



Press Summary

2 July 2024

The Manchester Ship Canal Company Ltd (Appellant) v United Utilities Water Ltd (Respondent) (No 2)

[2024] UKSC 22

On appeal from [2022] EWCA Civ 852

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose and Lord Richards

Background to the Appeal

This appeal forms part of long-running litigation about discharges of foul water contaminated with untreated sewage into the Manchester Ship Canal. The Supreme Court is asked to decide whether the owner of the beds and banks of the canal, the Manchester Ship Canal Company Ltd (“the **Canal Company**”), can bring a claim in nuisance or trespass when the canal is polluted by discharges of foul water from outfalls maintained by the statutory sewerage undertaker, United Utilities Water Ltd (“**United Utilities**”).

United Utilities is the statutory sewerage undertaker for the North West of England. Its sewerage network includes around 100 outfalls from which material emanating from sewers, sewage treatment works and pumping stations is discharged into the canal. When it is operating within its hydraulic capacity, the discharges are of surface water or treated effluent, but when the system’s hydraulic capacity is exceeded at least some of the outfalls discharge foul water into the canal. There is no suggestion that these polluting discharges are caused by negligence or deliberate wrongdoing on the part of United Utilities. However, they could be avoided if United Utilities invested in improved infrastructure and treatment processes.

The Canal Company threatened to bring a claim against United Utilities for trespass and nuisance. In response, United Utilities asked the court to make a declaration that the Canal Company had no right of action. The court was not asked to decide whether the Canal Company’s claim would be successful on the relevant facts. Rather, the question was whether the claim would be inconsistent with and therefore barred by the statutory scheme for regulating sewerage established by the Water Industry Act 1991 (“the **1991 Act**”).

The High Court judge agreed to make the declaration requested by United Utilities. His decision was upheld by the Court of Appeal. The implication of these judgments is that no owner of a canal (or other watercourse or body of water) can bring a claim based on nuisance or trespass against a sewerage undertaker in respect of polluting discharges into the water,

unless the sewerage undertaker is guilty of negligence or deliberate wrongdoing. A claim of this kind would be prevented even if the polluting discharges were frequent and had significant and damaging effects on the owner's commercial or other interests, or on its ability to enjoy its property. The Canal Company appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the Canal Company's appeal. It holds that the 1991 Act does not prevent the Canal Company from bringing a claim in nuisance or trespass when the canal is polluted by discharges of foul water from United Utilities' outfalls, even if there has been no negligence or deliberate misconduct. Lord Reed and Lord Hodge give a joint judgment with which the other members of the Court agree.

Reasons for the Judgment

The starting point is that the owner of a canal or other watercourse has a property right in the watercourse, including a right to preserve the quality of the water. That right is protected by the common law. The discharge of polluting effluent into a privately-owned watercourse is an actionable nuisance at common law if the pollution interferes with the owner's use or enjoyment of its property. The Supreme Court is, therefore, asked to decide whether the 1991 Act excludes common law rights of action in nuisance and trespass. This is a question of statutory interpretation [108]-[110].

A body which exercises statutory powers, such as a sewerage undertaker, is liable in the same way as any other person if it is responsible for a nuisance, trespass or other tort, unless either it: (i) is acting within its statutory powers, or (ii) has been granted some statutory immunity from suit. If a sewerage undertaker interferes with a person's rights, it is therefore necessary to distinguish between interferences which Parliament has authorised, which are lawful, and interferences which Parliament has not authorised, which are unlawful. When drawing this distinction, two principles are relevant. First, a person's rights to the peaceful enjoyment of its property and to access the courts are protected by both the common law and the Human Rights Act 1998. The principle of legality holds that fundamental rights cannot be overridden by general or ambiguous words. A statute will, therefore, only authorise what would otherwise be an unlawful interference with property rights, or deprive a person of the right to bring a legal claim, if this is clear from or a necessary implication of the express language used by Parliament. Secondly, Parliament will not be taken to have intended that statutory powers should be exercised, or duties performed, in a way which interferes with private rights, unless the interference is inevitable [15]-[21].

The 1991 Act does not expressly authorise United Utilities to cause a nuisance or to trespass by discharging foul water through the outfalls into the canal. United Utilities' entitlement to use the outfalls derives from section 116 of the 1991 Act. However, this entitlement is subject to a number of statutory protections for watercourses. Section 117(5) provides that nothing in section 116 (or the other relevant sewerage provisions of the 1991 Act) authorises a sewerage undertaker to use a sewer, drain or outfall to convey foul water into a watercourse. Sewerage undertakers therefore do not have statutory authority to discharge untreated sewage into watercourses. Section 117(6) prevents a sewerage undertaker from carrying out its functions under the relevant sewerage provisions so as to create a nuisance. Section 94(4) makes it clear that the common law remedies for nuisance – such as an injunction or damages – are available in addition to any remedy available by virtue of section 94. Section 186(3) further protects the owners of watercourses, and other rights-holders, by stating that nothing in the relevant sewerage provisions authorises a sewerage undertaker to damage a watercourse, or the quality of the water in it, without consent [60]-[62], [65], [111]-[112], [116].

The polluting discharges similarly cannot be regarded as having been impliedly authorised by Parliament, since they are not an inevitable consequence of a sewerage undertaker's performance of its statutory powers and duties. In the present case, the discharges could be avoided if United Utilities invested in improved infrastructure and treatment processes [113].

If Parliament has not authorised an interference with private law rights, it would normally follow that a claimant can enforce those rights at common law. Furthermore, since sections 117(5) and 186(3) limit the authority conferred on sewerage undertakers by the 1991 Act, there must be a common law remedy where those limits are exceeded: otherwise, the sections would have no purpose [114]-[115].

However, United Utilities argues that the Canal Company has no cause of action because the only way to avoid the discharges of foul water into the canal would be to construct new sewerage infrastructure. It relies on the House of Lords' decision in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66 ("*Marcic*"), which it says established that Parliament's intention was that the construction of new sewerage infrastructure should be a matter for the Secretary of State or the regulator, the Water Services Regulation Authority (known as "*Ofwat*"), not the courts [106].

The Supreme Court rejects this argument. There are a number of indications that Parliament did not intend the 1991 Act to exclude a claimant's right to enforce its private property right in a watercourse. First, section 186(7) provides for arbitration where water quality has been damaged without consent, at the option of the party complaining. This strongly suggests that the complainant could alternatively choose to pursue a common law claim [66], [117].

Secondly, section 180 of the 1991 Act gives effect to Schedule 12, which makes provision for statutory compensation. Compensation is available for damage caused by the authorised acts of sewerage undertakers, but not for damage caused by acts which are unauthorised, such as the discharges of foul water into the canal. This indicates that the victims of unauthorised damage retain their common law rights of action. Otherwise, they would be left without any remedy for the damage they have suffered, which would be anomalous. They would also be treated less favourably than the victims of authorised damage, which would be perverse [64], [118]-[121].

Thirdly, depriving the victims of a nuisance or trespass of their common law rights of action would be a substantial change to the law as it stood before the 1991 Act was enacted. It is unlikely that a change of this kind would have been made in a consolidation statute. Consolidation acts are not designed to make substantive changes to the law, but rather to reorganise and restate the existing law so that it is clearer and easier to understand. Moreover, since the 1991 Act is detailed and elaborate, it would be surprising if Parliament had left an important change in the law to be implied rather than stated expressly. In addition, the principle of legality holds that fundamental common law rights, such as a right of action to protect private property, are not to be taken to be overridden in the absence of express language or necessary implication [50], [53], [122]-[123].

United Utilities relies on section 18, which empowers the Secretary of State and Ofwat to make enforcement orders for the purpose of securing compliance by sewerage undertakers with statutory and certain other requirements. These include the general duty in section 94, which requires sewerage undertakers to provide a sewerage system. Section 18(8) makes it clear that it is not possible to enforce these statutory and other requirements by bringing a claim at common law; an order under section 18 provides the only available remedy. However, this ouster only applies to causes of action that are based on a breach of a statutory or other requirement that is enforceable under section 18. If a sewerage undertaker does something (or fails to do something) which gives rise to an independent common law cause of action, for example, for nuisance or trespass, the 1991 Act does not prevent the courts

from enforcing the claimant's common law rights and awarding any available common law remedies [56]-[59], [124], [133].

The Supreme Court accepts that the regulatory scheme established by the 1991 Act, including the making of enforcement orders under section 18, might be disrupted if the court were to grant injunctions which required a sewerage undertaker to spend large sums on new infrastructure as a remedy for interferences with private property rights. That might be so if such an injunction conflicted with the arrangements in the Act for the regulatory approval of capital expenditure and the charges imposed on the sewerage undertaker's customers. However, this does not mean that common law rights of action are excluded in such a case. Instead, the courts may make an award in damages, both for past invasions of property rights and for future or repeated invasions of those rights. This would vindicate property rights in relation to watercourses until the sewerage undertaker is in a position, with Ofwat's approval, to invest in a long-term solution [116], [125]-[132].

The Supreme Court's conclusion that the 1991 Act does not prevent the Canal Company from bringing a claim in nuisance or trespass when the canal is polluted by discharges of foul water from United Utilities' outfalls can be reconciled with the decision in *Marcic*. That case can be distinguished, first, because it did not concern the limits on the authority conferred on sewerage undertakers by the 1991 Act set out in sections 117(5) and 186(3). Secondly, the defendant sewerage undertaker had not created or adopted the relevant nuisance, as it has in the present case. Instead, it was said to be liable for continuing the nuisance by failing to take reasonable steps to avert it by constructing a new public sewer. An essential ingredient of the cause of action was therefore that the defendant was under a duty to build a new sewer, in accordance with section 94(1) of the 1991 Act. That duty could only be enforced by the Secretary of State or Ofwat under section 18, not by the courts. In contrast, the Canal Company's proposed claim against United Utilities is not based on a breach of section 94(1), or any other requirement enforceable under section 18, but rather on independent common law causes of action in trespass and nuisance [82]-[90], [95], [105], [135]-[136].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)