work done had been ultra vires the Act and was not therefore something for which compensation under the Act could be awarded. The Court of Appeal unhesitatingly rejected that submission. Ormrod LJ delivered the leading judgment (with which Orr and Buckley LJJ agreed) and said this (at page 384):

> "The submission is a remarkable one from every point of view. It amounts to this. A claimant who has never alleged negligence and who has never suggested that the authority was acting ultra vires is to be denied his compensation after a very long and expensive hearing because the person hearing the reference in the course of his decision uses words which are critical of the authority's methods of work or of their attitude towards the owners of fishing rights. Not surprisingly, there is no direct authority which supports such a proposition."

43. The Burgess case is readily explicable as being one in which the Tribunal found that the damage to the fishing had been a necessary incident of the bulldozing of the river bed, which was itself an operation within the powers of the Authority and which the Authority had intended to carry out. As Ormrod LJ held, relying on *Colac v Summerfield*, so long as the authority has acted within its statutory powers, negligence is immaterial to any question of compensation. In a short additional judgment, Orr LJ added that the fact that the Authority might have done rather less damage to the fishing than was in fact done did not mean that the works were ultra vires. A degree of damage was inevitable.

44. The last and most recent case in this trilogy is *Smith Stone & Knight Ltd v City of Birmingham District Council* [1988] 13 ConLR 118. HHJ Bowsher QC was invited by consent of the parties under section 2(1)(b) of the Arbitration Act 1979 to determine two questions of law arising in the course of an arbitration commenced in accordance with section 278 of the Public Health Act 1936. The respondent District Council had laid a sewer in a ditch across the claimant's driveway. The ditch was filled in and the surface of the driveway was restored but the ground subsided two years later. It was repaired by the respondent but subsided a second time. The

claimant suffered loss and claimed statutory compensation for that loss. Section 278 provided:

> "(1) Subject to the provisions of this section, a local authority shall make full compensation to any person who has sustained damage by reason of the exercise by the authority of any of their powers under this Act in relation to a matter as to which he has not himself been in default.
> (2) Any dispute arising under this section as to the fact of damage or as to the amount of compensation shall be determined by arbitration."

43. The second of the two questions of law was whether, if it was found that the respondent's sub-contractors had carried out the works of filling in the ditch and making good the surface of the driveway negligently, the claim for compensation lay outside the statutory scheme for compensation in section 278(1). Judge Bowsher answered this question in the negative. He held (at page 124) that: "To make a claim, the applicant has only to allege that an act was done pursuant to the statutory power and that damage has resulted to the applicant". In other words, the compensation scheme was one of strict liability. The District Council had asserted and was seeking to prove the negligence of its sub-contractors in an attempt to defeat the arbitration claim. This was an unattractive submission which Judge Bowsher appears to have little difficulty rejecting. He added (at page 124): "If the respondent alleges negligence, that plea is irrelevant unless it raises an issue under one of the heads described by Jenkins LJ. If such an issue is raised, the burden of proof will lie with the applicant to show that notwithstanding the plea of negligence, the act relied on was done pursuant to the statutory power".

44. These last three cases serve to emphasise that the exclusionary rule laid down in the *Marriage* case precludes the bringing of a common law claim wherever the injury is a necessary, in the sense of being an inevitable and direct, consequence of authorised works.

45. However, a statutory scheme for compensation is not ousted because, on the particular facts, a case in nuisance or negligence can be made out. A statutory scheme for compensation can provide exclusive cover in cases of tortious injury i.e. injury caused by conduct amounting to nuisance or negligence, provided that the conduct in question falls within the three parameters described by Jenkins LJ in the *Marriage* case. This is borne out by the decision of the Lands Tribunal in *Monckton v Severn Trent Water Authority* [1988] RVR 247. Mr Monckton was the owner of an access bridge over a brook who claimed compensation under the Land Drainage Act 1976 from Severn Trent Water Authority for damage to the foundations of the bridge allegedly caused by works carried out by the Authority upstream and downstream of the bridge which had increased the direction and velocity of the flow of water under the bridge and had promoted a scouring effect. The claim for statutory compensation succeeded but the Tribunal held that, aside from the statutory compensation scheme, the Authority would have been liable to Mr Monckton in negligence or nuisance.

46. Drawing together the threads from all of the above authorities, the starting point is to construe the statutory scheme to discern if expressly or by necessary implication it was designed to cover all cases of negligence and nuisance as well as imposing strict liability. Paragraph 5 of Schedule 21 of the WRA 1991 does not in my

judgment clearly embrace nuisance and negligence. The drafting is general and non-specific as to how the injury may have been caused ("Where injury is sustained by any person by reason of the exercise by the Agency of any powers under section 165(1) to (3) of this Act ...").

47. The next step is to consider whether the alleged negligent act is one which satisfies every stage of Jenkins LJ's four stage test, and is within the 3 parameters which he identified as defining "the limits outside which the ordinary rights of action remain". Applying those criteria, the argument in the present case is a narrow one. The EA contends that taking the roof off the culvert was an integral part of the works. comprised within the Morpeth Flood Alleviation Scheme. I agree. The difficulty, in my judgment comes in the next 3 stages of the test. Leaving the roof off the culvert for a period of 2 weeks, so that the culvert remained exposed and flooding occurred as a result of water escaping from the gaping hole in the top was not in my view either a necessary or inevitable part of the authorised works and cannot have been intended or contemplated as the kind of consequence which would flow from carrying out the works. Given the warning plate fixed to the manhole cover just upstream, the EA could have been expected only to open up the top of the culvert for such period as the weather forecast was good, or to have applied some heavily weighted temporary closing if the forecast turned bad before the new roof section was ready to be installed. What happened here was outside parameter (b) of the limits referred to by Jenkins LJ at page 309 in the *Marriage* case. The flooding was an unintended consequence of removing a section of the roof of the culvert in order to replace that part of the structure, because nothing at all was left in its place for an extended period of time during which there was heavy rainfall. There was debate at the hearing over the analogy of a hole dug in the road in order to carry out authorised works to pipework running beneath the road surface. The hole is undoubtedly a necessary part of the works. But if the hole is not protected and is left unlit, and a pedestrian falls into it at night and suffers injury, I do not believe that a statutory compensation scheme covering "injury ... sustained by any person by reason of the exercise ... of any powers" to carry out the works would preclude a claim by the pedestrian for damages for negligence. It would only do so if the scheme expressly contemplated injury through negligence of the kind that had occurred.

48. I acknowledge that the issue in the present case is quite finely balanced, but I have come to the clear conclusion, for the above reasons, that the compensation scheme in the WRA 1991 is not the exclusive remedy for the damage which the flooding caused to Mr Hall's property.

Conclusion

49. The application to strike-out the claim is dismissed. I am relieved to have reached this decision because the EA has pursued the application in order to be able to plead a limitation defence against Mr Hall if he was obliged to start his claim afresh in the Upper Tribunal. Progress towards unifying the Courts and Tribunals Service has not reached point where I can transfer an action from this Court to the Upper Tribunal. It is possible under CPR PD30 to make direct transfers between the Courts and the Competition Tribunal, but not between the Courts and other Tribunals. So Mr Hall would have been non-suited if the strike-out had succeeded.

50. Whilst that would have been a regrettable outcome, it is fair to point out two matters which would have mitigated that regret. The first is the evidence in the witness statement of Mr Carty, a Senior Lawyer with the EA, that the EA informed Mr Hall's solicitors in November 2012, both by telephone and in writing, that Mr Hall's claim for compensation fell to be dealt with under the statutory compensation scheme in the WRA 1991, and followed this up with a written warning in January 2013 that if a claim was commenced in the County Court the EA would dispute the Court's jurisdiction. At one point, it looked as though this warning had been taken on board because Mr Hall's solicitors sent an email to the EA in October 2013 saying that if the claim could not be settled proceedings would be commenced in the Upper Tribunal. But it would appear that Mr Hall's legal team had second thoughts. The point, however, is that Mr Hall was on notice of the jurisdiction point more than 3 years before this action was commenced. The second matter is that the commencement of this action was left to the very last minute. If the explanation for the fact that the action was commenced in the County Court rather than in the Lands Tribunal is that the claim was issued in haste in order to beat the time-bar and that the jurisdiction point was overlooked, I would have had a good deal less sympathy for the consequences of the action being struck out.